Case No. 14-56834

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JORDAN MARKS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff - Appellant,

v.

CRUNCH SAN DIEGO, LLC,

Defendant - Appellee.

On Appeal from Order of the
United States District Court for the Southern District of California
District Court No. 3:14-cv-00348 BAS BLM

APPELLEE'S PETITION FOR REHEARING *EN BANC*

GREENBERG TRAURIG, LLP
Ian C. Ballon (CA SBN 141819)
Lori Chang (CA SBN 228142)
1840 Century Park East, Suite 1900
Los Angeles, CA 90067
Telephone: 310-586-7700
Facsimile: 310-586-7800

Attorneys for Defendant-Appellee
CRUNCH SAN DIEGO, LLC

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

Regulations

Other Authorities

I. THE PANEL OPINION SUPPORTS A READING OF THE TCPA THAT DIRECTLY CONTRAVENES THE STATUTORY TEXT, LEGISLATIVE HISTORY, AND THIS COURT'S PRIOR DECISIONS

The panel's decision must be reconsidered because it interprets—and effectively rewrites—the Telephone Consumer Protection Act (TCPA) in a manner that directly conflicts with the statutory text, legislative history, and binding intra-circuit and persuasive inter-circuit authority from the Third and D.C. Circuits regarding the definition of an "automatic telephone dialing system" (ATDS).

The TCPA defines an ATDS as

> equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.

47 U.S.C. § 227(a)(1). This Court previously found this definition "clear and unambiguous." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009) (noting "the statute's clear language" and reading the phrase "to store or produce telephone numbers to be called, using a random of sequential number generator" to mean "store, produce, or call randomly or sequentially generated telephone numbers"). But the panel decision departed from this Court's ruling, holding that the statute is ambiguous and should instead be "read" as

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

Op. at 23. In other words, the Court interpreted the phrase "using a random or

sequential number generator" as applying *only* to the word "produce"— not "store." This reconstruction drastically alters the meaning from what the statutory text and *Satterfield* confirms was Congress's "clear and unambiguous" intent. 569 F.3d at 951.

Even if the ATDS definition is deemed ambiguous, the TCPA's legislative history supports the *Satterfield* Court's interpretation of the statute. The TCPA was enacted in 1991 to restrict telemarketing practices based on a specific type of dialing equipment that Congress defined in the statute. In prohibiting any person from making a call using an ATDS to a cellular number (except for calls made for emergency purposes or with prior consent), 47 U.S.C. § 227(b)(1)(A), Congress's chief "focus" was "on regulating the use of equipment that dialed blocks of *sequential or randomly generated numbers*." Op. at 21 (emphasis added); *see also, e.g.*, H.R. Rep. No. 101-633, at 3 (1990) (automatic dialers "dial[ed] sequential blocks of telephone numbers," including "emergency public organizations" and "unlisted subscribers"); S. Rep. No. 102-178, at 2 (1991) ("Having an unlisted number does not prevent those telemarketers that call numbers randomly or sequentially."); 137 Cong. Rec. S16200-04, S16202 (Nov. 7, 1991) (Sen. Pressler) ("Due to advances in autodialer technology, machines can be programmed to deliver a prerecorded message to thousands of sequential phone numbers," creating "a real hazard"); 137 Cong. Rec. H11307-01, H11310 (Nov. 26, 1991) (Rep. Markey)

("automatic dialing machines place calls randomly, meaning they sometimes call unlisted numbers, or numbers of hospitals, police and fire stations, causing public safety problems").[1] And despite "'significant changes'" to telemarketing equipment, "Congress never revised the definition of an ATDS." Op. at 7-8.

Although the panel construed Congress's *failure to amend* the ATDS definition (while the FCC orders were being challenged in multiple jurisdictions and were later rejected) as "tacit approval" of the agency's broader interpretation that any device that "store[s] numbers to be called" is an ATDS even if it lacks the capacity to generate random or sequential phone numbers, Op. at 22-2, any conclusions drawn from *post*-legislative *inaction* should be dismissed as speculative, *see* § III(B)(2), *infra*. By relying on what Congress did not do (versus what it in fact wrote in the statute), the panel circumvents the statute's "clear and unambiguous" plain meaning, *Satterfield*, 569 F.3d at 951, in favor of a statutory interpretation that is at odds with legislative intent and controlling law. [2]

---

[1] While the FCC issued multiple interpretative rulings addressing the functions of an ATDS, these rulings, which culminated in a 2015 order, were struck down as arbitrary and capricious in a consolidated challenge made under the Hobbs Act. *See ACA Int'l v. FCC*, 885 F.3d 687, 698-700 (D.C. Cir. 2018).

[2] Furthermore, the opinion creates greater uncertainty over what functionalities constitute "automatic *dialing*." Op. at 23. The platform at issue was not capable of choosing which numbers to dial without human instruction; to send a text, a person must create the content of a message, select which phone numbers will receive the message, and schedule when the message will be sent. *See* § II(A), *infra*. How this amounts to "dial[ing] numbers automatically" is unclear, and cannot be squared with

Finally, in addition to creating an intra-circuit inconsistency, the panel's ruling contributes to a broader circuit split that will cause more confusion and unsettled law in an area where litigation has skyrocketed with 4,860 and 4,392 TCPA suits filed in 2016 and 2017, respectively.[3] The panel decision cannot be reconciled with (for example) the Third Circuit's holding in two separate opinions that an ATDS must have the capacity to generate random or sequential telephone numbers. *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018) (holding that the "key" question under the TCPA is whether the equipment "had the present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers"); *Dominguez v. Yahoo, Inc.*, 629 F. App'x. 368, 372, 373 n.2 (3d Cir. 2015) ("an autodialer must be able to store or produce numbers that *themselves* are randomly or sequentially generated"). Nor can the panel decision be squared with *ACA*, which, in a decision binding on all circuit courts under the Hobbs Act, 28 U.S.C. § 2342(1), vacated the FCC's entire "treatment" of ATDS (*see* Op.

---

the statutory language. Op. at 24. Worse, this functionality exists in smartphones. Various mobile apps enable smartphones to automatically send texts at a scheduled date and time, such as birthday texts and auto-replies. *See, e.g.*, https://vintaytime.com/automatically-send-birthday-wish/, https://smallbusiness.chron.com/send-sms-messages-automatically-48180.html, and https://www.verizonwireless.com/support/knowledge-base-74755/ (last visited Sept. 19, 2018).

[3] *See* https://webrecon.com/2016-year-in-review-fdcpa-down-fcra-tcpa-up/, and https://webrecon.com/webrecon-stats-for-dec-2017-year-in-review/ (last visited Sept. 14, 2018).

at 17), including its interpretation that a device that dials stored numbers from a list is an ATDS even if it lacks the capacity to generate random or sequential phone numbers, and explaining that the FCC's expansive interpretation was "untenable" based on the statutory text and "impermissible" in its scope because it would "render every smartphone an ATDS." *Id.* at 697-703. Thus, what remains is a pervasive intra- and inter-circuit split on the reading of a statutory definition that this Court (and other Circuits) found "clear and unambiguous." *Satterfield*, 569 F.3d at 951.

Because this involves an issue of exceptional importance, we respectfully request this Court rehear the panel decision *en banc*.

II. RELEVANT FACTS AND PROCEEDINGS

Marks alleges that Crunch San Diego, LLC sent him three text messages without consent over an 11-month period when he was a member of the fitness gym. ER260 (Compl. ¶ 23). Like many businesses, Crunch uses a third-party platform to communicate with customers; here, the alleged texts were sent using Textmunication, Inc.'s web-based platform. ER052 (Romeo Decl. ¶¶ 2-4).

The district court granted Crunch summary judgment on two independent grounds. First, it ruled that the platform was not an ATDS because it was undisputed that the platform lacked capacity to generate numbers randomly or sequentially. *Marks v. Crunch San Diego, LLC*, 55 F. Supp. 3d 1288, 1292 (S.D. Cal. 2014). The district court held that the phrase "random or sequential number generator" must

"have some limiting effect" in the statute and "cannot reasonably refer broadly to any list of numbers" as that would "nullify the entire clause." *Id.* at 1292. Second, the court ruled the platform was not an ATDS because it was undisputed that texts could only be sent through "methods [that] require human curation and intervention." *Id.* at 1292 ("Users of the platform, including Crunch, select the desired phone numbers, generate a message to be sent, select the date the message will be sent, and then the platform sends the text messages to those phone numbers on that date," *id.* at 1289).

The panel erroneously concluded that Crunch did not dispute that the "system dials numbers automatically." Op. at 24. Rather, Crunch argued and demonstrated that it was undisputed that a user had to manually type out a message, select the phone numbers (that were manually inputted into the system), and input the criteria for the date/time of delivery. Dkt. 22 at 36-41. A person—not an algorithm—must determine which numbers "to dial."

The panel also effectively adopted an interpretation vacated by *ACA* as arbitrary and capricious by agreeing with Marks's argument, premised on the prior FCC rulings, that "equipment that has the capacity to store telephone numbers in a list or database," even if it "does not have the capacity to generate telephone numbers randomly or sequentially," constitutes an ATDS. Dkt. 15 at 13. But this interpretation was rejected by *ACA*, which is binding under the Hobbs Act.

III. THE ATDS RULING CONFLICTS WITH OTHER DECISIONAL LAW AND IS INCONSISTENT WITH THE STATUTORY TEXT, LEGISLATIVE HISTORY, AND BINDING AUTHORITY

A. The Panel Abrogates The Ninth Circuit's Decision In *Satterfield*

This Court previously construed the ATDS provision and determined "that the statutory text is clear and unambiguous." *Satterfield*, 569 F.3d at 951. "When evaluating the issue of whether equipment is an ATDS, the statute's clear language mandates that the focus must be on whether the equipment has the capacity 'to store or produce telephone numbers to be called, using a random or sequential number generator[;…]" *Id.*

The panel confined *Satterfield*'s holding to "only one aspect of the text: whether a device has the '*capacity* "to store or produce telephone numbers"'" (Op. at 20 n.6), but this reads *Satterfield* too narrowly. *Satterfield* made clear the dispute "center[ed] on the phrase "using a random or sequential number generator," and held, consistent with the statute, that "a system need not actually store, produce, or call randomly or sequentially generated telephone numbers, it need only have the capacity to do it." *Id.* at 951. *Satterfield* plainly did not instruct the district court to consider on remand the "*requisite* capacity" without reference to what the system must have "capacity" to do. *Id.* (italics added).

B. The Panel Decision Nullifies A Requirement Imposed By The Plain Terms Of The Statute And Legislative Intent

1. The ATDS Definition is Clear and Unambiguous

Even assuming *Satterfield* does not control, the ATDS definition is not ambiguous. As in that case, the central issue here is how to construe the first of the two enumerated ATDS functionalities: the capacity "to store or produce telephone numbers to be called, using a random or sequential number generator;…"

The grammatical structure of this provision requires reading the phrase "using a random or sequential number generator" as modifying ***either*** term—"store" ***or*** "produce"—in the preceding phrase. The "punctuation canon" dictates that "to store or produce telephone numbers to be called" must be read as the dependent phrase modified by "using a random or sequential number generator;…" *See Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996, 1000 (9th Cir. 2017) ("[B]oth we and our sister circuits have recognized the punctuation canon, under which a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one where the phrase is separated from the antecedents by a comma.") (citation and alterations omitted); The Chicago Manual of Style § 6.30 (16th ed. 2010) ("A dependent clause that precedes a main clause should be followed by a comma."). This is consistent with the Supreme Court's instruction that a "natural reading" of "or" in a sentence "covers any combination of its nouns, gerunds, and objects." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018).[4] Thus,

[4] In holding that service advisors constitute "salesmen," in a statutory exemption applying to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles," *Encino Motorcars* ruled that the "use of 'or' to join 'selling'

the use of the disjunctive in the phrase preceding the comma compels reading the statute as requiring that an ATDS must have the capacity to either "store" phone numbers "using a random or sequential number generator," or "produce" phone numbers "using a random or sequential number generator;…"

Of the two variants considered by the panel, only this interpretation is supported by the statute's plain language. There is no need to insert "additional words," as the panel concludes, such it would read: "equipment which has the capacity (A) to store [telephone numbers *produced* using a random or sequential number generator]; or [to] produce telephone numbers to be called, using a random or sequential number generator . . . ." Op. at 19-20 (italics added). The noun "generator" already implies that numbers will be "generated"; adding "produced" would be redundant.[5] By contrast, Marks's interpretation would require revising the statute's punctuation so that it read:

> equipment which has the capacity (A) to store[,] or produce telephone numbers to be called [no comma] using a random or sequential number generator; and (B) to dial such numbers

or changing the syntax with added words and subsections:

> equipment which has the capacity (A) to [i] store [telephone numbers to be called] or [ii] produce telephone numbers to be called, using a

---

and 'servicing' suggests that the exemption covers a salesman primarily engaged in either activity." *Id.* at 1141 (rejecting this Court's construction that the exemption does not apply to salesman "'primarily engaged in . . . servicing automobiles").

[5] "Generate" is synonymous with "produce." *See, e.g.*, *The Oxford Encyclopedic English Dictionary* 586 (1991).

random or sequential number generator; and (B) to dial such numbers.

Op. at 19-20. Under either formulation, number generation would be optional.

The ATDS definition is not "'susceptible to more than one *reasonable* interpretation'" based on "the statute's *actual language*." *Guido v. Mount Lemmon Fire Dist.*, 859 F.3d 1168, 1173 (9th Cir. 2017) (italics added). Marks's interpretation—which the panel adopted—would read out the phrase "using a random or sequential number generator"; hence, "a piece of equipment qualifies as an ATDS if it has the capacity to store telephone numbers and then dial them." Op. at 20. Ninth Circuit authority is clear that courts must interpret statutory terms by "'giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.'" *U.S. v. Neal*, 776 F.3d 645, 652 (9th Cir. 2015). Marks's assertion that "if a device already has the numbers stored, there would be no need to produce or generate numbers" (Dkt. 71 at 6) illustrates that the phrase "using a random or sequential number generator" would be a nullity. *See Marks*, 55 F. Supp. 3d at 1292 ("random or sequential number generator" must "have some limiting effect," and "cannot reasonably refer broadly to any list of numbers" which would "nullify the entire clause").

Moreover, Marks's contention "that a number generator is not a storage device" because "a device could not use 'a random or sequential number generator'

to store telephone numbers" (Op. at 19) is specious. Storage and number generation are not mutually exclusive concepts. Even Marks's proffered expert explained that random number generation and storage are "distinct parts of a computer system," implying that both functionalities can be present in the same system.[6] SER080-81 (Hansen Tr. 13:24-14:6).[7] Marks's argument that a computerized number generator can't store phone numbers is therefore wrong.

2. The Panel's Textual Reading is Based on Invalidated FCC Interpretations That Contravene Congressional Intent

Post-legislative policies and inaction cannot serve as a premise for re-writing the statute. *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). Here, the alleged ambiguity does not arise from the statute's plain terms but from FCC interpretations that are no longer valid post-*ACA*. The panel asserts that Congress ratified the FCC's broader interpretation by leaving the statutory definition unchanged, while narrowly amending the TCPA to exempt

[6] While Hansen testified that "generating numbers" "ha[s] nothing to do with computer storage, only the production," he admitted his conclusions were based on his inadmissible legal interpretation of the statutory language—which he claimed "us[ed] technical terms" to "describ[e] computer equipment"—and FCC rulings. ER200 (Hansen Decl. ¶ 12); SER080 & 204-07 (Hansen Tr. 13:7-17, 137:12-140:5). He nonetheless conceded that the statute "makes perfect sense the way that it's written," from a technical standpoint. SER081 (*id.* 14:23-25).

[7] The ability to store numbers using a number generator can also be found in programs like Excel. *See, e.g.*, https://www.excel-easy.com/examples/random-numbers.html and https://www.extendoffice.com/documents/excel/643-excel-random-number.html (last visited October 2, 2018).

debt collection calls made on behalf of the U.S. Op. at 22. But Congress could hardly have given its "tacit approval" by doing nothing in the wake of various challenges to the FCC orders. The Supreme Court has long held that "[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction," and Ninth Circuit authority is in accord. *Central Bank*, 511 U.S. at 187; *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation."); *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 886–87 (9th Cir. 2016) ("[C]ongressional inaction in the face of a judicial statutory interpretation . . . carries almost no weight.").[8] Thus, inferences based on congressional silence cannot support the panel's interpretation.

FCC policy also cannot trump *original* legislative intent confirming that "Congress focused on regulating the use of equipment that dialed blocks of sequential or randomly generated numbers—a common technology at that time." Op. at 21; *Union Bank v. Wolas*, 502 U.S. 151, 158 (1991) ("The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning."). Congress specifically targeted "machines [that] could be programmed to call numbers in large

[8] Similar arguments were rejected in *Alexander v. Sandoval*, 532 U.S. 275, 291-92 (2001) and *U.S. v. Wells*, 519 U.S. 482, 495 (1997).

sequential blocks or dial random 10-digit strings of numbers," because they "resulted in calls hitting hospitals and emergency care providers." Op. at 6. Restricting dialers that merely call stored numbers would not curb the abuses caused by dialing blocks of random or sequential numbers which impact emergency lines. Such an interpretation would not serve legislative intent and should be rejected. *See U.S. v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'").

The other TCPA provisions cited by the panel do not support its conclusion. While the TCPA addresses both opt-ins (authorized numbers) and opt-outs (do-not-calls), those provisions address consent, not the manner in which phone numbers are stored, produced, generated or dialed. The Do-Not-Call regulations are also irrelevant because such calls are actionable regardless if made using an ATDS. *See* 47 C.F.R. § 64.1200(c). Moreover, it does not follow that because calls made with consent are "dial[ed] from a list of phone numbers" (Op. at 21), an ATDS must be defined by that functionality. "Congress's understanding that an ATDS was not limited to dialing wholly random or sequential blocks of numbers, but could be configured to dial a curated list" (Op. at 21 n.7) simply underscores what *Satterfield* held—that the focus of the ATDS definition is on *capacity*, and applies regardless

of whether a device *actually* called randomly or sequentially generated numbers. Further, provisions barring ATDS-made calls to emergency lines, patient rooms, etc., reflect legislative intent to combat the specific abuses caused by randomly or sequentially dialed telephone calls. *See* n.12, *supra*. Indeed, the FCC initially clarified that the TCPA did not regulate automated dialers generally, but applied to only dialers that randomly or sequentially generated numbers. *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C. Rcd. 8752, 8773 (1992) ("autodialer calls" were "dialed using a random or sequential number generator"), 8776 (stating the prohibitions of § 227(b)(1) *do not apply* to functions like "speed dialing" and "call forwarding," because numbers are "not generated in a random or sequential fashion") (emphasis added). Nor do these prohibitions warrant a construction that broadens liability under the TCPA. *See VMG*, 824 F.3d at 883 ("We ordinarily would hesitate to read an *implicit expansion* of rights into Congress' statement of an *express limitation* on rights").

IV. THE PANEL OPINION CREATES A CIRCUIT SPLIT THAT WILL RESULT IN MORE UNCERTAINTY (AND LITIGATION)

A. The Panel Opinion Conflicts With Third Circuit Law

The Third Circuit held in a published opinion that the "key" question post-*ACA* is whether the equipment "had the present capacity to function as an autodialer by generating random or sequential telephone numbers and dialing those numbers." *Dominguez*, 894 F.3d at 121.

The panel declined to follow *Dominguez* for having made an "unreasoned assumption" that random/sequential number generation is a statutory requirement (Op. at 23 n.8), which is unfounded. In two opinions that first addressed the 2015 FCC ruling and then *ACA* in the second, the Third Circuit analyzed "the statute itself" and concluded that "[t]he statute's reference to a 'random or sequential number generator' reflects that, when the statute was enacted in 1992, telemarketers typically used autodialing equipment that either called numbers in large sequential blocks or dialed random 10-digit strings. Thus, the FCC initially interpreted the statute as specifically targeting equipment that placed a high volume of calls by randomly or sequentially generating the numbers to be dialed." *Dominguez*, 629 F. App'x. at 372-73. Accordingly, "the statutory definition does in fact include such a requirement," and "is explicit that the autodialing equipment may have the capacity to store *or* produce the randomly or sequentially generated numbers to be dialed." *Id.* at 372 & n.1. The "linguistic problem" that the panel criticized *Dominguez* for not resolving exists only because the panel held, contrary to *Satterfield*, that the statute is ambiguous. In construing the statute, legislative history, and FCC orders, *Dominguez* held an ATDS "must be able to store or produce numbers that *themselves* are randomly or sequentially generated." 629 F. App'x. at 373 n.2. These determinations were affirmed post-*ACA*. 894 F.3d at 119.

B. The Panel Opinion Conflicts With D.C. Circuit Law

The panel opinion revives the very overbreadth problem that *ACA* ruled was "impermissible" because it would "render every smartphone an ATDS." 885 F.3d at 697-98. Even with the caveat that there must be "automatic *dialing*" (Op. at 23)—an unwritten requirement that the panel fails to clarify—ordinary smartphones would still qualify as an ATDS because they have the capacity to make "calls automatically from a stored list" (Op. at 25 n.10). For example, smartphone users can call stored numbers by tapping on a party's name in the contacts list, without having to manually dial or press a 10-digit number, or program phones to send scheduled messages or auto-replies. The panel decision therefore contravenes *ACA*, which is binding authority under the Hobbs Act (Op. at 16) and expressly holds that an ATDS cannot be broadly construed where every one of the over 224 million smartphones in the United States would qualify as an ATDS.

For the foregoing reasons, *en banc* review should be granted.

Dated: October 4, 2018

GREENBERG TRAURIG, LLP

By: */s/ Ian C. Ballon*
Ian C. Ballon
Lori Chang

Attorneys for Defendant-Appellee,
Crunch San Diego, LLC

Form 11. Certificate of Compliance Pursuant to 9th Circuit Rules 35-4 and 40-1 for Case Number 14-56834

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the back of each copy of the petition or answer.*

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition (check applicable option):

☒ Contains 3893 words (petitions and answers must not exceed 4,200 words), and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

or

☐ Is in compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature of Attorney or Unrepresented Litigant: s/ Ian C. Ballon

Date: 10/4/2018

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I, Ian C. Ballon certify that on October 4, 2018, Appellee's Petition For Rehearing *En Banc* was filed through the CM/ECF System; registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF system sends an email notification of the filing to the parties and counsel of record who are registered with the Court's EMC/ECF system.

GREENBERG TRAURIG, LLP

By: _/s/ *Ian C. Ballon*_____

Ian C. Ballon
Lori Chang
1840 Century Park East, Suite 1900
Los Angeles, CA 90067
Telephone: (310) 586-7700
Facsimile: (310) 586-7800
Attorneys for Defendant-Appellee, Crunch San Diego, LLC