

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Rules and Regulations)
Implementing the)
Telephone Consumer Protection Act and)
Interpretations in Light of the Ninth Circuit's)
Marks v. Crunch San Diego, LLC Decision)

CG Docket No. 02-278
CG Docket No. 18-152

Comments of

National Consumer Law Center
on behalf of its low-income clients

By:

Margot Saunders

Senior Counsel

National Consumer Law Center

1001 Connecticut Ave., NW

Washington, D.C. 20036

msaunders@nclc.org

Carolyn Carter

Deputy Director

National Consumer Law Center

7 Winthrop Square

Boston, MA 02110

ccarter@nclc.org

Table of Contents

| | |
|--|----|
| Introduction and Summary | 1 |
| I. Equipment that Stores and Dials Numbers Meets the Definition of an ATDS | 3 |
| II. Interpreting the ATDS Definition Not to Encompass a Device that Dials from a Stored List Would Be Inconsistent with Other Provisions of the TCPA | 5 |
| III. The Smartphone is a Box with Multiple Functions Which Should be Dealt with Separately | 7 |
| Conclusion | 13 |

Introduction and Summary

These comments are respectfully submitted to the Federal Communications Commission (FCC or Commission) by the **National Consumer Law Center** (NCLC) on behalf of its low-income clients, in furtherance of the comments¹ we filed on behalf of **forty-one other national and state public interest groups and legal services organizations earlier in this proceeding.**² In these comments, we seek to provide answers to the questions posed by the Commission³ after the decision by the Ninth Circuit in *Marks v. Crunch San Diego, LLC*.⁴

The Ninth Circuit held that the TCPA's definition of an autodialer encompasses any device that dials numbers from a stored list—including the predictive dialers that most robocallers use today. The decision focuses on the role of the word “store” in the statutory definition—a question that no

¹ Comments of National Consumer Law Center on behalf of its low-income clients and forty-one other national and state public interest groups and legal services organizations, *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act and Interpretations in Light of the ACA International Decision, CG Dockets 02-278 and 18-152 (June 13, 2018) [hereinafter NCLC Primary Comments], *available at* <https://ecfsapi.fcc.gov/file/106131272217474/Comments%20on%20Interpretation%20of%20TCPA%20in%20Light%20of%20ACA%20International.pdf>.

² The national public interest organizations on whose behalf our primary comments were filed were: Americans for Financial Reform, Consumer Action, Consumer Federation of America, Consumers Union, NAACP, National Association of Consumer Advocates (NACA), National Association of Consumer Bankruptcy Attorneys (NACBA), National Legal Aid & Defender Association, Prosperity Now, Public Justice, Public Knowledge, US PIRG; the state public interest and legal services programs were Arkansans Against Abusive Payday Lending, Housing and Economic Rights Advocates, California, Public Good Law Center, California, Connecticut Legal Services, Inc., Jacksonville Area Legal Aid, Inc., Florida, Florida Alliance for Consumer Protection, LAF, Illinois, Greater Boston Legal Services, Massachusetts on behalf of its low-income clients, Public Justice Center, Maryland, Michigan Poverty Law Program, Legal Aid Center of Southern Nevada, Legal Services of New Jersey, Public Utility Law Project of New York, Bronx Legal Services, New York, Brooklyn Legal Services, New York, Long Term Care Community Coalition, New York, Manhattan Legal Services, New York, Queens Legal Services, New York, Staten Island Legal Services, New York, Financial Protection Law Center, North Carolina, North Carolina Justice Center, Legal Aid Society of Southwest Ohio, South Carolina Appleseed Legal Justice Center, Texas Legal Service Center, Virginia Poverty Law Center, Washington Defender Association, West Virginia Center on Budget and Policy, Mountain State Justice, West Virginia, and One Wisconsin Now.

³ 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. October 3, 2018, available at <https://ecfsapi.fcc.gov/file/10032573521648/DA-18-1014A1.pdf>.

⁴ ___ F.3d ___, 2018 WL 4495553 (9th Cir. Sept. 20, 2018).

other court had addressed in any detail. The court supports its conclusion with a meticulous analysis of the ways in which a narrower reading of the definition would be inconsistent with other TCPA provisions.

An important concern raised by the Commission regarding the Ninth Circuit's characterization of an ATDS is the potential that all smartphones will thus be included. We propose that the Commission address this concern by clarifying that the TCPA only covers systems that are actually used to make multiple calls or send mass texts, but does not include smartphones *not* used in these ways. We believe this approach provides an appropriate solution to the smartphone concern.

We urge the FCC to accept the Ninth Circuit's interpretation of the definition of an automated telephone dialer system (ATDS) for several reasons:

1. It is a grammatically sound reading of the statutory language in 47 U.S.C. Section 227(a)(1), as is further explained in Section I of these comments.
2. The structure of the Telephone Consumer Protection Act (TCPA) logically requires the conclusion reached by the Ninth Circuit. Indeed, as explained in Section II of these comments, this interpretation is mandated by the other provisions and requirements in the TCPA.

The concern that the *Marks* definition of an ATDS may include smartphones can be dealt with by recognizing the separate functions included in smartphones. If each relevant function is addressed separately, the analysis will ensure that ordinary users of smartphones who are only using factory-installed features are not be caught up in the ATDS definition:

- a) **Calling Function.** The calling function of a smartphone does not meet the definition of an ATDS. Smartphones only have one microphone and only one speaker, allowing only one human to make one call at one time.
- b) **Applications and Internet Access Features.** Smartphones come from the factory with the ability to access the Internet and to download apps, which can enable the phone to be used to make multiple calls at once. However, as these functions are not built into the smartphone, the possibility of using them through the phone does not make the smartphone an ATDS. However, once added to the smartphone, and then used to make multiple calls without human intervention, then that particular smartphone would be part of a "system" that constitutes an ATDS.

- c) **Texting Feature.** Smartphones are manufactured with some limited ability to send a text message to more than one person at approximately the same time. We urge the Commission to treat the capacity of a smartphone to send a single text message and its capacity to send group texts as two separate functions. Thus, a consumer who uses a smartphone to send an individually drafted text message to a single recipient is not using an ATDS regardless of the smartphone’s ability to send group texts. Group texts require a different analysis, as the typical smartphone comes equipped from the factory with the ability to send a certain number of multiple texts simultaneously. We propose that the Commission articulate that the most relevant distinction is whether the sender uses the smartphone’s group texting capability to send the same message *repeatedly* to different groups. In other words, a single use of a smartphone’s standard small-scale group messaging function would not be treated as an ATDS, but repeated use of the small-scale group messaging function in rapid succession, or other mass-blasting of text messages, would be treated as use of an ATDS.

I. **Equipment that Stores and Dials Numbers Meets the Definition of an ATDS.**

In *Marks*, the Ninth Circuit started by examining the grammar of the ATDS definition. It noted that “a number generator is not a storage device,” so a device “could not use ‘a random or sequential number generator’ to store telephone numbers.”⁵ Accordingly, it recognized the consumer’s argument that the definition should be interpreted to include devices that store numbers to be called, and then dial those numbers.⁶ However, the court held that the definition was too ambiguous to be susceptible to a straightforward interpretation. It therefore examined it in the context of the overall statutory scheme, which convinced it that a device that dials numbers from a stored list is an ATDS.

We do not disagree with the *Marks* court’s observation that there are ambiguities in the definition when it is viewed in isolation from the rest of the TCPA. However, we think that, despite these ambiguities, the far better interpretation of the language of the definition, even when construed in isolation from the rest of the statute, is that it includes a device that dials numbers from a stored list.⁷

⁵ *Marks v. Crunch San Diego, LLC*, 2018 WL 4495553, at *8 (9th Cir. Sept. 20, 2018).

⁶ *Id.*

⁷ NCLC Primary Comments in §II A.

The TCPA defines an ATDS as follows:

- (1) The term “automatic telephone dialing system” means 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.⁸

The question is whether the phrase “using a random or sequential number generator” modifies both the word “store” *and* the word “produce,” or only the word “produce.” If one were to interpret the sentence to require that the numbers *dialed* must always be produced by a random or sequential number generator, the effect would be to read the words “store or” out of the statute. Of equal consequence, such a reading also renders significant provisions of the statute superfluous or nonsensical (see Section II below).

Storage is an entirely separate function from generation of numbers.⁹ For example, one might store milk generated by a cow, but one would not store milk *using* a cow. In fact, it is not possible for one system both to store and to produce numbers. 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. Numbers cannot be *stored* using a random or sequential number generator, so the phrase “using a random or sequential number generator” must modify only the word “produce.”

Moreover, traditional canons of statutory construction support a reading of the statute that treats “storage” of telephone numbers separately from “production” of those numbers, and that

⁸ 47 U.S.C. § 227(a)(1) (emphasis added.)

⁹ This point was recognized in the *Marks* opinion in Note 8, agreeing with the Third Circuit in its first opinion in the case of *Dominguez v. Yahoo, Inc.*, 629 Fed. Appx. 369, 373 n.1 (3d Cir. 2015) (“To the extent the District Court held otherwise, we clarify that the statutory definition is explicit that the autodialing equipment may have the capacity to store *or* to produce the randomly or sequentially generated numbers to be dialed. We acknowledge that it is unclear how a number can be *stored* (as opposed to *produced*) using a ‘random or sequential number generator.’ To the extent there is any confusion between the parties on this issue (or whether Yahoo’s equipment meets this requirement in *Dominguez*’s case), the District Court may address it on remand.” (emphasis in original)).

treats “using a random or sequential number generator” as applying only to “produce.” First, it is a traditional canon of statutory interpretation that “a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”¹⁰ The ATDS definition includes the disjunctive “or,” meaning that an ATDS must include a system that simply *stores* telephone numbers, regardless of whether it *produces* the numbers.¹¹ 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.

Interpreting “store” as independent of “using a random or sequential number generator” is also supported by the Last Antecedent Rule. Under that rule, a limiting clause or phrase “should ordinarily be read as modifying only the noun or phrase that it immediately follows.”¹² Applying this rule to section 227(a)(1)(A), the most straightforward reading is that the phrase “using a random or sequential number generator” modifies only the word “produce,” and not the word “store.” This reading also avoids a nonsensical reading of the word “store” and gives meaning to all words in the definition.

II. Interpreting the ATDS Definition Not to Encompass a Device that Dials from a Stored List Would Be Inconsistent with Other Provisions of the TCPA.

The callers’ interpretation would not only read the word “store” out of the statute, but would also render other portions of the statute superfluous or nonsensical. First, under 47 U.S.C. § 227(b)(1)(A)(iii), the statute allows autodialed calls to be made only to a party who has consented. Were the Commission to adopt the callers’ interpretation that the definition includes only telephone numbers *produced* randomly or sequentially from thin air, rather than generated from a stored

¹⁰ TRW Inc. v. Andrews, 534 U.S. 19, 31, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001) (quoting Duncan v. Walker, 533 U.S. 167, 174, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001), which in turn cites Washington Market Co. v. Hoffman, 101 U.S. 112, 115-116, 25 L. Ed. 782 (1879)).

¹¹ See Bourff v. Rubin Lublin, L.L.C., 674 F. 3d 1238, 1241 (11th Cir. 2016) (explaining “or” in a similarly worded consumer protection statute).

¹² Barnhart v. Thomas, 540 U.S. 20, 26, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003).

database of inputted numbers, the prohibition of autodialed calls to consumers who had not consented to receive them would be meaningless. Autodialed calls would *always* reach parties who had not consented, because the calls would go to numbers that had been generated from thin air. Callers would have consent for calls to autodialed numbers only as a matter of sheer coincidence, if ever. Only if the prohibition encompasses calls made to a stored list of numbers, for which the caller will know whether it has obtained consent, does the prohibition make sense.

Second, the TCPA prohibits use of an autodialer in a way that ties up multiple lines of a multi-line business.¹³ If an autodialer is defined just as one that dials numbers in a random or sequential order, not from a list, it would be impossible to implement this prohibition, because a caller calling numbers produced out of thin air would have no way of ensuring that it was not tying up a business's multiple lines.

Third, as the Ninth Circuit pointed out in the *Marks* decision, recent Congressional action indicates approval of the FCC's previous interpretation of ATDS to include systems that dial from a list.¹⁴ In 2015, Congress amended section 227(b)(1)(A)(iii) to exempt the use of an ATDS to make calls "solely to collect a debt owed to or guaranteed by the United States."¹⁵ This exception would be wholly unnecessary if Congress did not consider the ATDS definition to encompass a device that makes calls to a stored list of debtors. Congress's enactment of this exception is an acknowledgment and endorsement of the FCC's many rulings adopting this interpretation. As noted by the *Marks* court, the Supreme Court has clearly articulated 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). Because we infer that Congress was aware of the existing definition of ATDS, its decision not to amend the statutory definition of ATDS to

¹³ 47 U.S.C. § 227(b)(1)(D).

¹⁴ *Marks v. Crunch San Diego, LLC*, 2018 WL 4495553 at 22.

¹⁵ 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)).

overrule the FCC's interpretation suggests Congress gave the interpretation its tacit approval. *See Lorillard v. Pons*, 434 U.S. 575, 580 (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.”).¹⁶

Finally, the TCPA permits an award of treble damages if a violation is willful or knowing.¹⁷

If numbers were generated out of thin air, rather than from a list, a caller could never *know* it was calling an emergency line or a cell phone, so this provision would also be rendered meaningless.

Importantly, the court in *ACA International* did not in any way disavow the interpretation that equipment which stores and dials is an ATDS. The court was only critical of the 2015 Order's lack of clarity on this point:

So which is it: does a device qualify as an ATDS only if it can generate random or sequential numbers to be dialed, or can it so qualify even if it lacks that capacity? The 2015 ruling, while speaking to the question in several ways, gives no clear answer (and in fact seems to give both answers). *It might be permissible for the Commission to adopt either interpretation.*¹⁸

III. The Smartphone is a Box with Multiple Functions Which Should be Dealt with Separately.

While we fully endorse the *Marks* court's conclusion that a system that dials numbers from a stored list is an ATDS, we also recognize that the definition of an ATDS should not be so broad that it sweeps in ordinary use of a smartphone. We propose that the Commission address this concern by clarifying that the TCPA only covers systems that are actually used to make multiple calls or send mass texts, but does not include smartphones *not* used in these ways. We believe this approach provides an appropriate solution to the smartphone concern.

¹⁶ *Marks v. Crunch San Diego, LLC*, 2018 WL 4495553 at 22.

¹⁷ 47 U.S.C. § 227(b)(3). *See also* *Lary v. Trinity Physician & Fin. Services.*, 780 F.3d 1101, 1107 (11th Cir. 2015).

¹⁸ *ACA International v. F.C.C.*, 885 F.3d 687, 702-703 (D.C. Cir. 2018) (emphasis added).

Chairman Pai has clearly articulated that he reads the term “capacity” in the TCPA’s definition of an ATDS¹⁹ to encompass only the system’s actual functionalities *at the time the call is made*.²⁰ Using Chairman Pai’s articulation of the term, the potential ability for the system to perform the functions of an ATDS at some time in the future, if additional software or hardware were added to one of the systems on the smartphone is not relevant.

When applying this standard to the smartphones that most consumers use for their daily communication needs, it is helpful to think of the smartphone as a box into which the manufacturer has packed a variety of systems and functions—voice calls, a camera, Internet access, a music player, a clock, etc. When determining whether a smartphone is an ATDS, the Commission should analyze the particular one of these many functions that the caller is using, and ignore the functions that the caller is not using. For example, many smartphones allow users direct access to the Internet, through which the user can do almost everything that can be accomplished on a full size computer. But the fact that smartphone users have the opportunity to access the Internet and initiate mass calling campaigns through their smartphones’ connection to the Internet does not make the smartphone itself an ATDS—any more than the fact that all of our personal computers *could* do this. It is only when the computer *does* do this activity—connect to a service on the Internet that sends out mass calls—that the computer or the smartphone becomes a part of an ATDS system.

The smartphone “box” includes many features that are not relevant to this inquiry (the camera, the photo editing and storage feature, the calendar, etc.). However, there are at least four systems that come from the factory that are relevant: the calling function, the ability to add

¹⁹ “(1) The term “automatic telephone dialing system” means 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.A. § 227(a) (emphasis added).

²⁰ *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 30 FCC Rcd. 7961 Dissenting Statement of Commissioner Ajit Pai, at 8075 (F.C.C. July 10, 2015).

applications (apps) to the smartphone to accomplish tasks that the smartphone does not come from the factory with the underlying capability to do, the Internet access function, and the texting function. We examine each of these below to illustrate their relevance to the ATDS definition.

Calling Function. The feature that is most obviously relevant to the ATDS definition is the smartphone’s calling feature. The issue is whether—without adding an app, or employing additional software or hardware that does not come with the factory-built phone—the calling function meets the definition of an ATDS. The answer is “no.” Without a human scrolling through a list of contacts, choosing a particular contact and pressing the highlighted number to dial that number, nothing would happen. Moreover, a smartphone has only one microphone and only one speaker, allowing only one human to make one call at one time. While it is possible on some smartphones to put the first party on hold, call a second party, and then engage in a conference call, that does not change the dynamic: the ability to make conference calls does not make the calling feature an ATDS. The calling function on smartphones that comes from the factory simply does not include the capability for a human to make a series of calls without human action taken for *each call*. Nor are smartphones manufactured to work like predictive dialers, dialing multiple calls simultaneously or near-simultaneously, detecting when a call is answered, and then routing that call to a live agent.²¹

Applications and Internet Access Features. Smartphones come from the factory with the ability to access the Internet and to download apps. It may be possible to purchase and add certain applications to a smartphone, or to access Internet applications, that will enable the phone to

²¹ This description of a smartphone’s voice call and other functions is informed by a conversation with Professor Henning Schulzrinne, a Professor in the Department of Computer Science at Columbia University who is also associated with the university’s Department of Electrical Engineering. He was formerly Chief Technology Officer of the FCC. He described the technological limitations of smartphones that make them unsuitable for making multiple calls at a time. He gave his permission to use his name for this purpose, and expressed a willingness, if requested, to provide more detail to the FCC on this question, or to address other questions about the technological capabilities of smartphones that would help the FCC draw the lines necessary to exclude their ordinary personal use from the definition of ATDS.

be used to make multiple calls at once.²² As these functions are not built into the smartphone, the possibility of using them through the phone does not make the smartphone an ATDS. However, if these features are *added* to a smartphone and then used to make multiple calls without human intervention, or if a smartphone is used to access an Internet application that can perform this function, then that particular smartphone would be part of a “system” that constitutes an ATDS. The Commission has long recognized that when hardware is paired with software that, together, perform the functions of an autodialer, then it is a “system” that qualifies as an ATDS.²³

Texting Feature. As for texting, smartphones are manufactured with some limited ability to send a text message to more than one person at approximately the same time.²⁴ Indeed, many people use this texting function to text their friends and family about personal news or to provide information about a party, or for similar reasons. These messages are typically sent with consent and are welcomed by the recipients, and smartphones typically offer recipients of texts sent through these features the option of leaving the group through a simple method such as tapping a “leave this conversation” button.²⁵ Recipients can also block the number from which such messages are sent. Without downloading an app to expand the text messaging capacity, it appears that this capacity is limited to a relatively small number of recipients such as ten to thirty.

Just as the Commission should treat the voice call function of a smartphone separately from its other functionalities, we urge the Commission to treat the capacity of a smartphone to send a

²² See e.g. Ring Central Contact Center, advertising, among other things: “**Superior outbound capabilities—** Improve outbound sales customer connections. Eliminate awkward delays when greeting callers while increasing agent productivity with RingCentral’s capability for multiple, simultaneous predictive calls. Agents are connected at the first hello, paving the way to better outcomes, higher conversion rates, and increased revenues.” Available at https://www.ringcentral.com/aff/contactcenter.html?BMID=AFF_CAPTERRA_CC&PID=1011214948&CID=AFF&AID=1011124560&SID=CCMAIN.

²³ See, e.g., *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991 (2003 Order), 18 F.C.C. Rcd. 14,014, 14,115, at ¶ 131 (2003).

²⁴ See e.g. <https://support.apple.com/en-us/HT202724>

²⁵ *Id.*

single text message and its capacity to send group texts as two separate functions. Thus, a consumer who uses a smartphone to send an individually-drafted text message to a single recipient is not using an ATDS regardless of the smartphone's ability to send group texts (or to access the Internet, make voice calls, or perform its many other functions).

Group texts require a different analysis, as the typical smartphone comes equipped from the factory with the ability to send a certain number of multiple texts simultaneously. The analysis should be informed by the expectation that recipients of the group texts sent for personal reasons are likely to have provided consent, although that may not always be the case. However, the most relevant distinction is whether the sender uses the smartphone's group texting capability to send the same message *repeatedly* to different groups.

In other words, a single use of a smartphone's standard small-scale group messaging function would not be treated as an ATDS, but repeated use of the small-scale group messaging function in rapid succession, or other mass-blasting of the same or similar text messages, would be treated as use of an ATDS. Unlike the situation with *calls* made by an ATDS, texts leave fingerprints on the sender's device, and are stored in the logs of the sender's cellular service provider.²⁶ These historical records will provide any reviewer (the FCC, another government enforcement agency, a potential plaintiff, or a court) with the ability to determine if the texts were sent using the ATDS function of the smartphone.²⁷ Moreover, any use of additional software or hardware, not included in the smartphone features built into the original box that came from the factory, including special texting applications, is likely to flip the use of the multiple texting feature into one considered to be an ATDS under the TCPA.

²⁶ This information also comes from our conversation with Professor Schulzrinne.

²⁷ Because of the importance of ensuring that texters do not attempt to conceal their use of a smartphone to send mass texts by deleting the records of the texts from their cell phone logs, the FCC might consider adopting a presumption that the texter did not have consent if the texter deleted these records.

We recommend that the distinction be based on whether there is more than one identical group text sent out from the smartphone. *In other words, the user's action of sending identical, or nearly identical, group messages multiple times to different parties converts the group texting function that comes embedded in the smartphone into an ATDS.*

Group texts to family and friends about personal news or plans may use the automated feature in the texting function, but these group texts are generally only sent out once. In addition, they are only sent to a relatively small number of people, in part because of limits on the group texting feature that is built into smartphones or because of carriers' limits on how many numbers a single group text can be sent to. These calls do not raise the privacy concerns that the TCPA was enacted to address. The Commission should make clear that this use of a smartphone's group texting feature is not use of an ATDS.²⁸

We think it would also be reasonable for the Commission to apply this same rule to group texts that are sent for purposes other than personal and social matters. While these texts *do* implicate the privacy concerns that underlie the TCPA, we think that it is unlikely that telemarketers, debt collectors, and other commercial entities will use a smartphone's function to send them in the very small batches that smartphones are configured to allow and that standard consumer cell phone plans permit. The Commission should make clear that repeat use of a smartphone's group text function to send identical, or near identical, information, is an ATDS.

To summarize, the following distinctions would apply:

1. **Individual texts for any purpose.** If a text is typed out by a human and sent individually by the human, no ATDS function has been employed.
2. **Group texts and mass texts.** Group texts using the texting feature built into the smartphone raises the issue of whether an ATDS is employed. Only when multiple, identical

²⁸ The Commission can base this interpretation on the prefatory language found at 47 U.S.C. § 227(b)(2), which reads: "The Commission shall prescribe regulations to implement the requirements of this subsection."

or near-identical, group text messages were sent, should the use of the group texting feature be considered an ATDS. In addition, if applications were added to the smartphone, or software or hardware that was not embedded in the smartphone as it came from the factory were used, to send out mass texts, those texts should be considered to have been sent from an ATDS.

Making these distinctions to deal with the smartphone conundrum is within the Commission's authority to refine the TCPA's definition of ATDS to regulate new technologies.²⁹ As Senator Hollings noted in 1991 when the TCPA was enacted, "The FCC is given the flexibility to consider what rules should apply to future technologies as well as existing technologies."³⁰ The Commission itself has articulated that it has the legal authority to recognize and regulate new technologies.³¹

Conclusion

For these reasons, the FCC should interpret the ATDS definition to include any device that calls numbers from a stored list, and should specifically articulate that smartphones are not necessarily considered ATDS device, unless they are used to send multiple group text messages of identical, or nearly identical information, or employ software, applications, or hardware that are not built into the devices to make mass calls or send mass texts.

²⁹ In 2003, the FCC interpreted the TCPA to apply it to both voice calls and "text calls to wireless numbers" including short message service (SMS) calls, which "provide[] the ability for users to send and receive text messages to and from mobile handsets with maximum message length ranging from 120 to 500 characters." changes warranted modifications to the existing rules. Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 18 FCC Rcd. 14,014, at 14,115 & n.606 (2003).

³⁰ 137 Cong. Rec. S18781-02 (1991) (statement of Sen. Hollings).

³¹ In 2003, the FCC extended the TCPA to apply it to both voice calls and "text calls to wireless numbers" including short message service (SMS) calls, which "provide[] the ability for users to send and receive text messages to and from mobile handsets with maximum message length ranging from 120 to 500 characters." changes warranted modifications to the existing rules. Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 18 FCC Rcd. 14,014, at 14,115 & n.606 (2003).

Respectfully submitted, this the 17th day of October, 2018, by:

Margot Saunders

Senior Counsel
National Consumer Law Center
1001 Connecticut Ave., NW
Washington, D.C. 20036
msaunders@nclc.org

Carolyn Carter

Deputy Director
National Consumer Law Center
7 Winthrop Square
Boston, MA 02110
ccarter@nclc.org