

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

|   |   |                             |
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| <b>In the Matter of</b>                               | ) |                             |
|   | ) |                             |
| <b>Rules and Regulations Implementing the</b>         | ) |                             |
| <b>Telephone Consumer Protection Act of 1991</b>      | ) | <b>CG Docket No. 02-278</b> |
|   | ) |                             |
| <b>Revolution Messaging’s Petition for an</b>         | ) |                             |
| <b>Expedited Clarification and Declaratory Ruling</b> | ) |                             |

**REPLY TO COMMENTS OF CCADVERTISING OPPOSING REVOLUTION  
MESSAGING’S PETITION FOR EXPEDITED CLARIFICATION AND  
DECLARATORY RULING**

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## **I. INTRODUCTION AND SUMMARY**

Revolution Messaging, LLC, a District of Columbia limited liability company (“RM”) respectfully submits these comments in response to ccAdvertising’s comments submitted on November 23, 2012 in the above captioned proceeding. ccAdvertising’s comments are merely a request for the Federal Communications Commission (the “Commission” or “FCC”) to exempt wholesale all text messages sent using a short message service (“SMS”) gateway and an Internet domain (“internet-to-text”) from the definition of “automatic telephone dialing system” (“ATDS”) and the applicable prohibitions of the Telephone Consumer Protection Act of 1991 (the “TCPA”). Such a conclusion would be contrary to Congressional intent, inconsistent with previous Commission guidance and ensure an assault on the privacy rights of citizens across the country.

ccAdvertising agrees that “[i]f [text messages] are sent using an autodialer to a wireless number, they are subject to the TCPA.”<sup>1</sup> RM simply requests the Commission to formally clarify what the intent and structure of the TCPA dictate: that the technology at issue, used to distribute mass, unsolicited internet-to-text messages to cellular telephone numbers, is a type of ATDS.

First, the relevant term used in the statutory definition of ATDS—“dial”—is not defined in any way in the TCPA and Congress could not have spoken clearly to the issue when TCPA was enacted because the relevant technology did not exist. Accordingly, the commission has the authority to interpret this term as long as its interpretation is reasonable.

Second, in this case, the only reasonable interpretation is to conclude that the subject Internet-to-text message technology does have the capacity to “dial” within the meaning of the

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<sup>1</sup> Comments of ccAdvertising, CG Docket No. 02-278 (filed Nov. 23, 2012) at 4 (“Comments”).

TCPA. The technology delivers text messages to the recipient by telephone and calls telephone numbers assigned to cellular telephones. Moreover, such an interpretation is the only one consistent with Congressional intent: to address the nuisance and invasion of privacy created by the sending of mass unsolicited communications to, which are received by, cellular telephones. The technology at issue clearly implicates the policy concerns underlying the TCPA. Contrary to ccAdvertising's contention, the spam SMS technology also imposes unwanted charges on consumers.

Third, contrary to ccAdvertising's suggestion, the regulation of Internet-to-phone SMS messages under the CAN SPAM Act does not indicate in any way that Congress intended to preclude regulation of this technology under TCPA as well. The CAN SPAM Act does not preclude or override the applicability of TCPA and the Commission has never found that the TCPA is inapplicable to this type of technology.

Finally, extending the TCPA prohibitions to this technology, with respect to political communications, would not in any way offend the First Amendment. To the contrary, allowing this spam SMS technology to fester would actually undermine public acceptance of a new technology that carries great promise in facilitating political and advocacy communications.

## **II. DISCUSSION**

### **A. The Commission has authority to determine that the definition of the ATDS encompasses the subject technology**

ccAdvertising argues that the Commission cannot interpret the term ATDS to include the subject technology because 1) the language of the statute is clear and excludes internet-to-text technology, and 2) even if the statute is unclear, if the Commission determines that internet-to-text technology is encompassed in the definition of an ATDS, that determination would be unreasonable. Neither proposition is correct.

Under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Commission’s “construction of a statutory scheme it is entrusted to administer” is entitled to great deference. *Id.* at 844. The first step in the *Chevron* analysis is to determine “whether Congress has directly spoken to the precise question at issue. If the intent is clear of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842-43.

If the statute is unclear, then the court will address whether the agency’s interpretation is “based on a permissible construction of the statute” and “reasonable.” *Id.* at 843-44. When the interpretation provided by the agency is “reasonable,” the reviewing court will “not substitute its own construction” for the agency’s. *Id.* Instead, step two of the *Chevron* analysis requires the court to defer to a reasonable administrative interpretation of a “silent or ambiguous” statutory provision made by the administrator of an agency. *Id.* at 843.

**1. “To dial” is ambiguous under the TCPA**

Although the term “automatic telephone dialing system” is clearly defined in the Act, a key term used in the definition of ATDS is not defined at all: “to dial.” 47 U.S.C. § 227. As ccAdvertising points out, the key issue is whether the subject technology has the capacity “to dial such numbers.” 47 U.S.C. §227(a)(1). In *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (2009), the Court addressed the issue of whether the FCC’s determination that the term “call,” as used in 47 U.S.C. § 227(b)(1)(A) - the very section at issue here - encompassed text messages, in addition to traditional voice calls, was permissible. Applying *Chevron*, the Court first addressed whether the term “call”<sup>2</sup> was ambiguous. To make this determination, the court applied the following canons of statutory interpretation:

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<sup>2</sup> 47 U.S.C. § 227(b)(1)(A) (“It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States--(A) to make any call (other than a call made for emergency

It is well settled that the starting point for interpreting a statute is the language of the statute itself. Unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.” Another fundamental canon of statutory construction is that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” [An additional proper canon of statutory construction is to] read statutory terms in light of the purpose of the statute. If, under these canons, or other traditional means of determining Congress's intentions, we are able to determine that Congress spoke clearly, [the statute is not ambiguous].

*Id.* at 953 (internal citations and quotations omitted).

To determine what Congress intended when it said “to make any call” under the TCPA, the Court “utilize[d] the aforementioned canons of statutory construction” and looked to the “ordinary, contemporary and common meaning of the verb ‘to call’” provided in Webster’s Third New International Dictionary: “to communicate with or try to get into communication with a person by a telephone.” *Id.* at 953-54. The Court concluded, “[t]his definition suggests that by enacting the TCPA, Congress intended to regulate the use of an ATDS to communicate or try to get into communication with a person by a telephone.” *Id.* at 954. Finally, the court concluded that whether the term encompassed text messages was ambiguous:

[W]e recognize that Congress could not have spoken clearly to this issue in 1991 when the statute was enacted. Therefore, we conclude that the statute is silent as to whether a text message is a call within the Act.

*Id.*

Likewise, the term “to dial,” in this context, is often defined as to “call.”<sup>3</sup> The technology at issue here used to distribute internet-to-text text messages was not in existence in

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purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice--... (iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.”)

<sup>3</sup> Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/dial>; Definitions.com, <http://www.definitions.net/definition/dial> (“to make a call to”); Webster’s Online Dictionary, <http://www.websters-dictionary-online.com/definition/dial> (“To select a number, or to call someone, on a telephone”). See also, *Joffe*, at 838, n.10 (“Dial has many plain and ordinary meanings. For example, ‘a device (as a disk) that may be operated to make electrical connections or to regulate the operation of a machine and that usu[ally] has guiding marks around its

1991, and therefore the language of the Act cannot possibly have clearly addressed that technology. Indeed, the Commission itself has already indicated that the definition of ATDS is ambiguous by soliciting comments expressly regarding the scope of the definition of ATDS and whether certain technology was encompassed in the definition in 2002. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking and Memorandum Opinion and Order*, 17 FCC Rcd 17459, CG Docket No. 02–278 and CC Docket No. 92–90 (2002). Given that Congress has not spoken clearly to the issue of whether Internet-to-text SMS technology “dials” cellular telephone numbers, the Commission has authority to adopt a reasonable construction of that term.

**2. The only reasonable interpretation of the term “dial” is that it does include Internet-to-text SMS technology**

The only reasonable interpretation of the term “dial” is one that would encompass Internet-to-phone SMS technology. First, this technology accomplishes what is clearly within the intended scope of the term ATDS: it automatically connects to cellular telephone numbers and delivers messages to those numbers. Indeed, the only court to squarely address the issue concluded that this technology is indeed a type of ATDS. In *Joffe v. Acacia Mortg. Corp.*, the Court explained the relevant features of the technology as follows:

A phone-to-phone SMS message is, as its name suggests, a text message sent from one cellular telephone to another cellular telephone....The Internet becomes involved, however, when an SMS message is transmitted Internet-to-phone. . . The text message is initially delivered over the Internet as an e-mail directed to an e-mail address assigned by a cellular telephone carrier to a subscriber. When the e-mail reaches the e-mail address, it is converted automatically by the carrier into a different format that can be transmitted to the customer’s cellular telephone.

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border,’ or ‘a rotatable plate or disk.’ In the context of the phrase ‘to dial such numbers’ the words ‘to dial’ mean to ‘operate’ or ‘manipulate’ a device ‘in order’ to make or establish a telephone call or connection.”) (citing Webster’s Ninth Collegiate at 349; Random House College at 366; Webster’s Ninth at 349; Webster’s Encyclopedic Unabridged Dictionary 397 (1989); Webster’s Ninth at 349; Random House College at 366; Webster’s Third at 622; The New Shorter Oxford English Dictionary 660 (1993)).

121 P.3d 831, 837-38 (Ariz. Ct. App. 2005).

The Court then clearly explained why this technology constitutes a form of ATDS:

Whether a text message is sent phone-to-phone or Internet-to-phone, the end result is the same. The recipient's cellular telephone carrier forwards what is an SMS message to the recipient's cellular telephone...As is clear from the foregoing discussion [defendant] did not, as it contents, simply send e-mail to an e-mail address. Using it computers and the Internet, [defendant] co-opted the SMS service offered by [recipient]'s carrier to deliver SMS test messages to [the recipient] by telephone. . . . In so doing, [defendant] attempted to communicate by telephone. Under the TCPA, [defendant] called [the recipient]. . . .

[Defendant] took advantage of Internet-to-phone SMS technology—technology that guaranteed its computer generated text messages would be delivered to [recipient]'s cellular telephone. By pairing its computers with SMS technology, [defendant] did what the TCPA prohibits. *It used an automatic telephone dialing system to call a telephone number assigned to a cellular telephone.*

*Id.* at 838-39 (emphasis added).

Moreover, including this Internet-to-phone SMS technology within the scope of the term ATDS is clearly necessary in order to effectuate the intent of the TCPA. As ccAdvertising itself acknowledges, “[t]here can be no doubt that the TCPA is a *broad* consumer protection statute designed to limit many calls to wireless devices.”<sup>4</sup> Congress recognized, and the Commission has determined, that the Commission has the authority to regulate new technologies, not in existence at the time of the Act’s passage, under the TCPA in order to effectuate Congress’s intent that the Act provide broad consumer protection. 137 Cong. Rec. S18781-02 at S18784 (1991) (statement of Sen. Hollings (D-SC)) (“[T]he FCC is not limited to considering existing technologies. The FCC is given the flexibility to consider what rules should apply to future technologies as well as existing technologies.”): *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 17 FCC Rcd 17459, 17473-476 (September 18, 2002).

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<sup>4</sup> Comments at 7 (emphasis added).

The purpose of the TCPA is to protect consumers who *receive* text messages. In assessing congressional intent, the Court of Appeals for the Ninth Circuit stated that :

The TCPA was enacted to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home. The consumers complained that such calls are a nuisance and an invasion of privacy. The purpose and history of the TCPA indicate that Congress was trying to prohibit the use of ATDSs *to communicate with others by telephone in a manner that would be an invasion of privacy*. We hold that a voice message or a text message are not distinguishable in terms of being an invasion of privacy.

*Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (2009) (emphasis added).

For these reasons, the only reasonable interpretation of the term ATDS is one that encompasses Internet-to-phone SMS technology.

**3. Treating Internet-to-phone SMS technology as a form of ATDS is consistent with prior Commission guidance.**

When the Commission addressed the scope of the term ATDS, and specifically the issue whether certain new technology was encompassed under the term ATDS, in 2002-2003, several commenters urged the Commission, as ccAdvertising does now, to apply a narrow definition which would exclude new technology.<sup>5</sup> In response, the Commission “effectively rejected these comments, concluding that ‘a predictive dialer’ falls within the meaning and statutory definition of ‘automatic telephone dialing equipment’ and the intent of Congress.” *Griffith v. Consumer Portfolio Serv. Inc.*, 838 F.Supp. 2d 723, 726 (2011) (citing *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, 14093 (July 3, 2003) (2003 TCPA Order).

In concluding that “predictive dialers” were encompassed in the definition of an ATDS, the Commission noted that “[t]he technology had changed, but the basic function of such

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<sup>5</sup> See e.g., Comments of the American Teleservices Ass’n 113 (“Predictive dialers do not generate ‘random’ or ‘sequential’ telephone numbers. Instead, they rely on telephone numbers from lists provided by the equipment operator. These lists are anything but ‘random’ or ‘sequential.’”).

equipment - ‘the capacity to dial numbers without human intervention’ had not.” *Id.* at 726 (citing 2003 TCPA Order at 14092). Further, the Commission stated, “[i]t is clear from the statutory language and the legislative history that Congress anticipated that the FCC, under its TCPA rulemaking authority, might need to consider changes in technology.” 2003 TCPA Order at 14092.

To the extent that the Commission has already concluded that the definition of ATDS is to be interpreted broadly, it would be unreasonable to suddenly restrict the scope of the definition merely to allow creative vendors to circumvent the Act by the use of new Internet-to-phone technology. Further, as the Commission has previously determined that text messages are encompassed in the term “to call” as found in the TCPA, to conclude that a new type of technology used to distribute text messages does not fall within the definition of ATDS would be unreasonable. Such a determination, would, in effect, eviscerate the entire prohibition as it applies to text messages, and would be unreasonable.

Finally, clarifying that an ATDS includes technology described in the Petition would not “cover every text sent.”<sup>6</sup> Only text messages sent using an ATDS would be covered. Sending text messages using any other type of technology would not be prohibited by the TCPA.

**B. The CAN-SPAM Act does not preclude application the TCPA to Internet-to-phone text messaging technology.**

ccAdvertising argues that “any attempt to regulate [non-commercial internet-to-text messages] under the TCPA would render the CAN-SPAM Act meaningless.”<sup>7</sup> To the contrary, it is well-established that the CAN-SPAM Act does not preclude application of the TCPA to text messages distributed by ATDSs.

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<sup>6</sup> Comments at 11.

<sup>7</sup> *Id.* at 15.

The CAN-SPAM Act itself states that, “[n]othing in this [Act] shall be interpreted to preclude or override the applicability of [the TCPA] or the rules prescribed under section 6102 of this title.” *CAN-SPAM Act*, Section 14(a), 15 U.S.C. § 7712(a). The Commission has clearly explained, “[t]he CAN-SPAM Act specifically states it does not override the TCPA” and that “nothing in [CAN-SPAM] shall be interpreted to preclude or override the applicability of the TCPA.” *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket Nos. 04-53 and 02-278, Order, 19 FCC Red 15927, 15930-31, para. 7 (2004). Further, the courts have concluded that text messages distributed by an ATDS, regardless of content, are subject to the very TCPA prohibitions in question even subsequent to enactment of the CAN-SPAM Act. *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009); *Joffe v. Acacia Mortgage*, 121 P.3d 831, 840 (Ariz. Ct. App. 2005) (“We also do not agree, as Acacia suggests, that in adopting rules pursuant to § 14 of the CAN-SPAM Act, the FCC took the position the language of the TCPA is not broad enough to encompass Internet-to-phone SMS calls....”).

That CAN-SPAM covers this technology would not render superfluous application of the TCPA to the same technology. In *Joffe*, the Court addressed the issue of whether the CAN-SPAM Act precluded the applicability of the TCPA to internet-to-text messages and concluded that:

As the Supreme Court has repeatedly instructed, ‘the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.’ ... Application of the TCPA to Internet-to-phone SMS messages does not render the CAN-SPAM Act’s regulation of such messages superfluous. Section 7712 of the CAN-SPAM Act is broader than the TCPA. The CAN-SPAM Act applies to all uninvited [mobile service commercial messages]. In contrast, the TCPA applies to only those made using an automated dialing system or an artificial or prerecorded voice. We conclude, therefore, that nothing in the wording, legislative history or FCC implementation of the CAN-SPAM Act demonstrates

Congress intended only the CAN-SPAM Act, and not the TCPA, to apply to the SMS text message calls.

*Joffe*, at 840-41.

For these reasons, that CAN-SPAM applies to the subject technology in no way supports the proposition that Congress would not have intended TCPA to apply to it as well.

**C. RM's policy concerns are well-founded.**

ccAdvertising attempts to dismiss two major policy concerns raised by RM: 1) consumers may be charged for each text message received, and 2) internet-to-phone technology is capable of sending a practically unlimited number of text messages. ccAdvertising urges the Commission to ignore a very important fact that even ccAdvertising implicitly acknowledges - an unknown number of text message recipients will be charged for text messages received. ccAdvertising also attempts to obscure the basic fact that this technology is capable of sending a practically unlimited number of text messages to individual consumers. The Commission should ignore ccAdvertising's blatant attempts to circumvent the ATDS prohibition in the TCPA at potential great cost to consumers.

**1. Whether a consumer is charged for a text message received on a cellular phone is not relevant under the TCPA.**

As an initial point, it is important to clarify that whether a consumer that receives a text message is charged for the text message is immaterial to the application to the prohibition against using an ATDS to call a cellular phone number. The TCPA prohibits making any call without the express consent of a recipient using an ATDS to, *inter alia*, "to any telephone number assigned to a... cellular telephone service... *or* any service for which the called party is charged for the call." 47 U.S.C. § 227(b)(1)(A)(iii)(emphasis added). Therefore, using an ATDS to place calls to any cellular phone number is prohibited regardless of whether the recipient is

charged for the text message. By the use of the word “or,” the TCPA, independently of whether the call is placed to a cellular phone number, prohibits using an ATDS to place calls to any number “for which the called party is charged for the call.” *Id.*

**2. ccAdvertising acknowledges that recipients may be charged for text messages received and the text message distributor is not able to determine which recipients will be charged for these services.**

Even assuming that ccAdvertising’s assertion that “80 percent of *new* subscribers choose unlimited [text messaging] plans,”<sup>8</sup> is correct, there are still 20 percent of new subscribers who do not choose unlimited plans, and therefore are likely to incur costs based on each text message received. In addition, the comments omit the portion of *current* subscribers who are charged for each text message received. This problem is emphasized by the fact that ccAdvertising indicates that “wireless devices are [currently]... the only way”<sup>9</sup> to reach people - implying that the vast majority of subscribers could not be classified as “new” because they are *current* subscribers.

More importantly, ccAdvertising admits that currently a text message distributor is not able to determine whether the recipient will be charged. ccAdvertising suggests that 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.”<sup>10</sup> ccAdvertising fails to indicate under what law the text message distributor would be required to pay for such messages or avoid sending messages to recipients who are to be charged.

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<sup>8</sup> *Id.* at 18.

<sup>9</sup> *Id.* at 17.

<sup>10</sup> *Id.* at 18.

**3. Internet-to-phone technology is capable of distributing a practically unlimited number of text messages to individual consumers.**

In addition, ccAdvertising’s argument that “[t]he risks to consumers are chimeras at best,” twists, at best, RM’s representations that internet-to-text technology can be used to send unlimited text messages to consumers. Granted, if 261 emails are generated for one consumer, one for each of the domains registered on the registry, RM acknowledges that the intended recipient consumer will only receive one text message. However, this argument fails to address RM’s main concern: that this technology is able to distribute a practically unlimited number of text messages to each of the 261 email addresses. The fact that only a small percentage of the text messages sent reach their intended recipient has no affect on the fact that each identified consumer may receive a practically unlimited number of text messages - and that the consumer may be charged for each text message received.

ccAdvertising’s claim that no number associated with “emergency numbers such as 911, hospitals, fire departments, physicians, poison control centers, hospital rooms, and nursing homes” are not “devices that have domains associated with them and cannot receive text messages” is flatly false.<sup>11</sup> This baseless assertion assumes that no emergency number, such as one associated with a physician, is a cellular phone. The fact that there is currently no database of these numbers,<sup>12</sup> coupled with ccAdvertising’s assertion that cell phones are, in essence, replacing land lines, indicates that it is exceptionally likely that some of the numbers are associated with a cellular phone, and at risk of being the target of an unlimited number of calls if the Commission does not define ATDS broadly to encompass this new technology.

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<sup>11</sup> *Id.* at 16.

<sup>12</sup> *Id.*

**D. Application of the TCPA ban on unsolicited cell phone calls to Internet-to-phone technology would not offend the First Amendment**

In its comments, ccAdvertising contends that regulating Internet-to-phone SMS messages with political content would offend the First Amendment.<sup>13</sup> This contention has been rejected by the Courts. *See, e.g., State v. Econ. Freedom Fund*, 959 N.E.2d 794 (Ind. 2011), *reh'g denied* (Mar. 14, 2012), *cert. denied*, 133 S. Ct. 218 (2012); *State ex rel. Stenehjem v. FreeEats.com, Inc.*, 712 N.W.2d 828 (2006), *cert. denied*, 127 S. Ct. 383 (2006). *Joffe v. Acacia Mortgage*, 121 P.3d 831, 842-43 (Ct. App. 2005), *cert. denied*, 127 S. Ct. 934 (2007); *Abbas v. Selling Source, LLC*, 2009 WL 4884471, \*7-8 (N.D. Ill. Dec. 14, 2009). The First Amendment does not prevent the Commission from concluding that the new technology in question is a type of ATDS regulated by the TCPA.

The *Joffe* Court specifically concluded that application to Internet-to-phone technology of the TCPA ban on unsolicited calls to cell phones, would not offend the First Amendment:

[A]pplication of the TCPA's restriction on autodialed calls to cellular telephones, including the Internet-to-phone SMS calls at issue here, is narrowly tailored to serve the significant and content-neutral governmental interest of protecting consumer privacy from unsolicited telemarketing calls. As applied to [the internet-to-text message distributor's] conduct, the TCPA did not violate its rights under the First Amendment.

*Joffe*, at 842-43.

Indeed, as RM pointed out in its original comments, if the Commission permits use of this technology as a means of circumventing the TCPA, that will make the public reluctant to receive text messages of any kind—even with prior consent—in political and advocacy campaigns, thereby *decreasing* the amount of political and advocacy speech

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<sup>13</sup> *Id.* at 19-22.

that is legitimately communicated through this promising new technology. Such a result would not be consistent with the objectives of the First Amendment.

### III. CONCLUSION

For the reasons set forth above, Revolution Messaging respectfully submits that the Commission can best serve the public interest by issuing a declaratory ruling that Internet-to-phone text messaging technology falls within the meaning and statutory definition of “automatic telephone dialing equipment.”

Respectfully submitted,



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