ORAL ARGUMENT NOT YET SCHEDULED

No. 15-1211 (consolidated with Nos. 15-1218, 15-1244, 15-1290, 15-1304, 15-1306, 15-1311, 15-1313, and 15-1314)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ACA INTERNATIONAL, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES,
Respondents.

On Petition for Review of an Order of the Federal Communications Commission

BRIEF OF *AMICUS CURIAE* COMMUNICATION INNOVATORS IN SUPPORT OF PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and Amici. All parties, intervenors, and amici appearing in this Court are listed in the Brief for Petitioners, except for Communication Innovators, the Internet Association, and the National Rural Electric Cooperative.

Rulings Under Review. Amicus Curiae supports Petitioners, who seek review of the following final order of the Federal Communications Commission: *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order*, 30 FCC Rcd. 7961 (2015).

Related Cases. All petitions for review of the order referenced above have been consolidated in this Court. Amicus is unaware of any related cases.

CERTIFICATE REGARDING CONSENT, AUTHORSHIP, AND SEPARATE BRIEFING

All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a). No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the Amicus Curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(c)(5).

Counsel for Amicus certifies that a separate brief is necessary because no other amicus brief of which Amicus is aware discusses the practical and financial impact of the TCPA litigation environment, and how the Order under review, in particular its treatment of the statutory term "Automatic Telephone Dialing System," will encourage further abusive litigation against entities that rely on modern dialing technology. Many of the nation's businesses dedicate significant time, energy, and resources to achieve compliance with the TCPA. These efforts are undermined by the burdens and expenses of defending private lawsuits prosecuted not by plaintiffs, but by lawyers in search of fee

awards. Prior to the ruling under review, opportunistic plaintiffs' attorneys routinely took advantage of the substantial statutory penalties available for each unauthorized call or text message, forcing defendants into costly settlements regardless of the merit of their cases. The ruling under review only exacerbates this situation by opening the courthouse door even wider. In light of the different and important issues presented in this brief, which are not addressed by any other party or amici, counsel for Amicus certifies that filing a joint brief is not practicable and that it is necessary to submit separate briefs. *See* Circuit Rule 29(d).

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Communication Innovators states that it does not have a parent corporation and that it has no stock, therefore no publicly held corporation owns 10% or more of its stock.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

Communication Innovators ("CI") is a nonprofit organization whose members include providers of cutting-edge dialing and communication services, and businesses and organizations that utilize and rely upon such services. CI's mission is to maximize the pace of telecommunications innovation and its benefits for American consumers and businesses. CI advocates for its members' interests in regulatory proceedings relating to the Telephone Consumer Protection Act (the "TCPA"), including the proceedings below, and participates in efforts to educate government agencies about the benefits of innovative telecommunication solutions and the detrimental effects of the rising tide of lawyer-driven TCPA litigation.

CI filed one of the petitions addressed by the Federal Communications Commission's July 10, 2015 Declaratory Ruling and Order, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling and Order*, 30 FCC Rcd. 7961 (2015) (the "Order").[1] CI also

[1] Order, ¶¶ 6 n.27, 7 n.30, and Appendices H, K, Q, S, V.

submitted comments in connection with several other petitions resolved by the Order, and information provided by CI is part of the record and cited in the Order.[2] CI believes the Order will increase abusive TCPA litigation against businesses that rely on modern dialing technology to engage with consumers. CI thus submits this brief in support of Petitioners.

SUMMARY OF ARGUMENT

In the past three years alone, class-action lawyers have hit virtually every sector of the American economy with TCPA lawsuits. Their targets have included Internet service providers, text-messaging platforms, social-networking sites, sports teams, retailers, banks, pharmacies, restaurants, entertainment studios, cable- and satellite-television providers, labor unions, and even President Obama's 2012 re-election campaign.[3] Because the TCPA imposes penalties of $500 to $1,500 per call, with no cap, the exposure for companies that engage with consumers can easily reach into the billions. With the stakes so high, gambling on the

[2] *E.g.*, Order, ¶ 11 n.42.

[3] *Shamblin v. Obama for Am.*, No. 13-2428, ECF No. 1 (M.D. Fla. Sept. 19, 2013).

outcome of a trial is typically not an option—even for those with strong defenses. Settlements of seven or even eight figures are routine, with the lion's share of the money going to the lawyers.

This is bad policy. Businesses in the United States have collectively paid hundreds of millions of dollars in TCPA class settlements since 2012. That is money that could have been used to create jobs or develop new products but instead ended up in the pockets of the plaintiffs' bar. But that is not the worst part of it. The worst part is this: The majority of businesses that find themselves staring down the barrel of a TCPA lawsuit are *not even violating the statute*.

Most TCPA complaints allege that the defendant uses an Automatic Telephone Dialing System ("ATDS") to call and text consumers on their cell phones without consent.[4] ATDS is defined in the statute: It 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." 47

[4] The TCPA also contains restrictions on facsimile transmissions. These provisions were not addressed by the Order and are not at issue in this proceeding.

U.S.C. § 227(a)(1). ATDSs were commonly used in the late 1980s and early 1990s to blast pre-recorded sales pitches to randomly dialed telephone numbers. They are now largely obsolete.[5]

The barrage of TCPA lawsuits did not come about because the entire business community collectively decided to flout the law, dig up some 25-year-old dialing machines, and start robocalling random consumers. It came about because opportunistic plaintiffs have exploited imprecise language in the Commission's early TCPA rulings to claim that *all* modern technology used to place calls or send text messages counts as an ATDS, irrespective of the statutory definition.

The Commission's new Order makes this situation exponentially worse. In response to a slew of requests to clarify the definition of ATDS in light of its previous, confusing rulings, the Commission issued an order that impermissibly expands the TCPA's coverage far beyond what the statute contemplates, while at the same time being *even less clear* than its previous orders.

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[5] *See* Order, ¶ 20.

In his dissent, Commissioner Pai described the Order's interpretation of ATDS as "a bit of a mess."[6] He was being charitable. The Order is a thicket of contradictory pronouncements about what functionality equipment must have to qualify as an ATDS. In some instances, the Commission *omits* functionality *required* by the statute.[7] In other instances, it appears to *add* functionality not mentioned in the statute, such as the ability to "dial numbers without human intervention."[8] Confusing things even further, the Order refuses to provide any guidance as to what the "human intervention" element means or how it is to be applied.[9] Then, three paragraphs later, the Order *rejects* a "human intervention" test.[10]

Strangest of all, the Order redefines the word "capacity" in the ATDS definition to encompass not just what the equipment is

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[6] Pai Dissent at 115.
[7] *See, e.g.*, Order, ¶ 12 (in order to be considered an ATDS, the "equipment need *only* have the capacity *to store or produce telephone numbers*") (emphasis added), ¶ 15 ("autodialers need *only* have the '*capacity' to dial random and sequential numbers*") (emphasis added).
[8] *Id.*, ¶ 17.
[9] *Id.*
[10] *Id.*, ¶ 20.

presently capable of doing, but also its "potential functionalities."[11] According to the Commission, to determine whether a specific piece of dialing equipment is an ATDS, one now has to analyze whether there is "*more than a theoretical potential* that the equipment could be modified to satisfy the [ATDS] definition."[12] It is unclear who exactly would be qualified to conduct such an analysis—perhaps a philosopher?

The rules of the road cannot be this unclear. The definition of ATDS is set forth in plain English in the statute. The Commission does not have the authority to change it. Nor does the Commission have the authority to use an idiosyncratic interpretation of the word "capacity" to shoehorn into the ATDS definition equipment that is *not* an ATDS but could, under some unforeseen future circumstances, theoretically become one. And it does not have the authority to mangle the ATDS definition Congress wrote simply because it decided that businesses should not be allowed to contact consumers without their express permission. The Order's interpretation of ATDS is wrong,

[11] *Id.*, ¶ 16.
[12] *Id.*, ¶ 18 (emphasis added).

unworkable, and ensures that the onslaught of TCPA litigation will continue unabated. The Petition should be granted.[13]

ARGUMENT

I. Runaway TCPA Litigation Is Threatening Virtually Every Sector Of The Economy And Chilling Valuable Communications.

A. The Plaintiffs' Bar Has Sued Thousands Of Businesses For Supposedly Using An ATDS.

The plaintiffs' bar files thousands of TCPA lawsuits per year, often demanding millions or even billions of dollars in statutory penalties.[14] It would be one thing if these lawsuits were being brought against fraudulent telemarketers and text spammers—but that isn't what is happening. Instead, "trial lawyers have found legitimate, domestic businesses a much more profitable

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[13] CI agrees with Petitioners that the portions of the Order relating to the revocation of consent and reassigned numbers are flawed and should be vacated. However, the Commission's treatment of the ATDS issue is at the root of these other problems, since the use of an ATDS to call cell phones is what triggers the need for consent and the risk of liability for calling a reassigned number.

[14] According to one source, 2,400 TCPA lawsuits were filed between January 1, 2015 and October 31, 2015. Jack Gordon, *Debt Collection Litigation & CFPB Complaint Statistics*, Oct. 2015, *available at* http://dev.webrecon.com/everything-is-broken-debt-collection-litigation-cfpb-complaint-statistics-oct-2015/.

target." Pai Dissent at 113. Rather than suing entities that are truly preying on consumers, TCPA lawyers exploited confusion about the ATDS definition to attack legitimate business across a wide range of industries:

Social Networking. Companies offering consumers text-messaging and social networking services are frequent targets of TCPA litigation. In 2011, GroupMe, a mobile group-messaging application, was hit with a class-action lawsuit by a person whose friends used GroupMe to invite him to a poker game. The plaintiff argued that the application was an ATDS because its technology was capable of being reprogrammed to store numbers and call them automatically. *Glauser v. GroupMe, Inc.*, No. 11-2584, 2015 WL 475111, at *1 (N.D. Cal. Feb. 4, 2015).

Internet service provider Yahoo has been sued in multiple class actions by people alleging that its free online-messaging service is an ATDS. *E.g., Dominguez v. Yahoo, Inc.*, — F. App'x —, 2015 WL 6405811 (3d Cir. Oct. 23, 2015); *Sherman v. Yahoo! Inc.*, 997 F. Supp. 2d 1129 (S.D. Cal. 2014). Google was likewise sued in a class action by plaintiffs claiming that its Disco text-messaging

service was an ATDS. *Pimental v. Google Inc.*, No. 11-2585, ECF No. 1 (N.D. Cal. May 27, 2011).

There is a TCPA class action pending against Facebook alleging that the texts it sends to warn users about a potential security breach on their accounts are delivered via an ATDS. *See Duguid v. Facebook, Inc.*, No. 15-985, ECF No. 1 (N.D. Cal. Mar. 3, 2015). There is also a TCPA class action pending against Twitter for allegedly using an ATDS to send "tweets" to people whose phone numbers used to belong to Twitter subscribers. *Nunes v. Twitter, Inc.*, No. 14-2843, ECF No. 1 (N.D. Cal. June 19, 2014).

Social-networking service Path was sued in a class action by a plaintiff who claimed the text message he received inviting him to view an acquaintance's photos was sent by an ATDS. *Sterk v. Path, Inc.*, No. 13-2330, ECF No. 1 (N.D. Ill. Mar. 28, 2013). A plaintiff has similarly brought a class action against Voxernet, claiming a text he received from a friend inviting him to use Voxernet's walkie-talkie application was sent by an ATDS. *Hickey v. Voxernet LLC*, 887 F. Supp. 2d 1125 (W.D. Wash. 2012).

Internet-Based Services and Mobile Apps. Technology-based business models have also come under fire from the TCPA plaintiffs' bar. In 2013 Taxi Magic, a precursor to Uber, was hit with a class-action lawsuit from a customer who alleged that the text message he received notifying him when the taxi he ordered would arrive was sent by an ATDS. *Gragg v. Orange Cab Co.*, 995 F. Supp. 2d 1189 (W.D. Wash. 2014).

A TCPA class action is also currently pending against Uber, alleging that it uses an ATDS to send texts to potential drivers. *Lathrop v. Uber Techs., Inc.*, No. 14-5678, ECF No. 1 (N.D. Cal. Dec. 31, 2014). One is also pending against the similar rideshare service Lyft, alleging that the "Invite Friends" feature on the Lyft mobile application is an ATDS. *Wright v. Lyft, Inc.*, No. 14-421, ECF No. 1 (W.D. Wash. Mar. 4, 2014).

PayPal has been sued in multiple class actions by users contending that PayPal used an ATDS to send them text messages. *E.g.*, *Roberts v. PayPal, Inc.*, — F. App'x —, 2015 WL 6524840 (9th Cir. Oct. 20, 2015). Square, an electronic-payment service, was sued in a class action based on a single transaction

receipt that was sent to the plaintiff via text message after a user made a purchase using Square and requested a receipt be sent to that number. *Ball v. Square, Inc.*, No. 12-6552, ECF No. 1 (N.D. Cal. Dec. 28, 2012).

Sports Teams. Professional sports organizations have been sued as well. In one highly publicized example, a fan attending a Los Angeles Lakers basketball game sent a text message to the team which he hoped would be displayed on the arena jumbotron. *Emanuel v. Los Angeles Lakers, Inc.*, No. 12-9936, 2013 WL 1719035, at *1 (C.D. Cal. Apr. 18, 2013). The Lakers sent back a single text message confirming that his request had been received. *Id.* The fan responded by suing the team, alleging that its return message was sent by an ATDS. *See id.*

The San Diego Chargers, Buffalo Bills, and the Los Angeles Clippers have also been hit by TCPA lawsuits. *See Friedman v. LAC Basketball Club, Inc.*, No. 13-818, ECF No. 1 (C.D. Cal. Feb. 6, 2013); *Wojcik v. Buffalo Bills, Inc.*, No. 12-2414, ECF No. 1 (M.D. Fla. Oct. 25, 2012); *Story v. Chargers Football Co., LLC*, No. BC566896, Dkt. No. 1 (Cal. Super. Ct. Dec. 16, 2014).

Restaurants. Rubio's, a restaurant chain with locations throughout the Western United States, was sued for accidentally sending food-safety text-message alerts meant for Rubio's staff to a person whose new cell phone came with a number that had been previously assigned to a Rubio's employee. Instead of notifying Rubio's or blocking the number, the new user waited until he had received 876 texts and then sued Rubio's for $500,000. In response to the lawsuit, Rubio's cancelled its food-safety alert system. *In the Matter of Rubio's Restaurant, Inc.*, Petition for Expedited Declaratory Ruling ("Rubio's Petition"), at 1-2.[15]

Pharmacies. Pharmacies have been sued for calling consumers to remind them to pick up their prescriptions. *See, e.g.*, *Kolinek v. Walgreen Co.*, No. 13-4806, ECF No. 1 (N.D. Ill. July 3, 2013); *Thompson v. CVS Pharm., Inc.*, No. 14-2081, ECF No. 1 (M.D. Fla. Dec. 19, 2014).

Labor Unions. The SEIU was sued in connection with a calling campaign aimed at a hospital involved in a labor dispute. The hospital alleged that the union's technology, which facilitated

[15] *Available at* apps.fcc.gov/ecfs/document/view?id=7521768526.

local residents calling the hospital with messages of support for the union, was an ATDS. *See Ashland Hosp. Corp. v. Serv. Emps. Int'l Union Dist. 1199 WV/KY/OH*, 708 F.3d 737 (6th Cir. 2013).

Banks and Financial Services. Banks and financial-services companies are regularly sued for calling borrowers who have stopped making payments. For example, in a recent TCPA lawsuit filed against Bank of America, the plaintiff class claimed damages in excess of *$3.5 billion* for people who received text messages and calls related to unpaid mortgages and credit cards. *See Rose v. Bank of Am. Corp.*, No. 11-2390, ECF No. 1 (N.D. Cal. May 16, 2011). Capital One, Chase, HSBC, Discover, GE Capital, and Citibank have all also been sued, among others.

B. Extortionate TCPA Settlements Have Drained Hundreds Of Millions Of Dollars Out Of American Businesses.

The reality of TCPA class litigation is that defendants sued for using an ATDS are almost always forced to settle regardless of the merits. In an environment where the plaintiffs' bar is targeting businesses whose daily operations involve engaging with consumers and demanding $500 to $1,500 per call or text,

settlement is often the only feasible option. Of course, defendants can elect to defend the case on the merits—for example, by arguing that their equipment is not an ATDS—but the law in this area is hopelessly muddled and most defendants do not have a spare billion dollars lying around in case they lose.

These circumstances—unsettled law, draconian statutory penalties, and unscrupulous plaintiffs' lawyers—create a fertile breeding ground for coercive settlements. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.").

This is precisely what has happened here. Seeing eight figures on a settlement check isn't even uncommon any more. In 2014, Capital One paid a whopping *$75.5 million* to settle TCPA class actions filed by cardholders. From Jiffy Lube ($46.6 million), to Chase Bank ($34 million), to Papa John's ($16.5 million), to

Bank of America ($32 million), to Lucky Jeans ($9.9 million), to HSBC ($40 million), to Sprint ($5.5 million), to Walgreen's ($11 million), to Steve Madden ($10 million), to Sallie Mae ($24.1 million), to Dun & Bradstreet ($4.9 million), to Google ($6 million), American businesses have been forced to divert enormous sums away from hiring workers, or from investing in research, or from developing new products, to settling litigation for making a call or sending a text message—sometimes for doing nothing more sinister than *dialing a wrong number*.

Although the costs involved in these cases are high enough to hit the bottom line of even the largest company, frivolous class actions "particularly hit[] small business because it is the small business that gets caught up in the class action web without the resources to fight." 151 Cong. Rec. 1664 (Feb. 8, 2005) (statement of Sen. Grassley); *see also* U.S. Chamber Institute for Legal Reform, Tort Liability Costs for Small Business 9 (July 2010) (noting that small businesses took in only 22% of total revenue but bore the brunt of 81% of business-tort liability costs); NFIB, National Small Business Survey vol. 5, issue 2 (2005) (noting that,

on average, the cost of settling a legal dispute consumes 10% of a small business owner's salary). Small businesses, of course, provide 55% of all jobs in the United States and have created 66% of all new jobs since the 1970s.[16]

To be clear, these windfalls are going to the lawyers, not the consumers on whose behalf these lawsuits are supposedly being brought. In 2014, the average consumer received $4.12 from a TCPA class-action settlement, while the plaintiffs' lawyers received an average of $2.4 million.[17] In the Capital One settlement referenced above, the plaintiffs' lawyers walked away with $15 million; class members who filed claims received about $35 each. *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 787, 809 (N.D. Ill. 2015). Similarly lopsided fee awards have been approved in TCPA cases against Steve Madden ($1.39 million to class counsel, $49.19 for each potential

[16] U.S. Small Business Administration, Small Business Trends Impact, *available at* https://www.sba.gov/content/small-business-trends-impact.

[17] Adonis Hoffman, Sorry Wrong Number, Now Pay Up (Wall Street Journal, June 15, 2015).

claimant),[18] Lucky Jeans ($2.4 million to class counsel, $45.68 for each class member),[19] Google ($1.5 million to class counsel, $15 per class member),[20] Jiffy Lube ($4.75 million to class counsel, $17.29 in Jiffy Lube coupons for each class member),[21] and Papa John's ($2.45 million to class counsel, and $50 and a pizza coupon for each class member).[22] Claim rates among class members in TCPA cases are typically in the single digits—meaning that most of the alleged "victims" do not even care enough to claim their compensation.

C. A Whole Cottage Industry Has Sprung Up To Profit From TCPA Litigation.

Because the prospect of multimillion-dollar fee awards is so alluring, lawyers have stampeded to sign up "victims" and file these cases. In fact, potential plaintiffs are so valuable that

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[18] *Ellison v. Steve Madden, Ltd.*, No. 11-5935, ECF No. 73 (C.D. Cal. May 7, 2013).
[19] *Robles v. Lucky Brand Dungarees, Inc.*, No. 10-4846, ECF No. 105 (N.D. Cal. May 10, 2013).
[20] *Pimental v. Google, Inc.*, No. 11-2585, ECF No. 107 (N.D. Cal. June 26, 2013).
[21] *In re Jiffy Lube Int'l, Inc. Text Spam Litig.*, No. 11-2261, ECF No. 32 (S.D. Cal. Feb. 20, 2013).
[22] *Agne v. Papa John's Int'l, Inc.*, No. 10-1139, ECF No. 389 (W.D. Wash. Oct. 22, 2013).

lawyers will go to extreme lengths to find them. In a series of cases involving the TCPA's junk-fax provisions, for example, one firm has been chastised by multiple courts for potential ethical violations associated with using a confidential database produced in discovery in one lawsuit to solicit new clients and file hundreds of additional class actions. *Reliable Money Order, Inc. v. McKnight Sales Co.,* 704 F.3d 489 (7th Cir. 2013); *Compressor Eng'g Corp. v. Mfrs. Fin. Corp.*, 292 F.R.D. 433 (E.D. Mich. 2013).

Some lawyers have launched mobile applications to easily convert texts and calls into cash-generating lawsuits. One plaintiffs' firm that has filed hundreds of TCPA lawsuits recently launched a mobile app called "Block Calls Get Cash," which delivers information about cell-phone calls to the law firm so that it can file TCPA lawsuits against the callers.[23] "Laugh all the way to the bank," the app's website boasts.[24] Not to be outdone, another firm was right on its heels with its own app, the less-creatively-named "Stop Calls Get Cash," which enables users to

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[23] *See* Block Calls Get Cash, How it Works, http://www.blockcallsgetcash.com/how-it-works/.

[24] Block Calls Get Cash, http://www.blockcallsgetcash.com/.

"capture evidence" and claims that users will get "up to $1000 for harassment, and $500 to $1500 for each illegal robocall."[25]

To be fair, the lawyers are not entirely to blame. Plaintiffs themselves can be equally opportunistic. One litigant in California, for example, deliberately maintained a phone number (999-9999) that he knew would get thousands of wrong-number calls per year so that he could make money on TCPA lawsuits. *See Kinder v. Allied Interstate, Inc.*, No. E047086, 2010 WL 2993958, at *1 (Cal. Ct. App. Aug. 2, 2010). He converted what had been a pager number to a stand-alone voicemail account and *hired staff* to log every wrong-number call he received, issue demand letters to purported violators, and negotiate settlements. *Id.* He filed hundreds of TCPA lawsuits over the course of four years before the court branded him as a vexatious litigant. *Id.*

Likewise, the plaintiff who sued Rubio's over misdirected food-safety texts waited until he had received hundreds of texts—racking up hundreds of thousands of dollars in statutory

[25] Stop Calls Get Cash, http://www.stopcallsgetcash.com/.

damages—before notifying Rubio's of the problem. Rubio's Pet. at 3.

There is now an entire corner of the Internet dedicated to advertising how people can make money using the TCPA. For example, a would-be plaintiff can enroll in an online course called "Make Money from Telemarketers – TCPA," taught by a man who brags that "[o]ver a 3-year period I made a living soley [sic] off of telemarketers calling me" and offering to share his "techniques" with his virtual students.[26] The list goes on. Websites blare that consumers can "Get Big Money From Companies Conducting Unsolicited Phone Calls.[27] They even provide specific advice on how consumers can increase their haul by tricking callers into calling back repeatedly in order to rack up violations.[28]

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[26] https://www.udemy.com/learn-how-to-make-money-every-time-a-telemarketer-calls-you/.

[27] http://www.local10.com/news/get-big-money-from-companies-conducting-unsolicited-phone-calls/32008544.

[28] How To Sue A Telemarketer, http://www.impactdialing.com/2012/05/how-to-sue-a-telemarketer/.

II. The Commission Created This Problem, And The 2015 Order Will Make It Worse.

A. The Commission's 2003 Ruling Created Confusion About The ATDS Definition.

The Commission's 2003 ruling relating to predictive dialers was the spark that ignited the TCPA litigation firestorm. Petitioners' Brief describes this ruling; we will not repeat it. *See* Pet. Br. at 6-7. The problem with the 2003 ruling, in a nutshell, was that the Commission concluded that at least some predictive dialers fell within the ATDS definition—*but did not clearly say why this was so*.[29] The lack of clarity in that ruling created the opening for plaintiffs' lawyers to argue that the Commission must

[29] We agree with Petitioners that the best reading is that equipment *that otherwise qualifies* as an ATDS is not exempt from the statute just because it has predictive-dialing software attached. This would explain why the Commission wrote that "to exclude from these restrictions (*i.e.*, the TCPA) equipment that use predictive dialing software" would lead to an "unintended result"—namely ATDS calls to cell phones and emergency lines would be permissible if the ATDS was "paired with predictive dialing software and a database of numbers, but prohibited when the equipment operates independently of such lists and software packages." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd. 14014, 14092-93 (2003).

have changed the definition of ATDS in order to sweep in predictive dialers.

The 2003 ruling was so confusing that courts presiding over these cases landed all over the map on the issue of what equipment qualifies as an ATDS. Some courts stayed true to the statutory definition. *See, e.g.*, *Marks v. Crunch San Diego, LLC*, 55 F. Supp. 2d 1288, 1291 (S.D. Cal. 2014); *Hunt v. 21st Mortg. Corp.*, No. 12-2697, 2013 WL 5230061, at *2 (N.D. Ala. Sept. 17, 2013). Other courts, however, thought that the Commission had eliminated the statutory requirement that an ATDS have the capacity to use a random or sequential number generator. *E.g.*, *Johnson v. Yahoo!, Inc.*, Nos. 14-2028, 14-2753, 2014 WL 7005102, at *3 (N.D. Ill. Dec. 11, 2014).

Some courts pieced together *new* ATDS definitions out of fragments from the 2003 Order. *E.g.*, *Gragg*, 995 F. Supp. 2d at 1192 ("Equipment is an ATDS if it either has 'the capacity to store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers' . . . or is a predictive dialer with the capacity to dial telephone numbers from

a list without human intervention."); *Nunes v. Twitter, Inc.*, No. 14-843, 2014 WL 6708465, at *1 (N.D. Cal. Nov. 26, 2014) (defining ATDS as "'any equipment' with the capacity to 'generate numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated or come from calling lists'").

The less courts considered themselves bound by the statute, the wider the door opened for lawsuits against businesses for using dialing equipment to contact specific consumers for specific reasons—equipment that would never trigger liability under the TCPA as it was written.

B. The 2015 Order Will Exacerbate The Problem Of Runaway TCPA Litigation.

The Commission's 2015 Order will only exacerbate this situation. The Order expands the definition of ATDS to the point of meaninglessness by stating that the word "capacity," as used in the ATDS definition, does not refer to what the equipment can currently do, but instead "includes its potential functionalities," *i.e.*, what the equipment could theoretically do if its software were modified or other components were added to it. Order at ¶ 17. The

Order thus arguably makes *every* technology an ATDS because, as the Commission admits, the "potential functionality" of any software-controlled equipment is unlimited. *Id.*, ¶ 16 n.63. The Order's weak gesture towards a limiting principle—*i.e.*, that there "must be more than a theoretical potential that the equipment could be modified to satisfy the autodialer definition," *id.*, ¶ 18—is too abstract to function as useful guidance.

The Order is also hopelessly ambiguous about what an ATDS must have the "capacity" to do. The statute, of course, answers this question clearly: An ATDS must have the capacity to store or produce numbers to be called, using a random or sequential number generator, and dial those numbers. *See* 47 U.S.C. § 227(a)(1). However, the Order suggests at one point that the "equipment need only have the capacity *to store or produce numbers*." Order, ¶ 12 (emphasis added). Then later it implies that an ATDS need only have the capacity to "*store and dial telephone numbers*." *Id.*, ¶ 16 (emphasis added).

Adding still another confusing layer, the Order also suggests that "human intervention" is an "element" of the ATDS definition

and implies that the ability to "dial thousands of numbers in a short period of time" may also be required—but the statute says nothing about "human intervention" or dialing thousands of numbers. *See* 47 U.S.C. § 227(a)(1). To the extent these statements are intended as pronouncements about the definition of ATDS and not merely the result of hasty drafting, they are impermissible. The Commission does not have the authority to change the statute that Congress wrote. *See La. Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 376 (1986) ("As we so often admonish, only Congress can rewrite [a] statute.").

The Order's interpretation of ATDS is replete with practical problems. It does not make sense, it is internally inconsistent, and it provides no workable guidance. Then, after irreparably muddying the issue, the Order dumps the problem onto the courts, announcing that it will not decide "the exact contours of the autodialer definition." Order, ¶ 18. This is a recipe for another five or six years of pointless litigation and coercive settlements.

Litigation epidemic aside, the Commission's whole approach is wrong. The "exact contours" of the ATDS definition are literally

right there in the statute. 47 U.S.C. § 227(a)(1). Businesses trying to comply with the law and courts presiding over TCPA cases should be using the statute as guidance, not this—as Petitioners aptly put it—"mush." Pet. Br. at 37.

Moreover, the ordinary meaning of "capacity" refers to what the equipment can do *in the form in which it currently exists*. It has nothing to do with "theoretical potential."[30] We will not belabor this point, since it is covered in Petitioners' Brief, other than to note that if Congress had meant for all dialing technology to qualify as an ATDS, the statute would say that—yet it doesn't. The very idea that Congress, back in 1991, deliberately used the word "capacity" in an idiosyncratic manner to smuggle all dialing

[30] Even the dictionary definition of "capacity" that the Commission quoted—*i.e.*, "the potential or suitability for holding, storing, or accommodating"—refers to what the thing in question is *currently capable* of storing, holding, or accommodating. We know this because the example the Commission's *own source* gives to illustrate that definition is "seating capacity" which refers to the number of people that can be seated in a space *as it currently exists*, not the number of people that could potentially be seated in the space *if the space was made larger*. *See* Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/capacity (last visited Nov. 30, 2015).

technology short of a rotary phone into the ATDS definition is, on its face, just not plausible.

III. Expanding The Definition of ATDS Is Not Necessary To Protect Consumers From Harassing Phone Calls.

The Commission clearly believed that expanding the ATDS definition was necessary to protect consumers from a barrage of unwanted telemarketing and "robocalls" by companies whose equipment would not fall within the statute as written. Of course, regulatory agencies are bound by the statutes they administer and are not entitled to write new laws to achieve their desired policy outcomes. *La. Pub. Serv. Comm'n*, 476 U.S. at 374-75.

That said, expanding the definition of ATDS is not necessary to protect consumers from annoying or harassing phone calls. Other statutes already do that. For example, the TCPA's Do-Not-Call Provisions and related regulations restrict telemarketing sales calls, provide a mechanism for consumers to opt out of unwanted telemarketing calls, and allow consumers to sue telemarketers who fail to comply for $500 per call. *See* 47 U.S.C. § 227(c)(1)-(5); 47 C.F.R. § 64.1200(c). Debt collectors are typically listed alongside telemarketers as abusive robocallers who need to

be reined in by the TCPA, but there are already laws in place that limit the time, place, and manner in which debt collectors can call consumers, and there are already statutes that allow consumers to sue debt collectors and recover statutory penalties in the event of a violation. *See* 15 U.S.C. §§ 1692c, 1692d(5), 1692k. Expanding the definition of ATDS is not required to restrict these calls.

Expanding the definition of ATDS also will not do anything to stop shady text spammers or illegal telemarketing. As Commissioner Pai observed, companies that engage in these illegal practices are not frequent targets of TCPA litigation because they do not have the deep pockets that law-abiding businesses do. Pai Dissent at 113. If anything, the Order will just discourage the communications consumers do actually want—security alerts, invitations to group messages, package-delivery notifications, flight-status information, and so on—because companies will not want to incur the increased litigation risk. This result is the opposite of what Congress intended when it enacted the TCPA.

CONCLUSION.

Unless this Court grants the petition and reverses the Commission's Order, which removed any real checks on abusive TCPA litigation, these kinds of suits will proliferate endlessly, defendants will be compelled into more and more coercive settlements, and legitimate uses of dialing technology and text messaging by innovating companies and their users will be continue to be significantly threatened.

Respectfully submitted,

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Certificate of Compliance

I certify that, pursuant to Rules 29(c)(7) and 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 5,285 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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Certificate of Service

I hereby certify that on December 2, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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