

Office of the Secretary
Marlene H. Dortch
Federal Communications Commission
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Washington, D.C. 20554

RULEMAKING PROCEEDING NOS. 02-278 AND 18-152

FEDERAL COMMUNICATIONS COMMISSION

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Dear Secretary Dortch:

The law firms Kazerouni Law Group, APC, Hyde & Swigart, APC and Law Offices of Todd M. Friedman, P.C. submit the following comments in response to the petition for rulemaking concerning the interpretation of the Telephone Consumer Protection Act in light of the Ninth Circuit's *Marks v Crunch San Diego, LLC* decision.

The FCC has recently sought comment from the public on a number of questions, each of which will be addressed below. Specifically, the Commission has asked for public comment on the question of what constitutes an Automatic Telephone Dialing System. The Commission posed the following questions and topics for comment:

- How should the FCC interpret the phrase “using a random or sequential number generator,” in light of the *Marks* decision?
- How does *Marks* bear on the analysis set forth in *ACA International*?
- To the extent the statutory definition is ambiguous, how should the Commission exercise its discretion to interpret such ambiguities?
- Does the interpretation of the *Marks* court mean that any device with the capacity to dial stored numbers automatically is an automatic telephone dialing system?
- What devices have the capacity to store numbers?
- Do smartphones have such capacity?
- What devices that can store numbers also have the capacity to automatically dial such numbers?
- Do smartphones have such capacity?
- In short, how should the Commission address these two court holdings?

- Any other issues addressed in the *Marks* decision that the Commission should consider in interpreting the definition of an “automatic telephone dialing system.”

The undersigned Commenters are class action attorneys who are some of the most frequent practitioners under the TCPA, representing consumers across the United States, and present these comments from a background of having collectively litigated numerous issues under the TCPA in hundreds of actions.

I. INTRODUCTION

The Telephone Consumer Protection Act, 47 U.S.C. §§ 227, *et seq.* (“TCPA”) is an incredibly important consumer privacy statute designed to protect consumers from an alarmingly increasing trend of unwanted and voluminous automated telephone calls. Indeed, Senator Hollings, the TCPA’s sponsor, described these calls back in 1991 as “the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone out of the wall.” *Osorio v. State Farm Bank*, F.S.B., 746 F.3d 1242, 1255-56 (11th Cir. 2014), citing 137 Cong. Rec. 30,821 (1991). The TCPA is “aimed at protecting recipients from the intrusion of receiving unwanted communications.” *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 2007 WL 564075, *4 (W.D. Wash. Feb. 16, 2007). Even the U.S. Supreme Court has noted that consumers are outraged over the proliferation of automated telephone calls that are intrusive, nuisance calls. *See Mims v. Arrow Fin. Servs. LLC*, 132 S. Ct. 740 (2012).

Congress enacted the TCPA in 1991 amidst an unprecedented increase in the volume of telephone calls (both live calls and automated calls) to consumers in America, which combats the threat to privacy being caused by the automated calling practices, stating it is unlawful: “(A) 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 ... (iii) to any telephone number assigned to a ... cellular telephone service ...” 47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added). It is also unlawful to “initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party.” 47 U.S.C. § 227(b)(1)(B). As the Seventh Circuit Court of Appeals has explained, there is a “right to be left alone under the TCPA.” *Auto-Owners Ins. Co. v. Websolv Computing, Inc.*, 580 F.3d 543, 551 (7th Cir. 2009).

The TCPA’s prohibition at issue (for autodialed calls and text messages) requires the calls to be made with through an automatic telephone dialing system (“ATDS”), which Congress defines 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.” 47 U.S.C. § 227(a)(1); *see also*, 47 U.S.C. § 227(b)(1)(A). The question of whether a dialing system qualifies as an ATDS focuses primarily on the capacity of the dialer or dialing system.

At its root, the TCPA is designed to curtail the volume of unwanted automated calls (which includes text messages) that people receive, and provide protections for consumers in preventing such calls from being placed to their phones, as well as compensation for automated calls without prior express consent. It is a broad consumer protection statute and remedial in nature, which means that it should be interpreted in a manner that best protects consumers. The statute also deters the use of automated equipment which society deems to be an annoyance, and to give consumers reasonable options, without having to jump through hoops, so that they can protect themselves and one of the most important rights people have as Americans – the right to privacy.

Consumers want to be free of ever-increasing mass-dialed calls and text messages where they have not provided their prior consent. According to the FTC in its December 2017 report for the fiscal year 2017, the agency received over 375,000 complaints per month about automated robocalls, amounting to 4.5 robocall complaints, plus an additional 2.5 million complaints about live telemarketing calls.¹

II. COMMENTS ON PROPOSED RULEMAKING UNDER THE TCPA

The FCC seeks comment on numerous topics, most of which stem from the recent decision from the Ninth Circuit Court of Appeals in the matter of *Marks v Crunch San Diego, LLC*, 2018 WL 4495553 (9th Cir. Sept. 20, 2018) (hereinafter “*Marks*”), as well as the interplay between *Marks* and the D.C. Circuit Court of Appeals decision in the matter of *ACA International, et al. v. Federal Communications Commission and United States of America*, No. 15-1211, 2018 U.S. App. LEXIS 6535 (D.C. Cir. Mar. 16, 2018) (“*ACA International*”). Commenters address these topics, and the appropriate interpretation of the TCPA, as well as the *Marks* decision and its interplay with *ACA International*.

A. Facts Surrounding *Marks v. Crunch San Diego, LLC*

Marks involved a set of relatively straightforward issues, which are hardly as groundbreaking as some commenters may suggest. The case involved an SMS blasting platform called Textmunication, which is a web-based marketing platform designed to send promotional text messages to stored telephone numbers.

Telephone numbers are captured and stored in various ways: 1) an operator of the Textmunication system may manually enter a phone number into the system; 2) a current or potential customer may respond to a marketing campaign with a text

¹ https://www.ftc.gov/system/files/documents/reports/biennial-report-congress-under-do-not-call-registry-fee-extension-act-2007-operation-national-do-not/biennial_do_not_call_report_fy_2016-2017_0.pdf

(which automatically provides the customer's phone number); or 3) a customer may provide a phone number by filling out a consent form on a Textmunication client's website. Additionally, the Textmunication system has the capacity to allow importing of lists of phone numbers into a database. A client of Textmunication can then design a marketing campaign that programs the Textmunication system to automatically send the desired messages to the stored phone numbers at a time scheduled by the client.

Crunch San Diego, LLC (“Crunch”) communicates with its prospective and current gym members by sending text messages through this Textmunication system. When Crunch wants to send a text message to its current or prospective customers, 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. Stated otherwise, the Textmunication system has the capacity to store numbers, and to dial said numbers automatically from a list, for such purposes as providing discounts or even sending a birthday message.² Promotional material for the Textmunication system informed companies who want to use the platform that the system could be used to “[s]end mass texts promoting an event”.

Mr. Marks received three promotional text messages from Crunch San Diego, LLC through the Textmunication SMS blasting platform. The District Court granted summary judgment in favor of Crunch on the ground that the Textmunication system did not qualify as an ATDS because it presently lacked a random or sequential number generator, and that it did not have the potential

² Publicly viewable evidence submitted to the Ninth Circuit of Appeals in *Marks* indicated that the Textmunication system could be used to “Remind clients about appointments, anniversaries, b-days, oil changes, tune ups, and more via text,” “schedule holiday campaigns ahead of time,” and provide an “auto response message”.

capacity to add such a feature. Because the District Court defined an ATDS as necessarily including a random or sequential number generator, the District Court did not consider the expert testimony from Mr. Marks' expert witness, stating that the Textmunication system automatically called numbers from a stored list. The District Court therefore denied Crunch's motion to exclude the expert's testimony as moot, and granted summary judgment in favor of Crunch San Diego, LLC.

B. *The Ruling in Marks v. Crunch San Diego, LLC*

On appeal, the Ninth Circuit in *Marks* reviewed the D.C. Circuit's *ACA International* decision, as well as the statutory language of the TCPA, its history, and the history of FCC Rulings and recent Congressional amendments to the TCPA, and concluded that "the statutory definition of ATDS includes a device that stores telephone numbers to be called, whether or not those numbers have been generated by a random or sequential number generator." *Marks*, at *3.

The Ninth Circuit began by reviewing the statutory language of the TCPA, which it held confirmed that the intent of Congress was to regulate "automatic" equipment that has "the capacity" to function in two specific ways: 1) "to store or produce telephone numbers to be called, using a random or sequential number generator" and 2) "to dial" said numbers. It also prohibited the use of an ATDS "in such a way that two or more telephone lines of a multi-line business are engaged simultaneously." *Id.* § 227(b)(1)(D). The Ninth Circuit further noted that although the TCPA has been amended several times since enactment, Congress never revised the definition of ATDS. "Therefore, Congress's decision to regulate only those devices which have the aforementioned functions, capacity, and ability to function automatically remains unchanged." *Marks*, at *2.

The Ninth Circuit went on to review the history of FCC Rules and amendments to the TCPA, starting with the 2003 Ruling.³ Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 18 FCC Rcd. 14,014, 14,017 (2003) (“2003 Ruling”). There, the FCC analyzed predictive dialers and held that such systems would qualify as an ATDS. The Ninth Circuit and the FCC both observed that traditional autodialers would dial a random or sequential block of numbers, but predictive dialers did not function in such a crude manner. Instead, predictive dialers dialed numbers automatically from a list, either in some sequence as programmed or randomly.

Predictive dialers typically do not produce telephone numbers on their own; telephone numbers would have to be preprogrammed into the dialer. The FCC in 2003 found that these systems were an ATDS because they had the capacity to dial numbers in an “automatic” fashion. Stated differently, “the FCC determined that predictive dialers and other new technology qualified as an ATDS, even if they did not generally generate or store random or sequential numbers.” *Marks*, at *3.

The Ninth Circuit then reviewed the history of further FCC interpretations over the next twelve years based on this same technological premise or automatic capacity. In 2012, the FCC suggested that a device could qualify as an ATDS even if it entirely lacked the capacity to dial numbers randomly or sequentially, holding that an ATDS “covers any equipment that has the specified capacity to generate numbers and dial them without human intervention regardless of whether the

³ Even the FCC’s first ruling on the TCPA in 1992 recognized (at least tacitly) the importance of restrictions on equipment such as predictive dialers. Referring in part to “predictive dialers” to place live solicitation calls (7 FCC Rcd 8752, 8756 (F.C.C. September 17, 1992)), the FCC then opined that “both live [referring again to live solicitation calls, such as with a predictive dialer] and artificial or prerecorded voice telephone solicitations should be subject to significant restrictions” (*id.*). As mentioned in the 2003 Ruling, the FCC has been concerned by predictive dialers since at least 1992. 2003 FCC LEXIS 3673 at *12.

numbers called are randomly or sequentially generated or come from calling lists.” *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 FCC Rcd. 15,391, 15,392 n.5 (2012) (2012 Declaratory Ruling). In 2015, the FCC held that “the capacity of an autodialer is not limited to its current configuration but also includes its potential functionalities.” *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7974 (2015) (“2015 Declaratory Ruling”). The FCC went further than before, observing that a device could have the requisite capacity if it had any potential to be programmed for that purpose. This was overturned by *ACA International*.

Considering this history, the *ACA International* ruling, the plain language of the TCPA, the Legislative History of the TCPA, and the recent amendment to the TCPA in the Bipartisan Budget Act of 2015, the Ninth Circuit analyzed the statutory definition of ATDS. The definition of ATDS raised two questions: “(i) when does a device have the ‘capacity’ to perform the two enumerated functions; and (ii) what precisely are those functions?” *Marks*, at *6, citing *ACA Int’l*, 885 F.3d at 695. The *Marks* Court analyzed the second question by asking whether a device must dial numbers generated by a random or sequential number generator, or whether it can still be an ATDS if it dials numbers from a stored list. The Ninth Circuit held that the latter was the correct interpretation of the statute, after acknowledging statutory inconsistencies in the plain language of the TCPA. Specifically, the Court observed that number generators are not storage devices, ergo, “store” cannot be read in subdivision (A) as applying to “telephone numbers to be called, using a random or sequential number generator.” 47 U.S.C. § 227(a)(1)(A). The Ninth Circuit grappled with competing arguments from both sides and ruled that the language of the statute was not susceptible to a

straightforward interpretation based on the plain language alone, necessitating a review of the statutory history and rulemaking efforts by the FCC.

The Ninth Circuit observed that the structure and context of the TCPA as enacted by Congress was intended to regulate devices that were capable of making automated calls, and that although common equipment used at the time dialed blocks of sequential or random numbers, that was not the intended focus of the statute. This was supported by other provisions of the statute, such as the affirmative defense of prior express consent, which permits such calls to be made if the recipient consented to receipt of such calls. Axiomatically, systems that randomly dial numbers or dial sequential blocks of numbers would not dial numbers that gave consent. Calling numbers with consent at the very least implies that a list of numbers that have consented have been loaded by the dialing entity into the dialer, and called thereafter. No other interpretation makes logical sense when compared to the language of 47 U.S.C. § 227(b)(1)(A).

Furthermore, after the FCC issued its 2015 Declaratory Ruling, Congress added language to § 227(b)(1)(A)(iii), exempting the use of an ATDS to make calls “solely to collect a debt owed to or guaranteed by the United States.” Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301, 129 Stat. 584, 588 (codified at 47 U.S.C. § 227(b)(1)(A)(iii)). This particular exemption demonstrates that equipment which dials specific intended recipients, i.e., people who owe debts to the United States, are exempt from the TCPA’s protection.

Again, what is important here is that the TCPA itself contemplates exemptions for situations involving a specific list of people whose numbers fit a particular set of criteria (i.e. not a random set of numbers, and not a sequential block of numbers, but instead one loaded into a dialing platform). The *Marks* Court found this to be demonstrative of the notion that the other provisions of the

TCPA revealed intent of Congress that platforms that dialed stored lists of numbers could be an ATDS.⁴ In other words, when read in the context of the rest of the statute, it is clear that Congress intended such an interpretation of the definition of an ATDS. Accordingly, the *Marks* court “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.” *Marks* at *7.

What is particularly interesting about the Ninth Circuit’s ruling is the following observation:

Because Congress was aware of the existing definition of ATDS, its decision not to amend the statutory definition of ATDS to overrule the FCC's interpretation suggests Congress gave the interpretation its tacit approval. *See Lorillard v. Pons*, 434 U.S. 575, 580, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978) (“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.”)

Marks at *8.

The implication of the *Marks* decision is that the FCC rulings concerning a predictive dialer being an ATDS were correctly reached, notwithstanding the subsequent *ACA International* decision. This is owing to Congress tacitly blessing all of the FCC’s prior interpretations of the definition of ATDS, when it amended the TCPA’s language in a manner that interacted with the ATDS definition, and chose not to amend those portions of the TCPA, including specifically the meaning of an “automatic telephone dialing system.” The FCC asks how *Marks* bears on

⁴ Courts should “presume that when Congress amends a statute, it is knowledgeable about judicial decisions interpreting the prior legislation.” *Porter v. Bd. of Trs. of Manhattan Beach Unified Sch. Dist.*, 307 F.3d 1064, 1072 (9th Cir. 2002).

the analysis set forth in *ACA International* and this is the answer: Congress has already impliedly blessed the FCC’s definition of an ATDS multiple times. *ACA International* is in conflict with the intent of Congress.

Next, the Ninth Circuit analyzed the question of human intervention, and what level, if any, would warrant a finding that the system did not qualify as an ATDS. Notably, the Ninth Circuit found it to be a matter of “common sense” that human intervention of some sort is required for any dialing system. What is important to the statute according to the Ninth Circuit is whether the system has the capacity to *dial* numbers automatically. The Ninth Circuit did not ultimately reach the issue of potential versus present capacity because it was unnecessary in light of the interpretation of an ATDS as not require telephone number generation, and the automatic dialing of the Textmunication text messaging platform.

Ultimately, the Ninth Circuit settled on the following definition of ATDS: “equipment which has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers automatically (even if the system must be turned on or triggered by a person).” *Marks*, at *9.

With this well-reasoned opinion in mind, Commenters turn to the remaining questions of the FCC.

C. How should the FCC interpret the phrase “using a random or sequential number generator,” in light of the *Marks* decision?

The TCPA⁵ defines an ATDS as: “equipment that has the **capacity**--(A) to store **or** produce telephone numbers to be called, using a random or sequential

⁵ “It is well settled that the starting point for interpreting a statute is the language of the statute itself.” *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953 (9th Cir. 2009) (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56 (1987) (internal citation and quotation marks omitted)). “The preeminent canon of statutory interpretation requires [a court] to presume that [the] legislature says in a statute what it means and means in a

COMMENT TO FCC

number generator; and (B) to dial such numbers. 47 U.S.C. § 226(a)(1)(A).” (emphasis added). The definition is written in the disjunctive; a telephone system is an ATDS if it has the capacity to store *or* produce telephone numbers to be called using a random or sequential number generator. To give meaning to every word in the statute, the phrase “using a random or sequential number generator” must modify “produce telephone numbers”⁶ because it makes no sense for a device to “store” numbers using a random or sequential number generator. Years ago, the FCC rejected the argument by *ACA International* “that a predictive dialer meets the definition of autodialer only when it randomly or sequentially generates telephone numbers, not when it dials numbers from customer telephone lists.” 23 FCC Rcd at 566. The *Marks* Court affirmed the correct meaning of an ATDS.

It should also be remembered when defining what constitutes an ATDS, that Congress’ intent was to limit the ability to place a high volume of calls to people’s telephones. Congress was made aware of predictive dialers during the senate hearings prior to enactment of the TCPA. See <https://www.c-span.org/video/?23630-1/telephone-solicitation>. From a policy standpoint, technology which has the capability of placing significantly more phone calls than

statute what it says there. Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous.” *Satterfield*, 569 F.3d 946 at 951 (quoting *McDonald v. Sun Oil Co.*, 548 F.3d 774, 780 (9th Cir. 2008) (quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004))). “[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.” *Satterfield*, 569 F.3d at 953 (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). As held by the Ninth Circuit Court of Appeals, “the statutory text [of the TCPA] is clear and unambiguous,” *Satterfield*, 569 F.3d at 951, but only with regard to whether a device had the “capacity” to store or produce telephone numbers,” *Marks*, at n. 6, citing *Satterfield*.

⁶ It is worth noting that the statute refers to producing “telephone numbers” to be called, not just any set of numbers. Even devices that produce truly random telephone numbers would need to take into account actual area codes in use, otherwise the telephone number produced would be useless. Consequently, even randomly produced telephone numbers are, in a sense, targeted or refined by practical considerations such as telephone number area codes actually in use.

traditional rotary or manual dialing methods is very likely an ATDS, because any such system will typically have the capacity to store or generate numbers and dial them from a list. Most modern dialing systems have this capability.⁷

The FCC should not permit companies and individuals, especially in the telemarketing and debt collection industry, to undue the meaning of an ATDS to unreasonably limit covered equipment/devises to a system that produces (or has the capacity to produce) random or sequential telephone numbers, ignoring the “word” store in the statutory text. Many companies desire such meaning of an ATDS to be limited to random or sequentially produced phone numbers, thereby allowing them to send thousands of text messages or place thousands of calls daily to known consumer cell phone numbers without needing to obtain prior express consent (or any form of consent). If such interpretation were adopted, it would effectively allow anyone to input the public phone book into an automatic dialing system and SPAM consumers at will without having to obtain any consumer consent.

1. An ATDS includes Equipment that has the *Capacity* to Store Telephone Numbers and to Dial Such Numbers Automatically

Equipment is an ATDS if it has the capacity to automatically dial stored telephone numbers, such as in causing hundreds of calls to be placed or hundreds of text messages to be sent at the press of a button in a short period of time, which

⁷ See *In re Jiffy Lube Int'l, Inc.*, 847 F. Supp. 2d 1253 (S.D. Cal. 2012) (“The Ninth Circuit has confirmed that the statute creates liability based solely on a machine’s capacity rather than on whether the capacity is utilized.”) (citing *Satterfield*, 569 F.3d at 951); see also *Iniguez v. CBE Grp.*, 969 F. Supp. 2d 1241, 1247 (E.D. Cal. 2013) (“whether or not Defendant's system randomly generated Plaintiff's number is not determinative because the TCPA only requires that the system have that capability, not that it was actually utilized with respect to a particular phone call.”); *Meyer v. Portfolio Recovery Assocs., Ltd. Liab. Co.*, 707 F.3d 1036, 1043 (9th Cir. 2012) (“[A] system need not actually store, produce, or call randomly or sequentially generated telephone numbers, it need only have the capacity to do it.”) (quoting *Satterfield*, 569 F.3d at 951)).

is what the FCC has referred to in prior rulings as dialing⁸ without human intervention. Any inquiry into human intervention is limited to “the *capacity to dial* numbers without human intervention,” *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 2003 FCC LEXIS 3673, *208 (F.C.C. June 26, 2003) (underlining added).

The plain and most reasonable construction of Section 227(a)(1) of the TCPA is one that interprets the definition of ATDS as equipment that has the capacity to: i) store numbers to be called and to dial such numbers automatically; or, alternatively, ii) produce random or sequential numbers to be called and dial such numbers automatically. The focus of § 227(b) of the TCPA is clearly on autodialing. *See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8781 (F.C.C. September 17, 1992) (referring generally to the “law on autodialing”). Even the relevant statutory headnote of the TCPA denotes the importance of the automated nature of the equipment, reading: “Restrictions on use of *automated* telephone equipment” (47 U.S.C. § 227(b), italics added).

A practical reading of § 227(a)(1) of the TCPA is that the phrase “using a random or sequential number generator” modifies only the last antecedent “produce telephone numbers to be called,” not “to store.” Such an interpretation is

⁸ Many TCPA defendants, following the FCC’s July 2015 ruling, have argued that courts must look to whether there is any human intervention in determining whether a system is an ATDS. Some courts have even considered the act of inputting a list to be autodialed sufficient human intervention that the system is not an ATDS. *See e.g., Marks v. Crunch San Diego, LLC*, 55 F. Supp. 3d 1288 (S.D.Cal. 2014), reversed on appeal, *Marks*, 2018 WL 4495553. That, however, makes no sense, especially where there was evidence that the dialing platform in the *Marks* case (the Textmunication platform) could send “mass texts promoting an event” to consumers’ cell phones. The FCC, when referring to human intervention, has tied that phrase to the dialing aspect only, not irrelevant actions that may proceed the actual dialing of the phone numbers. Telephone numbers, especially in the context of predictive dialing, will always need to be added to a list or database by someone, for it is impossible for a machine to create itself and then add phone numbers to a database to be called.

supported by the nearest-reasonable-referent canon, which provides that, “[w]hen the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent.” *Parm v. Nat'l Bank of Cal., N.A.*, 835 F.3d 1331, 1336 (11th Cir. 2016) (quoting Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 152 (2012)).

Under this reading of the statute, the equipment at issue need only have the ability to store telephone numbers to be called, and to dial such numbers. The narrower interpretation (requiring the storage of telephone numbers using a random or sequential generator) is more difficult to reconcile as noted by the Third Circuit Court of Appeals. *See Dominguez v. Yahoo, Inc.*, 629 F. App'x 369, 372 n.1 (3d Cir. 2015) (“We acknowledge that it is unclear how a number can be *stored* (as opposed to *produced*) using a random or sequential number generator.”), as well as by the D.C. Circuit in *ACA International*. It is also unclear how telephone numbers could be *stored* using a *generator*, for number generation is separate from number storage. This is why the Ninth Circuit in *Marks* commented that the Third Circuit’s decision in *Dominquez* is “unpersuasive” in avoiding the “interpretive questions raised by the statutory definition of ATDS,” *Marks*, at n.8. Even before a dialer may call a generated telephone numbers (whether the numbers are produced sequentially or at random), it must actually store those telephone number, even if only momentarily before the command is given to autodial the phone numbers, which again shows that number production is separate from number storage.

Further, the doctrine of the last antecedent⁹ does not lead to a different result because the doctrine “is of no great force,” and “the natural and common sense

⁹ The doctrine “requires in statutory construction that qualifying words, where no contrary intention appears, be ordinarily applied solely to the words or phrase immediately preceding.” *Buscaglia*, 139 F.2d at 296.

reading of the statute, may overturn it and give it a more comprehensive application.” *Buscaglia v. Bowie*, 139 F.2d 294, 296 (1st Cir. 1943) (quoting Lewis, *Sutherland Statutory Construction*, Vol. 2, § 420).

A broad interpretation is supported by the fact that the “TCPA is a remedial statute and thus entitled to a broad construction.” *Mey v. Monitronics Int’l, Inc.*, 959 F. Supp. 2d 927, 930 (N.D.W. Va. 2013) (citing *Holmes v. Back Doctors, Ltd.*, 695 F.Supp.2d 843, 854 (S.D. Ill. 2010) (“It is true that . . . the TCPA is a remedial statute.”)). Indeed, the TCPA “should be liberally construed and should be interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers.” *Mey*, 959 F. Supp. 2d at 930 (quoting *Scarborough v. Atlantic Coast Line R. Co.*, 178 F.2d 253, 258 (4th Cir. 1950)); *see also*, *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 562 (1987) (holding that when interpreting broad remedial statutes, courts should apply a “standard of liberal construction in order to accomplish [Congress's] objects” (citation omitted)); *E.E.O.C. v. Staten Island Sav. Bank*, 207 F.3d 144, 149 (2d Cir. 2000) (“[I]t is our duty to interpret remedial statutes broadly.”). Interpreting the statute broadly by defining an ATDS as equipment that has the capacity to store and dial numbers would discourage attempted violations of the TCPA and protect consumers. It would also help avoid creating avenues for companies and individuals to mass call or mass text known consumers without first obtaining their permission to be called.

From a common-sense standpoint, and in light of the statutory purpose of the TCPA, there should be a greater emphasis on the capacity of a system to automatically dial numbers that are stored from a list, especially since technology has evolved to the point that dialing random or sequentially generated numbers is of little practical value. Debt collectors and telemarketers do not want to contact people at random, they seek to call targeting and known telephone numbers, often

with sophisticated commercial dialing equipment (and increasingly online platforms) that can call thousands of phone numbers a day. *See* 23 FCC Rcd at 566 (“the evolution of the teleservices industry had progressed to the point where dialing lists of numbers was far more cost effective, but that the basic function of such dialing equipment, had not changed--the capacity to dial numbers without human intervention.”)

In 2015, the court in *Swaney v. Regions Bank*, No. 2:13-CV-00544-JHE, 2015 WL 12751706, at *5 (N.D. Ala. July 13, 2015), opined, based on the 2003 ruling, “By all appearances, the FCC is no longer concerned with whether equipment has the capacity to be programmed for sequential or random dialing when determining if it is an ATDS,” 2015 WL 12751706 at *6, and thus “it is reasonable to interpret the 2003 FCC Order as applying beyond the context of predictive dialers,” *id.* at *7.

Traditional SMS blasting platforms function by calling telephone numbers in a stored list of database. An entity or person loads a list of phone numbers into a database, programs the platform to dial those numbers at a certain time (and rate of speed), usually in sequence until the list is exhausted, sets the parameters of the campaign, *e.g.*, send text messages during normal business hours, or to send a text message on one’s birthday, and presses a button to initiate the campaign which then autodialed the telephone numbers.

Hundreds or even thousands of text messages in a short period of time can be sent out to people whose telephone numbers get added to a list by companies such as telemarketers and debt collectors. The purpose of the statute is to prevent autodialing of phone numbers unless there is consent, as people typically find these types of calls (automated or prerecorded) annoying and intrusive unless they have

expressly consented to them in advance. The harm from annoyance and privacy invasion is increased when it occurs on a large scale.

As noted above, technologically, storage is an entirely separate function from generation of numbers. Commenters understand, having spoken with experts in the field, that it is not possible for one system to both store and produce numbers, for those two functions are mutually exclusive. If the system already has the numbers in it (stored), then there would be no need for it to produce or generate the numbers. Traditional canons of statutory construction support a reading of the statute that treats “storage” of telephone numbers separately from “production” of those numbers. Under the Last Antecedent Rule, a limiting clause or phrase “should ordinarily be read as modifying only the noun or phrase that it immediately follows.” *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). Applying this rule to § 226(a)(1)(A), the phrase “using a random or sequential number generator” modifies the word “produce” rather than the word “store.”

Some commenters may argue that the Rule of Punctuation trumps the Last Antecedent Rule in this case. The Rule of Punctuation says that where, as in § 226(a)(1)(A), a modifier is set off from the series by a comma, it applies to more than the last antecedent. But punctuation rules should not be applied where applying them distorts a statute’s plain meaning. *See U.S. Nat’l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 459 (1993). However, applying the Rule of Punctuation violates the Rule of Superfluity, which prohibits reading a statutory provision such that any word or phrase is rendered superfluous. *Massle v. U.S. Dept. of Housing & Urban Dev.*, 620 F.3d 340, 352 (3rd Cir. 2010). As noted above, storing telephone numbers using a random or sequential number generator is nonsensical. Consequently, if the phrase “using a random or sequential number generator” modifies both “store” and “produce,” the term “store” is essentially read

out of the statute, becomes superfluous, and the plain meaning of the statute is distorted.

A statutory reading that focuses on storage furthers the policies the FCC has previously articulated, including preventing callers from placing thousands of calls and texts in a short time period or developing equipment that circumvents the plain language and intent of the statute. Focusing on the capacity to “store” numbers also makes it clear that a predictive dialer is an ATDS under the statute even if the predictive dialer relies on lists of numbers to call, as those lists would have to be uploaded and stored before they could be dialed. Although the decisions are few, courts have found that equipment that has the capacity to store numbers in such a manner constitutes an ATDS under the TCPA. *See Zeidel v. A&M (2015) LLC*, No. 13-cv-6989, 2017 WL 1178150, *8 (N.D.Ill. Mar. 30, 2017) (finding a text messaging system could be an ATDS regardless of whether it had the capacity to generate numbers sequentially or randomly, relying on the FCC’s 2003 ruling).¹⁰

Of course, to be an ATDS, the device must not only store the numbers, but must also dial them automatically, such that an ordinary smartphone or desk phone that requires a human caller to dial a stored telephone number when placing a live call would not be an ATDS. The simple process of selecting a stored contact in a

¹⁰ *See also, Echevvaria v. Diversified Consultants, Inc.*, 2014 WL 929275, at *6 (Feb. 28, 2014) (Mag.) (recommending summary judgment for consumer; system was ATDS where employee loaded 3,500,000 numbers into it each morning, the numbers were stored until midnight, and the system selected numbers to call according to a protocol determined by defendant, even though the system did not have the capacity to store or produce by random or sequential number generation); *Davis v. Diversified Consultants Inc.*, 36 F. Supp. 3d 217, 225–26 (D. Mass 2014) (granting summary judgment to plaintiff on issue of whether system was ATDS where system had the capacity to store numbers even though evidence was “murky” regarding whether the system had the capacity for random or sequential number generation); *Carroll v. SGS N. Am., Inc.*, 2017 WL 4183098 (M.D. La. Sept. 21, 2017) (finding sufficient evidence to defeat summary judgment where record showed defendant input and stored numbers in a predictive dialer system).

cell phone handset and then dialing that number if not automatic dialing, it is speed dialing,¹¹ which is not an autodialer.¹²

In terms of sending the same text message to multiple people, technically speaking, such equipment would have the latent (and present) capacity to automatically dial cell phones via group texting (which is akin to sending an email to multiple recipients). The FCC could, and should, create an exception for smartphones to the extent they are deemed an ATDS in light of group text messaging functionality. *See Telephone Consumer Protection Act of 1991*, Pub. L. No. 102-243 § 2(13), 105 Stat. 2394, 2395 (1991) (Congress explained that the FCC “should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered an invasion of privacy”).

Congress could not have reasonably foreseen in 1991 the existence or proliferation of today’s smartphone (used by millions of average Americans), to send a text message to multiple people nearly simultaneously, especially when taking a common-sense approach to the TCPA. *See Henrique v. U.S. Marshal*, 653 F.2d 1317, 1320 (9th Cir. 1981) (“the Court must recognize the common sense practicalities of the situation presented.”); *see also, Chesbro v. Best Buy Stores, L.P.*, 697 F.3d 1230, 1234 (9th Cir. 2012) (taking a common sense approach in a TCPA case in terms of whether a text message was for a commercial purpose).

¹¹ “Speed dialing” is not covered by the § 227(b)(1). *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8776 (F.C.C. September 17, 1992).

¹² A cell phone handset cannot place a voice call to more than one telephone number at a time. Furthermore, conference calls do not involve automatically dialing, but rather the joining of calls placed on a single bridge.

Moreover, the notion of a consumer suing another consumer in federal, or even state court, under the TCPA for a text message sent from an ordinary smartphone is untenable, particularly for instances of friends or family members sending a text message to another friend or family member for other than commercial purposes. One would also expect the existence of prior express consent for instances of receipt of a text message from a friend or family member.

2. An ATDS also includes Equipment that has the *Capacity* to Produce Telephone Numbers and to Dial Such Numbers Automatically

The statutory definition of ATDS contemplates autodialing equipment that either stores *or* produces numbers. As mentioned above, an interpretation that requires, in every instance, for telephone numbers to be *produced* using a random or sequential generator would read the words “to store” out of the statute. Indeed, the “canon against superfluity instructs that “[i]t is our duty to give effect, if possible, to every clause and word of a statute.” *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1258 (11th Cir. 2014) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). Stated differently, the use of the word “or” indicates the equipment need only store *or* produce telephone numbers to be called, not both store *and* produce such numbers.

Telephone numbers can only be called by a dialer sequentially¹³ or randomly, such as calling each number on a list until the list is exhausted or calling numbers on a list no particular order (i.e., randomly). Equipment that dials

¹³ The word “sequential” means “of, relating to, or arranged in a sequence,” or “following in sequence.” Merriam-Webster Collegiate Dictionary at www.merriam-webster.com/dictionary/sequential; (last accessed on June 12, 2018). The word “sequence” means an “order of succession.” *Id.* at <https://www.merriam-webster.com/dictionary/sequence>. Present-day text messaging platforms store telephone numbers that are typically uploaded as lists of contacts, and then transmit text messages to those numbers by arranging them in a sequence and dialing the numbers in that order.

(generated) telephone numbers in such manner, automatically, is an ATDS. *See In re Jiffy Lube Int'l, Inc.*, 847 F. Supp. 2d at n. 8 (“[defendant] has also failed to show that a machine which is fed a large list of telephone numbers and then dials them sequentially or randomly...should not be considered an ATDS.... given that such a machine could arguably be said to ‘store...telephone numbers to be called, using a random or sequential number generator.’”) (quoting 47 U.S.C. § 227(a)(1)); *Connelly*, 2012 U.S. Dist. LEXIS 81332, at *14 (rejecting defendant’s argument that it did not use an ATDS because “the calls were made from an existing list of telephone numbers rather than via a random or sequential number generator...given that such a machine could arguably be said to ‘store...telephone numbers to be called, using a random or sequential number generator.’”) (quoting *In re Jiffy Lube Int'l, Inc.*, 847 F. Supp. 2d at n. 8).

There appear to be three ways to generate telephone numbers for dialing: (1) manual selection, such as would be done when selecting numbers from a contact list in a cell phone handset; (2) truly random production performed by a computer; or (3) sequential production performed by a computer. The phrase “using a random or sequential number generator” refers to the production of telephone numbers to be called; it has nothing to do with telephone number storage. Equipment that has both the capacity to generate random or sequential numbers (or to store telephone numbers) and to dial the telephone numbers automatically is an ATDS.

3. To the Extent the Statutory Definition is Ambiguous, How Should the Commission exercise its Discretion to Interpret Such Ambiguities?

As held by the Ninth Circuit in *Marks*, the clear goal of Congress in passing the TCPA was to target technology which had the capability of autodialing. The question of whether the technology generated numbers on its own, or dialed lists of numbers is ultimately inconsequential to the analysis, because modern dialing

platforms routinely autodial numbers from lists that are loaded or programmed into the platform. Regardless of whether a dialer calls 1,000 calls an hour (or dozens of calls per minute) from a randomly generated list, or from a list of numbers loaded into the platform by a user, consumers who receive such calls or text messages are equally annoyed, and suffer an equal privacy invasion. As *Marks* observed, this was not the focus of Congress' intent when drafting the TCPA. For reasons already discussed throughout these Comments, the FCC should interpret the language of the TCPA in such a way that protects consumers' privacy rights, i.e., where ambiguities are interpreted in a manner consistent with the *Marks* decision.

D. Does the Interpretation of *Marks* Court Mean That any Device with the Capacity to Dial Stored Numbers Automatically is an Automatic Telephone Dialing System?

For reasons discussed above, *Marks* 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.” *Marks*, at *9. Accordingly, the TCPA requires two elements be met in order for there to be an ATDS. The dialing system must either be able to store numbers or produce numbers using a random or sequential number generator, and the dialing system must also have the capacity to automatically dial such telephone numbers.

The FCC asks whether *Marks* held that any device with the capacity to dial stored numbers automatically is an ATDS. This is exactly what *Marks* holds, and for good reason, because most modern sophisticated autodialers dial numbers from lists. A list of numbers naturally has to be stored for some period of time between being loaded and being dialed, typically in a .csv, .txt, or .xls format. What is critical to the question of an autodialer is the capacity to dial automatically, whether it is from a list or using a random or sequential number generator. Of

course, one of these other factors must also be met in order for the ATDS requirement to be triggered.

E. What devices have the capacity to store numbers, and Do Smartphones Fall into this Category?

Typically, any computing system with a memory bank, and a software interface allowing for the input and storage of phone numbers would have the capacity to store numbers. This would include most modern telephone systems, and in fact most computing devices. For instance, predictive dialers are used commonly in the telemarketing and debt collection industries and have the ability to store numbers and display consumer account information through a separate user interface, typically a customer relations management (CRM) system. Telephone numbers are stored in lists in a database, and can be dialed automatically through the predictive dialer, while a separate CRM interface allows a live agent to stand by and access the particular consumer's account.

Similarly, SMS blasting platforms, like the one used in *Marks*, have the capacity to call many telephone numbers in a short period of time. A user of the platform will load a list of numbers into the platform, and configure the system to automatically transmit SMS messages in campaigns, that can be configured to occur at specific times, carry specific messages, and follow other set parameters. In order for these campaigns to be run, a database of numbers must be accessed by the dialer. Those lists must be pre-loaded and stored until the appropriate parameters are configured and triggered, at which time the messages are disseminated.

There are many other types of devices which have the capacity to store numbers; however, since this is only half of the test, a large percentage of those systems would not qualify as an ATDS, because they lack the capacity to autodial.

In other words, they meet the first prong of the test, but fail to meet second prong. Smartphones potentially fall into this category, as explained below.

F. What Devices that can Store Numbers, Also have the Capacity to Automatically Dial Such Numbers?

As described herein, systems such as SMS blasting platforms (like the Textmunications platform in *Marks*), and predictive dialing devices have the capacity to autodial. Other systems may have such capacity as well. For instance, Power Dialers automatically dial numbers from a stored list and route the calls to available agents as they become available from prior calls. It eliminates the lag time between calls, where agents have to manually dial numbers, leading to more calls being able to be placed. One example is Five9, the description of which can be seen on the company's website here: <https://www.five9.com/products/virtual-contact-center/power-dialer>.

A progressive dialer is another type of autodialer that is capable of automatically dialing from a stored list. Like predictive dialers and power dialers, progressive dialers call numbers from stored lists, but the difference is that they only connect agents to calls answered by a live person. In progressive mode, dialers can run through a calling list of stored numbers calling multiple campaigns at once and pacing dialing based on abandonment rates, so that it only dials when agents become available, i.e. leading to more calls being able to be placed through the automated system. The goal is to increase contact rates, while decreasing lag times between calls.

Another type of autodialer with both the capacity to store numbers and dial automatically is live conversation automation. Such systems combine phone dialers with live agents and rapid call transfers, where the system can differentiate between calls where a live person picks up and speaks as opposed to a dial by

name directory or other type of business interactive voice response system (IVR) where an automated response is received by the dialer entity. Only calls where a live person picks up and answers are connected to a live agent. The goal is to allow numbers to be dialed automatically while weeding out the calls where live persons are not reached, increasing the number of hits per hour by agents. Example vendors include ConnectAndSell and ConnectLeader.

The form of autodialer that is most widely recognized as such is a voice broadcasting or guided voicemail system, which delivers a prerecorded message either to a consumer's voicemail, or upon a call being answered by a live consumer. Such messages can be delivered either by a prerecorded message with a "press one" IVR, or an Avatar using an IVR to recognize preprogrammed responses before connecting the consumer to a live agent. These systems are an ATDS, because they usually call numbers from a stored list, and are programmed to blast out high volumes of calls with an anticipated relatively low response rate. Example vendors include BoxPilot, Voice Broadcasting and CallFire.

Traditional autodialers are similar to voice broadcasting, and are typically used in the B2B context, though invariably and frequently reach consumers' cell phone numbers anyways, in violation of the TCPA. Such systems automatically dial numbers from a list, listen for the correct tone, and play a prerecorded message to a voicemail system in response. These are usually used to leave prerecorded messages to residential lines, or businesses, and cannot navigate dial by name directories. Examples of vendors include Voice2Phone and VoiceShot.

There are also hybrid systems that store numbers but are used in launch preview mode or manual mode, i.e. a click to call system, which has latent unused predictive progressive or power dialer features. These too are autodialers because

preview and manual modes of dialing on a predictive dialer do not redefine the predictive dialer – predictive (automated) dialing remains its primary purpose.

G. Do Smartphones Have Such Capacity?

Ordinary smartphones have the capacity to both store telephone numbers and automatically send text messages. Smartphones have the capacity to store lists of numbers, but do not (currently) have the capacity to automatically dial those numbers from a stored list when making a voice call. However, ordinary smartphones have the capacity to automatically dial in terms of group text messaging, for the cell phone handset can automatically transmit a text message to another cell phones, including to multiple cell phones virtually instantaneously.¹⁴ As explained by the FCC, a defining aspect of an autodialer is the ability to call many phone numbers in a short period of time. *See* FCC LEXIS 3673, *210 (“Coupled with the fact that autodialers can dial thousands of numbers in a short period of time, calls to these specified categories of numbers are particularly troublesome.”) Nevertheless, ordinary smartphones do not appear to be capable of texting a large number of recipients as would be done through a commercial autodialer or web-based marketing platform like the Textmunication system. To the extent the Commission finds an ordinary smartphone (without an installed autodialing application) has the capacity to be an ATDS due to the ability to send

¹⁴ The FCC should investigate any inherent limitations imposed by cell phone carriers in terms of the maximum number of text messages that can be sent at the same time from a smartphone. Cell phone carriers have a business interest in preventing smartphones from being using a mass dialers (such as for telemarketing purposes), because mass text messages utilize more data than a single text message and logically reduce available bandwidth. *See generally*, <https://www.androidauthority.com/what-is-sms-280988> (referring generally to bandwidth of wireless networks for SMS use). Moreover, carriers such as AT&T appear to place a limit of 10 people that can be sent the same text message. *See* <https://forums.att.com/t5/Data-Messaging-Features-Internet/AT-amp-T-Limit-of-10-people-on-text-messaging/td-p/4798760>. Additionally, Verizon appears to limit the number of contacts that can be sent the same text message to 20 (phone numbers). *See* <https://community.verizonwireless.com/thread/817603>.

the same text message to multiple recipients at virtually the same time, it would be appropriate and advisable for the FCC to create a common-sense exemption¹⁵ for smartphones.¹⁶

It should be noted that with technology improving, applications can be downloaded onto smartphone devices that allow them to thereafter auto-dial stored lists of telephone numbers, either by placing mass calls or sending mass text messages. Once such an application is loaded onto a smartphone, the device thereafter would certainly have the capacity to auto-dial, and would be an ATDS. It is very important that the Commission's rules account for this, because as technology improves, and these cheaper options become available, those who seek to use such technology to intrude into the lives of consumers will use these types of applications to invade consumers' privacy.

The Commission's ruling should account for the evolution of technology in order to ensure that wrongdoers cannot find loopholes in the law while at the same time creating a common-sense exemption for smartphones should the Commission determine ordinary smartphones are an ATDS.

H. How Should the Commission Address These Two Court Holdings?

For all of the reasons stated herein, the Commission should adopt a ruling aimed at advancing the interest of Congress, which both *ACA* and *Marks* acknowledge to be the protection of consumer privacy from unwanted calls and text messages. The *Marks* ruling correctly observes that there is an inherent

¹⁵ The FCC has, in the past, created common-sense exemptions, including for a one-time confirmatory text message. *In re Rules & Regulations Implementing the TCPA of 1991*, 27 FCC Rcd 15391, 15394 (F.C.C. November 29, 2012).

¹⁶ Care should be taken to avoid creating loopholes for companies and individuals to make use of equipment or web-based platforms to automatically dial or send mass text messages, thereby evading the TCPA's restrictions requiring consent for autodialed calls and texts.

disconnect between the position advanced by the defense bar and advocates of strong TCPA protections, wherein such interest groups argue that a system cannot be an ATDS if it cannot generate numbers. Congressional intent was not to place such limitation on the law. *Marks* expressly holds that number generation is not an essential aspect of an ATDS, whereas *ACA International*¹⁷ merely left open the possibility that the FCC could rule as has the *Marks* Court. The Commission should reach the same conclusion as in *Marks* in issuing further rulings on the meaning of an automatic telephone dialing system.

With respect to the question of “capacity,” *Marks* did not specifically address that issue, although *ACA International* did rule that the FCC’s definition of “capacity” was overbroad in that it could encompass ordinary smartphones. The holding in *Marks*, however, suggests that capacity includes some form of latent capacity. *See Marks*, at *28 (holding that a device is an ATDS “even if the system must be turned on or triggered by a person”).¹⁸ Adopting a latent capacity requirement, along with interpreting an ATDS to not require number generation, and creating a common-sense exemption for ordinary smartphones if they are deemed to be an ATDS, would allow the Commission to broadly protect consumers while at the same time avoid a finding that ordinary smartphones used by millions of consumers are regulated by the TCPA.

Moreover, the Ninth Circuit found that Congress impliedly blessed this Commission’s prior Rulings in 1992, 2003 and 2008 concerning predictive dialers when Congress amended the TCPA in the Bipartisan Budget Act of 2015, added

¹⁷ In *Reyes v. BCA Fin. Servs.*, 312 F. Supp. 3d 1308, 1322 (S.D.Fla. 2018), the Court noted, “*ACA International* did not say that a predictive dialer, or any other type of device, must be able to generate and dial random or sequential numbers to meet the TCPA’s definition of an autodialer.”

¹⁸ “Congress was clearly aware that, at the very least, a human has to flip the switch on an ATDS.” *Marks*, at *26.

language to the TCPA which touched on the intention behind the issue of “capacity,” and chose not to amend the statutory definition of an ATDS. By tacitly approving of such language, Congress suggested that the FCC’s prior Rulemaking efforts advanced the TCPA in a manner consistent with Congressional intent and goals. While *ACA* pointed out some fine-tuning which could be required, an overhaul or substantive revision of the findings of the Commission in its 2015 FCC Declaratory Ruling would be inconsistent with the clear goals of Congress. Anything less would be outside of the authority of the Commission because the Commission does not have authority to rewrite the express text of the TCPA, and if the Commission were to do so it would not be entitled to *Chevron* deference.

III. CONCLUSION

The TCPA is important to a basic fundamental bipartisan principle that almost every American can support – the right to privacy, including in one’s home and in one’s cell phone. Nobody wants to be robo-called multiple times a day unless they have expressly invited such form of contact into their lives.

Automated dialing systems, which are more and more being utilized in the form of online dialing platforms rather than physical dialer machines, that have the capacity to place high volumes of calls (or text messages) should be deemed autodialers because that is what Congress intended, and what the TCPA envisions. The *Marks* decision impliedly recognizes the harm to consumer privacy that would abound from a ruling that an ATDS includes only equipment that has the capacity to produce random or sequential telephone numbers, including from use of web-based dialing systems.

These are basic principles to which everyone should be able to agree. Yet the TCPA is under attack from the defense bar, the debt collection industry, the telemarketing industry, private interest groups, and others who do not have the

interests of consumer privacy in mind. The FCC has the power to make common sense rules that protect members of the public from intrusions into their rights to privacy. This power should be put to good use, and the common-sense rules advanced herein by Commenters should, respectfully, be adopted.

The TCPA should be interpreted to in a manner consistent with *Marks*, namely, that an ATDS does not require telephone number production; it is sufficient that equipment has the capacity to both store and automatically dial telephone numbers. To the extent ordinary smartphones have the capacity to be an ATDS, the Commission should create a common-sense exemption for smartphones, taking care to avoid creating loopholes that could allow for companies and individuals to skirt the protections of the TCPA to the detriment of consumer privacy.

Respectfully submitted,

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