



**Republican  
National  
Committee**

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

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	
Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
Petition for Clarification of the P2P Alliance	)	
	)	
	)	

**COMMENTS OF THE REPUBLICAN NATIONAL COMMITTEE**

**I. INTRODUCTION & SUMMARY**

The Republican National Committee (“RNC”) appreciates this opportunity from the Federal Communications Commission (“FCC” or “Commission”) to comment in strong support of the Petition for Clarification of the P2P Alliance (“*P2P Petition*”) regarding whether text messages from Peer-to-Peer (“P2P”) text messaging platforms are subject to the wireless-number restriction<sup>1</sup> of the Telephone Consumer Protection Act (“TCPA”).<sup>2</sup> **First**, the RNC urges the Commission to tread lightly when it comes to regulating political speech, which is what the

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<sup>1</sup> 47 U.S.C. § 227(b)(1)(A).  
<sup>2</sup> P2P Alliance, Petition for Clarification of the P2P Alliance, CG Docket No. 02-278 (filed May 3, 2018) (“*P2P Petition*”); *see also Consumer and Governmental Affairs Bureau Seeks Comment on the P2P Alliance Petition for Clarification Under the Telephone Consumer Protection Act*, Public Notice, GG Docket No. 02-278 (May 23, 2018).

wireless-number restriction of the TCPA does. *Second*, the RNC agrees with the P2P Alliance that P2P platforms are not autodialers and do not make calls using autodialing capabilities. P2P platforms do not meet the statutory definition of “automatic telephone dialing system” (“ATDS” or “autodialer”), and they do not share the characteristics that have historically troubled the Commission with respect to autodialers. Additionally, P2P platforms do not use ATDS functionalities when actually sending text messages; instead, they rely on human intervention. Accordingly, texts from these platforms are manual and do not require prior express consent.<sup>3</sup> *Third*, the RNC respectfully requests that the Commission further clarify that a smartphone is not automatically rendered an ATDS simply by downloading or installing an application with autodialer capabilities; rather, the Commission should look to determine if the calls in question were *made* using an autodialer application.

## **II. THE COMMISSION SHOULD TREAD LIGHTLY WHEN REGULATING POLITICAL SPEECH AND NOT UNDULY BURDEN SPEECH THAT IS CONSTITUTIONALLY PROTECTED.**

The importance of political speech cannot be overstated. Political speech is “at the very core of the First Amendment.”<sup>4</sup> It is the “speech upon which democracy depends”<sup>5</sup> and “[t]he First Amendment is designed and intended to remove governmental restraints” from political speech.<sup>6</sup> Because of its critical function in our society, political speech receives heightened First Amendment protections: “[l]aws that burden political speech are ‘subject to strict scrutiny,’

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<sup>3</sup> *Biennial Reminder for Political Campaigns about Robocall and Text Abuse*, FCC Enforcement Advisory, DA 16-264, Attachment 1 (March 14, 2016) (“There are no restrictions on live manually-dialed political calls, which may be delivered to any landline telephone or cell phone.”).

<sup>4</sup> *Carey v. FEC*, 791 F. Supp. 2d 121, 133-34 (D.D.C. 2011) (citing *Buckley v. Valeo*, 424 U.S. 1, 39 (1976)).

<sup>5</sup> *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 405 (2000) (Kennedy, J., dissenting).

<sup>6</sup> *McCutcheon v. FEC*, 134 S. Ct. 1434, 1448 (2014) (internal quotations and citation omitted).

which requires the Government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’”<sup>7</sup> Accordingly, the constitutionality of a statute or regulation depends on both the compelling interest of the government and the tailoring of the law to achieve that interest. To be narrowly tailored, a law must represent “the least restrictive means to further the articulated interest.”<sup>8</sup>

Telephone outreach—via traditional voice calls and increasingly text messages—is central to political activism and political speech. Political campaigns, political parties, political committees, and other political organizations (collectively, “political organizations”), including the RNC, engage in telephone outreach for a variety of reasons, including policy advocacy, fundraising, opinion research, voter persuasion, identifying supporters, and getting out the vote.

Because the TCPA sweeps in calls and texts from political organizations by broadly applying its consent requirements to *any* calls placed to wireless and other numbers (as opposed to solely telemarketing calls placed to those numbers),<sup>9</sup> the Commission must consider the regulation’s impact on constitutionally protected political speech, and narrowly tailor its rules to achieve a compelling interest. The government’s stated interest with respect to the TCPA—consumers’ privacy interest in being protected from unwanted and intrusive calls—is less compelling for political calls than with respect to commercial telemarketing, and may not be present at all.<sup>10</sup> Assuming there is a compelling interest, the regulations promulgated by the

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<sup>7</sup> *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (citation omitted).

<sup>8</sup> *Sable Commc’ns of Cal., Inc., v. FCC*, 492 U.S. 115, 126 (1989).

<sup>9</sup> 47 U.S.C. § 227(b)(1)(A).

<sup>10</sup> As the RNC has explained to the Commission in the past, *see* Comments of RNC, CG Docket No. 02-278, n.34 (filed March 10, 2017), because the Commission has not considered the impact of its TCPA rules on political speech, it has not weighed the interests of citizens in receiving political communications in its harm analysis. *Citizens United*, 558 U.S. at 339-40.

Commission must be the least restrictive to achieve the interest. As explained in greater detail below, broadly defining ATDS to include equipment such as a P2P platform cannot conceivably be the least restrictive means given that such equipment: (1) does not meet the statutory definition of ATDS; (2) depends on human intervention to send text messages; (3) is used to send text messages from one single individual to another single individual, rather than a large number of individuals over the course of a short duration; and (4) does not use ATDS functions to send the texts.

### **III. THE COMMISSION SHOULD CLARIFY THAT TEXT MESSAGES SENT VIA P2P PLATFORMS ARE NOT SUBJECT TO THE CONSENT RULES OF THE TCPA.**

#### **A. The Clear Language of the TCPA and the D.C. Circuit’s *ACA International* Decision Requires the Commission to Narrowly Define ATDS.**

In the past, the Commission has too broadly construed the definition of an autodialer, burdening important political speech. For example, in the *2015 Declaratory Ruling and Order*,<sup>11</sup> the Commission gave “capacity”—a key term in the definition of an autodialer—“a broad interpretation . . . to include ‘potential ability.’”<sup>12</sup> Commissioner Pai, who at the time was not yet Chairman, and Commissioner O’Rielly vehemently dissented. Commissioner Pai lamented that

[t]he *Order’s* expansive reading of the term “capacity” transforms the TCPA from a statutory rifle-shot targeting specific companies that market their services through automated random or sequential dialing into an unpredictable shotgun blast covering virtually all communications devices.<sup>13</sup>

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<sup>11</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 30 FCC Rcd. 7961 (July 10, 2015) (“*2015 Declaratory Ruling and Order*”).

<sup>12</sup> *Id.* ¶ 19.

<sup>13</sup> *Id.* (Pai Dissent).

Commissioner O’Rielly was also opposed to the broad interpretation of autodialer, appropriately viewing it as contradicting the statutory language. He explained the absurdity of the broad ATDS definition as follows:

Indeed, the new definition is so expansive that the FCC has to use a rotary phone as an example of a technology that would not be covered because the modifications needed to make it an autodialer would be too extensive. That is like the FAA regulating vehicles because with enough modifications cars and trucks could fly, and then using a skateboard as an example of a vehicle that does not meet the definition.<sup>14</sup>

The *2015 Declaratory Ruling and Order* was appealed to the D.C. Circuit, and that court agreed that the Commission’s interpretation of autodialer was too broad. Specifically, in *ACA International v. FCC*, the D.C. Circuit held that the Commission’s expansive reading of “capacity” was an “unreasonable, and impermissible, interpretation of the statute’s reach.”<sup>15</sup> Accordingly, the D.C. Circuit set aside the portion of the *2015 Declaratory Ruling and Order* that dealt with the ATDS definition.

We applaud the swift action to address this issue<sup>16</sup> and urge the Commission to take a reasonable approach to narrowly defining an autodialer as outlined in the 2015 dissents. Such a narrow definition would be consistent with the language of the statute and the guidance from the D.C. Circuit.<sup>17</sup>

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<sup>14</sup> *Id.* (O’Rielly Dissent).

<sup>15</sup> *ACA Int’l v. FCC*, 885 F.3d 687, 697 (D.C. Cir. 2018).

<sup>16</sup> *Interpretation of the Telephone Consumer Protection Act in Light of DC Circuit’s ACA International Decision*, Public Notice, DA 18-493 (May 14, 2018) (“*ACA International Decision Public Notice*”).

<sup>17</sup> This narrow definition would also be consistent with the canon of constitutional avoidance, a statutory interpretation tool that “counsels that if one interpretation of a statute ‘would raise a multitude of constitutional problems, the other should prevail.’” *2015 Declaratory Ruling and Order* (Pai Dissent) (quoting *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005)).

**B. P2P Platforms Do Not Meet the Statutory Definition of an ATDS and Do Not Have the Characteristics of an ATDS.**

Consistent with putting forth a new, reasonable interpretation of the scope of the term ATDS, the Commission should grant the current *P2P Petition*, which in part asks the Commission to clarify that “P2P text messaging does not involve the use of equipment that constitutes an automatic telephone dialing system [] as such term is defined by the TCPA.”<sup>18</sup> It is patently clear that a P2P platform is not an ATDS. The statute defines the term 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.”<sup>19</sup> P2P platforms do not meet either prong of the definition: a “P2P texting platform does not include ‘the capacity... to store or produce telephone numbers to be called, using a random or sequential number generator,’” and a P2P texting platform does not dial numbers, as “P2P text messages cannot be transmitted without affirmative human action.”<sup>20</sup> “If a piece of equipment *cannot* do those two things—if it *cannot* store or produce telephone numbers to be called using a random or sequential number generator and if it *cannot* dial such numbers—then how can it possibly meet the statutory definition?”<sup>21</sup>

Moreover, P2P platforms do not have the characteristics that the Commission traditionally has looked to in determining whether equipment is an ATDS. *First*, the Commission has consistently indicated that a “basic function of an autodialer is the ability to dial numbers without human intervention.”<sup>22</sup> P2P platforms are “entirely dependent on human

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<sup>18</sup> *P2P Petition* at 3.

<sup>19</sup> 47 U.S.C § 227(a)(1) (first citation omitted).

<sup>20</sup> *P2P Petition* at 4.

<sup>21</sup> *2015 Declaratory Ruling and Order (Pai Dissent)* (emphases in original).

<sup>22</sup> *ACA International*, 885 F.3d at 703 (internal quotation marks omitted) (referencing FCC orders from 2003, 2008, and 2015 that characterize autodialers in this way).

intervention.”<sup>23</sup> **Second**, on multiple occasions, the Commission has described that a troubling aspect of autodialers is that they are able to “dial thousands of numbers in a short period of time.”<sup>24</sup> P2P text messages are sent one-at-a-time, from one single individual to another single individual.<sup>25</sup> While we agree with the D.C. Circuit that the Commission’s “basic function” descriptions lack clarity,<sup>26</sup> common sense would lead one to believe that if a P2P platform lacks the two basic functions of an ATDS outside of its statutory definition, and at the same time fails both prongs of the statutory definition, then it is simply not an ATDS.

### **C. P2P Text Messages Are Not Made Using an ATDS.**

The Commission likewise should grant the request in the *P2P Alliance Petition* to clarify that “P2P messages [are not] made using an autodialer.”<sup>27</sup> The D.C. Circuit provided a roadmap for the Commission, based on Commissioner O’Rielly’s suggestion in his 2015 dissent, to reasonably construe the TCPA’s autodialer restriction.<sup>28</sup> Specifically, as the court explained, the definition of “ATDS,” which houses the word “capacity,” is not the only provision of the TCPA that creates the ATDS restriction. There is another provision that informs whether any given call or text to a wireless number violates the statute: “It shall be unlawful for any person ... to *make*

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<sup>23</sup> *P2P Petition* at 4.

<sup>24</sup> *2015 Declaratory Ruling and Order* ¶ 17; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd. 14014, ¶ 132-33 (July 3, 2003); *see also id.* ¶ 8 (“Autodialers can deliver prerecorded messages to thousands of potential customers every day.”).

<sup>25</sup> *P2P Petition* at 2, 3 (“[E]ach and every message transmitted using a P2P platform must be individually sent from a single sender to a single recipient; P2P texting does not allow the simultaneous or sequential transmittal of messages to a list of recipients.”).

<sup>26</sup> *ACA International*, 885 F.3d at 703 (“In short, the Commission’s ruling, in describing the functions a device must perform to qualify as an autodialer, fails to satisfy the requirement of reasoned decisionmaking. The order’s lack of clarity about which functions qualify a device as an autodialer compounds the unreasonableness of the Commission’s expansive understanding of when a device has the “capacity” to perform the necessary functions.”).

<sup>27</sup> *P2P Petition* at 3.

<sup>28</sup> *ACA International*, 885 F.3d at 704.

*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*” to any [wireless number].”<sup>29</sup>

The D.C. Circuit guided

The dissenting commissioner's interpretation would substantially diminish the practical significance of the Commission's expansive understanding of “capacity” in the autodialer definition. Even if the definition encompasses any device capable of gaining autodialer functionality through the downloading of software, the mere possibility of adding those features would not matter unless they were downloaded and used to make calls. Under the dissent's understanding of the phrase, “make any call,” then, everyday calls made with a smartphone would not infringe the statute: the fact that a smartphone could be configured to function as an autodialer would not matter unless the relevant software in fact were loaded onto the phone and were used to initiate calls or send messages.<sup>30</sup>

The Commission should follow that roadmap in the broader, ongoing proceeding regarding the definition of an autodialer,<sup>31</sup> and in this proceeding, as well.

It is clear that P2P text messages are not made using an ATDS. The messages sent can be modified and personalized at the discretion of the human using the equipment to send text messages.<sup>32</sup> Individual senders of text messages can see the individual responses of the people that they text, and they can respond with a specific script or personalized or modified message at their own discretion.<sup>33</sup> P2P text messages can only be sent when the human using the equipment takes affirmative action.<sup>34</sup> Accordingly, P2P text messages are not made using automatic functions; they are sent manually.<sup>35</sup>

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<sup>29</sup> 47 U.S.C. § 227(b)(1)(A)(iii) (emphases added).

<sup>30</sup> *ACA International*, 885 F.3d at 704.

<sup>31</sup> *ACA International Decision Public Notice*.

<sup>32</sup> *See P2P Petition* at 2.

<sup>33</sup> *See id.*

<sup>34</sup> *See id.*

<sup>35</sup> *ACA International*, 885 F.3d at 703 (noting that the “auto” in “autodialer” and the “automatic” in “automatic telephone dialing system” starkly contrasts with manual dialing).



**IV. THE COMMISSION SHOULD MAKE CLEAR THAT DOWNLOADING A DIALING APP DOES NOT MAKE ALL CALLS FROM A SMARTPHONE ATDS CALLS.**

The Commission should also take this opportunity to make clear that a whole host of political calling performed by the volunteers and staff of political organizations does not fall under the wireless-number restriction. Specifically, political organizations may choose to utilize autodialer applications as a means to quickly and efficiently reach voters and supporters for any number of reasons, as outlined above. Political organizations may also choose to reach out to the public manually. Regardless of *how* the calls or texts are placed—with an autodialer or manually—political organizations usually engage volunteers or staff, or both, to do the outreach, and it is common that individuals use their own smartphones to place these calls and texts.

If a political organization asks its volunteer or employee to download an autodialer app on his or her smartphone in order to place autodialed calls and texts with the requisite consent (or if the individual has an autodialer app for a completely different purpose such as use in one’s profession), *other calls and texts* placed by that volunteer or employee from the same smartphone should not automatically be considered to be ATDS calls and texts simply because of the existence of the app on the phone.<sup>36</sup> The same should be true for calls and text made from smartphones belonging to the political organization. For the Commission to hold otherwise would lead to an absurd result and have almost laughable practical consequences such as

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<sup>36</sup> The RNC disagrees with comments made in response to the *ACA International Decision Public Notice* that imply or state that simple download or installation of an ATDS application would be sufficient to transform an average smartphone into an ATDS. *See* Comments of Burke Law Offices, CG Docket No. 02-278, at 4 (filed June 13, 2018) (“Thus, in terms of dialing equipment’s *capacity* to be an autodialer, the use, creation, or downloading of an autodialing software or platform would certainly make that system have the capacity to automatically dial telephone numbers. For conventional, off-the-shelf smartphones without autodialing software installed, TCPA liability would not be a concern.” (emphasis in original)).

thousands of campaign volunteers repeatedly installing and un-installing an autodialer app as needed to send P2P messages without running afoul of the rule.<sup>37</sup>

The Commission should make clear that Commissioner O’Rielly’s test, as highlighted by the D.C. Circuit—that the call must be made using an ATDS—should govern in these situations. Doing so will be consistent with the D.C. Circuit’s decision, which found the fact that the previous interpretation of capacity included average smartphones to be “eye-popping:” “[t]he TCPA cannot reasonably be read to render every smartphone an ATDS subject to the Act’s restrictions, such that every smartphone user violates federal law whenever she makes a call or sends a text message without advance consent.”<sup>38</sup> It will also facilitate critical political speech and increase democratic engagement and participation.

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<sup>37</sup> See *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (“[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.”).

<sup>38</sup> *ACA International*, 885 F.3d at 697.

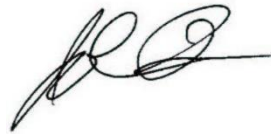
**V. CONCLUSION**

For the foregoing reasons, the Commission should grant the *P2P Petition* and further clarify that a smartphone is not automatically rendered an ATDS simply by downloading or installing an application with autodialer capabilities.

Respectfully Submitted,

The Republican National Committee

By:

A handwritten signature in black ink, appearing to read 'J.R. Philippe, Jr.', with a long horizontal line extending to the right.

John R. Philippe, Jr.  
Chief Counsel  
Republican National Committee  
310 First Street S.E.  
Washington, DC 20003  
(202)863-8500

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