ORAL ARGUMENT NOT YET SCHEDULED

No. 15-1211 (and consolidated cases)

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

ACA INTERNATIONAL ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents.

CAVALRY PORTFOLIO SERVICES, LLC ET AL.,
Intervenors for Petitioners.

ON PETITIONS FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

JOINT REPLY BRIEF FOR PETITIONERS ACA INTERNATIONAL, SIRIUS XM, PACE, SALESFORCE.COM, EXACTTARGET, CONSUMER BANKERS ASSOCIATION, U.S. CHAMBER OF COMMERCE, VIBES MEDIA, AND PORTFOLIO RECOVERY ASSOCIATES

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APA	Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*
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INTRODUCTION

Under the Commission's Order, any phone that has the capacity to store and dial numbers from a list is apparently an "autodialer," and any phone that could hypothetically be *altered* to do so has the requisite capacity. That test likely subjects every uninvited call or text to a wireless number from almost any modern phone—including smartphones—to a $500 penalty. Respondents cannot bring themselves to disagree, saying only that smartphones are not "necessarily" covered (Br. 34-35).

The purported authority for this newfound ban? The TCPA's prohibition against uninvited calls to police stations, hospital rooms, and wireless phones made with an "automatic telephone dialing system"—"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." 47 U.S.C. § 227(a)(1). In other words, the Commission transformed a narrow provision targeting automated, random-and-sequential dialers—a particularly troubling kind of dialing equipment that had clogged emergency lines, harassed hospital patients, and overwhelmed cellular networks—into a universal ban on far more calls, from devices that cannot even currently function that way.

The Order also makes it impossible for callers to *comply* with that ban by securing consent. Callers are strictly liable for calls unknowingly placed to

reassigned numbers. But given the sheer number of reassignments and the near-impossibility of sussing them out, such calls are admittedly unavoidable. And even if callers reach the right person, they still cannot trust the consent they have obtained. The Commission concluded that recipients may revoke consent through *any* "reasonable" means, not just designated channels. That choose-your-own-method-of-revocation regime prevents callers from efficiently tracking and honoring revocations. All told, the Order ensures that callers cannot avoid liability when making legitimate calls that Congress allowed: ones made without an ATDS or with prior consent.

Respondents counter by rewriting the statute, revising the Order, and ignoring Petitioners' arguments. But the TCPA is clear, and it clearly prohibits the Commission's boundless interpretation.

SUMMARY OF ARGUMENT

I. A. While Respondents accept that the Court has jurisdiction to review the Commission's interpretation of "capacity," they assert that the Court may not review its interpretations of the functions of an ATDS because earlier orders settled that issue. But those orders were ambiguous, which is why Petitioners asked for a declaratory ruling. Even if the earlier orders had been clear, this issue would still be before the Court because parties asked the Commission to initiate a rulemaking to revisit them, and the Order denied those requests.

B. The tools of statutory interpretation—and Respondents' own counterexamples—demonstrate that "capacity" refers to what equipment can do now, not what it might do if modified. Respondents fret over the administrability of the statute's test, but the distinction between using equipment and modifying it is far clearer than the Commission's "not-too-attenuated" alternative. Furthermore, Respondents' weak disclaimer that its test does not "necessarily" cover smartphones—like the logic of the Order—reveals the absurd, unconstitutional breadth of the Commission's interpretation.

Additionally, to fall within the TCPA, equipment must do more than dial from a list; it must have the capacity to store or to produce telephone numbers *using a random or sequential number generator*. Respondents disagree, but they cannot even settle on an interpretation of that phrase. Their suggestions also contravene basic rules of grammar and again threaten to sweep in every smartphone.

C. The Order's speech restrictions are impermissibly vague. Respondents cannot explain what makes a hypothetical modification too "attenuated" or why some kinds of software-controlled equipment (predictive dialers) qualify as ATDSs while others (smartphones) might not. Respondents do not even try to explain the Order's contradictory statements about the functions an ATDS must be able to perform.

II. A. The Order's interpretation of "called party" makes matters worse. The Commission concedes that diligent callers are liable for calls unintentionally placed to reassigned numbers under its interpretation. Although Respondents seek support for that result in the TCPA's text, they admit that "called party" is at best ambiguous. The Commission may not resolve ambiguities in profoundly unworkable (and thus unreasonable) ways, nor may it ignore the First Amendment's prohibition against strict liability for speech.

B. The Commission tried to cure its admittedly unworkable interpretation by giving callers one liability-free call. Respondents erroneously maintain that this arbitrary rule simply allocated risks between callers and call recipients. In fact, the Commission created the rule to give callers a reasonable opportunity to discover reassignments—an end it plainly fails to achieve. Moreover, contrary to Respondents' argument, the one-call rule is integral to the Commission's interpretation of "called party" and cannot be severed from it.

III. The Commission's revocation-of-consent rules are impracticable and unjustified. Recipients request automated calls and texts because they want information fast. Organizations cannot provide it if they must scour every channel through which someone might have "reasonably" revoked consent. Moreover, these burdens serve no purpose. The Commission essentially admitted that

consumers can handle standardized methods when it *required* consumers to use those methods to opt out of healthcare and banking messages.

ARGUMENT

I. THE COMMISSION'S INTERPRETATION OF ATDS IS UNLAWFUL

A. The Commission's Entire Interpretation Is Before The Court

Respondents assert (Br. 36-38) that, while the Commission's interpretation of "capacity" is reviewable, its related pronouncements about the functions that an ATDS must be able to perform are not. Respondents are wrong.

In addition to challenging a rule when promulgated, parties may secure judicial review in two ways. If the rule is unclear, parties may seek a clarifying declaratory ruling, *see* 5 U.S.C. § 554(e); 47 C.F.R. § 1.2(a), and then seek judicial review, *see, e.g.*, *TRT Telecomms. Corp. v. FCC*, 876 F.2d 134 (D.C. Cir. 1989). If the rule is clear, parties may "petition for a rulemaking to modify" it and seek review of the denial. *Biggerstaff v. FCC*, 511 F.3d 178, 184-85 (D.C. Cir. 2007); *Geller v. FCC*, 610 F.2d 973, 977-78 (D.C. Cir. 1979).

Petitioners did both. Some asked the Commission to clarify its earlier, ambiguous statements about the meaning of "capacity" and the functions that an ATDS must be able to perform. *E.g.*, TextMe, Inc. Pet. 7-13 (JA546-52); Glide Talk Ltd. Pet. 9-13 (JA255-59); PACE Pet. 7-8 (JA236-37). Others asked it to "initiate a rulemaking." ACA Int'l Pet. 1 (JA410); PACE Pet. 3 (JA232). In

response, the Order purportedly "clarif[ied]" the "meaning of 'capacity'" and "the definition of 'autodialer,'" while denying the requests for rulemaking. Order ¶¶165 & n.552, 167-87 (JA1222-24).

Respondents insist Petitioners could not seek a declaratory ruling on an ATDS's functions because the Commission's earlier orders settled that issue. But those orders were "hardly a model of clarity." *Dominguez v. Yahoo, Inc.*, 2015 WL 6405811, at *2 (3d Cir. Oct. 23, 2015) (unpub.). The 2003 Order, for example, set out at least three different accounts of an ATDS's functions: one mirroring the statute, one turning on the capacity "to dial [stored] numbers at random, in sequential order, or from a database," and one targeting "the capacity to dial without human intervention." 2003 Order ¶¶129, 131, 132. The *ACA Declaratory Ruling* parroted (but did not reconcile) these conflicting tests. ¶¶2 & n.6, 7 & n.23, 12-14. This mess explains why so many sought clarification and why one circuit has already read the Commission's old orders differently than Respondents do now. *See Dominguez*, 2015 WL 6405811, at *2. And it explains why, contrary to Respondents' revisionist account, the Order spent fifteen paragraphs "clarif[ying]" the definition of "autodialer." Order ¶165 n.552 (JA1222) (citing *id.* ¶¶10-24 (JA1154-61)).

Even if the Commission's earlier orders were clear, Petitioners secured review because ACA International and PACE expressly (but unsuccessfully) asked

for a rulemaking on this topic. *Id.* ¶¶164-65 & n.552 (JA1222). This Court has "repeatedly recognized" that parties may challenge rules "beyond the statutory period" this way. *Nat'l Min. Ass'n v. U.S. Dep't of Interior*, 70 F.3d 1345, 1350 (D.C. Cir. 1995).

B. ATDS Equipment Must Have The Present Ability To Store Or To Produce Telephone Numbers To Be Called, Using A Random Or Sequential Number Generator

1. "Capacity" means "present ability"

Respondents argue (Br. 29) that "capacity" includes "potential abilities"—what something might be able to do if modified or reprogrammed. But "capacity" refers to what something *can* do, not what it *could* do if altered. No one would advertise a laptop as having the capacity to store 500 GB because its 150 GB hard drive could be supplemented with a 350 GB external one. That remains true regardless of whether the modification is easy or hard, likely or unlikely. A pig lacks the capacity to fly because it doesn't have wings, not because the prospect of adding them is too "attenuated."

Respondents answer (Br. 27) that a "present ability" interpretation "add[s] a word" to the TCPA. Speaking of "present" capacity no more "adds a word" than clarifying that "spouse" means "current spouse"; it simply explains what "capacity" *means*.

Respondents next cherry-pick definitions (Br. 28). But agencies cannot look out over a crowd of definitions and pick their friend; the definition must "mak[e] … sense under the statute." *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418 (1992). Some of Respondents' definitions do not. For example, no one's phone has the "potential for growth, development, or accomplishment." Respondents' other definitions support Petitioners. "Capacity" does mean "potential or suitability for holding, storing, or accommodating," but a teaspoon cannot hold a tablespoon of sugar, even if it could be recast. "Capacity" also means "potentiality for production or use," but a standard printer lacks the potential to produce photocopies, even if it could be hooked up to a scanner.

Respondents' counterexamples (Br. 29-30) prove Petitioners' point. Take the question whether a browser has the capacity to play Flash videos even though it lacks the necessary plug-in. On Respondents' own account, the answer cannot be "yes," but rather, "[y]es, *if* you download the flash plug-in." That telltale "if" gives the game away: the browser lacks that capacity now, and would gain it only if modified. Next, Petitioners agree "a stadium's seating capacity [does not] rise[] and fall[] every time a person in a wheelchair enters and exits." Entering a stadium in a wheelchair does not *modify* the stadium; it *uses* it. So too for Respondents' factory. Producing more with additional workers does not alter the factory; it fully deploys it.

Finally, Respondents contend (Br. 30) Congress could have covered only existing abilities (rather than ones that arise upon modification) by banning equipment "which stores or produces numbers." But that hypothetical statute only covers equipment actually *used* to perform the specified functions, not equipment that *could* perform them (even if it has never done so). In any event, even if Respondents' hypothetical statute were coextensive with the TCPA, that would prove only that Congress could have said the same thing in two different ways. That does not mean the term Congress actually chose—here, "capacity"—should be given something other than its plain meaning.

Other interpretive tools compel the same conclusion. Congress provided that ATDS equipment must have 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)(A). If "capacity" included abilities that result only from modification, this limit would serve virtually no purpose because "[i]t's trivial to download an app, update software, or write a few lines of code that would modify a phone to dial random or sequential numbers." Pai Dissent 115 (JA1258). Similarly, the Commission's reading ignores the ATDS provision's targeted purpose, and absurdly and unconstitutionally covers every modern phone. Pet. Br. 25-29; *infra* 10-12.

Respondents claim (Br. 31) a "present ability" approach would lead to line-drawing problems because "activating the autodialer functionality will always require some degree of 'modification'" (such as "pressing a button" or "replacing the manufacturer's software"). But pressing a button does not "modify" equipment (it uses it), and replacing software does not "use" equipment (it modifies it). And even if there are hard cases, they pale in comparison to those augured by the Commission's test. How many lines of code before a reprogramming becomes "too theoretical"? How many new screws before adding a part is "too attenuated"?

Respondents similarly worry (Br. 32) consumers cannot easily determine which functionalities existed at the time of the call, making it difficult to plead violations. But consumers often cannot tell anything by ear about the telephone that called them: how it actually operated, how it could have been operated, or how it might have been reprogrammed to operate. This pleading difficulty comes from the *statute*; Respondents cannot lawfully "solve" it by covering every modern phone.

When Respondents finally address the limits of their "potential functionalities" approach (Br. 34-35), they cannot deny that it covers hundreds of millions of smartphones. Respondents instead claim that the test does not "necessarily" cover them, and anyone sued would not be "preclude[d] … from arguing" that smartphones do not qualify. These concessions are remarkable. The

First Amendment protects against the "inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable." *Citizens United v. FEC*, 558 U.S. 310, 327 (2010). Yet Respondents would condemn every modern telephone user to such a process. It is absurd to think that Congress intended to subject hundreds of millions of people to the prospect of $500-a-call litigation, even if they would not "necessarily" lose.[1]

Respondents' half-hearted disclaimers also defy the Order's logic. The Commission might as well have been talking about smartphones when it said (of predictive dialers) that "software-controlled equipment is designed to be flexible, both in terms of features that can be activated or de-activated and in terms of features that can be added … through software changes or updates." Order ¶16 n.63 (JA1157). The Order did not doubt that smartphones have the same capacity.

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[1] Respondents justify their hesitance (Br. 34) by claiming that there was "no factual record … describing the capabilities and limitations of smartphones." But everyone knows that smartphones are "minicomputers that also happen to have the capacity to be used as a telephone," *Riley v. California*, 134 S. Ct. 2473, 2489 (2014), and it is "trivial" to modify one to autodial or group text, Pai Dissent 115; *see also, e.g.*, GroupMe, Inc. Pet. 10 & n.21 (JA175) (describing an app that lets "someone else maintain your phone lists of important calls to make," syncs when you get in the car, and "start[s] dialing without [you] ever touching the phone again"). Respondents also assert (Br. 34) that no one has yet been *sued* for using a smartphone atypically, but the Commission's test would reach even "typical" uses.

Id. ¶21 (JA1159-60). That is why courts—and until now the United States—have rejected a "potential functionalities" approach. Pet. Br. 25 n.5 (collecting cases).[2]

Finally, even if Respondents could devise a "potential functionalities" test that might spare some modern phones, it would still violate the First Amendment. Time-place-and-manner restrictions must target "no more than the exact source of the 'evil' [they] seek to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). Even assuming the ATDS provision protects against *all* unrequested automated calls—its talk of random-or-sequential-number generators notwithstanding—the Order goes far beyond that "evil." It targets not just automated calls or even calls from equipment capable of making automated calls, but equipment that, if modified, *would be* capable of making them. Respondents proudly counter (Br. 74) that "[e]very court to consider" the constitutionality of the TCPA's restrictions has upheld them. But some of these cases involved other parts of the statute. *See Moser v. FCC*, 46 F.3d 970 (9th Cir. 1995) (prerecorded messages to residential

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[2] Respondents claim (Br. 36) the United States never took a position on "capacity." That is incorrect. *See* Br. of United States 11 n.7, *De Los Santos v. Millward Brown, Inc.*, 2014 WL 2938605 (S.D. Fla. June 30, 2014). There, the United States supported its claim that smartphones do not qualify by approvingly citing *Hunt v. 21st Mortgage Corp.*, 2013 WL 5230061 (N.D. Ala. Sept. 17, 2013). It described *Hunt* as "concluding that [the] device … had to have [the] present capacity … to store or produce and call numbers from a number generator."

lines). And none addressed the Commission's limitless, what-could-it-be-*modified*-to-do interpretation of "capacity."[3]

2. ATDSs must be able to do more than dial from a list

An ATDS must "ha[ve] the capacity … to store or produce telephone numbers to be called, using a random or sequential number generator; and … to dial such numbers." 47 U.S.C. § 227(a)(1). Pursuant to the rules of grammar, the phrase "using a random or sequential number generator" modifies the verbs "store" and "produce." An *automatic* dialer, therefore, must be able to generate random or sequential numbers, to use that random or sequential number generator to store or to produce numbers to be called, and to dial those numbers, all without human intervention.

Respondents contend (Br. 36) that the ability to dial from a prepared list of numbers—indeed, the ability to be *reprogrammed* to dial from a list—suffices. To explain why, they claim (Br. 40) the phrase "using a random or sequential number generator" "cannot modify '*store*.'" But if a dialer automatically stored every

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[3] Respondents assert (Br. 72) that Petitioners "do not directly challenge the TCPA's constitutionality," but raise only avoidance arguments. Petitioners repeatedly claimed (and still claim) that the TCPA is unconstitutional if it means what the Commission says. *E.g.*, Pet. Br. 25, 40. If the Court upholds the Commission's interpretation, it must invalidate the statute. *See Ruggiero v. FCC*, 317 F.3d 239, 241 (D.C. Cir. 2003) (en banc) (entertaining constitutional challenge to statute on petition for review).

telephone number that its random or sequential number generator spit out, it *would* have the capacity to "store telephone numbers ... using a random or sequential number generator." And even if this reading may be somewhat awkward, it is the only one the statute will bear. "[T]he statutory definition is explicit" that equipment must have the capacity "to store *or* to produce the randomly or sequentially generated numbers," even though it may be "unclear how a number can be *stored*" in that way. *Dominguez*, 2015 WL 6405811, at *3 n.1.

More importantly, Respondents' proposed alternatives—none of which Respondents endorse, even though the Commission supposedly settled this issue a decade ago—are indefensible. Respondents first suggest that the number-generator requirement modifies only "produce," not "store." That reading is a crime against grammar. Where a modifier follows a series of parallel verbs ("store or produce") and a shared object ("telephone numbers"), the modifier applies to each verb in the list, not just one of them. Antonin Scalia & Bryan A. Garner, *Reading Law* 147 (2012) (series-qualifier canon). That reading also produces absurd results. If the capacity to "store telephone numbers" were enough, every phone with a contact list would be an ATDS.[4]

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[4] Respondents also suggest (Br. 38) that any telephone with the capacity to store a list necessarily has the capacity to store numbers using a random or sequential number generator, because the caller could always put randomly or

Respondents alternatively suggest (Br. 40-41) that the number-generator requirement modifies the verb "called," not the verbs "store or produce." That reading overlooks the comma in the phrase "store or produce telephone numbers to be called, using a random or sequential number generator." The point of such a comma is to indicate that the modifier applies to an earlier portion of the sentence ("store or produce"), not the verb immediately preceding the comma ("called"). *See United States v. Pritchett*, 470 F.2d 455, 459 (D.C. Cir. 1972). That reading also ignores the ATDS definition's structure, which includes one subsection about "stor[ing]" and "produc[ing]" telephone numbers and another about "dial[ing] such numbers." If Congress had intended the number-generator requirement to apply to the method of calling rather than the method of storage or production, it would have placed the requirement in the latter subsection, not the former.

Moving past the text, Respondents contend (Br. 44) that Congress had "no sensible reason" to restrict equipment that has the capacity to generate random or sequential numbers but not equipment that dials from a list. Not true. The lawmakers who enacted the TCPA understood that random and sequential dialers cause unique problems. These inherently indiscriminate machines often reached

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(continued…)

sequentially generated phone numbers on its calling list. This theory, too, would cover any phone with a contact list.

"lines reserved for [specialized] purposes," including hospitals, police stations, and fire departments. S. Rep. No. 102-178, at 2 (1991); *see Telemarketing/Privacy Issues* 28 (statement of Rep. Unsoeld) (recounting "horror stor[y]" involving a "man in the hospital bed in the intensive care ward" who received an automated call "offering him a trip to Hawaii"); *id.* at 111 (statement of Michael Frawley) (calls to doctors' pagers and organ-transplant waitlist participants). Indiscriminate dialing also saddled cell phone and pager users with hefty charges, all for calls placed without any reason to believe that recipients would be interested. *See id.* at 28.

Sequential dialing caused additional problems. It overwhelmed *all* of the telephone lines in a hospital, police station, or fire department. H.R. Rep. No. 102-317, at 10 (1991). And because cellular carriers "obtain[ed] large blocks of consecutive phone numbers," sequential dialers "saturate[d] mobile facilities, thereby blocking the provision of service to the public." *Telemarketing/Privacy Issues* 113 (statement of Michael Frawley).

Dialing from a prepared list poses none of these problems. Those who prepare lists "ha[ve] an incentive to direct calls to those likely to be interested," *Unsolicited Telephone Calls*, 77 FCC 2d 1023, 1037 (1980); nobody deliberately calls police stations to sell time-shares or sends texts to random strangers to say the cable guy is coming. And dialers that rely on handpicked lists do not knock out

blocks of consecutive numbers or saturate entire networks. These differences explain why Congress wrote the targeted statute it wrote and why the Commission previously believed that the ATDS restrictions "clearly do not apply" where "the numbers called are not generated in a random or sequential fashion." 1992 Order ¶47; Br. 14 n.5 (conceding its flip-flop).

Respondents further worry (Br. 45-49) that consumers will face a flood of unwanted calls to wireless numbers unless the TCPA covers equipment that can dial from a list. But it is Congress's job to "update the statute" if necessary, not the Commission's. *United States v. Papagno*, 639 F.3d 1093, 1101 (D.C. Cir. 2011). Anyway, wireless subscribers can always sign up for the Do-Not-Call Registry. *See* 2003 Order ¶33. That is the same protection Congress offered to residential subscribers who do not wish to receive ATDS calls (as well as live-operator calls dialed from a list). *See* 47 U.S.C. § 227(b)(1)(B), (c).

Finally, Respondents claim (Br. 49) that Congress has implicitly ratified the Commission's interpretation. Such arguments generally "deserve little weight in the interpretive process." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). They deserve even less here. To be ratified, an agency's interpretation must have been "unequivocally established." *United States v. Mendoza-Lopez*, 481 U.S. 828, 836 (1987). But Respondents *still* cannot say what "using a random or sequential number generator" means. Even if

the Commission's dial-from-a-list interpretation had been settled, Congress "cannot by its silence ratify an administrative interpretation … contrary to the plain meaning of the Act." *Ashton v. Pierce*, 716 F.2d 56, 63 (D.C. Cir. 1983).

In any event, Respondents cannot identify (as they must) "overwhelming evidence" that Congress approved the agency's position on this "precise issue." *SWANCC v. Army Corps of Eng'rs*, 531 U.S. 159, 169 n.5 (2001). Respondents cite Congress's rejection of proposed amendments in 2011, but that proposal redefined "ATDS" to cover only *actual use* rather than *capacity*, exempted calls "made for a commercial purpose," and preempted most state regulation. H.R. 3035 (112th Cong. 2011). Members of Congress could have opposed the amendments for any of these reasons; that is why "[f]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation." *SWANCC*, 531 U.S. at 169-70.

Even less persuasive is Respondents' observation (Br. 50) that Congress enacted restrictions on "automatic dialing or 'robocall' equipment" in a rider attached to the Middle Class Tax Relief and Job Creation Act of 2012. Respondents provide no evidence that *Congress* intended "automatic dialing … equipment" to mean the same thing as "ATDS"; *the Commission* interpreted both terms in tandem "to provide regulatory consistency in complying with" the two statutes. *Public Safety Answering Point Registry* ¶29. And there is no reason to

believe that Congress incorporated the *Commission*'s definition of ATDS rather than the *TCPA*'s.

Congress also did not ratify the Commission's interpretation when it exempted calls to collect government debts from section 227(b)(1)(A)'s restrictions. Respondents claim (Br. 51) this exemption achieves nothing on Petitioners' view, because no one calls random or sequential numbers to collect debts. Not quite. Equipment qualifies as an ATDS if it has the *capacity* to perform the requisite functions. So even if the Government's debt collectors do not make random or sequential calls, their equipment might have the capacity to do so. In addition, section 227(b)(1)(A) restricts the use of "an artificial or prerecorded voice," which debt collectors regularly use. In all events, the most plausible explanation for this exemption is not that Congress agreed with the Commission's uncertain position, but rather that, regardless of how the uncertainty got resolved, the Government could collect its debts as it wished.

C. The Commission's Interpretation Is Unlawfully Vague

Both due process and the Administrative Procedure Act forbid agency interpretations that offer no meaningful guidance, particularly where speech is concerned. *See FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012); *USPS v. Postal Regulatory Comm'n*, 785 F.3d 740, 754 (D.C. Cir. 2015) (setting aside "alter a basic characteristic" standard); *Tripoli Rocketry Ass'n v.*

BATF, 437 F.3d 75 (D.C. Cir. 2006) ("much faster" standard). Despite this requirement, the Commission tersely stated that "capacity" includes what equipment could do if modified in non-"theoretical," non-"attenuated" ways.

Rather than explain the factors used to apply this "test," Respondents insist (Br. 33-35) that the Commission need not "comprehensively map" the devices that fall on each side of its line. Perhaps, but the Commission must explain *what the line is*—what makes a potential modification too "theoretical" or "attenuated"? The Order does not even attempt to answer that question, and its examples—rotary phones out, predictive dialers in, smartphones in limbo—only make things murkier. By treating predictive dialers and smartphones differently, the Commission contradicted itself on the central question raised by its interpretation: how to determine the "potential functionalities" of software-controlled devices. Neither the Order nor Respondents' brief sheds any light on that key issue.

Respondents insist (Br. 52) that the Order survives unless it is "vague in all of its applications." Not so. Even where speech is *not* at stake, the Supreme Court has squarely held that a provision cannot survive a vagueness challenge "merely because there is some conduct that clearly falls within [its] grasp." *Johnson v. United States*, 135 S. Ct. 2551, 2560-61 (2015). And where speech *is* at stake, courts routinely "invalidate *all* enforcement" of a law that "punishes a substantial

amount of protected free speech," even if it has some clear, "plainly legitimate" applications. *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003).

In any event, Respondents exaggerate (Br. 52-53) the number of clear applications. For example, out of an abundance of caution, many callers have abandoned predictive dialers and instead use other computerized systems to assist in calling cellular numbers. This equipment stores numbers from lists; an agent previews each number on the screen and initiates each call (by clicking a button or typing each number on a keypad). Petitioners cannot tell whether such "professional dialing equipment" (Resp. Br. 32) has the requisite "capacity" in the Commission's view. Petitioners also don't know whether it matters that these devices are not configured to do anything "using a random or sequential number generator." Respondents tellingly omit that phrase from their account of what the Order supposedly makes clear because, in four paragraphs, the Order put forth four distinct tests for the functions that an ATDS must be able to perform. Order ¶¶12-15 (JA1155-57). One even has its own sub-contradiction: the absence of human intervention is an "element" to be considered "case-by-case," *id.* ¶17 (JA1157-58), but is apparently not a requirement for TCPA liability, *id.* ¶20 (JA1159).

Respondents ignore these contradictions. For example, while the Order mentioned both the ability to *store* numbers and to *dial* numbers randomly, in sequence, or from a list, Respondents now refuse (Br. 40-43) to say which test

applies. Similarly, while the Order expressly *rejected* a request to "clarify that a dialer is not an autodialer unless it has the capacity to dial without human intervention," Order ¶20 (JA1159), Respondents revive that test (Br. 43, 53) in an attempt to save their dial-from-a-list reading from absurdity.[5] The Commission's lawyers cannot cure the Order's incoherence by rewriting it here.

II. THE ORDER'S PROVISIONS REGARDING REASSIGNED NUMBERS ARE UNLAWFUL

A. The Commission Misinterpreted "Called Party"

Despite securing consent and taking precaution after precaution, callers often unwittingly reach one of the 37 million wireless numbers that are reassigned annually. The Commission would hold those callers liable. Congress did not intend that result, and to avoid it, "called party" must refer to a call's expected recipient, not the number's current subscriber or customary user. This interpretation tracks the natural meaning of "called party," protects the consent defense, guarantees that those who wish to receive messages may do so, and avoids unconstitutionally punishing innocent callers. Pet. Br. 41-47.

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[5] Respondents paper over this problem by contending that the Commission merely rejected "one party's request to adopt *a test* for human intervention" (Br. 43 n.9 (emphasis added)). Not true. PACE sought clarification that the absence of human intervention is a prerequisite to liability. Order ¶20 (JA1159); PACE Pet. 12-13 (JA241-42).

Respondents contend (Br. 55) that an expected-recipient understanding of "called party" clashes with the TCPA's text and context. But if someone calls his uncle and reaches a stranger to whom the number has been reassigned, it would be perfectly natural to say that he called his uncle but inadvertently reached somebody else—in other words, the uncle remains the "called party." Respondents also rely (Br. 54-55) on cases reading "called party" to mean "current subscriber" and the variable use of "called party" elsewhere in the TCPA. Those courts did not consider the First Amendment, nor did they benefit from the Commission's finding that callers cannot avoid reaching reassigned numbers. Indeed, the Commission's interpretation of "called party" as "current subscriber *or customary user*," Order ¶73 (JA1183-84), belies its insistence that the Order simply tracks past, consistent usage: no circuit court has adopted that interpretation, and no other TCPA provision suggests it.

Ultimately, this linguistic sparring is beside the point. Even if "expected recipient" were not the only possible meaning of "called party," the Commission acknowledged that the term is at least "ambiguous." *Id.* ¶74 (JA1184). The Commission therefore had a duty—"[e]ven under *Chevron*'s deferential framework"—to interpret it in a way that "produces a substantive effect that is compatible with the rest of the law." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014). Only Petitioners' reading does so; the Commission's renders

the statute's explicit protection for invited calls worthless by holding innocent callers liable for calls to reassigned numbers.

Respondents downplay the burdens imposed by this regime (Br. 18, 58), claiming that callers have ways to learn of many (though not all) reassignments and so to "limit their liability." Respondents dramatically exaggerate the effectiveness of such tools. For example, Respondents urge callers (Br. 58) to use "simple steps" such as "interactive opt-out mechanisms" and "training customer service agents to update records during … calls." But many of these steps are irrelevant to texting technologies, and callers who take them frequently reach reassigned numbers anyway—and face class-action lawsuits for doing so. *See* DIRECTV, LLC Comments 6-10 (JA521-25); Abercrombie & Fitch Co. and Hollister Co. Ex Parte 2 (JA982).

Similarly, Respondents trumpet (Br. 58) "commercial databases … that claim to detect more than 80 percent of all reassignments." A compliance-oriented caller cannot bank on 80 percent, and the Commission never endorses the accuracy of that claim anyway. Indeed, the service itself claims only to "mitigate" the risk: it does not include all numbers and, in light of holes in the underlying data, it can only estimate the likelihood that a given number is "associated with" a consumer. Neustar Ex Parte 1-2 (JA914-15); Wells Fargo Ex Parte 7-8 (JA663-64).

Respondents likewise speculate (Br. 58) that the Order might prompt the development of new tools to discover reassignments. Agencies cannot foist unworkable regimes upon regulated parties on the theory that somebody might come along and clean up their mess. Respondents provide no reason to believe that such solutions are likely anyway; companies have faced reassigned-number lawsuits for years, and no one has yet devised one. Respondents further insist (Br. 60) that callers can simply "employ[] live operators and mak[e] calls manually" to avoid liability. But the Commission's test for "capacity" turns on the equipment's "potential functionalities," not its actual use. Because so many modern phones qualify as ATDSs under that test, even manual calls or texts risk liability. In any event, given our vast, fast-paced economy, callers who need to reach millions of people cannot manually dial before each and every call, nor can those who send time-sensitive text alerts wait around for confirmation.

By holding callers strictly liable for their speech, the Order also violates callers' constitutional rights. *See* Pet. Br. 46-47. Respondents do not bother to address this concern. Instead, they appear to claim (Br. 59, 76) that callers will rarely reach reassigned numbers and that, even if they do, strict liability will not deter anyone from speaking. These unsupported claims are false. *See* Pet. Br. 44-45. More importantly, they are irrelevant. Holding callers strictly liable would violate the First Amendment even if they would be affected only infrequently.

Finally, Respondents insist (Br. 57) that callers must bear these burdens because, without strict liability, consumers might otherwise face a "barrage of telemarketing [calls]" from callers who "[do] not honor requests of new subscribers ... to cease calls to the [reassigned] number." Such callers, however, would remain liable under an expected-recipient interpretation of "called party," because once a consumer informs the caller of the reassignment, the caller necessarily expects to reach the new subscriber. Respondents' argument that "*someone* must bear[] the risk" of reassigned-number calls (Br. 60) fares no better. Callers cannot eliminate the risk of reaching reassigned numbers; indeed, they remain liable even where a recipient acts *deliberately* to increase the number of mistaken calls. Order ¶95 (JA1194-95). Recipients, by contrast, need only identify themselves to stop the calls. In any event, the First Amendment is clear: where one of two sides must shoulder a risk, "obvious[ly]" "the side whose constitutional rights are not at stake" must carry it. *Knox v. SEIU*, 132 S. Ct. 2277, 2295 (2012). The First Amendment protects speakers from strict liability even when they destroy reputations. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974). It surely protects them when they unintentionally make someone's phone ring.

B. The One-Call Rule Cannot Salvage The Order's Interpretation Of "Called Party"

In the end, the Commission *agreed* that its interpretation of "called party" would, standing alone, conflict with the statute and impose unfair liability on callers. "[T]he term 'prior express consent' requires that the caller have either [actual or constructive knowledge]" of the reassignment, Order ¶82 n.290 (JA1187), and it would be "unworkable" to hold callers "liable for every call made after reassignment," *id.* ¶88 (JA1192). Accordingly, the Commission gave callers one free call to a reassigned number "as an opportunity for the caller to obtain constructive or actual knowledge of the reassignment." *Id.* ¶82 (JA1187-88). Whatever happens on that call, callers are liable for subsequent calls to reassigned numbers because they are deemed to have "constructive knowledge" of the reassignment. *Id.* ¶91 (JA1193).

But calls frequently go unanswered, texts unreturned—generally for reasons that have nothing to do with reassignment. No doubt a free call will occasionally unearth a reassignment. (Broken clocks and all that.) But that hardly means the Commission has provided what it promised: a "*reasonable* opportunity … to learn of the reassignment." *Id.* ¶90 (JA1192) (emphasis added); *see id.* ¶82 (JA1187-88) (an opportunity "to obtain constructive or actual knowledge of the reassignment").

Respondents appear to concede as much. They admit (Br. 18) that the one free call does not guarantee "actual notice," and they refuse to defend (or even

mention) the Commission's absurd conclusion that one call provides constructive knowledge to the caller, its subsidiaries, and its affiliates. Instead, Respondents claim (Br. 61) that the Commission never had the goal of "protect[ing] callers from all risk of liability." That, however, is not what the Order says. To be sure, the Commission purported to "balance" the interests of callers and those they mistakenly reach, and it refused to require "actual knowledge" before holding a caller liable. Order ¶88 (JA1192). But it stated—over and again—that callers must "have an opportunity to take *reasonable* steps to discover reassignments and cease … calling *before liability attaches*." *Id.* ¶89 (JA1192) (emphasis added); *see also id.* ¶¶82 n.290, 88, 90-92 (JA1187, 1192-93). That is what the one-call rule concededly fails to provide. Indeed, the rule's "constructive knowledge" framework *might* even harm *consumers* if callers, in an attempt to truly mitigate liability, stop making any future calls—even to consenting consumers whose numbers have not in fact been reassigned—once one call goes unanswered.

Perhaps realizing the capriciousness of the rule, Respondents further suggest (Br. 60) that "[n]othing in the Commission's interpretation of 'called party' depends" on it. But the Order expressly tied the one-call rule to the "key statutory term 'called party.'" Order ¶92 (JA1193). It even admitted that its interpretation would be "unworkable" without the exception, *id.* ¶88 (JA1192), because callers "need … a *reasonable* opportunity to discover a reassignment," *id.* ¶92 (JA1193)

(emphasis added). Since one part of the agency's interpretation of these terms is invalid, "the entire definition … must fall." *Addison v. Holly Hill Fruit Prods.*, 322 U.S. 607, 618 (1944). At the least, there is "substantial doubt" that the Commission would have adopted its interpretation of "called party" standing alone, making severance inappropriate. *Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441, 1447 (D.C. Cir. 1994).

III. THE COMMISSION'S TREATMENT OF REVOCATION OF CONSENT IS UNLAWFUL

An agency's position is arbitrary and capricious if it makes compliance impracticable, *see Almay, Inc. v. Califano*, 569 F.2d 674, 682 (D.C. Cir. 1977), or imposes disproportionate burdens, *see Michigan v. EPA*, 135 S. Ct. 2699, 2709 (2015). The Commission's revocation-of-consent regime does both. By refusing to establish (or allow callers to establish) standardized revocation procedures, the Commission made it all but impossible for callers to process revocations—thereby encouraging them to stop calls altogether, even to those who continue to consent—while offering no additional protection to consumers.[6]

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[6] Petitioners argued (Pet. Br. 55, 61) that the Commission apparently prohibited parties from agreeing upon a means of revocation. The Court should take Respondents at their word (Br. 64 n.16) that the Order "d[oes] not address" that issue and hold that private contracts governing revocation remain intact.

The Commission again downplays these burdens. It insists (Br. 66) that callers can have "live operators" sift through all the communications that they receive in order to sniff out attempted revocations. But speakers—schools, utilities, charities, and businesses—cannot hire "live operators" to review every response. The point of these communications, after all, is to provide quick information to those who request it.

Respondents further contend (Br. 66) that callers will be able to comply because they need only honor "reasonable" requests, a "familiar concept in the law." Respondents miss the point. The *cumulative* burden of devising means to honor one recipient's use of one procedure (say, speaking to a third-party vendor working with the caller), a second recipient's use of another, and a third recipient's use of yet another quickly becomes unmanageable, even if each might be deemed reasonable in isolation. Respondents' related, unsupported contention (Br. 67) that recipients are unlikely to use unusual revocation methods is false. *Cf.* Br. of *Amicus* Commc'ns Innovators 17-20 (describing the lengths to which plaintiffs' lawyers go in TCPA litigation). Indeed, if the Commission truly believed it, it would not have required callers to accept non-standard revocations in the first place.

Tellingly, the Commission never claims that these burdens translate into significant consumer benefits. Quite the contrary. The Commission *itself* dictated

the "exclusive means by which consumers may opt out" of banking and healthcare calls. Order ¶¶138, 147 (JA1210-11, 1214-15). Would it do that if consumers benefit—enough to justify the significant costs and threat of liability to callers—from the ability to use other, unspecified-but-"reasonable" means?

Unable to point to any material harm to consumers from standardized procedures, Respondents assert (Br. 67) that consumers must be free to revoke in any reasonable way because the Commission could not foresee "the infinite variety of conditions which [consumers] must face." Again, that inability did not stop the Commission from establishing standardized revocation procedures for banking and healthcare calls, nor Congress from prescribing specific revocation procedures in the FDCPA. And even if the Commission lacks such foresight, callers do not: they regularly interact with those whom they contact and know well what their members, customers, and clients need.

CONCLUSION

The petitions for review should be granted, and the challenged provisions of the Order vacated.

Dated: February 24, 2016

Respectfully submitted,

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CIRCUIT RULE 32(a)(2) ATTESTATION

In accordance with D.C. Circuit Rule 32(a)(2), I hereby attest that all other parties on whose behalf this brief is filed consent to its filing.

Dated: February 24, 2016

/s/ Shay Dvoretzky
Shay Dvoretzky

CERTIFICATE OF COMPLIANCE

This brief complies with the Court's Order of October 13, 2015, because it contains 6,948 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1), as determined by the word-counting feature of Microsoft Word.

Dated: February 24, 2016

/s/ Shay Dvoretzky
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CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2016, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system, which will send notification of the filing to all parties or their counsel of record.

/s/ Shay Dvoretzky
Shay Dvoretzky