No. _____

In The
Supreme Court of the United States

CRUNCH SAN DIEGO, LLC,

Petitioner,

v.

JORDAN MARKS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress enacted the Telephone Consumer Protection Act ("TCPA") in 1991 to curb then-prevalent telemarketing practices involving a type of bulk-dialing technology known as an "automatic telephone dialing system," which the statute defines 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).

The Ninth Circuit, by contrast, rewrote the definition to mean

> equipment which has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, *using a random or sequential number generator*—and to dial such numbers.

App., *infra*, 24a (emphasis added).

The question presented is:

Whether the Ninth Circuit erred in expanding the TCPA's definition of "automatic telephone dialing system"—in acknowledged conflict with the Third Circuit and in stark tension with the D.C. Circuit—to encompass any device with capacity merely to dial stored telephone numbers.

PARTIES TO THE PROCEEDING

Petitioner Crunch San Diego, LLC was the defendant in the district court and appellee in the court of appeals. Respondent Jordan Marks was the plaintiff in the district court and appellant in the court of appeals.

RULE 29.6 STATEMENT

Petitioner Crunch San Diego, LLC certifies that its parent corporation is Crunch JV Partners, LLC. No publicly held corporation owns 10% or more of Crunch San Diego's stock and/or equity.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND REGULATIONS:

OTHER AUTHORITIES

INTRODUCTION

This case concerns the scope of the Telephone Consumer Protection Act ("TCPA"). The TCPA defines an "automatic telephone dialing system" ("ATDS")—the use of which can trigger staggering statutory damages—as having the capacity "to store or produce telephone numbers to be called, *using a random or sequential number generator*." 47 U.S.C. § 227(a)(1) (emphasis added). But the Ninth Circuit rewrote that definition to include a device that has the capacity merely to store and dial telephone numbers, *whether or not* those numbers are generated "using a random or sequential number generator."

That decision squarely conflicts with the Third Circuit's decision, which adopted the opposite construction. It also contradicts the plain text and purpose of the TCPA, which was enacted in 1991 in light of Congress's specific concern over calls being made to large blocks of randomly or sequentially generated numbers with equipment designed for that purpose. And it massively increases exposure under the TCPA—not only for businesses facing over 4,000 TCPA suits each year (often filed as putative class actions), but for over 300 million smartphone users when sending everyday texts or making calls (because a smartphone qualifies as an ATDS under the Ninth Circuit's untenable construction). That outcome, expressly rejected by the D.C. Circuit as "utterly unreasonable," warrants this Court's review.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-26a) is reported at 904 F.3d 1041. The opinion of the district court (App., *infra*, 27a-38a) is reported at 55 F. Supp. 3d 1288.

JURISDICTION

The Ninth Circuit judgment was entered on September 20, 2018. The Ninth Circuit denied rehearing on October 30, 2018. App., *infra*, 40a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

The TCPA statutory provision at issue is 47 U.S.C. § 227(a)(1):

> The term "automatic telephone dialing system" means 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.

STATEMENT OF THE CASE

A. Legal Framework

In 1991, Congress enacted the TCPA to, among other things, curb certain automated calls to specialized telephone lines. Those specialized lines included emergency and hospital lines, police and fire station lines, paging lines, and, as relevant here, the then-nascent technology of "cellular telephone service" lines. 47 U.S.C. § 227(b)(1)(A). The TCPA's specific goal was to address "abuses of telephone technology"

by telemarketers, who, "by operating interstate, were escaping state-law prohibitions on intrusive nuisance calls." *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 370-371 (2012). Congress emphasized in its legislative findings that "[u]nrestricted telemarketing *** can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety." 47 U.S.C. § 227 note ¶ 5.

The Act generally prohibits any person, absent the prior consent of the recipient, from "mak[ing] any call *** using any [ATDS] *** to any telephone number assigned to" those specialized lines. 47 U.S.C. § 227(b)(1)(A)(iii). While not specified in the statute, a text message has been deemed a "call" covered by the TCPA. *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 667 (2016). In addition to permitting States to bring civil actions, Congress permitted private parties to seek redress for TCPA violations. 47 U.S.C. § 227(b)(3). A successful plaintiff may recover her "actual monetary loss" or $500 for each violation, "whichever is greater." *Id.* § 227(b)(3)(B). Damages may be trebled if "the defendant willfully or knowingly violated" the TCPA. *Id.* § 227(b)(3).

The Act 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). Shortly after the TCPA's enactment, the Federal Communications Commission ("FCC") promulgated a regulation that mirrors the statutory definition. *See* 47 C.F.R. § 64.1200(f)(1) (1992) ("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."). Around the same time, the FCC observed in a published order that "autodialer calls" are those "dialed using a random or sequential number generator." In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 FCC Rcd. 8752, 8773 (1992).

Since that time, the FCC has issued various other orders on the scope of an ATDS—the most recent of which from 2015 has been invalidated by the D.C. Circuit, as discussed *infra* (*see* pp. 10-13 & n.1).

B. Factual and Procedural Background

1. In 2012, Petitioner Crunch San Diego, a company that operates two health clubs, allegedly sent three text messages over an 11-month period to Respondent Jordan Marks, who was then a gym member. Marks, claiming that his wireless carrier charged him for all three texts and that they were sent without his express consent, filed a putative class action suit on behalf of all persons who received a text message from Crunch San Diego. Specifically, Marks alleged that Crunch San Diego sent messages using an ATDS with "the capacity to send text messages to cellular telephone numbers from a list of telephone numbers automatically and without human intervention." App., *infra*, 16a.

The specific system that Crunch San Diego used is a third-party web-based platform that allows clients to, "for example, offer[] customers free passes and personal training sessions, provide[] appointment reminders and class updates, or send[] birthday

greetings." App., *infra*, 15a. "[T]he *** system will automatically send the desired messages to the stored phone numbers at a time scheduled by the client." *Id.* The system lacks capacity to generate numbers to be called, and permits communications to be made only to a stored list of client customers.

2. The district court granted summary judgment in favor of Crunch San Diego. The court interpreted the phrase "random or sequential number generator" in the TCPA's definition of an ATDS to "refer[] to the genesis of the list of numbers" to be called. App., *infra*, 34a. "If the statute meant to only require that an ATDS include any list or database of numbers," the district court reasoned, "it would simply define an ATDS as a system with the 'capacity to store or produce numbers to be called'; 'random or sequential number generator' would be rendered superfluous." *Id.* at 33a-34a. The court rejected the plaintiff's contrary interpretation as "based on policy considerations" rather than "the plain language of the statute," which the Ninth Circuit previously had held to be "clear and unambiguous." *Id.* at 32a (quoting *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009)).

Based on that definition, the district court determined that Crunch San Diego could not be liable under the TCPA. Phone numbers may be entered into Crunch San Diego's communication system

> by one of three methods: (1) when [Crunch San Diego] or another authorized person manually uploads a phone number onto the platform; (2) when an individual responds to a [Crunch San Diego] marketing campaign

> via text message (a "call to action"); and (3) when an individual manually inputs the phone number on a consent form through [Crunch San Diego's] website that interfaces with [the] platform.

App., *infra*, 28a. Because "all three methods require human curation and intervention[,] [n]one could reasonably be termed a 'random or sequential number generator,'" thus disqualifying the platform from the statutory definition of an ATDS (and Crunch San Diego from TCPA liability). *Id.* at 34a.

3. The Ninth Circuit reversed. It first recognized (correctly) that the D.C. Circuit in *ACA International v. Federal Communications Commission*, 885 F.3d 687 (D.C. Cir. 2018), had "exercised its authority [under the Hobbs Act] to set aside the FCC's interpretations of the definition of an ATDS," such "that the FCC's prior orders on that issue are no longer binding." App., *infra*, 17a.

Setting out "anew to consider the definition of ATDS under the TCPA," the Ninth Circuit identified the principal question on appeal to be "whether, in order to be an ATDS, a device must dial numbers generated by a random or sequential number generator or if a device can be an ATDS if it merely dials numbers from a stored list." App., *infra*, 18a, 20a. The court distinguished its prior holding that the definition of an ATDS "is clear and unambiguous" as confined to "only one aspect of the text," finding that the rest of the definition "is not susceptible to a straightforward interpretation based on [its] plain language." *Id.* at 21a & n.6.

The Ninth Circuit thus looked to "infer[ences]" from post-enactment congressional inaction, as well as "the context and the structure of the statutory scheme." App., *infra*, 21a, 23a. Despite acknowledging the existence of pre-enactment legislative history showing that "Congress focused on regulating the use of equipment that dialed blocks of sequential or randomly generated numbers," *id.* at 21a-22a, the court asserted that Congress's "decision not to amend the statutory definition of ATDS to overrule the FCC's [subsequent] interpretation suggests Congress gave the interpretation its tacit approval," *id.* at 23a. The court also cited various other provisions of the TCPA that, in its view, implied that an ATDS may "be configured to dial a curated list." *Id.* at 22a & n.7.

After admitting that it was "struggling with" the proper statutory definition, the Ninth Circuit concluded that "the statutory definition of ATDS includes a device that stores telephone numbers to be called, whether or not those numbers have been generated by a random or sequential number generator." App., *infra*, 4a, 21a. In doing so, the court recognized that its interpretation made sense only if one were to "read[] additional words into the statute." *Id.* at 20a. It further recognized that its interpretation conflicts with the Third Circuit's decision in *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3d Cir. 2018) ("*Dominguez II*"), but discounted that holding as an "unpersuasive," "unreasoned assumption." App., *infra*, 24a n.8. Based on its statutory interpretation, the Ninth Circuit vacated the district court's summary judgment ruling.

4. Crunch San Diego timely sought rehearing, but its request was denied. The Ninth Circuit stayed the issuance of its mandate pending this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION CREATES A CIRCUIT CONFLICT OVER THE CONSTRUCTION OF "AUTOMATIC TELEPHONE DIALING SYSTEM"

The Ninth Circuit's holding that TCPA liability extends to equipment that "stores telephone numbers to be called, whether or not those numbers have been generated by a random or sequential number generator," creates a direct and acknowledged conflict with the Third Circuit. That holding also stands in serious tension with a D.C. Circuit opinion that rejected a similarly expansive interpretation as "utterly unreasonable" because, like the Ninth Circuit's interpretation, it threatened "hundreds of millions" of smartphone users with crippling TCPA statutory-damages liability. These irreconcilable conflicts merit this Court's review.

A. The Decision Acknowledges A Direct Conflict With The Third Circuit

In holding that an ATDS need only be capable of dialing stored telephone numbers automatically, the Ninth Circuit created a clear circuit conflict: It expressly "decline[d] to follow" the Third Circuit's precedential holding that an ATDS requires the capacity to "generat[e] random or sequential telephone

numbers and dial[] those numbers." App., *infra*, 24 n.8 (quoting *Dominguez II,* 894 F.3d at 120).

In *Dominguez II*, the TCPA plaintiff had "received approximately 27,800 text messages from Yahoo over the course of 17 months," "because the prior owner of [his cellular] telephone number had affirmatively opted to receive them." 894 F.3d at 117, 121. Like Respondent Marks, the plaintiff brought a putative class action under 47 U.S.C. § 227(b)(1)(A); thus, like here, the success of that lawsuit "depended upon his assertion that [defendant's texting system] was an 'automatic telephone dialing system,' *i.e.*, an autodialer." *Id.*

The "key *** question" on appeal was whether Yahoo's system "functioned as an autodialer by randomly or sequentially generating telephone numbers, and dialing those numbers." 894 F.3d at 121. The Third Circuit held that Yahoo's system flunked that definition because it "sent messages only to numbers that had been individually and manually inputted into its system by a user." *Id.* The plaintiff could not "point to any evidence that creates a genuine dispute of fact as to whether" Yahoo's system could "function as an autodialer by generating random or sequential telephone numbers and dialing those numbers." *Id.* Although the plaintiff undoubtedly faced "great annoyance as a result of the unwanted text messages," Yahoo was not liable under the TCPA because he received those messages because of the actions of his cellular number's prior owner, "not because of random number generation." *Id.*

The Ninth Circuit acknowledged the Third Circuit's divergent holding, but deemed it

"unpersuasive." App., *infra*, 24a n.8. In the Ninth Circuit's view, it constituted an "unreasoned assumption" that failed to grapple with the "linguistic problem" the Third Circuit had identified at an earlier stage of the case, when noting in passing that it was "unclear how a number can be *stored* (as opposed to *produced*) using a random or sequential number generator." *Id.* (internal quotation marks omitted) (quoting *Dominguez v. Yahoo, Inc.*, 629 F. App'x 369, 372 n.1 (3d Cir. 2015) ("*Dominguez I*")). The Ninth Circuit never acknowledged, however, that *Dominguez I*—which was cited approvingly in *Dominguez II*—made that observation only *after* it squarely held that the TCPA's "explicit" ATDS definition provides that "autodialing equipment may have the capacity to store *or* to produce the randomly or sequentially generated numbers to be dialed." *Dominguez I*, 629 F. App'x at 373 n.1; *see also id.* at 372 n.2 ("[W]e reject Dominguez's claim that the FCC has interpreted the autodialer definition to read out the 'random or sequential number generator' requirement.").

B. The Decision Cannot Be Reconciled With The D.C. Circuit's Rejection Of A Similarly Sweeping Interpretation Of ATDS

The Ninth Circuit's opinion also contradicts the interpretive limitation set forth in *ACA International*, 885 F.3d 687, which involved consolidated petitions for review of a 2015 FCC order, In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 30 FCC Rcd. 7961, 7969-7970 ¶¶ 6-7 (2015). As most relevant here, the D.C. Circuit vacated as "arbitrary and capricious" the FCC's

impermissibly "expansive" interpretation of the statutory term "capacity" in the definition of ATDS as encompassing future capacity that can be added via software. *ACA Int'l*, 885 F.3d at 700.[1]

Critically, the D.C. Circuit reasoned as follows: Because it was "undisputed that any smartphone, with the addition of software, can gain the statutorily enumerated features of an autodialer and thus function as an ATDS, *** it follows that all smartphones, under the Commission's approach, meet the statutory definition of an autodialer." *ACA Int'l*, 885 F.3d at 696-697. That approach gave the ATDS definition "an eye-popping sweep," as it would encompass "hundreds of millions" of smartphone devices. *Id.* at 697-698. The D.C. Circuit rejected as "utterly unreasonable," "impermissible," and "untenable" any ATDS interpretation that would "render every smartphone an ATDS subject to the Act's restrictions," because "[n]othing in the TCPA countenances concluding that Congress could have contemplated the applicability of the statute's restrictions to the most commonplace phone device

[1] The D.C. Circuit further found that, although the FCC's order purported to provide guidance on the ATDS definition, it failed to do so "meaningful[ly]." *ACA Int'l*, 885 F.3d at 701. The D.C. Circuit held that the FCC's guidance "falls short of reasoned decisionmaking" because its "ruling appears to be of two minds on the issue"—suggesting at different points that an ATDS must be able to "generate random or sequential numbers," or not. The Commission simply gave "no clear answer (and in fact seems to give both answers)." *Id.* at 701, 703. Because "the Commission cannot, consistent with reasoned decisionmaking, espouse both competing interpretations in the same order," the D.C. Circuit set aside the FCC's treatment of those matters. *Id.* at 703.

used every day by the overwhelming majority of Americans." *Id.* at 697-699.

That core holding—that the TCPA cannot be interpreted to mean that "every smartphone user violates federal law" by using their devices as intended—cannot be squared with the Ninth Circuit's ATDS interpretation. Because any device (including a smartphone) that "ma[kes] automatic calls from lists of recipients" may qualify as an ATDS, App., *infra*, 22a, under the Ninth Circuit's decision "nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact," *ACA Int'l*, 885 F.3d at 698. That cannot be what Congress intended. *See id.* at 697. ("The TCPA cannot reasonably be read to render every smartphone an ATDS subject to the Act's restrictions.").

In fact, the D.C. Circuit's concerns apply with even greater force here. Unlike *ACA International*, which hinged on the notion that a smartphone may obtain *future* capacity "with the addition of software," 885 F.3d at 696, many smartphones today *already have* capacity to make "automatic calls from lists of recipients." App., *infra*, 22a.[2] Nothing in the TCPA

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[2] The most recent version of the iPhone software, for example, includes a built-in feature called "Do Not Disturb," which allows iPhones to reply automatically to incoming texts and thus could qualify them as an ATDS under the Ninth Circuit's view. *See* Apple, *How To Use Do Not Disturb While Driving* (Sept. 17, 2018), https://support.apple.com/en-us/HT208090. Android phones have similar capabilities. Nancy Messieh, *How To Send Automatic Replies to Text Messages on Android* (May 10, 2017), https://www.makeuseof.com/tag/send-automatic-replies-text-messages-android/ (discussing apps such as SMS Auto Reply Text Message). Certain Samsung phones also

justifies, let alone requires, "extend[ing] a law originally aimed to deal with hundreds of thousands of telemarketers into one constraining hundreds of millions of everyday callers." 885 F.3d at 698. The Ninth Circuit's decision—irreconcilable with the D.C. Circuit's reasoning—necessitates this Court's review.[3]

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include a pre-installed SMS app that allows users to schedule text messages. Brendan Hesse, *How To Schedule Text Messages on Android* (Dec. 26, 2018), https://lifehacker.com/how-to-schedule-text-messages-on-android-1831323365.

[3] District court decisions both pre- and post-*Marks* are also split on the question presented, including some that explicitly reject the Ninth Circuit's interpretation. *See, e.g.*, *Thompson-Harbach v. USAA Fed. Sav. Bank*, No. 15-CV-2098-CJW-KEM, 2019 WL 148711, at *13 (N.D. Iowa Jan. 9, 2019) ("[T]his Court finds the *Marks* court's decision [regarding whether numbers to be called must have been generated by a random or sequential number generator] erroneous as a matter of statutory construction."); *Richardson v. Verde Energy, USA, Inc.*, No. 15-6325, 2018 WL 6622996, at *8-9 (E.D. Pa. Dec. 17, 2018) (declining to follow *Marks* "[b]ecause this Court is bound to follow the holding of *Dominguez II*," which "conclude[d] that a predictive dialing device that merely dials numbers from a stored list of numbers—rather than having generated those numbers either randomly or sequentially—is not an ATDS"); *Johnson v. Yahoo!, Inc.*, No. 14-cv-2028, 2018 WL 6426677, at *2 (N.D. Ill. Nov. 29, 2018) (rejecting *Marks*'s TCPA interpretation and holding instead that "[t]he phrase 'using a random or sequential number generator' applies to the numbers to be called," such that "[c]urated lists developed without random or sequential number generation capacity fall outside the statute's scope"), *appeal docketed*, No. 19-1001 (7th Cir. Jan. 2, 2019); *Roark v. Credit One Bank, N.A.*, No. CV 16-173 (PAM/ECW), 2018 WL 5921652, at *3 (D. Minn. Nov. 13, 2018) (rejecting *Marks* in favor of the Third Circuit's "more persuasive" reading of the TCPA, and holding that "the correct inquiry is whether a device can generate numbers to dial either randomly or sequentially"), *appeal dismissed*, No. 18-3643 (8th Cir. Jan. 4, 2019); *Gary v. TrueBlue,*

II. THE NINTH CIRCUIT'S DECISION IMPERMISSIBLY EXPANDS THE STATUTORY DEFINITION

A. The Ninth Circuit's Interpretation Conflicts With The TCPA's Plain Text

The plain text of the TCPA contemplates that an ATDS must be capable of more than simply dialing stored numbers. Congress did not broadly refer to any

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Inc., No. 17-CV-10544, 2018 WL 4931980, at *5 (E.D. Mich. Oct. 11, 2018) (no reasonable juror could find that system has "the capability to randomly or sequentially dial or send text messages"), *appeal docketed*, No. 18-2281 (6th Cir. Nov. 5, 2018); *Marshall v. CBE Grp., Inc.*, No. 2:16-CV-02406-GMN-NJK, 2018 WL 1567852, at *6 (D. Nev. Mar. 30, 2018) (finding no evidence or authority for proposition that system has "*capacity to randomly or sequentially* generate telephone numbers to be stored, produced, or called") (citation and quotation marks omitted). *But see, e.g.*, *Hatuey v. IC Sys., Inc.*, No. 1:16-cv-12542-DPW, 2018 WL 5982020, *6-7 (D. Mass. Nov. 14, 2018) (holding, without reference to *Marks*, that "[t]hese phone numbers need not be produced by a random number generator; a dialer that is connected to a database that contains information about individuals may nevertheless constitute an ATDS if it can dial numbers stored in the database automatically"); *Adams v. Ocwen Loan Servicing, LLC*, No. 18-81028-CIV-DIMITROULEAS, 2018 WL 6488062, at *3-4 (S.D. Fla. Oct. 29, 2018) (agreeing with reasoning of *Marks* and denying defendant's motion to dismiss); *Reyes v. BCA Fin. Servs., Inc.*, 312 F. Supp. 3d 1308, 1322 (S.D. Fla. 2018), *motion to certify appeal denied*, No. 16-24077-CIV-GOODMAN, 2018 WL 2849768 (S.D. Fla. June 8, 2018) (rejecting argument "that a predictive dialer must be able to generate and dial random or sequential numbers to be an ATDS"); *Glasser v. Hilton Grand Vacations Co.*, 341 F. Supp. 3d 1305, 1313 (M.D. Fla. 2018) ("A predictive dialer may fall within the TCPA's definition of an ATDS, even though it may not 'store or produce telephone numbers to be called, using a random or sequential number generator.'") (citation omitted).

equipment that can dial numbers from a list, but rather only to equipment with capacity "to store or produce telephone numbers to be called, *using a random or sequential number generator*." 47 U.S.C. § 227(a)(1)(A) (emphasis added). Congress included that distinctive limiting phrase for a reason: Congress sought only to capture technology "using a random or sequential number generator."

Basic rules of grammar and punctuation reinforce that commonsense conclusion. *See United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993) (statute's meaning "will typically heed the commands of its punctuation"). The disputed language comprises just two clauses: (i) linked verbs ("store or produce") that share a common object ("numbers to be called"), and (ii) a dependent modifier ("using a random or sequential number generator"). The latter clause, moreover, is set off by a comma.

Consistent with established principles of statutory construction, that structure strongly indicates that the latter clause modifies both parts of the preceding clause. *See Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1077 (2018) ("[T]he most natural way to view the modifier [following the comma] is as applying to the entire preceding clause."); *see also, e.g.*, *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996, 1000 (9th Cir. 2017) (describing adherence to "punctuation canon, under which a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one [where the phrase] is separated from the antecedents by a comma") (alteration in original)

(citation and internal quotation marks omitted); *Elliot Coal Mining Co. v. Director, Office of Workers' Comp. Programs*, 17 F.3d 616, 630 (3d Cir. 1994) ("Th[e] use of a comma to set off a modifying phrase from other clauses indicates that the qualifying language is to be applied to all of the previous phrases and not merely the immediately preceding phrase"); *Bingham, Ltd. v. United States*, 724 F.2d 921, 925-926 n.3 (11th Cir. 1984) (same).

The Ninth Circuit's interpretation flouts those principles and makes mincemeat of the statutory language. After "struggling with" the statutory definition, and deciding that it would be necessary to "read[] additional words into the statute," App., *infra*, 20a-21a, the Ninth Circuit ultimately concluded that an ATDS is "equipment which has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator," *id.* at 24a. Put another way, the Ninth Circuit determined that the "number generator" modifier should apply *only* to the act of "produc[ing]" numbers to be called, and not to the act of "stor[ing]" numbers to be called.

In order to reach that anomalous result, the Ninth Circuit engaged not in statutory *construction*, but statutory demolition and *reconstruction*. Specifically, the Ninth Circuit had to:

> (i) lop off the "number generator" modifier from the object it modified ("numbers to be called~~, using a random or sequential number generator~~");
>
> (ii) attach the unmodified object to the verb "store" ("store numbers to be called");

> (iii) attach the unmodified object to the verb "produce" ("produce numbers to be called"); and
>
> (iv) re-attach the "number generator" modifier *solely* to the latter phrase ("produce numbers to be called, using a random or sequential number generator"), while retaining the (now-superfluous) comma.

The end product is that while the two resulting clauses still share the same object, the "number generator" modifier now modifies just one of them.

The Ninth Circuit rationalized these linguistic gymnastics by suggesting that Petitioner's interpretation would require reading additional words into the statute as well. App., *infra*, 20a-21a. Not so: Petitioner's interpretation is perfectly sensible if one simply applies the dependent modifier ("using a random or sequential number generator") to the acts of either "stor[ing] or produc[ing]" the numbers to be called.

The Ninth Circuit believed that doing so leads to a "linguistic problem," in that it is "unclear" how equipment can "*store*[]*"* or produce telephone numbers to be called, "using a random or sequential number generator." App., *infra*, 24a n.8 (emphasis added) (citing *Dominguez I*, 629 F. App'x at 372 n.1). In reality, there is no problem. Number generation and storage are not mutually exclusive; there is no reason why a "number generator" may not only produce numbers to be called, but store them as well.[4] In any

[4] For example, software programs such as Microsoft Excel allow users to not only create but also store numbers using a

event, any such purported linguistic quirk would pale in comparison to the reconstruction of statutory language and contravention of grammatical and punctuation canons that flow from the Ninth Circuit's interpretation.

B. The Ninth Circuit's Interpretation Reaches Far Beyond The TCPA's Purpose

1. The statutory context, along with the legislative findings and history, confirm that Congress enacted the TCPA to target a particular type of behavior (telemarketing) using a particular type of equipment (ATDS). Congress plainly did not target *all* forms of solicitation by telephone or *all* technology that might someday be used to facilitate it.

Congress was concerned with a specific type of then-prevalent technology—namely, automatic block-dialing machines. As the Ninth Circuit itself recognized, "Congress focused on regulating the use of equipment that dialed blocks of sequential or randomly generated numbers," which could tie up emergency services and reach users with unlisted telephone numbers. App., *infra*, 21a-22a. Because such "machines could be programmed to call numbers in large sequential blocks or dial random 10-digit strings of numbers," they were "not only an annoyance but also posed dangers to public safety." *Id.* at 6a; *see*

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number generator tool. *See, e.g.*, Excel Easy, *Random Numbers*, https://www.excel-easy.com/examples/random-numbers.html (last visited Jan. 26, 2019); ExtendOffice, *How To Insert Random (Integer) Numbers Between Two Numbers Without Repeats in Excel?*, https://www.extendoffice.com/documents/excel/643-excel-random-number.html (last visited Jan. 26, 2019).

47 U.S.C. § 227 note ¶ 5 (noting concerns over not only invasions of privacy but, "when an emergency or medical assistance telephone line is seized, a risk to public safety"). That latter concern is why the TCPA proscribed ATDS calls solely to specialized lines such as "emergency," "hospital," "paging," and "cellular telephone service" lines, 47 U.S.C. § 227(b)(1)(A)(i)-(iii), rather than to all wired residential lines.

Similarly, the House and Senate Reports focused on the fact that automatic dialers were programmed "to dial sequential blocks of telephone numbers, including those of emergency public organizations and unlisted subscribers." H.R. REP. NO. 101-633, at 3 (1990); *see* S. REP. NO. 102-178, at 2 (1991) ("Having an unlisted number does not prevent those telemarketers that call numbers randomly or sequentially."); *see also* 137 CONG. REC. 30,818 (1991) (statement of Sen. Pressler) ("Due to advances in autodialer technology, machines can be programmed to deliver a prerecorded message to thousands of sequential phone numbers," including lines to hospitals, potentially creating "a real hazard."); 137 CONG. REC. 35,302 (1991) (statement of Rep. Markey) ("[A]utomatic dialing machines place calls randomly, meaning they sometimes call unlisted numbers, or numbers of hospitals, police and fire stations, causing public safety problems.").

Congress's findings make another thing clear: that Congress was concerned not with all types of unwanted communications, but rather only with unwanted calls from telemarketers. Its findings note that "30,000 businesses actively telemarket goods and services to business and residential customers," and

that "[m]ore than 300,000 solicitors call more than 18,000,000 Americans every day." 47 U.S.C. § 227 note ¶¶ 2-3; *see ACA Int'l*, 885 F.3d at 698 (emphasizing that "[t]hose sorts of predicate congressional findings can shed substantial light on the intended reach of a statute").

Needless to say, the implications of the Ninth Circuit's holding go well beyond the important but circumscribed problem that Congress identified. That is because the Ninth Circuit's interpretation is not limited to devices with the capacity to dial numbers generated randomly or sequentially, and is thus not targeted to telemarketers. Rather, as noted above, the Ninth Circuit's interpretation implicates commonplace smartphone technology and "hundreds of millions" of smartphone users. *See* pp. 10-13, *supra*. As the D.C. Circuit recognized, that "several-fold gulf between congressional findings and a statute's suggested reach" further confirms that Congress never could have intended for the TCPA (and its hefty statutory penalties) to someday reach the "most ubiquitous type of phone equipment known" today. *ACA Int'l*, 885 F.3d at 698.

2. Instead of that rich context, the Ninth Circuit relied primarily on congressional inaction when Congress amended a neighboring liability provision, 47 U.S.C. § 227(b), in 2015. *See* App., *infra*, 23a (noting that, "in amending this section, Congress left the definition of ATDS untouched" despite prior FCC orders concerning the definition). The Ninth Circuit's conclusion that Congress "tacitly approv[ed]" the FCC's contradictory—and since vacated—guidance on

the definition of ATDS when it amended a separate section rests on the thinnest of reeds.

This Court has long held that post-legislative policies and inaction are exceptionally weak indicators of congressional intent. *See, e.g.*, *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186-187 (1994) ("Congressional inaction cannot amend a duly enacted statute" and "lacks persuasive significance because several equally tenable inferences may be drawn from such inaction.") (citations and quotation marks omitted); *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation."). That is especially true where, as here, there is no obvious linkage between the provision amended and the provision in dispute, such that "[i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation." *Alexander v. Sandoval*, 532 U.S. 275, 291-292 (2001) (citation and internal quotation marks omitted).

In any event, the Ninth Circuit drew the wrong inference from such congressional silence. That is because the FCC's *own position* was not even clear in 2015. *See ACA Int'l*, 885 F.3d at 701-703 (observing that FCC's 2015 "ruling appears to be of two minds on the issue" of whether an ATDS must be able to "generate random or sequential numbers" or not, and that the FCC gave "no clear answer (and in fact seems to give both answers)"). Indeed, the only court of appeals to have construed the 2015 FCC order at the time of the TCPA's amendment was the Third Circuit,

which had explicitly *rejected* the argument that "the FCC ha[d] interpreted the autodialer definition to read out the 'random or sequential number generator' requirement." *Dominguez I*, 629 F. App'x at 373 n.2.

III. THE QUESTION PRESENTED IS AN IMPORTANT AND RECURRING ONE WARRANTING REVIEW NOW

Whether the statutory definition of ATDS sweeps in devices with the capacity merely to dial numbers from a stored list, without "using a random or sequential number generator," is a question of exceptional importance that this Court can and should resolve definitively.

1. TCPA lawsuits, which are often filed as nationwide class actions and seek damages of at least $500 per call made or text sent, comprise an ever-expanding category of civil litigation—a trend "likely attributable in part to the skyrocketing growth of mobile phones." *ACA Int'l*, 885 F.3d at 693 (citation and internal quotation marks omitted). "American businesses have been besieged," with "seemingly no industry *** safe from [TCPA] litigation" that has "now spread throughout the country." U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, TCPA LITIGATION SPRAWL 1-5 (Aug. 2017).[5] In the early 2000s, the number of TCPA complaints filed per year was in the single digits; by 2010, that number rose into the hundreds; and in both 2016 and 2017, the number surpassed 4,000 *per year*. *See* WEBRECON LLC, WEBRECON STATS FOR DEC 2017 & YEAR IN REVIEW

[5] *Available at* https://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Paper_Final.pdf.

(2018).[6] It is thus no surprise that TCPA cases have begun to make their way onto this Court's merits docket with increasing frequency. *See, e.g.*, *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 478 (2018) (mem.); *Mims*, 565 U.S. 368.

"The role of the phrase, 'using a random or sequential number generator,'" is a topic that "has generated substantial questions over the years" and has garnered considerable attention due to its "practical significance." *ACA Int'l*, 885 F.3d at 699, 701. Certain interpretations (like the FCC's since-vacated orders in the D.C. Circuit) have been described as having "an eye-popping sweep," given that they could make "nearly every American *** a TCPA-violator-in-waiting, if not a violator-in-fact." *Id.* at 697-698. For the same reasons, commenters have taken note of the Ninth Circuit's "extreme and expansive" reading of the statute,[7] which will only

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[6] *Available at* https://webrecon.com/webrecon-stats-for-dec-2017-year-in-review/.

[7] Artin Betpera, *"X"-Treme Marks the Spot: Ninth Circuit Takes Extreme Position—Holds That All Dialers That Call Automatically from Lists Are Subject to the TCPA*, TCPALAND (Sept. 20, 2018), https://tcpaland.com/x-treme-marks-the-spot-ninth-circuit-takes-extreme-position-holds-that-all-dialers-that-call-automatically-from-lists-are-subject-to-the-tcpa/; *see, e.g.*, Blaine C. Kimrey & Bryan K. Clark, *TCPA Alert—What's That* Crunch-*ing sound? Reason Being Destroyed in the Ninth Circuit*, MEDIA & PRIVACY RISK REPORT (VedderPrice) (Sept. 27, 2018), https://www.mediaandprivacyriskreport.com/2018/09/tcpa-alert-whats-that-crunch-ing-sound-reason-being-destroyed-in-the-ninth-circuit/ ("The problem with the Ninth Circuit's approach is that it is substantially overbroad—read literally, the Ninth Circuit's definition would include all smartphones in the definition of an ATDS.").

"open[] the door *** for more litigation to thrive under the statute."[8] Absent definitive resolution, a patchwork of TCPA interpretations and a "significant fog of uncertainty" will persist. *ACA Int'l*, 855 F.3d at 703.

2. This case is an ideal vehicle for clarifying the scope of the TCPA's critical definition of ATDS. There is no dispute that the communication system at issue lacked the present capacity to generate numbers randomly or sequentially and to dial such numbers. Accepting that fact, the district court granted summary judgment to Petitioner on the ground that "an ATDS *** necessarily includ[es] a random or sequential number generator," and the Ninth Circuit reversed after "conclud[ing] that the statutory definition of ATDS is not limited to devices with the capacity to call numbers produced by a 'random or

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[8] Allison Grande, *9th Circ. Heats Up TCPA Debate with Broad Autodialer Take*, LAW360 (Sept. 21, 2018), https://www.law360.com/articles/1085233. Indeed, the Ninth Circuit's decision has already spawned putative class action complaints that cite the broadened ATDS definition. *See, e.g.*, Pls.' Notice of Mot. and Mot. for Class Certification, *Pieterson v. Wells Fargo Bank, N.A.*, Nos. 3:17-cv-02306-EDL, 3:17-cv-03633-EDL, 2018 WL 6730035 (N.D. Cal. Nov. 16, 2018); Compl., *Barnes v. Wells Fargo Bank, N.A.*, No. 3:18-cv-06520-EDL, 2018 WL 5306629 (N.D. Cal. Oct. 25, 2018). Even political campaigns, which traditionally had been considered beyond the reach of the TCPA, have been impacted by the growing wave of *Marks*-inspired litigation. Bonnie Eslinger, *Beto for Texas Campaign Sued over Election Robotexts*, LAW360 (Oct. 22, 2018), https://www.law360.com/articles/1094601/beto-for-texas-campaign-sued-over-election-robotexts ("Syed's suit notes that the Ninth Circuit's September decision in Marks endorsed a broad definition of what constitutes an autodialer under the TCPA.").

sequential number generator.'" App., *infra*, 16a, 23a-24a. Based on these undisputed facts, Petitioner would indisputably prevail had this case been brought in the Third Circuit, which has adopted the competing construction (*see* pp. 9-10, *supra*).

This is not a case where the Court should sit idly awaiting further agency action. Since 1992, the FCC "has sought to address *** questions [about the definition of ATDS] in previous orders" to no avail, and its "most recent effort"—in the 2015 ruling at issue in *ACA International*—was found to "fall[] short of reasoned decisionmaking" when finally adjudicated three years later. 885 F.3d at 701. Regardless of when (or if) the FCC acts yet again, a pressing need remains for this Court to make clear—once and for all—that the TCPA forecloses the Ninth Circuit's manifestly atextual and unreasonably broad construction of ATDS.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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