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Unplanned Obsolescence: Interpreting the Automatic Telephone Dialing System After the Smartphone Epoch

Walter Allison
University of Michigan Law School

NOTE

UNPLANNED OBSOLESCENCE: INTERPRETING THE AUTOMATIC TELEPHONE DIALING SYSTEM AFTER THE SMARTPHONE EPOCH

Walter Allison*

Technology regulations succeed or fail based upon their ability to regulate an idea. Constant innovation forces legislators to draft statutes aimed at prohibiting the idea of a device, rather than a specific device itself, because new devices with new capacities emerge every day. The Telephone Consumer Protection Act (TCPA) is a federal statute that imposes liability based on the idea of an automatic telephone dialing system (ATDS). But the statute's definition of the device is ambiguous. The FCC struggles to coherently apply the definition to new technologies, and courts interpret the definition inconsistently. Federal circuit courts have split over these inconsistent interpretations. This Note explains the problems associated with the TCPA's definition and outlines a solution that ensures uniform and workable enforcement of federal rules.

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INTRODUCTION

A child sustains a life-threatening injury at home.[1] Frantic, the child's mother rushes to the telephone to dial 911 and summon an ambulance.[2] But she can't place the call.[3] Her phone line is tied up by an autodialer, a computerized device used by telemarketers to call potential customers.[4] The autodialer has seized her phone line and it won't disconnect, even if she hangs up.[5] While her child suffers, the mother realizes she is incapable of calling for help until the autodialer's recording has completed its message and relinquishes the line.[6] The mother's realization of helplessness will later be described as "sheer terror."[7]

That was thirty years ago. The child lived, but the problem persisted.[8] The early 1990s were plagued with automated calls that intruded into every facet of American life.[9] Some automated calls were merely a nuisance.[10] Oth-

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     1.   *See* 137 CONG. REC. 35,305–06 (Nov. 26, 1991) (statement of Rep. Roukema).

     2.   *See id.*

     3.   *See id.*

     4.   *See id.*

     5.   *See id.*

     6.   *See id.*

     7.   *Id.* at 35,305.

     8.   *Id.* at 35,306.

     9.   *See* Marks v. Crunch San Diego, LLC, 904 F.3d 1041, 1044 (9th Cir. 2018) ("The volume of automated telemarketing calls was not only an annoyance but also posed dangers to public safety."); 137 CONG. REC. 35,305–06 (Nov. 26, 1991) (statement of Rep. Roukema) ("Today, we unfortunatley [sic] find that automatic dialing recorded message players are being used in record numbers . . . [t]his practice is an unwarranted invasion of privacy, and it can be

ers threatened public safety. Automatic dialing systems unwittingly called firefighters, police officers, and hospital emergency lines, seizing the phone line and preventing actual emergency calls from getting through.[11]

In 1991, Congress enacted the Telephone Consumer Protection Act (TCPA), which defined devices that qualified as "automatic telephone dialing systems" (ATDSs), regulated their use, and empowered the Federal Communications Commission (FCC) to promulgate rules and regulations to implement the TCPA.[12] But since the TCPA's enactment, interpreting the ATDS definition has frustrated the FCC and courts alike. Applying the definition to emerging technologies has proved especially difficult, as smartphones and cloud-based communication apps have challenged preconceived notions of the type of device that constitutes an automatic telephone dialing system.

Definitional uncertainty can be devastating for defendants. The TCPA created a private right of action, permitting persons or entities to recover $500 in damages for each call placed in violation of the TCPA's regulations and treble damages if the court finds that the defendant willfully or knowingly violated the statute.[13] There is no cap on damages. Theoretically, they are infinite.[14] Thus, to insulate themselves from potential liability, organizations must be certain which devices qualify as ATDSs. Unfortunately, the FCC has not provided certainty. In a series of increasingly byzantine orders and declaratory rulings, the Commission revised its interpretation of the ATDS definition to account for technological innovations.[15] In the process, the FCC inadvertently raised new issues, fueling uncertainty over which types of devices qualified as ATDSs.[16] In 2015, the Commission issued an interpretation encompassing devices that had the "potential ability" to perform

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dangerous and life-threatening. This Congress can no longer stand by the wayside and allow telephones to become a potential health hazard.").

10.   *See* H.R. REP. NO. 102-317, at 9 (1991) (discussing findings that over two-thirds of Americans found telephone solicitations "very annoying").

11.   137 CONG. REC. 35,305 (Nov. 26, 1991).

12.   Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (codified as amended at 47 U.S.C. § 227); *see also* ACA Int'l v. FCC, 885 F.3d 687 (D.C. Cir. 2018).

13.   47 U.S.C. § 227(b)(3).

14.   *See* Creative Montessori Learning Ctrs. v. Ashford Gear LLC, 662 F.3d 913, 915–16 (7th Cir. 2011) ("[T]he [TCPA], with its draconian penalties . . . imposes potentially very heavy penalties on its violators—many of whom . . . have never heard of this obscure statute.").

15.   *See, e.g.*, Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 FCC Rcd. 14,014, 14,093 para. 133 (2003) [hereinafter 2003 Order] (applying the ATDS prohibition to predictive dialers).

16.   Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 30 FCC Rcd. 7961, 7976–77 para. 21 (2015) [hereinafter 2015 Declaratory Ruling] (discussing whether the Commission's interpretation of the ATDS definition applies to smartphones).

ATDS functions.[17] Finding the interpretation to be too expansive, the D.C. Circuit invalidated the FCC's 2015 Declaratory Ruling as it pertained to which devices qualified as ATDSs.[18] That decision perpetuated the uncertainty, eventually resulting in a split between the Third and Ninth Circuits.[19] Currently, there is no consensus on the ATDS definition.

This Note advocates for a new FCC declaratory ruling that decisively interprets "automatic telephone dialing system." The FCC should interpret the ATDS definition as: equipment which has the current ability to (1) store telephone numbers to be called, *or* produce telephone numbers to be called using a random or sequential number generator, and (2) dial such telephone numbers. The Commission should interpret the definition so as to not apply to ordinary smartphone usage. Part I explains the history of the TCPA, including the current ATDS definition and the FCC's history of applying and interpreting that definition. Part II analyzes how the FCC's incoherent interpretations facilitated a circuit split over the definition's necessary elements. Part III argues that the FCC should resolve the circuit split by declaratory ruling and provide meaningful guidance to affected parties by issuing a coherent and comprehensive interpretation of the ATDS definition.

I.   THE ORIGINS OF A DILEMMA

Interpreting the ATDS definition poses a dilemma. Different canons of interpretation yield vastly different understandings of which devices are—and which devices are not—ATDSs, but each choice inevitably conflicts with some aspect of the definition's text or the statute's regulatory scheme. These conflicts make interpreting the definition a case study in choosing which problems to live with. This Part provides context for understanding those problems. Section I.A explores the TCPA's legislative history, examining the statutory definition of "automatic telephone dialing system" (also called an "autodialer") and the penalties for TCPA violations. Section I.B analyzes the FCC's 2003 Order, which determined that the ATDS definition encompassed predictive dialers. Section I.C examines the Commission's 2015 Declaratory Ruling, highlighting the Ruling's incoherence and breadth.

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17.   *Id.* at 7972–76 paras. 10–19 (interpreting "capacity" to include "potential ability"); *id.* at 7974 para. 15 (suggesting that an ATDS must have the capacity to generate and then dial telephone numbers, randomly or sequentially); *see also ACA Int'l*, 885 F.3d at 693–94 ("[The FCC] construed a device's 'capacity' to encompass its 'potential functionalities' with modifications such as software changes.").

18.   *ACA Int'l*, 885 F.3d at 703.

19.   *Compare* Dominguez v. Yahoo, Inc., 894 F.3d 116, 119 (3d Cir. 2018), *with* Marks v. Crunch San Diego, LLC, 904 F.3d 1041, 1052 n.8 (9th Cir. 2018).

A.   *The TCPA and the ATDS Definition*

In 1990, U.S. telemarketing sales exceeded China's GDP.[20] At $435 billion, this staggering sum represented a four-fold increase from 1984.[21] That increase was driven by technology: computers spearheaded 82 percent of telemarketing campaigns.[22] In particular, automatic dialing systems were used en masse to "make millions of calls every day."[23]

The cost of this success was America's privacy. Every day, more than eighteen million Americans were called by a telemarketer.[24] Ill-timed automated calls proved an unwelcome, yet constant, interruption in daily life.[25] Because telemarketers programmed their autodialers indiscriminately, often using the dialing equipment to create and dial ten-digit telephone numbers randomly or sequentially,[26] calls were inadvertently placed to emergency services including hospitals, firefighters, and police.[27] Moreover, autodialers would "seize" a recipient's telephone line and not release the line when the recipient hung up, but only after the telemarketer had completed their message.[28] This practice would tie up emergency service lines for extended periods.[29] The never-ending intrusions prompted one senator to declare automated calls "the scourge of modern civilization."[30]

Finding that American citizens were "outraged over the proliferation of intrusive, nuisance calls to their homes," Congress enacted the TCPA in 1991 to regulate autodialers.[31] The TCPA defines "automatic telephone dial-

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20.   *See, e.g.*, Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(4), 105 Stat. 2394, 2394 ("Total United States sales generated through telemarketing amounted to $435,000,000,000 in 1990 . . . ."); *China*, WORLD BANK, https://data.worldbank.org/country/china [https://perma.cc/3VJX-9RY8] (noting China's 1990 GDP at $360.9 billion).

21.   § 2(4), 105 Stat. at 2394.

22.   H.R. REP. NO. 102-317, at 6 (1991) ("Today, computers assist an estimated 82 percent of America's businesses conducting telemarketng [sic] campaigns. And computer assistance goes far beyond dialing the telephone number . . . [t]he entire sales to service marketing function has been automated.").

23.   *Id.* at 10.

24.   § 2(3), 105 Stat. at 2394.

25.   *See* 137 CONG. REC. S16,205 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings).

26.   *See* 2003 Order, 18 FCC Rcd. 14,014, 14,092 para. 132 (2003) ("In the past, telemarketers may have used dialing equipment to create and dial 10-digit telephone numbers arbitrarily.").

27.   *See, e.g.*, 137 CONG. REC. 35,305–06 (Nov. 26, 1991) (statement of Rep. Roukema); H.R. REP. NO. 102-317, at 10 (1991); H.R. REP. NO. 101-633, at 3 (1990).

28.   H.R. REP. NO. 101-633, at 3 (1990) ("The Committee record includes examples of [autodialers] calling and seizing the telephone lines of public emergency services, dangerously preventing those lines from being utilized to receive calls from those needing emergency services.").

29.   *Id.*

30.   137 CONG. REC. S16,205 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings).

31.   Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(3), 105 Stat. 2394, 2394 (codified as amended at 47 U.S.C. § 227).

ing system" as: "[E]quipment 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."[32] The TCPA prohibited autodialers, making any call placed using an ATDS unlawful, with three exceptions: calls made with the prior express consent of the called party, calls made for emergency purposes, and calls made solely to collect a debt owed to or guaranteed by the United States.[33] "Call," as used within the TCPA, also applies to text messages placed to wireless numbers.[34]

To enforce this prohibition, the TCPA provides a private right of action for a person unlawfully contacted by an ATDS.[35] The action authorizes $500 in damages for each violation, or up to $1,500 if the violation is knowing or willful.[36] In class actions or cases with multiple violations, damages can add up fast, potentially resulting in astronomical liability.[37] For example, in 2017, an advertising company that ran a one-week telemarketing campaign was found liable for $1.6 billion before getting the damages award reduced on due process grounds in a post-trial motion.[38]

Such dramatic consequences should only attach to precise and predictable regulatory schemes. But the TCPA's application has been neither precise nor predictable because different interpretations have left organizations without a clear understanding of which devices qualify as ATDSs under the statutory definition. On the contrary:

> The TCPA has become fertile ground for . . . lawsuits because class action lawyers are often rewarded with quick settlements, even in cases without any merit, simply because litigation uncertainty and the potential financial exposure resulting from a bad decision are too great a risk for a company to bear . . . . [T]he major driving force behind the . . . rise of TCPA lawsuits is the legal ambiguity surrounding how the language of the TCPA itself can be squared with today's telephone software and equipment.[39]

Understanding how we got here from a seemingly innocuous definition requires a brief review of the FCC's efforts to interpret the ATDS definition

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32.   47 U.S.C. § 227(a)(1).

33.   *Id.* § 227(b)(1)(A). Though outside the scope of this Note, the debt-collection exemption has been declared unconstitutional by the Ninth Circuit. *See* Duguid v. Facebook, Inc., 926 F.3d 1146, 1149 (9th Cir. 2019).

34.   2003 Order, 18 FCC Rcd. 14,014, 14,115 para. 165 (2003).

35.   47 U.S.C. § 227(b)(3).

36.   *Id.*

37.   *See, e.g.*, Paul F. Corcoran, Marc J. Rachman & David S. Greenberg, *The Telephone Consumer Protection Act: Privacy Legislation Gone Awry?*, INTELL. PROP. & TECH. L.J., Oct. 2014, at 9 (discussing how Bank of America faced potential liability exceeding $35 billion).

38.   Golan v. FreeEats.com, Inc., 930 F.3d 950, 956–57 (8th Cir. 2019).

39.   Monica Desai, Ryan King, Maria Wolvin & Maxine Martin, *A TCPA for the 21st Century: Why TCPA Lawsuits Are on the Rise and What the FCC Should Do About It*, INT'L J. MOBILE MKTG., Summer 2013, at 65, 75–76.

and the problems encountered when applying the definition to emerging technologies.

B.   *Applying the ATDS Definition to New Technology in the FCC's 2003 Order*

By 2003, the telemarketing industry had evolved. The single largest direct marketing system in the United States, telemarketers placed approximately 104 million calls every single day and generated over $600 billion in sales per year.[40] The industry's growth was spurred by technological innovation.[41] In the twelve years following the TCPA's enactment, the telemarketing industry had largely transitioned to a new kind of automatic dialing system, the predictive dialer.[42] Predictive dialers improved efficiency by eliminating the downtime between telemarketing calls.[43] While a sales agent was still on a call with a customer, the predictive dialer would start dialing another phone number from a list of prospective customers so that, by the time the sales agent finished their call, the dialer had already reached another potential customer to transfer to the agent.[44] This timing function, achieved via algorithm,[45] was the predictive dialer's "principal feature."[46]

Given predictive dialers' prominent role within the telemarketing industry, the FCC sought comment on whether it should regulate them as automatic telephone dialing systems under the TCPA.[47] Controversy ensued. Because predictive dialers operate by dialing telephone numbers off of a list of numbers,[48] whether predictive dialers satisfy the ATDS definition depends on the definition's necessary elements.

If a "random or sequential number generator" is a necessary element, such that a device must possess a number generator to satisfy the ATDS def-

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40.   2003 Order, 18 FCC Rcd. 14,014, 14,021–22 para. 8 (2003).

41.   *Id.* at 14,054 para. 66 ("The number of daily calls has increased five fold (to an estimated 104 million), due in part to the use of new technologies, such as predictive dialers.").

42.   *Id.* at 14,090 para. 129 ("[M]ore sophisticated dialing systems, such as predictive dialers . . . are now widely used by telemarketers to increase productivity."); Am. Teleservices Ass'n, Comment Letter on Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, at 113 (Dec. 09, 2002), https://ecfsapi.fcc.gov/file/6513398307.pdf [https://perma.cc/S949-D9DG] ("The evolution of the teleservices industry has progressed far beyond the point where placing random or sequential calls would be cost-effective or profitable.").

43.   Am. Teleservices Ass'n, *supra* note 42, at 110.

44.   *Id.*

45.   *Id.* ("These benefits accrue because a predictive dialer uses intelligent algorithms to determine the number of calls it must dial . . . . The dialer bases its prediction of the number of calls that need to be made on the number of available telephone lines, the number of sales agents on duty, the average number of calls that do not reach a live person . . . and the average length of each call once connected.").

46.   2003 Order, 18 FCC Rcd. at 14,091 para. 131.

47.   *Id.* at 14,090 para. 129.

48.   Am. Teleservices Ass'n, *supra* note 42, at 110.

inition, then predictive dialers are not autodialers because they do not possess number generators. But if the generator is a nonessential element, such that some devices without a number generator may still be considered autodialers, then predictive dialers could qualify as ATDSs.

Generally, the comments were split between anti- and proregulation camps. Telemarketers argued against regulation. They contended that a random or sequential number generator is a necessary element of the ATDS definition based on the statutory text's plain meaning.[49] Telemarketers commented that predictive dialers were not autodialers because they rely on telephone numbers from lists rather than generators that produce random or sequential telephone numbers.[50] Proregulation consumer groups argued that this distinction, between devices that dialed off of lists and devices that dialed randomly, missed the point.[51] Adopting a purposivist approach, they contended that "for the recipient of the call, there is no difference whether the number is dialed at random or from a database of numbers."[52]

The FCC sided with consumer groups, though it is not entirely clear how it arrived at that conclusion.[53] The Commission atextually declared that the "basic function" of an ATDS is "to dial numbers without human intervention."[54] Then, the Commission interpreted the purpose of the definition's text—the "capacity to store or produce telephone numbers to be called"—as meaning that the "prohibition on autodialed calls [should] not be circumvented."[55] And, with little more than that, predictive dialers were considered autodialers.

Even if one agrees that predictive dialers should be regulated under the TCPA, the methods by which the FCC got there are troubling. The FCC's explanation meanders erratically, weaving between textual, historical, and atextual analysis without ever providing an explanation of each factor's relevance or importance.[56] The Commission's determination that predictive dialers qualify as autodialers meant that "using a random or sequential number generator" was a nonessential element of the ATDS definition because

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49.   Recall that the TCPA's definition is "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).

50.   Am. Teleservices Ass'n, *supra* note 42, at 113; *see* 2003 Order, 18 FCC Rcd. at 14,090 para. 130 ("Most industry members . . . argue that predictive dialers do not fall within the statutory definition . . . because [they] do not [generate and then] dial numbers 'randomly or sequentially.'").

51.   *See* 2003 Order, 18 FCC Rcd. at 14,090 para. 130.

52.   *Id.* at 14,091 para. 130.

53.   In 2015, the Third Circuit would later refer to the FCC's orders on this issue as "hardly a model of clarity." Dominguez v. Yahoo, Inc., 629 F. App'x 369, 372 (3d Cir. 2015).

54.   2003 Order, 18 FCC Rcd. at 14,092 para. 132.

55.   *Id.* at 14,092–93 para. 133 (quoting 47 U.S.C. § 227(a)(1)).

56.   *See, e.g., id.* at 14,092–93 paras. 132–33 (discussing the statute's text before transitioning to a discussion of Congress's intent, then human intervention, then considering the volume of calls autodialers place).

predictive dialers did not use such generators; indeed, some predictive dial-ers could not even be modified to do so.[57] But the 2003 Order did not ex-plain this departure from the statutory text or address its implications. The failure to coherently articulate a method for applying the ATDS definition to new technologies frustrated organizations' ability to predict what types of devices may qualify as ATDSs.

C. *The FCC's 2015 ATDS Interpretation Creates "Potential" Problems*

The FCC's incoherent interpretation led to a surge of TCPA lawsuits,[58] and unending technological innovation demanded clarification about which types of devices qualified as ATDSs.[59] Businesses could now reach consum-ers via smartphone app or dial phone numbers using cloud-based plat-forms.[60] Amidst a deluge of rulemaking petitions, the FCC issued a declaratory ruling in 2015 to clarify its ATDS interpretation.[61]

To bring predictive dialers within the statute's ambit, the Commission used the word "capacity" in the ATDS definition as a textual anchor point, determining that the best interpretation of "capacity" was as "potential abil-ity."[62] This interpretation equated potential ability with modification and meant that equipment that lacked the ability to generate random or sequen-tial numbers could nevertheless be considered an ATDS if it could be modi-fied to do so.[63] Because some predictive dialers could gain the ability to generate random or sequential numbers through software, they satisfied the ATDS definition.[64]

This interpretation clarified nothing. The Commission did not specify the degree of modification required for a device to have the "potential abil-ity" to be an ATDS.[65] Instead, it declared that "there must be more than a theoretical potential" of modification.[66] The Commission illustrated this standard by using the rotary-dial telephone as an example of a device "too attenuated" to be considered a potential autodialer because it was merely

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57.   *Id.* at 14,091 para. 131 n.432.

58.   *See generally* Desai et al., *supra* note 39, at 75–76 (attributing the rise in lawsuits to the TCPA's legal ambiguity); 2015 Declaratory Ruling, 30 FCC Rcd. 7961, 7970 para. 6 (2015) (noting that TCPA lawsuits were up 70 percent in 2013).

59.   2015 Declaratory Ruling, 30 FCC Rcd. at 7970 para. 7 ("Dialing options can now be cloud-based, and available via smartphone apps. Calling and texting consumers *en masse* has never been easier or less expensive . . . . The rise in complaints, litigation, and petitions may also be attributable to the skyrocketing growth of mobile phones . . . ." (footnotes omitted)).

60.   *Id.*

61.   *Id.* ("[T]he Commission received 27 petitions for declaratory ruling or rulemaking that raised TCPA questions about autodialed calls . . . .").

62.   *See id.* at 7975 paras. 15, 19.

63.   *Id.* at para. 18.

64.   *Id.* at 7974–75.

65.   *See id.* at 7975 paras. 18–19.

66.   *Id.*

theoretically possible to modify a rotary phone to such extremes, not *more than* theoretically possible.[67] Yet it was unclear whether any nonrotary devices could also pass the "theoretical potential" test. This prompted a dissenting Commissioner to exclaim that the interpretation was "so expansive that the FCC has to use a rotary phone as an example of a technology that would not be covered."[68] As in the 2003 Order, the FCC invoked atextual factors—the necessary degree of human intervention and the volume of calls a device can place—but did not clarify those factors' relevance or importance; in fact, the Commission specifically refused to clarify its human intervention stance.[69]

Furthermore, the Declaratory Ruling itself is contradictory. Per the Ruling, a random or sequential number generator is an *essential* definitional element because devices must have either the present or potential ability to use a random or sequential number generator to be considered an ATDS.[70] But the Commission also reaffirmed its 2003 Order, which determined that the generator was a *nonessential* element because predictive dialers without the present or even potential ability to use generators nevertheless satisfied the ATDS definition.[71] In practice, the 2015 Declaratory Ruling meant that any communications device that could be modified to perform autodialer functions could be declared an ATDS at the FCC's discretion. Such a broad interpretation would encompass nearly all modern communication devices, rendering almost every American citizen liable for damages under the TCPA.

II.   Circuits Split over the ATDS Definition's Necessary Elements

The D.C. Circuit invalidated the Commission's 2015 Declaratory Ruling in *ACA International v. FCC*.[72] The 2018 decision, however, did not an-

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67.   *Id.*

68.   *Id.* at 8088 (Comm'r O'Rielly, dissenting) ("Equipment that could conceivably function as an autodialer *in the future* counts as an autodialer *today* . . . . That is like the FAA regulating vehicles because with enough modifications cars and trucks could fly, and then using a skateboard as an example of a vehicle that does not meet the definition.").

69.   *Id.* at 7973 para. 14 (majority opinion) (citing predictive dialers' ability to dial "large numbers" of calls as evidence that they satisfy the ATDS definition); *id.* at 7976 para. 20 ("We also reject . . . [to clarify] that a dialer is not an autodialer unless it has the capacity to dial numbers without human intervention."); ACA Int'l v. FCC, 885 F.3d 687, 703 (D.C. Cir. 2018) ("According to the Commission, then, the 'basic function' of an autodialer is to dial numbers without human intervention, but a device might still qualify as an autodialer even if it cannot dial numbers without human intervention.").

70.   2015 Declaratory Ruling, 30 FCC Rcd. at 7974 para. 15 ("[A]utodialers need only have the 'capacity' to dial random and sequential numbers.").

71.   *Id.* at 7972 para. 10 (reaffirming its 2003 Order); 2003 Order, 18 FCC Rcd. 14,014, 14093, 14,091 para. 131 n.432 (2003) (noting that some predictive dialers are not capable of being modified for sequential or random dialing); *ACA Int'l*, 885 F.3d at 702 ("By reaffirming [the 2003 Order], the Commission supported the notion that a device can be considered an autodialer even if it has no capacity itself to generate random or sequential numbers . . . .").

72.   *ACA Int'l*, 885 F.3d 687.

nounce a governing ATDS interpretation. The resultant confusion led to contradictory interpretations, culminating in a split between the Third and Ninth Circuits. Now, the TCPA is applied inconsistently across jurisdictions, creating uncertainty for businesses concerned about class action liability.[73] Section II.A discusses *ACA International*'s holding. Section II.B then analyzes *ACA International*'s ramifications, focusing on the Third Circuit's *Dominguez v. Yahoo, Inc.* decision. Finally, Section III.C examines the other half of the circuit split, the Ninth Circuit's *Marks v. Crunch San Diego, LLC* decision.

A. ACA International v. FCC: *Setting Aside the FCC's Interpretation Sets the Stage for Circuit Split*

ACA International was a response to the FCC's 2015 Declaratory Ruling.[74] Entities regulated by the TCPA challenged the breadth of the ATDS definition, hoping to secure a narrower interpretation.[75] The decision focused on two aspects of the 2015 Ruling: the potential ability–capacity interpretation[76] and the ATDS definition's necessary elements.[77]

Reviewing the capacity interpretation first, the court determined that "[i]f a device's 'capacity' includes functions that could be added through app downloads," then the ATDS prohibition would assume an "eye-popping sweep."[78] As any smartphone could potentially download autodialing software, judging a device by its potential capacity renders every smartphone an autodialer.[79] Because the statute prohibits "any call"[80] placed with an ATDS, not just automatic calls, the court noted that "*any* uninvited call or message

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73.   Amy Mattson, *Unsolicited Text Messages Drive Circuit Split*, A.B.A. (July 2, 2019), https://www.americanbar.org/groups/litigation/publications/litigation-news/top-stories/2019/ /unsolicited-text-messages-drive-circuit-split/ [https://perma.cc/WX5U-W2Y6] ("'The current landscape makes it more difficult for plaintiffs' and defendants' counsel alike to understand what is and is not an ATDS[]'. . . . '[B]usinesses should be very careful about engaging in tele-marketing until after the law is well settled on the matter.'"); Michael O'Rielly, FCC Comm'r, Remarks Before the ACA International Washington Insights Conference (May 16, 2019), https://docs.fcc.gov/public/attachments/DOC-357496A1.docx   [https://perma.cc/4UBN-URQZ] ("It's a sad truth that case law has interpreted ATDS so broadly and unpredictably that practically all modern dialing and texting technologies face the threat of legal sanction . . . .").

74.   *ACA Int'l*, 885 F.3d at 691.

75.   *Id.* at 693–94, 696; Amended Petition for Review at 3, *ACA Int'l*, 885 F.3d 687 (No. 15-1211).

76.   *See supra* Section I.C (discussing the FCC's 2015 Declaratory Ruling and potential capacity interpretation).

77.   *ACA Int'l*, 885 F.3d at 695 (laying out the "two questions" of capacity and "functions"); *see also id.* at 701 (explaining "functions" as "requisite features," specifically the necessity of a number generator).

78.   *Id.* at 697.

79.   *Id.*

80.   47 U.S.C. § 227(b)(1) ("It shall be unlawful . . . to make *any* call . . . using any automatic telephone dialing system . . . ." (emphasis added)).

from [a smartphone] is a statutory violation" under the potential-capacity interpretation.[81] Therefore, any smartphone caller would be liable for a $500 penalty for every single text message or phone call placed without the prior express consent of the recipient.[82]

The D.C. Circuit considered this outcome "untenable."[83] The court reasoned that finding routine smartphone communications to violate federal law was several times removed from the TCPA's scope.[84] Determining that the FCC's potential-capacity interpretation lay "considerably beyond the agency's zone of delegated authority,"[85] the D.C. Circuit held it to be unreasonably expansive.[86]

The court then turned to whether a number generator is a necessary element of the ATDS definition.[87] Reviewing the Ruling's discussion of devices that qualify as ATDSs, the court noted that the FCC "gives no clear answer" as to whether a device must possess the ability to generate random or sequential numbers, "and in fact seems to give both answers."[88] This, on top of the FCC's potential-capacity interpretation, left affected parties "in a significant fog"[89] when assessing whether a device qualified as an ATDS. Ultimately, the D.C. Circuit held that the FCC's interpretation failed to evince reasoned decisionmaking because of its internal contradiction, then set aside the Commission's interpretation of which devices satisfy the ATDS definition.[90]

ACA International was a pyrrhic victory for regulated entities. By setting aside the potential-capacity interpretation, the D.C. Circuit limited the Commission's interpretive options for "capacity," but not so much as to give regulated entities the narrower definition they had hoped for. Similarly, the court noted that "[i]t might be permissible for the Commission to adopt either interpretation" of whether a number generator is a necessary element, so long as it does not "espouse both competing interpretations in the same order."[91] That hardly settled the debate over the ATDS definition's necessary elements.

In the end, by offering no guidance on what *does* constitute an ATDS, the D.C. Circuit's holding satisfied almost no one. Businesses still cannot be sure when they are exposing themselves to class action liability under the

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81. *ACA Int'l*, 885 F.3d at 697.

82. *Id.*

83. *Id.* at 698.

84. *Id.* ("But a several-fold gulf between congressional findings and a statute's suggested reach can call into doubt the permissibility of the interpretation in consideration.").

85. *Id.*

86. *Id.* at 700.

87. *Id.* at 703.

88. *Id.* at 702–03.

89. *Id.* at 703.

90. *Id.* at 695.

91. *Id.* at 703.

TCPA.[92] In hindsight, *ACA International*'s key takeaways are: (1) an interpretation of the ATDS definition encompassing ordinary smartphone usage is unreasonably expansive and (2) future FCC interpretations must be consistent with regard to the definition's necessary elements. Without a controlling FCC interpretation, litigants vied to fill the vacuum by trying their own interpretive theories in court.

B. *Dominguez v. Yahoo, Inc.: Interpreting ATDS Post-ACA International*

Like businesses, courts also confronted uncertainty after *ACA International.* In part, that was because courts were (and still are) confused about whether *ACA International* overturned all FCC rulings interpreting the ATDS definition or just the 2015 Ruling.[93] Some courts seized the opportunity to reinterpret the ATDS definition entirely.[94] Others looked back to precedent.[95]

In *Dominguez v. Yahoo, Inc.*, the Third Circuit looked backward. The case centered on Bill Dominguez, who had purchased a cell phone that came with a reassigned telephone number.[96] The number's previous owner had subscribed to email notifications provided by Yahoo, which texted the phone number whenever an email was sent to the previous owner's Yahoo account.[97] Dominguez received 27,809 text messages over seventeen months.[98] That is approximately fifty-four unsolicited messages per day.[99] Dominguez took many reasonable steps to stop the messages. He replied with "stop" and "help," then contacted customer service.[100] After Yahoo offered no solution,

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92.   *See* O'Rielly, *supra* note 73 ("Unfortunately, despite [the *ACA International* decision], the 'fog of uncertainty' . . . remains thicker than ever . . . . I've had countless businesses come into my office and tell me that it's now too risky to call their customers and provide them with critical and time-sensitive information. These are not entities randomly soliciting strangers . . . but providing data security breach notifications, prescription refill reminders, bill due date notices, school closure alerts, and notices of flight schedule changes.").

93.   *See, e.g.*, Gadelhak v. AT&T Servs., Inc., No. 17-cv-01559, 2019 WL 1429346, at *4 (N.D. Ill. Mar. 29, 2019) (holding that *ACA International* invalidated the 2003, 2008, and 2015 FCC rulings defining ATDS), *aff'd*, 950 F.3d 458 (7th Cir. 2020); Ammons v. Ally Fin., Inc., 326 F. Supp. 3d 578, 587 (M.D. Tenn. 2018) (holding that *ACA International* only invalidated the 2015 Declaratory Ruling); *see also* Lucas v. DeSilva Auto. Servs., No. 1:16-cv-790, 2018 WL 2020744, at *8 n.9 (S.D. Ohio May 1, 2018) (stating that *ACA International* only "vacated several aspects of" the 2015 FCC Ruling).

94.   Marks v. Crunch San Diego, LLC, 904 F.3d 1041, 1049–50 (9th Cir. 2018) (interpreting the ATDS definition "anew").

95.   Dominguez v. Yahoo, Inc., 894 F.3d 116, 119 (3d Cir. 2018) ("In light of the D.C. Circuit's holding, we interpret the statutory definition of an autodialer as we did prior to the issuance of 2015 Declaratory Ruling.").

96.   Dominguez v. Yahoo, Inc., 629 F. App'x 369, 370 (3d Cir. 2015).

97.   *Id.*

98.   *Id.* at 371.

99.   *Id.* at 370.

100.   *Id.* at 370–71.

he contacted the FCC.[101] He eventually organized and hosted a joint call with Yahoo's customer service and a representative from the FCC.[102] Nothing worked.[103] So, Dominguez filed a class action lawsuit against Yahoo under the TCPA.[104]

The Third Circuit, relying on its previous holdings interpreting the ATDS definition, held that the device Yahoo used to message Dominguez did not qualify as an ATDS.[105] Adopting the position that a random or sequential number generator is a necessary element of the ATDS definition, the court reviewed the evidence and determined that the device was not capable of randomly or sequentially generating telephone numbers.[106] Instead, the device had merely dialed numbers off a list that had been "inputted into its system."[107]

This result was not inevitable. The Third Circuit had heard this case before in 2015 when Dominguez appealed a 2014 district court summary judgment in favor of Yahoo, but because the FCC's 2015 Declaratory Ruling was published while the appeal was pending, the Third Circuit vacated the district court's summary judgment and remanded the case for consideration in light of the FCC's Ruling.[108] By the time the case returned in 2018, the Third Circuit was examining the problem post-*ACA International*. When previously hearing the case, the Third Circuit raised a critical interpretive issue with the ATDS definition.[109] Plainly read, the definition would require that the device "store . . . telephone numbers to be called, using a random or sequential number generator."[110] But number generators do not store information.[111] This befuddled the Third Circuit. The court expressed its confusion in a footnote: "We acknowledge that it is unclear how a number can be *stored* (as opposed to *produced*) using a 'random or sequential number generator.[']"[112] Rather than resolving the implications of this observation—implications which may have undermined the court's necessary-element interpretation—the Third Circuit simply did not address the issue when announcing its final holding.

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101.   *Id.* at 371.

102.   *Id.*

103.   *Id.*

104.   *Id.*

105.   Dominguez v. Yahoo, Inc., 894 F.3d 116, 119, 121 (3d Cir. 2018).

106.   *Id.* at 121.

107.   *Id.*

108.   *Dominguez*, 629 F. App'x at 373; *see also Dominguez*, 894 F.3d at 118.

109.   *Dominguez*, 629 F. App'x at 373 n.1.

110.   *See id.* at 373.

111.   *See infra* note 153 and accompanying text.

112.   *Dominguez*, 629 F. App'x at 373 n.1.

C.   Marks v. Crunch San Diego, LLC*: Circuit Split*

The Ninth Circuit's decision in *Marks v. Crunch San Diego, LLC* rejected *Dominguez*.[113] *Marks* involved a dispute between a gym, Crunch Fitness, and one of its members, Jordan Marks.[114] Crunch used a web-based marketing platform that automatically sent text messages to designated recipients by dialing off of a stored list of telephone numbers; it did not use a number generator.[115] Over the course of eleven months, Crunch sent three text messages to Marks's cell phone.[116] Marks was charged incoming tolls for each text message.[117] He filed a class action under the TCPA, lost summary judgment in the district court, and then appealed.[118]

The Ninth Circuit interpreted *ACA International* to have invalidated all prior FCC interpretations of the ATDS definition.[119] Accordingly, the court interpreted the ATDS definition "anew."[120] Beginning with the definition's text, the court narrowed the issue to whether a device must dial numbers produced by a random or sequential number generator to satisfy the ATDS definition, or if a device constitutes an ATDS by merely dialing numbers off of a stored list.[121]

Marks argued that, because a number generator is not a storage device, a device cannot use a number generator to store telephone numbers.[122] Therefore, the definition should be read as "'equipment which has the capacity . . . to [i] store [telephone numbers to be called] *or* [ii] produce telephone numbers to be called, using a random or sequential number generator.'"[123] Such a reading would interpret "number generator" as a nonessential element of the ATDS definition because some devices would qualify as an ATDS even though they do not possess or use a number generator.

Crunch instead relied on a grammatical approach, arguing that because of comma placement, "using a random or sequential number generator" modified both "store" and "produce."[124] Ergo, "number generator" was a

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113.   *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 n.8 (9th Cir. 2018).

114.   *Id.* at 1048.

115.   *Id.*

116.   *Id.*

117.   *Id.*

118.   *Id.* at 1048–49.

119.   *Id.* at 1049 ("Because the D.C. Circuit vacated the FCC's interpretation of what sort of device qualified as an ATDS, only the statutory definition of ATDS as set forth by Congress in 1991 remains.").

120.   *Id.* at 1049–1050.

121.   *Id.*

122.   *Id.*

123.   *Id.* at 1050 (alterations in original) (emphasis added) (quoting from Marks's brief).

124.   *Id.* at 1050–51.

necessary element of the ATDS definition.[125] Because Crunch's device lacked such a generator, it did not qualify as an ATDS.[126]

The court believed that neither party's reading offered a satisfactory interpretation of the statutory language.[127] The Ninth Circuit concluded that the ATDS definition was facially ambiguous because the statutory text was capable of more than one reasonable interpretation.[128] The court noted that the D.C. Circuit in *ACA International* "apparently agreed" because it had stated that either a nonessential-number-generator interpretation, or an essential-number-generator interpretation, "might be permissible."[129] Turning to other interpretive canons,[130] the Ninth Circuit reasoned that the ATDS definition, within the context of the whole act[131] and the TCPA's legislative history, encompassed devices without a number generator.[132] With its holding, the Ninth Circuit issued a new ATDS interpretation: "[E]quipment 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."[133]

The *Marks* court declined to follow the Third Circuit's "unreasoned assumption" that a number generator was a necessary element of the ATDS definition.[134] The court noted that the Third Circuit had encountered the number generator interpretive problem—that a plain reading suggests an ATDS can do the impossible and store information using a number generator—but "merely avoided" it.[135] Because the Third Circuit had failed to resolve the issue, the Ninth Circuit declared *Dominguez* "unpersuasive."[136] While the battles across jurisdictions exposed the ATDS definition to some much-needed percolation, *Marks* nevertheless exemplified an ugly truth: the TCPA's regulatory scheme was no longer nationally uniform.

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125.   *Id.* at 1051.

126.   *See id.*

127.   *Id.* at 1050 ("Marks and Crunch offer competing interpretations of the language of § 227(a)(1)(A), but both parties fail to make sense of the statutory language without reading additional words into the statute."); *see also supra* Section I.A (diagramming the ATDS definition language to illustrate the plain language's competing interpretations).

128.   *Marks*, 904 F.3d at 1051.

129.   *Id.* (quoting ACA Int'l v. FCC, 885 F.3d 687, 702–03 (D.C. Cir. 2018)).

130.   *Id.*

131.   *See infra* Section III.B.1 (discussing the TCPA's provisos as it relates to the ATDS definition's use of the word "store").

132.   *Marks*, 904 F.3d at 1052.

133.   *Id.* (emphasis added).

134.   *Id.* at 1052 n.8 (citing Dominguez v. Yahoo, Inc., 894 F.3d 116, 120 (3d Cir. 2018)).

135.   *Id.*

136.   *Id.*

III. THE FCC SHOULD RESOLVE THE CIRCUIT SPLIT BY DECLARATORY
RULING

The FCC should issue a new ATDS interpretation by declaratory ruling to provide certainty to consumers, businesses, and the judiciary. Section III.A examines declaratory rulings as a mechanism for resolving the circuit split, arguing that while the Commission is responsible for breaking the TCPA's regulatory scheme, it nevertheless possesses the most efficient method for fixing it. Section III.B proposes a new ATDS interpretation that solves both the hazards inherent to the Commission's previous interpretations and the deficiencies identified by the D.C. Circuit in *ACA International*.

A. *The FCC's Ability to Resolve the Circuit Split*

The FCC is most culpable for the ATDS dilemma. The Commission is responsible for implementing the TCPA's ATDS prohibition,[137] but the FCC abdicated this responsibility by issuing incoherent interpretations,[138] which facilitated the circuit split.[139] Now, the ATDS definition is fragmenting across jurisdictions, including those outside the circuit split. District courts are scrambling to apply the statutory text and case law, generating competing interpretations with each new holding.[140]

The competing interpretations mean that even a theoretically perfect judicial ATDS interpretation is an insufficient mechanism for achieving uniformity unless issued by the Supreme Court. Any interpretation is meaningless if it is not applied by all courts. The courts' divergent approaches all but ensure that a non-Supreme Court interpretation would just get lost in the echo chamber—ignored in deference to that jurisdiction's precedent. Thus, a lasting solution must not only provide a coherent ATDS interpretation but also rein in courts by binding every circuit.

The FCC can provide such a solution. Under *Brand X*, a court's prior interpretation of a statute supersedes a subsequent agency interpretation otherwise entitled to *Chevron* deference only if the court's prior decision held the statute to be unambiguous and leave no room for agency discretion.[141] Neither *Dominguez* nor *Marks* determined the TCPA's ATDS definition to

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137.	47 U.S.C. § 227(b)(2) ("The Commission shall prescribe regulations to implement the requirements of this subsection.").

138.	*E.g.*, 2015 Declaratory Ruling, 30 FCC Rcd. 7961 (2015) (issuing contradictory ATDS interpretations); *see supra* Sections I.B, I.C.

139.	*See supra* Part II.

140.	*See supra* note 93 and accompanying text (discussing district courts' inconsistent interpretations of *ACA International*'s holding and varying approaches toward applying the TCPA's ATDS prohibition).

141.	Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–84 (2005).

be unambiguous.[142] Thus, if the Commission issues a valid declaratory ruling reinterpreting the ATDS definition, that ruling would bind the Third and Ninth Circuits.

Applying the *Brand X* doctrine via declaratory ruling is the best mechanism available for resolving the circuit split. First, it is efficient. A declaratory ruling eliminates repetitious claims across circuits, thereby preserving judicial resources.[143] Second, a declaratory ruling ensures that "enforcement of federal rules is uniform and workable,"[144] rather than erratic and based on jurisdiction. And third, it allows the FCC to execute its congressionally mandated duty to the American people.[145]

B.   *A Twenty-First Century Interpretation of Automatic Telephone Dialing System*

The FCC should interpret the ATDS definition as: equipment which has the current ability to (1) store telephone numbers to be called, *or* produce telephone numbers to be called using a random or sequential number generator, and (2) dial such telephone numbers. The Commission should interpret the definition so as to not apply to ordinary smartphone usage. This position endorses the Ninth Circuit's *Marks* interpretation of "store," while recognizing that the *Marks* interpretation creates a smartphone-encompassing problem that is best resolved through declaratory ruling. Operating through declaratory ruling also allows the FCC to simultaneously reinterpret "capacity."

This interpretation is the best reading of the statute. It provides certainty to interested parties by answering the storage and capacity interpretive questions.[146] Furthermore, eliminating both the potential-capacity proposition and the TCPA's applicability to ordinary smartphone usage means that this interpretation is valid under *ACA International*.

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142.   Marks v. Crunch San Diego, LLC, 904 F.3d 1041, 1051 (9th Cir. 2018) (holding that the ATDS definition is facially ambiguous); Dominguez v. Yahoo, Inc., 894 F.3d 116 (3d Cir. 2018) (issuing a holding without addressing the TCPA's ambiguity).

143.   *See* Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1109–10 (1987) (discussing the unique strains circuit splits place on administrative agencies and "a bureaucratic structure Congress created specifically to encourage national uniformity in law administration").

144.   *Cf.* DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES 259 (5th ed. 2019) (referencing a similar virtue of universal injunctions).

145.   47 U.S.C. § 227(b)(2) ("The Commission shall prescribe regulations to implement the requirements of this subsection.").

146.   *See supra* Section I.A (outlining the interpretive difficulties inherent to the ATDS definition's plain text).

1.   To Store . . .

Ultimately, circuits split over the necessary elements of the ATDS definition.[147] Whether a device must be able to randomly or sequentially generate telephone numbers to satisfy the ATDS definition, or if it is sufficient that the device can merely store telephone numbers and dial them, is crucial to the TCPA's regulatory scheme. Technological innovations within the teleservices industry have made it more efficient to contact individuals by storing lists of telephone numbers than by randomly or sequentially generating those numbers.[148] The industry standard is to upload a database of phone numbers to a device and then program that device to automatically dial those numbers at predetermined times.[149] These devices do not use number generators.[150] If a random or sequential number generator is interpreted as a necessary element, then the TCPA's ATDS prohibition will not apply to the majority of automated phone calls and text messages.

The ATDS statutory definition is facially ambiguous because it is capable of more than one reasonable interpretation.[151] Courts and interested stakeholders disagree about whether the number generator is an essential element of the ATDS definition.

Interpreting the number generator as a nonessential element is the better reading. A literal reading produces the irrational result that an ATDS must be able to *store* numbers to be called *using* a random or sequential number generator.[152] Yet an ordinary number generator does not store information.[153] For "store" to have operative effect within the regulatory

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147.   *See supra* Section II.C (discussing the *Marks* decision).

148.   *See* Am. Teleservices Ass'n, *supra* note 42, at 113 ("The evolution of the teleservices industry has progressed far beyond the point where placing random or sequential calls would be cost-effective or profitable.").

149.   *See* 2003 Order, 18 FCC Rcd. 14,014, 14,090 para. 130 (2003) ("Most industry members . . . [use] predictive dialers [to] store pre-programmed numbers or receive numbers from a computer database and then dial those numbers . . . ."); Am. Teleservices Ass'n, *supra* note 42, at 113–14 (discussing how predictive dialers function by having an operator "obtain and program a list of numbers to call").

150.   A popular defense to § 227 claims is to argue that a device is not an ATDS because it cannot generate random or sequential numbers. *See, e.g.*, Marks v. Crunch San Diego, LLC, 904 F.3d 1041, 1043 (9th Cir. 2018); Dominguez v. Yahoo, Inc., 894 F.3d 116, 118 (3d Cir. 2018); Gadelhak v. AT&T Servs., Inc., No. 17-cv-01559, 2019 WL 1429346, at *6 (N.D. Ill. Mar. 29, 2019), *aff'd*, 950 F.3d 458 (7th Cir. 2020).

151.   *Marks*, 904 F.3d at 1051 ("[T]he statutory text is ambiguous on its face."); *see also* ACA Int'l v. FCC, 885 F.3d 687, 702–03 (D.C. Cir. 2018) (discussing the FCC's multiple interpretations of the ATDS definition and noting that "[i]t might be permissible for the Commission to adopt either interpretation").

152.   Dominguez v. Yahoo, Inc., 629 F. App'x 369, 372 n.1 (3d Cir. 2015) ("We acknowledge that it is unclear how a number can be *stored* (as opposed to *produced*) using a 'random or sequential number generator.[']").

153.   *See* 2015 Declaratory Ruling, 18 FCC Rcd. 7961, 8074 n.563 (2015) (Pai, Comm'r, dissenting) ("A random number [generator] generates numbers randomly . . . . A sequential number generator generates numbers in sequence . . . ."); *Random Number Generator (RNG)*,

scheme, the device itself must possess the storage capacity necessary for telephone numbers. Because storage is not derived from a number generator, but is nevertheless a capacity contemplated by the ATDS definition, "to store" is most logically read as a standalone ability. This disjunctive reading is consistent with the text: a device can be considered an ATDS if it has the ability to store *or* produce telephone numbers.[154] Under this approach, the number generator is relevant because it explains how an ATDS might produce telephone numbers, but it has no bearing on devices that merely store telephone numbers and then dial such numbers. Admittedly, this is an imperfect reading of the text. But it is a reading that prevents surplusage and pays due respect to the definition's operative elements.

The TCPA's provisos further support interpreting "number generator" as nonessential and preserving storage as a standalone ability.[155] The statute allows calls to be placed with an ATDS provided that the calling party has the prior express consent of the called party.[156] To call a consenting party, an ATDS would have to dial from a predetermined, preexisting list of telephone numbers belonging to consenters. The fact that this exception exists proves that a device merely dialing from a stored list of individuals without using a number generator is considered an ATDS under the statute. That is why calls placed to consenting individuals are specifically exempted from the statute's purview.[157]

The consent exception demonstrates how reading the statute as "to store . . . telephone numbers to be called, using a random or sequential number generator" renders the *generator* superfluous.[158] Because the generator is not used for storage, and the numbers being called are not being generated, the number generator is insignificant.[159] A better reading avoids surplusage by interpreting the existence or use of a generator as an element separate from storage and attached to the device's "to produce" functionality.

NAT'L INST. STANDARDS & TECH., https://csrc.nist.gov/glossary/term/random_number _generator [https://perma.cc/WMG8-APAP] (listing four different definitions for the term "random number generator," none of which reference storage capacity).

154.   47 U.S.C. § 227(a)(1).

155.   *See* 47 U.S.C. § 227(b)(1)(A); King v. Burwell, 135 S. Ct. 2480, 2492 (2015) (holding that a provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme, because only one of the permissible meanings produces a substantive effect compatible with the rest of the law); *see also* Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 101 (2018) (observing that the whole act canon is widely used).

156.   47 U.S.C. § 227(b)(1) ("It shall be unlawful . . . to make any call (other than a call . . . made with the *prior express consent* of the called party) using any automatic telephone dialing system . . . ." (emphasis added)).

157.   Marks v. Crunch San Diego, LLC, 904 F.3d 1041, 1051–52 (9th Cir. 2018).

158.   47 U.S.C. § 227(a)(1)(A).

159.   *See* Hibbs v. Winn, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ." (quoting 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:06, at 181–86 (6th ed. 2000 rev.))).

In 2015, Congress amended the TCPA to add another exception that further demonstrates that a device merely dialing stored telephone numbers without using a number generator satisfies the ATDS definition.[160] This exception exempted the ATDS prohibition for calls "made solely to collect a debt owed to or guaranteed by the United States."[161] For this exemption to have effect, a device calling from a predetermined, stored list of debtors for debt collection purposes must be considered an ATDS.

The fact that Congress amended the statute in 2015 is also relevant. By 2015, the FCC had been interpreting the ATDS definition to encompass devices that dialed stored telephone numbers, without possessing a number generator, for twelve years.[162] Congress's decision to amend the statute yet retain the same definition in light of the FCC's interpretation indicates that Congress concurred with the FCC's conclusion that a number generator is a nonessential element.[163]

Counterarguments to the proposition that a number generator is a nonessential element often begin with grammatical gymnastics and end with unsatisfying results.[164] In petitioning the Supreme Court to review the *Marks* decision,[165] the defendant argued that the "rules of grammar and punctuation" support the "commonsense" conclusion that the definition's proper interpretation is that telephone numbers are stored using a random or sequential number generator.[166] The defendant argued that the statute's conceived number generator is capable of storing information because "[n]umber generation and storage are not mutually exclusive."[167]

Reading storage capacity into "random or sequential number generator" creates more interpretive problems than it solves. First, as noted above, storage is not inherent to the ordinary meaning of "random or sequential number generator." Second, it begs the question: Why did Congress use the term "random or sequential number generator" if it was referencing more capaci-

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160.   Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301, 129 Stat. 584, 588.

161.   47 U.S.C. § 227(b)(1)(A)(iii).

162.   *See supra* Section I.B (discussing the 2003 FCC order which ruled that predictive dialers qualified as an ATDS).

163.   *See* Lorillard v. Pons, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."); *see also* Marks v. Crunch San Diego, LLC, 904 F.3d 1041, 1052 (9th Cir. 2018) ("Because we infer that Congress was aware of the existing definition of ATDS, its decision not to amend the statutory definition of ATDS to overrule the FCC's interpretation suggests Congress gave the interpretation its tacit approval.").

164.   Petition for a Writ of Certiorari at 17, 23–24, Crunch San Diego, LLC v. Marks, 139 S. Ct. 1289 (2019) (mem.) (No. 18-995), 2019 WL 411371 (referencing the Ninth Circuit's holding in *Marks* as "linguistic gymnastics").

165.   The case settled and the petition for certiorari was withdrawn. Justin O. Kay, *Defendant in* Marks v. Crunch San Diego, LLC *Abandons Appeal*, NAT'L L. REV. (Mar. 5, 2019), https://www.natlawreview.com/article/defendant-marks-v-crunch-san-diego-llc-abandons-appeal [https://perma.cc/G22N-NAK7].

166.   Petition for a Writ of Certiorari, *supra* note 164, at 15–19.

167.   *Id.* at 17.

ties than just random or sequential number generation?[168] The use of this narrow term, as opposed to a broader term like "computer," suggests that "number generator" should be interpreted narrowly.

But endowing generators with storage capacity expands the term to the point of encompassing so many abilities that the statute now refers to a computer instead of a generator. If the statute's contemplated random or sequential number generators are capable of storing telephone numbers, then they must also possess other capacities to make using the stored numbers practicable. For example, the generator would need to be capable of sorting stored telephone numbers. After all, an ATDS must dial the numbers in some designated order. Furthermore, a storage-capable generator implicates both hardware and software capacities associated with data storage, such as addressability, volatility, and data-transfer instructions.[169]

Stitching together this many capacities creates a Frankenstein device, with specialized components completely unrelated to number generation, and this leads to a line-drawing problem: At what point would this device exceed the bounds of what any reasonable person would call a number generator?[170] Since storage is a capacity ordinarily associated with computers, and ordinarily not associated with number generators, a storage-capable generator seems more aptly labeled some form of computer.[171] Here, a storage-capable argument collapses in on itself. Once the hypothetical number

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168.   47 U.S.C. § 227(a)(1)(A).

169.   *See* DAVID A. PATTERSON & JOHN L. HENNESSY, COMPUTER ORGANIZATION AND DESIGN: THE HARDWARE/SOFTWARE INTERFACE: RISC-V EDITION 15–25, 68 (2018). Address is a value used to delineate the location of a specific data element within a memory array. *Id.* at 68. Volatility references volatile memory, which is storage that retains data only if it is receiving power, and nonvolatile memory that can retain data without a power source like hard drives. *Id.* at 22–23. Data transfer instructions refer to commands that move data between memory arrays and registers. *Id.* at 68; *see also id.* at 19–20 (defining "memory" as "[t]he storage area in which programs are kept when they are running and that contains the data needed by the running programs" and explaining the necessary hardware components for DRAM).

170.   Congress was likely referencing the ordinary meaning of "random or sequential number generator." 47 U.S.C. § 227(a)(1)(A). If Congress had meant a unique device, then it would have almost certainly included it in § 227's list of definitions. *See id.* § 227(a) (defining five different definitions for the purposes of interpreting § 227 without a unique definition for "random or sequential number generator").

171.   *See, e.g.*, *Computer*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/computer [https://perma.cc/43R8-AGDK] ("[A] programmable usually electronic device that can *store*, retrieve, and process data[.]" (emphasis added)); Computer Fraud and Abuse Act of 1986, 18 U.S.C. § 1030(e)(1) ("[T]he term 'computer' means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device . . . ."); *cf.* 2015 Declaratory Ruling, 30 FCC Rcd. 7961, 8074 n.563 (2015) (Comm'r Pai, dissenting) ("A random number generates numbers randomly . . . . A sequential number generator generates numbers in sequence . . . ."); *Random Number Generator (RNG)*, *supra* note 153; ZOOLANDER (Paramount Pictures 2001) ("They're in the *computer*." (emphasis added)).

generator is endowed with storage ability, it becomes something more than a number generator. And that device, whatever it is, departs from the statute's text.

Some courts have interpreted the term "using a random or sequential number generator" to modify neither "store" nor "produce," but instead the object: the "telephone numbers to be called."[172] This interpretation focuses on the origin of the telephone numbers, holding that "using a random or sequential number generator" alludes to a required characteristic of the numbers to be dialed.[173] But this approach renders autodialers impracticable for uses expressly contemplated by the statute, namely, contacting consenters and debtors. Many companies want to call only stored numbers off of a predetermined list. If limited to using randomly or sequentially generated numbers, they will invariably generate numbers that they do not wish to call or even numbers they are barred from calling under the statute.[174] Notably, this reading renders the TCPA's consent proviso superfluous. A company seeking to contact a specific consenting party would have to begin by generating numbers, hoping to fortuitously generate that party's exact number. That result is absurd.[175] Functionally, it turns autodialers into an impracticable mechanism for calling consenting parties, rendering the TCPA's consent exemption mere surplusage.

This result contravenes the statutory scheme. The statute does not ban autodialers but rather regulates the types of calls that may or may not be made. Because certain types of calls are explicitly authorized, the statute should not be interpreted to render autodialers impracticable for those explicitly authorized uses.

2.   Excluding Ordinary Smartphone Use

The most persuasive counterargument to this Note's proposed storage interpretation is that it would fail the *ACA International* guidelines because it encompasses smartphones. Consider the basic calling function most smartphones use. Rather than dialing the number manually, a person instead selects a name and the phone dials the numbers automatically. Group text messaging has made it possible for even an ordinary smartphone user to contact dozens of people at once without having to manually dial a single

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172.   Gadelhak v. AT&T Servs., Inc., No. 17-cv-01559, 2019 WL 1429346, at *5 (N.D. Ill. Mar. 29, 2019) (quoting 47 U.S.C. § 227(a)(1)), *aff'd*, 950 F.3d 458 (7th Cir. 2020).

173.   *Id.*

174.   47 U.S.C.§ 227(b)(1)(A)(i) (forbidding ATDS calls to emergency telephone lines, hospitals, and law enforcement agencies).

175.   Similarly, forcing the telephone numbers themselves to be randomly or sequentially generated would also make autodialers impracticable to contact debtors, or to make calls for emergency purposes, since most emergencies (hurricanes, floods, tornados, fires, etc.) are limited to a specific geographic location. *Id.* § 227 (b)(1)(A) (creating an exception to the ATDS prohibition for calls made for emergency purposes).

number. For this reason, the FCC's interpretation of ATDS should expressly exclude ordinary smartphone usage.

Although a smartphone is a device that stores numbers to be called and then dials such numbers, the Commission has the power to issue rules or orders that exempt calls made to cellular phones from the ATDS prohibition.[176] Additionally, the FCC could acknowledge that applying the TCPA to smartphones would exceed the scope of its delegated authority. In the D.C. Circuit's words, the FCC can "fashion exemptions . . . preventing a result under which every uninvited call or message from a standard smartphone would violate the statute."[177]

A smartphone exemption coheres with the TCPA's regulatory framework. This can be demonstrated by applying Professor Samuel Bray's interpretation of the mischief rule to the ATDS prohibition by contrasting the antecedent problem that the prohibition addresses with smartphones' ordinary use.[178] The antecedent problem is businesses using esoteric autodialing devices to place high volumes of unsolicited calls.[179] A single solicitor frequently contacted more than sixty people per day prior to the TCPA's enactment.[180] By contrast, ordinary smartphones are not esoteric; they are ubiquitous. The problems presented by *Dominguez*[181] are not implicated by regular smartphone users. Reasonable people do not send 27,809 unsolicited messages to a protesting adult. Since ordinary smartphone usage is sufficiently distinct from the antecedent problem contemplated by the ATDS prohibition, it would impermissibly expand the statute's scope to apply the TCPA to smartphones.[182]

Essentially, this is what a smartphone exemption should look like: The FCC would be responsible for establishing the exemption's details and scope. In doing so, the Commission would rely on its own technical expertise and telemarking industry data to provide a basis for comparison. Should the case ever arise where a smartphone user is sued under the TCPA's ATDS prohibition, courts would then have a frame of reference to determine whether the smartphone user has sufficiently deviated from ordinary use and instead used the device as an ATDS.

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176.   *Id.* § 227(b)(2)(C) ("The Commission . . . may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect . . . .").

177.   ACA Int'l v. FCC, 885 F.3d 687, 699 (D.C. Cir. 2018).

178.   *See* Samuel L. Bray, *The Mischief Rule*, 109 Geo. L.J. (forthcoming 2021) (manuscript at 28) (on file with the *Michigan Law Review*).

179.   *See supra* Section I.A.

180.   *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243 § 2(3), 105 Stat. 2394, 2394.

181.   *See supra* Section II.B.

182.   *ACA Int'l*, 885 F.3d at 699.

This move may look suspiciously like a purposivist argument, but purposivism is focused on interpreting a statute to achieve an end state.[183] Rather, this Note's approach is merely a recognition that words are imprecise and that the check on imprecision is context.[184] Contextualizing statutory language requires understanding the problem, or mischief, that prompted that language's enactment.[185] This context helps to rationalize a stopping point when assessing a statute's scope.[186] Here, the breadth required by any ATDS definition runs the risk of inadvertently enveloping unassuming users beyond the statute's purview. Determining where the TCPA's necessarily broad language stops can be achieved by acknowledging that the ATDS prohibition was aimed at devices that were commercial and highly specialized and placed a large volume of unsolicited calls to a large volume of nonconsenting strangers.[187] Ordinary smartphones are personal and multifunctional, and they typically contact fewer strangers. Interpreting the statute not to include smartphones satisfies the statute's terms and stops at the obvious mischief, whereas interpreting it to include smartphones threatens innocent parties and agency overreach.[188]

In practice, the FCC may be reluctant to implement a smartphone exemption for fear of being overturned under *Utility Air Regulatory Group v. EPA* (*UARG*).[189] In *UARG*, the EPA was interpreting the Clean Air Act (CAA), which requires entities with the potential to emit more than 100 tons of a relevant pollutant per year to apply for permits.[190] Because the EPA interpreted "relevant pollutant" to encompass greenhouse gasses, and because practically every building emits more than 100 tons of greenhouse gasses per year, the EPA published a Tailoring Rule that articulated a new threshold of 100,000 tons per year to avoid impermissibly expanding the CAA's scope.[191] The Supreme Court struck down the greenhouse gas exemption, holding

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183.   *See* Bray, *supra* note 178, at 33 ("One way to conceptualize the distinction between the mischief and legislative purpose . . . is that the mischief will tend to be a negative state of affairs antecedent to the law, whereas the purpose is more likely to be an affirmative principle or aim going forward.").

184.   *See* Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.").

185.   Bray, *supra* note 178, at 24 ("[T]ext-in-light-of-mischief is often more predictable to the reasonable observer than the bare text read for all it is worth.").

186.   *Id.* at 36.

187.   *See supra* Part I.

188.   *See* Prescott v. Nevers, 19 F. Cas. 1286, 1288–89 (C.C.D. Me. 1827) ("If [a statute] is susceptible of two interpretations, one of which satisfies the terms, and stops at the obvious mischief provided against, and the other goes to an extent, which may involve innocent parties in its penalties, it is the duty of the court to adopt the former.").

189.   573 U.S. 302 (2014).

190.   *Util. Air Regul. Grp.*, 503 U.S. at 322–25.

191.   *Id.*

that "[a]n agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms."[192]

But a TCPA smartphone exemption is distinguishable from the exemption at issue in *UARG* because the ATDS definition is anything but an "unambiguous statutory term[]."[193] The CAA involved specific numerical thresholds, but in the TCPA, Congress elected not to use such specific prescriptions when crafting the ATDS definition. Congress certainly had enough data at its disposal that it could have included some form of numerical threshold, such as a prescribed call volume a device must be capable of achieving within eight hours before qualifying as an ATDS. Instead, Congress used broader language and entrusted its interpretation to the FCC.[194] By doing so, Congress implicitly authorized the FCC to interpret the ATDS definition to exclude specific devices.

This interpretation is permissible.[195] In *UARG*, the Court approvingly noted that while the Act-wide definition of air pollutant is very broad, "where the term 'air pollutant' appears in the Act's operative provisions, . . . EPA has routinely given it a narrower, context-appropriate meaning."[196] The Court endorsed the EPA's contextual interpretations, highlighting that the EPA had spent decades interpreting air pollutants as limited to "*regulated* air pollutants" in specific sections of the CAA, despite the fact that such a limitation was not within the term's statutory definition.[197] Here, while the ATDS definition may generically encompass smartphones, the FCC could interpret the definition more narrowly within the statute's ATDS prohibition. This device-specific exemption was specifically envisioned by Congress.[198] In its Congressional Statement of Findings, Congress noted that "the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls."[199]

In sum, endowing number generators with storage capacity contravenes "number generator's" plain meaning by conceiving of a number generator as a computer. Requiring the numbers themselves to have been randomly or sequentially generated renders autodialers unsuited for uses contemplated by

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192.   *Id.* at 325.

193.   *Id.*

194.   *See supra* Part I.

195.   Env't Def. v. Duke Energy Corp., 549 U.S. 561, 574 (2007) ("A given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies. The point is the same even when the terms share a common statutory definition . . . .").

196.   *Util. Air Regulatory Grp.*, 573 U.S. at 316.

197.   *Id.* at 316–17.

198.   Telephone Consumer Protection Act of 1991, Pub. L. No. 102–243, § 2(13), 105 Stat. 2394.

199.   *Id.*

the statute. For "store" and its associated provisos to simultaneously operate within the statute without rendering store or the number generator superfluous, it is essential to interpret the number generator as nonessential.

3.   Capacity

Interpreting "capacity" has proved troublesome.[200] The D.C. Circuit invalidated the FCC's notorious "potential capacity interpretation" because it was unreasonably expansive, setting in motion the chain of events that culminated with the circuit split.[201] Any declaratory ruling seeking to reinterpret the ATDS definition should also provide a consistent interpretation of "capacity" to address the grievances raised in *ACA International*.[202] Otherwise, the ruling runs the risk of judicial invalidation.

The statute's plain language supports interpreting "capacity" as synonymous with "current ability."[203] When determining statutory definitions, nontechnical words are given their ordinary meaning.[204] Ordinarily, defining an object by its capacity references its *present* capacity. For example, when Dodge advertises a truck's towing capacity at 9,000 pounds, it is not advertising the truck's ability to tow 9,000 pounds in the far-flung future after modifications. It is advertising its *current* ability to tow 9,000 pounds.[205] The same is true here. When the TCPA contemplates "equipment which has the capacity," it is contemplating equipment with the current ability to perform the specified functions.

This interpretation is supported by the grammatical context within which "capacity" is used.[206] Here, the sentence containing "capacity" is written in the present tense, suggesting the statute is not contemplating a device's future or potential capacity.[207] If Congress had intended the statute to encompass a device's potential, it could have done so by selecting language to that effect: for example, "equipment which *could have* the capacity" as opposed to "has the capacity."[208]

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200.   *See supra* Section I.B (discussing the definition of "capacity" and previous FCC interpretations).

201.   *See supra* Part II.

202.   *See supra* Section III.A

203.   *See* Notice of Ex Parte of Wells Fargo & Company at 1, 10, CG Docket No. 02-278 (June 5, 2015) [hereinafter Notice of Ex Parte], https://ecfsapi.fcc.gov/file/60001077006.pdf [https://perma.cc/N8TU-MQZ5].

204.   *See, e.g.*, Chapman v. United States, 500 U.S. 453, 462 (1991); Nix v. Hedden, 149 U.S. 304 (1893).

205.   *Cf.* Smith v. United States, 508 U.S. 223, 242–45 (1993) (Scalia, J., dissenting).

206.   *See* Deal v. United States, 508 U.S. 129, 132 (1993) ("[It is a] fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it used.").

207.   47 U.S.C. § 227(a)(1) ("The term 'automatic telephone dialing system' means equipment which *has* the capacity . . . ." (emphasis added)).

208.   Notice of Ex Parte, *supra* note 203, at 10.

The broader context of the TCPA's regulatory scheme supports interpreting capacity to mean "current ability." If "capacity" means "current ability," to qualify as an ATDS, the equipment must be presently able to make a call by dialing phone numbers.[209] The text bolsters this interpretation: the word "has" is a present-tense form of "to have," which means "possess."[210] Therefore, the equipment must possess the current ability to dial phone numbers to qualify as an ATDS. Put another way, triggering the prohibition requires the equipment to be functioning as an autodialer when the call is made. By comparison, if "capacity" is interpreted as "potential ability," then using an ATDS means using equipment that has the potential ability to dial phone numbers. This offers no guidance to interested parties because predicting an object's potential requires, in some sense, predicting the future. Furthermore, it means the statute is regulating every single call made by every single device that could "potentially" be an ATDS. This yields an absurdly overbroad result. The fact that Congress defined autodialers at all cautions against this interpretation, which would prohibit nonautomatic calls placed from devices incapable of satisfying the ATDS definition at the time the call was made. This interpretation would move significantly past the mischief the ATDS prohibition is meant to address.[211] Such a move is unnecessary to achieve the statute's regulatory effects and results in an impermissible scope encompassing ordinary devices that would not survive judicial review.[212]

Conclusion

The FCC is facing a dilemma of its own creation and it must act. To do nothing is to endorse the inconsistent enforcement of federal rules across jurisdictions. This Note calls on the FCC to do its job. A valid declaratory ruling is the simplest and fastest mechanism for resolving the circuit split and achieving a nationally uniform application of the ATDS prohibition. Substantively, interpreting storage as a stand-alone capacity is the best reading of the TCPA and can be implemented without affecting ordinary smartphone use. Finally, a coherent, internally consistent interpretation offers certainty to interested parties by settling the "capacity" and necessary elements interpretive issues.

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209.   47 U.S.C. § 227(a)(1).

210.   *Has*,   MERRIAM-WEBSTER   DICTIONARY,   https://www.merriam-webster.com/dictionary/has [https://perma.cc/5H4A-Q9KD] (defining as "present tense third-person singular of HAVE"); *Have*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/have [https://perma.cc/5XQ5-E8U3] (defining as "to hold or maintain as a possession" or "to possess as a characteristic"; listing "possess" as a synonym).

211.   *See supra* Sections I.A, III.B.2.

212.   *See, e.g.*, ACA Int'l v. FCC, 885 F.3d 687 (D.C. Cir. 2018).