

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Consumer and Government Affairs Bureau	)	CG Docket No. 18-152
Seeks Further Comment on Interpretation of	)	
the Telephone Consumer Protection Act in	)	
Light of the Ninth Circuit's <i>Marks v. Crunch</i>	)	
<i>San Diego, LLC</i> Decision	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	
	)	
	)	

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**COMMENTS OF CRUNCH SAN DIEGO, LLC**

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Crunch San Diego, LLC (“Crunch”) hereby submits these comments in response to the Commission’s Public Notice seeking comment on the interpretation of the Telephone Consumer Protection Act (“TCPA”)<sup>1</sup> following the recent decision of the U.S. Court of Appeals for the Ninth Circuit in *Marks v. Crunch San Diego, LLC*, \_ F.3d \_, 2018 WL 4495553 (9th Cir. 2018).

## I. INTRODUCTION

The Ninth Circuit in *Marks* expansively rewrote the statutory definition of an “automatic telephone dialing system” (“ATDS”) in a manner that conflicts with the plain language of the statute, conflicts with the TCPA’s legislative intent, conflicts with the Third Circuit’s construction of an ATDS based on the plain terms of the statute in two previous decisions, and rewrites the statutory term in a way that is inconsistent with the D.C. Circuit’s holding in *ACA Int’l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). For these reasons, Crunch, on October 4, 2018, petitioned for *en banc* review by the Ninth Circuit. A copy of that petition is attached as Exhibit A.

The Commission should not adopt the Ninth Circuit’s redefinition in *Marks* of the statutory term ATDS, but should instead interpret the statute consistently with its plain terms, as the Third Circuit did in the *Dominguez v. Yahoo, Inc.* line of cases. See *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018) (holding that after *ACA Int’l* the “key” question under the TCPA is whether the equipment used to send the alleged texts “had the present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers”); *Dominguez v. Yahoo, Inc.*, 629 F. App’x. 368, 372, 373 n.2 (3d Cir. 2015) (ruling “that an autodialer must be able to store or produce numbers that *themselves* are

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<sup>1</sup> *Consumer and 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*, CG Docket No. 18-152, CG Docket No. 02-278, DA 18-1014 (Oct. 3, 2018) (“Public Notice”).

randomly or sequentially generated”). In expansively construing the statutory term ATDS as “not limited to devices with the capacity to call numbers produced by a ‘random or sequential number generator,’ but also includ[ing] devices with the capacity to store numbers and to dial stored numbers automatically,”<sup>2</sup> *Marks* effectively rewrote the statute to expand potential liability under the TCPA to the subscribers and customary users of over 300 million smartphones because all smartphones have the capacity to dial from a phone list, such as a personal phone book or even a contacts list. In this respect, *Marks* directly conflicts with the D.C. Circuit’s recent holding in *ACA Int’l*. In that case, the court rejected that prior Commission’s expansive interpretation of TCPA – an interpretation that would “render every smartphone an ATDS.”<sup>3</sup> It also rewrote the statute in a way that renders the random or sequential number generation requirement superfluous because any device that has that capacity would inevitably also have the capacity to store numbers. Because *Marks* cannot be reconciled with this interpretative limitation set forth in *ACA Int’l* or with generally-recognized principles of statutory construction, the Commission should construe the ATDS definition based on its plain meaning, as a device or equipment that has the present capacity to store or produce phone numbers that are themselves generated randomly or sequentially by the device or equipment. This is the only interpretation that gives full effect to each part of the statutory definition of an ATDS and the only interpretation that limits the definition of the term to the practices Congress sought to restrict – calls to numbers generated randomly or sequentially (including emergency numbers) – and not to most phone calls and text messages made every day by over 300 million smartphones.

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<sup>2</sup> *Marks*, 2018 WL 4495553, at \*9.

<sup>3</sup> *ACA Int’l*, 885 F.3d at 697-98.

## II. THE *MARKS* INTERPRETATION OF *AUTOMATED TELEPHONE DIALING SYSTEM* IS INCONSISTENT WITH THE STATUTORY TEXT AND CLEAR LEGISLATIVE INTENT

### A. The ATDS Definition Cannot Be Read To Exclude Number Generation

*Marks* correctly held that following *ACA Int'l* the sole definition of an ATDS that applies is the one set forth in the statute,<sup>4</sup> but erroneously construed section 227(a)(1) of the TCPA in a manner that would read out the phrase “using a random or sequential number generator” from the statutory provision. In ruling that any device that “store[s] numbers to be called” is an ATDS even if it lacks the capacity to generate random or sequential phone numbers,<sup>5</sup> *Marks* eviscerates any kind of limitation that would delineate the types of smartphones used daily by millions of consumers from the specific type of automated dialing equipment that Congress intended to regulate—as evidenced by the statute’s plain terms.

The TCPA 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.<sup>6</sup>

The *Marks* Court changed the meaning of an ATDS by reconstructing the definition as

equipment which has 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.<sup>7</sup>

In other words, *Marks* interpreted the phrase “using a random or sequential number generator” as applying *only* to the word “produce”—not to “store.” However, this interpretation is grammatically incorrect and contrary to both the statutory text and legislative intent.

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<sup>4</sup> *Marks*, 2018 WL 4495553, at \*8-9; *see also ACA Int'l v. FCC*, 885 F.3d 687, 702-03 (D.C. Cir. 2018) (vacating the FCC’s “treatment” of ATDS, including its interpretation that a device that dials stored numbers from a list is an ATDS even if it lacks the capacity to generate random or sequential phone numbers).

<sup>5</sup> *Marks*, 2018 WL 4495553, at \*8-9.

<sup>6</sup> 47 U.S.C. § 227(a)(1).

<sup>7</sup> *Marks*, 2018 WL 4495553, at \*9.

The grammatical structure of the ATDS definition requires reading the phrase “using a random or sequential number generator” as modifying *either* term—“store” *or* “produce”—in the preceding phrase. “A dependent clause that precedes a main clause should be followed by a comma.”<sup>8</sup> “[T]o store or produce telephone numbers to be called” must be read as the dependent phrase modified by “using a random or sequential number generator.” This is consistent with the Supreme Court’s instruction that a “natural reading” of “or” in a sentence “covers any combination of its nouns, gerunds, and objects.”<sup>9</sup> Thus, the use of the disjunctive in the phrase preceding the comma compels reading the statute as requiring that an ATDS must have the capacity to either “store” phone numbers “using a random or sequential number generator,” or “produce” phone numbers “using a random or sequential number generator.”<sup>10</sup> Only this interpretation adheres to the plain text and provides the most natural and grammatically correct reading of the statute.<sup>11</sup>

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<sup>8</sup> The Chicago Manual of Style § 6.30 (16th ed. 2010).

<sup>9</sup> *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018). *Encino Motorcars* involved a statutory exemption to overtime-pay requirements that applies to “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles” under 29 U.S.C. § 213(b)(10)(A). In holding that service advisors constitute “salesmen,” and overruling this Court’s construction that the exemption does not apply to salesman “‘primarily engaged in . . . servicing automobiles,’” the Supreme Court ruled that the “use of ‘or’ to join ‘selling’ and ‘servicing’ suggests that the exemption covers a salesman primarily engaged in either activity.” *Id.* at 1141.

<sup>10</sup> Construing the statute this way would not require inserting “additional words” such that it would read, as the *Marks* Court concludes, that an ATDS is “equipment which has the capacity (A) to store [telephone numbers *produced* using a random or sequential number generator]; or [to] produce telephone numbers to be called, using a random or sequential number generator . . . .” *Marks*, 2018 WL 4495553, at \*8 (italics added). The noun “generator” already implies that numbers will be “generated”; adding “produced” would be redundant. *See, e.g., The Oxford Encyclopedic English Dictionary* 586 (1991) (“generate” is synonymous with “produce”).

<sup>11</sup> *See, e.g., Pinkus v. Sirius XM Radio, Inc.*, 319 F. Supp. 3d 927, 938 (N.D. Ill. July 26, 2018) (“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.”).



By contrast, *Marks*'s construction would require revising the statute's punctuation, or changing the syntax with added words and subsection breaks.<sup>12</sup> Under *Marks*'s alternative reading, number generation would be optional. But the statutory text does not permit this construction without materially altering the structure and meaning of the ATDS definition, as explained by a district court judge who rejected a statutory construction argument similar to the one advanced by the plaintiff in *Marks* (which the Ninth Circuit panel adopted):

According to [plaintiff], the placement of the adverbial phrase “using a random or sequential number generator” indicates that it modifies only the verb “produce” and not the verb “store.” On that reading, and given the disjunctive “or” separating “store” and “produce,” a device’s having the “capacity to produce telephone numbers to be called, using a random or sequential number generator” (and then to dial those numbers) is only *one* possible way a device can qualify as an ATDS. Another way is for the device to simply have the “capacity . . . to store and dial numbers.” . . .

[Plaintiff’s] reading of the statute would be convincing if subsection (a)(1)(A) were rearranged to read: “to store or, *using a random or sequential number generator*, to produce telephone numbers to be called.” Rearranging the text in that manner would make it clear that “using a random or sequential number generator” modified only “produce” and not “store.” But it is an unconvincing reading of the statute that Congress in fact drafted, with the adverbial phrase following both verbs. Understanding why requires some explanation.

Like “produce,” “store” is a transitive verb, and so requires an object. *See Merriam-Webster* (2018), <https://www.merriam-webster.com/dictionary/store>; *Oxford English Dictionary* (2018), <http://www.oed.com/view/Entry/190929?rskey=ppyROA&result=2#eid> . And the object of the verbs “store” and “produce” is “telephone numbers to be called.” As a result, despite the disjunctive “or” linking “store” and “produce,” “store” is not a grammatical orphan, rather, like “produce,” it is tied to the object, “telephone numbers to be called.” The TCPA thus defines as an ATDS a device that has the capacity “[1] to store or produce [2] telephone numbers to be called” and then “to dial such numbers.” 47 U.S.C. § 227(a)(1).

But what kinds of numbers? Given its placement immediately after “telephone numbers to be called,” the phrase “using a random or sequential number

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<sup>12</sup> *See Marks*, 2018 WL 4495553, at \*8-9 (explaining that the statutory term, rather than as written, should be read as “equipment which has 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”).

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. Had Congress meant “using a random or sequential number generator” to modify the verbs “store” and “produce,” Congress would have placed the phrase immediately after those verbs and before “telephone numbers to be called” — with subsection (a)(1)(A) reading, “to store or produce, *using a random or sequential number generator*, telephone numbers to be called.” Indeed, it would be odd to read the phrase “using a random or sequential number generator” as modifying “store” and “produce.” The 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,” *see Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996, 1000 (9th Cir. 2017) (“[B]oth we and our sister circuits have recognized the punctuation canon, under which a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one where the phrase is separated from the antecedents by a comma.”) (brackets and internal quotation marks omitted) (citing decisions from the Second, Third, Eleventh, and Federal Circuits), and yet it is hard to see how a number generator could be used to “store” telephone numbers.

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. True, the statute does not use the verb “generate.” But 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.<sup>13</sup>

Thus, to “giv[e] effect to each word and mak[e] every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous,”<sup>14</sup> the phrase “random or sequential number generator” must “have some limiting effect” and “cannot reasonably refer broadly to any list of numbers” which would “nullify the entire clause.”<sup>15</sup>

*ACA Int’l* similarly held that the ATDS definition cannot simply refer to dialing from a list without reference to the requirement that numbers be generated randomly or sequentially:

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<sup>13</sup> *Pinkus v. Sirius XM Radio, Inc.*, 319 F. Supp. 3d 927, 938 (N.D. Ill. 2018).

<sup>14</sup> *U.S. v. Neal*, 776 F.3d 645, 652 (9th Cir. 2015).

<sup>15</sup> *Marks v. Crunch San Diego, LLC*, 55 F. Supp. 3d 1288, 1292 (S.D. Cal. 2014), *vacated and remanded*, No. 14-56834, 2018 WL 4495553 (9th Cir. Sept. 20, 2018).

Anytime phone numbers are dialed from a set list, the database of numbers must be called in some order — either in a random or some other sequence. As a result, the ruling’s reference to “dialing random or sequential numbers” cannot simply mean dialing from a set list of numbers in random or other sequential order: if that were so, there would be no difference between “dialing random or sequential numbers” and “dialing a set list of numbers,” even though the ruling draws a divide between the two. It follows that the ruling’s reference to “dialing random or sequential numbers” means generating those numbers and then dialing them.<sup>16</sup>

Accordingly, the Commission should construe the statutory definition pursuant to its plain terms.

**B. Legislative History Confirms That Number Generation Is The Focus Of The ATDS Definition**

The Commission should also be guided by legislative intent confirming that “Congress focused on regulating the use of equipment that dialed blocks of sequential or randomly generated numbers—a common technology at that time.”<sup>17</sup> The TCPA’s legislative history makes clear that the statute was enacted in 1991 to restrict certain telemarketing practices based on a *specific* type of dialing equipment that Congress defined in the statute. In prohibiting any person from making a call using an ATDS to a wireless number (except for calls made for emergency purposes or with prior consent), 47 U.S.C. § 227(b)(1)(A), Congress’s “focus[]” was “on regulating the use of equipment that dialed blocks of *sequential or randomly generated numbers . . . .*”<sup>18</sup>

Congress specifically targeted “machines [that] could be programmed to call numbers in large sequential blocks or dial random 10-digit strings of numbers,” because they “resulted in calls hitting hospitals and emergency care providers.”<sup>19</sup> Provisions under the TCPA that bar ATDS-made calls to emergency lines, patient rooms, numbers associated with wireless devices,

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<sup>16</sup> *ACA Int’l*, 885 F.3d at 702 (internal citation omitted).

<sup>17</sup> *Marks*, 2018 WL 4495553, at \*8.

<sup>18</sup> *Marks*, 2018 WL 4495553, at \*8 (emphasis added).

<sup>19</sup> *Marks*, 2018 WL 4495553, at \*2.

and calls to even unlisted phone numbers reflect legislative intent to combat the specific abuses caused by randomly or sequentially dialed telephone calls. But restricting dialers that merely call stored numbers would not curb the abuses caused by dialing blocks of randomly or sequentially generated numbers that impact emergency lines.<sup>20</sup> *Marks*'s interpretation of the ATDS definition contravenes legislative intent because it is based not on the actual congressional record but on the Court's assumption that "Congress's understanding that an ATDS was not limited to dialing wholly random or sequential blocks of numbers, but could be configured to dial a curated list."<sup>21</sup> That premise merely underscores that while an ATDS may have the capacity to perform such functions, the legislative focus was not on dialing from a list which does not present the problems of seizing phone lines or cell phone networks. Further, it does not make sense to enact restrictions on devices that simply dialed stored numbers because, as the Commission has noted, organizations that call lists of numbers "ha[ve] an incentive to direct calls to those likely to be interested."<sup>22</sup>

Congress enacted the TCPA to address the particular problems caused by random or sequential dialing, and did not intend to restrict all unsolicited calls dialed from a list or database—otherwise it could have simply said so in the statute. Indeed, the agency's initial

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<sup>20</sup> See H.R. Rep. No. 101-633, at 3, 10 (1990) (automatic dialers call "sequential blocks of telephone numbers"); S. Rep. No. 102-178, at 2 (1991) ("Having an unlisted number does not prevent those telemarketers that call numbers randomly or sequentially"); 137 Cong. Rec. 30,818 (Nov. 7, 1991) ("Due to advances in autodialer technology, machines can be programmed to deliver a prerecorded message to thousands of sequential phone numbers," creating "a real hazard"); 137 Cong. Rec. H11307-01 (Nov. 26, 1991) at 11310 ("automatic dialing machines place calls randomly, meaning they sometimes call unlisted numbers, or numbers of hospitals, police and fire stations, causing public safety problems").

<sup>21</sup> See *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C. Rcd. 8752, 8773 (1992) ("autodialer calls" were "dialed using a random or sequential number generator"), 8776 (stating the prohibitions of § 227(b)(1) *do not apply* to functions like "speed dialing" and "call forwarding," because numbers are "not generated in a random or sequential fashion") (emphasis added).

<sup>22</sup> 77 F.C.C. 2d 1023, 1037 (1980).

clarification underscored that the TCPA did not regulate automated dialers generally, but applied to only dialers that randomly or sequentially generated numbers.<sup>23</sup> But even if certain technological advances may not be captured by the statute’s restrictions, and thus may be exploited, “[t]he fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning”<sup>24</sup> in interpreting the ATDS definition, that the agency lacks the authority to re-write.<sup>25</sup> *ACA Int’l* makes the same point: “Congress need not be presumed to have intended the term ‘automatic telephone dialing system’ to maintain its applicability to modern phone equipment in perpetuity, regardless of technological advances that may render the term increasingly inapplicable over time.”<sup>26</sup> Unless and until Congress enacts legislation to change the ATDS definition, the Commission should issue clarification consistent with the statutory text and legislative intent.<sup>27</sup>

**C. *Marks* Directly Conflicts With The Third Circuit’s Interpretation Of The ATDS Definition And The Express Limitation Set Forth In *ACA Int’l***

Under *Marks*’s definition, any person using a device capable of calling stored numbers—including the subscribers and customary users of over 300 million smartphones—would be subject to the TCPA’s restrictions and statutory penalties. As the Commission’s Public Notice

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<sup>23</sup> See *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C. Rcd. 8752, 8773 (1992) (“autodialer calls” were “dialed using a random or sequential number generator”), 8776 (stating the prohibitions of § 227(b)(1) *do not apply* to functions like “speed dialing” and “call forwarding,” because numbers are “not generated in a random or sequential fashion”) (emphasis added).

<sup>24</sup> *Union Bank v. Wolas*, 502 U.S. 151, 158 (1991).

<sup>25</sup> The statute defines an ATDS in § 227(a)(1). Section 227(a), in contrast to § 227(b) and (c), does not include a provision giving the Commission rulemaking authority. Compare *id.* with §§ 227(b)(2) and (c)(2). Sections § 227(b) and (c) expressly limit the agency’s rulemaking authority to only those subsections. See also 47 C.F.R. § 64.1200.

<sup>26</sup> *ACA Int’l*, 885 F.3d at 699.

<sup>27</sup> See *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 F.C.C Rcd. 7961, 8076 (2015) (Dissenting Statement of Commissioner Ajit Pai) (“[I]f the FCC wishes to take action against newer technologies beyond the TCPA’s bailiwick, it must get express authorization from Congress....”).

correctly summarized, the *Marks* decision is at odds with *ACA Int'l* which “held that the TCPA unambiguously foreclosed any interpretation that ‘would appear to subject ordinary calls from any conventional smartphone to the Act’s coverage.’”<sup>28</sup> It also directly conflicts with the Third Circuit’s rulings in two separate opinions holding that an ATDS “must be able to store or produce numbers that *themselves* are randomly or sequentially generated,”<sup>29</sup> and that following *ACA Int'l*, the “key” question under the TCPA is whether the equipment “had the present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers.”<sup>30</sup> In contrast to *Marks*, the Third Circuit’s interpretation of the ATDS definition is supported by the plain text of the statute and does not contravene *ACA* by transforming every smartphone user into “a TCPA-violator-in-waiting, if not a violator-in-fact.”<sup>31</sup>

The Third Circuit’s construction of the ATDS definition is premised on both a straightforward reading of the statute and legislative history confirming its meaning. In two opinions that first addressed the 2015 FCC ruling and then *ACA Int'l* in the second, the Third Circuit analyzed “the statute itself” and concluded that “[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 that either called numbers in large sequential blocks or dialed random 10-digit strings. Thus, the FCC initially interpreted the statute as specifically targeting equipment that placed a high volume of calls by randomly or sequentially generating the numbers to be dialed.”<sup>32</sup> Accordingly, “the statutory definition does in fact include such a

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<sup>28</sup> Public Notice (citing *ACA Int'l*, 885 F.3d at 692).

<sup>29</sup> *Dominguez*, 629 F. App’x. at 372, 373 n.2.

<sup>30</sup> *Dominguez*, 894 F.3d at 121.

<sup>31</sup> *ACA Int'l*, 885 F.3d at 698.

<sup>32</sup> *Dominguez*, 629 F. App’x. at 372-73.

requirement,” and “is explicit that the autodialing equipment may have the capacity to store *or* produce the randomly or sequentially generated numbers to be dialed.”<sup>33</sup> In construing the statute and legislative history, *Dominguez* held an ATDS “must be able to store or produce numbers that *themselves* are randomly or sequentially generated.”<sup>34</sup>

Unlike *Marks*, *Dominguez*’s construction avoids the overbreadth problem that *ACA Int’l* ruled was “impermissible” because it would “render every smartphone an ATDS.”<sup>35</sup> Even with the caveat that there must be “automatic *dialing*”<sup>36</sup>—an unwritten requirement that the panel fails to clarify—ordinary smartphones would still qualify as an ATDS because they have the capacity to make “calls automatically from a stored list.”<sup>37</sup> For example, smartphone users can call stored numbers by tapping on a party’s name in the contacts list, without having to manually dial or press a 10-digit number, or program phones to send scheduled messages or auto-replies.

The *Marks* opinion also creates greater uncertainty over what functionalities constitute “automatic *dialing*,” which the Ninth Circuit panel did not define.<sup>38</sup> This part of the opinion appears to address “human intervention” case law, but does not address any of the dozens of district court cases that had developed that test. Clearly, it cannot refer to all forms of computerized or “automated” calls made—the agency itself has stated for example, that the prohibitions of § 227(b)(1) *do not apply* to functions like “speed dialing” and “call forwarding.”<sup>39</sup> But in light of *ACA Int’l*, it also cannot solely mean “dial[ing] numbers

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<sup>33</sup> *Id.* at 372 & n.1.

<sup>34</sup> 629 F. App’x. at 373 n.2; *see also Dominguez*, 894 F.3d at 119 (affirming the court’s prior determinations).

<sup>35</sup> *ACA*, 885 F.3d at 697-98.

<sup>36</sup> *Marks*, 2018 WL 4495553, at \*9.

<sup>37</sup> *Id.* at \*9 n.10.

<sup>38</sup> *Id.* at \*9 (italics in original).

<sup>39</sup> *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C. Rcd. 8752, 8776 (1992).

automatically” from a stored list,<sup>40</sup> which is a functionality that exists in all smartphones, which are capable of sending automated messages to stored numbers.<sup>41</sup> At the very least, the Commission should clarify that the ability to send text messages or dial phone numbers “automatically” or without “human intervention” (under the agency’s alternative formulation) is a necessary, but not sufficient, qualification of an ATDS.<sup>42</sup>

### III. CONCLUSION

For the foregoing reasons, the Commission should construe the ATDS definition according to its plain terms and confirm that an ATDS includes only such equipment that has the current capacity to store or produce, and dial, phone numbers using a random or sequential number generator.

Dated: October 17, 2018

Respectfully submitted,

By:  /s/ Ian C. Ballon

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Lori Chang

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<sup>40</sup> *Marks*, 2018 WL 4495553, at \*9.

<sup>41</sup> Various mobile apps allow smartphone users to automatically send texts at a scheduled date and time, such as birthday texts. *See, e.g.*, <https://vintaytime.com/automatically-send-birthday-wish/>, <https://smallbusiness.chron.com/send-sms-messages-automatically-48180.html>, and <https://www.verizonwireless.com/support/knowledge-base-74755/> (webpages last visited on September 19, 2018).

<sup>42</sup> Dissenting Commissioner Michael O’Rielly previously criticized the majority for failing to provide clarity as to the ATDS definition and instead leaving the issue to the courts to resolve. *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, 8079 (rejecting the “impermissibl[e] expan[sion]” of the ATDS definition and explaining that, “to meet the definition of an autodialer, all of the statutory elements must be present”), 8098 (cautioning that such an expansive interpretation “will lead to more litigation and burdens on legitimate businesses without actually protecting consumers from abusive robocalls made by bad actors”) (2015) (O’Rielly, Comm’r, dissenting in part). Dissenting Commissioner Ajit Pai lodged similar criticisms, noting that the TCPA has “become the poster child for lawsuit abuse, with the number of TCPA cases filed each year skyrocketing from 14 in 2008 to 1,908 in the first nine months of 2014.” *Id.* at 8073 (Pai, Comm’r, dissenting).



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# **Exhibit A**

# EXHIBIT A

Case No. 14-56834

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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JORDAN MARKS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS  
SIMILARLY SITUATED,

*Plaintiff - Appellant,*

v.

CRUNCH SAN DIEGO, LLC,

*Defendant - Appellee.*

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**On Appeal from Order of the  
United States District Court for the Southern District of California  
District Court No. 3:14-cv-00348 BAS BLM**

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**APPELLEE'S PETITION FOR REHEARING *EN BANC***

---

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**I. THE PANEL OPINION SUPPORTS A READING OF THE TCPA THAT DIRECTLY CONTRAVENES THE STATUTORY TEXT, LEGISLATIVE HISTORY, AND THIS COURT’S PRIOR DECISIONS**

The panel’s decision must be reconsidered because it interprets—and effectively rewrites—the Telephone Consumer Protection Act (TCPA) in a manner that directly conflicts with the statutory text, legislative history, and binding intra-circuit and persuasive inter-circuit authority from the Third and D.C. Circuits regarding the definition of an “automatic telephone dialing system” (ATDS).

The TCPA 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.

47 U.S.C. § 227(a)(1). This Court previously found this definition “clear and unambiguous.” *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009) (noting “the statute’s clear language” and reading the phrase “to store or produce telephone numbers to be called, using a random or sequential number generator” to mean “store, produce, or call randomly or sequentially generated telephone numbers”). But the panel decision departed from this Court’s ruling, holding that the statute is ambiguous and should instead be “read” as

equipment which has 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.

Op. at 23. In other words, the Court interpreted the phrase “using a random or



sequential number generator” as applying *only* to the word “produce”— not “store.” This reconstruction drastically alters the meaning from what the statutory text and *Satterfield* confirms was Congress’s “clear and unambiguous” intent. 569 F.3d at 951.

Even if the ATDS definition is deemed ambiguous, the TCPA’s legislative history supports the *Satterfield* Court’s interpretation of the statute. The TCPA was enacted in 1991 to restrict telemarketing practices based on a specific type of dialing equipment that Congress defined in the statute. In prohibiting any person from making a call using an ATDS to a cellular number (except for calls made for emergency purposes or with prior consent), 47 U.S.C. § 227(b)(1)(A), Congress’s chief “focus” was “on regulating the use of equipment that dialed blocks of *sequential or randomly generated numbers*.” Op. at 21 (emphasis added); *see also*, e.g., H.R. Rep. No. 101-633, at 3 (1990) (automatic dialers “dial[ed] sequential blocks of telephone numbers,” including “emergency public organizations” and “unlisted subscribers”); S. Rep. No. 102-178, at 2 (1991) (“Having an unlisted number does not prevent those telemarketers that call numbers randomly or sequentially.”); 137 Cong. Rec. S16200-04, S16202 (Nov. 7, 1991) (Sen. Pressler) (“Due to advances in autodialer technology, machines can be programmed to deliver a prerecorded message to thousands of sequential phone numbers,” creating “a real hazard”); 137 Cong. Rec. H11307-01, H11310 (Nov. 26, 1991) (Rep. Markey)

(“automatic dialing machines place calls randomly, meaning they sometimes call unlisted numbers, or numbers of hospitals, police and fire stations, causing public safety problems”).<sup>1</sup> And despite ““significant changes”” to telemarketing equipment, “Congress never revised the definition of an ATDS.” Op. at 7-8.

Although the panel construed Congress’s *failure to amend* the ATDS definition (while the FCC orders were being challenged in multiple jurisdictions and were later rejected) as “tacit approval” of the agency’s broader interpretation that any device that “store[s] numbers to be called” is an ATDS even if it lacks the capacity to generate random or sequential phone numbers, Op. at 22-2, any conclusions drawn from *post-legislative inaction* should be dismissed as speculative, *see* § III(B)(2), *infra*. By relying on what Congress did not do (versus what it in fact wrote in the statute), the panel circumvents the statute’s “clear and unambiguous” plain meaning, *Satterfield*, 569 F.3d at 951, in favor of a statutory interpretation that is at odds with legislative intent and controlling law.<sup>2</sup>

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<sup>1</sup> While the FCC issued multiple interpretative rulings addressing the functions of an ATDS, these rulings, which culminated in a 2015 order, were struck down as arbitrary and capricious in a consolidated challenge made under the Hobbs Act. *See ACA Int’l v. FCC*, 885 F.3d 687, 698-700 (D.C. Cir. 2018).

<sup>2</sup> Furthermore, the opinion creates greater uncertainty over what functionalities constitute “automatic dialing.” Op. at 23. The platform at issue was not capable of choosing which numbers to dial without human instruction; to send a text, a person must create the content of a message, select which phone numbers will receive the message, and schedule when the message will be sent. *See* § II(A), *infra*. How this amounts to “dial[ing] numbers automatically” is unclear, and cannot be squared with

Finally, in addition to creating an intra-circuit inconsistency, the panel's ruling contributes to a broader circuit split that will cause more confusion and unsettled law in an area where litigation has skyrocketed with 4,860 and 4,392 TCPA suits filed in 2016 and 2017, respectively.<sup>3</sup> The panel decision cannot be reconciled with (for example) the Third Circuit's holding in two separate opinions that an ATDS must have the capacity to generate random or sequential telephone numbers. *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018) (holding that the "key" question under the TCPA is whether the equipment "had the present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers"); *Dominguez v. Yahoo, Inc.*, 629 F. App'x. 368, 372, 373 n.2 (3d Cir. 2015) ("an autodialer must be able to store or produce numbers that *themselves* are randomly or sequentially generated"). Nor can the panel decision be squared with *ACA*, which, in a decision binding on all circuit courts under the Hobbs Act, 28 U.S.C. § 2342(1), vacated the FCC's entire "treatment" of ATDS (*see Op.*

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the statutory language. *Op.* at 24. Worse, this functionality exists in smartphones. Various mobile apps enable smartphones to automatically send texts at a scheduled date and time, such as birthday texts and auto-replies. *See, e.g.*, <https://vintaytime.com/automatically-send-birthday-wish/>, <https://smallbusiness.chron.com/send-sms-messages-automatically-48180.html>, and <https://www.verizonwireless.com/support/knowledge-base-74755/> (last visited Sept. 19, 2018).

<sup>3</sup>*See* <https://webrecon.com/2016-year-in-review-fdcpa-down-fcra-tcpa-up/>, and <https://webrecon.com/webrecon-stats-for-dec-2017-year-in-review/> (last visited Sept. 14, 2018).

at 17), including its interpretation that a device that dials stored numbers from a list is an ATDS even if it lacks the capacity to generate random or sequential phone numbers, and explaining that the FCC's expansive interpretation was "untenable" based on the statutory text and "impermissible" in its scope because it would "render every smartphone an ATDS." *Id.* at 697-703. Thus, what remains is a pervasive intra- and inter-circuit split on the reading of a statutory definition that this Court (and other Circuits) found "clear and unambiguous." *Satterfield*, 569 F.3d at 951.

Because this involves an issue of exceptional importance, we respectfully request this Court rehear the panel decision *en banc*.

## II. RELEVANT FACTS AND PROCEEDINGS

Marks alleges that Crunch San Diego, LLC sent him three text messages without consent over an 11-month period when he was a member of the fitness gym. ER260 (Compl. ¶ 23). Like many businesses, Crunch uses a third-party platform to communicate with customers; here, the alleged texts were sent using Textmunication, Inc.'s web-based platform. ER052 (Romeo Decl. ¶¶ 2-4).

The district court granted Crunch summary judgment on two independent grounds. First, it ruled that the platform was not an ATDS because it was undisputed that the platform lacked capacity to generate numbers randomly or sequentially. *Marks v. Crunch San Diego, LLC*, 55 F. Supp. 3d 1288, 1292 (S.D. Cal. 2014). The district court held that the phrase "random or sequential number generator" must

“have some limiting effect” in the statute and “cannot reasonably refer broadly to any list of numbers” as that would “nullify the entire clause.” *Id.* at 1292. Second, the court ruled the platform was not an ATDS because it was undisputed that texts could only be sent through “methods [that] require human curation and intervention.” *Id.* at 1292 (“Users of the platform, including Crunch, select the desired phone numbers, generate a message to be sent, select the date the message will be sent, and then the platform sends the text messages to those phone numbers on that date,” *id.* at 1289).

The panel erroneously concluded that Crunch did not dispute that the “system dials numbers automatically.” *Op.* at 24. Rather, Crunch argued and demonstrated that it was undisputed that a user had to manually type out a message, select the phone numbers (that were manually inputted into the system), and input the criteria for the date/time of delivery. *Dkt.* 22 at 36-41. A person—not an algorithm—must determine which numbers “to dial.”

The panel also effectively adopted an interpretation vacated by *ACA* as arbitrary and capricious by agreeing with Marks’s argument, premised on the prior FCC rulings, that “equipment that has the capacity to store telephone numbers in a list or database,” even if it “does not have the capacity to generate telephone numbers randomly or sequentially,” constitutes an ATDS. *Dkt.* 15 at 13. But this interpretation was rejected by *ACA*, which is binding under the Hobbs Act.

### **III. THE ATDS RULING CONFLICTS WITH OTHER DECISIONAL LAW AND IS INCONSISTENT WITH THE STATUTORY TEXT, LEGISLATIVE HISTORY, AND BINDING AUTHORITY**

#### **A. The Panel Abrogates The Ninth Circuit’s Decision In *Satterfield***

This Court previously construed the ATDS provision and determined “that the statutory text is clear and unambiguous.” *Satterfield*, 569 F.3d at 951. “When evaluating the issue of whether equipment is an ATDS, the statute’s clear language mandates that the focus must be on whether the equipment has the capacity ‘to store or produce telephone numbers to be called, using a random or sequential number generator[;...]’” *Id.*

The panel confined *Satterfield*’s holding to “only one aspect of the text: whether a device has the ‘*capacity* “to store or produce telephone numbers”” (Op. at 20 n.6), but this reads *Satterfield* too narrowly. *Satterfield* made clear the dispute “center[ed] on the phrase “using a random or sequential number generator,” and held, consistent with the statute, that “a system need not actually store, produce, or call randomly or sequentially generated telephone numbers, it need only have the capacity to do it.” *Id.* at 951. *Satterfield* plainly did not instruct the district court to consider on remand the “*requisite capacity*” without reference to what the system must have “capacity” to do. *Id.* (italics added).

#### **B. The Panel Decision Nullifies A Requirement Imposed By The Plain Terms Of The Statute And Legislative Intent**

##### **1. The ATDS Definition is Clear and Unambiguous**

Even assuming *Satterfield* does not control, the ATDS definition is not ambiguous. As in that case, the central issue here is how to construe the first of the two enumerated ATDS functionalities: the capacity “to store or produce telephone numbers to be called, using a random or sequential number generator;...”

The grammatical structure of this provision requires reading the phrase “using a random or sequential number generator” as modifying *either* term—“store” *or* “produce”—in the preceding phrase. The “punctuation canon” dictates that “to store or produce telephone numbers to be called” must be read as the dependent phrase modified by “using a random or sequential number generator;...” See *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996, 1000 (9th Cir. 2017) (“[B]oth we and our sister circuits have recognized the punctuation canon, under which a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one where the phrase is separated from the antecedents by a comma.”) (citation and alterations omitted); The Chicago Manual of Style § 6.30 (16th ed. 2010) (“A dependent clause that precedes a main clause should be followed by a comma.”). This is consistent with the Supreme Court’s instruction that a “natural reading” of “or” in a sentence “covers any combination of its nouns, gerunds, and objects.” *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018).<sup>4</sup> Thus,

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<sup>4</sup> In holding that service advisors constitute “salesmen,” in a statutory exemption applying to “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles,” *Encino Motorcars* ruled that the “use of ‘or’ to join ‘selling’

the use of the disjunctive in the phrase preceding the comma compels reading the statute as requiring that an ATDS must have the capacity to either “store” phone numbers “using a random or sequential number generator,” or “produce” phone numbers “using a random or sequential number generator;...”

Of the two variants considered by the panel, only this interpretation is supported by the statute’s plain language. There is no need to insert “additional words,” as the panel concludes, such it would read: “equipment which has the capacity (A) to store [telephone numbers *produced* using a random or sequential number generator]; or [to] produce telephone numbers to be called, using a random or sequential number generator . . . .” Op. at 19-20 (italics added). The noun “generator” already implies that numbers will be “generated”; adding “produced” would be redundant.<sup>5</sup> By contrast, Marks’s interpretation would require revising the statute’s punctuation so that it read:

equipment which has the capacity (A) to store[,] or produce telephone numbers to be called [no comma] using a random or sequential number generator; and (B) to dial such numbers

or changing the syntax with added words and subsections:

equipment which has the capacity (A) to [i] store [telephone numbers to be called] or [ii] produce telephone numbers to be called, using a

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and ‘servicing’ suggests that the exemption covers a salesman primarily engaged in either activity.” *Id.* at 1141 (rejecting this Court’s construction that the exemption does not apply to salesman “‘primarily engaged in . . . servicing automobiles”).

<sup>5</sup> “Generate” is synonymous with “produce.” *See, e.g., The Oxford Encyclopedic English Dictionary* 586 (1991).



random or sequential number generator; and (B) to dial such numbers.

Op. at 19-20. Under either formulation, number generation would be optional.

The ATDS definition is not “susceptible to more than one *reasonable* interpretation” based on “the statute’s *actual language*.” *Guido v. Mount Lemmon Fire Dist.*, 859 F.3d 1168, 1173 (9th Cir. 2017) (italics added). Marks’s interpretation—which the panel adopted—would read out the phrase “using a random or sequential number generator”; hence, “a piece of equipment qualifies as an ATDS if it has the capacity to store telephone numbers and then dial them.” Op. at 20. Ninth Circuit authority is clear that courts must interpret statutory terms by “giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.” *U.S. v. Neal*, 776 F.3d 645, 652 (9th Cir. 2015). Marks’s assertion that “if a device already has the numbers stored, there would be no need to produce or generate numbers” (Dkt. 71 at 6) illustrates that the phrase “using a random or sequential number generator” would be a nullity. *See Marks*, 55 F. Supp. 3d at 1292 (“random or sequential number generator” must “have some limiting effect,” and “cannot reasonably refer broadly to any list of numbers” which would “nullify the entire clause”).

Moreover, Marks’s contention “that a number generator is not a storage device” because “a device could not use ‘a random or sequential number generator’

to store telephone numbers” (Op. at 19) is specious. Storage and number generation are not mutually exclusive concepts. Even Marks’s proffered expert explained that random number generation and storage are “distinct parts of a computer system,” implying that both functionalities can be present in the same system.<sup>6</sup> SER080-81 (Hansen Tr. 13:24-14:6).<sup>7</sup> Marks’s argument that a computerized number generator can’t store phone numbers is therefore wrong.

2. The Panel’s Textual Reading is Based on Invalidated FCC Interpretations That Contravene Congressional Intent

Post-legislative policies and inaction cannot serve as a premise for re-writing the statute. *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). Here, the alleged ambiguity does not arise from the statute’s plain terms but from FCC interpretations that are no longer valid post-*ACA*. The panel asserts that Congress ratified the FCC’s broader interpretation by leaving the statutory definition unchanged, while narrowly amending the TCPA to exempt

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<sup>6</sup> While Hansen testified that “generating numbers” “ha[s] nothing to do with computer storage, only the production,” he admitted his conclusions were based on his inadmissible legal interpretation of the statutory language—which he claimed “us[ed] technical terms” to “describ[e] computer equipment”—and FCC rulings. ER200 (Hansen Decl. ¶ 12); SER080 & 204-07 (Hansen Tr. 13:7-17, 137:12-140:5). He nonetheless conceded that the statute “makes perfect sense the way that it’s written,” from a technical standpoint. SER081 (*id.* 14:23-25).

<sup>7</sup> The ability to store numbers using a number generator can also be found in programs like Excel. *See, e.g.*, <https://www.excel-easy.com/examples/random-numbers.html> and <https://www.extendoffice.com/documents/excel/643-excel-random-number.html> (last visited October 2, 2018).

debt collection calls made on behalf of the U.S. Op. at 22. But Congress could hardly have given its “tacit approval” by doing nothing in the wake of various challenges to the FCC orders. The Supreme Court has long held that “[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction,” and Ninth Circuit authority is in accord. *Central Bank*, 511 U.S. at 187; *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) (“Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation.”); *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 886–87 (9th Cir. 2016) (“[C]ongressional inaction in the face of a judicial statutory interpretation . . . carries almost no weight.”).<sup>8</sup> Thus, inferences based on congressional silence cannot support the panel’s interpretation.

FCC policy also cannot trump *original* legislative intent confirming that “Congress focused on regulating the use of equipment that dialed blocks of sequential or randomly generated numbers—a common technology at that time.” Op. at 21; *Union Bank v. Wolas*, 502 U.S. 151, 158 (1991) (“The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning.”). Congress specifically targeted “machines [that] could be programmed to call numbers in large

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<sup>8</sup> Similar arguments were rejected in *Alexander v. Sandoval*, 532 U.S. 275, 291-92 (2001) and *U.S. v. Wells*, 519 U.S. 482, 495 (1997).

sequential blocks or dial random 10-digit strings of numbers,” because they “resulted in calls hitting hospitals and emergency care providers.” Op. at 6. Restricting dialers that merely call stored numbers would not curb the abuses caused by dialing blocks of random or sequential numbers which impact emergency lines. Such an interpretation would not serve legislative intent and should be rejected. *See U.S. v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989) (“The plain meaning of legislation should be conclusive, except in the ‘rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.’”).

The other TCPA provisions cited by the panel do not support its conclusion. While the TCPA addresses both opt-ins (authorized numbers) and opt-outs (do-not-calls), those provisions address consent, not the manner in which phone numbers are stored, produced, generated or dialed. The Do-Not-Call regulations are also irrelevant because such calls are actionable regardless if made using an ATDS. *See* 47 C.F.R. § 64.1200(c). Moreover, it does not follow that because calls made with consent are “dial[ed] from a list of phone numbers” (Op. at 21), an ATDS must be defined by that functionality. “Congress’s understanding that an ATDS was not limited to dialing wholly random or sequential blocks of numbers, but could be configured to dial a curated list” (Op. at 21 n.7) simply underscores what *Satterfield* held—that the focus of the ATDS definition is on *capacity*, and applies regardless

of whether a device *actually* called randomly or sequentially generated numbers. Further, provisions barring ATDS-made calls to emergency lines, patient rooms, etc., reflect legislative intent to combat the specific abuses caused by randomly or sequentially dialed telephone calls. *See* n.12, *supra*. Indeed, the FCC initially clarified that the TCPA did not regulate automated dialers generally, but applied to only dialers that randomly or sequentially generated numbers. *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C. Rcd. 8752, 8773 (1992) (“autodialer calls” were “dialed using a random or sequential number generator”), 8776 (stating the prohibitions of § 227(b)(1) *do not apply* to functions like “speed dialing” and “call forwarding,” because numbers are “not generated in a random or sequential fashion”) (emphasis added). Nor do these prohibitions warrant a construction that broadens liability under the TCPA. *See VMG*, 824 F.3d at 883 (“We ordinarily would hesitate to read an *implicit expansion* of rights into Congress’ statement of an *express limitation* on rights”).

#### **IV. THE PANEL OPINION CREATES A CIRCUIT SPLIT THAT WILL RESULT IN MORE UNCERTAINTY (AND LITIGATION)**

##### **A. The Panel Opinion Conflicts With Third Circuit Law**

The Third Circuit held in a published opinion that the “key” question post-*ACA* is whether the equipment “had the present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers.” *Dominguez*, 894 F.3d at 121.

The panel declined to follow *Dominguez* for having made an “unreasoned assumption” that random/sequential number generation is a statutory requirement (Op. at 23 n.8), which is unfounded. In two opinions that first addressed the 2015 FCC ruling and then *ACA* in the second, the Third Circuit analyzed “the statute itself” and concluded that “[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 that either called numbers in large sequential blocks or dialed random 10-digit strings. Thus, the FCC initially interpreted the statute as specifically targeting equipment that placed a high volume of calls by randomly or sequentially generating the numbers to be dialed.” *Dominguez*, 629 F. App’x. at 372-73. Accordingly, “the statutory definition does in fact include such a requirement,” and “is explicit that the autodialing equipment may have the capacity to store *or* produce the randomly or sequentially generated numbers to be dialed.” *Id.* at 372 & n.1. The “linguistic problem” that the panel criticized *Dominguez* for not resolving exists only because the panel held, contrary to *Satterfield*, that the statute is ambiguous. In construing the statute, legislative history, and FCC orders, *Dominguez* held an ATDS “must be able to store or produce numbers that *themselves* are randomly or sequentially generated.” 629 F. App’x. at 373 n.2. These determinations were affirmed post-*ACA*. 894 F.3d at 119.

## **B. The Panel Opinion Conflicts With D.C. Circuit Law**

The panel opinion revives the very overbreadth problem that *ACA* ruled was “impermissible” because it would “render every smartphone an ATDS.” 885 F.3d at 697-98. Even with the caveat that there must be “automatic *dialing*” (Op. at 23)—an unwritten requirement that the panel fails to clarify—ordinary smartphones would still qualify as an ATDS because they have the capacity to make “calls automatically from a stored list” (Op. at 25 n.10). For example, smartphone users can call stored numbers by tapping on a party’s name in the contacts list, without having to manually dial or press a 10-digit number, or program phones to send scheduled messages or auto-replies. The panel decision therefore contravenes *ACA*, which is binding authority under the Hobbs Act (Op. at 16) and expressly holds that an ATDS cannot be broadly construed where every one of the over 224 million smartphones in the United States would qualify as an ATDS.

For the foregoing reasons, *en banc* review should be granted.

Dated: October 4, 2018

GREENBERG TRAURIG, LLP

By: /s/ Ian C. Ballon

Ian C. Ballon

Lori Chang

*Attorneys for Defendant-Appellee,*  
Crunch San Diego, LLC

**Form 11. Certificate of Compliance Pursuant to  
9th Circuit Rules 35-4 and 40-1 for Case Number 14-56834**

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the back of each copy of the petition or answer.*

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition (check applicable option):

Contains  words (petitions and answers must not exceed 4,200 words), and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

**or**

Is in compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature of Attorney or Unrepresented Litigant  Date

("s/" plus typed name is acceptable for electronically-filed documents)



**CERTIFICATE OF SERVICE**

I, Ian C. Ballon certify that on October 4, 2018, Appellee's Petition For Rehearing *En Banc* was filed through the CM/ECF System; registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF system sends an email notification of the filing to the parties and counsel of record who are registered with the Court's EMC/ECF system.

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**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

JORDAN MARKS, individually and on behalf of all others similarly situated, <i>Plaintiff-Appellant,</i>	No. 14-56834
v.	D.C. No. 3:14-cv-00348- BAS-BLM
CRUNCH SAN DIEGO, LLC, <i>Defendant-Appellee.</i>	OPINION

Appeal from the United States District Court  
for the Southern District of California  
Cynthia A. Bashant, District Judge, Presiding

Argued and Submitted December 6, 2016  
Submission Vacated December 14, 2016  
Resubmitted September 13, 2018  
Pasadena, California

Filed September 20, 2018

Before: Consuelo M. Callahan, Carlos T. Bea,  
and Sandra S. Ikuta, Circuit Judges.

Opinion by Judge Ikuta

**SUMMARY\***

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**Telephone Consumer Protection Act**

The panel vacated the district court's grant of summary judgment to the defendant on a claim under the Telephone Consumer Protection Act, which places restrictions on the use of automated telephone equipment.

The plaintiff alleged that three text messages that he received from the defendant violated the TCPA. The district court held that the automatic text messaging system that had sent the messages was not an automatic telephone dialing system ("ATDS") under the TCPA because it lacked the present or potential capacity "to store or produce telephone numbers to be called, using a random or sequential number generator." After the district court ruled, the D.C. Circuit issued its opinion in *ACA Int'l v. Fed. Comm'cns Comm'n*, 885 F.3d 687 (D.C. Cir. 2018), invalidating the FCC's interpretation of questions raised by the statutory definition of an ATDS.

The panel held that, in light of *ACA Int'l*, and based on its own review of the TCPA, the statutory definition of an ATDS includes a device that stores telephone numbers to be called, whether or not those numbers have been generated by a random or sequential number generator. The panel remanded the case for further proceedings.

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\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

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**OPINION**

IKUTA, Circuit Judge:

Jordan Marks appeals the grant of summary judgment to Crunch Fitness on his claim that three text messages he received from Crunch violated the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227. The district court held that the automatic text messaging system that had sent the messages was not an automatic telephone dialing system (ATDS) under the TCPA, because it lacked the present or potential capacity “to store or produce telephone numbers to be called, using a random or sequential number generator.” *Id.* § 227(a)(1). In light of the D.C. Circuit’s recent opinion in *ACA International v. Federal Communications Commission*, 885 F.3d 687 (D.C. Cir. 2018) (which was decided after the district court ruled), and based on our own review of the TCPA, we conclude that the statutory definition of ATDS includes a device that stores telephone numbers to be called, whether or not those numbers have been generated by a random or sequential number generator. Therefore, we reverse the district court’s grant of summary judgment.

## I

## A

By the early 1990s, telemarketing was in its golden age. Telemarketing sales had “skyrocketed to over \$435 million in 1990,” which was a “fourfold increase since 1984.” 137 Cong. Rec. S16,971 (daily ed. June 27, 1991) (statement of Rep. Pressler). “This marketing success ha[d] created an industry in which over 300,000 telemarketing solicitors call[ed] more than 18 million Americans every day.” *Id.* In

part, this was due to the advent of machines that “automatically dial a telephone number and deliver to the called party an artificial or prerecorded voice message.” S. Rep. No. 102-178, at 2 (1991). Advertisers found these autodialers highly efficient because they could “ensure that a company’s message gets to potential customers in the exact same way, every time, without incurring the normal cost of human intervention.” H.R. Rep. No. 102-317, at 6 (1991). At that time, a single autodialer could cause as many as 1,000 phones to ring and then deliver a prerecorded message to each. *Id.* at 10.

The dark side of this success story caught Congress’s attention. As Senator Fritz Hollings complained, “[c]omputerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall.” 137 Cong. Rec. S16,205 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings). Recipients deemed that “automated telephone calls that deliver an artificial or prerecorded voice message are more of a nuisance and a greater invasion of privacy than calls placed by ‘live’ persons.” S. Rep. No. 102-178, at 4. Among other reasons, “[t]hese automated calls cannot interact with the customer except in preprogrammed ways, do not allow the caller to feel the frustration of the called party” and deprive customers of “the ability to slam the telephone down on a live human being.” *Id.* at 4 & n.3 (citation omitted). Congress also noted surveys wherein consumers responded that the two most annoying things were (1) “[p]hone calls from people selling things” and (2) “phone calls from a computer trying to sell something.” H.R. Rep. No. 102-317, at 9.

The volume of automated telemarketing calls was not only an annoyance but also posed dangers to public safety. S. Rep. No. 102-177, at 20 (1991). “Due to advances in auto-dialer technology,” the machines could be programmed to call numbers in large sequential blocks or dial random 10-digit strings of numbers. *Id.* This resulted in calls hitting hospitals and emergency care providers “and sequentially delivering a recorded message to all telephone lines.” *Id.* And because some autodialers would “not release [the line] until the prerecorded message is played, even when the called party hangs up,” H.R. Rep. No. 102-317, at 10, there was a danger that the autodialers could “seize” emergency or medical assistance telephone lines, rendering them inoperable, and “dangerously preventing those lines from being utilized to receive calls from those needing emergency services,” H.R. Rep. No. 101-633, at 3 (1990). Representative Marge Roukema noted that it was “not just calls to doctors’ offices or police and fire stations that pose a public health hazard.” 137 Cong. Rec. H35,305 (daily ed. Nov. 26, 1991) (statement of Rep. Roukema). She recounted “the sheer terror” of a New York mother who, when she tried to call an ambulance for her injured child, “picked up her phone only to find it occupied by a computer call that would not disconnect.” *Id.* at 35,305–06.

In light of these and other concerns, Senator Hollings introduced a bill to amend the Communications Act of 1934, in order to “protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers.” S. Rep. No. 102-178, at 1. This bill became the Telephone Consumer Protection Act of 1991.

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As originally enacted, the TCPA placed restrictions on the use of automated telephone equipment, including automatic telephone dialing systems and telephone facsimile machines. The statute defined “automatic telephone dialing systems” (ATDS) as follows:

(1) The term ‘automatic telephone dialing system’ means 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.

Pub. L. No. 102-243, § 227, 105 Stat. 2394, 2395. This language established Congress’s intent to regulate equipment that is “automatic,” and that has “the capacity” to function in two specified ways: “to store or produce telephone numbers to be called, using a random or sequential number generator” and “to dial” those telephone numbers. Although the TCPA has been amended several times since its original enactment, Congress has never revised the definition of an ATDS. Therefore, Congress’s decision to regulate only those devices which have the aforementioned functions, capacity, and ability to function automatically remains unchanged.

The TCPA prohibited the use of an ATDS 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 or an artificial or prerecorded voice” to emergency telephone lines, hospital rooms or other health care facilities, and paging and cellular



telephones. 47 U.S.C. § 227(b)(1)(A) (1991). It also prohibited the use of an ATDS “in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.” *Id.* § 227(b)(1)(D).

As required by the TCPA, *id.* § 227(b)(2), in 1992 the FCC promulgated rules to implement the statute. *See Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC Rcd. 8752, 8753 (1992). The FCC did not elaborate on the functions of an ATDS and its definition merely tracked the statutory definition. *Id.* at 8755 n.6, 8792.<sup>1</sup>

## B

It was not until ten years later that the FCC realized that “the telemarketing industry ha[d] undergone significant changes in the technologies and methods used to contact consumers,” and such marketplace changes warranted modifications to the existing rules. *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14,014, 14,017 (2003) (*2003 Order*). In particular, the

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<sup>1</sup> As originally promulgated, 47 C.F.R. § 64.1200(f)(1) (1992) provided:

(f) As used in this section:

(1) The terms automatic telephone dialing system and autodialer mean 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.

The same definition is in force today.

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FCC was concerned about the proliferating use of the predictive dialer, which is “an automated dialing system that uses 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.” *Id.* at 14,022 n.31. Unlike the automated telemarketing devices prevalent in the early 1990s, which dialed a random or sequential block of numbers, predictive dialers generally automatically dialed a list of numbers that had been preprogrammed and stored in the dialer, or were downloaded from a computer database. *Id.* at 14,090.

In order to determine whether the TCPA applied to this new technology, the FCC had to assess whether the predictive dialer qualified as an ATDS. This required consideration of the statutory definition: whether the equipment was “automatic” and whether it had the capacity to function in the two relevant ways.

In a series of rulings, from 2003 to 2015, the FCC determined that predictive dialers and other new technology qualified as an ATDS, even if they did not generally generate or store random or sequential numbers. In its 2003 ruling, the FCC reasoned that a predictive dialer may have the “capacity” to dial random and sequential numbers, even if it was not currently being used for such a purpose. *Id.* at 14,091. The FCC acknowledged the telemarketing industry’s argument that predictive dialers do not fall within the statutory definition of ATDS because they “do not dial numbers ‘randomly or sequentially,’” but nevertheless concluded that predictive dialers’ “hardware, when paired with certain software, ha[d] the capacity to store or produce numbers and dial those numbers at random, in sequential

order, or from a database of numbers.” *Id.* at 14,090–91. In its later 2015 order, the FCC went even further, and determined that a device could have the requisite capacity if it had any potential to be configured for that purpose. *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7974 (2015) (*2015 Declaratory Ruling*) (holding that “the capacity of an autodialer is not limited to its current configuration but also includes its potential functionalities”).

Second, the FCC suggested that a device could qualify as an ATDS even if it entirely lacked the capacity to dial numbers randomly or sequentially. Thus in its 2012 ruling, the FCC stated that the definition of an ATDS “covers any equipment that has the specified *capacity* to generate numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated or come from calling lists.” *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 FCC Rcd. 15,391, 15,392 n.5 (2012) (*2012 Declaratory Ruling*). The FCC’s subsequent 2015 ruling, however, made the contrary suggestion that a device would not meet the definition of an ATDS unless it had the capacity to dial random or sequential numbers. *See 2015 Declaratory Ruling*, 30 FCC Rcd. at 7971–72 (“We reaffirm our previous statements that dialing equipment generally has the capacity to store or produce, and dial random or sequential numbers (and thus meets the TCPA’s definition of ‘autodialer’) even if it is not presently used for that purpose, including when the caller is calling a set list of consumers.”).

The FCC relied on policy and legislative history to support its application of the definition of ATDS to new technology. The FCC reasoned that “through the TCPA,

Congress was attempting to alleviate a particular problem—an increasing number of automated and prerecorded calls to certain categories of numbers,” and therefore Congress intended for any device that had the basic function of being automatic, i.e., had “the *capacity* to dial numbers without human intervention,” *2003 Order*, 18 FCC Red. at 14,092, to be regulated under the TCPA.<sup>2</sup> Further, the FCC thought that it was clear “that Congress anticipated that the FCC, under its TCPA rulemaking authority, might need to consider changes in technologies.” *Id.* Accordingly, the FCC concluded that an interpretation of the statutory definition of ATDS which excluded new technology that could automatically dial thousands of numbers merely because it “relies on a given set of numbers would lead to an unintended result” and fail to effectuate the purpose of the statutory requirement. *Id.*

## C

After the FCC’s 2015 ruling, a large number of regulated entities challenged the FCC’s definition of an ATDS in the D.C. and Seventh Circuits, and the petitions were consolidated in the D.C. Circuit. *See* Consolidation Order, *ACA Int’l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (No. 15-1211). Among other things, petitioners had sought clarification from the FCC on how the TCPA applied to new technologies, including cloud-based dialing options and

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<sup>2</sup> In the 2003 order, the FCC also confirmed that the TCPA applied to both voice calls and “text calls to wireless numbers” including short message service (SMS) calls, which “provide[] the ability for users to send and receive text messages to and from mobile handsets with maximum message length ranging from 120 to 500 characters.” *2003 Order*, 18 FCC Red. at 14,115 & n.606 (citation omitted).

smartphone apps. *2015 Declaratory Ruling*, 30 FCC Rcd. at 7970. In challenging the 2015 order, petitioners argued that they had not received the clarification they sought, asserting specifically that the FCC erred in concluding that equipment that merely had the potential future capacity to function as an autodialer, taking into account possible upgrades or modifications, met the statutory definition of ATDS. *ACA Int'l*, 885 F.3d at 696. They also challenged the FCC's conclusion that equipment qualifies as an ATDS so long as it can automatically dial from a list of numbers, even if it does not have the capacity to store or produce random or sequential numbers. *Id.* at 694.

The D.C. Circuit first asked whether it had jurisdiction to consider all of the FCC's rulings on this issue, including those that predated the 2015 order. Although normally all challenges to an FCC rule must be made within 60 days after its entry, 28 U.S.C. § 2344, a petition for a rulemaking may reopen consideration of prior rulemakings, *see Pub. Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 151–52 (D.C. Cir. 1990). “An agency's reconsideration of a rule in a new rulemaking constitutes a reopening when the original rule is ‘reinstated’ so as to have renewed effect.” *Biggerstaff v. FCC*, 511 F.3d 178, 185 (D.C. Cir. 2007) (quoting *Pub. Citizen*, 901 F.2d at 152). The D.C. Circuit concluded that the parties' 2015 rulemaking petition to the FCC reopened consideration of the definition of ATDS established in the FCC's 2003 order, as well as its subsequent rulings. *ACA Int'l*, 885 F.3d at 701.

On the merits, the D.C. Circuit invalidated the FCC's interpretation of the two key questions raised by the statutory definition of an ATDS, namely: “(i) when does a device have

the ‘capacity’ to perform the two enumerated functions; and (ii) what precisely are those functions?” *Id.* at 695.

Turning first to the FCC’s interpretation of “capacity,” the D.C. Circuit concluded it was overbroad. According to the court, the “straightforward understanding of the Commission’s ruling is that all smartphones qualify as autodialers because they have the inherent ‘capacity’ to gain ATDS functionality by downloading an app.” *Id.* at 700. Because “[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,” *id.* at 698, the D.C. Circuit concluded that the FCC’s interpretation “is an unreasonably, and impermissibly, expansive one,” *id.* at 700.

Turning to the second issue, the D.C. Circuit concluded that the FCC’s explanation of the functions of an ATDS was inadequate. The court explained that “[a] basic question raised by the statutory definition is whether a device must *itself* have the ability to generate random or sequential telephone numbers to be dialed,” or whether it would be “enough if the device can call from a database of telephone numbers generated elsewhere.” *Id.* at 701. The FCC had stated that a device qualified as an ATDS *only if* it could generate random or sequential numbers to be dialed, but also indicated that a device which could only dial numbers from a stored list also qualified as an ATDS. *Id.* at 701–02. While “[i]t might be permissible for the Commission to adopt either interpretation,” the D.C. Circuit held that “the Commission cannot, consistent with reasoned decisionmaking, espouse both competing interpretations in the same order.” *Id.* at 703. The D.C. Circuit also noted that the 2015 ruling lacked clarity on whether an autodialer must dial numbers without human

intervention. Although the FCC indicated that “the ‘basic function[]’ of an autodialer is to ‘dial numbers without human intervention,’” it declined a request to clarify that a dialer must have such a feature. *Id.* (alteration in original) (quoting *2015 Declaratory Ruling*, 30 FCC Rcd. at 7975). Because “[t]he order’s lack of clarity about which functions qualify a device as an autodialer compounds the unreasonableness of the Commission’s expansive understanding of when a device has the ‘capacity’ to perform the necessary functions,” the court “set aside the Commission’s treatment of those matters.” *Id.*

## II

We now turn to the facts of this case. The device at issue in this appeal is called the Textmunication system, which is a web-based marketing platform designed to send promotional text messages to a list of stored telephone numbers.<sup>3</sup> Phone numbers are captured and stored in one of three ways: An operator of the Textmunication system may manually enter a phone number into the system; a current or potential customer may respond to a marketing campaign with a text (which automatically provides the customer’s phone number); or a customer may provide a phone number by filling out a consent form on a Textmunication client’s website. A client of Textmunication can then design a marketing campaign that, for example, offers customers free passes and personal training sessions, provides appointment reminders and class updates, or sends birthday greetings, and

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<sup>3</sup> We have concluded that the TCPA applies to text messages because it is “a form of communication used primarily between telephones.” *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953–54 (9th Cir. 2009).

the Textmunication system will automatically send the desired messages to the stored phone numbers at a time scheduled by the client.

Crunch Fitness communicates with its prospective and current gym members by sending text messages through this Textmunication system. When Crunch wants to send a text message to its current or prospective customers, a Crunch employee logs into the Textmunication system, selects the recipient phone numbers, generates the content of the message, and selects the date and time for the message to be sent. The Textmunication system will then automatically send the text messages to the selected phone numbers at the appointed time.

Jordan Marks signed up for a gym membership with Crunch Fitness in 2012. After joining the gym, Marks received three text messages from Crunch over a period of eleven months. Marks's phone carrier charged him incoming tolls for each of these text messages. In February 2014, Marks filed a putative class action complaint against Crunch, alleging violations of § 227(b) of the TCPA. He claimed that Crunch "negligently contact[ed] [him] on [his] cellular telephone, in violation of the [TCPA], thereby invading [his] privacy." Marks alleged that the text messages were sent using an ATDS which has "the capacity to send text messages to cellular telephone numbers from a list of telephone numbers automatically and without human intervention."

The district court granted summary judgment in favor of Crunch on the ground that the Textmunication system did not qualify as an ATDS because it presently lacked a random or sequential number generator, and did not have the potential capacity to add such a feature. Because it defined an ATDS



as necessarily including a random or sequential number generator, the court did not consider the declaration of Marks's expert witness, Jeffrey Hansen, stating that the Textmunication system called numbers from a stored list. The court therefore denied Crunch's motion to exclude Hansen's testimony as moot. Marks timely appealed. We vacated submission of Marks's appeal pending the issuance of *ACA International*.

### III

#### A

After *ACA International* was issued, we ordered supplemental briefing to address the impact of the D.C. Circuit's opinion on this case. Under the Hobbs Act, an appellate court "has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—(1) all final orders of the [FCC] made reviewable by [47 U.S.C § 402(a)]," 28 U.S.C. § 2342, so long as the appeal is timely, meaning that it was brought within sixty days from when the FCC releases the final order to the public, *see* 28 U.S.C. § 2344.<sup>4</sup> Here, various parties timely challenged the FCC's 2015 order in both the Seventh and D.C. Circuits; these challenges were consolidated and assigned to the D.C. Circuit, which then became "the sole forum for addressing . . . the validity of the FCC's" order. *MCI Telecomms. Corp.*

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<sup>4</sup> An appellate court lacks authority to consider a challenge to an FCC order that is brought after sixty days from the date when the FCC releases the final order to the public. *See* 28 U.S.C. § 2344; *see also U.S. W. Commc'ns, Inc. v. Jennings*, 304 F.3d 950, 958 n.2 (9th Cir. 2002) (stating that "[p]roperly promulgated FCC regulations currently in effect must be presumed valid" for purposes of a case not brought pursuant to a petition under the Hobbs Act).

*v. U.S. W. Commc'ns*, 204 F.3d 1262, 1267 (9th Cir. 2000) (quoting *GTE South, Inc. v. Morrison*, 199 F.3d 733, 743 (4th Cir. 1999)). Because the D.C. Circuit exercised its authority to set aside the FCC's interpretations of the definition of an ATDS in the 2015 order, 28 U.S.C. § 2342, and any prior FCC rules that were reinstated by the 2015 order, *see Biggerstaff*, 511 F.3d at 185 (quoting *Pub. Citizen*, 901 F.2d at 152), we conclude that the FCC's prior orders on that issue are no longer binding on us. *See King v. Time Warner Cable Inc.*, 849 F.3d 473, 476–77 (2d Cir. 2018) (holding that *ACA International* “invalidated that [FCC 2015 Declaratory Ruling] and thereby removed any deference we might owe to the views the FCC expressed in it”); *Dominguez ex rel Himself v. Yahoo, Inc.*, 894 F.3d 116, 119 (3d Cir. 2018) (holding that in light of the D.C. Circuit's holding, the court was free to interpret the statutory definition of an autodialer as it had prior to the issuance of the FCC's 2015 order).

We review a district court's grant of summary judgment *de novo*, viewing the evidence in the light most favorable to the nonmoving party in order to determine whether there are any genuine issues of material fact. *Thomas v. Ponder*, 611 F.3d 1144, 1149–50 (9th Cir. 2010). The district court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1291.

## B

Because the D.C. Circuit vacated the FCC's interpretation of what sort of device qualified as an ATDS, only the statutory definition of ATDS as set forth by Congress in 1991

remains. *See* 47 U.S.C. § 227(a).<sup>5</sup> Accordingly, we must begin anew to consider the definition of ATDS under the TCPA.

We “begin [our analysis] with the plain language of the statute.” *Guido v. Mount Lemmon Fire Dist.*, 859 F.3d 1168, 1170 n.1 (9th Cir. 2017) (alteration in original) (quoting *Negusie v. Holder*, 555 U.S. 511, 542 (2009)). “If the ‘statutory text is plain and unambiguous[,]’ we ‘must apply the statute according to its terms.’” *Id.* (alteration in original) (quoting *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009)). If the language of a statute is ambiguous, “we may use canons of construction, legislative history, and the statute’s overall purpose to illuminate Congress’s intent.” *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1133 (9th Cir. 2009) (quoting *Jonah R. v. Carmona*, 446 F.3d 1000, 1005 (9th Cir. 2006)). “It is also ‘a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.’” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803, 809 (1989)). “In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.” *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *see also United States v. Lewis*, 67 F.3d 225, 228–29 (9th Cir. 1995) (“Particular phrases must be construed in light

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<sup>5</sup> Although the FCC had promulgated a regulation defining ATDS, the “regulation does little more than restate the terms of the statute itself,” and “the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute.” *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006).

of the overall purpose and structure of the whole statutory scheme.”).

As the D.C. Circuit noted, the definition of ATDS “naturally raises two questions: (i) when does a device have the ‘capacity’ to perform the two enumerated functions; and (ii) what precisely are those functions?” *ACA Int’l*, 885 F.3d at 695. We start by addressing the second question regarding functions. The TCPA defines 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). The question is whether, in order to be an ATDS, a device must dial numbers generated by a random or sequential number generator or if a device can be an ATDS if it merely dials numbers from a stored list. We must also determine to what extent the device must function without human intervention in order to qualify as an ATDS.

Marks and Crunch offer competing interpretations of the language of § 227(a)(1)(A), but both parties fail to make sense of the statutory language without reading additional words into the statute.

Marks points out that a number generator is not a storage device; a device could not use “a random or sequential number generator” to store telephone numbers. Therefore, Marks asserts, it does not make sense to read “store” in subdivision (A) as applying to “telephone numbers to be called, using a random or sequential number generator.” 47 U.S.C. § 227(a)(1)(A). Instead, Marks contends that we should read the definition as providing that an ATDS is “equipment which has the capacity (A) to [i] store [telephone numbers to be called] or [ii] produce telephone numbers to be

called, using a random or sequential number generator; and (B) to dial such numbers.” In other words, a piece of equipment qualifies as an ATDS if it has the capacity to store telephone numbers and then dial them.

Crunch, in turn, argues that due to the placement of the comma in the statute, the phrase “using a random or sequential number generator” modifies both “store” and “produce.” Therefore, Crunch argues that the best reading of the statute defines an ATDS as “equipment which has the capacity (A) to store [telephone numbers produced using a random or sequential number generator]; or [to] produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” As such, to qualify as an ATDS, according to Crunch, a device must store telephone numbers that have been produced using a random or sequential number generator.

After struggling with the statutory language ourselves, we conclude that it is not susceptible to a straightforward interpretation based on the plain language alone. Rather, the statutory text is ambiguous on its face.<sup>6</sup> The D.C. Circuit apparently agreed, stating that “[i]t might be permissible” for the FCC to adopt an interpretation that a device had to generate random or sequential numbers in order to be an ATDS, or that a device could be an ATDS if it was limited to dialing numbers from a stored list. *ACA Int’l*, 885 F.3d at 702–03. We therefore turn to other aids in statutory interpretation.

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<sup>6</sup> Our statement in *Satterfield* that “the statutory text is clear and unambiguous” referred to only one aspect of the text: whether a device had the “*capacity* ‘to store or produce telephone numbers . . . .’” 569 F.3d at 951 (emphasis in original).

## C

Because the statutory language is ambiguous, we look at the context and the structure of the statutory scheme. The structure and context of the TCPA as originally enacted indicate that Congress intended to regulate devices that make automatic calls. Although Congress focused on regulating the use of equipment that dialed blocks of sequential or randomly generated numbers—a common technology at that time—language in the statute indicates that equipment that made automatic calls from lists of recipients was also covered by the TCPA.

This conclusion is supported by provisions in the TCPA allowing an ATDS to call selected numbers. For instance, the TCPA permitted use of autodialers for a call “made with the prior express consent of the called party.” 47 U.S.C. § 227(b)(1)(A) (1991). To 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.<sup>7</sup> Congress’s 2015 amendment to the TCPA

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<sup>7</sup> Other provisions in the statute prohibited calls to specified numbers. For instance, the statute authorized the FCC to establish and use a national database “to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations” and who could not be called by telemarketers. *Id.* § 227(c)(3). It likewise prohibited calls to emergency telephone lines, *id.* § 227(b)(1)(A)(i), patient rooms in hospitals or other health care facilities, *id.* § 227(b)(1)(A)(ii), and paging services and cellular phones, *id.* § 227(b)(1)(A)(iii). In order to comply with such restrictions, an ATDS could either dial a list of permitted numbers (as allowed for autodialed calls made with the prior express consent of the called party) or block prohibited numbers when calling a sequence of random or sequential numbers. In either case, these provisions indicate Congress’s understanding that an ATDS was not

provides additional information about Congress's views on the scope of the definition of ATDS. After the FCC issued its 2015 order, Congress added language to § 227(b)(1)(A)(iii), exempting the use of an ATDS to make calls "solely to collect a debt owed to or guaranteed by the United States." Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301, 129 Stat. 584, 588 (codified at 47 U.S.C. § 227(b)(1)(A)(iii)). Like the exception allowing the use of an autodialer to make calls "with the prior express consent of the called party," this debt collection exception demonstrates that equipment that dials from a list of individuals who owe a debt to the United States is still an ATDS but is exempted from the TCPA's strictures. Moreover, in amending this section, Congress left the definition of ATDS untouched, even though the FCC's prior orders interpreted this definition to include devices that could dial numbers from a stored list. We "presume that when Congress amends a statute, it is knowledgeable about judicial decisions interpreting the prior legislation." *Porter v. Bd. of Trs. of Manhattan Beach Unified Sch. Dist.*, 307 F.3d 1064, 1072 (9th Cir. 2002). Because we infer that Congress was aware of the existing definition of ATDS, its decision not to amend the statutory definition of ATDS to overrule the FCC's interpretation suggests Congress gave the interpretation its tacit approval. See *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

Despite the ambiguity of the statutory definition of ATDS, reading the definition "in [its] context and with a view

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limited to dialing wholly random or sequential blocks of numbers, but could be configured to dial a curated list.

to [its] place in the overall statutory scheme,” *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133, we conclude that the statutory definition of ATDS is not limited to devices with the capacity to call numbers produced by a “random or sequential number generator,” but also includes devices with the capacity to dial stored numbers automatically. Accordingly, we read § 227(a)(1) to provide that the term automatic telephone dialing system means equipment which has 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.<sup>8</sup>

We also reject Crunch’s argument that a device cannot qualify as an ATDS unless it is fully automatic, meaning that it must operate without any human intervention whatsoever. By referring to the relevant device as an “*automatic telephone dialing system*,” Congress made clear that it was targeting equipment that could engage in automatic *dialing*, rather than equipment that operated without any human oversight or

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<sup>8</sup> Therefore, we decline to follow the Third Circuit’s unreasoned assumption that a device must be able to generate random or sequential numbers in order to qualify as an ATDS. *Dominguez ex rel. Himself v. Yahoo, Inc.*, 894 F.3d 116, 120 (3d Cir. 2018) (stating, without explanation, that the plaintiff’s claims against Yahoo failed because he “cannot point to any evidence that creates a genuine dispute of fact as to whether [Yahoo’s device] had the present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers”). In making this assumption, the Third Circuit failed to resolve the linguistic problem it identified in an unpublished opinion in the same case, where it acknowledged that “it is unclear how a number can be *stored* (as opposed to *produced*) using ‘a random or sequential number generator.’” *Dominguez v. Yahoo, Inc.*, 629 F. App’x 369, 372 n.1 (3d Cir. 2015). Because the Third Circuit merely avoided the interpretive questions raised by the statutory definition of ATDS, its published opinion is unpersuasive.



control. 47 U.S.C. § 227(a)(1) (emphasis added); *see ACA Int'l*, 885 F.3d at 703 (“‘[A]uto’ in autodialer—or, equivalently, ‘automatic’ in ‘automatic telephone dialing system,’ 47 U.S.C. § 227(a)(1)—would seem to envision non-manual dialing of telephone numbers.”). Common sense indicates that human intervention of some sort is required before an autodialer can begin making calls, whether turning on the machine or initiating its functions. Congress was clearly aware that, at the very least, a human has to flip the switch on an ATDS. *See The Automated Telephone Consumer Protection Act of 1991, Hearing Before the Subcomm. on Commc’ns of the Comm. on Commerce, Sci., and Transp.*, 102nd Cong. 15 (1991) (statement of Robert Bulmash, President, Private Citizen, Inc.) (describing a pitch for autodialers in a telemarketing magazine as stating: “You come home from work[, and] turn on the machine, just like turning on a radio.”). Crunch does not dispute that the Textmunication system dials numbers automatically, and therefore it has the automatic dialing function necessary to qualify as an ATDS, even though humans, rather than machines, are needed to add phone numbers to the Textmunication platform.

#### D

Because we read § 227(a)(1) to provide that the term “automatic telephone dialing system” means equipment which has 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 automatically (even if the system must be turned on or triggered by a person), we conclude there is a genuine issue of material fact as to whether the Textmunication system is an ATDS. The evidence in the record shows that the

Textmunication system stores numbers and dials them automatically to send text messages to a stored list of phone numbers as part of scheduled campaigns. This is sufficient to survive summary judgment.<sup>9</sup> Because the district court did not have the benefit of *ACA International* or our construction of the definition of ATDS, we vacate the district court's ruling and remand it for further proceedings.<sup>10</sup> Each party shall bear its own costs on appeal.

**VACATED AND REMANDED.**

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<sup>9</sup> Because we vacate the district court's decision on this ground, we decline the reach the question whether the device needs to have the current capacity to perform the required functions or just the potential capacity to do so. *Cf. Meyer v. Portfolio Recovery Assocs. LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012); *Satterfield*, 569 F.3d at 951.

<sup>10</sup> We also vacate the district court's dismissal of Crunch's motion to exclude Hansen's declaration as moot. The district court based its ruling on its conclusion that there was no dispute of material fact as to whether the Textmunication system was an ATDS, and Hansen's declaration could not help create one. To the extent Hansen's declaration addresses whether the Textmunication system calls automatically from a stored list, it is relevant to the question whether the system qualifies as an ATDS.

We **DENY** Marks's motion for judicial notice of two newspaper articles. We "may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Because Marks has not pointed to any judicially noticeable facts in these articles, we decline to take judicial notice.