No. 19-1738

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ALI GADELHAK, individually and on behalf of all others similarly situated,
Plaintiff-Appellant,

v.

AT&T SERVICES INC.,
Defendant-Appellee.

Appeal from Judgment of the United States District Court for the Northern District of Illinois, Eastern Division, No. 1:17-CV-01559 (Chang, J.)

BRIEF OF APPELLEE AT&T SERVICES INC.

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-1738

Short Caption: Ali Gadelhak v. AT&T Services, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

AT&T Services, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Mayer Brown LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

AT&T Inc. and AT&T Teleholdings, Inc.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

No publicly held company owns more than 10% of the stock of AT&T Inc., AT&T Services, Inc.'s parent

Attorney's Signature: s/ Andrew J. Pincus Date: 8/15/2019

Attorney's Printed Name: Andrew J. Pincus

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Attorney's Signature: s/ Archis A. Parasharami Date: 8/15/2019

Attorney's Printed Name: Archis A. Parasharami

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JURISDICTIONAL STATEMENT

AT&T Services Inc. ("AT&T") agrees that the jurisdictional statement included in the opening brief of Plaintiff-Appellant Ali Gadelhak ("Gadelhak") is complete and correct.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Telephone Consumer Protection Act ("TCPA") defines an "automatic telephone dialing system" ("ATDS") as "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 U.S.C. § 227(a)(1) (emphasis added). The district court granted summary judgment to AT&T because it held that the equipment used to send survey texts to Gadelhak's cellular telephone number did not constitute an ATDS, and accordingly there was no violation of the TCPA as a matter of law.

Three issues are presented by Gadelhak's appeal:

1. Whether equipment that only has the capacity to dial numbers from a preexisting list of phone numbers—rather than creating its own list of random or sequential numbers— qualifies as an ATDS under the plain meaning of the TCPA's statutory definition.
2. Whether Federal Communications Commission ("FCC") orders from 2003, 2008 and 2013 that purported to expand the statutory definition

of an ATDS bind courts in light of the D.C. Circuit's decision in *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018), and the Supreme Court's decision in *PDR Network, LLC v. Carlton & Harris Chiropractic Inc.*, 139 S. Ct. 2051 (2019).

3. Whether the district court properly granted summary judgment on the basis of undisputed record evidence demonstrating that the equipment used to send the survey-related text messages had only the capacity to send messages to a list of phone numbers obtained from AT&T's account records.

STATEMENT OF THE CASE

The TCPA makes it unlawful "to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system [ATDS] . . . to any telephone number assigned to a . . . cellular telephone service . . . ." 47 U.S.C. § 227(b)(1)(A)(iii). The statute defines an ATDS as "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." *Id.* at § 227(a)(1) (emphasis added).

AT&T uses a program called the AT&T Customer Rules Feedback Tool ("TACRFT") to request (via text message) that customers of its corporate affiliates

respond to customer-service related surveys. SA21, ¶ 4. These affiliates include AT&T Mobility (for wireless service), DIRECTV (for satellite television service), and other AT&T providers (for "U-verse" TV, Voice and Internet service). SA21, ¶ 5. The surveys are intended to obtain feedback from customers on their interactions with the affiliates' service representatives. SA21, ¶¶ 4, 6.

After a customer has a qualifying interaction with a service representative, the TACRFT program selects the first eligible cellular telephone number listed on the customer's account to receive a survey. SA22, ¶ 7; Resp. to Plaintiff's SA36-37, ¶ 11. No surveys are sent to any numbers other than those listed in the AT&T customer databases as the contact numbers for the customers' accounts. Because his telephone number was listed as a contact phone number on an AT&T customer account, SA22, ¶ 7; SA44, ¶ 41. Gadelhak received one of those surveys. SA28, ¶ 8.

AT&T contracts with a vendor, Message Broadcast, to transmit the survey messages. SA24, ¶ 13. Before a set of survey messages is sent out, the TACRFT team at AT&T receives files drawn from the various customer account systems of its affiliates. That data shows which AT&T accounts had qualifying interactions with a service representative. SA23, ¶ 9.

The TACRFT program involves different survey programs developed for the assorted AT&T businesses. Each survey program is set up with particular business

requirements. SA23, ¶ 10. The business requirements developed for each program determine the rules used to filter the list of customer numbers into a final list of those individuals who receive surveys. *Id.* However, no survey program obtains numbers from any source other than AT&T's customer records. SA22, ¶ 7.

Once the appropriate business requirement rules are applied, a "flat file"—essentially a database—is created that contains a list of numbers to be called. SA23, ¶ 11. The flat files contain the telephone numbers drawn from AT&T's customer account systems, along with a unique identifier that can be used to track the survey, including the customer's responses. *Id.*

The complete flat file is sent from AT&T to Message Broadcast. SA24, ¶ 14. After Message Broadcast receives the file, an employee of that company compares the flat file to relevant "do-not-call" and "stop" lists to ensure that texts are not sent to individuals who requested not to receive such communications. SA24, ¶ 15. After the phone numbers of such individuals are removed from the calling list, the Message Broadcast employee then uploads the data into a computer system and instructs the system to direct the appropriate survey to the remaining numbers on the list. SA25, ¶ 16. That system then uses a short-message peer-to-peer protocol to send the survey text message to the recipient's number. SA25, ¶ 17. The TACRFT survey system, thus, is a targeted, *list-based* system that does not (and cannot) generate numbers to receive texts from any source other than those numbers

already listed in AT&T's customer records.

On July 15, 2016, Mr. Gadelhak received text messages seeking his response to a survey. SA31, ¶ 29. He subsequently filed this action, in February 2017, alleging that the texts he received violated the TCPA, and sought to represent a nationwide class of recipients of similar text messages. ECF No. 1 (Compl.) at ¶ 34-48.

AT&T moved for summary judgment on the ground that the system used to send the TACFRT surveys does not constitute an ATDS because it only had the capacity to dial numbers based on a list provided to the equipment—not the capacity to generate numbers randomly or sequentially. ECF Nos. 50-52. Gadelhak later filed a cross motion for summary judgment on the same issue. ECF Nos. 66-67.

On March 29, 2019, the district court granted AT&T's motion and denied Gadelhak's. SA2-18. The district court analyzed the statutory and regulatory background of the TCPA, including the history of FCC orders enlarging the types of equipment covered by the TCPA. SA6-11. The district court held that the D.C. Circuit's recent decision in *ACA International* invalidated the FCC's prior orders. SA9-11. In particular, it reasoned that, in *ACA International*, the D.C. Circuit had considered and rejected an argument from the FCC that review of such orders was not timely. SA10. The district court concluded that *ACA International*'s

reasoning—which led the D.C. Circuit to declare arbitrary and capricious the FCC's 2015 order giving a broad reading to the TCPA's ATDS definition—applied equally to earlier FCC orders and, thus, *ACA International* invalidated those earlier orders as well. SA11.

The district court then analyzed the statutory text defining an ATDS to determine whether the equipment used to send the text messages to Gadelhak constituted an ATDS. SA11-17. The district court first looked to the statute's "plain meaning," and held that the phrase "using a random or sequential number generator" in the definition of an ATDS "describes a required characteristic of the *numbers* to be dialed by an ATDS—that is, *what* generates the numbers." SA12-13.

Applying that reading of the term, the district court held that a list-based system like the one used by Message Broadcast to send the survey texts here is not an ATDS, because such a system does not generate random or sequential numbers, but rather sends texts only to a list of numbers that is generated from preexisting customer databases. SA16-17. The Court also rejected Gadelhak's argument that the evidence of record showed that the dialing system was capable of using a random number generator to produce telephone numbers to be called. SA16-17.

SUMMARY OF THE ARGUMENT

In a carefully reasoned opinion, the district court correctly interpreted the

meaning of the term "automatic telephone dialing system" as defined in the TCPA. Based on that interpretation and the undisputed evidence in the record, the district court correctly concluded that the equipment used to send the text messages to Gadelhak was not an ATDS, and therefore properly granted summary judgment in favor of AT&T.

1. The TCPA defines an ATDS as equipment that 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 U.S.C. § 227(a)(1). Although courts have divided over how to interpret that definition, the better-reasoned decisions—including the ruling below—explain that "the most sensible reading of the provision is that the phrase '***using a random or sequential number generator***' describes a required characteristic of the *numbers* to be dialed by an ATDS." SA13 (emphasis added).

This construction flows naturally from basic principles of grammar: The phrase "using a random or sequential number generator" necessarily modifies "telephone numbers to be called," which is the object of ***both*** of the verbs in the definition— "store" *and* "produce." *Pinkus v. Sirius XM Radio, Inc.*, 319 F. Supp. 3d 927, 937-38 (N.D. Ill. 2018).

That is why, as another district court has explained, "a device meets the definition of an ATDS only when it is capable of randomly or sequentially

producing, or randomly or sequentially storing telephone numbers." *Thompson-Harbach v. USAA Fed. Savings Bank*, 359 F. Supp. 3d 606, 624 (N.D. Iowa 2019). The Third Circuit similarly has concluded that, to qualify as an ATDS, the equipment must have the capacity to "randomly or sequentially generat[e] telephone numbers, and dial[] those numbers." *Dominguez v. Yahoo Inc!*, 894 F.3d 116, 120-21 (3d Cir. 2018).

Because the equipment used by the TACRFT system can only dial numbers from a list of numbers inserted into the system (and cannot randomly or sequentially generate its own list of numbers), that system does not fall within the statutory definition.

Gadelhak urges this Court to follow a different approach in interpreting the ATDS definition—exemplified by the Ninth Circuit's decision in *Marks v. Crunch San Diego LLC*, 904 F.3d 1041 (9th Cir. 2018). The *Marks* court held that the phrase "using a random or sequential number generator" does not modify the verb "store," and therefore (according to the Ninth Circuit) the ATDS definition encompasses all equipment that has the capacity to store any list of numbers (no matter how generated) and then dial them automatically. *Id.* at 1052. But "the *Marks* court's decision [is] erroneous as a matter of statutory construction" because, among other things, it would require "[r]earranging the text" of the statute. *Thompson-Harbach*, 359 F. Supp. 3d at 624, 626.

Moreover, that expansive construction is impossible to square with the D.C. Circuit's decision in *ACA International*, which held that the FCC's reading of the term ATDS was arbitrary and capricious because it would sweep in millions of smartphones used by citizens every day. *Marks* suffers from the same problem: any smartphone has the ability to "store" a list of numbers and dial them automatically. Yet "[i]t cannot be the case that every uninvited communication from a smartphone infringes federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in- fact." *ACA Int'l*, 885 F.3d at 698.

2. Gadelhak also argues that the district court should have deferred to earlier FCC orders stating that the ATDS definition encompassed a broad range of equipment, including (according to Gadelhak) any equipment with the capacity to dial from a list of numbers, even if the numbers could not be generated randomly or sequentially. Although courts are divided on the issue, the better reasoned decisions hold that those prior FCC orders were invalidated by the D.C. Circuit's decision in *ACA International*. The district court was required to—and did—interpret the meaning of the term ATDS according to the statute's plain language.

3. Finally, Gadelhak contends that the TACRFT system has the capacity to generate numbers randomly. But his argument rests on a mistaken premise wholly unsupported by the record. He points to testimony from Kerry Lyon (an AT&T employee who oversees the TACRFT program) that Mr. Lyon was

uncertain how the TACRFT system chose where to send the text when more than one number appeared on an account. But after reviewing the system's code, Mr. Lyon filed an affidavit clarifying that, in fact, the system always selects the first eligible number on the account, not a random number. SA36-37, ¶ 11. In light of that uncontroverted clarification, there is no genuine dispute of fact that the system lacks the capacity to generate phone numbers randomly.

STANDARD OF REVIEW

This Court reviews an order granting summary judgment de novo. *Vallone v. CNA Fin. Corp.*, 375 F.3d 623, 631 (7th Cir. 2004). A grant of summary judgment is appropriate as long as the movant shows "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elect. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Thus, "only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment." *Id.*

ARGUMENT

I. The Statutory Definition of an ATDS Does Not Include Equipment That Has Only The Capacity To Dial From a List of Numbers.

"Statutory interpretation . . . begins with the text[.]" *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016); *see also Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494

U.S. 827, 835 (1990). The TCPA defines an ATDS as equipment that 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 U.S.C. § 227(a)(1). Thus, as the D.C. Circuit put it, "a device constitutes an ATDS if it has the capacity to perform both of two enumerated functions: 'to store or produce telephone numbers to be called, using a random or sequential number generator;'" and "'to dial such numbers.'" *ACA Int'l*, 885 F.3d at 701 (quoting 47 U.S.C. § 227(a)(1)).

Critical to the resolution of this appeal is the role of the phrase "using a random or sequential number generator" in determining whether equipment qualifies as an ATDS. The district court held that "the most sensible reading of the provision is that the phrase 'using a random or sequential number generator' describes a required characteristic of the *numbers* to be dialed by an ATDS—that is, *what* generates the numbers." SA13.

As we explain below, the district court's interpretation is correct. A system that has only the capacity to send text messages to a particular list of numbers (like the TACRFT system)—and does not and cannot generate random or sequential numbers—does not qualify as an ATDS.

A. The Phrase "Using A Random or Sequential Number Generator" Modifies the Term "Telephone Numbers To Be Called" And Thus Applies To Both The Verbs "Store" and "Produce."

"In determining the meaning of a statutory provision, we look first to its language, giving the words used their ordinary meaning." *Artis v. D.C.*, 138 S. Ct. 594, 603 (2018) (internal citations and quotations omitted). Where "the statute's language is plain" the analysis should begin "with the language of the statute itself, and that is also where the inquiry should end." *Puerto Rico v. Franklin California Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (internal citations omitted).

Here, the plain meaning of the statute, informed by basic rules of punctuation and grammar, permits only one interpretation. As noted above, the critical language is the TCPA's definition of an ATDS, which covers equipment with 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 U.S.C. § 227(a)(1) (emphasis added).

In assessing this language, punctuation matters. The Supreme Court has explained that a statute's meaning "will typically heed the commands of its punctuation." *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993). The placement of the comma answers how to interpret the key text—"to store or produce telephone numbers to be called, using a random or

sequential number generator." This passage has a parallel structure: two linked verbs ("store ***or*** produce") that share a common object ("numbers to be called"), and a dependent modifier ("using a random or sequential number generator") that is set off by a comma.

Ordinary principles of style and usage confirm this point. "When a dependent clause precedes the main, independent clause, it should be followed by a comma." *The Chicago Manual of Style* § 6.24 (17th ed. 2017). Here, the phrase "to store or produce telephone numbers to be called" is dependent on the clause "using a random or sequential number generator," and the term "using a random or sequential number generator" thus modifies the phrase "telephone numbers to be called" (and, by extension, both verbs in the statute, to store and to produce).

To constitute an ATDS, therefore, a system must have the capacity to either (i) produce telephone numbers randomly or sequentially on its own, and then dial them; or (ii) store telephone numbers that have been generated randomly or sequentially and then dial them later.

The better-reasoned lower court decisions reach that conclusion. One district court explained that "[t]he comma separating 'using a random or sequential number generator' from the rest of subsection (a)(1)(A) makes it grammatically unlikely that the phrase modifies only 'produce' and not 'store.'" *Thompson-Harbach*, 359 F. Supp. 3d at 625 (internal citation omitted). Another court

recognized—as the district court did here—that "[t]he phrase 'using a random or sequential number generator' applies to the numbers to be called and an ATDS must either store or produce those numbers (and then dial them)." *Johnson v. Yahoo Inc!*, 346 F. Supp. 3d 1159, 1162 (N.D. Ill. 2018).

Judge Feinerman explained this conclusion concisely:

> Given its placement immediately after "telephone numbers to be called," the phrase "using a random or sequential number generator" is best read to modify "telephone numbers to be called," describing a ***quality of the numbers an ATDS must have the capacity to store or produce***. …

Pinkus, 319 F. Supp. 3d at 938 (emphasis added). Therefore, "[c]urated lists developed without random or sequential number generation capacity fall outside the statute's scope." *Johnson*, 346 F. Supp. 3d at 1162.[1]

B. Gadelhak's Construction of The Statute, Based Largely On The Ninth Circuit's Decision In *Marks*, Is Inconsistent With The Plain Text.

Gadelhak (at 19-20) and his *amici* urge this Court to adopt the interpretation

[1] *See also Fleming v. Assoc. Credit Services*, 342 F. Supp. 3d 563, 576 (D. N.J. 2018) ("Does a system that dials numbers from a list that was not randomly or sequentially generated when the list was created qualify as an ATDS? With only the statutory text to guide me, I am convinced that the answer is no."); *Snow v. Gen. Elec. Comp.*, 2019 WL 2500407, at *6 (E.D.N.C. June 14, 2019) ("plaintiff must allege facts permitting an inference that defendants called her with equipment that has the capacity to store or produce numbers using a random or sequential number generator."), *appeal pending*, No. 19-1724 (4th Cir.); *Adams v. Safe Home Security*, 2019 WL 3428776, at *3 (N.D. Tex. July 30, 2019) ("'using a random or sequential number generator' modifies both 'to store' and 'to produce.'").

of the statute endorsed by the Ninth Circuit in *Marks*, 904 F.3d 1041, and some other courts, which hold that random or sequential number generation is not necessary for equipment to constitute an ATDS.[2]

That construction, however, cannot be squared with the statute's plain text. Importantly, the panel in *Marks* itself did not rest its decision squarely on the statutory text, acknowledging that it had "struggl[ed] with the statutory language" and finding the definition of an ATDS "not susceptible to a straightforward interpretation based on the plain language alone." 904 F.3d at 1051. In fact, the *Marks* analysis is inconsistent with the statutory language.

First, Gadelhak (at 20) states that the *Marks* court "found that the presence of the disjunctive 'or' indicates that an ATDS need not have the capacity to *produce* telephone numbers at all." But that assertion effects a rearrangement of the statutory language, as the Ninth Circuit appeared to recognize, to instead "provide that the term [ATDS] means equipment which has the capacity (1) to

[2] Many of the other cases cited by Gadelhak simply accept the reasoning of *Marks* wholesale. *See, e.g.*, *Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1151 (9th Cir. 2019); *Adams v. Ocwen Loan Servicing, LLC*, 366 F. Supp. 3d 1350; 1355 (S.D. Fla. 2018).

Gadelhak also cites (at 20) *Heard v. Nationstar Mortgage, LLC*, but that court did not address what the phrase "using a random or sequential number generator" might mean in the context of the TCPA, and instead chose to depart from the text of the statute for a broad interpretation because the TCPA is a "remedial statute" that should be interpreted broadly. 2018 WL 4028116, at *5 (N.D. Ala. Aug. 23, 2018).

store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers." *Marks*, 904 F.3d at 1052. In other words, the Ninth Circuit determined that the "using a random or sequential number generator" modifier should apply only to the numbers that are the object of the second verb "produce," and not the numbers that are the object of the first verb "store."

Nothing in the text or ordinary rules of statutory interpretation support that asymmetrical reading—which makes the word "store" a grammatical orphan. As Judge Feinerman has explained, "store" is a "transitive verb" and, as such, "requires an object." *Pinkus*, 319 F. Supp. 3d at 937 (citing *Merriam-Webster* (2018); *Oxford English Dictionary* (2018)). Given the structure of the statute, the object of the verb "store" can only be "telephone numbers to be called." *Id.*

These principles of grammar are well established rules of statutory interpretation. The Supreme Court has explained that, when interpreting modifiers set off by commas, "the most natural way to view the modifier is as applying to the entire preceding clause." *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1077 (2018).

Numerous courts of appeals similarly recognize that the "use of a comma to set off a modifying phrase from other clauses indicates that the qualifying language is to be applied to ***all*** of the previous phrases ***and not merely the immediately***

preceding phrase." *Elliot Coal Mining Co. v. Dir., Office of Workers' Comp. Programs*, 17 F.3d 616, 630 (3d Cir. 1994) (emphasis added); *accord Bingham, Ltd. v. United States*, 724 F.2d 921, 925-926 n.3 (11th Cir. 1984) (same); *see also, e.g.*, *Am. Int'l Grp., Inc. v. Bank of Am. Corp.*, 712 F.3d 775, 782 (2d Cir. 2013) ("When a comma is included, . . . the modifier is generally understood to apply to the entire series."); *Sobranes Recovery Pool I, LLC v. Todd & Hughes Const. Corp.*, 509 F.3d 216, 223 (5th Cir. 2007) (when "there is a serial list followed by modifying language that is set off from the last item in the list by a comma, this suggests that the modification applies to the whole list and not only the last item.").

Rather than following this straightforward rule, the Ninth Circuit took an approach that results in "a grammatically incongruous sentence structure." *Adams*, 2019 WL 3428776, at *4. If—as Gadelhak asserts—the words "to store" are severed from the rest of Section 227(a)(1)(A), the result would be to "define an ATDS, in part, as a device that has the capacity 'to store … and to dial such numbers.'" *Id.* But "[t]his interpretation does not make sense because, as a transitive verb, 'to store' requires an object." *Id.* And the logical object of "to store" is "telephone numbers to be called, using a random or sequential number generator." *See id.* (explaining that, under Fifth Circuit precedent, "a transitive verb requires an object and a clause modifying that object must be read in

conjunction with the transitive verb") (citing *Cruz v. Abbott*, 849 F.3d 594, 599 (5th Cir. 2017)).

Second, Gadelhak argues (at 22-23) that the phrase "using a random or sequential number generator" cannot modify the phrase "telephone numbers to be called" because telephone numbers are "inert objects" and do not "do anything." But as Judge Feinerman explained in *Pinkus*, "the phrase 'using a random or sequential number generator' indicates that a number generator must be used to do *something* relevant to the "telephone numbers to be called—most naturally, either to generate the numbers themselves, or to generate the order in which they will be called." 319 F. Supp. 3d at 938. And the latter option makes sense "because the phrase 'using a random or sequential number generator' refers to the ***kinds of*** 'telephone numbers to be called' that an ATDS must have the capacity to store or produce"; "it follows that that phrase is best understood to describe the ***process by which those numbers are generated in the first place***." *Id.* (emphasis added).

Third, Gadelhak attempts to buttress the *Marks* analysis by claiming that its approach is necessary to avoid rendering the term "store" superfluous. Opening Br. 21 (citing *Gonzalez v. Hosopo Corp.*, 371 F. Supp. 3d 26, 34 (D. Mass. 2019)). That is incorrect; "store" plays an independent role from "produce" in delineating what counts as an ATDS.

Specifically, the term "store" in the statute properly ensures that companies cannot side-step the prohibitions on the use of ATDS by using a random or sequential number generator to generate numbers and then save them for dialing later. As Judge Shah has pointed out, "[t]he word "store" ensures that a system that generated random numbers and did not dial them immediately, but instead ***stored them for later automatic dialing*** (after, for example, some human intervention in activating the stored list for dialing) is an ATDS." *Johnson*, 346 F. Supp. 3d at 1162 n.4. And the district court here likewise concluded that "[t]he word ['store']'s presence in the provision ensures that systems that generate numbers randomly or sequentially, but then store the numbers for a period of time before ***dialing them later*** after a person has intervened to initiate the calls are still covered by the statutory definition of ATDS." SA16. "Store," therefore, is not superfluous, but sweeps additional equipment within the statute's scope.

In any event, as the district court correctly noted, even if the reference to "store" were rendered superfluous, "it would not, by itself, justify disregarding the plain meaning of the provision." SA15. That is because "'[t]he canon against surplusage is not an absolute rule.'" *Id.* (quoting *Marx v. General Revenue Corp.*, 568 U.S. 371, 385 (2013)).

Fourth, *Marks*' construction is directly contrary to the D.C. Circuit's holding in *ACA International v. FCC*.

In *ACA International*, the D.C. Circuit acted on consolidated petitions challenging the validity of several aspects of the 2015 FCC Order. Most relevant here, the D.C. Circuit rejected and "set aside"—*i.e.*, invalidated—the FCC's determination that in assessing whether equipment has the "capacity" to "store or produce telephone numbers to be called, using a random or sequential number generator," the "'capacity' of calling equipment 'includes its potential functionalities' or 'future possibility,' not just its 'present ability.'" *ACA Int'l*, 885 F.3d at 695, 703.

The court reasoned that if a device has the "capacity" to be an ATDS based only on potential functionality "that could be added through app downloads and software additions, and if smartphone apps can introduce ATDS functionality into the device, it follows that ***all smartphones***" are an ATDS. *Id.* at 697 (emphasis added). That, in turn, would mean that "every smartphone user violates federal law whenever she makes a call or sends a text message without advance consent." *ACA Int'l*, 885 F.3d at 697.

For that reason, the D.C. Circuit held that the FCC's interpretation of "capacity" was "unreasonably, and impermissibly, expansive"—because "[n]othing in the TCPA countenances concluding that Congress could have contemplated" that the TCPA's restrictions would apply "to the most commonplace phone device used every day by the overwhelming majority of

Americans." *Id*. at 699-700. Put simply, the D.C. Circuit explained, any interpretation of the TCPA that would result in treating smartphones as an ATDS "is utterly unreasonable." *Id*. at 699 (quotation marks and citation omitted).

But the *Marks* court's broad interpretation similarly would encompass even the most common smartphones on the market (which—even without modification through the use of "app downloads and software additions" (*ACA Int'l*, 885 F.3d at 696-697)—can readily store numbers to be called in their contact lists and can dial or text those numbers). The *Marks* approach to an ATDS thus gives the statute exactly the "eye-popping" sweep that concerned the D.C. Circuit in *ACA International*.[3]

C. The Structure and Legislative History of the TCPA Support The Plain Text's Requirement Of Random Or Sequential Number Generation To Classify Equipment As An ATDS.

Gadelhak argues (at 24-35) that the structure and legislative history of the TCPA support his position that equipment lacking the capacity to generate numbers randomly or sequentially nonetheless qualifies as an ATDS. The Court need not consider these arguments, because the statute's plain language is

[3] Indeed, after *Marks* was decided, the FCC issued a public notice pointing out that *ACA International* "held that the TCPA unambiguously foreclosed any interpretation that 'would appear to subject ordinary calls from any conventional smartphone to the Act's coverage.'" Public Notice, *Consumer & Governmental Affairs Bureau Seeks Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's Marks v. Crunch San Diego, LLC Decision* (Oct. 3, 2018), https://docs.fcc.gov/public/attachments/DA-18-1014A1.pdf, at p. 2.

unambiguous. *See, e.g.*, *Barhart v. Sigmon Coal Co. Inc.*, 534 U.S. 438, 461-62 (2002) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" (internal citations and quotations omitted)); *Mohamed v. Palestinian Auth.*, 566 U.S. 449, 458-59 (2012) ("reliance on legislative history is unnecessary in light of the statute's unambiguous language").

But, in any event, these contentions are unpersuasive.

1. The Availability of Various Defenses Under § 227(b)(1) Does Not Support An Expansive Reading Of The Definition Of An ATDS.

The TCPA contains exemptions for, *inter alia*, calls that are made with the prior express consent of the called party and calls made to collect a debt owed to the United States. 47 U.S.C. § 227(b)(1)(A).[4] The *Marks* court believed the existence of these defenses supported its reading of the ATDS definition because "[t]o take advantage of this permitted use, an autodialer would have to dial from a list of phone numbers of persons who had consented to such calls, rather than merely dialing a block of random or sequential numbers." *Id.* Gadelhak echoes this

[4] The Fourth and Ninth Circuits have found the latter provision inconsistent with the First Amendment and have declared that the provision must be severed from the statute. *Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1153-56 (9th Cir. 2019), *pet. for reh'g en banc pending*, No. 17-15320; *American Association of Political Consultants Inc. v. FCC*, 923 F.3d 159, 170 (4th Cir. 2019).

argument (at 25-27), as did the district court in another case Gadehlak cites, *Espejo v. Santander Consumer United States Inc.*, 2019 WL 2450492, at *7 (N.D. Ill. June 12, 2019).

That argument is misguided. As Judge Feinerman explained, "it is possible to imagine a device that has both the capacity to generate numbers randomly or sequentially ***and*** can be programmed to avoid dialing certain numbers, including numbers that belong to customers who have not consented to receive calls from a particular marketer." *Pinkus*, 319 F. Supp. 3d at 939 (emphasis added); *see also* SA14; *accord Thompson-Harbach*, 359 F. Supp. 3d at 626. "A violation of the TCPA, therefore, would not be a matter of coincidence, but, rather, would result from a company's failure to program an ATDS device correctly." *Id*.

Moreover, at least as currently interpreted, the TCPA only requires that a machine have the *capacity* to generate numbers randomly or sequentially—not that that capacity actually be used to dial the calls in question. Equipment thus meets the statutory definition if, for example, it can toggle back and forth between random dialing and list-based dialing by flipping a switch. *ACA Int'l*, 885 F.3d at 696. The consent defense, then, provides an additional protection for companies who use this type of equipment to call their customers, but do not use the random or sequential dialing features on the equipment.

Finally, the same TCPA provision that prohibits placing calls to cell phones

using an ATDS also prohibits placing prerecorded or artificial voice calls to cell phones without prior express consent. 47 U.S.C. § 227(b)(1)(A). Even if the consent defense and debt-collection exemption had no bearing on equipment that generated phone numbers randomly or sequentially, they would nevertheless serve the extremely important purpose of precluding liability for calls using prerecorded and artificial voice messages when (1) the called party has consented or (2) the call relates to collection of a federal government debt. These exemptions therefore play a significant role in the statutory scheme that sweeps far more broadly than calls placed by an ATDS.

2. The Legislative History Does Not Support Gadelhak's Interpretation.

Both Gadelhak (at 31-35) and his *amici* (at 12-14) rely heavily on the legislative history to argue that Congress intended the ATDS definition to reach broadly. Gadelhak, for example, argues (at 31-33) that "Congress was concerned about the sheer number of nuisance calls unleased upon the public by automated dialing systems" and a "burgeoning consumer data market was resulting in *targeted* calls" to consumers. EPIC similarly claims (at 10-11) that "[t]he TCPA was enacted to . . . shield consumers from the nuisance and privacy invasion of robocalls." They assert that a broad ATDS definition is necessary to protect consumers' privacy interests in the manner intended by Congress.

But these very general statements say nothing about which types of equipment are encompassed within the statutory definition. Indeed, they would support banning all automatic calls—but Congress did not do that.

The arguments also ignore historical reality. When Congress enacted the TCPA in 1991—over a quarter-century ago—the primary method of communication was the *landline,* not cellular telephones. *See* EPIC Brief at 19 ("In 1991, Americans communicated across more than 139 million landline connections, but there were only 7.5 million wireless subscribers."); *see also* https://www.npr.org/2017/12/04/568393428/the-first-text-messages-celebrates-25-years (noting that the first text message was sent in December 1992—that is, after the TCPA's enactment).

If, as Gadelhak suggests, a broad ATDS definition was essential to protect the privacy of everyday consumers, Congress no doubt would have made sure the protections extended to the telephones that were most likely to ring—those attached to individuals' residential landlines.

But Congress did not do that. The TCPA contains a separate provision that specifically applies to *all* residential lines; and that provision does not contain *any* limitations on the use of an ATDS. 47 U.S.C. § 227(b)(1)(B). Gadelhak and EPIC's arguments, then, assume that the same Congress that left landline calls free of restrictions on automatic calling nonetheless wanted to reach very broadly in

prohibiting the automatic calls to cell phones—as if Congress somehow knew cell phones would one day supplement landlines (or that text messages would become ubiquitous).[5]

Moreover, Gadelhak ignores much more relevant legislative history materials. Gadelhak points (at 33-34) to part of the general discussion of the state of telemarketing in House Report 102-317, but ignores the part that specifically addresses "automatic dialing systems." That part says nothing about dialing a targeted list, but instead shows a concern with the public health impacts of sequential dialing:

> In recent years a growing number of telemarketers have begun using automatic dialing systems to increase their number of customer contacts. The Committee record indicates that these systems are used to make millions of calls every day. Each system has the capacity to automatically dial as many as 1,000 phones per day. *Telemarketers often program their systems to dial sequential blocks of telephone numbers, which have included those of emergency and public service organizations, as well as unlisted telephone numbers.*

H.R. Rep. No. 102-317 at 10 (emphasis added). Likewise, Congresswoman Roukema, who had introduced an earlier version of the bill in the House of

[5] It is certainly true, as EPIC argues (at 18-19), that since 1991 the use of cellular telephones has grown exponentially and, in some cases, replaced landlines. But to the extent that changes in technology have created new policy issues, the proper response is for Congress to amend the law, not for courts to rewrite the statute. Perhaps Congress will do so; EPIC points to (at 23-25) numerous ongoing hearings regarding potential Congressional action. But that potential legislative activity simply underscores why courts should interpret the statute as written.

Representatives in 1989, stated in a committee hearing on that bill that its goal was to end random dialing such that dialers "would have to take pains to differentiate between health and safety agencies and those who wish to receive these calls, and those who don't." *Hearing Before the Subcommittee on Telecommunications and Finance: Committee on Energy and Commerce of the House of Representatives*, 101-43 at 21.

It was entirely sensible for Congress to address these concerns by banning the use of equipment that generates numbers randomly or sequentially, which would prevent the block dialing described above while still allowing for targeted dialing to customers.[6]

3. Congress Did Not Ratify The FCC's Prior Interpretation Of An ATDS.

Gadelhak also argues (at 28-30) that Congress in 2015 ratified the FCC's broad construction of the ATDS definition in its 2015 Order and earlier—by amending the TCPA to add an exemption for calls made to collect a debt owed the United States. That contention is wrong for multiple reasons.

To begin with, "[w]hen Congress has not comprehensively revised a

[6] Gadelhak (at 35) points to Congressional hearing comments from Bell Atlantic, the National Retail Merchants Association, and Nynex that suggest those companies expressed concern that the automated equipment covered by the statute might prevent them from dialing lists of customers. But those comments appear to address a different definition of automated equipment which the commenters understood to cover "any equipment which has the capacity to dial and play recorded messages." National Retail Merchants Association Comments at 111.

statutory scheme but has made only isolated amendments, …[i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval" of the existing statutory interpretation. *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) (internal citations and quotations omitted); *see also Helvering v. Hallock*, 309 U.S. 106, 121 (1940) ("[W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle."). *See also, e.g., Catron County Bd. of Com'rs, New Mexico v. U.S. Fish & Wildlife Service*, 75 F.3d 1429, 1438 (10th Cir. 1996) ("the congressional acquiescence theory applies only where Congress has revisited the language subject to the administrative interpretation"). Here, the amendment at issue did not address the definition of an autodialer, but instead added a single new statutory exemption.

Moreover, the rule cited by Gadelhak assumes a settled judicial or administrative construction. *See Metro. Stevedore Co. v. Rambo*, 515 U.S. 291, 299 (1995). That was not true of the FCC's interpretation of the statute.

When Congress amended the TCPA in late 2015, petitions for judicial review challenging the FCC's construction had already been filed. *See ACA Int'l v. FCC*, Case No. 15-1211 (D.C. Cir.), Dkt. No. 1 (July 10, 2015) (Petition for

Review).[7] Legal industry magazines at the time referred to the "fog of uncertainty" that "engulf[ed]" the FCC's interpretations of the ATDS definition. *See* 70 Bus. Law. 563, 564-65 (Spring 2015). Indeed, a number of TCPA damages actions were stayed pending the decision in *ACA International*, showing that courts believed the result was far from certain. *See, e.g.*, *Shahin v. Synchrony Fin.*, 2016 WL 4502461, at *1-2 (M.D. Fla. Apr. 12, 2016); *Salehi v. Bluestem Brands*, 2016 WL 10459422, at *2-3 (S.D. Cal. Aug. 9, 2016); *Clayton v. Synchrony Bank*, 219 F. Supp. 3d 1006, 1010-11 (E.D. Cal. 2016). Especially given the pending petitions for review and the ultimate overturning of the 2015 Order, Congress thus did not act against the backdrop of any settled construction of the ATDS definition.

Gadelhak relies on *Tex. Dep't of Hous & Cmty. Affairs v. Inclusive Cmtys Project, Inc.*, 135 S. Ct. 2507 (2015), to support its argument, but in that case, unlike here, the law was in fact settled when Congress acted.

The case addressed whether Congress had ratified the prevailing judicial construction of the Fair Housing Act ("FHA") that allowed for findings of disparate impact liability. At the time of the amendments, the courts of appeals had

[7] Gadelhak argues (at 31) that the fact that *ACA International* found that multiple interpretations of the statute were likely permissible shows that it did not "adopt a contrary judicial construction of the ATDS definition." But this misses the point: if multiple interpretations of the statute are possible and permissible, that simply shows that the statute's construction is not "settled" and cannot be ratified by Congress.

unanimously held that the FHA imposed liability based on a disparate impact theory. *See id.* at 2519 ("By that time, all nine Courts of Appeals to have addressed the question had concluded the Fair Housing Act encompassed disparate-impact claims."). In this case, by contrast, the agency's construction of the statute remained hotly contested at the time Congress amended the TCPA, and the construction that Gadelhak claims was settled law was overturned shortly thereafter.[8]

In short, the exemption added for calls relating to debts owed to the United States did not reflect Congressional acceptance of a broad view of the ATDS definition.

D. Gadelhak's Policy Arguments Are Misplaced And In Any Event Cannot Overcome The Plain Language Of The Statute.

Gadelhak suggests (at 54) that interpreting the term ATDS to require the capacity for random or sequential number generation will allow individuals to "trivially circumvent" the law's prohibitions. But his examples actually prove the opposite, because they would be prohibited by the construction of the statute adopted by the court below.

[8] *Tex Dep't of Hous. & Cmty. Affairs* is further distinguishable from this case because the "substance" of the amendments "assum[ed] the existence of disparate impact claims" and because the legislative history revealed that Congress had considered the prevailing interpretation when amending the statute. 135 S. Ct. at 2520-21.

For example, if, as Gadelhak hypothesizes, a system was programmed to dial automatically every number in a given area code or within a block of the national numbering plan, that would constitute *sequential* number generation in violation of the statute. Gadelhak's hypothetical refers to a "preset list" (*id.*), but—as explained above—the "numbers to be called" would have been generated sequentially before being stored and dialed.

And Gadelhak's colorful hypothetical (at 54) of Google's parent company assembling a list of the phone numbers of all Google users is equally misguided. Although Gadelhak suggests that "[t]elemarketers employing" list-based dialing "would be free to unleash billions of calls upon the public with reckless abandon" (*id.*), he ignores that the TCPA prohibits placing telemarketing calls to individuals on the National Do-Not-Call Registry as well as internal do-not-call lists. *See* 47 U.S.C. § 227(c); 47 C.F.R. § 64.1200(c); 47 C.F.R. § 64.1200(d). Indeed, telemarketers remain subject to the do-not-call regulations no matter what dialing technology they employ, and the National Do-Not-Call Registry contains over 235 million phone numbers.[9]

But even if Gadelhak were correct that a greater number of undesirable communications would take place, Gadelhak's policy arguments are appropriately directed to Congress. *See Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 214-15

[9]https://www.ftc.gov/news-events/press-releases/2018/12/ftc-releases-fy-2018-national-do-not-call-registry-data-book-mini.

(1962) ("The question of what change, if any, should be made in the existing law is one of legislative policy properly within the exclusive domain of Congress—it is a question for law makers, not law interpreters. Our task is the more limited one of interpreting the law as it now stands.").[10]

II. The 2003, 2008, and 2012 FCC Orders Provide No Support For Gadelhak's Interpretation.

Gadelhak recognizes, as he must, that the FCC's 2015 Order was invalidated by the D.C. Circuit in *ACA International*. But he relies (at 36-40) on prior FCC orders addressing the TCPA's ATDS provision, including orders from 2003, 2008, and 2012.[11] Those orders do not bind this Court, and their construction of the TCPA is not entitled to any deference.

To begin with, the FCC has not adhered to a consistent interpretation of the ATDS definition.

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[10] That is especially true in light of the fact that the TCPA regulates speech, and therefore triggers significant First Amendment concerns. Courts should hesitate to give statutory limitations on speech the broadest possible reading (such as the one advocated by Gadelhak) in the absence of clearly-expressed Congressional intent to do so.

[11] *See In re Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C.R. 14014, 2003 WL 21517853 (2003) ("2003 Order"); *Rules and Regulations Implementing the Tel. Consumer Protection Act of 1991*, 23 F.C.C.R. 559, 2008 WL 65485 (2008) ("2008 Order"); *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C.R. 15391, 2012 WL 5986338 (2012) ("2012 Order"); *In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C.R. 7961, 2015 WL 4387780 (2015) ("2015 Order").

In its first order implementing the TCPA (promulgated just a year after the statute's adoption), the FCC concluded that "[t]he prohibitions of § 227(b)(1) clearly do not apply to functions like 'speed dialing,' 'call forwarding,' or public telephone delayed message services (PTDMS), because the numbers called are not generated in a random or sequential fashion." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd. 8752, 8776, 1992 WL 690928, at *17.[12] The FCC also concluded that debt collection calls, which are directed to specific telephone numbers, "are not autodialer calls (i.e., dialed using a random or sequential number generator)." *Id.* at *14.

Subsequently, on reconsideration of that first order, the FCC described only "calls dialed to numbers generated randomly or in sequence" as "autodialed." *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 10 FCC Rcd. 12391, 12400, 1995 WL 464817 (1995). That understanding aligns with the historical practice at the time Congress enacted the TCPA: "[t]he statute's reference to a 'random or sequential number generator' reflects that, when the statute was enacted in 1992, telemarketers typically used autodialing equipment

[12] A PTDMS system allows individuals to record a message for the phone company to deliver a later date when the individual had used a pay phone but could not reach the number dialed. *See In the Matter of the Bell Atlantic Telephone Companies' Request for Waiver to Offer Coin Message Delivery Service*, 6 FCC Rcd. 3400, 3400, 1991 WL 640329 (1991).

that either called numbers in large sequential blocks or dialed random 10-digit strings." *Dominguez v. Yahoo, Inc.*, 629 F. Appx 369, 372 (3d Cir. 2015).

But the FCC later altered its interpretation of the statute. In 2003, the FCC ruled that "predictive dialers" able to dial numbers from a set list can qualify as an ATDS. 2003 Order, ¶ 133.[13] The FCC recognized that such dialers "do not dial numbers 'randomly or sequentially'" but rather "store pre-programmed numbers or receive numbers from a computer database and then dial those numbers." *Id.* at ¶ 130. The FCC acknowledged that the text of the TCPA refers to "using a random or sequential number generator," but—despite that plain statutory language—concluded that in light of the "the evolution of the teleservices industry" it would be an "unintended result" to exclude from the definition of an ATDS "equipment that use predictive dialing software." *Id*. ¶¶ 132-33.

The FCC reaffirmed this ruling in its 2008 Order, ¶¶ 12-14, cited it in its 2012 Order, ¶ 2 n.5, and reaffirmed it again in the 2015 Order, ¶¶ 12-22 & n.78. None of those orders aid Gadelhak.

A. The *ACA International* Decision Invalidated the FCC's Pre-2015 Determinations.

In *ACA International*, the D.C. Circuit "set aside . . . the [FCC's] effort to

[13] The FCC described predictive dialers as "us[ing] a complex set of algorithms to automatically dial consumers' telephone numbers in a manner that 'predicts' the time when a consumer will answer the phone and a telemarketer will be available to take the call." 2003 Order, ¶ 8 n.31.

clarify the types of calling equipment that fall within the TCPA's restrictions." 885 F.3d at 692. The court's ruling rested on two grounds: first, "[t]he impermissibility of the Commission's interpretation of the term 'capacity' in the autodialer definition"; and, second, "inadequacies in the agency's explanation of the requisite features [of an autodialer]." *Id.* at 701.

As to "capacity," the court found "utterly unreasonable in the breadth of its regulatory [in]clusion" the FCC's conclusion that even "potential" functionalities of equipment to store or generate numbers to be called using a random or sequential number generator count, regardless of whether those functionalities were actually installed at the time of the call. *Id.* at 699. For example, the court noted that under the FCC's construction, every ordinary smartphone would constitute an ATDS, a result it found unreasonable and inconsistent with the statute. *Id.* at 697.

With respect to the agency's explanation of the essential features of an ATDS, the court noted that in the 2015 Order the FCC reaffirmed its prior orders defining an ATDS to include "predictive dialers" and certain types of automated equipment that dial from a database, but also stated that equipment must have the capacity to "dial random or sequential numbers" to constitute an ATDS. *Id.* at 702-03. The court pointed to this contradiction to conclude the FCC failed to satisfy the requirement of reasoned decision-making:

> So which is it: does a device qualify as an ATDS only if it can generate random or sequential numbers to be dialed, or can it so qualify even if it lacks that capacity? ***The 2015 ruling, while speaking to the question in several ways, gives no clear answer (and in fact seems to give both answers).*** . . . [T]he Commission cannot, consistent with reasoned decisionmaking, espouse both competing interpretations in the same order.

Id. at 702-03 (emphasis added).

The latter element of the D.C. Circuit's decision to set aside the 2015 Order necessarily invalidated the prior FCC orders as well.

1. *ACA International* Itself Clearly Indicates That The D.C. Circuit Intended To Overturn The Prior FCC Determinations.

Plaintiff correctly notes (at 41) that courts have divided on the question whether the FCC's interpretation of the ATDS definition in the 2003, 2008 and 2012 Orders was set aside by *ACA International*. *Compare, e.g.*, *Marks*, 904 F.3d at 1049-50; *Pinkus*, 319 F. Supp. 3d at 934-36; *Thompson-Harbach*, 359 F. Supp. 3d at 621; *Sessions v. Barclays Bank Delaware*, 2018 WL 3134439 at *4 (N.D. Ga. June 25, 2018) (holding that *ACA International* invalidated the prior FCC Orders) *with Maddox v. CBE Grp., Inc*, 2018 WL 2327037 at *4 (N.D. Ga. May 22, 2018); *Reyes v. BCA Fin. Servs.*, 2018 WL 2220417 at *11 (S.D. Fla. May 14, 2018); *Ammons v. Ally Fin. Inc.*, 2018 WL 3134619 at *6 (M.D. Tenn. June 27, 2018); *Maes v. Charter Commun.*, 345 F. Supp. 3d 1064 at 1068 (W.D. Wisc. 2018) (concluding that prior FCC Orders remain in effect).

But *ACA International* itself answers this question. The FCC expressly argued that the D.C. Circuit "lack[ed] jurisdiction to entertain [the] challenge concerning the functions that a device must be able to perform" because "it is too late now" to review the earlier orders. 885 F.3d at 701.[14] The D.C. Circuit "disagree[d]" with that assertion, explaining that "the agency's pertinent pronouncements" were "not shield[ed] … from review." *Id.* Such review was necessary because the "prior rulings left significant uncertainty about the precise functions an autodialer must have the capacity to perform." *Id.*

As Judge Shah recently put it, that language in *ACA International* is "not consistent with a belief that the [D.C. Circuit] was leaving the 2003 and 2008 orders alone—it was telling the agency to start over." *Johnson*, 346 F. Supp. 3d at 1161 n.3; *see also Pinkus*, 319 F. Supp. 3d at 935 ("*ACA International* necessarily invalidated the 2003 Order and 2008 Declaratory Ruling insofar as they provide, as did the 2015 Declaratory Ruling, that a predictive dialer qualifies as an ATDS even if it does not have the capacity to generate phone numbers randomly or sequentially and then to dial them").

[14] The FCC's brief stated that "[t]he Court lacks jurisdiction, however, over the Commission's statements summarizing its past disposition of issues addressed in prior orders that the Commission did not reconsider or reopen." *ACA Int'l v. FCC*, Brief for Respondents, 2016 WL 194146, at *8 (D.C. Cir. Jan. 15, 2016).

There can be no doubt that the court in *ACA International* expressly examined the FCC's expansive view of the ATDS definition in prior orders—and declared that approach inconsistent with the requirements of reasoned rulemaking. The D.C. Circuit explained that the earlier orders contain the same flaw that it identified in the 2015 Order: the failure to explain whether the key criterion for ATDS status is the capacity to dial numbers generated randomly or sequentially, on one hand, or the capacity to dial numbers from a list, on the other, which the D.C. Circuit declared inconsistent with the requirement of reasoned rulemaking. 2003 Order, ¶ 132; *ACA Int'l*, 885 F.3d at 702.

Thus, as Judge Feinerman observed, the "infirmity in the FCC's reasoning that *ACA International* identified in invalidating the 2015 Declaratory Ruling—. . . that a device qualifies as an ATDS only if it can generate random or sequential numbers to be dialed, and at other points that a device can so qualify even if it lacks that capacity—is equally present in the FCC's two earlier 'pronouncements.'" *Pinkus*, 319 F. Supp. 3d at 936; *see also, e.g.*, *Thompson-Harbach*, 359 F. Supp. 3d at 621-622. Accordingly, the reasoning behind the D.C. Circuit's invalidation of the FCC's 2015 Order necessarily applies to the FCC's similarly flawed 2003 and 2008 Orders.

In addition, the D.C. Circuit recognized that the FCC identified the ability to "dial numbers without human intervention" and the ability to "dial thousands of

numbers in a short period of time" as "basic function[s]" of an ATDS in its *prior* orders, not just the 2015 Order. *Id.* at 703. But the D.C. Circuit concluded that the FCC's treatment of these other "function[s]" was flawed. *Id.* The FCC's statement concerning "human intervention" was contradictory as it stated that a "basic function" of an ATDS was the ability to dial numbers without human intervention but also that "a device might still qualify as an [ATDS] even if it cannot dial numbers without human intervention." *Id.* The court of appeals recognized that the FCC had described dialing thousands of numbers in a short period of time as a "basic function" of an ATDS, but never stated whether it was a "necessary", "sufficient", or even "relevant condition" and gave no additional guidance as to "what would qualify as a 'short period of time.'" *Id.* If the D.C. Circuit intended to allow the earlier orders to remain undisturbed, then it would have had no reason to discuss these flaws in those orders.

Gadelhak's argument (at 47) that the D.C. Circuit "would have found no problem" with the 2015 Order if the FCC had simply reaffirmed its prior orders thus ignores the fact that, as that court expressly recognized, those earlier orders had the same flaws that led the D.C. Circuit to invalidate the 2015 Order. The *ACA International* court's invalidation of the agency's reasoning with respect to the 2015 Order therefore necessarily invalidates the prior orders resting on the same

flawed rationale insufficient to support the very same conclusion in the 2015 Order.

2. The 2015 Order Reaffirmed and Reinstated The Prior Orders, Placing Them Properly Before The D.C. Circuit.

Gadelhak also argues (at 44) that the clear language of the *ACA International* decision indicating it had jurisdiction to review the earlier orders should be disregarded, because the ruling states that the court was reviewing the FCC's "latest ruling" (in the singular). But that contention ignores the plain fact that the FCC's 2015 Order reaffirmed the earlier FCC determinations and the earlier orders therefore were properly before the D.C. Circuit *via* the 2015 Order.

Prior regulations can be challenged either by petition for rulemaking or under the reopening doctrine. *Biggerstaff v. FCC*, 511 F.3d 178, 184-85 (D.C. Cir. 2007). Petitioning for a rulemaking is "ordinarily . . . the appropriate way in which to challenge a longstanding regulation." *Id.* (quoting *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1214 (D.C. Cir. 1996)). In addition, an "[a]gency's reconsideration of a rule in a new rulemaking constitutes a reopening when the original rule is 'reinstated' so as to have renewed effect." *Id.* (quoting *Pub. Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 152 (D.C. Cir. 1990)). "[W]here an agency's actions show that it has not merely republished an existing rule in order to propose minor changes to it, but has reconsidered the rule and

decided to keep it in effect, challenges to the rule are in order." *Pub. Citizen*, 901 F.2d at 150.

In *ACA International*, "[p]etitioners covered their bases by filing petitions for both a declaratory ruling and a rulemaking." 885 F.3d at 701. In response, the FCC "issued a declaratory ruling that purported to provid[e] clarification on the definition of autodialer and denied the petitions for rulemaking on the issue." *Id.* Thus, the D.C. Circuit's review occurred on "both grounds" (*i.e.*, the agency's determinations with respect to its declaratory ruling and denial of the petitions for rule-making) and it had jurisdiction to consider the earlier orders. *Id.*; *see also Johnson*, 346 F. Supp. 3d at 1161 ("[The FCC] reaffirmed and reiterated its approach [in the 2015 Order], which brought the entire agency definition of ATDS up for review in the D.C. Circuit.").

3. Two Other Circuits Have Determined That *ACA International* Invalidated The Prior FCC Rulings.

Both the Third and Ninth Circuits have determined (either explicitly or implicitly) that *ACA International* precludes deference to the pre-2015 FCC orders when interpreting the statute's ATDS definition.

The Ninth Circuit squarely addressed the issue in *Marks*, holding that "[b]ecause the D.C. Circuit exercised its authority to set aside the FCC's interpretations of the definition of an ATDS in the 2015 order and any prior FCC rules that were reinstated by the 2015 order, we conclude that the FCC's prior

orders on that issue are no longer binding on us." 904 F.3d at 1049-50 (internal citations omitted).

The Third Circuit's opinion in *Dominguez* did not expressly reference the FCC's pre-2015 orders, but that court necessarily reached the same conclusion because it did not defer to those.[15] *Dominguez* held that text messages directed at a customer list, and not randomly-generated numbers, did not constitute use of an ATDS. 894 F.3d at 121. It thus applied the same interpretation of the ATDS definition as the district court here; that would only make sense if the prior FCC guidance was no longer entitled to deference.[16]

B. In Any Event, The Prior FCC Orders Do Not Support Gadelhak's Interpretation.

Even if *ACA International* did not invalidate the prior FCC orders, they would neither bind this Court nor be entitled to deference.

This Court previously interpreted the Hobbs Act to preclude collateral challenges to FCC orders. *Blow v. Birju*, 855 F.3d 793, 802-03 (7th Cir. 2017)

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[15] The plaintiff in that case had argued, albeit prior to the issuance of *ACA International*, that the court was required to defer to the FCC's 2003, 2008, and 2012 Orders. Br. of Appellant, *Dominguez v. Yahoo! Inc.*, No. 14-1751 (3d Cir. filed June 30, 2014), 2014 WL 3402425 at *23-*28.

[16] Similarly, the majority of the district courts in this Circuit which have addressed this issue have found that *ACA International* overturned all of the prior FCC determinations regarding the ATDS definition. *Pinkus*, 319 F. Supp. 3d at 934-36; *Johnson*, 346 F. Supp. 3d at 1161; *Espejo v. Santander Consumer USA Inc.*, 2019 WL 2450492, at *5-6 (N.D. Ill. June 12, 2019); *Folkerts v. Seterus, Inc.*, 2019 WL 1227790, at *6-7 (N.D. Ill. Mar. 15, 2019); *Bader v. Navient Solutions, LLC*, 2019 WL 2491537, at *1-2 (N.D. Ill. June 14, 2019).

("absent a direct appeal to review the 2015 FCC Order's interpretation of an autodialer, we are bound to follow it.").

But the Supreme Court's recent decision in *PDR Network, LLC v. Carlton & Harris Chiropractic Inc.*, 139 S. Ct. 2051 (2019), casts significant doubt on the continued vitality of that principle, for multiple reasons.

PDR Network involved a private action under the TCPA. The question before the Supreme Court was whether the Hobbs Act made the FCC's interpretation of the statutory term "unsolicited advertisement" in a 2006 order binding in the TCPA private action.

The majority ruled narrowly, holding that when the FCC issues an "interpretive rule" that simply "advis[es] the public of the agency's construction of the statutes and rules which it administers," rather than a "legislative rule," it "may not be binding on a district court." *PDR Network*, 139 S. Ct. at 2055 (quotation marks and citations omitted). It remanded the case to permit the lower courts to determine whether the FCC's view constituted an "interpretative" or "legislative" rule.

Four Justices reached a different conclusion, concurring only in the judgment. In their view, "a defendant may argue that an agency's interpretation of a statute is wrong, at least unless Congress has expressly precluded the defendant from advancing such an argument. The Hobbs Act does not expressly preclude

judicial review of an agency's statutory interpretation in" a private action under the TCPA, and therefore PDR was free to "argue to the District Court that the FCC's interpretation of the TCPA is wrong." *PDR Network*, 139 S. Ct. at 2058 (Kavanaugh, J., concurring).

Here, the prior FCC statements cited by Gadelhak are interpretive rules, not "legislative rules," and therefore are not binding under *PDR Network*. For example, in its 2003 Order (¶ 133) the FCC concluded "that a predictive dialer falls within the meaning and statutory definition of 'automatic telephone dialing equipment' and the intent of Congress," but the agency did not purport to prescribe any regulation to that effect. To the contrary, the text of the regulation promulgated with that Order simply mimics the statutory definition, and does not expand it to include predictive dialers. *See* 2003 Order, Appendix A (§ 64.1200(f)(1)).

The 2008 Order rejected a request for reconsideration of the FCC's ruling regarding predictive dialers, and "affirm[ed] that a predictive dialer constitutes an [ATDS]." 2008 Order, ¶ 12. And the 2012 Order addressed a petition for a declaratory ruling regarding certain text messaging practices, but did not expressly rule upon whether the petitioner's equipment constituted an ATDS or upon the definition of an ATDS. *See* 2012 Order, ¶ 1.[17]

[17] The 2012 Order, in a confusing footnote (oft-cited by plaintiffs in TCPA cases), quoted the statutory definition of an ATDS and then cited to its 2003 Order to state that the statute "covers any equipment that has the specified *capacity* to generate

In sum, none of the pre-2015 orders invoked by Gadelhak qualify as legislative rules; they at the very most reflect the FCC's interpretation of the statutory language—in a manner similar to the order at issue in *PDR Network*—and none promulgates a rule embodying that interpretation.

Even if one of these orders could qualify as a legislative rule, it would not bind this Court—for the reasons set forth by the four concurring Justices in *PDR Network*. *See also Gorss Motels v. Safemark Systems*, 2019 WL 3384191, at *9-*13 (11th Cir. July 26, 2019) (unanimous concurrence of panel) (taking note of *PDR Network* and stating, in a TCPA case, that "[t]he Hobbs Act, correctly construed, does not require district courts adjudicating cases within their ordinary jurisdiction to treat agency orders that interpret federal statutes as binding precedent.").

Finally, the FCC orders are not entitled to *Chevron* deference. They are inconsistent with the plain statutory text, undermined by the conflicting rationales set forth in the FCC's 2015 Order and identified in *ACA International*, and—in any event—do not support Gadelhak's position.

---

numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated or come from calling lists." 2012 Order, ¶ 2 n.5. That statement can in no way be considered a "legislative rule." The FCC's confusing footnote also begs the question of what the FCC meant when it referred to the "specified capacity"—the "capacity" specified in the statute that it just quoted in the prior sentence, or the capacity to "generate numbers and dial them without human intervention" that the FCC then referenced.

For example, when it determined that a predictive dialer is an ATDS, the FCC explained that "[t]he record demonstrates that a predictive dialer is equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when a sales agent will be available to take calls." 2003 Order, ¶ 131. There can be no dispute here that Message Broadcast's equipment, which sends text messages, is not a "predictive dialer" within the meaning of this FCC order. It sends texts, rather than place voice phone calls at a pace designed to "predict" when a sales agent will be available to take a call.[18]

III. The TACRFT System Does Not Constitute An ATDS.

A. TACRFT Dials From A List of Numbers, Which Is Not Random or Sequential Number Generation.

The district court's conclusion that AT&T's system lacks the capacity for random or sequential number generation is fully consistent with the undisputed evidence of record. *See* SA16-17.

There is no dispute that the system used by Message Broadcast to send the texts dials only the numbers contained in flat files sent to it by AT&T. SA24, ¶ 14. Those flat files are "just an electronic list." SA23, ¶ 12. Nor does Gadelhak dispute that the numbers in the flat files are generated only from AT&T's customer

[18] Plaintiff may point to the FCC's statement that the "basic function of such equipment" is "the capacity to dial numbers without human intervention," but the FCC did not hold that any equipment with that capacity constitutes an ATDS.

databases and that the numbers utilized by the system are not obtained from any other source (including a random or sequential number generator). SA22, ¶ 7.

The TACRFT program thus utilizes only numbers from customer lists, and there is undoubtedly a distinction between equipment that can "*generate* and then dial ***random*** or ***sequential*** numbers" and the "use of equipment to call[] a set list of consumers." *ACA*, 885 F.3d at 701-02 (emphasis added) (internal quotations and citation omitted). Indeed, rather than encompassing any form of dialing from a list, "[r]andom number generation means random sequences of 10 digits, and 'sequential number generation' means (for example) (111) 111-1111, (111) 111-1112, and so on." *Gragg v. Orange Cab Co.*, 995 F. Supp. 2d 1189, 1193 (W.D. Wash. 2014) (internal citation omitted).

Courts interpreting the TCPA have long recognized the difference between random and sequential number generation on the one hand; and calling numbers from a preexisting list of customers on the other. For example, in *Trumper v. GE Capital Retail Bank*, the plaintiff alleged that the defendant bank mistakenly placed calls to her cell phone in an attempt to reach a different individual (*i.e.*, the bank's customer). 79 F. Supp. 3d 511 (D.N.J. 2014). The court observed that the "[c]omplaint takes the position that the calls were placed using an [ATDS]–a random number or sequential number generator–[but] it appears that the calls were directed at" a specific person, and thus not random. *Id.* at 513; *see also Despot v.*

Allied Interstate Inc., 2016 WL 4593756, at *5 (W.D. Pa. Sept. 2, 2016) ("Moreover, the calls were not random or sequential because they were made to Plaintiff" specifically).

Similarly, in a series of decisions regarding the ATDS definition following the D.C. Circuit's decision in *ACA International*¸ several courts held that systems with only the capacity to dial numbers from customer lists do not fall within the statute's ATDS definition. *See, e.g.*, *Dominguez*, 894 F.3d at 121 ("those messages were sent precisely because the prior owner of Dominguez's telephone number had affirmatively opted to receive them, not because of random number generation"); *Pinkus*, 319 F. Supp. 3d at 939; *Keyes v. Ocwen Loan Servicing, LLC*, 2018 WL 3914707, at *8 (E.D. Mich. Aug. 16, 2018); *Johnson*, 346 F. Supp. 3d at 1162 ("The PC2SMS system did not have the capacity to generate random or sequential numbers to be dialed—it dialed numbers from a stored list."); *Thompson-Harbach*, 359 F. Supp. 3d at 624; *Folkerts v. Seterus*, 2019 WL 1227790, at *7 (N.D. Ill. Mar. 15, 2019).

B. The TACRFT System Lacks The Capacity To Generate Numbers Randomly Or Sequentially.

Gadelhak argues (at 50) that even if the statutory definition of an ATDS requires random or sequential number generation, the TACRFT system nevertheless meets this definition. But that argument is based on a misunderstanding of the record..

Specifically, Gadelhak points to a snippet of deposition testimony from Kerry Lyon, who leads the group that oversees the TACRFT program for AT&T. Mr. Lyon testified that when more than one number is listed on an AT&T account, he did not know how the system selected a number to receive a survey and that he would have to check the underlying computer code for that information. SA36-37, ¶ 11.

Gadelhak contends that Mr. Lyon's deposition testimony meant that, in fact, the system could randomly select numbers to send a survey-related text. But the context makes clear that Mr. Lyon testified that he simply did not know how numbers were selected when more than one number is listed on an account:

> Q: So I guess if there's multiple numbers on the record and they're all eligible to be sent a survey text, how does it pick which to send it to?
>
> A I'd have to get the actual code to tell you, but I can confidently say it's only sending one.
>
> Q Okay. Would it choose the -- if there are multiple numbers on a record and they're all eligible and one of those is the primary number on the account, would it send the text to the primary number?
>
> A No, because we don't know anything about primary. That doesn't mean anything to us.
>
> Q You don't know what it is. So the code could be set up to -- you don't know the reason for choosing one or the other?

> A Right, it could be randomized, I'd have to look at the code. But like I say, we don't know anything about primaries or secondaries. They're just two number fields.
>
> (SuppA.4, Lyon Dep. 143:2-19).

Mr. Lyon later checked the code and submitted an affidavit clarifying that the system does ***not*** randomly select from among the numbers listed on an account, but instead ***always chooses*** the first number listed on the account. SA36, ¶ 11; SuppA.8, Lyon Aff. ¶ 5 ("I have confirmed the code selects the first eligible wireless number to send the survey system.")

There is thus no contradiction between the two statements offered by Mr. Lyon and, because Gadelhak offered no other contradictory evidence, he did not create a genuine issue of material fact that prevented the district court from granting summary judgment. This Court has repeatedly rejected arguments to the contrary. *Adelman-Trembley v. Jewel Companies, Inc.*, 859 F.2d 517, 520 (7th Cir. 1988) (an affidavit that clarifies prior ambiguous deposition testimony does not prevent entry of summary judgment); *Fischer v. Avanade, Inc.*, 519 F.3d 393, 407 (7th Cir. 2008) (holding that a witness's "more fulsome testimony in his declaration cannot be said to contradict his earlier, curt response at his deposition").

In any event, even if the system did select randomly between two numbers on the same account, that would not transform it into an ATDS. As the district

court recognized (at SA17) the statute requires that numbers be *generated* randomly, not merely that they be dialed or selected randomly. Numbers in AT&T's customers database obviously are not generated randomly but are instead entered as a result of customer interactions.

Gadelhak claims (at 51) that the additional information provided by Mr. Lyon "does not meaningfully distinguish 'first eligible' from random" but that assertion adds nothing to the argument.

If Gadelhak means that "first eligible" and random" are functionally equivalent, that is plainly wrong. Random means "without definite aim, direction, rule, or method." *Merriam-Webster Dictionary*, available at https://www.merriam-webster.com/dictionary/random. Selecting the first eligible number listed on each account is a plain rule and method, and thus texts directed at specifically selected customer numbers cannot be considered "random." *See e.g.*, *Dominguez*, 894 F.3d at 121 ("those messages were sent precisely because the prior owner of Dominguez's telephone number had affirmatively opted to receive them, not because of random number generation")

Gadelhak also argues (at 52) that the numbers generated by the TACRFT program are "numerically random" because the actual numbers show no pattern when included in a list. But the mere fact that the TACRFT numbers might appear random if listed without context does not change the fact that they are ***not***

generated randomly, but instead drawn from AT&T's customer records. And the statute requires random number *generation*—that is to say, numbers that are produced with the use of any definite rule or method. *Pinkus*, 319 F. Supp. 3d at 938.[19]

Finally, Gadelhak (at 51) argues that even if the TACRFT program does not currently generate numbers randomly or sequentially, it has the *capacity* to do so, because the system might be modified in some way to generate numbers randomly rather than from a customer database (or, in the alternative, to randomly select numbers from the customer database rather than using preset rules). This argument, however, is inconsistent with *ACA*, which recognized that defining "capacity" to include features that can be added through any type of changes or updates would be improper. *ACA Int'l*, 885 F.3d at 697. The D.C. Circuit thus held in *ACA International* that:

> whether equipment has the 'capacity' to perform the functions of an ATDS ultimately turns less on labels such as 'present' and 'potential' and more on considerations such as how much is required to enable the device to function as an autodialer: does it require the simple flipping of a switch, or does it require essentially a top-to-bottom reconstruction of the equipment?

Id. at 696.

[19] In any event, Gadelhak did not raise this argument before the district court and it therefore is waived. *Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012).

In applying these considerations, the Second Circuit has identified "a distinction between a device that currently has features that enable it to perform the functions of an autodialer—whether or not those features are actually in use during the offending call—and a device that can perform those functions only if additional features are added." *King v. Time Warner Cable Inc.*, 894 F.3d 473, 479 (2d Cir. 2018). Thus, the Second Circuit held that "capacity" referred only to a "device's current functions"—that is, the device as it existed at the time of the challenged communication—not to potential modifications to a device's hardware or software. *Id.* at 481. That approach appropriately limits the scope of the TCPA to avoid reaching far beyond the conduct it was meant to address: indiscriminate calls to strangers using a particularly bothersome type of technology—automatically dialed calls placed as a result of random or sequential number generation.

Here, the undisputed facts show that Message Broadcast used a proprietary system wholly dedicated to sending texts under the TACRFT program. The only source for the numbers are AT&T's customer databases, which feed the Message Broadcast system through flat files. There are no random or sequential number generators installed, and including such tools would require modification of the current system for a different purpose—much more than the "flipping of a switch" (*ACA Int'l*, 885 F.3d at 696).

The facts, therefore, are similar to those in *Blow v. Bijora*, 855 F.3d 793 (7th Cir. 2017), the most recent pre-*ACA* case decided by this Court regarding the ATDS definition In that case, a retailer (Akira) hired a third-party marketing company (Opt It) to send texts to customers. Opt It's CEO testified that (i) "Opt It obtained a spreadsheet of customer phone numbers from Akira and imported those numbers into its system and that telephone numbers texting the message "Akira" to the short code Akira provided were automatically added to Opt It's text messaging list" and (ii) "[t]he messages are drafted by humans, who decide when the message will be sent, and press a button to either send the messages or schedule a future sending." *Id.* at 801. Opt It's platform thus functioned similarly to the Message Broadcast platform utilized by AT&T. It dialed only from a curated list of numbers provided by the retailer, and did not store or produce numbers randomly or sequentially.

This Court agreed with the district court that the undisputed evidence established that Akira's "platform lacks the present capacity to use a random or sequential number generator for storing or producing numbers." *Id.* at 801.[20] The

[20] EPIC and NCLC argue in their *amicus* brief (at 27) that under the lower's court interpretation of an ATDS, the list-based texting system found to be an ATDS in *Blow* would no longer be considered an ATDS. That is true, but it is the necessary consequence of *ACA International's* overturning of the FCC's 2015 order as arbitrary and capricious. *Blow* need not be overruled; it is enough to recognize that the intervening holding in *ACA International* undermines *Blow*'s premise that the FCC order was entitled to deference.

Court nevertheless concluded that summary judgment for defendants on this ground was inappropriate because it concluded—prior to *ACA International* and *PDR Network*—that it was required to defer to the "FCC's conclusion that equipment need not possess the 'current capacity' or 'present ability' to use a random or sequential number generator." *Id.* (internal citations omitted).[21] But as explained above, deference to the now-vacated 2015 Order is neither necessary nor permissible.[22]

[21] The *Blow* Court upheld summary judgment on the alternative ground that the calls were made with consent. 855 F.3d at 803-05.

[22] This Court held in *Blow* that "absent a direct appeal to review the 2015 FCC Order . . . we are bound to follow it." *Id.* at 802. But the *Blow* Court also recognized that *ACA International* was such an appeal. *Id.* ("Remarkably, neither party mentions just such a direct appeal currently pending in the D.C. Circuit, where multiple companies filed petitions under the Hobbs Act challenging the 2015 FCC Order and its definition of an autodialer in particular.").

CONCLUSION

The district court's judgment should be affirmed.

Dated: August 15, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32

I certify that the foregoing Brief of Defendant-Appellee AT&T Services Inc.:

1. complies with the type volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 13,312 words, including footnotes and excluding the parts of the brief exempted under Rule 32(f); and

2. complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) & (6) and Circuit Rule 32(b) because it was prepared in a proportionally spaced typeface using Microsoft Word 2016, in 14-point Times New Roman for both the text and footnotes.

/s/ *Andrew J. Pincus*

No. 19-1738

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ALI GADELHAK, individually and on behalf of all others similarly situated,
Plaintiff-Appellant,

v.

AT&T SERVICES INC.,
Defendant-Appellee.

Appeal from Judgment of the United States District Court for the Northern District of Illinois, Eastern Division, No. 1:17-CV-01559 (Chang, J.)

SUPPLEMENTAL APPENDIX TO BRIEF OF APPELLEE AT&T SERVICES INC.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ALI GADELHAK, on behalf of himself and all others similar situated,	)	
Plaintiff,	)	17-cv-1559
vs.	)	Hon. Edmond Chang
AT&T SERVICES, INC.,	)	
Defendant.	)	

Deposition of KERRY LYON, taken on behalf of the Plaintiff, reading and signing of the deposition being reserved, before Lynn Van Ry, RPR, Certified Court Reporter, at 1170 Peachtree Street, Atlanta, Georgia, on November 30, 2017, commencing at the hour of 9:40 a.m.

Q Okay. You don't know what data it exactly checks?
A No.
Q Okay. Do you know if it accounts for telephone number porting?
A I don't know that answer either.
Q Okay. And in the file that you get, there's a phone number in it that -- is the file a spreadsheet?
A It depends. Some of them are -- when I use the term flat file, some of them are truly a flat file that we pull over. Some of them are on a database that we're just pulling columns out of a database and dropping them down.
Q Okay. So let's just refer to a particular transaction -- the data regarding a particular transaction that you get as just a record. Okay?
A Uh-huh. (Witness answers affirmatively.)
Q Does that record include one and only one phone number, that you get?
A It -- again, it depends. All the sources are different. I think that most -- I'll say this. Most of them produce just one telephone number. We do have some others that have two telephone numbers. We

may have some that produce a number that's just an attribute that we just pass through. So it depends on the source.

Q So with respect to the files that have more than one telephone number on the record, which of the numbers is sent the survey?

A Whichever one -- so let's just say that there was more than one number. The validation would look to see if it's actually a wireless number. That would be -- for a text, it would have to be wireless. If the first one was not wireless, it would check to see if the second was wireless, and it would go with the first one that actually was eligible.

Q So potentially the texts could be sent to multiple numbers?

A No. It will only choose one.

Q What if they're both wireless numbers?

A Then it will just choose the first one.

Q The first one --

A It will just choose the one that's eligible. So it will check -- it will only send it to one of those for each record. So when the record comes in, it gets a unique ID assigned to it. And it will look to see is it wireless, is it not wireless. And again, I don't know all the details of it, but

then it will select just one of those numbers.
Q So I guess if there's multiple numbers on the record and they're all eligible to be sent a survey text, how does it pick which to send it to?
A I'd have to get the actual code to tell you, but I can confidently say it's only sending one.
Q Okay. Would it choose the -- if there are multiple numbers on a record and they're all eligible and one of those is the primary number on the account, would it send the text to the primary number?
A No, because we don't know anything about primary. That doesn't mean anything to us.
Q You don't know what it is. So the code could be set up to -- you don't know the reason for choosing one or the other?
A Right, it could be randomized, I'd have to look at the code. But like I say, we don't know anything about primaries or secondaries. They're just two number fields.
Q All right. So going back to 2281, the second to last entry in the TACRFT section says run other business exclusions?
A Correct.
Q That's not referring to anything that wasn't in the criteria in the --

Page 41 /Line 1 /Should Read:
Change "receive sample" to "receive a sample"
Reason: Omitted word

Page 65 /Line 3 /Should Read:
Change "a particular either" to "either a particular"
Reason: Words transposed

Page 121 /Line 18 /Should Read:
Change "digitally first thing" to "digitally as the first thing"
Reason:

Page ____/Line ____/Should Read:

Reason:

Page ____/Line ____/Should Read:

Reason:

KERRY LYON

Sworn to and subscribed before me,

Cheryl D. Hopper, Notary Public
This 10th day of January, 2018
My Commission Expires: August 28, 2018

CHERYL D. HOPPER NOTARY PUBLIC FORSYTH CO. GEORGIA

CERTIFICATE OF REPORTER

STATE OF GEORGIA)
COUNTY OF GWINNETT)

I, LYNN VAN RY, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me to the best of my ability and thereafter reduced to typewriting under my direction; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.

This, the 11th day of December, 2017.

LYNN VAN RY, CCR, RPR
CERT. NO. B-1120

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION**

ALI GADELHAK, on behalf of himself and all others similar situated,	)	
	)	17-cv-1559
Plaintiff,	)	
	)	Hon. Edmond Chang
v.	)	
AT&T SERVICES, INC.	)	
Defendant.	)	

DECLARATION OF KERRY LYON

Pursuant to 28 U.S.C. § 1746, I, Kerry Lyon, declare and state as follows:

1. I am employed as a Director-Market Research & Analysis at AT&T Services Inc. ("AT&T").

2. AT&T engages in the AT&T Customer Rules Feedback Tool ("TACRFT"), a program though which text message surveys are directed to the customers of its corporate affiliates to assess the customers' satisfaction with their interactions with service representatives. In my position, part of my responsibilities include overseeing the surveys sent pursuant to the TACRFT program.

3. I was previously deposed in the above-captioned case. In that deposition, I was asked, when an AT&T customer record contains more than one cellular telephone number, how a particular number from that record was selected to receive a text message survey.

4. At the time, I testified that while I knew the system chose a single number to receive the text, I would have to review the code to determine how it selected one number over another to receive the text if multiple cellular numbers were associated with the account.

5. Since that time, I have had the opportunity to review the relevant systems, including the code. I have confirmed the code selects the first eligible wireless number to send the survey system.

6. The LS-CRM system, which produced the number used to send the text to Gadelhak's cellular telephone, contains a "primary" and "secondary" contact field. The code would thus send the surveys to the primary number field if it was a qualifying number, and if not, use the secondary contact field.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct,

Dated this 19 day of October, 2018 in Atlanta, Georgia

Kerry Lyon

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Certificate of Service

I certify that on August 15, 2019 I electronically filed the foregoing brief and supplemental appendix with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the CM/ECF system, which will serve counsel of record for all parties.

s/ *Andrew J. Pincus*
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