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

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 Consumer and Government 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	CG Docket No. 18-152 CG Docket No. 02-278

COMMENTS OF U.S. CHAMBER INSTITUTE FOR LEGAL REFORM

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I. Introduction & Summary

Signed into law 27 years ago, the Telephone Consumer Protection Act[1] ("TCPA") has been distorted and misapplied in serious ways. Since its passage, entrepreneurial plaintiffs' lawyers have found creative ways to stretch the statute's black letter text far beyond its original terms. The result is a regulatory regime far different than what Congress intended that has caused an onslaught of litigation against well-intentioned businesses trying to reach their customers for legitimate business purposes.

While the TCPA may be outdated in some respects, the text of the law is clear and unambiguous, particularly as it pertains to the definition of "automatic telephone dialing system" ("ATDS" or "autodialer"). The U.S. Chamber Institute for Legal Reform and the U.S. Chamber Technology Engagement Center, (together, the "Chamber")[2] reiterate the request presented in our May 2018 Petition for Declaratory Ruling filed in conjunction with 17 other trade associations, collectively representing nearly every sector of the economy and millions of businesses worldwide.[3] While the

[1] 47 U.S.C. § 227(a)(1).

[2] The U.S. Chamber Institute for Legal Reform ("ILR") is an affiliate of the U.S. Chamber of Commerce, the world's largest business federation, representing the interests of more than three million businesses of all sizes and sectors, as well as state and local chambers and industry associations. ILR promotes civil justice reform through regulatory, legislative, judicial, and educational activities at the global, national, state, and local levels. ILR has long been involved in work to curb litigation abuse under the TCPA, which imposes substantial compliance burdens on American business, impedes how businesses communicate with their customers, and generates enormous litigation risk and expense. The U.S. Chamber Technology Engagement Center ("C_TEC") promotes the role of technology in our economy and advocates for rational policy solutions that drive economic growth, spur innovation, and create jobs.

[3] Petition for Declaratory Ruling, U.S. Chamber Coalition (filed May 3, 2018).

Federal Communications Commission ("FCC" or "Commission") has been diligent in building its record and evaluating the issues, there is simply no need for further delay in bringing reason back to the TCPA landscape.

Recent judicial decisions confirm the need for the FCC to act now. We urge the Commission, before the end of 2018, to follow the D.C. Circuit's guidance in interpreting the phrase ATDS by: (1) confirming that to be an ATDS, equipment must use a random or sequential number generator to store or produce numbers and dial those numbers without human intervention; (2) clarifying that if human intervention is required in generating a list of numbers to call or in making a call, then equipment in use is not automatic and therefore not an ATDS; and (3) finding that only calls made using actual ATDS capabilities are subject to the TCPA's restrictions.[4]

II. Background on the TCPA Landscape

In recent years, frivolous litigation under the TCPA has been accelerated by both court decisions and FCC rulings which have strayed far from the statute's text, Congressional intent, and common sense. For example, in the wake of the FCC's 2015 Omnibus Declaratory Ruling and Order[5] ("Omnibus Order"), TCPA litigation

[4] Petition for Declaratory Ruling, U.S. Chamber Coalition (filed May 3, 2018).
[5] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Declaratory Ruling and Order, 30 FCC Rcd. 7961 ¶ 5 (July 10, 2015) ("*2015 Omnibus Order*").

increased 46 percent, with class actions comprising approximately one-third of those filings.[6]

A pivotal part of the Omnibus Order was the FCC's expansion of the interpretation of what constitutes an ATDS. The TCPA defines an ATDS as equipment that "has the capacity—(1) to store or produce telephone numbers to be called, using a random or sequential number generator; and (2) to dial such numbers."[7] However, the FCC adopted an extremely broad interpretation of the term "capacity."[8] The Commission's unreasonably expansive reading included not only devices that can generate random or sequential numbers, but also those that currently cannot. For example, the FCC's reading swept in devices that do not currently autodial, but could be modified to do so in the future.[9]

According to then-Commissioner Pai, the FCC's interpretation was not only bad policy, it was "flatly inconsistent with the TCPA."[10] As he observed, "[t]he statute lays out two things that an automatic telephone dialing system must be able to

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[6] *See TCPA Litigation Sprawl*, U.S. Chamber Institute for Legal Reform at 2, http://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Paper_Final.pdf; *see also Abusive Robocalls and How We Can Stop Them: Hearing Before the S. Comm. On Commerce, Science & Transportation,* 115th Cong. (2018) (statement of Mr. Scott Delacourt, Partner, Wiley Rein).

[7] 47 U.S.C. § 227(a)(1).

[8] *2015 Omnibus Order*, *supra* note 5, at 15. *See also* 47 U.S.C. § 227(a)(1) (defining ATDS to mean "equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers").

[9] *2015 Omnibus Order, supra* note 5, at 10-14.

[10] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135, Dissenting Statement of Commissioner Ajit Pai, 30 FCC Rcd. 7961, at 1 (July 10, 2015) ("Pai Dissent").

do or, to use the statutory term, must have the 'capacity' to do. If a piece of equipment cannot do both 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?"[11]

In March, the D.C. Circuit took important steps in realigning the law with its true intent by vacating portions of the FCC's Omnibus Order in *ACA Int'l v. FCC*.[12] Numerous petitioners, including the Chamber, sought judicial review of the Omnibus Order's unjustifiable expansion of the TCPA, arguing that the regime was unreasonable, impractical, and inconsistent with the statute's text. The D.C. Circuit agreed with this premise in relation to the Commission's interpretation of the term ATDS, finding that the interpretation of capacity was "utterly unreasonable," "incompatible" with the statute's goals, and "impermissibly" expansive. The court found that the Commission had offered an inconsistent and "inadequa[te]" explanation of what features constitute an ATDS, "fall[ing] short of reasoned decisionmaking."[13] However, the court stopped short of clarifying the existing standard or establishing a new one.

[11] *Id.* at 1.
[12] *ACA Int'l v. FCC*, 885 F.3d 687 (2018).
[13] *Id.* at 701.

III. Circuit Courts Are Creating a Patchwork of TCPA Interpretations

Since the D.C. Circuit's ruling, several district courts,[14] and notably three circuit courts, have tackled TCPA-related cases, with two examining the definition of an ATDS. The Second and Third Circuits have taken a narrow approach to interpreting the TCPA's statutory language,[15] while the most recent decision from the Ninth Circuit is an expansive example[16] Unfortunately, this most recent Ninth Circuit panel decision pursues a fundamentally misguided view of the statutory language, which the FCC can and should rectify.

In June, the Third Circuit recognized in *Dominguez v. Yahoo* that the D.C. Circuit set aside the FCC's 2015 Declaratory Ruling.[17] The court narrowly construed the ATDS definition, concluding that a device is not an ATDS unless it can generate random or sequential telephone numbers.[18] The court also applied a "present capacity" standard and noted that the plaintiff could "no longer rely on his argument that the Email SMS Service had the latent or potential capacity to function as an auto dialer."[19]

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[14] *See, for example, Fleming v. Associated Credit Servs.*, No. 16-3382, 2018 U.S. Dist. LEXIS 163120 (D.N.J. Sep. 21, 2018); *See also Marshall v. CBE Grp., Inc.*, No. 216CV02406GMNNJK, (D. Nev. Mar. 30, 2018); *see also John Herrick v. GoDaddy.com LLC*, No. CV-16-00254-PHX-DJH, at 1 (D. Ariz. May 14, 2018); *see also Reyes v. BCA Fin. Servs., Inc.*, No. 16-24077-CIV, at 1 (S.D. Fla. May 14, 2018).
[15] *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3rd Cir. Jun. 2018) and *King v. Time Warner Cable, Inc.*, 849 F.3d 473 (2d Cir. Aug. 2018).
[16] *Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 WL 4495553 (9th Cir. Sept. 20, 2018).
[17] *Dominguez*, 894 F.3d at 6.
[18] *Id.* at 7.
[19] *Id.*

Similarly, three days later, the Second Circuit in *King v. Time Warner Cable* found a narrow reading of the term "capacity."[20] The court held that this term refers to a device's current functions, absent any modification to the device's hardware or software.[21] The court went on to determine that the definition does not include every smartphone or computer that might be turned into an ATDS if reprogrammed, but it does include equipment "that *can* perform the functions of an autodialer, regardless of whether it has actually done so in a particular case."[22]

The Ninth Circuit reached the opposite conclusion in *Marks v. Crunch San Diego*, expanding the definition of an ATDS to the broadest sense by finding that equipment qualifies as an ATDS if it can store "telephone numbers to be called, whether or not those numbers have been generated by a random or sequential number generator."[23] This definition effectively captures devices that can dial from prepopulated lists of phone numbers, even if such devices do not have the ability to randomly or sequentially generate phone numbers to be dialed.

The *Marks* court began their analysis by looking at the plain language of the statute, ultimately concluding Congress' definition of an ATDS is "ambiguous."[24] The court stated that it was not persuaded by either party's interpretation of the

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[20] *King*, 849 F.3d 473.
[21] *Id.* at 15-16.
[22] *Id.* at 18. The Chamber also notes that it strongly disagrees with this portion of the court's interpretation and maintains that the autodialing functions must be in use when a call is actually placed in order for equipment to meet the definition of an ATDS.
[23] *Id.* at 4.
[24] *Marks,* at 20.

definition, finding that "competing interpretations . . . fail[ed] to make sense of the statutory language without reading additional words into the statute."[25] The Ninth Circuit concluded, after "struggling with the statutory language" themselves, "that it is not susceptible to a straightforward interpretation based on plain language alone. Rather the statutory text is ambiguous on its face."[26]

By determining that the statutory language was not clear on its face, the Ninth Circuit gave itself leeway to move beyond the unambiguous text of the statute in order to provide its own interpretation of what equipment should qualify as an ATDS. However, this interpretation is contrary to a 2009 Ninth Circuit opinion in *Satterfield v. Simon & Schuster, Inc.*, which determined "the statutory text is clear and unambiguous."[27] In *Marks*, the court confines *Satterfield* to a mere footnote, stating that the referenced phrase only applied to "one aspect of the text: whether a device has the 'capacity' to store or produce telephone numbers . . . ."[28] The Chamber contends that this is too narrow of a reading of *Satterfield*, as the *Satterfield* court does not qualify this statement to one particular piece of the TCPA. Instead, *Satterfield* makes the broad assertion the language of the TCPA is unambiguous: "[r]eviewing this statute, we conclude that the statutory text is clear and unambiguous."[29]

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[25] *Id.* at 19.
[26] *Id.* at 20.
[27] *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009).
[28] *Id.* at 20 n. 6.
[29] *Id.* at 951.

Following this broad assertion, the court then narrows its analysis down to the question at issue in the case, which is "center[ed] on the phrase 'using a random or sequential number generator.'"

This places *Marks* in direct contradiction with the court's previous statements in *Satterfield*. As Crunch San Diego points out in its *Petition for Rehearing En Banc*, "the panel circumvents the statute's 'clear and unambiguous' plain meaning . . . in favor of statutory interpretation that is at odds with legislative intent and controlling law."[30]

Ultimately, the Ninth Circuit sidestepped the statute's unambiguous plain language and blatantly ignored the fact that the clause "random and sequential number generator" applies to both stored or produced; determining it only applies to produced numbers. The result of the Ninth Circuits' broad reading of what constitutes an ATDS ropes in nearly every smartphone in America, putting it squarely at odds with the findings in *ACA Int'l v. FCC* and ultimately the Hobbs Act,[31] which the Third Circuit seemed to have no issue following in *Dominguez v. Yahoo, Inc.*[32]

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[30] *Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 WL 4495553 (9th Cir. Sept. 20, 2018) (petition for rehearing en banc).

[31] Hobbs Act, 28 U.S.C. 2341 (the Hobbs Act—also known as the Administrative Orders Review Act—provides that "[t]he court of appeals . . . has exclusive jurisdiction to enjoy, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the Federal Communications Commission made reviewable by [47 U.S.C. 402(a)].") ("Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter . . . shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.") *See Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014); *see also Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC,* 2018 WL 1021225, at 2-4 (4th Cir. 2018). *ACA Int'l*, 885 F.3d at 703 was a Hobbs Act appeal from the 2015 FCC order (centralized in the D.C. Circuit by the Judicial Panel on Multidistrict Litigation), making the ruling binding on all other circuit and district courts.

[32] *Dominguez,* 894 F.3d 116.

For these reasons, the conclusion in *Marks* is based on tenuous arguments and flawed reasoning.[33] Further, as the Chamber has explained in various comments filed with the Commission regarding the TCPA, in recent years American businesses have been besieged by litigation under the TCPA.[34] At the same time, numerous reports point to the increase in the number of robocalls from bad actors. Modernization of the TCPA is the job of Congress, not the FCC. Therefore, it is time for the FCC to act to bring the TCPA back to its original purpose and restore common sense to the plain language of the statute.

IV. The Language of the TCPA Is Clear On Its Face

The language of the TCPA is clear.[35] However, since its passage in 1991, courts and the FCC have expanded the definition beyond the confines of

[33] Marks is still unsettled law, as the defendants filed a *Petition for Rehearing En Banc* with the Ninth Circuit Court of Appeals on October 4, 2018. *Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 WL 4495553 (9th Cir. Sept. 20, 2018) (petition for rehearing en banc).

[34] *See, e.g.*, U.S. Chamber Comments on Communication Innovators' Petition for a Declaratory Ruling (filed Nov. 15, 2012 in CG Docket No. 02-278); US Chamber Comments on PACE's Petition for Expedited Declaratory Ruling and/or Expedited Rulemaking (filed Dec. 19, 2013 in CG Docket No. 02-278); U.S. Chamber Comments on United Healthcare's Petition for Expedited Declaratory Ruling (filed Mar. 10, 2014 in CG Docket No. 02-278); U.S. Chamber Comments on ACA International's Petition for Rulemaking (filed Mar. 27, 2014 in CG Docket No. 02-278); U.S. Chamber and Institute for Legal Reform Comments on American Association for Justice's Petition for Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules (filed Feb. 18, 2015 in CG Docket No. 02-278, CG Docket No. 05-338); U.S. Chamber Comments on Petition for Rulemaking and Declaratory Ruling filed by Craig Cunningham and Craig Moskowitz (filed March 10, 2017, in CG Docket No. 02-278, CG Docket No. 05-338).

[35] In 2015, then-Commissioner Pai agreed with this statement in his dissent to the Omnibus Order by stating, "we should read the TCPA to mean what it says: Equipment that cannot store, produce, or dial a random or sequential telephone number does not qualify as an automatic telephone dialing system because it does not have the capacity to store, produce, or dial a random or sequential telephone number." *See Pai Dissent, supra* note 10, at 1.

reasonableness and the statute's plain meaning. For example, Internet-to-phone messaging could have existed only in the realm of science fiction when the TCPA was enacted in 1991, but today are being swept under the requirements of the TCPA through the definition of an ATDS.[36] It is time for the FCC to align the language of this statute with its intended meaning so TCPA litigation no longer undermines the rule of law.

To again revisit the definition, ATDS "means equipment which has the capacity—

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers."

The statute has two parts and both must be satisfied in order for a piece of equipment to qualify as an ATDS. Part (A), begins with the requirement for an ATDS "to store" or "to produce," both of which are modified by the phrase "telephone numbers to be called." Therefore, step 1 in the analysis is determining whether the equipment can store telephone numbers to be called or can produce telephone numbers to be called. The second half of part (A)—"using a random or sequential number generator"[37]—is preceded by a comma, meaning it pertains to the

[36] *See In re Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. at 8087 (O'Reilly Dissent) ("The TCPA was enacted in 1991 – before the first text message was ever sent. The Commission should have had gone back to Congress for clear guidance on the issue rather than shoehorn a broken regime on a completely different technology.").

[37] By definition "generate" means "to define or originate (something, such as a mathematical or linguistic set or structure) by the application of one or more rules or operations." Merriam Webster https://www.merriam-webster.com/dictionary/generate.

entirety of the phrase coming before the comma. Without the presence of that comma, the reader could misconstrue the language after the comma to refer only to the production of numbers to be called, rather than to *both* the production *and* storage of telephone numbers to be called. Finally, part (B) requires that the device that stores or produces those numbers, using a random or sequential number generator, to also dial those numbers.

What is notably absent from the terms in this definition is the word "list." While Congress intended to limit certain types of dialing activities, it did not intend to stifle the use of automated dialing equipment in every sense. As then-Commissioner Pai argued, "[h]ad Congress wanted to define automatic telephone dialing system more broadly it could have done so . . . But it didn't. We must respect the precise contours of the statute that Congress enacted."[38] Certainly, if Congress wanted to exclude a company's ability to call a defined set of individuals in an efficient manner, it would have specifically enumerated this requirement in the statute, as opposed to making a convoluted reference for parties to grapple with for nearly 30 years.

To avoid any confusion, the FCC should also make clear that both definitional functions must be actually—not theoretically—present and active in a device at the time the call is made. The statute uses the present tense to limit the use of equipment that "has the capacity" to perform the ATDS function and makes no reference to

[38] *See Pai Dissent, supra* note 10, at 3-4 (discussing how "capacity" can only mean "present capacity" and not "future capacity").

potential or theoretical capabilities.[39] Then-Commissioner Pai found that this "present capacity" or "present ability" approach was compelled by the text and purpose of the statute, by the Commission's earlier approaches to the TCPA, and by common-sense.[40] This approach provides a clear, bright-line rule for callers. Callers do not need to worry about whether their calling equipment *could perhaps* one day be used as an ATDS. Instead, they can focus on what their devices *currently* do.

The Commission should not deviate from this straightforward language. Devices that cannot perform these functions cannot meet the statutory definition of an ATDS. Further, if the types of technologies discussed under the law are no longer in use, it seems the law has served its intended purpose. As then-Commissioner Ajit Pai explained in his dissent to the 2015 order, "Congress expressly targeted equipment that enables telemarketers to dial random or sequential numbers in the TCPA. If callers have abandoned that equipment, then the TCPA has accomplished the precise goal Congress set out for it."[41] By the same token, if new technologies do not fit under the original terms of the TCPA that is a problem for Congress to remedy through new legislation.

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[39] 47 U.S.C. § 227(a)(1).

[40] *See, e.g, Pai Dissent*, *supra* note 10 ("Had Congress wanted to define automatic telephone dialing system more broadly it could have done so by adding tenses and moods, defining it as 'equipment which has, has had, or could have the capacity.' But it didn't.").

[41] *See Id.* at 1.

The FCC can also take this opportunity to clarify that the absence of human intervention is what makes an *automatic* telephone dialing system automatic. In *Marks*, Crunch San Diego did not dispute that their system dialed numbers automatically, and therefore had an automatic dialing function, but "humans, rather than machines [were] needed to add phone numbers" to the platform.[42] In this instance, the numbers dialed were not produced automatically by a random or sequential number generator.

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.[43] It also heeds the D.C. Circuit's suggestion that the absence of human intervention is important; a logical conclusion, it found, "given that 'auto' in autodialer—or equivalently, 'automatic' in 'automatic telephone dialing system'—would seem to envision non-manual dialing of telephone numbers."[44] Importantly, this interpretation creates a clear rule for businesses to follow and courts to enforce, instead of a vague, case-by-case analysis of requiring each piece of dialing equipment.

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[42] *Marks,* at 24.

[43] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Declaratory Ruling and Order, 18 FCC Rcd. 14014 ¶ 132 (July 3, 2003) ("2003 TCPA Order") ("The basic function of such equipment, however, has not changed–the *capacity* to dial numbers without human intervention.").

[44] *ACA Int'l*, 885 F.3d at 703 (citation omitted).

V. The Legislative Intent of the TCPA Points to a Narrow Interpretation of an ATDS

The legislative history of the TCPA supports a narrow interpretation of what constitutes automatic telephone dialer technology, as it demonstrates that Congress intended to remedy a very particular issue, caused by a very specific type of technology. Consumer complaints detailed in congressional reports specifically mention "systems used to make millions of calls everyday . . . " and that "each system has the capacity to automatically dial *sequential blocks* of telephone numbers, which have included those of emergency and public service organizations, as well as unlisted telephone numbers."[45] Congressional reports also highlighted the indiscriminate approach of ATDS technology which "dialed numbers in *sequence*, thereby tying up all the lines of a business and preventing any outgoing calls."[46] It is clear that the language included in the statute was in direct response to these indiscriminate methods of dialing random or sequential numbers. Further, lawmakers made a point to distinguish "the technology used by telemarketers for their random solicitations" from automatic message delivery that, while computerized, "*does not consist of random calls* . . . that invade the privacy of . . . constituents."[47] Congress further acknowledged

[45] H. Rept. No. 102-317, at 10 (1991)(emphasis added).
[46] S. Rept. No. 102-178, at 2 (1991) (emphasis added).
[47] 137 Cong. Rec. H. 11311 (daily ed. Nov. 26. 1991)(statement of Rep. Bryant) (emphasis added).

the importance of protecting "existing and emerging technologies and services that are beneficial to the public" from TCPA restrictions that would stifle innovation.[48]

Congress did not intend for the TCPA to function as a broad, all-encompassing ban on commercial automated telephone dialing, but rather "to address various consumer concerns without unnecessarily burdening the telemarketing industry."[49] The economic and consumer benefits from the use of ATDS technology are well documented in the legislative history. The Senate companion bill, S. 1462, "explicitly recognize[d] that there are certain classes and categories of calls that consumers do not mind and in fact would probably like to receive . . . the bill grants the FCC the latitude to exempt certain services that telephone companies presently offer, or in the future are likely to offer, to send messages and other information."[50] Indeed the future does portend the possibility of there being services that consumers would want to receive from ATDS services, and the Congressional foresight to recognize these distinct uses of ATDS technology further support the conclusion that Congress intended to prohibit only a particular type of ATDS use.

However, ATDS technology has become more sophisticated and precise since the random dialing mechanisms of 1990. Predictive dialing technology is far from the public nuisance of the random and sequential number generation of ATDS

[48] *Id.*
[49] 137 Cong. Rec. H. 11312 (daily ed. Nov. 26. 1991) (statement of Rep. Lent).
[50] *Id.*

technology in 1990. Furthermore, today's technology has specific safeguards which protect against the seizure of public emergency telephone lines or unlisted numbers which Congress sought to prohibit when it initially enacted the ATDS provisions of the TCPA. Simply put, predictive dialing technology is distinctly different from the automatic telephone dialing technology and was not the type of technology Congress intended to limit through the TCPA's restrictions.

VI. The Ninth Circuit's ATDS Definition Contradicts *ACA v. FCC*

The Ninth Circuit's definition leads the TCPA back into dangerous territory that the D.C. Circuit already found to be unreasonable. The FCC's 2015 Omnibus Order adopted an extremely broad interpretation of the term "capacity" as used in the TCPA's definition of ATDS.[51] In doing so, the FCC determined that a device that did not have "autodialing" capabilities, but could be modified to have those functions, should be considered an ATDS under the statute.

The D.C. Circuit firmly struck down this interpretation. The court found the FCC's ruling to be "utterly unreasonable in the breadth of its regulatory [in]clusion."[52] The court opined, "[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

[51] *See 2015 Omnibus Order, supra* note 5, at 15. *See also* 47 U.S.C. § 227(a)(1) (defining ATDS to mean "equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers").
[52] *ACA Int'l v. FCC*, 885 F.3d 687, 19 (2018).

advance consent."[53] The court went on to stress how unreasonable this situation is by arguing that "[i]t 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."[54]

Similar to the FCC's 2015 Omnibus Order, *Marks* held "that the statutory definition of ATDS includes a device that stores telephone numbers to be called, whether or not those numbers have been generated by a random or sequential number generator"[55] and "dials such numbers automatically."[56] Breaking this apart, cellular devices and computers have the capacity to store telephone numbers in contact lists and through various apps.[57] Those numbers can be dialed automatically through the use of apps or extensions. By defining an ATDS in these terms, the Ninth Circuit rendered every smartphone user a "potential TCPA violator." This

[53] *Id.* 16-17.
[54] *Id.* at 17.
[55] *Marks,* at 4.
[56] *Id.* at 24.
[57] A survey in 2011 by the Pew Research Internet Project found that "the average cell phone user has 664 social ties," but a survey done the same year in Great Britain found that the average person had 152 mobile phone contacts. *See* Julie Dobrow, *Be My Friend: The Staggering Number of Young People's Cell Phone Contacts*, Huffington Post, Sept. 22, 2014, https://www.huffingtonpost.com/julie-dobrow/be-my-friend-the-staggeri_b_5858474.html. It is likely that with the ever-increasing use of cellphones globally, this number has risen in recent years.

position is directly contrary to that of the D.C. Circuit in *ACA International*[58] and, therefore, impermissible under the Hobbs Act.[59]

VII. Conclusion

It has been over seven months since the D.C. Circuit rolled back key provisions of the FCC's 2015 Omnibus Order interpreting the TCPA, including the ATDS definition.[60] Uncertainty still remains, and the problem is only set to get worse as a patchwork of precedents emerges around the country. In the meantime, well-intentioned businesses are left without clear rules for compliance, leaving them subject to abusive litigation every time they pick up the phone or send a text message or fax to their consumers.

Moreover, TCPA litigation is proliferating at an alarming rate. This year alone, from January 2018 through August 2018, 2,706 TCPA lawsuits have been filed.[61] 2,091 of those lawsuits were filed from March 2018 (when the D.C. Circuit issued its decision regarding the 2015 Omnibus Order) through August 2018.[62] Clarity is desperately needed. The Chamber encourages the FCC to act before the end of 2018

[58] *ACA Int'l*, 885 F.3d 687, stating "[w]hen evaluating the issue of whether equipment is an ATDS, the statute's clear language mandates that the focus must be on whether the equipment has the capacity 'to store or produce telephone numbers to be called, using a random or sequential number generator . . . ."
[59] 28 U.S.C. § 2342(1) (making one circuit court's decision "binding" in all other circuits).
[60] *ACA Int'l*, 885 F.3d 687.
[61] WebRecon LLC, Blog/Litigation Stats (Jan. 2018 – Aug. 2018) http://webrecon.com/category/fdcpa-case-statistics/.
[62] *Id.*

to stem this tide and provide businesses with clear rules to contact their consumers without fear of abusive litigation.

Specifically, the Chamber urges the Commission to: (1) confirm that to be an ATDS, equipment must use a random or sequential number generator to store or produce numbers and dial those numbers without human intervention; (2) clarify that if human intervention is required in generating a list of numbers to call or in making a call, then equipment in use is not automatic and therefore not an ATDS; and (3) find that only calls made using actual ATDS capabilities are subject to the TCPA's restrictions.

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