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.

Through its counsel, A Place for Mom, Inc. submits the following comments to provide its view of the efforts by the Federal Communications Commission (FCC or Commission) to appropriately define an "automatic telephone dialing system" under the Telephone Consumer Protection Act of 1991 (TCPA).[1] We support the Commission's actions to seek public input after the D.C. Circuit invalidated the Commission's 2015 TCPA Declaratory Ruling and Order in its decision in *ACA International v. FCC*.[2]

I. BACKGROUND

A Place for Mom, located in Seattle, Washington, 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

[1] *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 (rel. May 14, 2018).
[2] 885 F.3d 687 (D.C. Cir. 2018).

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 advisors, who are specially trained to assist. A Place for Mom contacts people who have asked for its assistance—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 has helped families all over the country by providing the personal support and guidance of a local advisor at no cost to the family. It has over 500 local employee advisors across the U.S. who work directly with families to understand their needs and then provide senior living options that meet those requirements.

A. A Passion for Service

A Place for Mom's advisors are passionate about helping families and committed to delivering best-in-class service during difficult times. Its successful, industry-changing business model takes much of the guesswork out of selecting a senior living care facility. And this model relies in large part on its ability to communicate by phone with families who request its services.

Since Americans increasingly use cell phones to communicate, it has also become increasingly important for A Place for Mom to communicate with individuals on their cell phones. As the Commission has acknowledged, "wireless use has expanded tremendously since

passage of the TCPA in 1991."[3]

B. The Need for Reform

A Place for Mom's business requires that it use the telephone to collect information about the nuanced and individual needs of those who have asked for its help, and to stay in touch with those individuals as they navigate through diverse senior living options in their area. But using this simple piece of 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 requests that the FCC take this opportunity to provide clear guidelines to companies about the type of equipment that qualifies as "automatic telephone dialing systems" ("ATDS" or "autodialer"), that it anchor this guidance to the plain language of the statute and Congress's clear mandate, and that it limit the application of the TCPA to calls "ma[de] … using" autodialer functionality, as the statute requires. 47 U.S.C. § 227(b). A Place for Mom also supports interpreting "called party" to refer to the person the caller expected to reach, but does not address this issue separately here.

II. ARGUMENT

A. American Businesses Need Clear Guidelines

The TCPA was designed to address invasive cold-call telemarketing calls and fax-based spamming using equipment that could generate and dial random or sequential phone numbers.[4]

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[3] *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").

[4] *See* Comments of the U.S. Chamber of Commerce & U.S. Chamber Institute for Legal Reform, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at 2-3 (filed Mar. 10, 2017).

However, in the nearly three decades since its passage, the TCPA was turned into something else entirely: a regulatory "gotcha" that plaintiffs can claim imposes non-intuitive requirements on legitimate businesses seeking to contact their customers about services those customers have requested. The record in this proceeding shows that American businesses are eager for clear, practical guidelines about the scope of the TCPA.[5]

As in other areas of law, businesses need clear rules to follow, and those rules should comport with the laws drafted by our elected representatives. Anything less has the potential to inflict costly, frivolous lawsuits upon businesses who are attempting to comply with their legal obligations. Such lawsuits are not in the interest of businesses or the consumers they serve. Regulatory uncertainty under the TCPA has allowed costly litigation to needlessly flourish, which has chilled innovation, imposed high compliance costs on American businesses, and deprived consumers of efficient communications methods. We respectfully request that the FCC set clear boundaries based on the TCPA's plain language so that businesses can operate in the scope of the law without fear of such lawsuits.

B. "Automatic Telephone Dialing System" Should be Defined According to the Language of the Statute

The Commission has asked for comments on whether, "[i]f equipment cannot itself dial random or sequential numbers, can that equipment be an automatic telephone dialing system?"

[5] *See, e.g.*, Comments of the Retail Industry Leaders Association, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at 7-16 (filed June 13, 2018); Comments of Quicken Loans, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at 2-3 (filed June 13, 2018); Comments of ACT | The App Association, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at 3-5 (filed June 15, 2018); Comments of the Republican National Committee, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at 4-10 (filed June 22, 2018).

The clear answer is no.[6] The TCPA defines an "automatic telephone dialing system" 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."[7] 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 which 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 embrace modern forms of dialing equipment that cannot call randomly or sequentially.[8] But a change in technology does not justify departing from Congress's mandate in the plain language of the statute.[9] Rather, as Chairman Pai (then Commissioner) recognized, "if the FCC wishes to take action against newer technologies beyond the TCPA's bailiwick, it must get express

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[6] There is broad support in the record for this position. *See, e.g.*, Comments of the Retail Industry Leaders Association, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at 13-14 (filed June 13, 2018); Comments of the U.S. Chamber Institute for Legal Reform, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at 10-13 (filed June 13, 2018).

[7] 47 U.S.C. § 227(a)(1).

[8] *See, e.g.*, Comments of Consumer Action, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at 1-2 (filed June 11, 2018); Comments of Burke Law Offices, LLC, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at 3-4 (filed June 14, 2018); Comments of Consumers Union, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at 3 (filed June 13, 2018).

[9] 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).

authorization from Congress—not make up the law as it goes along."[10] The D.C. Circuit agreed. As the court described, "[n]othing in the TCPA countenances concluding that Congress could have contemplated the applicability of the statute's restrictions to the most commonplace phone device used every day by the overwhelming majority of Americans."[11] Instead, "Congress need not be presumed to have intended the term 'automatic telephone dialing system' to maintain its applicability to modern phone equipment in perpetuity, regardless of technological advances that may render the term increasingly inapplicable over time."[12]

The Commission has also asked for comment on "[h]ow 'automatic' must dialing be for equipment to qualify as an automatic telephone dialing system?" Specifically, the Commission asked whether an ATDS must "dial numbers without human intervention." The answer is yes. The statute requires that autodialer "equipment" have the capacity to "dial." If human intervention is required to generate a list of numbers to call or to make a call, the equipment does not have that capacity and is not an ATDS.[13] Businesses should be provided clear guidance that they will not be subject to the TCPA's autodialer provisions if their dialing equipment only operates with human intervention.

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

If a caller does not use equipment as an automatic telephone dialing system, the TCPA autodialer provisions also should not apply. The statute provides, "It shall be unlawful for any person ... to *make any call* (other than a call made for emergency purposes or made with the prior

[10] 2015 Order, 30 FCC Rcd. at 8076 (dissenting statement of Commissioner Pai).
[11] *ACA Int'l*, 885 F.3d at 699.
[12] *Id.*
[13] *See, e.g.*, U.S. Chamber Institute for Legal Reform et al., Petition for Declaratory Ruling, CG Docket No. 02-278, at 24-25 (filed May 3, 2018) ("The FCC should make clear that if human intervention is required in generating the list of numbers to call or in making the call, then the equipment in use is not an ATDS. This comports with the commonsense understanding of the word 'automatic,' and the FCC's original understanding of that word.").

express consent of the called party) *using any automatic telephone dialing system* ... to any telephone number assigned to a ... cellular telephone service[.]"[14] As Commissioner O'Rielly observed in 2015, 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.[15] Indeed, 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. (Imagine a system that had both a traditional manual rotary phone and autodialer capability—should someone manually dialing consumers on the rotary phone be liable for statutory penalties for merely using the phone on a system that could, but was not being used to, autodial?)

Moreover, the TCPA was not enacted to discourage owning autodialers, but to discourage *using* autodialers to make harassing phone calls.[16] 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 Commission should endorse this interpretation, as the D.C. Circuit suggested.[17]

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[14] 47 U.S.C. § 227(b)(1) (emphases added).
[15] 2015 Order, 30 FCC Rcd. at 8088 (dissenting statement of Commissioner O'Rielly).
[16] Pub L. No. 102-243, § 2(5), (6), (12) (1991).
[17] *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, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at 13-15 (filed June 13, 2018); Comments of the Republican

III. CONCLUSION

We commend the Commission for taking this opportunity to provide clarity about the meaning of ATDS and the scope of the TCPA. 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 request 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.

Respectfully submitted,

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Date June 28, 2018

National Committee, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at 4-5 (filed June 22, 2018).