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

In the Matter of	)	
	)	
Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of 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 THE RETAIL INDUSTRY LEADERS ASSOCIATION

Kathleen McGuigan
Nicholas R. Ahrens
RETAIL INDUSTRY LEADERS ASSOCIATION
1700 N. Moore Street, Ste. 2250
Arlington, VA 22209

Michael W. McTigue Jr.
Meredith C. Slawe
Kathryn E. Deal
Mira Baylson
AKIN GUMP STRAUSS HAUER & FELD LLP
2001 Market Street, Ste. 4100
Philadelphia, PA 19103

Jennifer Richter
James Tysse
Lide Paterno
Lyndsey Grunewald
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036

Michael J. Stortz
AKIN GUMP STRAUSS HAUER & FELD LLP
580 California Street, Ste. 1500
San Francisco, CA 94104

Counsel to the Retail Industry Leaders Association

October 24, 2018

EXECUTIVE SUMMARY

The Retail Industry Leaders Association ("RILA") submits these reply comments to advocate for reasonable and administrable rules interpreting the "automatic telephone dialing system" ("ATDS") provisions of the Telephone Consumer Protection Act ("TCPA"). This issue is of critical importance to RILA's members. The lack of consistent, clear, and workable regulatory guidance interpreting ATDS restrictions continues to have significant consequences for the retail industry. Not only are compliance-oriented retailers left to grapple with contradictory judicial rulings, they are increasingly faced with rampant, abusive litigation under the TCPA because of the lack of commonsense rules.

Accordingly, RILA urges the Commission to reject the reasoning in *Marks v. Crunch San Diego, LLC*, and to adopt an interpretation of ATDS that is consistent with the plain and unambiguous statutory definition, Congressional intent, and the D.C. Circuit's reasoning in *ACA International v. FCC*. Specifically, the Commission should find that (1) whether a device qualifies as an ATDS should be based on that device's "present capacity" rather than its "potential" or "theoretical" capacity, and that (2) in order for a particular call to have been placed by an ATDS, the call in question must actually have been dialed (a) using a random or sequential number generator to produce the number called and (b) without human intervention.

The *Marks* decision, which conflicts with both *ACA International* and Third Circuit precedent, adopts an impermissibly expansive interpretation of ATDS that violates canons of statutory construction, misinterprets the statutory scheme, inappropriately relies on post-enactment legislative history, and ignores Congress's clearly expressed policy goals. Indeed, rather than reining in the overly broad statutory interpretations that have spawned unprincipled waves of TCPA litigation in recent years, the *Marks* panel endorsed a dramatic expansion of the

definition of ATDS to encompass any device with the capacity to dial stored numbers automatically. This interpretation would broaden the reach of the TCPA to any calls made from smartphones—a result the D.C. Circuit appropriately found unacceptable in *ACA International*. For all these reasons, and to prevent further harm to compliance-minded businesses in the form of unnecessary, unpredictable, and abusive TCPA litigation, the Commission should reject the reasoning of the *Marks* decision and expeditiously adopt guidance on the ATDS definition as proposed above.

TABLE OF CONTENTS

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

In the Matter of	)	
	)	
Consumer and Governmental Affairs	)	
Bureau Seeks Comment on Interpretation	)	CG Docket No. 18-152
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		

REPLY COMMENTS OF THE RETAIL INDUSTRY LEADERS ASSOCIATION

The Retail Industry Leaders Association ("RILA") respectfully submits these reply comments in connection with the Federal Communications Commission's October 3, 2018 Public Notice[1] seeking further comment on the Commission's interpretation of the Telephone Consumer Protection Act ("TCPA") in light of the Ninth Circuit's decision in *Marks v. Crunch San Diego, LLC* ("*Marks*").[2] The Commission has requested comments, in part, to supplement the record being developed in connection with *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) ("*ACA International*"). RILA appreciates the Commission's continued attention to this critically important issue for retailers and other businesses, and its prompt request for comment on the *Marks* decision.

RILA joins the U.S. Chamber of Commerce and numerous other commenters asking the Commission to interpret the term "automatic telephone dialing system" ("ATDS") consistent

[1] Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's *Marks v. Crunch San Diego, LLC* Decision, CG Docket Nos. 18-152, 02-278, Public Notice, DA 18-1014 (rel. Oct. 3, 2018).

[2] *Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 WL 4495553 (9th Cir. Sept. 20, 2018).

with its plain and unambiguous statutory definition, Congressional intent, and the D.C. Circuit's reasoning in *ACA International*.[3] Specifically, the Commission should reject *Marks*'s aberrational view that the definition of ATDS "includes devices with the capacity to dial stored numbers automatically," regardless of whether such numbers are generated using a random or sequential number generator.[4] *Marks*'s sweeping ruling creates an overbreadth issue identical to the one that prompted the D.C. Circuit to vacate the ATDS portion of the Commission's July 2015 Declaratory Ruling and Order,[5] in that it potentially applies to virtually all dialing devices (including smartphones), and thus threatens to perpetuate the untenable, inconsistent, and abusive litigation environment confronting scrupulous businesses seeking to communicate with consumers. RILA agrees with the U.S. Chamber that "[t]he Ninth Circuit's definition leads the TCPA back into dangerous territory that the D.C. Circuit already found to be unreasonable."[6]

As set forth in its prior comments ("RILA *ACA* Comments"), RILA maintains that the time is ripe for the Commission to rule that: (1) whether a device qualifies as an ATDS should be determined based on that device's "present capacity" rather than its "potential" or "theoretical" capacity, and (2) in order for a particular call to have been placed by an ATDS, the call in question must actually have been dialed (a) using a random or sequential number generator to produce the number called and (b) without human intervention.[7] RILA urges the

[3] *See, e.g.*, Comments of the U.S. Chamber Institute for Legal Reform, CG Docket Nos. 18-152, 02-278 (filed Oct. 17, 2018) ("U.S. Chamber *Marks* Comments"); Comments of Third Federal Savings & Loan, CG Docket Nos. 18-152, 02-278 (filed Oct. 17, 2018); Comments of the Professional Association for Customer Engagement, CG Docket Nos. 18-152, 02-278 (filed Oct. 17, 2018); Comments of Five9, Inc., CG Docket Nos. 18-152, 02-278 (filed Oct. 17, 2018).

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

[5] *See ACA Int'l*, 885 F.3d at 702 ("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. We must therefore set aside the Commission's treatment of those matters.").

[6] U.S. Chamber *Marks* Comments at 16.

[7] Comments of the Retail Industry Leaders Association, CG Docket Nos. 18-152, 02-278, at 8 (filed June 13, 2018).

Commission to promptly act and reject the Ninth Circuit's interpretation of the term ATDS. In doing so, the Commission will ensure that compliance-minded companies can provide consumers with the valuable communications they want without persistent fear of exploitative and costly class action litigation and uncertain potential liability. The *Marks* decision clearly demonstrates the current confusion regarding the definition of ATDS and reinforces the urgent need for the Commission to provide clear guidance on this issue as soon as possible.

I. A CLEAR ATDS INTERPRETATION CONSISTENT WITH THE STATUTORY LANGUAGE IS VITALLY IMPORTANT TO RILA AND ITS MEMBERS.

A. RILA's Interest in the Proper Interpretation of ATDS

RILA is the trade association of the world's largest and most innovative retail companies. Its more than 200 members include retailers, product manufacturers, and service suppliers that collectively account for more than $1.5 trillion in annual sales, millions of American jobs, and more than 100,000 retail stores, manufacturing facilities, and distribution centers around the world. Many RILA members endeavor to cultivate deep, meaningful, and sustained relationships with consumers through important outreach that can take many forms, including a variety of informational and promotional calls and text messages. These communications are affirmatively sought out and valued by consumers.

In recent years, RILA members have increasingly found themselves the targets of abusive litigation under the TCPA, much of it brought by professional plaintiffs and counsel who specialize in manufacturing and magnifying potential liability. Overly broad interpretations of the definition of ATDS have contributed to a tidal wave of TCPA class action litigation and demand letters threatening to file class action lawsuits absent prompt settlements. RILA reiterates its prior proposal to the Commission to set forth commonsense interpretations of the TCPA that are faithful to the letter and spirit of the statute and that would advance the shared

goal of its members, the Commission, and the general public to develop reasonable, understandable, and administrable rules and prevent unwarranted and burdensome litigation.

B. Although the Statutory Language is Clear and Unambiguous, the Commission's Prior Inconsistent Interpretations of ATDS Have Caused Uncertainty for Retailers and the Courts.

ACA International made clear that the Commission's interpretation of ATDS in the 2015 Omnibus Declaratory Ruling and Order ("*2015 Omnibus Order*")[8] was "utterly unreasonable," "incompatible" with the statute's goals, "impermissibly" expansive,[9] and inconsistent with the statutory definition.[10] It remanded the issue back to the Commission to provide further guidance on what equipment qualifies as an ATDS under the statute's plain language.[11] In response to the Commission's request for comments on the issue,[12] RILA asked the Commission to provide guidance that is consistent with statutory language and Congressional intent.[13]

Unfortunately, before the Commission could issue that guidance, courts were left to develop their own *ad hoc* interpretations of ATDS, without authoritative guidance from the expert agency. The lack of current Commission guidance on the interpretation of ATDS resulted in conflicting interpretations among the federal courts, first in the district courts, and now in the courts of appeals. Some courts have enforced the plain language of the statute and dismissed or granted summary judgment for lack of any plausible claim that the dialing technology included

[8] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961, 7975–77 (2015).

[9] *ACA Int'l*, 885 F.3d at 700.

[10] *Id*. at 701.

[11] *Id*. at 703.

[12] *Consumer and Governmental Affairs Bureau Seeks Further 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).

[13] RILA *ACA* Comments at 13–15.

random or sequential number functionality.[14] Other courts have ignored this statutory requirement, concluding in some instances that the Commission's 2003 and 2008 predictive dialer rulings remained good law even after *ACA International*.[15]

It is not surprising that courts have struggled with the definition of ATDS given the regulatory history. Initially, the Commission's rulings followed the narrow statutory language and clear Congressional intent that limited the reach of the TCPA to equipment with automated or sequential number generation functionality. In its first order implementing the TCPA, the Commission ruled that equipment with features such as speed dialing, call forwarding and other functions are not autodialers, "because the numbers called are not generated in a random or sequential fashion."[16] The Commission subsequently explained that the ATDS restriction did not apply to calls directed to "[a] specifically programmed contact number" as opposed to "randomly or sequentially generated telephone numbers."[17] These rulings provided predictability to companies seeking to provide customers with desired and expected communications, while honoring Congress's intent in addressing specific technologies that had been shown to cause actual risk of harm when misused.

Unfortunately, the Commission's approach changed dramatically beginning in 2003, when the Commission issued the first in a series of rulings that expanded the scope of the autodialer definition, based on the stated goal of regulating new technologies. In a ruling that

---

[14] *See, e.g., Gary v. Trueblue, Inc.*, No. 17-10544, 2018 WL 4931980, at *6 (E.D. Mich. Oct. 11, 2018); *Marshall v. CBE Grp., Inc.*, No. 16-2406, 2018 WL 1567852, at *5 (D. Nev. Mar. 30, 2018).

[15] *See, e.g., Reyes v. BCA Fin. Servs., Inc.*, 312 F. Supp. 3d 1308, 1322 (S.D. Fla. 2018), *motion to certify appeal denied*, No. 16-24077, 2018 WL 2849768 (S.D. Fla. June 8, 2018); *Glasser v. Hilton Grand Vacations Co.*, No. 16-0952, 2018 WL 4565751, at *3 n.5 (M.D. Fla. Sept. 24, 2018).

[16] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd. 8752, 8776 (1992).

[17] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 FCC Rcd. 12391, 12400 (1995).

year, the Commission articulated several expansive and inconsistent criteria for what constitutes an ATDS, including whether equipment can dial "at random, in sequential order, or from a database of numbers" and whether it can dial "without human intervention."[18] The ruling expanded the TCPA to encompass predictive dialing technology, and also opened the door to arguments that other calling technologies fell within the statute's reach. The justification for these shifting tests was to permit "the FCC, under its TCPA rulemaking authority," to "consider changes in technolog[y]."[19] As explained in a 2008 ruling, the Commission "expected such automated dialing technology to continue to develop" and believed that Congress had anticipated that it "might need to consider changes in technology."[20]

In the *2015 Omnibus Order*, the Commission affirmed its prior rulings regarding ATDS functionality and the various and conflicting tests it had announced for determining whether equipment constitutes an ATDS. [21] The Commission then expanded the statute's scope even further by holding that the capacity of equipment included "its potential functionalities"—*i.e.*, functionalities that the device did not currently possess and that it would not possess unless and until its software were reprogrammed. [22] On that basis, the Commission declined to clarify "that a dialer is not an autodialer unless it has the capacity to dial numbers without human intervention."[23] Again, the Commission justified this further expansion of the statute's scope based on a purported need to address evolving dialing technology, insofar as "little or no modern

[18] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14091–92 (2003).

[19] *Id.* at 14092.

[20] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd. 559, 566 (2008); *see also In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd. 15391, 15392 n.5 (2012).

[21] *2015 Omnibus Order*, 30 FCC Rcd. at 7974.

[22] *Id.* at 7974.

[23] *Id.* at 7976.

dialing equipment would fit the statutory definition of an autodialer."[24] The Commission defaulted to a "case-by-case" approach for determining whether any particular equipment might qualify as an ATDS.[25]

As now-Chairman Pai noted in his dissent, these rulings, as incorporated in the *2015 Omnibus Order*, did not "focus on the illegal telemarketing calls that consumers really care about," but instead "twist[ed] the law's words even further to target useful communications between legitimate businesses and their customers."[26] The two dissenting Commissioners urged the Commission to "respect the precise contours of the statute that Congress enacted," rather than transform the statute "into an unpredictable shotgun blast covering virtually all communications devices."[27] As the U.S. Chamber noted, "[t]he Commission's unreasonably expansive reading included not only devices that can generate random or sequential numbers, but also those that currently cannot," which now-Chairman Pai stated was "flatly inconsistent with the TCPA."[28]

The D.C. Circuit ultimately "realign[ed] the law with its true intent,"[29] and determined that the Commission's overbroad and inconsistent approach to the interpretation of ATDS was arbitrary and capricious. It noted that "affected parties are left in a significant fog of uncertainty about how to determine if a device is an ATDS so as to bring into play the restrictions on unconsented calls."[30] The D.C. Circuit, however, declined to clarify the existing standard.

---

[24] *Id.*

[25] *Id.* at 7975.

[26] *Id.* at 8073 (Pai, dissenting).

[27] *Id.* at 8075 (Pai, dissenting).

[28] U.S. Chamber *Marks* Comments at 3 (citation omitted).

[29] *Id.* at 4.

[30] *ACA Int'l*, 885 F.3d at 703.

It is no wonder that courts are deeply split as they wade through the Commission's prior rulings. This has resulted in widely disparate and uncertain treatment of defendants in the ongoing onslaught of TCPA litigation at the district court and the circuit court levels[31] and led to a patchwork of conflicting decisions—sometimes within the very same jurisdiction.[32] As the expert agency, the Commission has both the authority—and, in light of the conflicting decisions—the duty, to facilitate uniformity and consistency among the courts and to provide compliance-minded businesses with the means to communicate important information to their customers without risking potentially damaging TCPA litigation.

II. THE COMMISSION SHOULD ADOPT A DEFINITION OF ATDS THAT IS CONSISTENT WITH ITS STATUTORY LANGUAGE AND REJECT THE NINTH CIRCUIT'S ABERRATIONAL INTERPRETATION.

A. The Commission Should Clarify the Scope of the ATDS Restriction Consistent with the Text and Intent of the TCPA and *ACA International*.

The statutory language is unambiguous: An "automatic telephone dialing system" is "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."[33] Congress's use of a comma after the phrase "telephone numbers to be called" clearly expresses its intent that any numbers to be dialed must be generated "using a random or sequential number generator"—regardless of whether the device itself "produce[s]" those numbers to be called or merely

[31] *Infra* § I.B.

[32] *Compare Fleming v. Associated Credit Services, Inc.*, No. 16-3382, 2018 WL 4562460, at *8 (D.N.J. Sept. 21, 2018) (*ACA International* "necessarily set aside the parts of the previous 2003 and 2008 FCC Orders that ruled that a predictive dialer was impermissible under the TCPA"), *with Somogyi v. Freedom Mortg. Corp.*, No. 17-6546, 2018 WL 3656158, at *5 (D.N.J. Aug. 2, 2018) ("The 2003 Order remains effective guidance" after *ACA International*), *Sieleman v. Freedom Mortg. Corp.*, No. 17-13110, 2018 WL 3656159, at *3 n.4 (D.N.J. Aug. 2, 2018) ("[T]he 2003 FCC Order was not overruled" by *ACA International*).

[33] 47 U.S.C. § 227.

"store[s]" them. Congress's limitation cannot encompass equipment that "merely dials numbers from a stored list,"[34] if those numbers were not randomly or sequentially generated.

Thus, consistent with its prior comments, RILA urges the Commission to interpret ATDS to mean that in order for a particular call to be deemed to have been placed with an ATDS, that call must actually have been (a) generated using a random or sequential number generator and (b) dialed without human intervention. Furthermore, the Commission should clarify that it is a device's "present capacity," rather than its "potential or theoretical capacity" that matters. RILA agrees with the U.S. Chamber that "[t]his approach provides a clear, bright line rule for callers. . . [because] [c]allers 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."[35] Now-Chairman Pai noted that this approach "was compelled by the text and purpose of the statute, by the Commission's earlier approaches to the TCPA, and by common-sense."[36] As he stated in his dissent, "[h]ad 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." [37]

The Commission is now in a position to issue guidance that adheres to the unambiguous statutory language. The interpretation proposed by RILA and other stakeholders is fully consistent with the principles outlined by the D.C. Circuit in *ACA International*, including: (1) the Commission need not presume that Congress intended the TCPA to encompass all or even most modern dialing technology, (2) "capacity" should not be interpreted as encompassing

[34] *Marks*, 2018 WL 4495553, at *7.
[35] U.S. Chamber *Marks* Comments at 12.
[36] *Id.*
[37] *2015 Omnibus Order*, 30 FCC Rcd. at 8075 (Pai, dissenting) (footnote omitted).

functionality that equipment does not presently have, (3) the Commission should provide clear guidelines to remove the "fog of uncertainty about how to determine if a device is an ATDS," and (4) the Commission should also require that the call be made using autodialer functions.[38]

B. The *Marks* Decision Impermissibly Expands the Reach of the TCPA.

Despite the statute's clear language[39], the *Marks* court essentially—and incorrectly—read the key phrase, "using a random or sequential number generator," out of the statutory definition.[40] Under the panel's impermissibly expansive interpretation of the statutory language, an ATDS is "not limited to devices with the capacity to call numbers produced by a 'random or sequential number generator,' but also includes devices with the capacity to dial stored numbers automatically." [41] That holding was in error in multiple respects.

First, the *Marks* interpretation violates several canons of statutory construction. Most glaringly, the Ninth Circuit's reading violates the canon against superfluity, which requires that "every clause and word of a statute" must be given meaning, especially when the clause "occupies so pivotal a place in the statutory scheme." [42] The Ninth Circuit's reading would render superfluous the statutory requirement that equipment "produce numbers to be called, using a random or sequential number generator[.]"[43] Because *Marks* holds that any equipment that has the capacity merely to "store" numbers to be called (no matter how generated) is an ATDS, the phrase "using a random or sequential number generator" no longer has any meaning under the statutory scheme. In addition, *Marks* also ignores Congress's choice to place a comma

---

[38] RILA *ACA* Comments § III.A.2.

[39] 47 U.S.C. 227(a)(1) ("The term 'automatic telephone dialing system' 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.").

[40] *Marks*, 2018 4495553, at *9.

[41] *Id.* at *9.

[42] *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

[43] 47 U.S.C. § 227(a)(1)(A).

after the phrase "telephone numbers to be called."[44] If Congress had intended the meaning the Ninth Circuit adopted, it would have omitted the comma, thereby clarifying that only equipment that can "produce telephone numbers to be called using a random or sequential number generator" falls within the statutory language. But Congress did not do so, and the Ninth Circuit should not have rewritten the statute in Congress's stead.

Second, the *Marks* panel erroneously concluded that because the TCPA permits calls made with the prior express consent of the called party, and prohibits calls to other specified numbers, an ATDS "would have to dial from a list of phone numbers" rather than dial random or sequential numbers.[45] However, this conclusion does not follow from the premise. The use of a stored list of numbers is not inconsistent with the requirement of random or sequential number generation, as a random or sequential number generator may produce and store a list of numbers, which in turn may be filtered to include or exclude specific numbers.[46] This standard process, of filtering a list of numbers to determine which numbers on the list may or may not be called, does not dispense with the antecedent requirement that the numbers be randomly or sequentially generated.

Third, the *Marks* panel incorrectly looked to subsequent Congressional amendments to the TCPA to infer that Congressional inaction amounted to "tacit approval" of the Commission's prior orders interpreting the term "ATDS" to include devices that could dial numbers from a stored list. The Supreme Court has repeatedly held that "[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation."[47] The *Marks* panel's embrace of such perceived inaction is particularly problematic, insofar as the D.C. Circuit in

---

[44] *Id.*

[45] *Marks*, 2018 WL 4495553, at *8 (citing 47 U.S.C. §§ 227(b)(1)(a), (c)(3)).

[46] Common programs such as Excel can store lists of numbers generated by a random number generator function. *See, e.g.*, https://www.excel-easy.com/examples/randomnumbers.html.

[47] *Brusewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011).

ACA International vacated the Commission's prior rulings for failing to provide "meaningful guidance to affected parties in material respects on whether their equipment is subject to the statute's autodialer restrictions."[48] The D.C. Circuit's justification for vacating the prior rulings included, among other things, that the Commission's prior orders were "of two minds" on the issue of whether ATDS equipment must "itself have the ability to generate random or sequential telephone numbers to be dialed" or whether it is enough if the device can call from a database of telephone numbers generated elsewhere."[49] There is no basis to infer that Congress intended to ratify the Commission's definition of ATDS where the Commission's prior orders were internally contradictory on the meaning of that term—and were ultimately vacated for "fall[ing] short of reasoned decisionmaking[.]"[50]

Fourth, the *Marks* panel adopted an interpretation that conflicts with Congress's clearly expressed policy goals. The D.C. Circuit has already determined that it would be impermissible to adopt a definition of ATDS that could apply to almost all modern dialing technology.[51] Such a result would lead to an undeniable chilling effect on communications from retailers that consumers expect and appreciate to be initiated via modern dialing technology—*e.g.*, order confirmations, appointment reminders, shipping and delivery notifications, product and services notifications, prescription refill reminders, fraud alerts, satisfaction surveys, and loyalty program alerts. As the RILA *ACA* Comments emphasize, that result would go far beyond Congress's original intent in enacting the TCPA, which rejected an all-encompassing prohibition against all future dialing technologies in favor of a limited focus on *specific* harms arising from the use of

[48] *ACA Int'l*, 855 F.3d at 701 (internal quotation marks and citation omitted).
[49] *Id.* at 701–03.
[50] *Id.* at 701.
[51] *Id.*

random or sequential dialers. For instance, Congress was concerned that automated dialers can reach numbers indiscriminately, tying up lines reserved for specialized purposes, including hospitals and police and fire departments.[52] In addition, sequential dialing functionality, if employed *en masse*, could create a "dangerous" situation wherein whole blocks of numbers were called at once, leaving no lines available for outbound calls in the event of an emergency and limiting the provision of service to numbers within particular blocks.[53] In line with this Congressional intent, the Commission, even in its most expansive interpretation of the scope of ATDS, has treated the phrase "using a random or sequential number generator" as a central component of the ATDS definition.[54]

Fifth, the *Marks* panel parts company with the statutory text and legislative and regulatory history, and instead adopts a novel and dramatic expansion of the scope of the TCPA. As the Ninth Circuit had previously recognized, the statutory language is both "clear and unambiguous[.]"[55] Even so, the *Marks* panel took a contrary approach and concluded that the statutory definition is ambiguous, and on that basis embarked on an exercise of statutory interpretation that culminated in a conclusion that the TCPA reaches equipment with the mere capacity "to store numbers to be called[,]" even if those numbers were not randomly or sequentially generated.[56] That reading cannot be supported, either on its own terms or in light of other precedent.

---

[52] S. Rep. No. 102-178 at 2 (1991); Telemarketing/Privacy Issues: Hearing Before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce on H.R. 1304 and H.R. 1305 ("Telemarketing/Privacy Issues"), 102d Cong., 1st Sess. 111 (Apr. 24, 1991).

[53] H.R. Rep. No. 102-317 at 10 (1991); Telemarketing/Privacy Issues 113.

[54] *See 2015 Omnibus Order*, 30 FCC Rcd. at 7971–72 ("We reaffirm our previous statements that dialing equipment generally has the capacity to store or produce, *and dial random or sequential numbers (and thus meets the TCPA's definition of "autodialer"*) even if it is not presently used for that purpose, including when the caller is calling a set list of consumers." (emphasis added)).

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

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

Sixth, the *Marks* panel acknowledged that its decision was contrary to the Third Circuit's recent decision—also issued after *ACA International*—in *Dominguez v. Yahoo*, 894 F.3d 116, 120 (3d Cir. 2018). In that case, the Third Circuit determined that the challenged equipment must have "the present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers[,]" and affirmed the grant of summary judgment based on the plaintiff's failure to present evidence that the technology had such functionality.[57] In so ruling, the Third Circuit confirmed its prior decision that an ATDS "must be able to store or produce numbers that themselves are randomly or sequentially generated"— a square conflict with the *Marks* decision.[58] The *Marks* panel summarily dismissed this holding as an "unreasoned assumption," but the fact remains that there is now a clear circuit split as to the scope of the ATDS definition—a split that only exacerbates the uncertainty for compliance-minded companies seeking to communicate with customers through accepted and widely-used technologies.[59] It also means that, as things stand, RILA members and other businesses are unable to develop one set of uniform customer communication policies and procedures that meets the differing and sometimes conflicting legal regimes and potential liability risks. This intolerable conflict should be resolved by the Commission.

Finally, in addition to the square conflict with the Third Circuit, *Marks* stands in significant tension with *ACA International*. Specifically, in *ACA International*, the D.C. Circuit

[57] *Dominguez v. Yahoo*, 894 F.3d 116, 121 (3d Cir. 2018).

[58] *Dominguez v. Yahoo*, 629 F. App'x 369, 372 (3d Cir. 2015).

[59] Likewise, district courts have taken radically different approaches in their attempts to understand the definition of ATDS. *Compare Pinkus v. Sirius XM Radio, Inc.*, 319 F. Supp. 3d 927, 938–39 (N.D. Ill. 2018) (rejecting the proposition that all predictive dialers must be considered an ATDS and ruling that a predictive dialer that calls numbers from a stored list does not meet the statutory definition), *Fleming*, 2018 WL 4562460, at *9 (same), *with Reyes*, 312 F. Supp. 3d at 1323 (granting "summary judgment in [plaintiff's] favor on the ATDS issue" because defendant's "predictive dialer . . . was an ATDS as a matter of law"); *O'Shea v. Am. Solar Sol., Inc.*, No. 14-0894, 2018 WL 3217735, at *2 (S.D. Cal. July 2, 2018) ("[A] predictive dialer is an ATDS.").

held that "[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."[60] Though the D.C. Circuit was referring to the *2015 Omnibus Order* provision regarding the capacity to perform autodialer functions, its rationale applies equally to the sweeping statutory interpretation in *Marks*, given that essentially all modern phone technology—including all smartphones—can "store telephone numbers to be called."[61] Contrary to the Ninth Circuit's apparent conclusion, the D.C. Circuit explained that "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."[62]

Given the clear inter- and intra-circuit conflicts, it is necessary for the Commission to step in to clarify that the Ninth Circuit's reading is now out-of-step with the Third and D.C. Circuits. The *Marks* decision in no way precludes the Commission from issuing its own ruling as to the appropriate interpretation of the statutory definition in light of *ACA International*. Even if the Ninth Circuit were correct that the "statutory text is ambiguous on its face"[63]—which it is not—it follows that the Commission, as the agency tasked with interpreting the TCPA, has the authority to adopt its own interpretation of the TCPA within the bounds of Congress's statutory language.[64]

---

[60] *ACA Int'l*, 885 F.3d at 697.

[61] *Id*.

[62] *Id*. at 699 (noting that the statute prohibits nonconsensual calls to pagers and specialized mobile radio service, even though "those terms have largely ceased to have practical significance").

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

[64] *See, e.g.*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 982–86 (2005) ("Only a judicial precedent that that statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.").

C. The Commission Should Provide Much-Needed Clarity on the Scope of the ATDS Definition.

The need for clarity and uniformity as to the scope of the TCPA's statutory definition of ATDS is now acute. The different outcomes at the district court level have been compounded by the split of authority in the circuit courts. The Commission's recent request for comment on the *Marks* decision, as part of its ongoing review of these issues, is most welcome, as it suggests that the Commission will soon provide the necessary bright-line ruling addressing these issues. The Commission, as the agency tasked with interpreting the TCPA, has plenary authority to adopt its own interpretation of the TCPA, with the benefit of *ACA International* as its guide.[65]

In so doing, the Commission should reject the expansive statutory interpretation offered in *Marks*, which ignores both the plain statutory language and the more recent experience of consumers and businesses in the wake of the Commission's now-vacated rulings that expanded the scope of the statute to encompass all modern calling technologies. Rather than rewind to the prior regime, where any equipment with the basic capability to automatically dial from a stored list might expose the user to statutory damages, the Commission should heed the lessons learned from *ACA International*: namely, that such an approach is neither a valid interpretation of the statute, nor one that provides consumers and companies alike the requisite clarity as to when the TCPA's restrictions apply. The Commission should not endorse yet another attempt to expand the statute "to target useful communications between legitimate businesses and their customers[,]"[66] but should instead adhere to the statutory language and Congress's original intent in enacting the statute.

---

[65] *See Chevron, USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984); *see Auer v. Robbins*, 519 U.S. 452, 461 (1997).

[66] *2015 Omnibus Order*, 30 FCC Rcd. at 8073 (Pai, dissenting).

III. CONCLUSION

For the foregoing reasons, as well as those set forth in the RILA *ACA* Comments, the Commission should reject the Ninth Circuit's expansive reasoning in *Marks*, which ignores both the plain statutory language and the more recent experience of consumers and businesses in the wake of the Commission's now-vacated rulings that expanded the scope of the statute to encompass all modern calling technologies. Specifically, the Commission should rule that (1) whether a device qualifies as an ATDS should be determined based on that device's "present capacity" rather than its "potential" or "theoretical capacity," and (2) in order for a particular call to have been placed by an ATDS, the call in question must actually have been (a) generated using a random or sequential number generator, and (b) dialed without human intervention. Such an interpretation would provide much needed clarity to courts, consumers, and compliance-minded businesses.

October 24, 2018

Respectfully submitted,

/s/ Jennifer Richter

Kathleen McGuigan
Nicholas R. Ahrens
Retail Industry Leaders Association
1700 N. Moore Street, Ste. 2250
Arlington, VA 22209
Phone: (703) 841-2300

Michael W. McTigue Jr.
Meredith C. Slawe
Kathryn E. Deal
Mira Baylson
Akin Gump Strauss Hauer & Feld LLP
2001 Market Street, Ste. 4100
Philadelphia, PA 19103
Phone: (215) 965-1298

Jennifer Richter
James Tysse
Lide Paterno
Lyndsey Grunewald
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036
Phone: (202) 887-4524
Email: jrichter@akingump.com

Michael J. Stortz
Akin Gump Strauss Hauer & Feld LLP
580 California Street, Ste. 1500
San Francisco, CA 94104
Phone: (415) 765-9508

Counsel to the Retail Industry Leaders Association