No. 19-1738

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ALI GADELHAK, individually and on behalf of all others similarly situated,	
Plaintiff-Appellant,	Appeal from the United States District Court for the Northern District of Illinois (Case No. 1:17-cv-01559)
v.	
AT&T Services, Inc.	Honorable Edmond E. Chang
Defendant-Appellee.	

PLAINTIFF-APPELLANT'S PETITION FOR REHEARING EN BANC

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-1738

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

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

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

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Attorney's Signature: s/ Timothy J. Sostrin Date: March 4, 2020

Attorney's Printed Name: Timothy J. Sostrin

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ______

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Attorney's Signature: s/ Keith J. Keogh Date: March 4, 2020

Attorney's Printed Name: Keith J. Keogh

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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Petitioner's Rule 35 Statement

This proceeding involves a question of exceptional importance on which the panel decision conflicts with the authoritative decision of the United States Court of Appeals for the Ninth Circuit in *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018):

(1) Whether the Telephone Consumer Protection Act (TCPA)'s restrictions on auto-dialed calls and text messages apply only to systems that generate arbitrary telephone numbers or whether those restrictions also apply to systems that autodial and spam stored lists of phone numbers.

When the TCPA was enacted, 30-40% of telemarketing calls were placed by list based autodialers. In ruling the TCPA restrictions do not apply to those systems, the panel adopted an interpretation of the statute that squarely conflicts with the Ninth Circuit's ruling and numerous FCC orders, renders the operative statutory text superfluous, and defeats the congressional purpose. If the ruling stands, autodialers in the Seventh Circuit will be free to send spam text messages and place autodialed calls to lists containing millions of telephone numbers with a single click of a button. Sending billions of text messages to a

list of every telephone number in the country would not be covered under the TCPA.

Argument

I. Introduction

The TCPA defines Automatic Telephone Dialing System (ATDS) as "equipment which has the capacity - (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers. 47 U.S.C. § 227(a)(1) (emphasis added).

In *Marks*, the Ninth Circuit ruled that this definition encompasses two types of systems – (1) those that store lists of telephone numbers to be called and then automatically dial those stored telephone numbers; and (the Store Prong) (2) those that produce telephone numbers to be called using a random or sequential number generator and then automatically dial those numbers (the Produce Prong). *Marks*, 904 F.3d at 1052-53.

This is the same interpretation that the Federal Communications Commission has also repeatedly espoused in its orders implementing the TCPA. *See In re Rules & Regs Implementing the TCPA*, 18 FCC Rcd. 14014, 14092 (2003); *In re Rules & Regs Implementing the TCPA*, 23

FCC Rcd. 559, 566 (2008); *In re Rules & Regs Implementing the TCPA*, 27 FCC Rcd 15391, 15392 n.5 (2012); *In re Rules & Regs Implementing the TCPA*, 30 FCC Rcd. 7961, 7972 (2015).

This Court adopted and applied the FCC's orders in *Blow v. Bijora, Inc.*, 855 F.3d 793 (7th Cir. 2017). However, the panel in this case ruled that it was bound neither by *Blow* nor by the FCC's orders in light of the D.C. Circuit's decision in *ACA International v. FCC*, 885 F.3d 687, 695 (D.C. Cir. 2018), which considered a challenge to the 2015 order. The panel found that *ACA International* had also vacated all of the FCC's prior orders concerning the ATDS definition, even though *ACA International* expressly reserved judgment on the proper interpretation. *See id.* at 703.[1]

Believing itself freed from these prior rulings, the panel proceeded to interpret the statutory definition on its face and concluded both the FCC and the Ninth Circuit were wrong. Under the panel's view, only

---

[1] Gadelhak respectfully submits that the panel's interpretation of *ACA International* is mistaken, as that decision expressly vacates only the FCC's 2015 order due to internally inconsistent statements in that order on the ATDS interpretation. *Ibid.* Gadelhak nevertheless need not rely on that argument, as the plain language of the statutory definition of ATDS encompasses the dialing system at issue here.

one of the two types of autodialers commonly used when the TCPA was enacted will qualify as ATDS – those that generate random or sequential telephone numbers. Systems that autodial from stored lists of telephone numbers no longer qualify, even though those systems were commonly used at the time of enactment and have consistently been deemed to qualify for almost 30 years.

II. The Panel's Interpretation Violates the Cardinal Principle of Statutory Construction

The panel acknowledges its interpretation of ATDS renders the words "store or" superfluous. Opinion at 12. By limiting the scope of the ATDS definition to only those systems that generate random or sequential telephone numbers, it simply never matters under the panel's interpretation if a system can store telephone numbers at all. *Ibid*.

The Supreme Court has repeatedly held that "[w]e must give effect to every word of a statute wherever possible." *Ransom v. FIA Card Servs.*, 562 U.S. 61, 70 (2011), quoting *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004). This is the "cardinal principle of statutory construction" (*Williams v. Taylor*, 529 U.S. 362, 404 (2000)), which has guided courts for hundreds of years. *See Market Co. v. Hoffman*, 101 U.S. 112, 115

(1879) ("As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' This rule has been repeated innumerable times.")

In this case, therefore, the Court must "assume that Congress used two terms ["'store' or 'produce'"] because it intended each term to have a particular, nonsuperfluous meaning." *Bailey v. United States*, 516 U.S. 137, 146 (1995) (rejecting interpretation that "undermines virtually any function" for a statutory term in favor of an interpretation that "preserves a meaningful role" for that term.)

The panel acknowledges the surplusage created by its interpretation, but concluded it "is not a deal breaker" because "it is plausible that Congress chose some redundancy" in some sort of "ill-conceived . . . belt-and-suspenders approach." Opinion at 12 (citations omitted). This is contrary to the record and contrary to binding precedent. Speculation that Congress may have actually chosen to create superfluous words cannot overcome the rule against superfluity. *Bilski v. Kappos*, 561 U.S. 593, 608 (2010) ("This established rule of statutory interpretation cannot be overcome by judicial speculation as

to the subjective intent of various legislators in enacting the subsequent provision.") To be clear, such speculation is not supported by anything in the record and is contrary to the legislative history, which shows that Congress was in fact concerned about list-based dialing systems even in 1991.

When congress enacted the TCPA in 1991, it was well aware that telemarketers routinely used *list-based* autodialers to engage in *targeted* advertising campaigns (e.g., seniors, homeowners, etc.) to "lists which are [] bought or sold without restriction." *See Bills to Amend the Communications Act of 1934 to Regulate the Use of Telephones in Making Commercial Solicitations and to Protect the Privacy Rights of Subscribers: Hearing on H.R. 1304 and H.R. 1305 before the Subcomm. on Telecomm. and Fin. of the House Comm. on Energy and Commerce*, 102nd Cong. 2 (1991) (statement of Rep. Markey) ("the reason for the proliferation of such unsolicited advertising over our Nation's telecommunications network is that companies can now target their marketing . . . corporate America has your number.")

Even in 1991, Congress recognized that "modern telemarketing software organizes information on current and prospective clients into

databases designed to support businesses in every aspect of telephone sales-all with the objective of bringing the company's product or service to the customer most likely to purchase it." H.R. REP. NO. 102-317, at 7-8; *see also The Automated Telephone Consumer Protection Act of 1991: Hearing on S. 1462 before the Sen. Subcomm. on Commc'ns of the Comm. on Commerce, Sci., and Transp.*, 102 Cong. 27 (July 24, 1991) ("There are list brokers out there whose business it is to sell phone numbers, names, and so on and so forth, to the telemarketing industry[.]") (Stmt. Of Robert S. Bulmash).

Indeed, the testimony before Congress showed that "30 to 40 percent of the national telemarketing firms" were using list-based predictive dialers even in 1991. *See id.* at 16 (Stmt. Of Robert S. Bulmash). In light of the repeated references to list-based dialing systems in the legislative history, it is evident that Congress enacted the Store Prong to ensure that list-based systems were covered by the statute, not to somehow create redundancy for a number random generation requirement. But even if there was no such legislative history, it is contrary to *Bilski* to speculate that Congress may have intended "store" to be redundant.

III. Neither Grammatical Considerations nor Policy Concerns Can Overcome the Superfluity Problem

Despite the acknowledged problem with its interpretation, the panel ruled that it could not accept the alternative interpretation adopted by both the Ninth Circuit in *Marks* and by the FCC, in which the phrase "using a random or sequential number generator" modifies only the immediately preceding verb 'produce,' and not the earlier verb 'store.' The panel posited just two reasons for rejecting that interpretation - first, it found that interpretation to be "ungrammatical" and second, it worried that interpretation could be construed to cover iPhones even though iPhones did not exist in 1991 when the TCPA was enacted. Opinion at 16. Plaintiff respectfully submits that neither consideration can overcome the superfluity problem with the Panel's own interpretation.

A. Grammar

To begin with grammar, Gadelhak respectfully disagrees the *Marks* interpretation is "unnatural" or "ungrammatical." The panel concluded that because both "store" and "produce" share a direct object ("telephone numbers to be called"), the subsequent modifier ("using a random or sequential number generator") must act on both verbs. A

few examples show why there is no such hard and fast rule:

> "The surgeon sterilized and incised my elbow, using a scalpel."
>
> "Baseball is a sport in which players throw or hit a ball, using a bat."
>
> "This company manufactures and ships widgets, using the U.S. postal service."
>
> "I have deduced that Mrs. Peacock either shot or bludgeoned Colonel Mustard in the Billiard Room, using the Candlestick."

In each of these examples two verbs share a direct object, which is followed by a modifying phrase that is most naturally read to modify only the last verb in the series. One need not "contort the [] text almost beyond recognition" (opinion at 14) to conclude that the surgeon used the scalpel to incise my elbow, not to sterilize it. Likewise, no rule of grammar requires the reader to conclude that baseball players use a bat to throw a baseball.

The ATDS definition is no different. It is not a "judicial rewrite" (Opinion at 15) to simply conclude that "using a random or sequential number generator" does not modify "store," especially when "the phrase is an admittedly imperfect fit for the verb 'store.'" Opinion at 14. "At this point we recognize that it pays not to daydream in grade school

English class." *American Nat'l Fire Ins. Co. v. Rose Acre Farms*, 107 F.3d 451, 455 (7th Cir. 1997).

More importantly, even if some rule of grammar supported the construction adopted by the panel, it would not overcome the rule against superfluity. The Supreme Court made this clear in *Lockhart v. United States*, 136 S. Ct. 958 (2016), where it rejected application of the series qualifier rule, which would require the modifier to apply to all preceding items in the series, because doing so would create a superfluity problem. *Id.* at 965-66 ("it is clear that applying the limiting phrase to all three items would risk running headlong into the rule against superfluity by transforming a list of separate predicates into a set of synonyms describing the same predicate.").

In doing so, the court recognized that application of a modifier to all of the preceding terms depends on context, not grammatical rules. "It would be as if a friend asked you to get her tart lemons, sour lemons, or sour fruit from Mexico. If you brought back lemons from California, but your friend insisted that she was using customary speech and obviously asked for Mexican fruit only, you would be forgiven for disagreeing on both counts." *Id.* at 966.

Lockhart thus rejected the most natural construction of the statute at issue in that case because doing so avoided the superfluity problem that reading would create. *Ibid*. *Lockhart* establishes that the rule against superfluity should supersede a court's concerns about grammar. The Tenth Circuit recently applied this rule from *Lockhart* to reach the same conclusion. *Jordan v. Maxim Healthcare Servs.*, 2020 U.S. App. LEXIS 5061, * 50 (10th Cir. February 19, 2020) ("As in *Lockhart*, following the series-qualifier canon here creates (for reasons explicated supra) serious surplusage; it makes 'companions' and 'casual babysitters' redundant with 'domestic employees.'") The panel thus erred in this case by discounting the superfluity problem due to grammatical concerns.

B. iPhones

The only other reason the panel rejected the *Marks* interpretation is that it could, hypothetically, be construed to apply to iPhones due to an obscure "Do Not Disturb While Driving" feature: "If someone sends you a message [while this feature is turned on], they receive an automatic reply letting them know that you're driving." Opinion at 16.

Yet the panel's description of this iPhone feature, which does not

come from the record, simply does not qualify as an ATDS under the Store Prong, which covers systems that store multiple telephone numbers to be called and then automatically dial those stored telephone numbers. 47 U.S.C. § 227(a)(1). The iPhone's "do not disturb" feature does not work as an autodialer – it does not autodial a series of numbers that were stored to be called. It is a one-off response to an incoming message.

No court has ever found anyone liable under the TCPA's ATDS provision for using such technology and there is little reason to think that any court would. "Out of the box" (Opinion at 16) iPhones not only fail to satisfy the plain language of the ATDS definition, they do not match up to that language when the words are "read in their context and with a view to their place in the overall statutory scheme." *Lockhart*, 136 S.Ct. at 963; *see also New Prime Inc. v. Oliveira*, 139 S.Ct. 532, 539 (2019) ("It's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute.") (citation omitted).

Gadelhak agrees with the panel that it "makes little sense" to construe the statute as regulating iPhones when smartphones did not

even exist when Congress enacted the TCPA in 1991. Opinion at 16. Accordingly, in the highly speculative and unlikely scenario that someone is ever sued for the normal use of an iPhone, the court in that case could rightly dismiss the case for failure to state a claim. Or that court could rightly dismiss the case because the plaintiff does not "fall within the zone of interests protected by the law invoked" and would therefore lack *statutory standing* to proceed. *United States v. All Funds on Deposit with R.J. O'Brien & Assocs.*, 783 F.3d 607, 617 (7th Cir. April 2, 2015), quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984). Or that court could rightly dismiss the case because application of the TCPA would be unconstitutional *as applied* to such conduct. *See Regan v. Time, Inc.*, 468 U.S. 641, 651 n. 8 (1984) ("one arguably unconstitutional application of the statute does not prove that it is substantially overbroad, particularly in light of the numerous instances in which the requirement will easily be met.")

The panel's concerns about a hypothetical application of the statute to everyday use of an iPhone are simply too speculative and attenuated to eliminate the statute's application to dialing systems commonly used by telemarketers even in 1991 and thus "close[] the

courthouse door to a broad swath of consumers who . . . have suffered the very harm for which Congress provided recourse." *Glasser v. Hilton Grand Vacations Co., LLC*, 2020 U.S. App. LEXIS 2481, *36 (January 27, 2020) (Dissenting Opinion).

The Supreme Court has frequently rejected such speculative concerns as a basis to so narrowly construe a statute. *Lawson v. FMR LLC*, 571 U.S. 429, 446-47 (2014) ("it would thwart Congress' dominant aim if contractors were taken off the hook for retaliating against their whistleblowing employees, just to avoid the unlikely prospect that babysitters, nannies, gardeners, and the like will flood OSHA with §1514A complaints."); *United States v. Classic*, 313 U.S. 299, 324 (1941) (doing otherwise would be "to say that acts plainly within the statute should be deemed to be without it because other hypothetical cases may later be found not to infringe the constitutional right with which alone the statute is concerned."); *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32 (1963) ("[A] limiting construction could be given to the statute by the court responsible for its construction if an application of doubtful constitutionality were . . . presented."); *Coleman v. Tollefson*, 135 S. Ct. 1759, 1764-65 (2015) ("If and when the situation

that Coleman hypothesizes does arise, the courts can consider the problem in context.")

IV. The TCPA's Purpose is Clear

Congress enacted the TCPA with clear purpose: to prevent automated calls from "proliferat[ing] beyond our control." 137 Cong. Rec. 9,840 (1991) (statement of Sen. Hollings). The "[e]vidence compiled by the Congress indicate[d] that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy." Pub. L. 102-243, § 2, 105 Stat. 2394 (1991) (note to 47 U.S.C. § 227). Congress found that "federal legislation is necessary to protect the public from automated telephone calls. These calls can be an invasion of privacy, an impediment to interstate commerce, and a disruption to essential public safety services." S. Rep. 102-178, at 5 (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1972–1973

Automated calls do not just invade our privacy, they threaten the viability of the telephone as a useful means of communication for both business and consumers. As Senator Brian Schatz has noted, "robocalls have turned us into a nation of call screeners" and this could become a

"significant economic issue." Illegal Robocalls: Calling all to Stop the Scourge: Hearing before the S. Comm. on Com., Sci., and Transp., 116th Cong. (Apr. 11, 2019). Many people now refuse to answer calls from unfamiliar sources, sometimes leading to harmful results. See, e.g., Tim Harper, Why Robocalls are Even Worse Than You Thought, Consumer Reps. (May 15, 2019) (reporting delays in medical treatment because people no longer respond to calls from medical specialists); Tara Siegel Bernard, Yes, It's Bad. Robocalls, and Their Scams, Are Surging, N.Y. Times (May 6, 2018) (reporting that one doctor ignored a call from the emergency room because he assumed it was a robocall).

And this is the state of affairs when everyone has thought that list-based dialers were regulated by the TCPA given the FCC's repeated orders on the issue for more than fifteen years. See e.g., 2003 Order, 18 FCC Rcd. 14014. If those systems no longer qualify as ATDS, we should expect an onslaught of spam text messages and autodialed voice calls. Constant bombardment of mobile devices could render telephone services useless to businesses and consumers alike, preventing legitimate and necessary communications and commerce from flowing from one phone to another.

By adopting the interpretation of ATDS set forth in *Marks* and the FCC's orders, this Court can prevent such an outcome and ensure the TCPA is applied as congress intended. "[T]he TCPA was enacted to solve a problem. Simply put, people felt almost helpless in the face of repeated and unwanted telemarketing calls . . . It would be dispiriting beyond belief if courts defeated Congress' obvious attempt to vindicate the public interest with interpretations that ignored the purpose, text, and structure of this Act at the behest of those whose abusive practices the legislative branch had meant to curb." *Krakauer v. Dish Network, L.L.C.*, 2019 U.S. App. LEXIS 16111, *40 (4th Cir. 2019).

V. Conclusion

The Court should grant this petition for rehearing en banc.

Respectfully Submitted,

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Certificate of Compliance

1. This petition complies with the type-volume limitation of Fed. R. App. P. 35 because it contains 3,295 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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Dated: March 4, 2020

s/ *Timothy J. Sostrin*
Timothy J. Sostrin
Attorney for Plaintiff-Appellant

PROOF OF SERVICE

I, Timothy J. Sostrin, certify that on March 4, 2020, I served the following registered users of the court's electronic filing system with the foregoing petition by electronically filing the same:

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s/ *Timothy J. Sostrin*
Timothy J. Sostrin (counsel of record)
Attorney for Plaintiff-Appellant