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,

On Appeal from the United States District Court
for the Northern District of Illinois
No. 17-cv-1559
Hon. Edmond E. Chang (United States District Judge)

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF AT&T SERVICES, INC., AND AFFIRMANCE

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-1738

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

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

In that capacity, it has regularly participated in cases concerning the scope of liability under the Telephone Consumer Protection Act. For example, it was one of the petitioners in *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018), where it successfully set aside the Federal Communications Commission's most recent comprehensive statement about the TCPA. It also participated as an *amicus curiae* in *Duguid v. Facebook, Inc.*, 926 F.3d 1146

[1] All parties consent to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution intended to fund to the preparation or submission of this brief.

(9th Cir. 2019), and *Gallion v. Charter Communications, Inc.*, 772 F. App'x 604 (9th Cir. 2019).

INTRODUCTION

In the 1980s, telemarketers used dialing equipment that randomly or sequentially generated numbers to place millions of calls, usually to deliver a prerecorded or artificial-voice message.[2] These machines caused harms over and above any distraction caused by unwanted telemarketing generally. By calling indiscriminately, they reached "lines reserved for [specialized] purposes," including emergency rooms, police stations, and fire departments.[3] And by dialing sequentially, they threatened to shut down calls to entire facilities; one, for instance, tied up "exam rooms, patient rooms, and x-ray facilities" with phone calls about a free vacation.[4]

These problems became particularly acute when the machines reached pager lines or nascent wireless networks. Even though these specialized numbers were usually unlisted—no would-be transplant recipient, for

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[2] *Telemarketing Practices: Hearing Before the Subcomm. on Telecommc'ns and Fin. of the House Comm. on Energy and Commerce*, 101st Cong. 1, 3 (1989) (statements of Reps. Rinaldo and Markey).

[3] S. Rep. No. 102-178, at 2 (1991); *see also, e.g.*, *Computerized Telephone Sales Calls and 900 Service: Hearings Before the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong. 34 (1991) (statement of Chuck Whitehead) (describing prerecorded calls to 911 operators that began "This is your lucky day.").

[4] *S. 1462, The Automated Telephone Consumer Protection Act of 1991: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong. 43 (1991) (statement of Michael F. Jacobson).

instance, would disclose his transplant-dedicated pager number—random or sequential dialing machines reached them anyway.[5] And because wireless carriers "obtain[ed] large blocks of consecutive phone numbers," a sequential dialer chancing upon that block would knock out an entire network.[6]

Congress responded. To deal with the general aggravation of prerecorded or artificial voice messages—so-called "robocalls"—it banned them (absent prior express consent) whether made to residential or wireless numbers. *See* 47 U.S.C. § 227(b)(1)(A), (b)(1)(B). But to deal with the unique dangers that random or sequential dialers posed to specialized numbers, it banned unconsented calls made "using any automatic telephone dialing system"—defined as "equipment which has the capacity … to store or produce telephone numbers to be called, using a random or sequential number generator[,] and … to dial such numbers"—when placed to "emergency telephone line[s]," "patient room[s] of a hospital," or "any telephone number assigned to a paging service [or] cellular telephone service." *Id.* § 227(a)(1), (b)(1)(A). Calls made via ATDS to then-dominant residential numbers—which did not face the same threatened harms—remained lawful.

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[5] *Id.* at 111 (statement of Michael J. Frawley).

[6] *Telemarketing/Privacy Issues: Hearing Before the Subcomm. on Telecommc'ns and Fin. of the House Comm. on Energy & Commerce on H.R. 1304 & H.R. 1305*, 102d Cong. 113 (1991) (statement of Michael J. Frawley).

For decades, the ATDS provision hummed along quietly, eliminating the use of random or sequential dialing machines without much fanfare. But after the Federal Communications Commission began trying to stretch the statute to cover unwanted calls generally, the plaintiffs' bar brought a deluge of lawsuits asserting that virtually every kind of machine-assisted dialing involves the use of an ATDS.

Appellant's theory of the statute represents the high water mark of these efforts. Because (he insists) the TCPA restricts any equipment that merely stores numbers and dials them automatically, it covers Appellee's efforts to survey its affiliates' own customers about their interactions with service representatives. *See* Appellant's Br. 7–9; SA 2–3.

This Court should reject Appellant's boundless view. His interpretation cannot be squared with the statute's text, context, or evident purpose. Just as importantly, it renders the ATDS provision absurdly and unconstitutionally overbroad; if the TCPA covers anything that can store and automatically dial numbers, then it covers nearly every smartphone in America. Rather than adopt Appellant's atextual, unconstitutional approach, this Court should restore to the TCPA what Congress required of every ATDS: the capacity to "us[e] a random or sequential number generator."

ARGUMENT

I. An ATDS Must Do More Than Merely Store and Dial Numbers

Congress defined 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). Appellant insists that this provision's key phrase—"using a random or sequential number generator"—modifies the verb "produce," but not the immediately preceding verb "store." On this view, anything that "stores telephone numbers to be called and automatically dials those numbers is an ATDS"; a "random or sequential number generator" is not "necessary" unless the equipment *produces* numbers rather than store them. Appellant's Br. 20 (emphasis omitted); *see Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 (9th Cir. 2018) (adopting this interpretation).

Appellant's reading cannot be squared with basic rules of grammar or with ordinary principles of statutory interpretation. It also cannot be squared with the cardinal rule for interpreting the ATDS provision—that it must not be read to cover smartphones. It must be rejected.[7]

[7] In 2015, the Commission purported to "clarif[y]" its prior statements about the functions of an ATDS and denied a petition for rulemaking seeking to overturn those prior statements. *See In re Rules & Regs. Implementing the TCPA*, 30 FCC Rcd. 7961, 8039 & n.552 (2015) ("2015 TCPA Order"). Even though the D.C. Circuit invalidated the Commission's "pertinent pronouncements" on that subject upon direct review, *ACA Int'l*, 885 F.3d at

A. Appellant's Interpretation Is Textually Flawed

Take first the linguistic problems in Appellant's interpretation. The phrase "using a random or sequential number generator" is a "postpositive modifier"; it alters the meaning of an element (or elements) of the sentence that come before it. "When there is a straightforward, parallel construction that involves all nouns or verbs in a series, a … postpositive modifier normally applies to the entire series." Antonin Scalia & Bryan A. Garner, *Reading Law* 147 (2012) (series-qualifier canon) ("*Reading Law*"). Under this rule, for instance, if a statute provided tax preferences to "a corporation or partnership registered in Delaware," "a corporation as well as a partnership must be registered in Delaware" to qualify. *Id.* at 148.

This rule applies with particular force to postpositive modifiers that are separated from the verbs in question by those verbs' direct object. For example, imagine you told your friend that "Netflix produces and distributes movies using cutting-edge technology." You would be baffled if your friend nonetheless expressed surprise at Netflix's state-of-the-art film studios; after all, you just

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701, Appellant insists that this Court remains bound by the Commission's pre-2015 statements. *See* Appellant's Br. 41–49. For the reasons given by Appellee and the Ninth Circuit, the D.C. Circuit's decision forecloses that view. *See* Appellee's Br. 32–42; *Marks*, 904 F.3d at 1049. Moreover, "[t]he Hobbs Act does not bar a defendant in an enforcement action from arguing that the agency's interpretation of the statute is wrong." *PDR Network, LLC v. Carlton & Harris Chiropractic*, 139 S. Ct. 2051, 2058 (2019) (Kavanaugh, J., concurring); *see also* Appellee's Br. 43–44.

told him that it "produces *and* distributes movies using cutting-edge technology." Similarly, a public official who "sends and receives emails using his personal account" almost certainly does not disregard government policy only with respect to incoming messages. And an offer promoting the chance "to lease or purchase a golf cart using a 25% off code" works both for those interested in owning one outright and for those with more temporary preferences. As a rule, then, a postpositive modifier that follows the direct object of conjoined verbs modifies *both* of those verbs, not just the second of them. *See Reading Law* at 148.

Appellant's interpretation—that the phrase "using a random or sequential number generator" modifies "produce" but not "store"— violates this grammatical rule. Indeed, the Ninth Circuit's decision in *Marks* illustrates as much. In its own words, the court interpreted the ATDS provision to cover equipment with the capacity "(1) to 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." 904 F.3d at 1052. But the Ninth Circuit's need to rewrite the provision gives the game away. In light of the rules regarding postpositive modifiers, the Ninth Circuit had to (1) separate the statute's two paired verbs; (2) shove the verbs' shared object in between those verbs; and (3) insert an added copy of that object into the statute, *after* the now-separated verb "to

produce," to clarify that the modifier affects "produce" but not "store." That's surgery, not statutory interpretation.

Appellant's interpretation has other textual and contextual flaws as well. If Congress had wanted to restrict equipment that stores and dials numbers, why didn't it just say so? There were plenty of ways to bring about that result—say, for instance, the Ninth Circuit's rewritten version—and yet Congress drafted a provision dominated by the modifying phrase "using a random or sequential number generator." Moreover, why *would* Congress restrict all equipment that stores and dials numbers, but only equipment that produces and dials numbers when those numbers are produced "using a random and sequential number generator"? After all, equipment that produces and then automatically dials numbers causes exactly the same supposed harms as equipment that stores and automatically dials them.

Similarly, courts must "give effect," "if possible," to each word in a statute. *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). But it is hard to imagine a device that has the capacity to "produce" telephone numbers and to "dial" them, but not to "store" them—between the time when the numbers are produced and when they are dialed, they must presumably be stored. As a result, the modifier "using a random or sequential number generator" does virtually no work on Appellant's interpretation—every piece

of equipment that qualifies under the "produce" prong would also qualify under the "store" prong. And even if there may be rare instances in which the "produce" prong has independent effect, it would be strange to give so limited a reading to the statute's most distinctive phrase. It "account[s] for" nearly "half of [subsection (A)'s] text," yet it "would lie dormant in all but the most unlikely situations." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). That is not how statutes should be read.

Finally, Appellant's interpretation makes no sense of the ATDS provision's history. Over and over and over again, members of Congress and testifying witnesses spoke to the particular harms associated with random or sequential dialers—they reached unlisted numbers (like doctors' pagers), they tied up numbers that no directed telemarketing campaign would ever contact (like fire stations and emergency rooms), and they knocked out entire networks of cellular numbers for hours at a time. *See supra* 3–4. Dialing from a list, by contrast, creates none of these risks; no telemarketer *could* reach an unlisted number by using a list, and no telemarketer would *want* to call to 911 or bring down a wireless network in a futile effort to sell timeshares.

Despite this evidence, Appellant tries to suggest that, in fact, the TCPA's ATDS provision was driven by Congress's dislike for "automated communications" in general. Appellant's Br. 18; *see also* EPIC Amicus Br. 12–

14. That can't be right. When Congress enacted the TCPA and its ATDS provision, the overwhelming majority of Americans had residential landlines only; wireless numbers were particularly rare (and particularly expensive).[8] If Congress thought that ATDSs were bad simply because they place unwanted calls—or even because they place *too many* unwanted calls—it would have restricted their use when calling landlines as well. That is, after all, precisely what Congress did with prerecorded- or automated-voice-message calls; they have always been unlawful (absent consent) whether delivered to wireline or wireless numbers. *See* 47 U.S.C. § 227(b)(1)(A) (wireless numbers); *id.* § 227(b)(1)(B) ("residential telephone line[s]").

But Congress did not restrict ATDS calls placed to residential wireline numbers. Instead, it gave residential subscribers upset with ATDS calls the same option that they (and others) have for any other potentially unwanted call—the Do-Not-Call Registry. *See* 47 U.S.C. § 227(c) (requiring the Commission to consider creating a nationwide Do-Not-Call Registry); *In re Rules & Regs. Implementing the TCPA*, 18 FCC Rcd. 14014, 14034–42 (2003)

[8] *See Hearing Before the Subcomm. of Commc'ns of the S. Comm. on Commerce, Science, & Transp.*, 102d Cong. 45 (1991) (statement of Thomas Stroup) (only six million wireless subscribers nationwide in 1991); *Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993*, 10 FCC Rcd. 8844, 8875–81 (1995) (60-minutes-per-month plan cost $63 in 1991).

(creating the Registry and authorizing "residential" wireless subscribers to add their numbers as well). This differential treatment demonstrates that Congress meant what it said about random or sequential number generators in the TCPA. Courts should not override that choice through Appellant's rewriting of the ATDS provision.

B. Appellant's Interpretation Absurdly and Unconstitutionally Covers Nearly Every Smartphone

In addition to its grammatical, contextual, and historical implausibility, Appellant's interpretation faces another, insuperable obstacle—it subjects hundreds of millions of ordinary Americans to $500-a-call liability for the sin of using one smartphone to call or text another. Consider the iPhone. Every iPhone that runs iOS 11 or iOS 12 comes equipped with a feature called "Do Not Disturb." An iPhone user who wishes not to be disturbed may activate this feature and thereby instruct her phone to send automated responses, either to all incoming calls and messages or to a select group (such as recent callers, her favorites list, or her contacts list). "If someone sends [the user] a message, they receive an *automatic* reply letting them know that [the user is] driving." Apple, *How To Use Do Not Disturb While Driving*, https://apple.co/2w8nurH (emphasis added); *see also, e.g.*, Nick Douglas, Lifehacker, *Add an Auto-Responder to Do Not Disturb*, https://bit.ly/2NDKQxg (explaining how a user can "activate" this iPhone feature so that it "auto-respond[s] to anyone who

texts" during the user's chosen time frame, "not just when [the user is] driving").

Given this pre-installed feature, all iPhones currently running iOS 11 or iOS 12—that is, 96% of the 193 million iPhones currently in use in the United States[9]—could qualify as ATDSs under Appellant's interpretation because they have "the capacity" to "store[] telephone numbers to be called and *automatically* dial[] those numbers." Appellant's Br. 20. And iPhone users aren't the only people who accidentally own ATDSs. Hundreds of millions of other Americans own smartphones with similar auto-response capabilities. *See, e.g.*, Nancy Messieh, Make Use Of, *How To Send Automatic Replies to Text Messages on Android*, https://bit.ly/2IRgGWA (May 10, 2017) (discussing automatic replies for Android phones); Verizon, *Turn On Auto Reply*, https://vz.to/2A5tqpH (discussing the auto-reply functionality in Verizon's often pre-installed messaging app). Under Appellant's view, all calls or text messages to other wireless numbers from devices with these capabilities—whether to ask a neighbor to move his car, to raise funds for a child's soccer

[9] *See* Apple, *Developer Support*, https://developer.apple.com/support/app-store/ (reporting that, as of May 30, 2019, 87% of iPhones are using iOS 12 and 9% are using iOS 11); Juli Clover, MacRumors, *Apple's U.S. iPhone User Base Sees Slowing Growth in Q1 2019*, https://bit.ly/2HysMU5 (reporting research showing that there were 193 million iPhones in the United States as of March 30, 2019).

team, or to drum up support for a political candidate—require the prior express consent of the called party. Otherwise, the caller faces at least $500 in statutory damages—and trebled damages if she does it again.

"Nothing in the TCPA countenances concluding that Congress" wanted to apply its "restrictions to the most commonplace phone device used every day by the overwhelming majority of Americans." *ACA Int'l*, 885 F.3d at 699. Indeed, it would be absurd to think 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." *Id.* at 698.

And even if Congress unintentionally brought about that Orwellian result, the Constitution would stand in the way. A content-neutral time, place, or manner restriction must "leave open ample alternative channels" of communication. *Weinberg v. City of Chicago*, 310 F.3d 1029, 1036 (7th Cir. 2002).[10] In this Circuit, a law banning book sales within 1,000 feet of a stadium without the stadium owner's consent violates the First Amendment because it "prevents [the seller] from reaching" his "unique" intended "audience." *Id.* at

[10] In 2015, the TCPA was amended to exclude calls "made solely to collect a debt owed to or guaranteed by the United States." Pub. L. No. 117-74, 129 Stat. 584 (Nov. 2, 2015). Two circuits have invalidated that exemption as content-based and then severed it from the statute. *See Duguid v. Facebook, Inc.*, 926 F.3d 1146 (9th Cir. 2019); *Am. Ass'n of Political Consultants, Inc. v. FCC*, 923 F.3d 159 (4th Cir. 2019).

1042. If that is so, then it most certainly violates the First Amendment to require nearly every American to secure prior express consent before calling or texting nearly anyone else in the country.

II. This Court Cannot, Should Not, and Need Not Gut the Statute's Random-or-Sequential-Number-Generator Requirement

It is thus clear that Appellant's interpretation rewrites the ATDS provision, quite literally restructuring its basic elements in a manner that eliminates its key limiting provision. Worse, Appellant's interpretation then exposes millions upon millions of people to liability for routine conduct. Because Appellant's construction "would raise serious constitutional problems," it must be rejected unless it is the only "possible" one. *INS v. St. Cyr*, 533 U.S. 289, 300 (2001).

But there is another "possible"—indeed, far better—way to interpret the statute—that is, to give full meaning to the modifier, "using a random or sequential number generator." 47 U.S.C. § 227(a)(1). This Court can give full effect to this phrase—and avoid boundless TCPA liability for smartphone users—by interpreting the modifier to cover both verbs ("store" and "produce"). And in the event the Court finds that interpretation unpersuasive, there is still another that avoid the pitfalls of Appellant's—the modifier could be read to cover the phrase "telephone numbers to be called," again giving pride of place to the statute's key limit and properly cabining the TCPA's sweep.

A. This Court Could Read "Using a Random or Sequential Number Generator" To Modify Both "Store" and "Produce"

1. To sidestep the interpretive dangers lurking in Appellant's approach, this Court could follow the Third Circuit in reading the modifier to cover both of the verbs that precede it. Under that reading, equipment qualifies as an ATDS only if it either stores telephone numbers or produces telephone numbers "using a random or sequential number generator." If it lacks that capacity, there is no TCPA violation. *See Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018) (affirming summary judgment where the equipment lacked "the present capacity to … generat[e] random or sequential telephone numbers" and instead "sent messages only to numbers that had been individually and manually inputted into its system").

This reading has a number of advantages as compared to Appellant's. First, it follows the ordinary rule for postpositive modifiers that follow two verbs' shared direct object—it modifies *both* of those verbs, not just one of them. *See supra* 7–8. Second, it gives proper effect to the comma separating the modifier from the rest of the sentence. The point of such a comma is to "indicate[] 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. Director, Office of Workers' Comp. Programs*, 17 F.3d 616, 630 (3d Cir.

1994). Third, this interpretation makes sense of the TCPA's legislative history and early interpretation, which focused on random and sequential dialing. *See supra* 3–4; *see also In re Rules & Regs. Implementing the TCPA*, 7 FCC Rcd. 8752, 8776 (1992) ("speed dialing," "call forwarding," and "delayed message" equipment not covered "because the numbers called are not generated in a random or sequential fashion"); *In re Rules & Regs. Implementing the TCPA*, 10 FCC Rcd. 12391, 12400 (1995) (the ATDS provision does not apply to calls "directed to [a] specifically programmed contact number[]," just to calls to "randomly or sequentially generated numbers"). And last—but not least—this interpretation avoids treating every smartphone like an ATDS, as few smartphones have been programmed to randomly or sequentially generate telephone numbers to be called.

2. Appellant attacks this plausible interpretation on several grounds, but they are all mistaken. First, Appellant contends that this interpretation renders the verb "store" superfluous, since it is supposedly difficult to see how a device could "store" a telephone number "using a random or sequential number *generator*." Appellant's Br. 20–22. That's not right; a machine that stores every number spit out by its generator and then later dials them can be said to "store" those numbers "using" the generator. More importantly, Appellant cannot complain about redundant words in opposing interpretations

anyway. "[T]he canon against surplusage 'assists only where a competing interpretation [itself] gives effect to every clause and word of a statute.'" *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013) (quoting *Microsoft Corp. v. I4I Ltd. P'ship*, 564 U.S. 91, 106 (2011)). As explained, however, Appellant's interpretation does no such thing because it leaves nothing for the "produce" prong to do. And whatever textual difficulties there might be in this interpretation pale in comparison to those apparent on the face of Appellant's interpretation, which requires restructuring the provision wholesale in order to reach Appellant's result. *See supra* 7–10.

Appellant also contends that other provisions of the TCPA—namely, the consent defense to ATDS calls and the exemption for ATDS calls made to collect government-owned or government-backed debt, *see supra* 14 n.10—demonstrate that the ATDS provision must include equipment that dials numbers from a list. Appellant's Br. 25–27. On Appellant's view, the consent defense and the government-debt exemption "serve[] little purpose" if the ATDS provision covers only equipment that "dial[s] telephone numbers generated out of thin air." Appellant's Br. 25; *see also id.* at 26.

Appellant would have something of a point if the ATDS provision regulated only equipment that *actually* generated and dialed random or sequential numbers. (But only something of a point—the consent defense and

the debt-collection exemption apply to the statute's combined prohibition on prerecorded calls *and* ATDS calls, so there is still work for both to do on this reading of the statute). However, the ATDS provision has long been understood to sweep more broadly. The statute covers equipment that merely "has the *capacity*" to perform the requisite functions. 47 U.S.C. § 227(a)(1) (emphasis added). Applying this language, courts have held that, to qualify as an ATDS, "a system need not actually store, produce, or call randomly or sequentially generated telephone numbers, it need only have the capacity to do it." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009). With "capacity" in mind, Appellant's purported tension dissolves: it makes perfect sense to consent to a directed call from equipment that can also call randomly or sequentially generated numbers, just as it makes sense to use such equipment to place calls to collect government-backed debt.

Appellant also argues that the government-debt exemption demonstrates that Congress has ratified a list-based understanding of the ATDS provision. *See* Appellant's Br. 27–31. This suggestion is difficult to take seriously. The Commission's statements regarding ATDS functionality have always been a mishmash. Its statements prior to the 2015 TCPA Order, for instance, were "hardly a model of clarity." *Dominguez v. Yahoo, Inc.*, 629 F. App'x 369, 372 (3d Cir. 2015); *see also ACA Int'l*, 885 F.3d at 701 (the

Commission's statements "left significant uncertainty about the precise functions an autodialer must have the capacity to perform"). In fact, the only appellate court to assess those statements read them to espouse *Appellee*'s view of the statute. *See Dominguez*, 629 F. App'x at 372–73 & n.2.

These problems were exacerbated by the 2015 TCPA Order, issued just months before Congress amended the statute. As the D.C. Circuit explained, that order "seem[ed] to give both answers" to the key question here: whether "a device qualif[ies] as an ATDS only if it can generate random or sequential numbers to be dialed." *ACA Int'l*, 885 F.3d at 702–03. It should go without saying that Congress cannot ratify an agency's position that has long been muddled and that finally became so self-contradictory that it "fail[ed] to satisfy the requirement of reasoned decisionmaking." *Id.* at 703. Rather, Congress simply did what every other defendant facing the deluge of new TCPA litigation only wishes it could do: spare its own ox from getting gored.

B. Alternatively, This Court Could Read "Using a Random or Sequential Number Generator" To Modify "Telephone Numbers To Be Called"

1. If, however, the Court concludes that the ATDS provision's modifier cannot cover both "store" and "produce," there is still another interpretation that avoids the perils of Appellant's: the court could read the modifier to affect the adjectival infinitive "to be called" in the phrase "telephone

numbers to be called." On this reading, the modifier thus "describe[s] a quality of the numbers an ATDS must have the capacity to store or produce." *Pinkus v. Sirius XM Radio Inc.*, 319 F. Supp. 3d 927, 938 (N.D. Ill. 2018) (Feinerman, J.); *see also* SA 11–12. From that, "it follows that that phrase is best understood to describe the process by which those numbers are generated in the first place." *Pinkus*, 319 F. Supp. 3d at 938. And that process is random or sequential number generation; after all, "the phrase 'using a random or sequential number generator' … must be used to do *something* relevant to the 'telephone numbers to be called.'" *Id.*; *see also id.* ("[T]he phrase 'using a random or sequential number generator' necessarily conveys that an ATDS must have the capacity to generate telephone … numbers, either randomly or sequentially, and then to dial those numbers.").

This view, too, has considerable strengths. First, it gives full weight to the most obvious implication of Congress's definition—that an ATDS must do something "using a random or sequential number generator." Second, this interpretation plausibly reads the postpositive modifier to cover the nearest possible referent—the adjectival infinitive "to be called"—without needing to skip over the intervening direct object. Third, it mitigates any potential superfluity of the word "store" by modifying "to be called" instead. And finally, it cabins the ATDS provision within reasonable bounds, covering the (once

common) machines that randomly or sequentially generate numbers but leaving smartphones and other ordinary devices unaffected. *See generally* Appellee's Br. 10–21.

2. Appellant attacks this interpretation as well, arguing first that the phrase "using a random or sequential number generator" cannot modify the noun "telephone numbers" because it is an adverbial phrase. Appellant's Br. 22–23. But Appellant misunderstands the district court's interpretation. On its view, the modifier affects "telephone numbers *to be called*," not just "telephone numbers." *Pinkus*, 319 F. Supp. at 938 (emphasis added). As a result, Appellant's grammatical attack misfires; it is perfectly possible for an adverbial phrase to modify a direct object that itself has an adjectival infinitive. For instance, imagine the sentence "Mom wants the lawn to be cut, using Grandpa's lawnmower." Any English speaker would understand that "using Grandpa's lawnmower" says *how* Mom wants the lawn to be cut, even though the phrase "the lawn to be cut" is technically a noun phrase because "the lawn" is the direct object.

Appellant also insists that this interpretation still renders "store" superfluous. Appellants' Br. 23–24. As explained above, it wouldn't matter even if this were true; Appellant's interpretation faces similar (and graver) problems, so this interpretive canon is a wash. *See supra* 17–18. And in any

event, Appellant again misunderstands the interpretation below. The district court (and Judge Feinerman in *Pinkus*) recognized that the statute focuses on the act of generating and dialing random or sequential numbers. The verbs "store" and "produce" represent distinct parts of that overarching act, which Congress spelled out in detail so as to make sure that any random or sequential number generator was covered.

* * *

Sometimes no one interpretation of a statute puts the puzzle together perfectly; like every other author, Congress occasionally drafts inartfully. The ATDS provision may well represent one of those occasions.

But that would not justify the Court adopting Appellant's store-and-dial-numbers interpretation of the statute. To reach that reading, one must either ignore fundamental principles of grammar or rewrite the provision almost entirely. And to come to that conclusion, one must countenance the possibility that millions upon millions of calls and text messages sent in this country each day violate federal law. Because the TCPA is much more plausibly read in other ways—and because Appellant's reading violates the First Amendment—this Court should enforce the obvious thrust of the ATDS provision and demand that any ATDS be capable of generating and dialing random or sequential telephone numbers.

CONCLUSION

For these reasons, and those raised in the brief of Defendant-Appellee AT&T Services, Inc., the judgment below should be affirmed.

Dated: August 22, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

This brief complies with the limitations set forth in Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 5,089 words, excluding the portions exempted under F. R. App. P. 32(a)(7)(B)(iii).

This brief has been prepared in Microsoft Office Word 2010 using the proportionally spaced typeface Century Schoolbook Standard in 13 point, in conformity with Rules 32(a)(5) and 32(a)(6).

Dated: August 22, 2019

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CERTIFICATE OF SERVICE

I certify that on August 22, 2019, I caused the foregoing document to be filed electronically with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to all attorneys of record by operation of the Court's electronic filing system.

Dated: August 22, 2019

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