ORIGINAL

No. 15-1211 (and consolidated cases)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ACA INTERNATIONAL

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

BRIEF OF AMICUS CURIAE CHARLES R. MESSER IN SUPPORT OF ACA INTERNATIONAL'S PETITION

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GLOSSARY

ATDS	Automatic Telephone Dialing System as defined by the TCPA (see 47 U.S.C. section 227(a)(1)).
ATDS Rules	The Federal Communications Commission's rules which modified and expanded the definition of an ATDS under the TCPA. See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014 (2003), *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd. 559 (2008), and *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961 (2015).
Auto-dialer	Any automated system that is capable of dialing telephone numbers, including but not limited to ATDS's.
FCC	Federal Communications Commission.
TCPA	Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394, codified at 47 U.S.C. sections 227 *et seq*.

1. Statement of identity, interest in this case, and source of authority to file an amicus brief.

I am a lawyer in private practice who, among other things, represents defendants in civil cases that allege violations of the Telephone Consumer Protection Act ("TCPA").

This Amicus Brief reflects my personal legal perspective of the FCC's ATDS Rules. I do not know whether this brief represents the personal views of my colleagues at Carlson & Messer LLP, represents the view of any of my firm's clients or of any organization which we have represented or consulted with, or represents the views of petitioner ACA International or of any other petitioner.

My interest in this case stems from my personal belief that the government should never rely on false or dishonest claims, and on the fact that the FCC has consistently relied on false and dishonest claims about changes in auto-dialer technologies to justify its ATDS Rules. Governmental reliance on false and dishonest claims destroys respect for law, and it undermines the integrity of courts.

The parties ask the court to determine whether the FCC lacks regulatory authority to expand the definition of an ATDS, but this brief demonstrates a different point that could make that determination unnecessary: The FCC's factual bases of its 2003, 2008, and 2015 Orders that expanded the definition of an ATDS (changes in technologies since the TCPA was enacted in 1991) were false in 2003,

were false in 2008, and are false today. The FCC's 2003 and 2015 Orders claim that an auto-dialer that dials telephone numbers from a list is a new post-TCPA technology, but this brief demonstrates that that technology was patented in 1976 (see U.S. Patent no. 3,989,899) and was widely used by 1985. And the FCC's 2008 and 2015 Orders claim that predictive auto-dialing is another new post-TCPA technology, but this brief demonstrates that predictive auto-dialers were developed during the 1980's (see U.S. Patent nos. 4,599,493 and 4,933,964) and were widely used before the TCPA was enacted in 1991. The Court of Appeals should know that the FCC has consistently published and relied upon false and dishonest claims to justify its ATDS Rules.

I have concurrently filed a Motion for Leave to file this brief. Rule 29(a), Federal Rules of Appellate Procedure.

2. The FCC generally claims that changes in technology justify its ATDS Rules.

Congress defined an Automatic Telephone Dialing System, ATDS, in section 227(a) of the TCPA. This brief will demonstrate that since the TCPA was enacted in 1991, the FCC has relied on false claims about, "changes in technologies," to justify its unauthorized and abusive expansions of the definition of an ATDS.

The FCC's June 18, 2015 Declaratory Ruling and Order states that the basis of its regulatory authority to expand the definition of an Automatic Telephone Dialing System, ATDS, is post-TCPA changes in auto-dialer technologies:

> *Since the TCPA's enactment, calling technology has changed*, and businesses have grown more vocal that modern dialing equipment should not be covered by the TCPA and its consumer protections.

FCC's Declaratory Ruling and Order, June 18, 2015, section 2 (*emphasis* added). And this:

> In the 2003 TCPA Order, the Commission found that, in order to be considered an "automatic telephone dialing system," the "equipment need only have the "capacity to store or produce telephone numbers." (fn. 47). The Commission stated that even when dialing a fixed set of numbers, equipment may nevertheless meet the autodialer definition.

FCC's Declaratory Ruling and Order, June 18, 2015, section 12. The Commission's footnote 47 referred to this:

> It is clear from the statutory language and the legislative history that Congress anticipated that the FCC, under its TCPA rulemaking authority, might need to consider *changes in technologies*.

FCC's Report and Order of July 3, 2003, section 132 (*emphasis* added).

Auto-dialer technologies have changed, but when? The TCPA was enacted in 1991. In the context of the FCC's regulatory authority and this case, it is critical to distinguish between pre-enactment and post-enactment technologies. The FCC itself recognizes that critical distinction in its June 18, 2015 Declaratory Ruling and Order, "*Since the TCPA's enactment*, calling technology has changed…." (see p. 3, above, *emphasis* added).

Section 3 of this brief sets forth the FCC's specific claims about changes in auto-dialer technologies. Section 4 demonstrates that the FCC's claims about "changes in technology" are false.

3. The FCC specifically claims that auto-dialers that dial from lists, or that dial predictively, are post-enactment technologies.

The TCPA was enacted in 1991. In its 2003 and 2015 Orders, the FCC claims that auto-dialers that dial telephone numbers from lists, or from databases, are new post-1991 technologies:

> In the past, telemarketers may have use dialing equipment to create and dial 10-digit telephone numbers arbitrarily. As one commenter points out, the evolution of the teleservices industry has progressed

> to the point where using lists of numbers is far more cost effective. The basic function of such equipment, however, has not changed—the capacity to dial numbers without human intervention. We fully expect automated dialing technology to continue to develop.

FCC's Report and Order of July 3, 2003, section 132. The FCC's 2015 June 18, 2015 Declaratory Ruling and Order confirmed and endorsed this 2003 Order. See section 12 cited at page 3, above.

In its 2008 and 2015 Orders, the FCC claims that auto-dialing predictively is another post-1991 technology:

> In the 2008 *ACA Declaratory Ruling*, the Commission "affirmed that a predictive dialer constitutes an automatic telephone dialing system and is subject to the TCPA's restrictions on the use of autodialers." (fn. 50).

FCC's Declaratory Ruling and Order, June 18, 2015, section 13. The Commission's footnote 50 referred to this:

> [T]he evolution of the teleservices industry had progressed to the point where dialing lists of numbers was far more cost effective, but that the basic function of such dialing equipment, had not changed—the capacity to dial numbers without human intervention.

> The Commission noted that it expected such automated dialing technology to continue to develop and that Congress had clearly anticipated that the FCC might need to consider *changes in technology*.

FCC's Report and Order, January 4, 2008, section 13 (*emphasis* added).

4. U.S. Patents are the world's most reliable records about changes in technologies, and those records demonstrate that the FCC's claims are false.

The world's most reliable records about changes in technologies are United States Patents. The Patent Office's archive of patents is easily searchable. The TCPA was enacted in 1991. Old auto-dialer patents, and the knowledge of their inventors, obliterate the FCC's false claims that auto-dialing from lists, or auto-dialing predictably, are new technologies which were developed after the TCPA was enacted.

A Quick Search through the Patent Office's website for pre-TCPA auto-dialer patents identifies inventors such as Ellis K. Cave, who is a knowledgeable historian about the evolution of auto-dialer technology:

DECLARATION OF ELLIS K. CAVE

I, Ellis K. ("Skip") Cave, certify and declare as follows:

1. I am over the age of 18 years and not a party to this action. I have personal knowledge of the facts set forth herein, and if called as a witness I could and would testify to these facts.

2. I have a Bachelor of Science degree in Electrical Engineering, which was awarded by the University of Kansas in 1969. Since 1992, I have been a principal of Cave Consulting Services, which provides design, installation, and maintenance services for telephone and computer systems to small- and medium-sized businesses in the Dallas-Fort Worth area. Cave Consulting is currently located in Frisco, Texas, a few miles north of Dallas.

3. Since 1978, I have designed and developed communications and telephony systems and services. I have been issued 37 patents by the U.S. Patent Office, and I have 9 patent applications currently pending.

4. From 1978 to 1988 I was employed by Telephone Broadcasting Systems ("TBS") as Vice President of Research and Development. In 1978 and 1979, TBS was known as Dycon, and in

1980 it was known as Bank-By-Phone. During my work at TBS, I designed one of the first automatic dialing systems, and I pioneered many of the key concepts in predictive dialing. During that time, several of my inventions were issued patents by the U.S. Patent Office. I have been awarded more than two dozen patents in the fields of telecommunications and automatic dialing systems.

5. Auto-dialers that dialed telephone numbers that were generated by random or sequential number generators were marketed in the 1970's and 1980's.

6. By 1980, we at TBS understood that randomly generated numbers meant ten-digit telephone numbers that were computer-generated without any order or underlying sequence. Also at that time, we understood that sequentially generated telephone numbers meant computer-generated telephone numbers such as (310) 211-1111, (310) 211-1112, and so forth.

7. Auto-dialers that dialed telephone numbers that were generated by a random or sequential number generator are an older technology, as compared with auto-dialers that dial telephone numbers that are retrieved from a database.

8. I know that in our marketing and research efforts at TBS, we knew as of 1980, if not earlier, that auto-dialers that dialed telephone numbers that were generated by random or sequential number generators were disliked by our customers because, among other reasons, they resulted in calls to hospitals and emergency lines. Also, TBS's customers needed auto-dialers that would dial the telephone numbers of their clients and customers. From 1978 to 1988, my work at TBS, and the company's marketing efforts, were focused on inventing, producing, and selling automatic dialers that dialed telephone numbers that were stored in databases with customers' names.

9. United States Patent no. 3,989,899, issued on November 2, 1976, generally describes a technology that allows an auto-dialer to dial telephone numbers that are stored in a pre-determined list or database, along with the names of the intended persons to be contacted. This technology did not utilize or need a random or sequential number generator. To the best of my knowledge, database auto-dialers (i.e., auto-dialers that did not use number generators) were first marketed in the late 1970's, and they were commonly used by banks and creditors by 1985.

10. During the time that I worked as the Vice President of Research and Development for TBS, TBS never, to the best of my knowledge, marketed an auto-dialer that dialed telephone numbers that were generated by a random or sequential number generator. All of our auto-dialers were designed to dial telephone numbers that were stored in, and retrieved from, databases.

11. United States Patent no. 4,599,493, issued on July 8, 1986, is one of my patents that improved the efficiency of TBS's predictive auto-dialers. From 1983 to 1989, TBS sold predictive auto-dialers to, among others, creditors and collection agencies. During those years, all of TBS's predictive auto-dialers dialed telephone numbers that were retrieved from databases which also contained the names of intended contacts. None of TBS's auto-dialers was designed to dial telephone numbers that were generated by a random or sequential number generator.

12. Based on my work as TBS's Vice President of Research and Development and on my knowledge of auto-dialers that were marketed from 1978 to 1988, I know that by 1988, predictive auto-dialers that dialed telephone numbers that were retrieved from databases were in wide-spread use by banks, creditors, and other

businesses. And to the best of my knowledge, older-technology auto-dialers that dialed telephone numbers that were generated by a random or sequential number generator were never utilized by banks or creditors.

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

Executed on November 23, 2015 in Parker, Texas.

Ellis K. Cave

Two points here. First, in the FCC's 2003 and 2015 Orders, the FCC claimed that an auto-dialer that dials telephone numbers from lists is a new post-TCPA technology. But this technology was patented in 1976 (U. S. Patent no. 3,989,899) and it was widely used by 1985, long before the TCPA was enacted in 1991 (Declaration of Ellis K. Cave, paragraph 9 at page 9, above). The FCC's 2003 and 2015 claims that an auto-dialer that dials numbers from a list or database is a post-enactment, post-1991 technology, are false.

Second, the 2008 and 2015 Orders in which the FCC characterized predictive auto-dialers as another post-enactment, post-TCPA technology, are also

false. Predictive auto-dialers were widely marketed and utilized in the 1980's, before the TCPA was enacted in 1991 (Declaration of Ellis K. Cave, paragraphs 11 and 12 at pp. 10-11, above). That fact can be corroborated or discovered by a few clicks through the Patent Office's website (new patents cite old patents) which yields these historical insights from U.S. Patent no. 4,933,964 for an improved predictive auto-dialer, *circa* 1989:

> Field of the Invention.
>
> The present invention generally relates to call origination management systems of the type wherein telephone calls are automatically dialed and, when a call results in an answer, transferred to an available operator. More particularly, the invention is directed to an improved pacing system which regulates the rate at which calls are dialed to maximize the time an operator talks to clients and to minimize the number of answered calls for which there is no operator available.
>
> Description of the Prior Art.
>
> Automated calling systems which dial clients, listens for the call result (i.e., ringing, busy signal, answer, no answer, etc.), and when a call results in an answer, automatically transfers the call to

> an available operator *are in general use today by a variety of businesses, groups and organizations.* For example, banks and other creditors use these systems for debt collection, publishers use them for soliciting subscriptions, and charitable and political organizations use them to promote their causes and solicit funds. In all these cases, the client contact is by an operator whose job is to deliver the message, answer questions and input data to the system. The purposes of such call origination management systems are to automate the process of calling clients and to process the data input in the course of a call with a client, thereby increasing the productivity of the operators.

U.S. Patent no. 4,933,964, filed July 25, *1989*, and issued June 12, *1990* (*emphasis* added). Pacing systems are a component of predictive auto-dialers (i.e., predictive features are designed to predict when operators will be available and to pace dialing accordingly), and this patent demonstrates that such systems were invented and widely used before the TCPA was enacted in 1991.

United States Patents are the world's most reliable records about changes in technology. The Patent Office's searchable archive sheds historical light where the FCC offers only dark dishonesty.

The FCC falsely claimed in its 2003, 2008, and 2015 Orders that auto-dialing from lists, or predictively, are new technologies that were developed after the TCPA was enacted. Contrary to the FCC's false and dishonest claims, those technologies were patented and utilized before the TCPA was enacted in 1991. This court should not endorse or support the FCC's false and dishonest claims.

5. The FCC's false and dishonest claims are abusive.

As demonstrated above, the FCC's expanding definitions of an ATDS (its 2003, 2008, and 2015 ATDS Rules) are based on its false and dishonest claims. The consequence of the FCC's unfair expansion of the definition of an ATDS has been a tsunami of TCPA cases against companies that never used auto-dialers with random or sequential number generators. See the November 25, 2015 Joint Brief for Petitioners, Document #1585568 at pages 10-11, "TCPA Litigation Explodes." Because the TCPA imposes statutory damages of $500 or $1,500 per call, TCPA class actions have threatened to annihilate companies on account of their lawful infrastructure (that is, computerized telephone systems that do not use random or sequential number generators). Some district courts have declined to enforce the FCC's ATDS Rules, *Marks v. Crunch San Diego, LLC,* 55 F. Supp. 3d 1288, 1290-93 (S.D. Cal. 2014), but other courts have ruled that they must enforce those Rules

because they lack jurisdiction to do otherwise. *Morse v. Allied Interstate, LLC,* 65 F. Supp. 3d 407, 411-412 (M.D. Pa. 2014).

The FCC's ATDS Rules, which are based on the FCC's false and dishonest claims about changes in technology, have caused companies in numerous industries to pay millions to settle non-meritorious TCPA class actions. Hundreds of other companies have been sued because of the FCC's false and dishonest ATDS Rules, and many courts have been misled to enforce those Rules, based on their assumption that the FCC acted with integrity when it promulgated these Rules. Companies which have settled TCPA class actions include providers of apparel, automotive services, communications equipment and services, debt collection, education, electronics, entertainment, financial services, fitness/gymnasiums, healthcare, home services, marketing, pharmacies, pizza restaurants, professional sports teams, and utility companies.

None of those defendants ever used an auto-dialer with a random or sequential number generator (i.e., an ATDS as defined by Congress in the TCPA). But all of those defendants felt compelled to settle TCPA class actions because of the FCC's reliance on false and dishonest claims to promulgate its unfair and abusive ATDS Rules.

The cost of unfair and abusive TCPA cases that are based on the FCC's false and dishonest claims exceeds a billion dollars.

The FCC's 2003, 2008, and 2015 ATDS Rules are unfair and abusive, and this court should not endorse or support the FCC's false and dishonest claims that are the foundation of those rules.

6. The court should not endorse the FCC's abusive ATDS Rules.

A regulation promulgated upon false assumptions is invalid. *Emily's List v. Federal Election Commission*, 581 F.3d 1, 26 (D.C. Cir. 2009) ("[b]ecause that necessary assumption is false, these regulations remain invalid"). Regulations that are promulgated on an insufficient administrative record are invalid. *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 100 S. Ct. 2844, 65 L. Ed. 2d 1010 (1980) (affirming the unenforceability of a standard promulgated by the Secretary of Labor pursuant to The Occupational Safety and Health Act of 1970 because it was based on findings that were unsupported by the administrative record). And where an administrative agency fails to provide findings or evidence to support a regulation, the regulation is invalid. *Diplomat Lakewood Inc. v. Harris*, 613 F.2d 1009, 1022 (D.C. Cir. 1979) (holding regulation invalid where "[W]e are forced to conclude that [the Secretary of Health,

Education and Welfare] either was not aware of the problem at all or he chose to ignore it. In either event, he has provided us with no findings or evidence in the record to support the distinction.")

In this case, the FCC's 2003, 2008, and 2015 Orders that expanded the definition of an ATDS are based on its false and dishonest claims that auto-dialers that dial predictively, or from lists, are new technologies that were developed after the TCPA was enacted in 1991. But pre-TCPA patents and the Declaration of Ellis K. Cave, above, demonstrate that those technologies were invented and widely used before the TCPA was enacted in 1991. The FCC's claims are false.

7. Conclusion.

This court should not endorse or support the FCC's false and dishonest claims about changes in technologies, and this court should not endorse or support the FCC's abusive ATDS Rules that are based on the Commission's false and dishonest claims.

For the reasons stated herein and by the petitioners, the petitions should be granted.

Dated: December 1, 2015 Respectfully submitted,

By: _____

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with applicable rules and orders because it contains 3,996 words, as determined by the word-counting feature of Microsoft Word.

Dated: December 1, 2015

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STATEMENT PURSUANT TO RULE 29(c)(5)

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), the undersigned Amicus Curiae states as follows:

(A) Ellis Cave and I wrote the Declaration of Ellis K. Cave that is located at pages 7-11 of this brief. I personally wrote all other parts of this brief.

(B) A party's counsel did not author this brief in whole or in part.

(C) A party or party's counsel did not contribute any money that was intended to fund the preparation or submission of this brief.

(D) I used the resources of Carlson & Messer LLP to prepare and submit this brief and, if he ever sends an invoice for this matter, to compensate Mr. Cave.

Dated: December 1, 2015

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PROOF OF SERVICE

STATE OF CALIFORNIA)
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I am employed in the County of Los Angeles, State of California.

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On **December 1, 2015**, I served two (2) copies of the foregoing document(s) described as: **BRIEF OF AMICUS CURIAE CHARLES R. MESSER IN SUPPORT OF ACA INTERNATIONAL'S PETITION** on all interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

[X] **BY MAIL:** I sealed such envelope(s) and placed it (them) for collection and mailing on this date following the ordinary business practices of Carlson & Messer LLP. I am readily familiar with the business practices of Carlson & Messer LLP for collection and processing of correspondence for mailing with the United States Postal Service. Such correspondence would be deposited with the United States Postal Service at Los Angeles, California this same day in the ordinary course of business with postage thereon fully prepaid.

[] **BY ELECTRONIC MAIL:** Based on Court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the said documents to be sent to the persons at the electronic mail addresses listed below (see attached service list). I did not receive within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

[] **BY FACSIMILE:** I transmitted via telecopier machine such document to the interested parties at the facsimile number(s) listed on the attached service list.

[] **BY OVERNIGHT DELIVERY:** I deposited the above document(s) in a box or other facility regularly maintained by FedEx in an envelope or package designated by FedEx with delivery fees paid or provided for.

[] **(STATE):** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[X] **(FEDERAL):** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed this **1st** day of **December, 2015** at Los Angeles, California.

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{POS - Brief.1}

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