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

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

REPLY COMMENTS OF A PLACE FOR MOM, INC.

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EXECUTIVE SUMMARY

A Place for Mom supports the Commission's initiative to seek public comment after the D.C. Circuit invalidated the Commission's 2015 TCPA Declaratory Ruling and Order in its decision in *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).[1] A Place for Mom also commends the Commission for considering input about how it should interpret the meaning of ATDS in light of the Ninth Circuit's recent holding in *Marks v. Crunch San Diego LLC*, No. 14-56843, 2018 WL 4495553 (9th Cir. Sep. 20, 2018).[2]

The Ninth Circuit erred in *Marks* by interpreting the phrase ATDS broadly to encompass equipment that has the capacity to both store and dial numbers. This interpretation turns the exception into the rule and allows for the argument that nearly any modern equipment with dialing capacity is an autodialer, *i.e.*, smartphones, VoIP phones that sit on office desks, and Internet-based video calling platforms could be claimed to be an ATDS for purposes of the TCPA, regardless of whether such devices can generate random or sequential numbers or in fact make calls using ATDS functionality. This result is illogical, commercially impracticable,[3] not intended by Congress,[4] and would fail to curb the actual robocalling abuse that Congress sought

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[1] *See Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision*, Public Notice, DA 18-493 (May 14, 2018).

[2] *See Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's Marks v. Crunch San Diego, LLC Decision*, Public Notice, DA 18-1014 (Oct. 14, 2018).

[3] One commenter suggested that the FCC could adopt the interpretation of ATDS in *Marks* without sweeping smartphones into the ambit of the TCPA by treating each function of a smartphone (calling, using the Internet, and texting) as a different "device" and *then* excluding any such function that does not both call or text individuals simultaneously and repeatedly. *See* Comments of National Consumer Law Center, CG Docket Nos. 18-152, 02-278, at 2-3 (filed Oct. 17, 2018). This convoluted solution strays far beyond the TCPA's language and Congress's intent in passing the statute and proves how broad the *Marks* interpretation really is.

[4] *See* Comments of ADT, LLC d/b/a ADT Security Services, CG Docket Nos. 18-152, 02-278, at 22 (filed Oct. 17, 2018) ("The legislative history is replete with admonitions that normal,

to address when it enacted to the TCPA. The Ninth Circuit reached this erroneous conclusion only by disregarding its own precedent[5] and incorrectly deeming the statutory language ambiguous.[6]

We urge the Commission to act quickly and confirm that (1) an ATDS is limited to equipment that can generate random or sequential numbers, and (2) the TCPA covers only calls made using ATDS functionality. Swift action is necessary. A Place for Mom relies on using the telephone to provide free information to those who have provided their phone number and requested information about senior living options and to evaluate their individual needs. But using the telephone has become fraught with risk. Until the *Marks* panel is reversed[7] or the Commission issues a contrary interpretation of ATDS, *Marks* will continue to fuel the cottage TCPA litigation industry that has plagued small- and medium-sized businesses like A Place for Mom over the last decade.[8]

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expected communications between businesses and their customers were not the object of the TCPA's restrictions and would be protected.").

[5] *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009).

[6] *See id.*; *see also Pinkus v. Sirius XM Radio, Inc.*, 319 F. Supp. 3d 927, 938 (N.D. Ill. 2018) (analyzing grammar and punctuation and concluding that "the phrase 'using a random or sequential number generator' necessarily conveys that an ATDS must have the capacity to generate telephone phone numbers, either randomly or sequentially, and then to dial those numbers").

[7] A petition for rehearing *en banc* was filed on October 4, 2018. App.'s Pet. For Rehearing *En Banc, Marks v. Crunch San Diego, LLC*, No. 14-56834 (9th Cir. Oct. 4, 2018).

[8] *See* U.S. Chamber Inst. for Legal Reform, TCPA Litigation Sky-rockets Since 2007; Almost Doubles Since 2013, *available at* https://bit.ly/2OnEAyP (Feb. 5, 2016).

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REPLY COMMENTS OF A PLACE FOR MOM, INC.

Through its counsel, A Place for Mom, Inc. ("A Place for Mom") submits the following reply comments and offers its views of the efforts by the Federal Communications Commission (Commission) to appropriately define an "automatic telephone dialing system" (ATDS or autodialer) under the Telephone Consumer Protection Act of 1991 (TCPA).[9]

BACKGROUND

A Place for Mom is located in Seattle, Washington and was founded 18 years ago to help families navigate the maze of senior housing options. Since then, A Place for Mom has grown to become the largest senior living referral service in the U.S. and has helped thousands of thankful families nationwide. Its mission is to help families, at no charge to them, to learn about and find senior living options for their loved ones, based upon the family's needs and preferences.

A Place for Mom helps families who contact it to identify options, and assists them to make informed decisions by connecting them with one of A Place for Mom's over 500 local employee advisors, who are specially trained to assist. A Place for Mom contacts people who have asked for its assistance. To be clear, it does not cold call or otherwise contact people who have not asked for help. Based on an evaluation of the needs and preferences of the family, A Place for Mom provides information about one or more communities in the A Place for Mom network. A Place for Mom is paid by the participating communities and providers in the network, which is why its service can be offered at no charge to families.

A Place for Mom's business depends on the use of the telephone to collect information about the nuanced and individual needs of those who have asked for its help, and to stay in touch

[9] *See also* Reply Comments of A Place for Mom, Inc., CG Docket Nos. 18-152, 02-278 (filed June 28, 2018).

with those individuals as they navigate through diverse senior living options in their area. But using this commonplace and efficient technology—the telephone—has become an area increasingly fraught with risk. The TCPA's high statutory damages provisions and the cottage class action litigation industry that has flourished in the wake of improperly expansive interpretations of the TCPA have made calling cell phones extremely risky to American businesses.

A Place for Mom therefore joins the majority of businesses and associations participating in this proceeding in requesting that the Commission take this opportunity to correctly interpret the term ATDS according to its plain language and the intent of Congress and, by doing so, reject the Ninth Circuit's erroneous conclusion in *Marks*. An autodialer under the TCPA means equipment that has the capacity to generate random or sequential numbers, as the statutory language makes plain. More importantly, the Commission should limit enforcement of the TCPA to calls "ma[de] … using" autodialer functionality, as the statute also requires. 47 U.S.C. § 227(b).[10]

A. A Place for Mom Agrees that *Marks* Was Incorrectly Decided

A Place for Mom agrees with the many other comments in this proceeding concluding that *Marks* reached the wrong result and should have no bearing on the Commission's interpretation of the TCPA's autodialer provisions.[11] *Marks* interpreted the term ATDS to encompass not only devices with the capacity to call numbers produced by a "random or

[10] A Place for Mom also supports interpreting ATDS to exclude calls placed with human intervention and defining "called party" to refer to the person the caller expected to reach, but does not address these issues separately here.

[11] *See, e.g.*, Comments of Encore Capital Group, Inc., CG Docket Nos. 18-152, 02-278, at 2 (filed Oct. 16, 2018); Comment of Professional Association for Customer Engagement, CG Docket Nos. 18-152, 02-278, at 2 (filed Oct. 17, 2018); National Association of Federally-Insured Credit Unions Letter to Chairman Pai, CG Docket Nos. 18-152, 02-278, at 2 (filed Oct. 2, 2018).

sequential number generator," 47 U.S.C. § 227(a)(1), but also "devices with the capacity to dial stored numbers automatically."[12] This is the wrong result. Interpreting the TCPA to reach this far directly contradicts the D.C. Circuit's decision in *ACA International.* There, the D.C. Circuit expressly rejected the Commission's prior interpretation of autodialer, in part because it would encompass essentially every smartphone.[13] The *Marks* interpretation reaches just as far, if not further. As even commenters who endorse *Marks* acknowledge, under *Marks,* a plaintiff could argue that any device that dials numbers from a stored list qualifies as an autodialer, and any call placed by such a device requires prior express consent.[14] Yet it is difficult to imagine any modern telephone equipment that does *not* have the capacity to both store and dial numbers. The telephones that we use at home, in the office, and carry in our pockets could all be characterized incorrectly as falling within this expansive definition. As *ACA International* made clear, extending the TCPA to routine, commonplace calls was never the intention of Congress.[15]

The *Marks* decision creates a circuit split, creating confusion for businesses attempting to operate nationwide under a single standard. This circuit split is particularly stifling for businesses given the inherently interstate nature of most business communications. In *Dominguez v. Yahoo, Inc.*, the Third Circuit adopted a narrow interpretation of the TCPA's autodialer provision,

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

[13] *See ACA Int'l v. Fed. Commc'ns Comm'n*, 885 F.3d 687, 698 (D.C. Cir. 2018) ("It cannot be the case that every uninvited communication from a smartphone infringes federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact.").

[14] Even commenters who endorse an interpretation of autodialer that is consistent with the *Marks* decision acknowledge that such an interpretation would encompass group texting on a smartphone. *See, e.g.*, Comments of Jeffrey Hanson, CG Docket Nos. 18-152, 02-278, at 15 (filed Oct. 17, 2018); Comments of Law Offices of Todd M. Friedman, et al., CG Docket Nos. 18-152, 02-278, at 20 (filed Oct. 17, 2018).

[15] *See ACA Int'l*, 885 F.3d at 698 ("It is untenable to construe. . . the statutory definition of an ATDS in a manner that brings within the definition's fold the most ubiquitous type of phone equipment known, used countless times each day for routine communications by the vast majority of people in the country.").

holding that the "key … question" in any ATDS case is "whether the [equipment] functioned as an autodialer by randomly or sequentially generating telephone numbers, and dialing those numbers."[16] As several commenters have suggested, the Third Circuit's interpretation better aligns with both the language and legislative history of the TCPA, and is consistent with the D.C. Circuit's opinion in *ACA International*.[17] *Marks* also contradicts the Ninth Circuit's prior decision in *Satterfield v. Simon & Schuster, Inc.* There, the court held that the statute was "clear and unambiguous" and read the phrase "to store or produce telephone numbers to be called, using a random or sequential number generator" to mean "store, produce, or call randomly or sequentially generated telephone numbers."[18] The finding in *Marks* that the definition of autodialer is "ambiguous"—squarely at odds with the *Satterfield* court's conclusion to the contrary—thus departs abruptly from the Court's own precedent.

Additionally, the *Marks* court's interpretation defies grammar. As various commenters have noted, the definition of autodialer must require the use of a random or sequential number generator.[19] As one district court clearly explained:

> Like "produce," "store" is a transitive verb, and so requires an object. And the object of the verbs "store" and "produce" is "telephone numbers to be called." As a result, despite the disjunctive "or" linking "store" and "produce," "store" is not a grammatical orphan, rather, like "produce," it is tied to the object, "telephone numbers to be called." The TCPA thus defines as an ATDS a device that has the capacity "[1] to store or produce [2] telephone numbers to be called" and then "to dial such numbers." 47 U.S.C. § 227(a)(1).
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> But what kinds of numbers? **Given its placement immediately after "telephone numbers to be called," the phrase "using a random or sequential number generator" is best read to modify "telephone**

[16] 894 F.3d 116, 121 (3d Cir. 2018).
[17] *See, e.g.*, Comments of Crunch San Diego, LLC, CG Docket Nos. 18-152, 02-278, at 1 (filed Oct. 17, 2018); Comments of ADT, LLC at 11-12.
[18] 569 F.3d 946, 951 (9th Cir. 2009).
[19] *See* Comments Crunch San Diego, LLC at 2; Comments of TCN, Inc., CG Docket Nos. 18-152, 02-278, at 2 (filed Oct. 17, 2018); Comments of ADT, LLC at 11-12.

numbers to be called," describing a quality of the numbers an ATDS must have the capacity to store or produce. Had Congress meant "using a random or sequential number generator" to modify the verbs "store" and "produce," Congress would have placed the phrase immediately after those verbs and before "telephone numbers to be called"—with subsection (a)(1)(A) reading, "to store or produce, using a random or sequential number generator, telephone numbers to be called." Indeed, it would be odd to read the phrase "using a random or sequential number generator" as modifying "store" and "produce." **The comma separating "using a random or sequential number generator" from the rest of subsection (a)(1)(A) makes it grammatically unlikely that the phrase modifies only "produce" and not "store"and yet it is hard to see how a number generator could be used to "store" telephone numbers.**

Because the phrase "using a random or sequential number generator" refers to the kinds of "telephone numbers to be called" that an ATDS must have the capacity to store or produce, it follows that that phrase is best understood to describe the process by which those numbers are generated in the first place. True, the statute does not use the verb "generate." But the phrase "using a random or sequential number generator" indicates that a number generator must be used to do *something* relevant to the "telephone numbers to be called"—most naturally, either to generate the numbers themselves, or to generate the order in which they will be called.

The latter possibility is highly unlikely for at least two reasons. For one, as ACA International recognized, numbers must necessarily "be called in *some* order—either in a random or some other sequence." As a result, were the phrase "using a random or sequential number generator" understood to refer to how numbers are called rather than to how they are generated, it would be superfluous, as it would simply encompass the universe of possible orders in which numbers could be dialed. For another, if "using a random or sequential number generator" referred to the order in which numbers are dialed and not the process of generating them, the phrase would have followed, rather than preceded, "dial such numbers" in section (a)(1)(B). That is, the statute would have read: "to store or produce telephone numbers to be called; and to dial such numbers, *using a random or sequential number generator*"—which it does not.

So, the phrase "using a random or sequential number generator" necessarily conveys that an ATDS must have the capacity to generate telephone phone numbers, either randomly or sequentially, and then to dial those numbers.[20]

[20] *Pinkus v. Sirius XM Radio, Inc.*, 319 F. Supp. 3d 927, 937–38 (N.D. Ill. 2018) (emphases added) (holding that calls using a predictive dialer were not made using an ATDS); *see also* Comments of American Financial Services Association and the Consumer Mortgage Coalition,

The *Marks* court did not correctly address the grammatical structure of the autodialer definition, and its interpretation is wrong.

Finally, even if the *Marks* court had been right that the TCPA's statutory language is ambiguous, A Place for Mom agrees with other commenters[21] that the legislative history makes clear that Congress never intended the TCPA's autodialer provisions to extend to equipment that merely has the capacity to dial stored numbers. Rather, "Congress focused on regulating the use of equipment that dialed blocks of sequential or randomly generated numbers—a common technology at that time."[22] As *Marks* explained, Congress's "focus[]" was "on regulating the use of equipment that dialed blocks of *sequential or randomly generated numbers . . . .*"[23] Expanding the definition of autodialer well beyond this focus finds no support in the legislative history.[24]

CG Docket Nos. 18-152, 02-278, at 5 (filed Oct. 17, 2018) ("In crafting legislation, Congress is presumed to follow accepted punctuation standards and thus, its placement of the comma in the ATDS definition is assumed to be meaningful.") (citing *United States v. Ron Pair Enters.*, 489 U.S. 253, 241-42 (1989)).

[21] *See* Comments of Crunch San Diego, LLC at 7-9.

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

[23] *Id.* (emphasis added). This was also the view held by the Commission for over a decade after the passage of the TCPA. The Commission's 1992 Order expressed the view that "[t]he prohibitions of § 227(b)(1)"— the prohibitions that make it unlawful to use an ATDS under certain conditions—"clearly do not apply to functions like 'speed dialing,' 'call forwarding,' or public telephone delayed message services (PTDMS), *because the numbers called are not generated in a random or sequential fashion*." *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC Rcd. 8752, 8776 ¶ 47(1992) (amending 47 C.F.R. § 64.1200). And in a follow-on 1995 ruling, the Commission described "calls dialed to numbers generated randomly or in sequence" as "autodialed." *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 10 FCC Rcd. 12391, 12400 ¶ 19 (1995). The Commission's pre-2003 understanding of § 227(a)(1) thus reinforces what its plain text shows—that equipment qualifies as an ATDS only if it has the capacity to "function ... by generating random or sequential telephone numbers and dialing those numbers." *Dominguez*, 894 F.3d at 12.

[24] Congress's subsequent inaction in modifying the statutory language likewise has no bearing on whether Congress approved of the Commission's interpretation of autodialer as extending beyond equipment that has the present capacity to dial sequentially or randomly. *See* Comments of TCN, Inc. at 2 ("Congress amended the TCPA in 2015 by making a discrete addition to provide an exemption for federal debt collection communications. That amendment affected at most one type of call that was within the TCPA's strictures, not the types of equipment subject to

The *Marks* court reached its erroneous conclusion based largely on the fact that the TCPA exempts autodialed calls placed with consent—reasoning that a consent exception would make little sense if only random or sequential calls could trigger the statute.[25] However, this logic ignores the myriad ways that dialers generating and calling random or sequential numbers could be programmed to both blacklist mobile numbers, emergency numbers, and other covered phone numbers, while allowing random or sequential calls to go through to residential numbers (which are not subject to the autodialer provisions[26]) and to individuals who have consented. Indeed, when the TCPA was enacted, cellular phones were the rare exception, not the commonplace device that they are today.[27] Cabining the autodialer provisions to calls generated randomly or sequentially is perfectly logical, even with the consent exception, when considering that only a small fraction of all phone numbers would have been subject to the TCPA's autodialer prohibitions at the time the TCPA was enacted.[28]

B. The Record Supports Rejection of the *Marks* Interpretation Because it Would Hamper Ordinary, Expected Communications with Little Benefit to Consumers

Marks acknowledged that the TCPA's autodialer provisions were designed, not to prevent expected calls between businesses and their clientele, but to address "machines [that]

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the TCPA, and therefore did not 'provide additional information about Congress' views on the scope of the definition of ATDS' despite the Marks court's statement to the contrary" (internal citations omitted)).

[25] *See Marks*, 2018 WL 4495553, at *8.

[26] 47 U.S.C. § 227(b)(1)(a).

[27] *Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 FCC Rcd. 1830, ¶ 29 (F.C.C. Feb. 15, 2012) ("2012 TCPA Order") ("[W]ireless use has expanded tremendously since passage of the TCPA in 1991.")

[28] *See also* Comments of ADT, LLC at 17 ("[T]he prior consent exemption set forth in section 227(b)(1)(A) in no way compels a finding that ATDS must be seen as dialing from lists. In fact, the context of this provision indicates the contrary conclusion because it precludes the use of ATDS only with respect to those categories of numbers that Congress was concerned would be reached through random or sequential dialing – emergency lines, patient rooms, and cellular phones.").

could be programmed to call numbers in large sequential blocks or dial random 10-digit strings of numbers" as well as equipment that played prerecorded messages that would "not release the line until the prerecorded message is played, even when the called party hangs up."[29] As *Marks* noted, "there was a danger that the autodialers could 'seize' emergency or medical assistance telephone lines, rendering them inoperable."[30]

Sweeping the modern dialing equipment that businesses use to contact their clients into the definition of autodialer solves none of these problems. Modern dialing equipment that dial stored numbers from a list combine traditional telephone dialing capabilities with modern technology to reduce costs, reduce mistakes, and increase compliance, all of which benefits consumers and businesses alike. These systems do not dial large sequential blocks of phone numbers or dial random 10-digit strings of numbers, and they do not tie up emergency phone lines. They do not play pre-recorded messages unless programmed to do so, despite the *Marks* court suggesting that they are the culprit of that ill too.[31] As another commenter noted, these dialing devices, among other things, (1) increase productivity by placing calls as agents are completing calls with other clients so that the new call is connected immediately when the agent becomes available; (2) ensure that agents do not inadvertently call phone numbers other than the ones that businesses are intending to call; and (3) avoid calls to individuals who request not to

[29] *Marks*, 2018 WL 4495553, at *2 (citing S. Rep. No. 102-177, at 20 (1991); H.R. Rep. No. 102-317, at 10).
[30] *Id.* (citing H.R. Rep. No. 101-633, at 3 (1990)).
[31] *See Marks*, 2018 WL 4495553 (describing Congress's findings regarding prerecorded messages and quoting statements about "automated calls" that "cannot interact with the customer except in preprogrammed ways, do not allow the caller to feel the frustration of the called party and deprive customers of the ability to slam the telephone down on"); *see also* Comments of ADT, LLC at 15 ("The *Marks* court . . .is oblivious to the distinct automated functions of random/sequential number generation and the delivery of prerecorded messages that can seize lines. Instead, it conflates the two functions noting, for example, that "autodialers" could seize lines. But it is the prerecorded message that seizes lines." (internal citations omitted)).

receive them by making it technologically impossible for agents to call those numbers.[32] All of these factors benefit businesses and consumers alike.

Critically, from the perspective of the consumer, there is little to no difference between a call placed using a dialer that stores and then dials numbers and a call placed using a rotary telephone.[33] The consumer receives the call and speaks with a person on the other line. It is simply nonsensical, then, to lump together this type of dialer with the random number generators that Congress sought to regulate in 1991.

C. The Definition of ATDS Must Conform to the Language of the Statute

As explained in A Place for Mom's earlier comments, the TCPA defines an ATDS as "equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."[34] Thus, an ATDS is equipment that can store or produce *and dial* random or sequential numbers and necessarily does *not* include equipment that does not have that capacity. Accordingly, the Commission should clarify that equipment that cannot dial numbers randomly or sequentially—such as equipment that dials from a stored list of numbers but cannot generate random or sequential numbers—is not an ATDS.

Other commenters have suggested that a broader interpretation of ATDS is necessary to

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[32] *See* Comments of Five9, Inc., CG Docket Nos. 18-152, 02-278, at 2 (filed Oct. 17, 2018) ("Many businesses rely on Five9's calling solutions to place outbound calls, to receive inbound calls, and to track and manage their compliance obligations in connection with their calls, including honoring do-not-call requests and updating their internal do-not-call lists.").

[33] With some dialing equipment, a consumer may experience a beep or a pause before connecting with a live agent. This experience is leagues away from the issues like impeding emergency calls that Congress sought to avoid when it enacted to the TCPA and does not justify the draconian regulatory regime associated with autodialed calls.

[34] 47 U.S.C. § 227(a)(1).

embrace modern forms of dialing equipment that cannot call randomly or sequentially.[35] But a change in technology does not justify departing from Congress's mandate in the plain language of the statute.[36] Rather, as Chairman Pai previously recognized, "if the FCC wishes to take action against newer technologies beyond the TCPA's bailiwick, it must get express authorization from Congress—not make up the law as it goes along."[37] And another commenter noted, "even if certain technological advances may not be captured by the statute's restrictions, and thus may be exploited,'[t]he fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning' in interpreting the ATDS definition, that the agency lacks the authority to re-write."[38]

D. The TCPA Should Only Cover Calls Made Using ATDS Functionality

A Place for Mom joins numerous other commenters in urging the FCC to take up the D.C. Circuit's invitation to properly interpret the TCPA to extend only to calls placed *using* autodialer functionality. In other words, if a caller does not use equipment as an automatic telephone dialing system, then the TCPA autodialer provisions also should not apply.[39] The statute provides, "It shall be unlawful for any person ... to *make any call* (other than a call made

[35] *See, e.g.*, Comments of Consumer Action, CG Docket No. 02-278, at 1-2 (filed June 11, 2018); Comments of Burke Law Offices, LLC, CG Docket No. 02-278, at 3-4 (filed June 14, 2018); Comments of Consumers Union, CG Docket No. 02-278, at 3 (filed June 13, 2018); Comments of Law Offices of Todd Friedman, et al., CG Docket Nos. 18-152, 02-278, at 16 (filed Oct. 17, 2018).

[36] As Commissioner O'Rielly wrote in 2015, "[t]he [FCC] does not have the statutory authority to change the TCPA's definition of an ATDS." *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 8089 (F.C.C. July 10, 2015) ("2015 Order") (dissenting statement of Commissioner O'Rielly) (alterations in original); *see also Marks v. Crunch San Diego, LLC*, 55 F. Supp. 3d 1288, 1291 (S.D. Cal. 2014).

[37] 2015 Order, 30 FCC Rcd. at 8076 (dissenting statement of Commissioner Pai).

[38] *See* Comments of Crunch San Diego, LLC at 9 (quoting *Union Bank v. Wolas*, 502 U.S. 151, 158 (1991)).

[39] *See* Comments of TCN, Inc. at 6; Comments of American Financial Services Association and the Consumer Mortgage Coalition at 9.

for emergency purposes or made with the prior express consent of the called party) *using any automatic telephone dialing system* ... to any telephone number assigned to a ... cellular telephone service[.]"[40] Commissioner O'Rielly observed in 2015 that the commonsense reading of this provision means "that the equipment must, in fact, be used *as an autodialer* to make the calls" before a TCPA violation can be found.[41] Any other interpretation is illogical since it would allow lawful conduct to be accused simply because equipment had the ability, *even though that ability was not used*, to autodial calls. *Marks* did not address this aspect of the TCPA.

Moreover, the TCPA was not enacted to discourage owning autodialers, but to discourage *using* autodialers to make harassing phone calls.[42] Thus, it should not matter what equipment a business uses to place calls if the equipment is not being used *as an autodialer*. What should matter is whether that capacity was used to place the call. The statute would otherwise forbid clearly legal conduct solely based on a potential for equipment to be used in a certain fashion.

An interpretation of the TCPA as extending only to calls made using an autodialer thus not only comports with the language of the statute but with common sense as well. The full Commission should endorse Commissioner O'Rielly's wise interpretation, as the D.C. Circuit suggested.[43]

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[40] 47 U.S.C. § 227(b)(1) (emphases added).
[41] 2015 Order, 30 FCC Rcd. at 8088 (dissenting statement of Commissioner O'Rielly).
[42] Pub L. No. 102-243, § 2(5), (6), (12) (1991).
[43] *See ACA Int'l*, 885 F.3d at 704 (observing that this interpretation "would substantially diminish the practical significance of the Commission's expansive understanding of 'capacity' in the autodialer definition"). Many comments filed in this proceeding urge the Commission to follow the D.C. Circuit's precedent from *ACA International*. *See, e.g.*, Comments of the Retail Industry Leaders Association, CG Docket No. 02-278, at 13-15 (filed June 13, 2018); Comments of the Republican National Committee, CG Docket No. 02-278, at 4-5 (filed June 22, 2018).

CONCLUSION

We urge each Commissioner to consider the benefits, to both consumers and businesses, of clear rules to American businesses seeking to grow and succeed in an increasingly competitive and global marketplace. And we join with numerous other commenters in requesting that the Commission align the definition of autodialer with the clear language of the statute and confirm that the TCPA only applies to autodialed calls. Because *Marks* was wrongly decided, it should have no bearing on the Commission's interpretation of the TCPA's autodialer provisions.

Respectfully submitted,

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