No. 19-1738

United States Court of Appeals for the Seventh Circuit

ALI GADELHAK, on behalf of himself and all others similarly situated,
Plaintiff-Appellant,

v.

AT&T SERVICES, INC.,
Defendant-Appellee.

On Appeal From
The United States District Court
For The Northern District Of Illinois, Eastern Division
Case No. 1:17-cv-1559

BRIEF OF AMICI CURIAE NATIONAL CONSUMER LAW CENTER, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, CONSUMER FEDERATION OF AMERICA AND ELECTRONIC PRIVACY INFORMATION CENTER IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING EN BANC

Tara Twomey
Counsel of Record
National Consumer Law Center
7 Winthrop Square, 4th Floor
Boston, MA 02110
(617) 542-8010
(831) 229-0256 DIRECT
tara.twomey@comcast.net

On Brief:
Justin Holcombe
Skaar & Feagle, LLP

Dated: March 11, 2020

CIRCUIT RULE 26.1 & DISCLOSURE STATEMENT

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

National Consumer Law Center
National Association of Consumer Advocates
Consumer Federation of America
Electronic Privacy Information Center

(2) The names of all law firms whose partner 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:

Marc Rotenberg, Electronic Privacy Information Center

(3) If the party or amicus is a corporation: All parties are non-profit organizations with no parent corporations or stockholders.

i) Identify all its parent corporations, if any; and
N/A

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

s/ Tara Twomey
Tara Twomey
*Counsel of Record**
National Consumer Law Center
7 Winthrop Square, 4th Floor
Boston, MA 02110
(617) 542-8010
(831) 229-0256 DIRECT
tara.twomey@comcast.net

*New Counsel of Record replacing
Marc Rotenberg as Lead Counsel

Dated: March 11, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

REGULATIONS:

OTHER AUTHORITIES:

INTEREST OF AMICI CURIAE[1]

Amici Curiae are consumer protection organizations that work to safeguard consumers from unwanted robocalls and to ensure the enforceability of consumer rights under the Telephone Consumer Protection Act (TCPA) and other consumer protection statutes. Amici have advocated extensively for strong interpretations of the TCPA before the Federal Communications Commission, and have filed amicus curiae briefs defending the TCPA as the primary means to protect Americans from unwanted robocalls.

SUMMARY OF ARGUMENT

This appeal raises questions of exceptional importance. The panel decision is based on an erroneous interpretation of the TCPA, conflicts with other precedent, and will have far-reaching consequences. It opens the floodgates to robocalls that tie up cell phones, emergency lines, and businesses, and that cumulatively threaten to undermine the integrity of the nation's communications system.

The panel's holding that systems that *store* telephone numbers must also *produce* such numbers conflicts with the plain reading of "store *or* produce." The

[1] No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than amici made a monetary contribution to the preparation or submission of this brief.

opinion will permit callers to tie up the telephone systems of emergency providers and elderly care homes, and subjects businesses to denial of service attacks by exempting from the TCPA systems which target specific numbers. Consumers, businesses, the FCC, and states will lose the ability to enjoin this behavior. The TCPA was intended to prevent this result.

ARGUMENT

I. Rehearing is Necessary to Give Effect to the Words "Store or Produce."

A. The TCPA's Coverage of Autodialers Calling *Stored* Telephone Numbers is Essential to Protect Privacy.

"Voluminous consumer complaints about abuses of telephone technology— for example, computerized calls dispatched to private homes— prompted Congress to pass the TCPA. Congress determined that federal legislation was needed because telemarketers, by operating interstate, were escaping state-law prohibitions on intrusive nuisance calls." *Mims v. Arrow Fin. Svcs., LLC*, 132 S. Ct. 740, 744 (2012).

Rather than outlaw such autodialers entirely, Congress required users to obtain consent, absent an emergency, to use autodialers to call emergency lines, hospital and elder care guest rooms, cell phones, and other specific types of telephone lines. 47 U.S.C. § 227(b)(1)(A). Congress prohibited using an autodialer in a way that would simultaneously engage multiple lines of a multi-line business,

which requires the caller to know what numbers it is calling in order to avoid this prohibition. 47 U.S.C. § 227(b)(1)(D).

According to the Department of Homeland Security, autodialers *specifically* targeting emergency lines, including 911, in telephony denial of service attacks remain a real problem. Homeland Security, Partnering to Prevent TDoS Attacks, (accessed March 9, 2020), available at https://www.dhs.gov/science-and technology/blog/2018/07/09/partnering-prevent-tdos-attacks. "These attacks pose significant risks to banks, schools, hospitals, and even government agencies. When banks are attacked, customers are denied access to their accounts[.]" *Id.*

Fortunately, the TCPA gave States, consumers, and businesses a real tool to stop these calls. States as well as consumers and businesses can file an action for damages, seek an injunction enforceable by contempt, or both. 47 U.S.C. §§ 227(b)(3) and (g). These tools are a good deterrent to such calls and are efficient to stop them. Under the panel opinion in this case, these tools are lost because dialers that target specific stored telephone numbers are no longer regulated in this Circuit.

B. The Panel Acknowledged its Reading had a Surplusage Problem.

The panel opinion reads "store *or* produce" to only include systems which *produce* telephone numbers using a random or sequential number generator, rendering "store or" superfluous. The panel acknowledges the "problem" with its

own reading: "'it is hard to see how a number generator could be used to 'store' telephone numbers.'" *Gadelhak v. AT&T Svcs., Inc.*, 2020 WL 808270, at *4 (7th Cir. Feb. 19, 2020) quoting *Pinkus v. Sirius XM Radio, Inc.*, 319 F. Supp. 3d 927, 938 (N.D. Ill. 2018). The panel dealt with this problem by observing that a system that produces telephone numbers can *also* store them before dialing. *Id.*

This interpretation suffers a fatal flaw: the statute says "store *or* produce," not "store *and* produce." 47 U.S.C. § 227(a)(1). "[The panel's] strained construction would have us ignore the disjunctive 'or' and rob the term ['store'] of its independent and ordinary significance." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 238-39 (1979)("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise; here it does not."). The use of "or" means that a system which "stores" such numbers need not also "produce" them.

Quoting Scalia & Garner's discussion of doublets, the panel accepts this surplusage. *Gadelhak* at *5 quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 176-77 (2012) ("*Reading Law*"). However, doublets typically use "and" rather than "or." *See Reading Law* at 176-77 (using "[*e*]*xecute* <u>*and*</u> *perform*[,]" "[*r*]*est, residue,* <u>*and*</u> *remain*[,]" "[*p*]*eace* <u>*and*</u> *quiet*[,]" and "*indemnify* <u>*and*</u> *hold harmless*[,]" as examples). Although Justice Scalia references his dissent in *Moskal v. United States*, the majority in *Moskal* rejected it

because it violated the rule against surplusage. 498 U.S. 103, 109-10 (1990). The Court itself emphasized the disjunctive "or" to belabor this point. *Id.* at 111.

"Store" and "produce" have ordinary meanings that are not synonymous, so they cannot be doublets. Rather, the statute references alternative functions: "store *or* produce."

II. The Panel Suggested an Interpretation that Would Give Meaning to "Store or Produce."

A. The Panel's Suggestion is Superior to Rendering "Store" Superfluous.

The Court *sua sponte* considered an interpretation which would give meaning to every word of the statute — "that 'using a random or sequential number generator' modified how the telephone numbers are 'to be called.'" *Gadelhak* at *7. *See also Parm v. Nat'l Bank of Ca., N.A.*, 835 F.3d 1331, 1336 (11th Cir. 2016) *quoting Reading Law* at 152 ("'When the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent.'"). Here, the syntax includes something other than a parallel series of verbs: the direct object "telephone numbers" and the infinitive phrase "to be called[.]" 47 U.S.C. § 227(a)(1).

The adverbial phrase only modifies the nearest reasonable referent — "to be called." *Lockhart v. United States*, 136 S. Ct. 958, 963 (2016)("That is particularly

true where it takes more than a little mental energy to process the individual entries in the list, making it a heavy lift to carry the modifier across them all."). At least one District Court has followed this approach and a second has evaluated it without conclusion. *Heard v. Nationstar Mortg. LLC*, No. 2:16-CV-00694-MHH, 2018 WL 4028116, at *6 (N.D. Ala. Aug. 23, 2018)(finding that a system that automatically sequences previously stored telephone numbers was an autodialer); *Sessions v. Barclays Bank Delaware*, 317 F. Supp. 3d 1208, 1214 (N.D. Ga. 2018).

Modern autodialers store massive amounts of data, including telephone numbers. A dialer manager inputs criteria to develop a dialing campaign. For instance, a bank could create a campaign to call consumers who are two weeks delinquent, live in Georgia, and have not been reached in three days. The dialer uses propriety algorithms to generate and queue the sequence of numbers to be called, then dials them at a preprogrammed rate. The numbers are *generated* from the *preexisting* stored database. The numbers are not *stored* using a sequential number generator; they are stored *to be called* using a sequential number generator.

There are two ways to *automatically* generate numbers from a stored database for dialing, either truly at random or in some sequence (e.g., a dialing algorithm). *See also ACA Int'l v. FCC*, 885 F.3d 687, 701 (D.C. Cir. 2018) ("[A]nytime 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."). Of

course, if the numbers are *not* automatically generated from the stored database, they can be called by human selection at the time of the call, which would be *neither* random *nor* sequential, and certainly not generated by the *system*. For instance, speed dialing or calling from a contact list (e.g., a smartphone) would be neither random nor sequential because the caller is individually choosing the number to call at the time of the call. No number is *automatically generated* from the stored database to call the next number in queue. The automatic, systemic generation of the next number *to be called* distinguishes an autodialer from other devices which merely store telephone numbers and dial them at the caller's command. Of course, an autodialer must also actually dial such numbers. 47 U.S.C. § 227(a)(1)(B).

B. The Comma Does Not Require a Different Result.

The panel rejected this approach, without argument from the parties, because of the comma. *See Gadelhak* at *7-8 citing WILLIAM N. ESKRIDGE JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 67–68 (2016) ("[a] qualifying phrase separated from antecedents by a comma is evidence that the qualifier is supposed to apply to all the antecedents instead of only to the immediately preceding one."). While a comma may be *evidence* of intent, this is not an incontrovertible rule. The nearest reasonable referent cannon has been applied to a modifier following a comma.

Parm v. Nat'l Bank of Ca., N.A., 835 F.3d 1331, 1336 (11th Cir. 2016). Borrowing from Petitioners baseball analogy, nobody would question the meaning of "to hit or throw a ball *to be caught*, using a glove."

Punctuation is important, but context and the importance of avoiding surplusage compel a different outcome. "Perhaps more than any other indication of meaning, punctuation is often a scrivener's error, overcome by other textual indications of meaning." *Reading Law* at 164-65. While "the meaning of a statute will typically heed the commands of its punctuation[,]" "a purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning." *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993).

> Punctuation marks are no part of an act. To determine the intent of the law, the court, in construing a statute, will disregard the punctuation, or will repunctuate, if that be necessary, in order to arrive at the natural meaning of the words employed.

Freeman v. Chicago Title & Trust Co., 505 F.2d 527, 530 (7th Cir. 1974) quoting *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 82-83 (1932) (citing cases).

The FCC deleted the comma from its regulation defining a covered autodialer. 47 C.F.R. § 64.1200(f)(2)("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."). This regulation, promulgated in 1992, was not subject to the proceeding, or even considered, in *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). The panel itself acknowledged that the comma was inappropriate. *Gadelhak* at *7, citing THE CHICAGO MANUAL OF STYLE ¶ 6.31 (17th ed. 2017)("The grammar and style treatise of record dictates that a comma is inappropriate for a restrictive adverbial phrase found at the end of a sentence.").

Instead of giving undue meaning to a grammatically misplaced comma that was deleted by the FCC, this Court should avoid surplusage and give meaning to every *word* used by Congress, including "store *or* produce." This approach gives meaning to every word of the statute, does not sweep in smartphones, and protects consumers, businesses, and emergency lines from targeted autodialing and denial of service campaigns.

III. Smartphones Cannot Autodial.

The panel expresses concern that smartphones could be swept into the definition of ATDS if it were to adopt the reasoning of *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018). *See Gadelhak* at *6. Since *Marks* was decided, there is no evidence of people in the Ninth Circuit being sued for standard use of an iPhone. The reason is simple — iPhones don't autodial.

Factory default smartphone applications require a human to cognitively select numbers to call, whether by touch or voice command. Even the "Do Not

Disturb While Driving" text feature only texts a single response to an individual call, and it only does so as a result of the initial caller triggering the system to return the call. That's neither automatic nor unsolicited.

Even if smartphones had evolved to encroach upon what Congress outlawed in 1991, the correct response is for Congress or the FCC to exempt such calls. *See ACA Int'l v. FCC*, 885 F.3d 687, 699 (D.C. Cir. 2018) (recognizing that the FCC has authority to exempt ordinary smartphone usage). The fact that Apple made a device 16 years after the statute was enacted that became ubiquitous says nothing about the judgment of Congress in 1991. *See Salcedo v. Hanna*, 936 F.3d 1162, 1166 (11th Cir. 2019) (holding that Congress expressed no judgment on the issue of text messaging which did not exist in 1991). It is error to rely on a text response feature to determine what Congress meant when it defined ATDS in 1991.

CONCLUSION

The panel opinion in this case will result in *more* robocalls and *more* difficulty for businesses and emergency providers subjected to denial of service attacks. This is not supported by the statutory text's specific inclusion of systems which store telephone numbers *to be called* using a random or sequential number generator even if they do not also produce such numbers. The panel's concerns that an alternative reading could encompass ordinary smartphones is misplaced, both because smartphones "out of the box" do not autodial and because it is the

province of Congress, or the FCC under authority delegated by Congress, to make exceptions to the statutory text. This Court should correct this *en banc*.

Respectfully submitted,

/s *Tara Twomey*
Tara Twomey
National Consumer Law Center

Counsel for *Amici Curiae*

On Brief:
Justin Holcombe
Skaar & Feagle, LLP

Dated: March 11, 2020

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font. This document complies with the word limit of Federal Rule of Appellate Procedure 29(b)(4) because, excluding parts of the documents are exempted by Federal Rule of Appellate Procedure 32(f), this document contains 2323 words.

Respectfully submitted,

/s *Tara Twomey*
Tara Twomey
National Consumer Law Center

Counsel for *Amici Curiae*

Dated: March 11, 2020

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the CM/ECF system, which will cause it to be served on all parties through their counsel of record.

s/ Tara Twomey
Tara Twomey
National Consumer Law Center