No. 19-1738

**In the United States Court of Appeals
for the Seventh Circuit**

Ali Gadelhak, individually and on behalf of other similarly situated,

***Plaintiff - Appellant*,**

v.

AT&T Services, Inc.

Defendant - Appellee.

**Appeal from the United States District Court for the Northern District of Illinois
Case No. 1:17-CV-01559,
Hon. Edmond E. Chang**

Brief of ACA International, Inc. as *Amicus Curiae* In Support of Defendant – Appellee AT&T Services, Inc.

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Appellate Court No: No. 19-1738

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

Gray, Reed & McGraw LLP (Jim A. Moseley, Greg White, Kelley Clark Morris)

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

i) Identify all its parent corporations: **N/A**

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

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

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Interest of Amicus Curiae ACA International, Inc.

ACA International—the Association of Credit and Collection Professionals—is a not-for-profit corporation based in Minneapolis, Minnesota.[1]

Founded in 1939, ACA represents nearly 3,700 members, including credit grantors, collection agencies, attorneys, asset buyers, and vendor affiliates. ACA produces a wide variety of products, services, and publications, including educational and compliance-related information; and articulates the value of the credit-and-collection industry to businesses, policymakers, and consumers.

ACA company members range in size from small businesses with a few employees to large, publicly held corporations. ACA company members collect rightfully owed debts on behalf of other small and local businesses. ACA members include businesses that operate within a single town, city, or state and large national corporations that do business in every state. Approximately 75% of ACA's company members have fewer than twenty-five employees.

ACA members are an extension of every community's businesses. ACA

[1] No Party's counsel authored this brief in whole or in part. No Party or Party's counsel contributed money that was intended to fund preparing or submitting this brief. No person (other than Amicus Curiae ACA International, its members, and its counsel) contributed money that was intended to fund preparing or submitting this brief.

All the Parties have consented to ACA filing this brief.

members work with these businesses, large and small, to obtain payment for the goods and services already received by consumers. In years past, the combined effort of ACA members has resulted in the annual recovery of billions of dollars—dollars that are returned to and reinvested by businesses and that would otherwise constitute losses to member businesses. Without an effective collection process, the economic viability of these businesses—and, by extension, the American economy in general—is threatened. Recovering rightfully owed consumer debt preserves business; helps prevent job losses; keeps credit, goods, and services available; and reduces the need for tax increases to cover governmental budget shortfalls.

In 2017, ACA commissioned a study to measure the various impacts of third-party debt collection on the national and state economies. The study found that in calendar year 2016:

- Third-party debt collectors recovered about $78.5 billion from consumers on behalf of creditors and government clients, to whom nearly $67.6 billion was returned.[2]
- The third-party collection of consumer debt returned an average savings of $579 per household by keeping the cost of goods and services lower.[3]

[2] Ernst & Young, *The Impact of Third-Party Debt Collection on the US National and State Economies in 2016* at 2 (2017), *online at* https://www.acainternational.org/assets/ernst-young/ey-2017-aca-state-of-the-industry-report-final-5.pdf (accessed Aug. 22, 2019).

[3] *Id.*

ACA members often use computer equipment to dial phone numbers, but not to generate numbers. The District Court's opinion in this case permits what ACA members sometimes do. The District Court's opinion does not diminish the legitimate protection that consumers are entitled to receive from unsolicited telemarketing robocalls.

Instead of protecting consumers, the Telephone Consumer Protection Act is more commonly used as a profit model for lawyers seeking out consumers to file opportunistic lawsuits against businesses dependent on phone calls, like many ACA members. One self-proclaimed consumer credit expert is offering a "kit" to "turn robocalls into cash."[4] In fact, one of the *amici* supporting Gadelhak, the National Consumer Law Center, has received significant funding as a *cy pres* beneficiary from settlements in telemarketing cases.[5] Despite the protective rhetoric, it appears that the Telephone Consumer Protection Act is too frequently used as a revenue stream.

[4] www.robocalls.cash

[5] *See Cabiness v. Educ. Fin. Sols., LLC*, 16-CV-01109-JST, 2019 WL 1369929, at *2 (N.D. Cal. Mar. 26, 2019); *Lee v. Glob. Tel*link Corp.*, 215CV02495ODWPLA, 2018 WL 4625677, at *9 (C.D. Cal. Sept. 24, 2018); *Leung v. XPO Logistics, Inc.*, 326 F.R.D. 185, 206 (N.D. Ill. 2018); *Martinez v. Medicredit, Inc.*, 4:16CV01138 ERW, 2018 WL 2223681, at *3 (E.D. Mo. May 15, 2018).

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AT&T Services, Inc.

Defendant - Appellee.

To the Honorable Court of Appeals for the Seventh Circuit:

ACA International files this Brief as *Amicus Curiae* in support of the District Court's Memorandum and Opinion below in favor of AT&T Services, Inc., Appellee in this case. In this Brief, the parties will be referred to by name.

Introduction

This is not a telemarketing case. Telemarketers do not care who answers the phone, as long as *someone* answers the phone. They rely on random or sequential phone numbers to harvest their customers. List-based calling is very different. It matters who answers the phone because the caller is looking for a specific person.

In telemarketing, a salesperson is rewarded based on finding a voice, any voice, on the other end of the line. The unfortunate voice on the other end of the line suffers the frustration of anonymous selection, feeling foolish for even answering

the call. In contrast, list-based callers only accomplish their purpose by finding a specific voice on the other end of the line. The list-based caller is frustrated by any failure to locate the person that they need to talk to.

The economics of telemarketing depend on chance. Some percentage of people will succumb to the high-pressure sales pitch based on statistics. This model is successful so long as enough people (anyone) are called. In contrast, the economics of list-based calling depend on the successful location of a specific person. Whether that person owes a debt, has engaged with customer service, or has used a particular product, there is information to be gained only by talking to the right person.

The briefs in support of Gadelhak's position in this case attempt to convince the Court that telemarketers and list-based callers are the same. List-based callers have no interest in contacting *groups* of people—vulnerable populations, veterans or small business owners—because contacting *groups* is a ridiculously inefficient way to communicate a particular person. Nor does a random or sequential selection of numbers serve list-based callers. A debt collector would be foolish to call people at random just to ask whether the person answering the phone would be willing to pay another person's debt. Similarly, a customer experience survey is worth nothing if the survey is completed by a person with no experience to offer.

List-based callers are permitted to use their computer-aided systems under the

unambiguous language of the Telephone Consumer Protection Act. They are not doing what the statute proscribes, and the Gadelhak's only argument is that a court should ignore the plain words to reach a different result. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.")

The job of deciding what to ban, and what not to ban, is not a policy choice that belongs in the courts. Congress made its policy choice in 1991, and, despite repeated revisions to the statute, Congress has not banned list-based calling.

Statement of Issues

Issue No. 1:

Telemarketing robocalls are different from specific-consumer contact calls.

Issue No. 2:

Using a list to contact people is a common and permissible means to attempt to communicate**.**

Issue No. 3:

Had Congress intended to prohibit list-based calling, simple declaratory language would have accomplished that result.

Summary of the Argument

ACA's interest in this case is based, in part, on the application of this statute to its members: persons and entities in the business of collection of debt. Debt collection companies use lists of telephone numbers to contact debtors. Like the lists used by AT&T, debt collection contact lists are targeted and are intended to provide a means of contact with a specific person for a specific reason. ACA members do not randomly or sequentially dial phone numbers, hoping to coincidentally come upon a person who owes money. A random or sequential calling system would be economically disastrous for debt collectors and would possibly run afoul of other federal statutory schemes, including the Fair Debt Collection Practice Act, 15 U.S.C. § 1692, *et seq.*, and the Telemarketing Sales Rule, 16 C.F.R. § 310.4(b)[6] (FTC Rule prohibiting contacting persons on a Do Not Call list).

Efforts to contact a person to collect a debt are not perfect. Some debtors actively avoid contact, some do not update their contact information, and some debtors provide erroneous information. But despite these shortcomings, lists of possible contact information are an efficient, organized, and permissible means of exercising an undisputed right to attempt to collect legitimate debts. And the

[6] *See* 15 U.S.C. § 6151 (authorizing a national do-not-call registry and ratifying that portion of the Telemarketing Sales Rule); *see also* 47 C.F.R § 64.1200(c) (FCC Rule providing strict liability for violations of the national do-not-call registry).

ability to dial from that list, without manual input, aids in reducing instances of human error which would otherwise result in calling the wrong person.

The District Court correctly concluded that the Telephone Consumer Protection Act does not prohibit list-based calling. That decision is correct for three reasons.

First, there is a difference between telemarketing robocalls and list-based calling. The plain language of the statute prohibits telemarketing robocalls. List-based calls are just as plainly permitted. The real-life differences between the two justify this distinction.

Second, using a list to contact specific people is a conventional means of communication not limited to businesses like debt collectors or customer surveys. Expanding the Telephone Consumer Protection Act's plain language to cover every call made from a list would classify ordinary Americans, small businesses, and innocent organizations as violators. In fact, this interpretation would make any phone call resulting from selecting a contact (like in cell phone contacts application), rather than keying in a phone number, a violation.

Third, underlying Gadelhak and amici's arguments is the idea that the courts should do what Congress did not. The Court, they argue, should expand the Telephone Consumer Protection Act by reading words into the statute. Had Congress intended to ban list-based calling, surely it would not do so by using ambiguous words and attaching significant penalties, leaving Americans uncertain

of what they could and could not do. The plain language—as confirmed by the District Court ruling—provides certainty, predictability, and fairness. *See United States v. Locke*, 471 U.S. 84, 95-96 (1985).[7]

[7] "[T]he fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do. There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. Nor is the Judiciary licensed to attempt to soften the clear import of Congress' chosen words whenever a court believes those words lead to a harsh result." *United States v. Locke*, 471 U.S. 84, 95 (1985) (internal quotations and citations omitted).

Argument and Authorities

Issue No. 1: Telemarketing robocalls are different from specific-consumer contact calls.

There is a legally and factually significant difference between a telemarketing "robocall" and a specific-consumer contact call. Congress understood that the robocall was random automatic dialing of a phone number with no purpose in mind other than getting a person—any person—to answer. *E.g.* 15 U.S.C. § 6101 (congressional finding that "[t]elemarketing differs from other sales activities"). The person who answered was then subjected to a high-pressure sales script to sell something the person did not want to buy. The unwanted pressure of a professional salesperson insistent on getting the consumer to part with money was made more powerful and more invasive by the computer-aided method of a random selection of the numbers called. Consumers were alarmed by the frequency and persistence of calls because they immediately understood upon answering that the call had nothing to do with them as a person, but instead that they had fallen victim to a computer that picked them out at random.[8]

Those telemarketing robocalls are addressed by the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* And, those telemarketing robocalls are

[8] When Congress passed the Telephone Consumer Protection Act in 1991, it made fifteen specific findings to support the passage of the Act. Of those fifteen, nine findings specifically mention "telemarketing" or "soliciting" or both. *See* 105 Stat. 2394 (1991).

very different from the call from AT&T Customer Service, or from a call attempting to collect a debt:

Telemarketing Robocalls	List- Based Contacts
The caller designs a sales script.	The content of the call depends on the conversation with the recipient.
A computer randomly selects a telephone number.	The caller selects the recipient.
A computer dials the number.	A computer suggests numbers previously linked to the selected person that will likely result in a completed call to that person.
The recipient is a randomly selected target of a spam message.	The caller selects, among possible numbers, which should be used so that the caller can talk to a specific person.
The recipient has no idea why they were selected to receive the call.	The recipient has an identifiable prior relationship to the message that makes it rational that this particular recipient would be contacted. While the recipient may not have anticipated the message, the recipient is not surprised that they were called.

Congress banned telemarketing robocalls. It did not ban list-based calling.

Many of the cases cited by other *amici* prove that Congress addressed telemarketing when it passed the Telephone Consumer Protection Act:

- *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018): Telemarketing by a Health Club -automated texts offering free passes and personal training sessions, appointment reminders and class updates, and birthday greetings.

- *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041 (7th Cir. 2013): Pre-recorded political messages delivered to random numbers.

- *Ashland Hospital Corp. v. SEIU*, 708 F.3d 737 (6th Cir. 2013): Union made pre-recorded robocalls to protest health care expenses.

- *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037 (9th Cir. 2017): Solicitation of gym membership.

- *Blow v. Bijora, Inc.*, 855 F.3d 793 (7th Cir. 2017): Use of a text-messaging platform to inform people of promotions, discounts, and in-store special events, such as parties, and the Court found consent to receipt of the text messages)

The District Court was correct in drawing the critical distinction between telemarketing robocalls and list-based contacts. Its decision should be affirmed.

Issue No. 2: Using a list to contact people is a common and permissible means to attempt to communicate.

Everyone is on a list somewhere. It might be a list of high school graduates for a particular year. It might be a list of church or synagogue members. And, it might be a former boyfriend's social network. Any member of those groups might seek to communicate with each other or the entire group easily and efficiently. A consumer might also be on a list of car owners who need to be contacted about a recall of their vehicle, or on a list of customers who are particularly vulnerable to a credit card scam, or on a list of property owners who might be interested in recently filed building permits in their neighborhood. And almost every American is included on the contact list of another person's cell phone.

People sometimes wish they were not on a list. Some do not want to be

contacted, while others welcome the contact, grateful for essential notifications or individualized customer service. Under Gadelhak's reading of the Telephone Consumer Protection Act, using any list to contact people is a violation of federal law and subjects the caller to penalties if they use automated software to make contact by phone or text.

List-based calling does not run afoul of any of the purposes of the Telephone Consumer Protection Act. It is not random. It is not sequential. A list includes telephone numbers selected with the purposeful effort and intervention of humans—not robots. A calling list identifies persons who are related to the message in a unique way and sometimes also includes alternative ways to contact those persons. In the case of ACA members, the resulting contact is based on a message that the caller has a legal right to convey. The District Court honored this right, and its decision should be affirmed.

Issue No. 3: Had Congress intended to prohibit list-based calling, simple declaratory language would have accomplished that result.

The District Court's interpretation of the statutory definition of an Automated Telephone Dialing System ("ATDS") to exclude list-based calling systems comports with the holdings of other courts. *See e.g., Adams v. Safe Home Security, Inc.*, Civil Action No. 3:18-cv-03098-M, 2019 WL 3428776 (N.D. Tex. 2019) (slip op.). However, other courts have reached the opposite conclusion, urged by Gadelhak, that equipment meets the definition of ATDS if it has the capacity "to

store numbers to be called." *E.g. Marks*, 904 F.3d at 1052; *accord Daguid v. Facebook, Inc.*, 926 F.3d 1146, 1149-50 (9th Cir. 2019). Those courts have reached this conclusion by holding that the definition of ATDS is ambiguous.[9] *Marks*, 904 F.3d at 1051; *see also Espejo v. Santander Consumer USA, Inc.*, No. 11 C 8987, No. 12 C 9431, 2019 WL 245092 at *7 (N.D. Ill. June 12, 2019). But if the Telephone Consumer Protection Act is ambiguous when it comes to list-based calling, a change should come from Congress and not from judicial fiat.

Moreover, Gadelhak and amici's arguments concerning the political posture of members of Congress that deal with the Telephone Consumer Protection Act are singularly unpersuasive in determining the clear meaning of the words in the statute.[10] Had Congress intended to impose a ban on list-based calling, simple declarative language would have accomplished that purpose. Surely, Congress would not have chosen ambiguous and unclear sentences to express its political will to ban list-based calling.

Congress could have defined an "autodialer" as "equipment with the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator, *or a list;* and (B) to dial such numbers." The

[9] ACA disagrees that the statutory definition of ATDS is ambiguous—the plain language does not include list-based calling. *See* 47 U.S.C. § 227(a).

[10] In any event, the views of individual Members of Congress as to the construction of a statute adopted years before by another Congress have "'very little, if any, significance.'" *United States* v. *Sw. Cable Co.*, 392 U.S. 157, 170 (1968); *United States v. Clark*, 445 U.S. 23, 33 n.9 (1980).

addition of those three italicized words to the Telephone Consumer Protection Act would have clearly pronounced a ban of list-based calling. Absent such a clear pronouncement, the statute as written fails to provide fair and adequate notice that list-based calling violates the Telephone Consumer Protection Act so as to support the imposition of penalties.

Gadelhak's argument attempts to exploit the frustration suffered by recipients of telemarketing calls to suggest that the general public would welcome a ruling expanding the reach of the statute. That argument fails to honor the role of the courts. In *Soppet v. Enhanced Recovery Co., LLC*, this Court wisely said:

> Courts do try to avoid imputing nonsense to Congress. This means, however, modest adjustments to texts that do not parse. It does not mean—at least, should not mean—substantive changes designed to make the law "better." That would give the judiciary entirely too much law-making power . . . . Nor should a court try to keep a statute up to date. Legislation means today what it meant when enacted.

679 F.3d 637, 642 (7th Cir. 2012) (citing *National Broiler Marketing Ass'n v. United States*, 436 U.S. 816, 827 (1978)).

Moreover, Gadelhak's arguments fail to recognize the economic reality of list-based calling. Companies that use a list to target specific people for a specific purpose do not want to use random or sequential number generators to find their target. Random and sequential calling is a colossal waste of time and economic resources. Indeed, random and sequential calling only serves to increase a debt collector's risk of violating other federal laws specifically and unmistakably aimed

at protecting consumers and their privacy.

These companies do need to contact specific persons as efficiently and expeditiously as possible, and using software to dial from a list of numbers is designed to make effective contact. Interpreting the Telephone Consumer Protection Act to require ACA members to manually dial phone numbers introduces a significant opportunity for human error, resulting in more calls to the wrong person. Additionally, manual dialing would slow down the collection process, driving up the cost of debt collection—and, thus, the cost of debt itself. Ultimately, under Gadelhak's desired interpretation, the American people would be the ones harmed, not the ones protected.

Consumers do not need an expanded Telephone Consumer Protection Act. If an ACA member uses abusive tactics, the Fair Debt Collection Practices Act provides ample protection and remedies. If an ACA member violates the Telemarketing Sales Rule or the National Do-Not-Call Registry rules, a consumer has adequate protection and remedies. Additional protection under a separate section of the Telephone Consumer Protection Act where significant liability attaches if a violation occurs is unnecessary especially where it is not unambiguously contemplated by Congress.

Conclusion & Prayer for Relief

For the reasons stated herein, ACA International respectfully urges the Court to affirm the judgment of the District Court.

Respectfully submitted,

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Certificate of Service

This is to certify that a true and correct copy of the foregoing was delivered to counsel of record via electronic filing with the Clerk of Court using the Electronic Filing System which will send notification of such filing to all counsel of record, on this 22nd day of August, 2019.

/s/ Greg White

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Pursuant to Federal Rule of Appellate Procedure 32(a)(7) and the Federal Circuit Rules, the undersigned certifies this brief complies with the type-volume limitations applicable in this circuit.

Exclusive of the exempted portions in Federal Rule of Appellate Procedure 32(f), the Brief contains no more than 3,331 words in proportionally spaced typeface, including headnotes, footnotes and quotations.

/s/ Greg White