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

In the Matter of	)	
	)	**CG Docket No. 02-278**
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	
Revolution Messaging's Petition for an Expedited Clarification and Declaratory Ruling	)	

COMMENTS OF CCADVERTISING OPPOSING REVOLUTION MESSAGING'S PETITION

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INTRODUCTION AND SUMMARY

ccAdvertising submits these comments opposing the petition for an expedited clarification and declaratory ruling ("Petition") submitted by Revolution Messaging ("Petitioner"). Petitioner asks the Federal Communications Commission ("the Commission" or "FCC") to stretch the definition of "automated telephone dialing system" ("ATDS") set forth in the Telephone Consumer Protection Act of 1991 ("TCPA") to include text messages sent via email. ccAdvertising urges the Commission to reject Petitioner's request because such an interpretation (1) contravenes Congress's intent when it enacted both the TCPA and, subsequently, the Controlling Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act") and (2) would not stand up to rigorous First Amendment scrutiny.

Text messages can be sent in two different ways, each using very different technology. First, they may be sent using an autodialer to a wireless phone number. Second, they may be sent using a short message service ("SMS") gateway and an Internet domain ("internet-to-text"). If they are sent using an autodialer to a wireless number, they are subject to the TCPA.[1] Commercial text messages that have references to Internet domains, such as internet-to-text messages, are subject to the CAN-SPAM Act. Petitioner now asks the Commission to extend the reach of the TCPA to include internet-to-text messages by defining "autodialer" and "dial" to include the transmission of a text message using internet-to-text, a process that does not involve dialing at all, but the sending of email.

Petitioner asks the Commission to stop those using internet-to-text from "[l]egally circumventing the ATDS prohibitions contained in the TCPA." In other words, Petitioner wants the FCC to change its interpretation of a statutorily defined term to outlaw activity that is lawful under the statute. As explained below, however, the FCC does not have the authority to construe a statutory term in way that contradicts its plain meaning.

The FCC should decline to twist the definition of autodialer set forth in the TCPA for a second reason: more than a decade after passing the TCPA, Congress addressed the issue of unwanted text messages to wireless devices when it devel-

[1] Although ccAdvertising recognizes that calls and text messages are technically subject to the statute and regulations as written, it does not believe the TCPA can constitutionally be enforced against political calls or text messages. These comments are focused on text messages and offer the Commission a way to craft regulations for text messages that would withstand First Amendment scrutiny.

oped, negotiated, and passed the CAN-SPAM Act, and limited the new regulatory scheme to commercial messages.

Finally, the FCC should not interpret the TCPA in a way that further restricts noncommercial speech, in particular where, as here, the statutory language does not support such an interpretation. Under First Amendment standards, the FCC "must give the benefit of any doubt to protecting rather than stifling speech." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469 (2007).

DISCUSSION

I. The Commission Should Reject the Petition Because It Provides No Legal Basis for the Commission to Conclude that Internet-to-Text Messages are Sent with an Autodialer.

A. The Commission has not addressed this issue.

The Petitioner first argues that the Commission has already decided this issue because it has not distinguished between the two types of text messages. The Petition quotes the Commission's 2003 statements that "the TCPA prohibits *any* call using an automatic telephone dialing system…this encompasses…text calls, including Short Message Service (SMS) text messaging calls, to wireless phone numbers."[2] It also quotes a similar passage from 2004 that says "the TCPA prohibition on using automatic telephone dialing systems to make calls to wireless numbers applies to

[2] Petition for an Expedited Clarification and Declaratory Ruling, Revolution Messaging, LLC, CG Docket No. 02-278 (filed Jan. 19, 2012) at 10 ("Petition") (quoting Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, *Order*, CG Docket Nos. 04-53 & 02-278, ¶ 7 (2004) ("2004 Order")).

text messages…."[3] Petitioner then asserts that these quotes show that the "Commission did not, in these statements, draw any distinction between Internet-to-phone text messaging technologies and phone technologies."[4]

True enough, but this argument is nothing more than a tautology; the quotes from the Commission's prior orders do nothing more than state that text messages *sent by autodialer* are prohibited. Nothing in the Commission's discussion addresses whether internet-to-text messages are sent using an autodialer. The Commission was simply reiterating what the regulations say: if the text messages are sent using an autodialer without prior consent, they are prohibited. Thus, to date, the Commission has not addressed the question at hand at all.

For the reasons set forth below, Petitioner's attempts to argue why the FCC *should* consider internet-to-text calls to be made with an autodialer are no less persuasive.

B. Petitioner's pleas to focus on the purpose of the TCPA ignore the language of the statute.

The main thrust of Petitioner's argument seems to be that the purpose of the TCPA can only be satisfied if internet-to-text calls are deemed to be made with an autodialer and therefore be prohibited. But looking to the purpose of the statute, rather than to the actual language of the statute, is not the appropriate inquiry where the statutory language is clear. "A statute is not a 'Magic Eye' image. When

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[3] *Id.* at 11.

[4] *Id.*

presented with the plain text of a statute, we do not gaze at it blurry-eyed, attempting to see some hidden image formed by the broad purpose that lies behind the legislation." *Myers v. TooJay's Mgmt. Corp*, 640 F.3d 1278, 1286 (11th Cir. 2011). This is because "purpose-driven statutory interpretation 'at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action.'" *Id.* (quoting *Bd. of Governors v. Dimension Fin. Corp.,* 474 U.S. 361, 373–74 (1986)). The Supreme Court has made clear that courts should reject interpretations by an agency based on attempts to divine the purpose of the statute rather than follow the text of the statute. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002) (rejecting Commissioner of Social Security's attempt "to search for and apply an overarching legislative purpose to each section of the statute").

There can be no doubt that the TCPA is a broad consumer protection statute designed to limit many calls to wireless devices. However, it does not prohibit all such calls, and to extrapolate the purpose of the statute as prohibiting all calls is simply too general an approach, particularly given the careful choice of words in the TCPA and Congress's later pronouncements on this very subject. We must presume that Congress "says in a statute what it means and means in a statute what it says there." *Id.* at 461-62 (quoting *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 254-55 (1992)). As such, the Commission cannot "alter the text in order to satisfy the policy preferences" of the Petitioner. *Id.* at 462. That is, the Commission cannot interpret

"autodialer" to include internet-to-text calls absent any textual support for such an interpretation. None exists.

C. Congress's use of the term autodialer was intentional and specified a limitation on the restrictions applicable under the TCPA.

1. Congress used different terms to impose different restrictions in other places in the TCPA, and this distinction is important.

The statutory text of the TCPA includes several different prohibitions on making calls. These prohibitions are phrased in different ways. Section 227(b)(1)(A)—the provision at issue here—prohibits anyone from "mak[ing] any call…using an automatic telephone dialing system…to any telephone number assigned to a…cellular telephone service." Section 227(b)(1)(B), on the other hand, prohibits a person from "initiat[ing] any telephone call to any residential telephone line using an artificial or prerecorded voice." The first section requires the use of an ATDS. The second section applies to any calls to residential numbers using prerecorded voice technology. In other words, the first provision applies only to calls that are made using an autodialer. The second, however, would apply just as much to a person manually dialing a number and pushing play on a tape recorder as it would to a sophisticated dialing system.

It is a general principle of statutory construction that when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Barnhart*, 534 U.S. at 452 (quoting *Russello*

v. United States, 464 U.S. 16, 23 (1983)). Here, Congress could have drafted section 227(b)(1)(A) to mirror section 227(b)(1)(B) (i.e., prohibiting any person from "initiating any call to a to any telephone number assigned to a…cellular telephone service"), but it did not. The FCC may not ignore such textual distinctions, which were carefully crafted and actively negotiated, when interpreting statutory language.

2. The FCC must look to the specific language Congress used.

Given these different prohibitions, the Commission must determine the meaning of the words "automatic telephone dialing system." The statutory text provides one. Although the Commission has leeway to clarify ambiguity in a statute, where the language of a statute is clear, the implementing agency must give effect to the plain meaning of the text. *Barnhart*, 534 U.S. at 454 (rejecting the Commissioner of Social Security's interpretation of statute where "statute is explicit"); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992) ("Of course, a reviewing court should not defer to an agency position which is contrary to an intent of Congress expressed in unambiguous terms."); *Prudencio v. Holder*, 669 F.3d 472 (4th Cir. 2012) (declining to defer to Attorney General's procedural framework for determining whether a particular conviction is for a crime "involving moral turpitude" where statutory language is clear). In particular, where Congress has demonstrated how to prohibit all types of calls in other parts of the statute—as it did in section 227(b)(1)(A) of the TCPA—the FCC cannot ignore the text and simply look to the purpose of the TCPA to support an unlimited reading.

The TCPA and FCC implementing regulations define ATDS as "equipment which has the capacity (A) to store or produce numbers to be called, using a random or sequential number generator; and (B) *to dial such numbers*."[5] As the Petitioner concedes, internet-to-text messaging technology does not use a traditional dialing technique.[6] The Petitioner nevertheless argues that "by intentionally transmitting text messages to specific cellular phone numbers," a sender of an internet-to-text message is "dialing." Petitioner's strained reading of the definition of ATDS does not square with even the most liberal understanding of the words "to dial." It would have the Commission define "to dial" to mean "to send an email."[7]

Moreover, if the Commission were to say that any time an internet-to-text message is sent, it is made with an autodialer, then virtually every text message would be prohibited, rendering much of the language of section 227(b)(1)(A) meaningless. This is because sending an email from Outlook, from a web-based email system, or from a handheld device to a mobile domain would be dialing a number. Under Petitioner's theory, these devices can store numbers (in the form of an email address) and "dial" them by sending the email. Because there are no content based limits on this restriction, Petitioner would have section 227(b)(1)(A) apply to any text message "intentionally transmitted to specific cellular phone numbers." Such an expan-

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[5] 47 U.S.C. § 227(a)(1); 47 C.F.R. § 64.1200(f)(1) (emphasis added).

[6] Petition at 12.

[7] Under well-established rules of statutory construction, it is presumed that the legislature used words in their ordinary, usual, popularly understood meaning, unless they are otherwise defined. *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 251-52 (2004); *Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 109-10, n. 5; *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202 (1997); *Park N'Fly, Inc. v. Dollar Park & Fly. Inc.*, 469 U.S. 189, 194 (1985).

sive interpretation is impermissible: the Commission must read the statute to avoid making any provision superfluous, void, or insignificant. *See Milner v. Dep't of Navy*, 131 S. Ct. 1259, 1268 (2011).

Thus, Petitioner's attempt to have the Commission define "autodialer" fails for several reasons. First, it removes any normal meaning of the word "dial" and imports instead the term "initiate," ignoring the plain meaning of the statute. Second, by substituting in a different word, the statutory language becomes meaningless because the prohibition would cover every text sent. Finally, it ignores the phrase "using a random or sequential number generator." The Commission has broadly construed the definition to include predictive dialers and other equipment that makes traditional telephone calls, even if it does not use random or sequential systems, because those kinds of systems, according to the Commission, must have the lessor capacity to also make random or sequential calls. Those systems have one thing in common—they dial telephone numbers (or send text messages to telephone numbers). The Petitioner would have the Commission go well beyond that interpretation to include systems that send email. The email systems here do not store numbers; they store email addresses. They cannot make random or sequential calls because they cannot make calls at all; they just send email-to-text messages. Such an interpretation would truly lead to absurd results and should be avoided.

D. Congress addressed the use of email-to-text messages in CAN-SPAM and differentiated between commercial and noncommercial messages.

Petitioner spends a scant six lines discussing the CAN-SPAM Act's application to internet-to-text messages. Yet the CAN-SPAM Act is far more important to this discussion. When Congress passed the TCPA in 1991, text messages did not exist.[8] Therefore, any application of the TCPA to text messages is, necessarily, an interpretative exercise. Defining "call" to include a text message was one way for the Commission to address concerns about spam text messages. When Congress enacted the CAN-SPAM Act, it recognized the limits of the TCPA, and specifically included provisions to apply to internet-to-text messages to address the TCPA's shortcomings.

The CAN-SPAM Act regulates "mobile service commercial messages" ("MSCM") through rules promulgated by the FCC. The statute defines MSCM as a "commercial electronic mail message that is transmitted directly to a wireless device that is utilized by a subscriber of commercial mobile service."[9] Electronic mail requires a message to be sent with "a reference to an Internet domain."[10] Therefore, the FCC has explained, this set of rules applies only to messages sent to a wireless device using a specific internet domain name set aside for messages to be sent to a wireless device.[11]

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[8] Victoria Shannon, *15 years of text messages a 'cultural phenomenon'*, N.Y. TIMES, Dec. 5, 2007, *available at* http://www.nytimes.com/2007/12/05/technology/05iht-sms.4.8603150.html?pagewanted=all&_r=1&.

[9] 15 U.S.C. § 7712(d).

[10] 2004 Order ¶ 10 (citing 15 U.S.C. § 7702(6)).

[11] 2004 Order ¶ 12.

Under Petitioner's reading of the TCPA, the provision of the CAN-SPAM Act requiring the FCC to promulgate rules to protect wireless subscribers from receiving MSCM is completely unnecessary and redundant because the TCPA already banned those types of text messages. Clearly, such a reading cannot be correct. When the CAN-SPAM Act was enacted, the Commission had already made clear that the TCPA reached text messages when sent with an autodialer, and Congress recognized that with the provision in the statute making CAN-SPAM compatible with the TCPA. If, however, all messages sent using internet-to-text were already prohibited, then there would be no need to include such a provision. Congress does not enact meaningless laws. *Bilski v. Kappos*, 130 S. Ct. 3218, 3228-29 (2010) (finding that the canon against interpreting any statutory provision in a manner that would render another provision superfluous applies to interpreting any two provisions in the United States Code, even when Congress enacted the provisions at different times); *See also Milner*, 131 S. Ct. at 1268 (disagreeing with Navy's interpretation of FOIA Exemption 2 because, in part, interpretation would render later amendment to Exemption 7 superfluous).

Moreover, because the CAN-SPAM Act was enacted after the TCPA, to deal with a specific issue, the Commission must look to the later in time statute. *In re Burnett*, 635 F.3d 169, 173 (5th Cir. 2011) ("Congress is presumed to have knowledge of its previous legislation when making new laws") (internal citations omitted). The CAN-SPAM Act does not counteract the TCPA, rather, it fills a gap known to exist in the statute at that time. Congress banned the use of internet-to-text messages

that are *commercial in nature* and required the FCC to implement that ban.[12] It did not amend the TCPA to reach internet-to-text messages.

Thus, the clear implication of the CAN-SPAM Act is that Congress knew there was an issue with certain kinds of text messages and solved the problem. As Representative Markey, the sponsor of the wireless spam amendment to the original CAN-SPAM bill, stated during floor debates (when referring to commercial text messages):

> [The amendment] requires the FCC to initiate a rulemaking for wireless spam so that no loopholes are created but in a way to ensure that wireless consumers have greater protection than that accorded in the underlying bill. As we attempt to tackle the issue of spam that is sent to our desktop computers, we must also recognize the millions of wireless consumers in the United States run the risk of being inundated with wireless spam. [ ] To present wireless spam from overwhelming the American wireless marketplace as it has networks in other countries, this legislation tasks the FCC to promulgate rules in order to put strong consumer protections on the books.[13]

What Congress did not do was ban all internet-to-text messages. It just prohibited commercial messages. When Congress specifies one type of message, it implicitly excluded other types. *See, e.g.*, *Anderson v. U.S.*, 86 Fed. Cl. 532, 545 (2009) ("When there is 'particularization and detail' in a statutory scheme that Congress has created, a court should not add provisions that are not present in the scheme."). As such, the CAN-SPAM Act left non-commercial internet-to-text messages unregulated.

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[12] The CAN-SPAM Act only prohibits sending "commercial" content. 2004 Order ¶ 12. "Commercial electronic mail" is defined as "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose)." 15 U.S.C. § 7702(2).

[13] 149 Cong. Rec. H12186-02, H12195 (Nov. 21, 2003).

Any attempt to regulate them under the TCPA would render the CAN-SPAM Act meaningless and must be avoided.

II. The Policy Concerns Petitioner Raises are Misplaced.

The Petition raises a number of different policy concerns to justify an expansive definition of autodialer. These policy arguments fall into two main categories: (a) a flood of unwanted messages will result, and (b) consumers will bear a high out-of-pocket cost for these messages. Neither withstands scrutiny.

A. The risks to consumers Petition raises are chimeras at best.

The Petition goes to great lengths to raise concerns about a flood of messages if the Commission does not act to define autodialer as it requests. These concerns are completely misplaced.

First, the Petition argues that when those sending text messages are trying to locate the right domain to use, they will generate an unlimited number of messages to consumers because they will send messages to a wireless number with every possible MCSM domain.[14] Yet each wireless number can belong to only one wireless device, which will have one domain associated with it. Even if a company sent an email to each of the 261 domains currently on the registry,[15] only one text message would come through to any one phone number because that number belongs to one

[14] Petition at 5.

[15] http://transition.fcc.gov/Bureaus/CGB/DomainNames/DomainNames.txt (visited November 14, 2012)

phone on one carrier's network. Thus, the flood predicted will not materialize when trying to locate the right domain.

Second, Petitioner suggests that if the Commission does not define autodialer to cover internet-to-text messages, emergency numbers such as 911, hospitals, fire departments, physicians, poison control centers, hospital rooms, and nursing home rooms will be deluged with calls.[16] That simply is not the case. Those numbers are not devices that have domains associated with them and cannot receive text messages. A sender could email 911@ each of the 261 mobile domains and not a single one would go through or tie up the line in any way. Moreover, no change to the definition of autodialer is needed to protect those lines because the current rules in place prohibit placing actual calls to them. Indeed, Congress recently recognized that a database of such numbers would be useful and just last month the Commission issued the implementing rules for this database.[17] Nothing the Commission decides in response to this Petition will result in a single call being placed to any of these numbers.

Finally, Petitioner raises concerns about diluting the private right of action under the TCPA because consumers will not know how the message was sent.[18] If a

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[16] Petition at 15

[17] In the Matter of Implementation of the Middle Class Tax Relief and Job Creation Act of 2012, ; Establishment of a Public Safety Answering Point Do-Not-Call Registry, *Report and Order*, CG Docket No. 12-129 ¶ 14 (2012). Interestingly, the Commission noted in that proceeding that "the Tax Relief Act should be interpreted as giving PSAP telephone numbers protection against the use of autodialed equipment beyond that already provided by the TCPA." In other words, the Commission was careful to construe the statute in a way that was not merely redundant of existing protections.

[18] Petition at 16

consumer receives a noncommercial text message and files suit, then the method of sending will be an issue of proof in the case. This is no different than most issues of fact that must be determined in the course of litigation.

B. The Petition erroneously raises cost concerns about text messages when carriers' standard plans offer unlimited text messages today.

When the TCPA was enacted 21 years ago, wireless devices were relatively scarce and calls were expensive. Moreover, virtually everyone who had a wireless number also had a traditional landline, so the special restrictions on calls to wireless devices were not overly burdensome on those trying to contact individuals. Times have changed. Wireless devices are no longer a backup way to reach people but the only way. Moreover, the way people pay for wireless calls and text messages is changing.

In June, 2012, Verizon Wireless changed the landscape of how mobile phones will be charged for all of its customers and by default for all carriers when it announced that "it will provide voice and texting services free of charge while boosting its billing rate for data."[19] In July, 2012, AT&T announced similar plans that offer free voice and text.[20] All of the major wireless carriers standard LTE service plans

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[19] Cecilia Kang, *Verizon Wireless to offer free voice and texting, boost cost for data use*, WASHINGTON POST, June 12, 2012, *available at* http://www.washingtonpost.com/business/technology/verizon-wireless-to-offer-free-voice-and-texting-boost-cost-for-data-use/2012/06/12/gJQAmXXbYV_story.html.

[20] *See, e.g.*, Hayley Tsukayama, *AT&T releases shared data plans. How do they stack up against Verizon's?*, WASHINGTON POST, July 18, 2012, *available at* http://www.washingtonpost.com/business/technology/atandt-releases-shared-data-plans-how-do-they-stack-up-against-verizon/2012/07/18/gJQAJNZetW_story.html.

include unlimited texting.[21] Thus, there is no per-text charge for customers on these plans. Even many basic plans include unlimited text messages.[22] T-Mobile reported in early 2012 that 80 percent of new subscribers choose unlimited plans.[23] Even when customers have a bucket of minutes, research suggests that many of them do not use nearly all of the minutes.[24]

In other words, what was once unlimited—data—will now be limited and what was once limited or sold in specific units—minutes or text messages—will be unlimited.

Accordingly, there is simply no reason to treat text messages differently because of the fear of costs associated with them. As discussed below, to the extent this remains a concern for a small fraction of customers, the Commission could simply mandate that the carriers disclose to those who wish to use internet-to-text messaging which customers will have to pay for the incoming text and allow the sender a mechanism to pay for the text.

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[21] *See, e.g.*, Mike Dano, *LTE Service pricing*, FIERCEBROADBAND WIRELESS, http://www.fiercebroadbandwireless.com/special-reports/lte-service-pricing; Greg Bensinger, *Talking Less, Paying More for Voice*, WALL STREET JOURNAL, June 6, 2012 B1, *available at* http://online.wsj.com/article/SB10001424052702304065704577426760861602618.html?mod=googlenews_wsj#printMode.

[22] *See, e.g.*, Jared Newman, *Running the Numbers on AT&T's New Shared Data Plans,* TIME, July 19, 2012, *available at* http://techland.time.com/2012/07/19/att-shared-data-plans-a-raw-deal/.

[23] Bensinger*, supra* note 19.

[24] *See, e.g.*, David Lazarus,*Talk isn't cheap? For cellphone users, not talking is costly too*, LOS ANGELES TIMES, March 8, 2009 *available at* http://articles.latimes.com/print/2009/mar/08/business/fi-lazarus8.

Finally, it is important to understand the difference between the cost of receiving unwanted commercial messages and the cost of receiving political messages. While it may be unfair for businesses to shift the cost of receiving a message on to consumers, political speech is different and citizens may have to bear some cost of receiving political speech. Alternatively, the Commission could establish a mechanism by which those who receive a text message and pay for it can seek reimbursement from the sender.

III. The Petition Ignores Fundamental First Amendment Protections for Political Speech.

The Petition fails to address an essential aspect of political text messages: they are protected by the First Amendment. Congress recognized the distinction between commercial and political speech when it enacted both the TCPA and the CAN-SPAM Act, and the Commission has recognized those differences in its regulations as well. The Petitioner's request would upend those distinctions and ban an entire channel of political speech.

A. When Congress enacted the TCPA and the CAN-SPAM Act, it recognized the sensitive nature of its regulations and the need to protect political speech; Petitioner's position would eviscerate those carefully crafted lines.

In the findings to the TCPA, Congress explained its reasoning for authorizing the FCC to exempt certain types of noncommercial calls:

> While the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for these types of automated or prerecorded calls that it finds are not considered a nui-

> sance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution.[25]

Furthermore, noncommercial speech was deliberately excluded from the reach of the CAN-SPAM Act. As Representative Sensenbrenner stated during the floor debate on the bill, "there are some activities that [the bill] deliberately does not reach. Specifically, the legislation concerns only commercial and sexually explicit e-mail and is not intended to intrude on the burgeoning use of e-mail to communicate for political, news, personal and charitable purposes."[26]

B. Political speech is entitled to heightened protection and the Petitioner would have the FCC trample on those rights.

The FCC should decline to interpret the TCPA in a way that further restricts noncommercial speech, in particular where, as here, the statutory language does not support such an interpretation. Unlike commercial speech, political speech is at the very core of the First Amendment. *Carey v. FEC*, 791 F. Supp. 2d 121, 133-34 (D.D.C. 2011) (citing *Buckley v. Valeo*, 424 U.S. 1, 39 (1976)). First Amendment standards "must give the benefit of any doubt to protecting rather than stifling speech." *Wisconsin Right to Life, Inc.*, 551 U.S. at 469.

Political speech receives heightened protection under the First Amendment. Laws that burden political speech are subject to strict scrutiny, which requires the government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest. *Citizens United v. FEC*, 130 S. Ct. 876, 898

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[25] TCPA Congressional Finding 13.

[26] 149 Cong. Rec. H12186-02 at H12193.

(2010); *Wisconsin Right to Life, Inc.*, 551 U.S. at 464. Here, a ban on noncommercial internet-to-text messages does not further a compelling governmental interest.

Accordingly, such a ban would not stand up to rigorous First Amendment scrutiny. As discussed above, the Petitioner's policy arguments are weak. First, an ever-increasing majority of recipients of political text messages do not incur a per-text charge for such messages. Second, there is no evidence that consumers will be—or have been in the last few election cycles—bombarded with a flood of unwanted political text messages. If this does turn out to be a problem, then the Commission can develop less burdensome alternatives to an outright ban on text messages. The use of text messaging technology to communicate with voters is a recent development; regulating it essentially out of existence is both premature and stifling. As the U.S. Supreme Court in *Citizens United* noted, "[r]apid changes in technology—and the creative dynamic inherent in the concept of free expression—counsel against upholding a law that restrict political speech in certain media or by certain speakers." 558 U.S. at 912-13. At the same time, text messaging may already be a technology that will be eclipsed by other means of communication, so the Commission should not be overly concerned with one type of technology.

Finally, because the TCPA's prohibitions operate on "persons," whether in the form of calls to landlines, calls to wireless devices, or text messages, communications between elected officials and the voting public are exempt from such regulation, creating an inherent imbalance between incumbents and challengers. This is because the government is not a "person," under established case law. The term

"person" is defined under the TCPA (and the Communications Act generally) as "an individual, partnership, association, joint-stock company, trust, or corporation."[27] In *Miranda v. Michigan*, 168 F. Supp. 2d 685, 692 (E.D. Mich. 2001), a federal district court expressly held that this exact definition did not include governmental entities. Moreover, there is substantial precedent finding that statutes employing the word "person" should be ordinarily construed to exclude governmental entities.[28] The Supreme Court has stated that the longstanding presumption that "person" does not include the sovereign "may be disregarded only upon some affirmative showing of statutory intent to the contrary."[29]

Accordingly, government officials, including incumbent Members of Congress, have the ability to use text message technology to reach their constituents because such communications fall outside the scope of the TCPA. The more communications channels closed through the TCPA, the greater the imbalance between incumbent and challenger, and the greater the First Amendment problem becomes. Thus, the Commission must tread very carefully in this area to avoid censoring speakers. It can avoid this problem by rejecting the request to treat internet-to-text calls as being made by an autodialer and therefore subject to the TCPA's prohibitions.

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[27] 47 U.S.C. § 153(32). Although "person or entity" is not defined in the regulations, it is an established principle that a regulation cannot go beyond its enabling statute, and therefore the statutory definition would apply. *See MCI Telecomm. Corp. v. Am. Telephone & Telegraph Co.*, 512 U.S. 218, 229 (1994) (citing *Pittston Coal Group v. Sebben*, 488 U.S. 105, 113 (1988)).

[28] *See, e.g.*, *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765 (2000) (False Claims Act); *Will v. Mich. Dept. of State Police*, 491 U.S. 58 (1989) (42 U.S.C. § 1983); *Pieczenik v. Domantis*, 120 Fed. Appx. 317 (Fed. Cir. 2005) (Rackateer Influenced and Corrupt Organizations Act); *Al Fayed v. CIA*, 229 F.3d 272 (D.C. Cir. 2000) (28 U.S.C. § 1782).

[29] *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765 (quoting *Int'l Primate Protection League v. Administrators of Tulane Ed. Fund*, 500 U.S. 72, 83 (1991)).

CONCLUSION

For the foregoing reasons, the Commission should reject the Petition and clearly state that political text messages sent using internet-to-text technology are not prohibited by the TCPA.

Respectfully submitted,

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