

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

To: The Commission

REPLY COMMENTS OF SIRIUS XM RADIO INC.

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EXECUTIVE SUMMARY

An overwhelming majority of commenters urge the Commission to reform its interpretation of the term “automatic telephone dialing system” (“ATDS”) as required by statute and by the U.S. Court of Appeals for the District of Columbia Circuit in *ACA International v. FCC*. The Commission must now confirm that only equipment that can generate and automatically dial random or sequential numbers are ATDS—and only to the extent such equipment is currently configured to do so.

Nevertheless, despite the D.C. Circuit’s clear rebuke, a few commenters still urge the agency to maintain its prior unlawful determinations. Several commenters simply ignore the statute’s text and the D.C. Circuit decision in *ACA International*, making little or no attempt to explain how their requests for an overbroad interpretation of ATDS could be lawful. Others rely on readings of the statute that have no basis in the language of the statute Congress enacted. For instance:

- *Dialing from a list.* Some suggest that a device is an ATDS if it has the capacity to call from a database of numbers. But a device that dials a number from a list has used a list, and has not used a random or sequential number generator as required by the statute’s text. Further, if the ability to dial numbers from a list makes a device an ATDS, then every smartphone would be an ATDS—a result already rejected by the D.C. Circuit.
- *Dialing large batches of telephone numbers.* Others seek an ATDS definition that would reach equipment capable of dialing thousands of numbers in a short period of time. However, whether a device qualifies as an ATDS under the law turns on whether it uses a “random or sequential number generator”—and not on how many numbers the device can call or how fast. Over-reading the TCPA to restrict equipment that can quickly call large batches of numbers again leads to results the D.C. Circuit has already condemned.
- *Predictive dialing.* Some commenters have incorrectly suggested that a predictive dialer is an ATDS, but nowhere does the TCPA prohibit the use of predictive dialers. Instead, the statutory text only restricts the use of dialers capable of “using a random or sequential number generator.” If Congress had wished to write a statute to restrict predictive dialing, it could have done so.

The record overwhelmingly demonstrates the Commission’s clear path forward. The Commission must now confirm that an ATDS includes only such equipment that can generate and automatically dial random or sequential numbers, and only to the extent such equipment is currently configured to do so.

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REPLY COMMENTS OF SIRIUS XM RADIO INC.

Sirius XM Radio Inc. (“SiriusXM”) hereby submits these reply comments in response to the Commission’s Public Notice seeking comment on the interpretation of the Telephone Consumer Protection Act (“TCPA”).¹ Consistent with the recent decision of the U.S. Court of Appeals for the District of Columbia Circuit in *ACA International v. FCC*,² the Commission must now return its interpretation of the term “automatic telephone dialing system” (“ATDS”) to that which is required by the statute’s plain text, consistent with legislative intent.

I. THE RECORD OVERWHELMINGLY SUPPORTS REFORM OF THE COMMISSION’S ATDS INTERPRETATION

An overwhelming majority of commenters urge the Commission to reform its ATDS interpretation as required by statute and by the D.C. Circuit’s guidance in *ACA International*.

Commenters persuasively show that:

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*, CG Docket Nos. 18-152, 02-278, Public Notice, DA 18-493 (rel. May 14, 2018) (“*Public Notice*”).

² *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

- “*ACA International* marks a much-needed reset for the Commission’s interpretation of the TCPA.... Rather than protecting consumers from abusive practices while balancing legitimate business communications, the current TCPA landscape has become a minefield that penalizes callers and discourages communications that benefit consumers.”³
- “[T]he Commission’s past interpretations of the TCPA have left a persistent and insurmountable lack of clarity in their wake.... After years of uncertainty, the Commission must finally bring clarity to the ATDS definition in a manner consistent with the statute’s plain language and that provides clear guidance to the industry....”⁴
- *ACA International* “brings a welcomed opportunity for the FCC to adopt straight-forward, statutorily-faithful, and common sense interpretations of the TCPA to achieve the dual goals of combatting unlawful telemarketing and protecting communications between legitimate businesses and their customers.”⁵
- “By reconceiving and clarifying [the Commission’s] interpretations of the TCPA ... the Commission can provide unambiguous, workable standards that are well-grounded in its authority under the statute.”⁶

The Commission must now confirm that only equipment that can generate and automatically dial random or sequential numbers are “ATDS”—and only to the extent such equipment is currently configured to do so.

Countless commenters demonstrate that the functions of an ATDS appropriately and solely consist of automatically generating and dialing random or sequential numbers.⁷ Further,

³ A to Z Communications Coalition and Insights Association (“A to Z”) Comments at 2.

⁴ Cisco Systems, Inc. (“Cisco”) Comments at 2, 5.

⁵ Electronic Transactions Association (“ETA”) Comments at 3.

⁶ News Media Alliance (“NAM”) Comments at 7-8.

⁷ See, e.g., A to Z Comments at 4-5; ACA International (“ACA”) Comments at 6; ADT Security Services (“ADT”) Comments at 12-13; American Financial Services Association (“AFSA”) Comments at 4; American Association of Healthcare Administrative Management (“AAHAM”) Comments at 4; Bellco Credit Union (“Bellco”) Comments at 1; Cisco Comments at 6-7; Consumer Bankers Association (“CBA”) Comments at 2; Consumer Mortgage Coalition and Housing Policy Council Comments at 3; Credit Union National Association Comments at 4; DialAmerica Marketing, Inc. (“DialAmerica”) Comments at 2, 4-6; Edison Electric Institute and National Rural Electric Cooperative Association (“EEI/NRECA”) Comments at 6-7; ETA

they explain that a device has the necessary “capacity” to be an ATDS only if said device, as programmed at the time of the call, has the ability to perform the aforementioned functions.⁸

Finally, they explain that a caller’s use of a device constitutes the use of an ATDS only if the caller uses the capacity that *makes* the device an ATDS in the first place.⁹ As SiriusXM

Comments at 5; Heartland Credit Union Association Comments at 1; INCOMPAS Comments at 3-4; Independent Community Bankers of America (“ICBA”) Comments at 3-4; International Pharmaceutical & Medical Device Privacy Consortium (“IPMDPC”) Comments at 8; John Mabie Comments at 1; National Association of Federally-Insured Credit Unions (“NAFICU”) Comments at 2; National Council of Higher Education Resources (“NCHER”) Comments at 5; National Mortgage Servicing Association Comments at 1; NCTA – The Internet & Television Association (“NCTA”) Comments at 5; NAM Comments at 2; Noble Systems Corporation (“Noble”) Comments at 9-10; Ohio Credit Union League (“OCUL”) Comments at 2; PRA Group, Inc. (“PRA”) Comments at 5; Professional Association for Customer Engagement (“PACE”) Comments at 2, 8; Quicken Loans Comments at 2; Randolph-Brooks Federal Credit Union (“Randolph-Brooks”) Comments at 2; Research Triangle Institute d/b/a RTI International (“RTI”) Comments at 2, 8-9; Restaurant Law Center (“RLC”) Comments at 4-5; Retail Industry Leaders Association (“RILA”) Comments at 14; RingCentral, Inc. (“RingCentral”) Comments at 1; Selene Finance LP (“Selene”) Comments at 3; Sherry Tunender (“Tunender”) Comments at 1-2; Tatango, Inc. (“Tatango”) Comments at 4; TCN Inc. (“TCN”) Comments at 3; The National Opinion Research Center (“NORC”) Comments at 16-17; The Retail Energy Supply Association (“RESA”) Comments at 6; The Student Loan Servicing Alliance *et al.* (“SLSA”) Comments at 20-21; U.S. Chamber Institute for Legal Reform (“Chamber”) Comments at 12.

⁸ See, e.g., A to Z Comments at 9-11; ACA Comments at 4, 7; ADT Comments at 16; AFSA Comments at 4; AAHAM Comments at 3; Bellco Comments at 1; Cisco Comments at 6; Coalition of Higher Education Assistance Organization Comments at 4; CBA Comments at 2; DialAmerica Comments at 4-6; EEI/NRECA Comments at 6; ETA Comments at 5; INCOMPAS Comments at 3; ICBA Comments at 3; IPMDPC Comments at 6; NAFICU at 2; National Automobile Dealers Association (“NADA”) Comments at 3; NCHER Comments at; NCTA Comments at 4; Noble Comments at 8; OCUL at 2; PRA Comments at 5-6; PACE Comments at 6; RTI Comments at 9; RLC Comments at 6; RILA Comments at 8, 14; RingCentral Comments at 2-3; Selene Comments at 3; Tuneunder Comments at 1; Tatango Comments at 4; TCN Comments at 4; The Insurance Coalition Comments at 3; NORC Comments at 18; RESA Comments at 12; SLSA Comments at 21-22; Chamber Comments at 10.

⁹ See, e.g., A to Z Comments at 11-12; ACA Comments at 7; ADT Comments at 15-16; Bellco Comments at 1; Charles Messer Comments at 3; CBA Comments at 2; DialAmerica at 6-7; EEI/NRECA Comments at 6-7; ETA Comments at 5; ICBA Comments at 4; NAFICU Comments at 1; NADA Comments at 3-4; NCHER Comments at 5; NCTA Comments at 5; NAM Comments at 2-3; Noble Comments at 17; PRA Comments at 6; PACE Comments at 2, 10; Randolph-Brooks Comments at 2; RLC Comments at 4; RILA Comments at 15-16; NORC

explained in detail in its initial comments, the plain text of the statute and the D.C. Circuit’s opinion in *ACA International* compels these answers.¹⁰

II. THE COMMISSION MUST REJECT COMMENTERS’ REQUESTS FOR ATDS INTERPRETATIONS INCONSISTENT WITH THE STATUTE AND THE D.C. CIRCUIT DECISION

Despite the D.C. Circuit’s rebuke of the Commission’s interpretations of what constituted ATDS, a few commenters still urge the agency to maintain its prior unlawful determinations.

A. Some Proponents of an Overbroad ATDS Definition Entirely Ignore the Statute and *ACA International*

Several commenters simply ignore the statute’s text and the D.C. Circuit decision in *ACA International*, making little or no attempt to explain how their requests for an overbroad interpretation of ATDS could be lawful. For example, one plaintiffs’ firm asserts that “equipment should not have to be able to randomly or sequentially generate telephone numbers to qualify as an ATDS ... [b]ecause if it did, users of modern autodialing technology would be able to escape liability for mass-scale violations of TCPA simply because the autodialing technology they use places calls from lists they create or acquire.”¹¹

This view ignores the law. Congress chose to require that equipment must randomly or sequentially generate telephone numbers to qualify as an ATDS and chose not to include autodialing technology that places calls from lists within that definition. The Commission is not free to expand the statutory definition to account for technology that Congress chose not to include in the law.

Comments at 16; RESA Comments at 12; SLSA Comments at 23; Chamber Comments at 12; United Health Group Comments at 1-2.

¹⁰ SiriusXM Radio Inc. (“SiriusXM”) Comments at 4-12.

¹¹ Greenwald Davidson Radbil PLLC (“Radbil”) Comments at 2.

Similarly, Consumer Action suggests that “[t]he definition of autodialers *must* remain broad enough to include all equipment and methods used today to make these automated calls”¹² and Consumers Union urges the Commission to “issue a definition that covers all existing equipment used to send autodialed messages, and written with the flexibility to also cover other technologies that may become available in the future.”¹³ But such approach is not consistent with the plain text of the statute nor the D.C. Circuit’s decision.

As SiriusXM previously said, “[e]ven if callers have switched away from random and sequential dialers to other kinds of dialing technologies since the TCPA was adopted in 1991, the Commission cannot go back and rewrite the statute.”¹⁴ The Commission is bound by the language of the statute—it must adopt a definition of ATDS that is limited to equipment that generates random or sequential numbers.

B. Other Proponents of an Overbroad ATDS Definition Rely on Impermissible and Flawed Readings of the Statute

While a small minority of other commenters attempt to justify alternative readings of the statute, these would-be alternates share a common flaw: none have any basis in the language of the statute Congress enacted. Specifically, the TCPA says—with unmistakable clarity—that

¹² Consumer Action Comments at 2.

¹³ Consumers Union Comments at 3; *see also* John Herrick (“Herrick”) Comments at 5 (claiming that an ATDS definition which must randomly or sequentially generate numbers and call them would render ATDS meaningless “in light of modern technology”).

¹⁴ SiriusXM Comments at 10 (citing *ACA International*, 885 F.3d at 699 (“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.”) and *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd 7961, 8076 (2015) (Dissenting Statement of Commissioner Ajit Pai) (“[I]f the FCC wishes to take action against newer technologies beyond the TCPA’s bailiwick, it must get express authorization from Congress....”)); *see also, e.g.*, Noble Comments at 8; RILA Comments at 12.

only equipment capable of “using a random or sequential number generator” qualifies as an ATDS.¹⁵ Any construction of the term which would lead to equipment possibly qualifying as an ATDS even if it does not “us[e] a random or sequential number generator” violates the “cardinal principle” of statutory construction that requires every interpretation “to give effect, if possible, to every clause and word of a statute.”¹⁶ The Commission must reject these requests for atextual statutory interpretations.

Dialing from a List. Some commenters mistakenly suggest that a device qualifies as an ATDS if it has the capacity to call from a database of numbers. Some of those commenters reach that countertextual result by contending that “the act of generating random or sequential numbers encompasses pulling numbers from a call list or database of stored numbers.”¹⁷ That is not right: A device that dials a number from a list has used a list; it has not used a random or sequential number generator. As the D.C. Circuit understood, there is a fundamental difference between “a device [that] itself ha[s] the ability to generate random or sequential telephone numbers to be dialed” and a “device [that] can call from a database of telephone numbers.”¹⁸ Moreover, these commenters’ understanding of “using a random or sequential number generator” ignores the structure of the ATDS definition: it interprets the phrase to relate to how the numbers are called (that is, by pulling them from a list), even though a *separate* part of the ATDS definition addresses dialing.¹⁹ Finally, if Congress had wished to restrict all automated

¹⁵ 47 U.S.C. § 227(a)(1).

¹⁶ *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

¹⁷ Burke Law Offices, LLC (“Burke”) Comments at 3; *see also* Justin T. Holcombe (“Holcombe”) Comments at 4.

¹⁸ *ACA International*, 885 F.3d at 701.

¹⁹ *See* 47 U.S.C. § 227(a)(1)(B).

dialing from lists, it would have just said so; it would not have instead required the “us[e]” of a “random or sequential number generator.”

Other commenters reach a similar dial-from-a-list result by arguing that the modifier “using a random or sequential number generator” modifies only the word “produce,” not the word “store.” If that is so, then the statute covers every device that “stores ... telephone numbers to be called,” whether or not it “us[es] a random or sequential number generator.”²⁰ This interpretation creates the very problem that the D.C. Circuit identified with the Commission’s prior understanding of “capacity”: it turns every smartphone into an ATDS. Every smartphone with a contact list has the capacity to “store” telephone numbers, and smartphones generally allow their users to forward texts along to a group of recipients, automatically in some instances. “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.”²¹

This reading of the statute also violates basic principles of grammar. The provision’s two verbs—“store” and “produce”—share a direct object that *precedes* the modifier “using a random or sequential number generator.” No writer would place a shared direct object in between two conjoined verbs and a modifier that supposedly affects only one of them; if a farmer said he “grew and distributed wheat using modern technology,” no one would think that he used the most up-to-date systems to transport his crops but grew them with antiquated methods.

²⁰ See Burke Comments at 2; The National Consumer Law Center (“NCLC”) Comments at 17-18; Joe Shields (“Shields”) Comments at 2-3; Herrick Comments at 12-13; Holcombe Comments at 3; Mississippi Attorney General’s Office (“Mississippi AG”) Comments at 2; Jeffrey A. Hansen (“Hansen”) Comments at 11; Law Office of Todd M. Friedman *et al.* (“Friedman”) Comments at 6. Some of these commenters also defend this interpretation on the grounds that it pays proper respect to the “or” in between “store” and “produce.” NCLC Comments at 17-18; Shields Comments at 2-3; Herrick Comments at 12-13; Holcombe Comments at 3; Mississippi AG Comments at 2; Hansen Comments at 11; Friedman Comments at 6.

²¹ *ACA International*, 885 F.3d at 698.

Similarly, the comma between “telephone numbers to be called” and “using a random or sequential number generator” exists to make clear that the modifier covers both verbs. “Th[e] use of a comma to set off a modifying phrase from other clauses indicates that the qualifying language is to be applied to all the previous phrases and not merely the immediately preceding phrase.”²²

Some commenters nevertheless insist that the TCPA must cover every phone that can store and dial telephone numbers, because the modifier “using a random or sequential number generator” cannot sensibly apply to the verb “store.”²³ But it makes sense to “store” a number “using a random or sequential number generator”; a device programmed to store every number that a number generator spit out and call those numbers at some future time would do just that. In any event, whatever issues one might imagine in reading the modifier to cover “store,” they pale in comparison to the textual and practical difficulties that follow from treating literally every device that stores and dials numbers as an ATDS.

Some commenters also insist that the ATDS provision must cover every phone that dials from a list because some TCPA provisions (such as the exception for calls made with consent²⁴ and the prohibition on using an ATDS to tie up multiple business lines at once²⁵) seem to

²² *Elliot Coal Mining Co. v. Director, Office of Workers’ Comp. Programs*, 17 F.3d 616, 630 (3d Cir. 1994).

²³ *E.g.*, NCLC Comments at 17.

²⁴ *See* 47 U.S.C. § 227(b)(1)(A) (exempting calls made with the “prior express consent of the called party”); *see also id.* (exempting calls made “for emergency purposes”); *id.* § 227(b)(1)(A)(iii) (exempting calls made “solely to collect a debt owed to or guaranteed by the United States”).

²⁵ *See id.* § 227(b)(1)(D) (making it unlawful “to use an [ATDS] in such a way that two or more telephone lines of a multi-line business are engaged simultaneously”).

envision a caller who knows who he is about to call, not a random or sequential dialer.²⁶ Of course, if the Commission sticks with an understanding of “capacity” under which callers may not use equipment that has the *capacity* to perform ATDS functions even if those functions were not used in placing the call, then these purported problems disappear. It is possible to intentionally dial someone using equipment that could otherwise be used in random or sequential fashion, so it follows that it is possible to secure prior express consent for such calls, to direct them to a hospital in an emergency, or to place them so as to avoid tying up multiple business lines.

Even if the Commission rightly jettisons this view of “capacity,” however, these provisions still have plenty of work to do on a fair reading of the statute. With regard to the multi-line restriction, even if a caller’s equipment is blindly dialing sequential numbers, the caller could program it to place the calls one after the other rather than “simultaneously,” thereby complying with the statute.²⁷ The consent-related provisions similarly make sense even if the statute covers only randomly or sequentially dialed calls. The prohibition in question makes it unlawful to “make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any [ATDS] *or an artificial or prerecorded voice*” to certain kinds of numbers, with an exception for calls to collect a government debt.²⁸ It is of course possible to consent to a prerecorded call, as well as to direct such a call to someone who owes the government money. The TCPA as a whole thus would function just as Congress

²⁶ See Burke Comments at 1; NCLC Comments at 18.

²⁷ 47 U.S.C. § 227(b)(1)(D).

²⁸ *Id.* § 227(b)(1)(A) (emphasis added).

intended if the Commission properly restores the statute’s random-or-sequential-number-generator requirement.

The flaws in dial-from-a-list interpretations go beyond textual construction. These interpretations also disregard the *purposes* of the ATDS provisions. Congress enacted the ATDS restrictions in order to tackle the problems caused by random and sequential dialing, not to address concerns about automated dialing from a handpicked list.²⁹ Whereas random and sequential dialers can reach specialized lines such as 911, dialers that rely on prepared lists can reach only those whom callers deliberately choose to call. Random and sequential dialers do not distinguish between people who care about the caller’s message and people who do not. In contrast, organizations that prepare lists of people to call “ha[ve] an incentive to direct calls to those likely to be interested.”³⁰ Whereas sequential dialers knock out blocks of consecutive numbers—sometimes seizing entire cell phone networks—dialers that rely on handpicked lists do not. Whatever the pros and cons of dialers capable of calling from a list, these dialers do not raise the concerns that led Congress to enact the TCPA’s ATDS restrictions nor did Congress include them within those restrictions.³¹

²⁹ See SiriusXM Comments at 6-9; see also, e.g., Tatango Comments at 6.

³⁰ *Unsolicited Telephone Calls*, Memorandum Opinion and Order, 77 FCC 2d 1023, 1037 (1980).

³¹ These interpretations also contradict the TCPA’s legislative history, which suggests lawmakers were aware of the distinction between random and sequential dialing on the one hand and dialing from a prepared list on the other. See *Telemarketing Practices: Hearing Before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce*, 101st Cong. 1, 40-41 (1989) (statement of Richard A. Barton). See also *id.* at 71-72 (statement of Robert L. Ellis).

Nevertheless, some commenters look to the legislative history to argue that Congress intended a broad ATDS reach.³² These same commenters, however, quote statements in the legislative record that undermine their claim, citing concerns about computerized calls *to the home*, but not about such calls to cell phones.³³ But Congress chose to apply to residential lines only the restriction on “using an artificial or prerecorded voice,” and not also the ATDS restriction which Congress limited to calls to wireless numbers and certain emergency telephone and hospital lines.³⁴ The legislative history shows that Congress intended to address concerns about “computerized” calls through broadly applicable restrictions on using an artificial or prerecorded voice message, whereas Congress’ ATDS restriction had a different purpose: to address the unique problems random and sequential dialers posed to a discrete class of entities (namely, wireless services, emergency providers, and hospitals).³⁵

Dialing large batches of telephone numbers. Other commenters urge a broad ATDS interpretation such that the statute would reach any equipment capable of dialing thousands of

³² Herrick Comments at 8; *see also* NCLC Comments at 1; Friedman Comments at 1.

³³ *See* Herrick Comments at 7 (quoting 137 Cong. Rec. S16204-01 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings) (“Computerized telephone calls *are invading our homes*”) (emphasis added)); *id.* at 7-8 (quoting Telephone Consumer Protection Act of 1991, Pub. L. 102-243, § 2, 105 Stat. 2394 (1991) (“Evidence compiled by the Congress indicates that *residential telephone subscribers* consider *automated* or prerecorded telephone calls ... to be a nuisance.... Banning such *automated* or prerecorded telephone calls *to the home* ... is the only effective means of protecting telephone consumers....”) (emphasis added). *See also* Friedman Comments at 1 (quoting same Senator Hollings discussion of autodialed calls to *homes* that “wake us up in the morning” and “interrupt our dinner at night”); NCLC Comments at 1 (same).

³⁴ *Compare* 47 U.S.C. § 227(b)(1)(B) (restricting initiating any telephone call “using an artificial or prerecorded voice to deliver a message” to residential lines), *with id.* § 227(b)(1)(A) (restricting making a call “using an automatic telephone dialing system or an artificial or prerecorded voice” to emergency telephone lines, telephone lines of any guest room or patient room of certain establishments, or telephone numbers assigned to certain wireless services).

³⁵ *See, e.g.,* SiriusXM Comments at 6-9.

numbers in a short period of time. For example, one filing asserts that “technology which has the capability of placing significantly more phone calls than traditional rotary or manual dialing methods is very likely an ATDS[.]”³⁶ This reading, too, is wrong. Under the TCPA, whether a device qualifies as an ATDS turns mainly on whether it uses a “random or sequential number generator.” The key criterion, in other words, is how the telephone generates the numbers to be called—not how many numbers it calls, or how fast. Despite various advocates’ arguments, the law includes no reference whatsoever to dialing thousands of numbers or to dialing them in a short period of time.³⁷

Over-reading the TCPA as though it restricts equipment with the capacity to call large batches of numbers in a short span of time leads to precisely the kinds of results the D.C. Circuit condemned in *ACA International*. The D.C. Circuit found it “untenable to construe ... the statutory definition of an ATDS in a manner that brings within the definition’s fold” the “smartphone”—“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.”³⁸ Yet common smartphone apps enable users to send text messages to groups of contacts.³⁹ Under the “dial

³⁶ Friedman Comments at 7; *see also, e.g.*, Radbil Comments at 1 (“placing autodialed calls to hundreds-of-thousands of cellular telephone numbers (if not more)”); Herrick Comments at 5 (“distinction between automated dialers that broadcast tens of thousands of text messages using a pre-set list, and those that internally generate the numbers randomly or sequentially, is meaningless”); NCLC Comments at 22 (urging Commission to define ATDS by excluding equipment “not customarily used ... to make large numbers of automated calls”).

³⁷ *Cf.* 47 U.S.C. § 227.

³⁸ *ACA International*, 885 F.3d at 698. As the D.C. Circuit explained, “[i]f every smartphone qualifies as an ATDS, the statute’s restrictions on autodialer calls assume an eye-popping sweep,” which amounts to “an unreasonable, and impermissible, interpretation of the statute’s reach.” *Id.* at 697.

³⁹ *See, e.g.*, GroupMe, *The Best Way to Chat With Everyone You Know*, <http://groupme.com> (last visited June 26, 2018).

thousands of numbers” theory, smartphones on which these apps have been installed would qualify as ATDS equipment, because these phones could send text messages *en masse*. The court made clear that this is an absurd result: “It cannot be the case that every uninvited communication from a smartphone [with a group-messaging app] infringes federal law.”⁴⁰

Predictive dialing. Finally, some commenters have incorrectly suggested that a predictive dialer is an ATDS.⁴¹ A device is an ATDS only if it is capable of automatically generating and dialing random or sequential numbers. In contrast, a device is a predictive dialer if it is capable of calling multiple telephone numbers simultaneously after using an algorithm to “predict” how many will answer the phone. These are different functionalities. As the D.C. Circuit explained, “at least some predictive dialers ... have no capacity to generate random or sequential numbers.”⁴² Or, as the Commission put it, “the principal feature of predictive dialing software is a timing function, not number storage or generation.”⁴³

Nowhere does the TCPA prohibit the use of predictive dialers.⁴⁴ The statutory text restricts the use of dialers capable of “using a random or sequential number generator”—not devices capable of “predictive dialing.” If Congress had wished to write a statute to restrict predictive dialing, it could have done so.

⁴⁰ *ACA International*, 885 F.3d at 698.

⁴¹ See, e.g., Burke Comments at 2; Friedman Comments at 14; NCLC Comments at 25; Radbil Comments at 2; Hansen Comments at 4.

⁴² *ACA International*, 885 F.3d at 703; see also *id.* at 702 (“some predictive dialers cannot be programmed to generate random or sequential phone numbers”); *id.* (“‘predictive dialers’ can differ from other ‘dialers that utilize random or sequential numbers’”).

⁴³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14091-92 ¶ 131 (2003).

⁴⁴ Cf. 47 U.S.C. § 227.

III. CONCLUSION

The record overwhelming demonstrates the Commission's clear path forward. The Commission must now confirm that an ATDS includes only such equipment that can generate and automatically dial random or sequential numbers, and only to the extent such equipment is currently configured to do so.

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