No. 14-56834

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JORDAN MARKS, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,
Plaintiff-Appellant,

v.

CRUNCH SAN DIEGO, LLC,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of California
No. 3:14-cv-00348-BAS-BLM, Cynthia A. Bashant, District Judge

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BRIEF OF *AMICI CURIAE* NATIONAL CONSUMER LAW CENTER and NATIONAL ASSOCIATION OF CONSUMER ADVOCATES IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Per Federal Rule of Appellate Procedure 26.1, the National Consumer Law Center (NCLC) is a Massachusetts non-profit corporation established in 1969 and incorporated in 1971. It is a national research and advocacy organization focusing specifically on the legal needs of low-income, financially distressed, and elderly consumers. NCLC operates as a tax-exempt organization under the provisions of section 501(c)(3) of the Internal Revenue Code. It has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

The National Association of Consumer Advocates (NACA) is a non-profit membership organization of law professors, public sector lawyers, private lawyers, legal services lawyers, and other consumer advocates. NACA is tax-exempt under section 501(c)(6) of the Internal Revenue Code. It has no parent corporation, nor has it issued shares or securities.

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INTEREST OF *AMICI CURIAE*

Amici submitting this brief are consumer protection organizations that work to protect consumers from the scourge of unwanted robocalls. Their activities have included many filings with the Federal Communications Commission (FCC) urging strong interpretations of the Telephone Consumer Protection Act (TCPA), including extensive comments in the docket leading to the FCC's 2015 TCPA Order. *Amici* National Consumer Law Center and National Association of Consumer Advocates also filed an *amicus* brief in the appeal of that order to the D.C. Circuit.

NCLC and NACA filed a motion for leave to file this brief. All parties have consented to the filing of this *amicus* brief.

RULE 29(a)(4)(E) STATEMENT

No party's counsel authored this brief in whole or in part, or contributed money to fund preparing or submitting it; and no person—other than *amici*, their members, or their counsel—contributed money to fund preparing or submitting it.

ARGUMENT

I. THE FCC'S PRE-2015 ORDERS INTERPRETING THE ATDS DEFINITION ARE STILL IN EFFECT AND COMPEL REVERSAL OF THE DISTRICT COURT'S DECISION.

A. The FCC's Pre-2015 Orders Are Still in Effect and Are Binding on Courts.

The effect of *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018), on three pre-2015 FCC orders interpreting the definition of automated telephone dialing systems (ATDS) under the TCPA, 47 U.S.C. § 227(a)(1), is critical to this appeal but has not received thorough analysis in the other briefs. The relevant orders are found at 27 FCC Rcd. 15391 (F.C.C. Nov. 29, 2012) ("2012 Order"), 23 FCC Rcd. 559 (F.C.C. Jan. 4, 2008) ("2008 Order"), and 18 FCC Rcd. 14014 (F.C.C. July 3, 2003) ("2003 Order"), all with the caption *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991. All three orders state, among other things, that a system that dials numbers from a list is an ATDS. As shown below, these orders are still in effect and compel reversal of the district court.

The *amici* supporting Appellee have argued that the 2003 and 2008 Orders were struck down by the D.C. Circuit's decision in *ACA International*. This is incorrect. The only matter before the D.C. Circuit in *ACA International* was a Hobbs Act appeal from the 2015 FCC Order. In a Hobbs Act appeal, the court only has authority "to enjoin, set aside, suspend (in whole or in part), or to

determine the validity of" final FCC orders. 28 U.S.C. § 2342. As recognized recently in *Reyes v. BCA Fin. Servs.*, the Hobbs Act would not have permitted a review of the earlier orders:

> [N]owhere in the D.C. Circuit's opinion are the prior FCC orders overruled. Indeed, that would have been impossible given that the time to appeal those orders had long passed. . . . [T]he D.C. Circuit merely said that it had jurisdiction to address the recent pronouncements and clarifications issued in 2015, not whether the 2003 and 2008 orders remained valid.

2018 WL 2220417, at *11 (S.D. Fla. May 14, 2018) (emphases added).

That *ACA International* set aside only the 2015 Order is clear from the decision's second paragraph, which notes that the petitioners:

> seek review of a 2015 order in which the Commission sought to clarify various aspects of the TCPA's general bar against using automated dialing devices to make uninvited calls.

ACA International, 885 F.3d at 691 (emphasis added). *See also id.* at 695 ("Applying [the APA's] standards to petitioners' four sets of challenges to the Commission's 2015 Declaratory Ruling, we set aside the Commission's explanation of which devices qualify as an ATDS") (emphasis added), and 701-703 (repeatedly referring to flaws in 2015 Order).

Indeed, except for a brief mention of the 2003 Order in an introductory section describing the FCC's history of rulemaking and declaratory rulings (885 F.3d at 683), *ACA International* mentions the 2003 and 2008 Orders only in section II(A)(2) to rebut the FCC's argument that the petitioners could not appeal

the ATDS part of the order because it simply reiterated questions resolved by previous orders. The court states:

> The agency's prior rulings left significant uncertainty about the precise functions an autodialer must have the capacity to perform. . . . In response [to the parties' petitions], the Commission issued a declaratory ruling that purported to "provid[e] clarification on the definition of 'autodialer,'" and denied the petitions for rulemaking on the issue. The ruling is thus reviewable . . . .

Id. at 701 (emphases added, internal citations omitted). The court disagrees with the FCC that "because there was no timely appeal from those previous orders, it is too late now to raise a challenge by seeking review of a more recent declaratory ruling . . . ." *Id.* (emphasis added). The court concludes that "[t]he ruling"—in the singular—is reviewable. *Id.*

The decision then addresses the 2015 Order's ambiguity about whether "a device's capacity must be measured solely by reference to its 'present capacity' or its 'current configuration' without any modification . . . . or 'future possibility.'" *Id.* at 695 (internal citation omitted). It refers to the 2003 and 2008 Orders only because they "reinforce [the court's] understanding" of what was left unclear by the 2015 Order. *Id.* at 702. Only those open issues were addressed in the 2015 Order relating to the definition of an ATDS.

Thus nothing in *ACA International* overturned the 2003 and 2008 Orders. Moreover, *ACA International* does not even mention the 2012 Order, so cannot possibly be interpreted as overturning it.

As these three pre-2015 orders are still in effect, the Hobbs Act makes them binding on the courts. Jurisdiction to determine the validity of final FCC orders is vested exclusively in the courts of appeal through a Hobbs Act petition filed within sixty days after the order's entry. 28 U.S.C. §§ 2342, 2344, 2349(a); 47 U.S.C. § 402. Except when exercising jurisdiction under the Hobbs Act, courts cannot determine that an FCC final order is invalid. *Federal Communications Comm'n v. ITT World Communications, Inc.*, 466 U.S. 463, 468-469, 104 S. Ct. 1936, 80 L. Ed. 2d 480 (1984).

This court has twice held that the Hobbs Act precludes challenges to FCC orders except by direct appeal. *U.S. W. Communications, Inc. v. Jennings*, 304 F.3d 950, 958 n.2 (9th Cir. 2002) ("The Hobbs Act . . . requires that all challenges to the validity of final orders of the FCC be brought by original petition in a court of appeals. The district court thus lacked jurisdiction to pass on the validity of the FCC regulations, and no question as to their validity can be before us in this appeal."); *U.S. W. Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1120 (9th Cir. 1999). *See also Baird v. Sabre, Inc.*, 636 Fed. Appx. 715, 716 (9th Cir. 2016) (Hobbs Act precludes challenge to FCC's interpretation of "prior express consent").

Neither *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014), *aff'd*, ___U.S.___, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016), nor *Satterfield v. Simon &*

Schuster, Inc., 569 F.3d 946, 953 (9th Cir. 2009), in which this court applied *Chevron* deference instead of the Hobbs Act standard to TCPA questions, undermines the conclusion that the Hobbs Act makes FCC orders binding on the courts. Both upheld the FCC's orders, so it was not necessary for the court to consider how they would fare under the even more deferential Hobbs Act standard. To hold otherwise would be contrary to the weight of authority from other circuits that FCC orders regarding the TCPA are binding except through a Hobbs Act appeal. *See, e.g., Carlton & Harris Chiropractic, Inc. v. PDR Network*, 883 F.3d 459 (4th Cir. 2018); *Baisden v. Credit Adjustments, Inc.*, 813 F.3d 338, 342 (6th Cir. 2016).

B. The District Court Erred By Not Following the FCC's 2003, 2008, and 2012 Orders.

The FCC's pre-2015 orders interpreting the definition of ATDS are crystal clear on aspects of the ATDS definition that are central to this appeal. All three orders state that a device cannot be excluded from the ATDS definition because it dials from a given set of numbers rather than from randomly or sequentially generated numbers:

> The statutory definition contemplates autodialing equipment that <u>either</u> stores or produces numbers . . . .
>
> [T]o exclude from these restrictions equipment that use predictive dialing software from the definition of "automated telephone dialing equipment" <u>simply because it relies on a given set of numbers would lead to an unintended result</u>.

2003 Order at 14092 ¶¶ 132, 133 (emphases added, footnotes omitted). *Accord* 2008 Order at 566 ¶ 12 (rejecting ACA's argument that a predictive dialer meets the definition "only when it randomly or sequentially generates telephone numbers, not when it dials numbers from customer telephone lists"); 2012 Order at 15392 ¶ 2 n.5 ("the scope of [the ATDS] definition encompasses 'hardware [that], when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers'") (emphases added, citation omitted).

The district court erred by refusing to apply these orders. Not only did it fail to give the orders the deference required by the Hobbs Act, but it also wrongly held that it could ignore this court's endorsement of the FCC's 2003 Order in *Meyer v. Portfolio Recovery Assocs.*, 707 F.3d 1036, 1044-1045 (9th Cir. 2012). Its rationale was that the *Meyer* defendant had waived any challenge to the FCC's authority to interpret the statute. *Marks v. Crunch San Diego, L.L.C.*, 55 F. Supp. 3d 1288, 1293 (S.D. Cal. 2014). But it failed to note that this court ruled in *Meyer* that "even if the argument had not been waived . . . the TCPA was designed to protect against the types of calls at issue in this case." *Meyer*, 707 F.3d at 1044.

Because of its failure to follow the FCC's pre-2015 orders and *Meyer*, the district court erroneously treated the question of whether the defendant had used an ATDS as a question of law. It excluded the proffered expert testimony as moot on

the mistaken ground that factual development was unnecessary. The district court's decision should be reversed and the case remanded to that court to develop the facts, and apply the FCC's orders and *Meyer* to those facts.

II. THE STATUTORY LANGUAGE DOES NOT REQUIRE THAT NUMBERS BE PRODUCED BY A RANDOM OR SEQUENTIAL GENERATOR.

As the FCC's pre-2015 orders are still in effect, the court need not interpret the statutory language. However, if the court does undertake that task, it should recognize that the definition does not require that the numbers dialed be produced by a number generator, because the definition also includes equipment that stores and dials telephone numbers. "Because the TCPA is a remedial statute intended to protect consumers from unwanted automated telephone calls . . ., it should be construed in accordance with that purpose." *Van Patten v. Vertical Fitness Grp., L.L.C.*, 847 F.3d 1037, 1047 (9th Cir. 2017).

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 language cannot be interpreted to require that the numbers dialed be produced by a random or sequential number generator. To do so ignores the word "store" in the statute, and renders several statutory provisions superfluous or nonsensical.

The ATDS definition includes the disjunctive "or," meaning that an ATDS must include systems like the one used by Crunch that *stores* telephone numbers, regardless of whether it *produces* the numbers. *See Bourff v. Rubin Lublin, L.L.C.*, 674 F.3d 1238, 1241 (11th Cir. 2016) (explaining "or" in a similarly worded consumer protection statute). Numbers cannot be *stored* using a random or sequential number generator, so the phrase "using a random or sequential number generator" must modify only the word "produce."

This interpretation conforms to the Last Antecedent Rule, under which a limiting clause "should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart v. Thomas*, 540 U.S. 20, 26, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003). It also avoids a nonsensical reading of the word "store" and gives meaning to all words in the definition. A cardinal principle of statutory interpretation requires statutes to be construed so that, "if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001).

Crunch's interpretation not only reads the word "store" out of the statute, but also renders other portions of the statute superfluous or nonsensical. First, the statute allows autodialed calls to be made to a party who has consented. 47 U.S.C. § 227(b)(1)(A)(iii). Were the court to adopt Crunch's interpretation that only telephone numbers *produced* randomly or sequentially from thin air, rather than

generated from a stored database of inputted numbers, would be the only covered calls from an autodialer, callers would never have consent to call those numbers. As the caller would not know which numbers it was calling—because the numbers had been generated from thin air, rather than from a list—it would be impossible for any caller to have meaningful consent for autodialed calls to those numbers. This reading would mean that callers would have consent for calls to autodialed numbers only as a matter of sheer coincidence, if ever.

Second, the TCPA prohibits use of an autodialer in a way that ties up multiple lines of a multi-line business. 47 U.S.C. § 227(b)(1)(D). If an autodialer is defined just as one that dials numbers in a random or sequential order, not from a list, it would be impossible to implement this prohibition, because a caller calling numbers produced out of thin air would have no way of ensuring that it was not tying up the business' multiple lines.

Finally, the TCPA permits an award of treble damages if a violation is willful or knowing. 47 U.S.C. § 227(b)(3). If numbers were generated out of thin air, rather than from a list, a caller could never *know* it was calling an emergency line or a cell phone, so this provision would also be rendered meaningless.

The district court relied heavily on the unpublished opinion *Dominguez v. Yahoo, Inc.*, 629 Fed. Appx. 369 (3d Cir. 2015), to bolster its view that numbers must be generated randomly. But the *Yahoo* court acknowledged that it could not

reconcile its position with the word "stored": "We acknowledge that it is unclear how a number can be *stored* (as opposed to *produced*) using a 'random or sequential number generator.'" *Id*. at 372 n.1 (emphases in original).

But even if this court concludes that the words "using a random or sequential number generator" modify both "store" and "produce," it should adopt a liberal construction of the term "sequential." As *ACA International* notes: "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." 885 F.3d at 702 (emphasis in original). Thus "sequential" simply means that numbers are dialed pursuant to an order chosen by the dialing system. With this interpretation of "sequential," a system that dials numbers from a stored list in a sequence it selects is an ATDS.

CONCLUSION

For the foregoing reasons, *Amici* urge the court to reverse the decision below and remand to apply the FCC's orders and *Meyer* to the facts.

Respectfully submitted,

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Dated: May 21, 2018

CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by this court's Order of March 22, 2018. *See* Dkt. 70. The brief is 2442 words long, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a). The brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using Microsoft Word 2016.

/s/ Stuart T. Rossman

Stuart T. Rossman

Dated: May 21, 2018

CERTIFICATE OF SERVICE

I certify that on May 21, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to all registered parties.

/s/ Stuart T. Rossman

Stuart T. Rossman