No. __

IN THE SUPREME COURT OF THE UNITED STATES

MELANIE GLASSER,
PETITIONER
v.
HILTON GRAND VACATIONS COMPANY, LLC,
RESPONDENT

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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September 28, 2020

QUESTIONS PRESENTED

The Telephone Consumer Protection Act of 1991 ("TCPA"), Pub. L. No. 102-243, 105 Stat. 2394, prohibits use of an "automatic telephone dialing system" ("ATDS") to initiate voice calls and text messages to certain phone numbers, including numbers assigned to cellular telephone service, without the prior express consent of the called party. 47 U.S.C. § 227(b)(1)(A).

Petitioner sued Respondent for violating this provision after Respondent used a predictive dialer to place timeshare telemarketing calls to Petitioner's cellular telephone. The district court entered judgment for the Respondent on the grounds the dialing system used to send the messages does not qualify as an ATDS, and the Eleventh Circuit affirmed.

The TCPA defines 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).

The first question presented is whether this definition encompasses predictive dialers, which automatically dial telephone numbers stored in a list and then forward those calls to a human being only if somebody answers the phone. Or, is the definition limited only to systems that utilize a random or sequential number generator to generate arbitrary numbers to be called? The Court recently granted a petition for a writ of certiorari to consider this question in *Facebook, Inc. v. Duguid*, No. 19-511, 2020 U.S. Lexis 3559 (July 9, 2020).

The second question presented is whether a predictive dialer is removed from

the scope of the ATDS definition simply because it requires a human being, who does not participate in the phone calls, to forward the list of numbers that will be called to the dialer.

PARTIES TO THE PROCEEDINGS

Melanie Glasser is Petitioner here and was Plaintiff-Appellant below.

Hilton Grand Vacations Company, LLC is Respondent here and was Defendant-Appellee below.

STATEMENT OF RELATED PROCEEDINGS

Glasser v. Hilton Grand Vacations Company, LLC, No. 18-14499 (11th Cir.) (opinion and judgment issued January 27, 2020; petition for rehearing denied April 29, 2020; mandate issued May 7, 2020).

Glasser v. Hilton Grand Vacations Company, LLC, No. 8:16-cv-00952 (M.D. Fla.) (opinion and order granting motion for summary judgment entered September 24, 2018; final judgment entered September 25, 2018).

There are no additional proceedings in any court that are directly related to this case.

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The Eleventh Circuit's opinion is reported at 948 F.3d 1301 and reproduced at App. A, and its order denying Petitioner's petition for rehearing en banc is unreported, but reproduced at App. C.

The District Court's opinion and order granting Respondent's motion for summary judgment is reported at 341 F. Supp. 3d 1305 and reproduced at App. B.

JURISDICTIONAL STATEMENT

The Eleventh Circuit issued its opinion on January 27, 2020. Petitioner filed a petition for rehearing en banc on February 14, 2020 and the Eleventh Circuit denied the petition on April 29, 2020. This Court entered a COVID-19 related order on March 19, 2020, which extended the deadline to file any petition for a writ of certiorari due on or after that date by 150 days from the date of an order denying a timely petition for rehearing.

This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

> "The term 'automatic telephone dialing system' means equipment which has the capacity – (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1).
>
> "It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—
>
> (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—
>
> (i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service

> office, health care facility, poison control center, or fire protection or law enforcement agency);
> (ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or
> (iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States[.]" 47 U.S.C. § 227(b)(1).

STATEMENT OF THE CASE

The federal courts of appeals are split on how to interpret the foundational provision of the Telephone Consumer Protection Act (TCPA) regulating automated phone calls to cellular telephone numbers. 47 U.S.C. § 227(a)(1). By current count, three Circuit Courts have interpreted the Act's definition of "automatic telephone dialing system" (ATDS) to cover predictive dialers and other list-based dialers, which automatically dial telephone numbers stored in a database or list. *See Allan v. Pa. Higher Educ. Assistance Agency*, 2020 U.S. App. Lexis 23935 (6th Cir. July 29, 2020); *Duran v. La Boom Disco, Inc.*, 955 F.3d 279 (2nd Cir. 2020); *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018).

On the other hand, three other Circuit Courts have held the ATDS definition was never intended to apply to list-based dialers and instead applies only to those systems that dial arbitrary phone numbers by generating random or sequential numbers out of thin air. *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458 (7th Cir. 2020); *Glasser v. Hilton Grand Vacations Co., LLC*, 948 F.3d 1301 (11th Cir. 2020); *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3rd Cir. 2018).

This is a question of exceptional importance. Robocalls are not only a nuisance to those that receive them, they are threatening the viability of the telephone as a useful means of communication. As Senator Brian Schatz has noted, "robocalls have turned us into a nation of call screeners," which presents a "significant economic issue." *Illegal Robocalls: Calling all to Stop the Scourge: Hearing before the Subcommittee On Communications, Technology, Innovation, and the Internet, of the Committee on Commerce, Science, and Transportation*, 116th Cong. (Apr. 11, 2019). Many people now refuse to answer calls from numbers they do not recognize, which can lead to harmful results. *See e.g.*, Tim Harper, *Why Robocalls are Even Worse Than You Thought*, CONSUMER REPORTS, May 15, 2019, available at https://www.consumerreports.org/robocalls/why-robocalls-are-even-worse-than-you-thought// (reporting delays in medical treatment because people no longer respond to calls from medical specialists).

Congress recognized the implications of unregulated robocalls even in 1991 and accordingly banned unsolicited autodialed calls to cellular telephone numbers and other specialized telephone lines. 47 U.S.C. § 227(b)(3); *see also* S. REP. NO. 102-178, at 5 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1972–1973 ("The Committee believes that Federal legislation is necessary to protect the public from automated telephone calls. These calls can be an invasion of privacy, an impediment to interstate commerce, and a disruption to essential public safety services.").

When Congress enacted the TCPA in 1991, predictive dialers were commonly used by telemarketers. *See The Automated Telephone Consumer Protection Act of*

1991: Hearing on S. 1462 before the Sen. Subcomm. on Commc'ns of the Comm. on Commerce, Sci., and Transp., 102nd Cong. 16 (1991) (testimony of Robert S. Bulmash that thirty to forty percent of telemarketers were using predictive dialers in 1991).

When the popularity of cellular telephones took off in the early 2000s, the Federal Communications Commission sought comment on the scope of the ATDS definition and issued an order confirming predictive dialers qualify as ATDSs under the Act. *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014, 14091-93 ¶¶131-33 (2003) ("2003 Order"). Telemarketers have thus operated under the belief that predictive dialers are covered by the Act.

The ruling below threatens to reverse decades of precedent and gives a green light to telemarketers and scammers who will suddenly be free to initiate billions of automated calls to Americans who have a united distain for intrusive robocalls.

I. Congressional Concerns about "Database Telemarketing" Resulted in Passage of the Telephone Consumer Protection Act

"The TCPA was enacted to solve a problem. Simply put, people felt almost helpless in the face of repeated and unwanted telemarketing calls." *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 663 (4th Cir. 2019). As the Committee on Energy and Commerce reported at the time, new and "sophisticated, computer driven telemarketing tools have caused the frequency and number of unsolicited telemarketing calls [to] increase markedly." H.R. Rep. No. 102-317, at 6 (1991). "[T]he entire sales to service marketing function has been automated. Modern telemarketing software organizes information on current and prospective clients

into databases designed to support businesses in every aspect of telephone sales[.]" *Id.* at 7. "Hundreds of companies" had begun developing and selling computer database telemarketing applications. *Ibid.* Other companies had begun to sell instructional videos on how to engage in "Database Marketing." *Id.* at 8.

Congress was aware a burgeoning market for consumer contact information also made it easier than ever for telemarketers to fill their databases with phone numbers to call. *Id.* at 7 ("Businesses routinely purchase data from multiple sources in an effort to create unique product or service specific databases."); *see also The Automated Telephone Consumer Protection Act of 1991: Hearing on S. 1462 before the Sen. Subcomm. on Commc'ns of the Comm. on Commerce, Sci., and Transp.*, 102nd Cong. 27 (July 24, 1991) ("There are list brokers out there whose business it is to sell phone numbers, names, and so on and so forth, to the telemarketing industry[.]") (Stmt. Of Robert S. Bulmash).

These advances in database telemarketing had resulted in an explosion of telemarketing calls. As representative Markey put it: "The reason for the proliferation of such unsolicited advertising over our Nation's telecommunications network is that companies can now target their marketing . . . corporate America has your number." *Bills to Amend the Communications Act of 1934 to Regulate the Use of Telephones in Making Commercial Solicitations and to Protect the Privacy Rights of Subscribers: Hearing on H.R. 1304 and H.R. 1305 before the Subcomm. on Telecomm. and Fin. of the House Comm. on Energy and Commerce*, 102nd Cong. 2 (1991) (statement of Rep. Markey).

A growing number of telemarketers had also begun to pair their databases with automatic dialing technology "to increase their number of customer contacts." H.R. REP. NO. 102-317, at 10 (1991). Congress was concerned that autodialers were exacerbating the growing problem of unsolicited calls, as they were being used to make "millions of calls every day" and "each system has the capacity to automatically dial as many as 1,000 phones per day." H.R. REP. NO. 102-317, at 10 (1991). Congress found autodialers to be particularly problematic when used to call cellular telephone numbers, because they "impose a cost on the called party . . . cellular users must pay for each incoming call." S. REP. NO. 102-178, at 2 (1991). These concerns (the sheer number of calls and the costs they impose on cellular telephone users) extend beyond the dialing of arbitrary phone numbers generated by random or sequential number generators. Indeed, Congress was aware that only "*some* automatic dialers" functioned in that way. S. Rep. No. 102-178, at 2 (1991) (emphasis added). Thus, it was simply not the case that Congress was concerned only with dialers that randomly created numbers out of thin air.

II. Predictive Dialers

Among the autodialers in use at the time of enactment were the so-called "predictive dialers," which not only dial numbers stored in a database automatically, but dial those numbers at such excessively high rates that there is often no telemarketer available to take the call if somebody answers the phone. *See The Automated Telephone Consumer Protection Act of 1991: Hearing on S. 1462 before the Sen. Subcomm. on Commc'ns of the Comm. on Commerce, Sci., and*

Transp., 102nd Cong. 16 (testimony of Robert S. Bulmash).

To be clear, predictive dialers did not come into existence after the TCPA was enacted; Telemarketers have been using predictive dialers since the late 1980s. *See* Douglas A. Samuelson, *Predictive Dialing for Outbound Telephone Call Centers*, 29 Interfaces (INFORMS Journal on Applied Analytics) 66 (October 1, 1999) (describing invention of predictive dialers); *see also Telemarketing Sales Rule*, 67 Fed. Reg. 4492, 4523 (January 30, 2002) ("Predictive dialers are not a new phenomenon. The telemarketing industry has used these devices for many years"). By the time the TCPA was enacted in 1991, thirty to forty percent[1] of telemarketers were using them according to the testimony presented to Congress. *See The Automated Telephone Consumer Protection Act of 1991: Hearing on S. 1462 before the Sen. Subcomm. on Commc'ns of the Comm. on Commerce, Sci., and Transp.*, 102nd Cong. 16 (1991) (testimony of Robert S. Bulmash).

Like other list-based autodialers, "predictive dialers store pre-programmed numbers or receive numbers from a computer database and then dial those numbers in a manner that maximizes efficiencies for call centers." *2003 Order*, 18 FCC Rcd. at 14091. They automatically "initiate phone calls while telemarketers are talking to other consumers" so telemarketers do not have to spend time dialing

[1] Given that predictive dialers are a sophisticated version of a standard list-based dialing system, the percentage of telemarketers using list-based dialing systems in 1991 was significantly more than thirty to forty percent.

phone numbers and waiting for someone to answer. *Id.* at 14022. Only when the software detects an answer does it attempt to transfer the call to a telemarketer. *Ibid.* The 'predictive' moniker refers to the timing of the calls. The software monitors the progress of ongoing calls and attempts to "predict when a telemarketer will be free to take the next call, in order to minimize the amount of downtime for the telemarketer." *Telemarketing Sales Rule*, 67 Fed. Reg. at 4522.

As Congress understood even in 1991, however, predictive dialers frustrate and annoy consumers by "overdialing." *See The Automated Telephone Consumer Protection Act of 1991: Hearing on S. 1462 before the Sen. Subcomm. on Commc'ns of the Comm. on Commerce, Sci., and Transp.*, 102nd Cong. 19 (testimony of Robert S. Bulmash). "A predictive dialer's speed is controlled by setting its 'abandonment rate,' the rate at which the machine will 'overdial,' thus summoning more citizens to their phones than there are tele-yackers to pitch them. When this occurs, the machines generally hang-up on us." *Ibid.* In other words, predictive dialers "frequently abandon calls before a telemarketer is free to take the next call. Using predictive dialers allows telemarketers to devote more time to selling products and services rather than dialing phone numbers, but the practice inconveniences and aggravates consumers who are hung up on." *2003 Order*, 18 FCC Rcd. at 14022.

"Each telemarketing company can set its predictive dialer software for a predetermined abandonment rate, i.e., the percentage of hang-up calls the system will allow-the higher the abandonment rate, the higher the number of hang-up

calls. High abandonment rates can ensure that each telemarketing sales representative will spend the maximum possible number of minutes per hour talking with customers. However, the more rapidly the dialer places calls, the more probable it is that the telemarketers will still be on previously placed calls and not be available when the consumer picks up the phone." *Telemarketing Sales Rule*, 67 Fed. Reg. at 4523.

The testimony before Congress in 1991 clearly outlined the nuisance caused by these machines: "What we are encountering is many people picking up the phone, hearing dead air and then being hung up on. The telenuisance industry, those folks who make predictive dialers, recommend to their customers that a 2- to 8-percent abandonment rate be set in using this type of equipment." *See The Automated Telephone Consumer Protection Act of 1991: Hearing on S. 1462 before the Sen. Subcomm. on Commc'ns of the Comm. on Commerce, Sci., and Transp.*, 102nd Cong. 16 (testimony of Robert S. Bulmash); *see also id.* at 24-25.

Congress acted by banning the use of any automatic telephone dialing system (ATDS) to place calls to cellular telephone numbers and other specialized telephone lines, unless such calls were "made for emergency purposes" or "made with the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A). In order to ensure that *all* autodialers were covered by the statute, Congress defined ATDS to encompass systems like predictive dialers that dial telephone numbers *stored* in a list or database (the "store" prong) *and* systems that dial arbitrary numbers *produced* by a random or sequential number generator (the "produce" prong). *See* 47

U.S.C. § 227(a)(1) (ATDS "means equipment which has the capacity—(A) to store *or* produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.") (emphasis added). By including the store prong, Congress ensured it did not exclude the list based dialing systems that it was concerned about, and which *at least* thirty to forty percent of telemarketers were using at the time of enactment.

III. Factual Background

Between October 16, 2013 and April 2, 2014, Respondent conducted a timeshare telemarketing campaign in which its "Intelligent Mobile Connect" dialing system ("the IMC System") placed approximately fifteen million nine hundred thousand (15,900,000) calls to cellular telephone numbers across the country. Cir. Ct. App. at 685-86. Given the one hundred sixty eight (168) day time-period at issue and assuming constant operation 24 hours a day, that is an average rate of 2.46 calls per second. *Ibid*; *id.* at 429. Petitioner received thirteen of these calls on her cellular telephone. App. A at p. 3. The calls were unsolicited; Petitioner had not consented to receive them. App. A at 4.

The IMC System is a predictive dialer with tremendous overdialing capacity - its abandonment rate is adjustable to one hundred (100) calls for every available telemarketer, up to one thousand (1,000) simultaneous calls. Cir. Ct. App. at 425-26, 670, 674.

Like any other predictive dialer, the IMC system is paired with a database of telemarketing prospects. App. A. at 20. Every week, Respondent programmed the software to pull certain telephone numbers from the database for dialing that

matched Respondent's marketing criteria. App. A. at 20. Like any other predictive dialer, the IMC system dials those numbers automatically, while no telemarketer is on the line, and then attempts to transfer any calls that are answered to available telemarketers. Cir. Ct. Appendix at 432. And like any other predictive dialer, the IMC system would hang up on the called party if a telemarketer did not become available to take the call within two seconds after the called party answered the phone. *Id.* at 768-69. This scenario often results in the called party answering the call with "hello?", …"hello?" into "dead air." This is the exact type of nuisance the TCPA is meant to prevent.

Like any other predictive dialer, the IMC system also requires a human being to upload the list of numbers to be called to the computer server that actually dials the telephone numbers. *Id.* at 430-31. In order to create the illusion that the IMC system was not an autodialer, however, Respondent designed the IMC system such that it was not possible to upload the list of telephone numbers to the dialer with a *single* click of a button; rather the IMC system required one click *per telephone number* to upload the list. *Ibid.* Respondent accordingly paid several individuals in Orlando, FL to rapidly click a button on a desktop application with a computer mouse, which would forward the telephone numbers in the list to the dialer (located in Florence, KY). *Id.* at 372, 581, 615. These persons could not even decide which number to click or skip any numbers, but much like the drinking bird clicked the numbers appearing on the monitor without any thought or discretion. *Id.* at 421. In order to complete the illusion, Respondent called these employees "manual dialing

marketing agents," labeled the button to forward the list as "make call," forbade its employees from ever referring to the IMC system as an autodialer, and instructed its employees to lie to the called parties about why there was a delay after they answered the phone before the telemarketer came on the line. App. B at 3; Cir. Ct. App. at 615.

In reality, however, these clicker agents were not and could not actually dial any telephone numbers because they were not using a telephone. *Id.* at 606-07. The only thing they could do was forward the list of telephone numbers to the IMC dialer in Kentucky, hundreds of miles away. *Id.* at 626-27. The desktop application they were clicking had no telephony function whatsoever and the so-called "make call" button accordingly could not make any calls. *Id.* at 431-32. These clicker agents took no active part in the call itself whatsoever. The clicker agents were not "on the line" when the calls were placed, and they could not listen, speak, or otherwise participate in the calls. *Ibid.* If any of the calls were answered, the IMC dialer would attempt to transfer the call to a different employee whose job it was to sell timeshares over the phone. *Ibid.* And if no nobody was available within two seconds of an answer, the IMC dialer would hang up on the called party. *Id.* at 570-71, 674, 768-69.

IV. Proceedings Below

In April 2016, Petitioner filed a civil complaint against Respondent in the United States District Court for the Middle District of Florida, alleging that

Respondent's calls violated the ATDS prohibitions of the TCPA. App. B at 1. The district court had federal question jurisdiction pursuant to 28 U.S.C § 1331.

At the time that Petitioner filed her complaint, the TCPA's application to predictive dialers was well established. The Federal Communications Commission had repeatedly confirmed that predictive dialers qualified as ATDSs under the statute. *See 2003 Order*, 18 FCC Rcd. at 14091-93 ¶¶133 ("a predictive dialer falls within the meaning and statutory definition of "automatic telephone dialing equipment" and the intent of Congress."); *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 23 FCC Rcd. 559, 566-67 ¶¶ 12-14 (2008) (2008 Order); *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7971-73 ¶¶ 10-14 (2015) (2015 Order). Moreover, the Circuit Courts had also confirmed the TCPA's application to predictive dialers, citing the FCC's orders. *See Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1114 (11th Cir. 2014); *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012).

In February 2018, Respondent filed a motion for summary judgment, contending that the IMC System was not a predictive dialer, and did not qualify as an ATDS, because it could not dial telephone numbers without "human intervention." App. B at 2.

On March 16, 2018, the D.C. Circuit issued an opinion in *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018), which vacated the FCC's 2015 Order because it contained confusing and seemingly contradictory statements about the FCC's

interpretation of the ATDS definition. *Id.* at 701 ("the Commission's ruling appears to be of two minds on the issue."); *Id.* at 703 ("It might be permissible for the Commission to adopt either interpretation. But the Commission cannot, consistent with reasoned decisionmaking, espouse both competing interpretations in the same order.")

On September 24, 2018, the district court granted Respondent's motion for summary judgment, ruling that the IMC System was not an ATDS both because it could not "generate" telephone numbers for dialing and because "human intervention was required before a cell number could be dialed by [the IMC System]. App. B at 5, 8, 11. The district court held "it matters not that the computer actually dials the number forwarded to it by the clicking agent."

On appeal, the Eleventh Circuit affirmed on both points, ruling that the ATDS definition does not encompass list-based autodialers (App. A at 2) and that the IMC System does not automatically dial telephone numbers because "calls cannot be made unless an agent forwards a telephone number to the server to be called." App A at 20. Judge Martin issued a separate opinion dissenting from the majority's interpretation of the ATDS definition that would exclude list-based autodialers. *Id.* at 25 (Martin, J., Dissenting in part).

REASONS FOR GRANTING REVIEW

This Court has already determined certiorari is warranted as to the ATDS issue when it granted certiorari in *Facebook, Inc. v. Duguid*, No. 19-511, 2020 U.S.

Lexis 3559 (July 9, 2020). Certiorari here is warranted for the same reasons and for the reasons that follow.

First, the Circuit Court "decided an important federal question in a way that conflicts with relevant decisions of this Court." SUP. CT. R. 10(c). The Circuit Court's interpretation of the ATDS definition renders superfluous the very language on which Petitioner seeks to rely – the words "store or." The court acknowledged that its interpretation "run[s] into superfluity problems," but rejects a competing interpretation that resolves the superfluity because of "conventional rules of grammar and punctuation." App A. at 7-9. That decision conflicts with *Lockhart v. United States*, 136 S. Ct. 958 (2016) and similar decisions, which establish that the rule against superfluity should supersede any concerns about the strict application of grammatical rules. *Id.* at 965-66; *see also Ransom v. FIA Card Servs.*, 562 U.S. 61, 70 (2011) ("We must give effect to every word of a statute wherever possible."), quoting *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004).

The Circuit Court further departed from this Court's precedent by allowing purely hypothetical and speculative concerns about the statute's potential application to calls placed by smartphones to guide its interpretation of the statutory text. App. A. at 14. This Court has repeatedly held that such hypothetical concerns cannot control the decision about what a law actually provides. *See e.g.*, *Coleman v. Tollefson*, 135 S. Ct. 1759, 1765 (2015) ("If and when the situation that Coleman hypothesizes does arise, the courts can consider the problem in context."); *Lawson v. FMR LLC*, 571 U.S. 429, 453 (2014) ("it would thwart Congress'

dominant aim if contractors were taken off the hook for retaliating against their whistleblowing employees, just to avoid the unlikely prospect that babysitters, nannies, gardeners, and the like will flood OSHA with §1514A complaints.")

Second, the Court should grant certiorari because "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). The Circuit Court's decision conflicts with decisions in the Second Circuit, Sixth Circuit, and Ninth Circuit, all of which interpret the ATDS definition to encompass list-based autodialers like the one Respondent used in this case. *Duran*, 955 F.3d at 287; *Allan*, 2020 U.S. App. Lexis 23935 at 28; *Marks*, 904 F.3d at 1052. Moreover, as to the second question presented, the Circuit Court's opinion conflicts with the Ninth Circuit's opinion in *Marks*, the Second Circuit's opinion in *Duran*, and the Seventh Circuit's opinion in *Blow v. Bijora*, 855 F.3d 793 (7th Cir. 2017), which all hold that human intervention in a dialing system prior to the actual dialing of phone numbers does not render the device non-automatic. *Id.* at 1052-53; *Duran*, 955 F.3d at 289-90; *Blow*, 855 F.3d at 802. The Court should grant certiorari to resolve this circuit split on both of these questions and bring uniformity to the law.

I. The Court Should Grant Certiorari to Resolve the Statute's Application to List-Based Autodialers

The TCPA defines 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). The definition is written in the disjunctive – its plain language encompasses systems that

automatically dial telephone numbers after *either* storing those telephone numbers to be called (the store prong) *or* producing those telephone numbers to be called using a random or sequential number generator (the produce prong). That is why the FCC confirmed in 2003 that predictive dialers qualified as ATDS regardless of whether they could produce telephone numbers using a random or sequential number generator. *2003 Order*, 18 FCC Rcd. at 14092, ¶ 132 ("the statutory definition contemplates autodialing equipment that *either* stores *or* produces numbers") (emphasis added).

Under this interpretation, the clause "using a random or sequential number generator" modifies only the verb "produce;" it does not reach back to also modify the verb "store." "This means the numbers to be called by an ATDS may be 'stored' or they may be 'produced,' but only if they are produced must they come from 'a random or sequential number generator.'" *Duran*, 955 F.3d at 283-84. By this reading, the ATDS definition is not limited to devices with the capacity to generate random or sequential telephone numbers, but "also includes devices with the capacity to dial stored numbers automatically." *Marks*, 904 F.3d at 1052.

This reading is supported by two semantic considerations. First, the clause "using a random or sequential number generator" cannot naturally be read to modify the verb "store" because it makes no sense to *store* telephone numbers *using* a random or sequential number *generator*. Storage and generation are functionally distinct processes. And while number generators can obviously be used to "produce" telephone numbers, it is hard to see how a number generator could be used to 'store'

telephone numbers. App. A at 8 (acknowledging "the oddity of 'storing' telephone numbers using a number generator.") "Because a number generator produces numbers, the more natural reading is that 'using a random or sequential number generator' solely modifies 'produce.'" *Allan*, 2020 U.S. App. LEXIS 23935 at 9.

The Circuit Court attempted to resolve the "oddity" by positing that some kind of ephemeral storage must occur whenever a number is generated, so, "in that way," an autodialer "employs the number generator as part of the storage process." App. A at 8. But as the dissenting opinion points out, the majority "never explains how numbers are actually stored 'using' a random or sequential number generator." App. A at 26 (Martin, J., dissenting in part). Instead, it simply presumes that storage is just "something that happens whenever a number is generated." *Id.* at 27. Moreover, the majority opinion contradicts itself by acknowledging that some autodialers, which make numbers "available for immediate dialing" do not store telephone numbers at all. App. A at 9 ("Sometimes storage would happen; sometimes it wouldn't.") The Circuit Court thus adopted "a tortured definition of 'store,'" which is distorted "beyond its plain and ordinary meaning." App. A at 27. (Martin, J., dissenting in part). As the dissenting opinion put it, "[t]he Court would be better off acknowledging that 'store . . . using a random or sequential number generator' does not make sense, and thus avoiding the gymnastics required to give meaning to the phrase." *Id.* at 28.

The second semantic consideration undermining the Circuit Court's interpretation is that it renders the words "store or" superfluous. Whenever a

dialing system utilizes a random or sequential number generator, it has *produced* numbers *using* a random or sequential number generator, and the produce prong is satisfied. Always. *See Duran*, 955 F.3d at 284 ("Common sense suggests that any number that is stored using a number-generator is also produced by the same number-generator[.]") There is nothing for the words "store or" to do if the use of a random or sequential number generator is a necessary element of an ATDS.

There is no reason to put the words "store or" in the definition if, in fact, it only applies to systems that use random or sequential number generators. Even if the system somehow *could* also store numbers using the random or sequential number generator, it would not matter because the ATDS definition would *already be satisfied*. *See Allan*, 2020 U.S. App. LEXIS 23935 at 10 (its storage function would be "incidental to its production function").

A. The Circuit Court's Interpretation of ATDS Violates Cardinal Principles of Statutory Interpretation

This Court has repeatedly held courts "must give effect to every word of a statute wherever possible." *Ransom*, 562 U.S. at 70, quoting *Leocal*, 543 U.S. at 12. This is the "cardinal principle of statutory construction" (*Williams v. Taylor*, 529 U.S. 362, 404 (2000)), which has guided courts for hundreds of years. *See Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879) ("As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' This rule has been repeated innumerable times.")

The Circuit Court was therefore bound to "assume that Congress used two

terms ["'store' or 'produce'"] because it intended each term to have a particular, nonsuperfluous meaning." *Bailey v. United States*, 516 U.S. 137, 146 (1995) (rejecting interpretation that "undermines virtually any function" for a statutory term in favor of an interpretation that "preserves a meaningful role" for that term.)

The Circuit Court admitted its interpretation of ATDS does indeed "run into superfluity problems" (App. A at 9), but held that it was "the least superfluous approach" because the alternative interpretation (now adopted by the Ninth, Second, and Sixth Circuits) would "read a key clause ('using a random or sequential number generator') out of the statute. As Judge Martin put it, this is simply "Not so." App. A at 29 (Martin, J., dissenting in part). "There is no surplusage problem if one reads the statute to say that an autodialer must either (1) store telephone numbers, or (2) produce telephone numbers using a number generator." *Ibid.* An ATDS definition that encompasses both types of systems gives meaning to both the Store Prong and the Produce Prong and renders neither superfluous. If an autodialer can store telephone numbers to be called before dialing them then it is an ATDS and it doesn't matter if it could also produce them using a random or sequential number generator before dialing. Likewise, if an autodialer can produce telephone numbers to be called using a random or sequential number generator before dialing them then it is an ATDS and it doesn't matter if it could also store them before dialing.

The Circuit Court rejected this common sense interpretation in favor of an interpretation of "redundancy," in which "'produce' and 'store' operate more as

doublets than independent elements." App. A at 9. This interpretation not only violates this Court's directive to "give effect to every word of a statute wherever possible" (*Ransom*, 562 U.S. at 70), it ignores the substantial legislative history showing exactly why Congress chose to include the words "store or" – to ensure the statute's application to list-based dialing systems.

Congress was concerned a burgeoning market for the sale of consumer contact information, and increased use of sophisticated computer databases by telemarketers, was resulting in an explosion of unsolicited telemarketing calls. And they were right. In its report on the House version of the bill that would become the TCPA, the Committee on Energy and Commerce found telephone solicitations were increasing at an unprecedented rate due to the growth of "Database Marketing." H.R. REP. NO. 102-317, at 7 (1991) ("Modern telemarketing software organizes information on current and prospective clients into databases designed to support businesses in every aspect of telephone sales[.]") The committee found that "hundreds of companies" had begun developing and selling computer database applications for telemarketers, while others had begun to sell instructional videos on how to engage in "Database Marketing." *Id.* at 7-8. It found further that telemarketers routinely purchased demographic and psychographic data (including names, addresses, and telephone numbers) from multiple sources in order to build their telemarketing databases. *Ibid.*

In a hearing on the Senate's version of the bill, the Committee on Commerce, Science, and Transportation, similarly heard testimony about "list brokers . . .

whose business it is to sell phone numbers, names, and so on and so forth, to the telemarketing industry[.]" *The Automated Telephone Consumer Protection Act of 1991: Hearing on S. 1462 before the Sen. Subcomm. on Commc'ns of the Comm. on Commerce, Sci., and Transp.*, 102nd Cong. 27 (July 24, 1991) (Stmt. Of Robert S. Bulmash). According to the same testimony, thirty to forty percent of telemarketers were already using highly advanced "Predictive Dialers" to automatically dial the telephone numbers from lists they were purchasing. *Id*. at 16. Given predictive dialers evolved from standard list-based dialers, the percentage of telemarketers using list-based autodialers in 1991 is far more than thirty to forty percent.

Then representative Markey put it in plain terms: "The reason for the proliferation of such unsolicited advertising over our Nation's telecommunications network is that companies can now target their marketing . . . corporate America has your number." *Bills to Amend the Communications Act of 1934 to Regulate the Use of Telephones in Making Commercial Solicitations and to Protect the Privacy Rights of Subscribers: Hearing on H.R. 1304 and H.R. 1305 before the Subcomm. on Telecomm. and Fin. of the House Comm. on Energy and Commerce*, 102nd Cong. 2 (1991) (statement of Rep. Markey).

Thus, contrary to the Circuit Court's assertion, random dialers did not "occupy the waterfront", but instead were only part of the problem Congress was addressing. As such, the Circuit Court's reading of "store" as being redundant is contradicted by the legislative history, which shows that the word has an obvious purpose: to cover the predictive dialers and other list-based dialing systems that

were commonly used by telemarketers even in 1991 and which Congress believed were contributing to the increase in unsolicited telemarketing calls.

The Circuit Court nevertheless rejected Petitioner's interpretation because it believed doing so would violate "conventional rules of grammar and punctuation." App. A at 7. Relying on the so-called "Series-Qualifier Canon," *see* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 148-149 (2012), the Circuit Court held that "when two conjoined verbs ('to store or produce') share a direct object ('telephone numbers to be called'), a modifier following that object ('using a random or sequential number generator') customarily modifies both verbs." *Ibid.* Accordingly, because the phrase "telephone numbers to be called" is the direct object of both "store" and "produce," the Circuit Court believed it must therefore modify both 'store' and 'produce.'

These grammatical concerns cannot save the Circuit Court's reading of ATDS for a number of reasons. To begin, a postpositive modifier that follows the shared direct object of multiple verbs (like the phrase "using a random or sequential number generator" in the ATDS definition) is often most naturally read to do exactly what the Circuit Court says it should not do - modify only one of the verbs that precede it. Consider the following sentences:

> "The surgeon sterilized and incised my elbow, using a scalpel."
>
> "Baseball is a sport in which players throw, catch, or hit a ball, using a bat."
>
> "This company manufactures and ships widgets, using the U.S. postal service."

> "I have deduced that Mrs. Peacock either shot or bludgeoned Colonel Mustard in the Billiard Room, using the Candlestick."

In each of these examples, multiple verbs share a direct object, which is followed by a modifying phrase that is most naturally read to modify only the last verb in the series. One need not engage in textual "surgery" (App. A at 18) to conclude that the surgeon used the scalpel to incise my elbow, not to sterilize it. Likewise, no rule of grammar requires the reader to conclude that baseball players use a bat to throw a baseball, or that a company manufactures widgets using the U.S. Postal service. Moreover, the existence of a comma immediately before the modifying clause in each of these examples does not make their obvious readings any less natural. The ATDS definition is no different. It is perfectly natural to conclude that "using a random or sequential number generator" does not modify "store," especially because "the phrase is an admittedly imperfect fit for the verb 'store' to begin with.

That is why the so-called "series-qualifier canon" does not apply here. On its face, the cannon states: "When there is a *straightforward*, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series." SCALIA & GARNER, READING LAW 147 (emphasis added). Just as there is no straightforward way for Ms. Peacock to shoot Colonel Mustard using a candlestick, there is no straightforward way to store telephone numbers using a random or sequential number generator, as everyone agrees. That is why the series-qualifier canon, "[p]erhaps more than most of the

other canons, . . . is highly sensitive to context." *Id.* at 150. It cannot be applied to the ATDS definition because the context precludes it. Not only does it make no sense to store numbers using a random or sequential number generator, doing so would render the word store superfluous (supra), and conflict with the other contextual evidence that Congress intended to regulate list-based autodialers.

More importantly, the series-qualifier canon cannot overcome the rule against superfluity. In *Lockhart*, this Court considered a sentencing provision in a child pornography statute that applied if the offender had "a prior conviction . . . under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." *Lockhart*, 136 S. Ct. at 961. As the Court put it, "[t]he question before us is whether the phrase 'involving a minor or ward' modifies all items in the list of predicate crimes ('aggravated sexual abuse,' 'sexual abuse,' and 'abusive sexual conduct') or only the one item that immediately precedes it ('abusive sexual conduct'). *Ibid.* Like the Circuit Court here, Lockhart argued that the series-qualifier canon required the modifier to apply to all of the items in the series preceding it because it would represent the most natural reading of the language. *Id.* at 965. The Court rejected application of the series-qualifier canon, however, because doing so would create a superfluity problem by making each of the items in the series "hopelessly redundant." *Lockhart*, 136 S. Ct. at 965-66 ("it is clear that applying the limiting phrase to all three items would risk running headlong into the rule against superfluity by transforming a list of separate predicates into a set of synonyms describing the same predicate.").

Lockhart thus rejected the most natural construction of the statute at issue in that case because doing so avoided the superfluity problem that reading would create. *Ibid.* *Lockhart* establishes that the rule against superfluity should supersede a court's concerns about grammar. Following *Lockhart*, the Tenth Circuit recently rejected application of the series-qualifier canon to avoid a superfluity problem. *Jordan v. Maxim Healthcare Servs.*, 950 F.3d 724, 747 (10th Cir. 2020) ("As in *Lockhart*, following the series-qualifier canon here creates (for reasons explicated supra) serious surplusage; it makes 'companions' and 'casual babysitters' redundant with 'domestic employees.'") The Circuit Court should have done the same in this case.

B. The Statutory Context Confirms Regulation of List-Based Dialing Systems

The statutory context of the TCPA also confirms its application to list-based autodialers and precludes the Circuit Court's interpretation. First, the Congressional testimony set forth above makes it clear Congress was concerned with corporate America buying lists to make telemarketing calls and not just randomly created numbers.

Second, the statute creates an affirmative defense for ATDS calls made to cellular telephone numbers when they are made with "the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A). A consent defense for ATDS calls serves little purpose if the only systems regulated by the ATDS provision are those that dial telephone numbers generated out of thin air. Users of those systems could only ever establish a consent defense through sheer dumb luck because they are, by

definition, calling completely arbitrary telephone numbers. The only conceivable way for callers using automated systems to ensure they call telephone numbers with consent is to *use a targeted list* of telephone numbers believed to have consent. But, of course, if they do that, then they are not using an ATDS (as the Circuit Court sees it) in the first place, and thus have no need for a consent defense. *See Marks*, 904 F.3d at 1052 ("to take advantage of this permitted use, an autodialer would have to dial from a list of phone numbers of persons who had consented to such calls, rather than merely dialing a block of random or sequential numbers.")

As the Sixth Circuit aptly held in *Allan*, "[t]he consent exception is key to defining ATDS because an exception cannot exist without a rule. An exception for consented-to calls implies that the autodialer ban otherwise could be interpreted to prohibit consented-to calls. And consented-to calls by their nature are calls made to known persons, i.e., persons whose numbers are stored on a list and were not randomly generated. Therefore, the TCPA's exception for calls made to known, consenting recipients implies that the autodialer ban applies to stored-number systems." *Allan*, 2020 U.S. App. LEXIS 23935 at 15-16.

The Circuit Court rejected this argument because § 227(b)(1) also regulates calls made "using an artificial or prerecorded voice" and therefore the consent exception could be read as applying only to those calls, rather than calls placed by an ATDS. App. A at 19. But as both the Second Circuit and Sixth Circuit have now held, "the language of the statute does not make that distinction." *Allan*, 2020 U.S. App. LEXIS 23935 at 16-17 (quoting *Duran*, 955 F.3d at 279, n.20). "There is no

basis at all in the text of the statute for the Eleventh Circuit's bald assertion that the consent exception does not apply to automated calls." *Ibid.*

Third, "the now-defunct government debt collection exemption implies that the autodialer ban covers stored-number systems." *Id.* at 18. Congress amended the statute to add the government debt collector exemption on November 2, 2015. *See* Bipartisan Budget Act of 2015, 114 Bill Tracking H.R. 1314. Although this Court has since severed that amendment from the statute as an unconstitutional content-based restriction on speech (*Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020)), its addition to the statute in 2015 is significant in understanding the scope of the act. At that time, the statute's application to predictive dialers had been well established for over twelve years and was considered binding under the Hobbs Act. *See 2003 Order*, 18 FCC Rcd. at ¶ 12. Moreover, the Courts of Appeals had consistently confirmed the FCC's interpretation of the statute. *See e.g., Soppet v. Enhanced Recovery Co.*, 679 F.3d 637, 638-39 (7th Cir. 2012); *Mais*, 768 F.3d at 1114; *Meyer*, 707 F.3d at 1043. Thus, contrary to the Circuit Court's description of the history, the ATDS definition had indeed "been given a consistent judicial construction." *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 185 (1994).[2]

[2] The Circuit Court is also mistaken that the D.C. Circuit's *ACA Int'l* opinion described the list-based dialer interpretation of ATDS as "inconsistent with reasoned decision making" and therefore undermines a finding of ratification here. App. A at 16. To the contrary, *ACA Int'l* found that both interpretations were likely permissible, but that the FCC's 2015 Order, specifically, was not

Congress thus knew that the statute applied to the predictive dialers used by the government's debt collectors and so enacted the amendment specifically "to authorize the use of automated telephone equipment to call cellular telephones for the purpose of collecting debts owed to the U.S. government." Bipartisan Budget Act of 2015, 114 Bill Tracking H.R. 1314. By amending the statute to add the exemption, Congress ratified a "consistent judicial construction" of the statute. *See Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 185 (1994) ("When Congress reenacts statutory language that has been given a consistent judicial construction, we often adhere to that construction in interpreting the reenacted statutory language."); *see also Marks*, 904 F.3d at 1052 ("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.")

The Circuit Court rejected this argument because "[t]he 2015 amendment did not reenact § 227's definition of an auto-dialer; it added to § 227's liability provision - a change that has nothing to do with this debate." App. A at 17 (internal citation omitted). This distinction fails as the definition is dormant without a corresponding liability provision. The Court's decision in *Tex. Dep't of Hous. & Cmty. Affairs. v. Inclusive Cmtys Project, Inc.*, 135 S. Ct. 2507 (2015) is on point. The issue in that case was whether the Fair Housing Act allowed for "disparate-impact" claims. *Id.* at

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"consistent with reasoned decision making" because it "espouse[d] *both interpretations in the same order*." *ACA Int'l*, 885 F.3d at 703 (emphasis added).

2513. As is the case here, Congress amended the statute to create certain *exemptions from liability* for disparate-impact claims when disparate-impact liability had already been well established in the lower courts. *Id.* at 2519. This Court ruled that, through this amendment, "Congress ratified disparate-impact liability." *Id.* at 2521. In addition, the Court held that because the amendment created exemptions to disparate-impact liability, it "would be superfluous if Congress had assumed that disparate-impact liability did not exist" *Id.* at 2520. Thus, the Court was compelled to construe the statute as imposing general disparate-liability "in order to avoid a reading which renders some words altogether redundant" *Id.* The same is true here. Congress's amendment creating an exception to ATDS liability for government debt collectors only makes sense if Congress understood the statute to impose liability on the list-based dialing systems in the first place. Congress ratified that well-established interpretation of the act when in enacted the amendment.

The Circuit Court's citations to the statutory and regulatory context in support of its interpretation are not persuasive. As § 227(b)(1) prohibits ATDS calls to emergency telephone lines, the Circuit Court reasoned that Congress could not have been concerned about list-based autodialers since telemarketers would not store emergency numbers in their lists. App. A at 10. Yet, as shown above, Congress was concerned about both database telemarketing and random number generation. That one particular application of the statute (calls to emergency lines) bears more on the latter does not detract from the statute's application to list-based

dialers used to call cellular telephone numbers, which Congress recognized "impose a cost on the called party" even when the numbers were are not randomly generated. S. Rep. No. 102-178, at 2 (1991). Moreover, as the dissenting opinion notes, there is no reason to think that calls to hospitals, physicians, etc. are more likely to be randomly generated than to be stored in some telemarketer's list. App. A at 31 (Martin, J., dissenting in part). After all, telemarketers call businesses as well.

The Circuit Court also believed that, until 2003, the FCC had consistently interpreted the ATDS definition to apply only to those systems that generated random or sequential phone numbers. App. A at 11, citing *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd. 8752, 8776 (1992) ("1992 Order"); *In re TCPA Rules & Regulations*, 10 FCC Rcd. 12391, 12400 (1995) ("1995 Order"). However, as the dissenting opinion points out, neither the 1992 Order nor the 1995 Order are on point. App. A at 32, n.4 (Martin, J., dissenting in part). Rather than address list-based dialing, the relevant portions of the 1992 order concern (1) whether identification requirements for *prerecorded* phone calls (*see* 47 USC § 227(d)(3)(A)) apply to prerecorded calls made by debt collectors (*1992 Order*, 7 FCC Rcd at 8773); and (2) whether the FCC should create an exemption from the prerecorded call rules for services that *forward prerecorded voice messages*. *Id.* at 8776. Similarly, the relevant portions of the 1995 Order again concern only whether prerecorded calls placed by debt collectors have to comply with the TCPA's identification requirement for prerecorded calls. *1995 Order*, 10

FCC Rcd at 12400-401, citing 47 U.S.C. § 227(d)(3)(A). Thus, these early orders provide little guidance on the statute's application to list-based dialing systems.

C. The Circuit Court's Speculative Concerns about the Statute's Application to Smartphones are Unfounded

The Circuit Court also expressed concerns that Petitioner's interpretation would create liability for the ordinary use of a smartphone. App. A at 14 ("Suddenly, an unsolicited call using voice activated software (think Siri, Cortana, Alexa) or an automatic 'I'm driving' text message could be a violation worth $500.")

Yet these functionalities simply do not turn smartphones into ATDS. The ATDS definition covers systems that store *multiple* "telephone numbers (plural) to be called" and then automatically "dial[s] such numbers" (plural). 47 U.S.C. § 227(a)(1) (emphasis added). In other words, its plain language is limited to list-based autodialers used to automatically dial numerous telephone numbers stored in a list. Dialing a telephone number through Siri, Cortana, or Alexa is not automatic dialing and, as far as Petitioner can tell, no plaintiff in a TCPA action has ever claimed otherwise. Similarly, the "I'm driving" auto-response also does not work as an ATDS – it does not autodial a series of numbers that were stored to be called. It is a one-off reply to an incoming message. Moreover, as the Sixth Circuit noted in *Allan*, "automatic reply messages are only sent in reply. Plaintiffs would have a tough go showing that they did not consent to receiving a message after they themselves initiated contact. At bottom, [these] 'pragmatic' concerns are really a parade of horribles." 2020 U.S. App. LEXIS 23935 at 26.

The fact is that no court has ever found anyone liable under the TCPA's ATDS provision for ordinary use of a smartphone and there is little reason to think that any court would. Out of the box smartphones not only fail to satisfy the plain language of the ATDS definition, they do not match up to that language when the words are "read in their context and with a view to their place in the overall statutory scheme." *Lockhart*, 136 S.Ct. at 963; *see also New Prime Inc. v. Oliveira*, 139 S.Ct. 532, 539 (2019) ("It's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute.") (citation omitted).

Accordingly, in the highly speculative and unlikely scenario that someone is ever sued for the normal use of a smartphone, the court in that case could and should rightly dismiss the case for failure to state a claim. Or that court could rightly dismiss the case because the plaintiff does not "fall within the zone of interests protected by the law invoked" and would therefore lack statutory standing to proceed. *United States v. All Funds on Deposit with R.J. O'Brien & Assocs.*, 783 F.3d 607, 617 (7th Cir. April 2, 2015), quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984). Or that court could rightly dismiss the case because application of the TCPA would be unconstitutional as applied to such conduct. *See Regan v. Time, Inc.*, 468 U.S. 641, 651 n. 8 (1984) ("one arguably unconstitutional application of the statute does not prove that it is substantially overbroad, particularly in light of the numerous instances in which the requirement will easily be met.")

This Court has frequently held that the proper course in such situations is to leave resolution of the hypothetical issue to the court that might actually, if ever, hear such case. *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32 (1963) ("[A] limiting construction could be given to the statute by the court responsible for its construction if an application of doubtful constitutionality were . . . presented."); *Coleman v. Tollefson*, 135 S. Ct. 1759, 1764-65 (2015) ("If and when the situation that Coleman hypothesizes does arise, the courts can consider the problem in context.")

Concerns about a hypothetical application of the statute to everyday use of a smartphone, which did not even exist in 1991, are entirely too speculative and attenuated to eliminate the statute's application to dialing systems commonly used by telemarketers prior to 1991. Doing so would "close[] the courthouse door to a broad swath of consumers who . . . have suffered the very harm for which Congress provided recourse." *Glasser*, 948 F.3d at 1318 (Dissenting Opinion).

This Court reached a similar conclusion in *Lawson*, where it considered the scope of the whistleblower protections in the Sarbanes-Oxley Act of 2002, which prohibited public companies, their officers, employees, contractors, subcontractors, and agents from discriminating against "an employee" because of whistleblowing activity. *Lawson*, 571 U.S. at 432. The question before the Court was whether the term "an employee" applied only to employees of a public company itself, or whether it also included employees of its officers, contractors, etc. *Id.* at 433. FMR argued that the term "an employee" "must be read to refer exclusively to public company

employees to avoid the absurd result of extending protection to the personal employees of company officers and employees, e.g., their housekeepers or gardeners." *Id.* at 445. The Court rejected the argument for two reasons that are relevant here. First, the Court found there to be "scant evidence . . . that these floodgate-opening concerns are more than hypothetical" given that nobody had identified a single case in which such allegations had been made *Id.* at 452. Second, the Court held that narrowly construing the term "an employee" to apply only to employees of the public company itself would contravene the legislative intent by excluding the entire mutual fund industry from the scope of a statute, which was an industry that Congress clearly had in mind when it enacted the statute. *Id.* at 453. The Court accordingly refused to so narrowly construe the statute because of speculation that others might take it too far. "[I]t would thwart Congress' dominant aim if contractors were taken off the hook for retaliating against their whistleblowing employees, just to avoid the unlikely prospect that babysitters, nannies, gardeners, and the like will flood OSHA with §1514A complaints." *Ibid.*

The same considerations apply here. There is no evidence whatsoever that anybody has ever been sued under the TCPA for the normal use of a smartphone. Furthermore, excluding list based dialing systems from the scope of the statute over such concerns would thwart Congress's primary purpose of alleviating consumers from the burden of automated telemarketing calls.

D. The Court Should Grant Certiorari to Resolve the Circuit Split

For all of these reasons, Petitioner contends the ATDS definition must be

read to encompass list-based autodialers. Three Circuit Courts agree with Petitioner. Without final resolution of the issue by this Court, both telemarketers and the persons they seek to call will face uncertainty and divergent outcomes based solely on their geographic location. Congress intended for this federal statute to have a uniform application across the United States. Granting certiorari to resolve the question presented will bring uniformity to the law.

II. The Court Should Grant Certiorari to Resolve the Circuit Split on the Degree of "Human Intervention" Allowed by the ATDS Definition

The Circuit Court's decision also creates a circuit split on the issue of "automatic" dialing. Everyone agrees that an ATDS must have the capacity to dial telephone numbers automatically; indeed, under the statutory definition, it is the "*equipment*" that must itself have "the capacity to . . . dial [stored telephone numbers]" 47 U.S.C. § 227(a)(1). Although the words "human intervention" do not appear in the statute, the FCC and the courts have interpreted this automatic dialing requirement to mean that an ATDS must have "the capacity to *dial* numbers without human intervention." *See 2003 Order*, 18 FCC Rcd at 14092 (emphasis added).

The Second, Seventh, and Ninth Circuits have accordingly ruled that human intervention *prior to* the dialing of the telephone numbers by the equipment, such as in creating the list of telephone numbers to be called, does not remove the dialer from the scope of the statute. *See Duran*, 955 F.3d at 287-90; *Blow*, 855 F.3d at 802; *Marks*, 904 F.3d at 1052. As the Seventh Circuit put it, "dialing" is "the precise point of action" at which human intervention becomes relevant. *Blow*, 855 F.3d at

802; *see also Marks*, 904 F.3d at 1052 ("By referring to the relevant device as an '*automatic* telephone *dialing* system,' Congress made clear that it was targeting equipment that could engage in automatic *dialing*, rather than equipment that operated without any human oversight or control.") (original emphasis).

The Circuit Court stands alone among the federal appellate courts in adopting a narrower view of "automatic" dialing in which a dialer is removed from the scope of the statute if there is "human involvement *before* it places any calls." App. A at 20 (emphasis added). Under the Circuit Court's view, it doesn't matter that a computer server in Respondent's IMC System, "dials the numbers itself" while nobody is on the line to speak to the called party because the "calls cannot be made unless an agent *forwards a telephone number to the server* to be called." App. A at 20, 21 (emphasis added). And it doesn't matter that this computer server can dial *one thousand simultaneous calls*, or *one hundred calls for every telemarketer who is currently available*, in the hopes that one will result in answer. Cir. Ct. App. at 425-26, 670, 674. And it doesn't matter that this computer server will itself automatically hang up the phone if a telemarketer does not become available within two seconds of the called party's answer (remember, *there is nobody on the phone when the dialer places the call*). *Id.* at 768-69. In the Circuit Court's view, the rapid clicking of a button by clicker agents who do not even participate in the calls, and instead merely "forward" a list of numbers to a computer server located hundreds of miles away *before* those numbers are dialed, is enough to remove the dialer from the scope of the statute. App. A at 20.

The Circuit Court's view not only conflicts with the decisions of its sister circuits, it cannot be squared with the statutory text or the purpose of the statute. The statute, on its face, regulates "automatic telephone *dialing* systems" – not automatic list forwarders. 47 U.S.C. § 227(a)(1) (emphasis added). It is the dialing that must be automatic, not the work required to feed a list of numbers to the dialer.

The fact that the clicker agents in the IMC System upload the list of telephone numbers to the dialer one number a time through rapid clicks of a button, rather than uploading the entire list with a single click of a button, does not change the analysis because they are not *dialing* telephone numbers. Indeed, they are not even using a telephone. Cir. Ct. App. at 606-07. The Second Circuit addressed a similar system in *Duran*, and correctly identified the distinction: "When a person clicks 'send' in such a program, he may be instructing the system to dial the numbers, but he is not actually dialing the numbers himself. His activity is one step removed." *Duran*, 955 F.2d at 289. Indeed, the IMC system's configuration to require rapid clicking to upload the list to the dialer rather than allowing uploading of the entire list with a single click was done in a transparent attempt to evade the TCPA. *See* Cir. Ct. App. at 679 ("This is critical for customers who need to be able to go in front of a judge and say they do not even own an auto-dialer.")

There is good reason why *dialing* is the critical step. When numbers are dialed automatically, no human being is on the phone when the numbers are dialed, no human being is listening for an answer, and no human being will be on the

phone when the call is answered. Cir. Ct. App. at 416. And predictive dialers make it even worse by rudely hanging up on the called party when there are no telemarketers available to take the call because the system has "overdialed." This practice "inconveniences and aggravates consumers who are hung up on." 2003 Order, 18 FCC Rcd. at 14022.

The nuisance of answering a phone only to find that there is no human being on the line, or only to be hung up on by a machine, is precisely the type of harm that Congress was seeking to address in its regulation of ATDSs. *See* 105 Stat. 2394, Pub. L. 102-243, § (2)(6) ("Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers."). Indeed, the congressional testimony that led to the passage of the TCPA clearly outlined this nuisance caused by predictive dialers. *See The Automated Telephone Consumer Protection Act of 1991: Hearing on S. 1462 before the Sen. Subcomm. on Commc'ns of the Comm. on Commerce, Sci., and Transp.*, 102nd Cong. 19 (testimony of Robert S. Bulmash) ("A predictive dialer's speed is controlled by setting its 'abandonment rate,' the rate at which the machine will 'overdial,' thus summoning more citizens to their phones than there are tele-yackers to pitch them. When this occurs, the machines generally hang-up on us.")

By adopting such a broad view of "human intervention," in which a computer server capable of placing one thousand simultaneous calls with no human being on the line does not qualify as an ATDS, the Circuit Court's approach "seems to defy Congress's ultimate purpose in passing the TCPA, which was to embrace within its

scope those dialing systems which can blast out messages to thousands of phone numbers at once, at least cost to the telemarketer." *Duran*, 955 F.3d at 289.

Unless this Court grants certiorari to resolve the circuit split on both this issue and the statute's application to list-based dialing systems, the scope and application of the TCPA will remain uncertain. And if all it takes to remove an autodialer from the scope of the statute is to require a human being to forward the numbers to the dialer system that makes the call, "then it is hard to imagine how any dialing system could qualify as automatic." *Ibid.* Until the Court resolves these issues, consumers will continue to be inundated with invasive automated telemarketing calls.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully Submitted,

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APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14499

D.C. Docket No 8:16-cv-00952-JDW-AAS

MELANIE GLASSER,

Plaintiff-Appellant,

versus

HILTON GRAND VACATIONS COMPANY, LLC,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

No. 18-14586

D.C. Docket No. 3:16-cv-00082-TCB

TABITHA EVANS,

Plaintiff-Appellee,

versus

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

(January 27, 2020)

Before WILLIAM PRYOR, MARTIN, and SUTTON,[*] Circuit Judges.

SUTTON, Circuit Judge:

After they each received over a dozen unsolicited phone calls, some about repaying a debt, others about buying vacation properties, Melanie Glasser and Tabitha Evans sued the companies that called them for violating the Telephone Consumer Protection Act. Both women allege that the companies placed the calls through "Automatic Telephone Dialing Systems," which the Act regulates and restricts. Because neither phone system used randomly or sequentially generated numbers and because the phone system in Glasser's appeal required human

[*] Honorable Jeffrey S. Sutton, United States Circuit Judge for the Sixth Circuit, sitting by designation.

intervention and thus was not an auto-dialer, the Act does not cover them.

I.

In 1991, Congress enacted the Telephone Consumer Protection Act. Pub. L. No. 102-243, 105 Stat. 2394. The law makes it illegal to "make any call . . . using any automatic telephone dialing system or an artificial or prerecorded voice" to "emergency telephone line[s]," to "guest room[s] or patient room[s] of a hospital," or "to any telephone number assigned to a paging service[] or cellular telephone service" without the "prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A). It defines an "automatic telephone dialing system" 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." *Id.* § 227(a)(1). The law's prohibition on using auto-dialers does not apply to residential land lines. *Id.* § 227(b)(1)(B). The Act enforces these requirements with penalties, including $500 for each illegal call. *Id.* § 227(b)(3)(B). If the caller "willfully" or "knowingly" violated the prohibition, the court may award $1,500 or more per call. *Id.* § 227(b)(3).

Melanie Glasser and Tabitha Evans entered the picture in 2013. Over the course of about a year, they each received over a dozen unsolicited phone calls to their cell phones. Hilton Grand Vacations Company, LLC, a timeshare marketer, called Glasser thirteen times about vacation opportunities. The Pennsylvania

Higher Education Assistance Agency, a loan servicer, called Evans thirty-five times about unpaid student loans. Neither Glasser nor Evans consented to the calls.

The plaintiffs alleged that the companies used "automatic telephone dialing system[s]," often referred to as auto-dialers, in violation of the Act. The companies admitted that they called the plaintiffs, and they admitted that they used sophisticated telephone equipment to make the calls. But they disputed that their systems counted as auto-dialers under the Act. In Glasser's case, the district court concluded that the system did not qualify as an auto-dialer because it required human intervention to dial the telephone numbers. In Evans' case, the court concluded that the system qualified as an auto-dialer because it did not require human intervention and had the capacity to dial automatically a stored list of telephone numbers. The court also ruled that the Agency willfully violated the Act for thirteen of the calls that it made to Evans because those calls used an artificial or prerecorded voice, a separate means of violating the Act. The court accordingly awarded treble damages for those calls. Glasser and the Agency appealed.

II.

A brief word or two about jurisdiction is in order before we turn to the merits of these consolidated appeals. The U.S. Constitution empowers the federal courts to decide "Cases" or "Controversies." To ensure that a plaintiff has standing to bring

such a claim, we ask whether the plaintiff (1) alleged a concrete injury (2) that's traceable to the defendant's conduct and (3) that the courts can redress. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–61 (1992).

The only tricky issue is whether these unwanted phone calls amount to concrete injuries. That Congress called them injuries and awarded damages for them does not end the inquiry. Congress "cannot erase Article III's standing requirements" by granting a plaintiff "who would not otherwise have standing" the right to sue via statute. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547–48 (2016) (quotation omitted). A real injury remains necessary. But a recent decision, as it happens, resolves the point for the plaintiffs. "The receipt of more than one unwanted telemarketing call," the court concluded, "is a concrete injury that meets the minimum requirements of Article III standing." *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1270 (11th Cir. 2019). We appreciate that the point is close, as another decision of the court suggests. *See Salcedo v. Hanna*, 936 F.3d 1162, 1168 (11th Cir. 2019). But *Cordoba* resolves it, establishing an Article III injury and giving plaintiffs standing to bring these claims.

III.

Section 227(a)(1) of the Act defines an "automatic telephone dialing system" 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." Remember these words.

A.

The first question is what to do with the clause: "using a random or sequential number generator." Does it modify both verbs ("to store" and "[to] produce") or just one of them ("[to] produce" but not "to store")?

As Hilton and the Agency see it, the clause modifies both verbs. Thus: to be an auto-dialer, the equipment must (1) store telephone numbers using a random or sequential number generator and dial them or (2) produce such numbers using a random or sequential number generator and dial them. Because the equipment used in the debt-collection calls targeted a list of debtors (like Evans) and the equipment used in the solicitation calls targeted individuals likely to be interested in buying vacation properties (like Glasser), they say that the statute does not apply to their calls.

As Evans and Glasser see it, the clause just modifies "[to] produce." Thus: to be an auto-dialer, the equipment must (1) store telephone numbers and dial them or (2) produce such numbers using a random or sequential number generator and dial them. Under this reading, the statute extends to phone calls that target a pre-existing list of prospects or debtors, even though they were not randomly or sequentially identified.

Clarity, we lament, does not leap off this page of the U.S. Code. Each interpretation runs into hurdles. In the absence of an ideal option, we pick the better option—in this instance that the clause modifies both verbs.

Start with conventional rules of grammar and punctuation. When two conjoined verbs ("to store or produce") share a direct object ("telephone numbers to be called"), a modifier following that object ("using a random or sequential number generator") customarily modifies both verbs. Consider these examples to see the point. In the sentence, "Appellate courts reverse or affirm district court decisions using the precedents at hand," no one would think that the appellate judges rely on precedents only when affirming trial judges. Or if a law gives tax preferences for "[a] corporation or partnership registered in Delaware," then "a corporation as well as a partnership must be registered in Delaware" in order to be eligible for the preference. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 148 (2012). The same principle applies here. *See also Am. Nat'l Fire Ins. Co. v. Rose Acre Farms, Inc.*, 107 F.3d 451, 456–57 (7th Cir. 1997).

On top of that, the sentence contains a comma separating the phrase "to store or produce telephone numbers to be called" from the phrase "using a random or sequential number generator." That, too, indicates that the clause modifies both "store" and "produce" and does not modify just the second verb. *See* Scalia &

Garner, *Reading Law* at 150. *See also Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1257 (11th Cir. 2014); *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996, 999–1000 (9th Cir. 2017) (collecting cases).

The content of the words takes us in the same direction, though with two hiccups along the way. The first hiccup is the oddity of "stor[ing]" telephone numbers using a number generator. But this problem fades when one considers how automatic phone-dialing technology works and when one keeps in mind the goal of giving content to each word and phrase in the statute. *Russello v. United States*, 464 U.S. 16, 23–24 (1983). The key reality is that it is difficult to think of dialing equipment that can "produce" telephone numbers and "dial" them but lacks the "capacity" to "store" them. Somewhere between identification and production, storage occurs. In that way, a device "stores" telephone numbers "using" a random or sequential number generator because the device employs the number generator as part of the storage process. The near impossibility that such equipment would not "store" phone numbers leads to another clue. The key modifier ("using a random or sequential number generator") would rarely, if ever, make a difference under the plaintiffs' approach. If all you need to show is storing and calling, that would apply to the "capacity" of nearly every piece of equipment, whether designed to produce randomly generated numbers or not. Helping matters is the fact that devices that randomly generated phone numbers and stored them existed

at the time Congress passed the Act. *See Noble Systems Corp., Comments on FCC's Request for Comments on the Interpretation of the TCPA*, 12–13 (Oct. 16, 2018) FCC DA 18-493.

That brings us to the second hiccup. If a device that produces telephone numbers *necessarily* stores them, that creates another problem, one of superfluity. *See Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013). What role does that leave for "store" to play? Three answers, none perfect, appear. One is that, in the context of this kind of technology, "produce" and "store" operate more as doublets than independent elements. Scalia & Garner, *Reading Law* at 176–77. Another is that both interpretations on the table run into superfluity problems. And we prefer the least superfluous approach—one that acknowledges some redundancy between store and produce but does not read a key clause ("using a random or sequential number generator") out of the statute.

One last point turns on history. The regulatory record confirms that, at the time of enactment, devices existed that could randomly or sequentially create telephone numbers and (1) make them available for immediate dialing or (2) make them available for later dialing. *See Noble Systems Corp. Comments* at 13. Sometimes storage would happen; sometimes it wouldn't. Under this reading, § 227(a) occupied the waterfront, covering devices that randomly or sequentially

generated telephone numbers and dialed those numbers, or stored them for later dialing.

The context in which these words appear cuts in the same direction. Think about the types of calls the Act seeks to prohibit. Section 227(b)(1) makes it unlawful to use an auto-dialer or an artificial or prerecorded voice to call "any emergency telephone line" including "any '911' line." 47 U.S.C. § 227(b)(1)(A)(i). It suspends belief to think that Congress passed the law to stop telemarketers from *intentionally* calling 911 operators and playing them a prerecorded message. Congress instead passed the law to prevent callers from accidently reaching 911 lines by dialing randomly or sequentially generated telephone numbers—a concern raised in the legislative debates. *See Computerized Telephone Sales Calls & 900 Service: Hearing Before the Senate Comm. on Commerce, Science & Transp.*, 102d Congress 34–35 (1991) (Statement of Chuck Whitehead) ("[T]hese automated dialers dial 911, they dial all of our emergency numbers . . . . it delays the response of emergency services."). So too for the Act's prohibition on calls to the "guest room or patient room of a hospital." *Id.* at § 227(b)(1)(A)(ii).

Contemporaneous understanding supports this interpretation as well. Everyone seemed to accept this interpretation for the first dozen years of the statute's existence. The Federal Communications Commission, the agency that

administers the Act, shared this view after the Act's passage. In a 1992 declaratory order, the Commission explained that certain technologies would not qualify as auto-dialers under the Act because the numbers these devices called "are not generated in a random or sequential fashion"—a baseline for all covered calls. *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd. 8752, 8776 (1992). The agency did not alter its view in 1995, saying that it did not cover calls "directed to . . . specifically programmed contact numbers," only to those "randomly or sequentially generated telephone numbers." *In re TCPA Rules & Regulations*, 10 FCC Rcd. 12391, 12400 (1995). The "random or sequential" requirement, thought the Commission, modified produce and store. The law did not cover devices that merely stored numbers and called them later. From 1991 to 2003, this perspective prevailed. The plaintiffs have not identified any court from that era that took the view that the law covered devices that merely stored numbers and called them later. What litigation there was focused on the Act's constitutionality, its relationship to state law, and its ban on junk faxes. *See, e.g.*, *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54, 55–56 (9th Cir. 1995); *Van Bergen v. Minnesota*, 59 F.3d 1541, 1547–49 (8th Cir. 1995); *Texas v. American Blastfax, Inc.*, 121 F. Supp. 2d 1085, 1087–93 (W.D. Tex. 2000); *Szefczek v. Hillsborough Beacon*, 668 A.2d 1099, 1102–1109 (N.J. Super. Ct. 1995).

Not until 2003 did this common understanding dissipate. That year, the Commission issued a new order that interpreted § 227 to extend to equipment that merely dialed numbers "from a database of numbers"—that merely stored numbers and called them. *In re TCPA Rules & Regulations*, 18 FCC Rcd. 14014, 14091 (2003). This new take on § 227's coverage, and its expansion of that coverage, sparked litigation over the meaning of an auto-dialer. *See Satterfield v. Simon & Schuster*, No. C 06-2893 CW, 2007 WL 1839807 at *4–5 (N.D. Cal. June 26, 2007), *rev'd*, 569 F.3d 946 (9th Cir. 2009); *Hicks v. Client Servs., Inc.*, No. 07-61822-CIV, 2009 WL 2365637 at *5–6 (S.D. Fla. June 9, 2009).

What changed? Technology and marketing strategies. But not the statute. Before it tried to pour new wine into this old skin, the Commission had watched companies switch from using machines that dialed a high volume of randomly or sequentially generated numbers to using "predictive dialers" that called a list of pre-determined potential customers. 18 FCC Rcd. at 14090–91. The shift in practice was understandable. Why call random telephone numbers when you could target the consumers who showed an interest in your product or actually owed a debt? But it didn't mean fewer calls. The Commission estimated that telemarketers attempted 104 million calls a day in 2002, compared to 18 million in 1991. *In re TCPA Rules & Regulations*, 17 FCC Rcd. 17459, 17464 (2002). Concerned that technological innovation might defeat the purpose of the Act, the

Commission invited commentators to weigh in on "whether Congress intended the definition of 'automatic telephone dialing system' to be broad enough to include any equipment that dials numbers . . . from a database of existing telephone numbers." *Id.* at 17474.

Congress in retrospect drafted the 1991 law for the moment but not for the duration. The focus on number generation eradicated one form of pernicious telemarketing but failed to account for how business needs and technology would evolve. Watching this happen in real time, the Commission tried to use a broad "reading of the legislative history" and an all-encompassing view of the law's purpose to expand the statute's coverage and fill this gap. *Id.*

The D.C. Circuit in large part rejected this interpretation and the Commission's like-minded 2008 rulemaking efforts as well. *ACA Int'l v. FCC*, 885 F.3d 687, 702–703 (D.C. Cir. 2018). The Commission, the court found, had been talking out of both sides of its mouth when it came to defining an auto-dialer. *Id.* In a 2015 order (meant to clarify the agency's position), the Commission had affirmed its initial view, that auto-dialers *must* generate random or sequential numbers, but also its revision that devices *may* count if they dial numbers from a stored list. *Id.* To "espouse . . . competing interpretations in the same order," the court held, was arbitrary and capricious and required vacating the Commission's orders. *Id* at 703.

At the same time, the court expressed skepticism about a different interpretive question that bears on this case. Besides "clarify[ing]" the definition of an auto-dialer, the Commission had decided that the word "capacity" in § 227 meant "potential." *Id.* at 695–98. Any device that could be modified to perform the functions of an auto-dialer, even a rotary telephone, now counted under the Act. *Id.* at 700. The D.C. Circuit rejected this far-reaching interpretation because it brought "within the definition's fold [smartphones,] the most ubiquitous type of phone equipment known." *Id.* at 698.

We share the D.C. Circuit's concern. In recognizing that the Commission's efforts to fill a legislative gap in coverage created by new communication technology would create an administrative expansion of coverage that extended to all communication technology, the court identified a problem that applies just as forcefully to the definition of an auto-dialer's functions as it does to the definition of capacity. In the age of smartphones, it's hard to think of a phone that does not have the capacity to automatically dial telephone numbers stored in a list, giving § 227 an "eye-popping" sweep. *Id.* at 697. Suddenly an unsolicited call using voice activated software (think Siri, Cortana, Alexa) or an automatic "I'm driving" text message could be a violation worth $500. 47 U.S.C. § 227(c)(5)(B). Not everyone is a telemarketer, not even in America. One would not expect to find this exponential expansion of coverage in a law targeting auto-dialers and randomly

generated numbers—an expansion by the way that would moot much of the Fair Debt Collection Act's application to telephone debt collection efforts. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

Constitutional avoidance principles also support our interpretation. Would the First Amendment really allow Congress to punish every unsolicited call to a cell phone? That is a G too far. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996). And how could it be consistent with the First Amendment to make exceptions for calls with a specific content, such as the exception for calls about government debts? 47 U.S.C. § 227(b)(1)(A)(iii); *Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1152–56 (9th Cir. 2019); *Am. Ass'n of Political Consultants, Inc. v. FCC*, 923 F.3d 159, 169–171 (4th Cir. 2019), *cert. granted*, No. 19–631 2020 WL 113070 (Jan. 10, 2020); *see generally Clark v. Martinez*, 543 U.S. 371, 381–82 (2005).

We are not alone in adopting this interpretation. Several other courts agree. *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 119 (3d Cir. 2018); *DeNova v. Ocwen Loan Servicing*, No. 8:17-cv-2204-T-23AAS, 2019 WL 4635552 at *3–4 (M.D. Fla. Sept. 24, 2019); *Adams v. Safe Home Sec. Inc.*, No. 3:18-cv-03098-M, 2019 WL 3428776 at *3–4 (N.D. Tex. July 30, 2019); *Gadelhak v. AT&T Servs., Inc.*, No. 17-cv-01559, 2019 WL 1429346 at *5–6 (N.D. Ill. Mar. 29, 2019); *Keyes v. Ocwen Loan Servicing, LLC*, 335 F. Supp. 3d 951, 962–63 (E.D. Mich. 2018).

Evans and Glasser resist this conclusion on several grounds. They insist that we must follow the Commission's interpretation, adopted in the 2003 and affirmed in 2008. Why? A different law, the administrative Hobbs Act, requires any challenge to an agency decision, like these orders, to go through a specific process not used here. *See Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1049 (9th Cir. 2018). Since the time for that type of review has passed, they say, the Commission's rulings govern our application of the statute. But they do not come to grips with the reality that the D.C. Circuit, in a Hobbs Act proceeding of its own, wiped the slate clean. *ACA Int'l*, 885 F.3d at 703; *Marks*, 904 F.3d at 1049–50; *Dominguez*, 894 F.3d at 119; *Pinkus v. Sirius XM Radio Inc.*, 319 F. Supp. 3d 927, 932–35 (N.D. Ill. 2018) (collecting cases). The court reviewed the relevant parts of the orders and "set aside the Commission's treatment of those matters." *ACA Int'l* 885 F.3d at 703.

Also unpersuasive is the contention that Congress "ratified" the Commission's expansive interpretation when it amended § 227 in 2015. That is an odd thing to say about a reading of the statute that the D.C. Circuit described as "[in]consistent with reasoned decisionmaking"—and was issued nearly four months before the amendment. *Id.* at 703; *In re TCPA Rules & Regulations*, 30 FCC Rcd. 7961 (2015); Pub. L. 114-74 § 301, 129 Stat 584 (2015). This principle of statutory interpretation at any rate carries weight only "[w]hen Congress

reenacts statutory language that has been given a consistent judicial construction." *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 185 (1994). Any consistency runs away from what Congress purportedly ratified, particularly if one factors in the first dozen years of the courts' and agency's experience with the statute. One thing more. The 2015 amendment did not reenact § 227's definition of an auto-dialer; it added to § 227's liability provision, Pub. L. 114-74 § 301, 129 Stat 584 (2015)—a change that has nothing to do with this debate. No circuit court to our knowledge has accepted this argument. Many have rejected it. *See*, *e.g.*, *Osthus v. Whitesell Corp*., 639 F.3d 841, 853 (8th Cir. 2011); *Paralyzed Veterans of Am. v. Sec'y of Veterans Affairs*, 345 F.3d 1334, 1351–52 (Fed. Cir. 2003); *Gen. Am. Transp. Corp. v. Interstate Commerce Comm.*, 872 F.2d 1048, 1053 (D.C. Cir. 1989); *accord VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 886–87 (9th Cir. 2016).

More profitably, but not profitably enough, Evans and Glasser invoke the Ninth Circuit's decision on the merits in *Marks*, a thoughtful opinion by Judge Ikuta. The court construed § 227 to cover devices with the capacity to automatically dial telephone numbers from a stored list or to dial telephone numbers produced from a random or sequential number generator. 904 F.3d at 1050–53. We appreciate, as shown, a key source of the court's hesitation—the instinct against "using a random or sequential number generator" to "store"

telephone numbers. *Id.* at 1050–51. But this approach creates problems of its own, as we have also shown. To adopt this reading, one must separate the statute's two verbs ("to store or produce"), place the verbs' shared object ("telephone numbers to be called") in between those verbs, then insert a copy of that shared object to the statute, this time after the now separate verb "to produce" to make clear that "using a random or sequential number generator" modifies only "to produce." That looks more like "surgery," in the words of Hilton, than interpretation. Br. 35.

Evans and Glasser assure us that, if we just apply the last antecedent canon to § 227, their reading follows. But this ignores an exception to the canon. If a comma separates a modifier ("using a random or sequential number generator") from multiple antecedents ("to store or produce telephone numbers to be called"), the modifier alters both antecedents. *Yang*, 876 F.3d at 1000 & n.3 (collecting cases). Besides, even if the canon applied, the "last antecedent" is not "to produce" but is "telephone numbers to be called." Neither the plaintiffs nor the Ninth Circuit explain why we should read the statute as they do when it's just as plausible that an auto-*dialer* refers to a device that randomizes or sequences a dialing order.

The legislative history identified by Evans and Glasser gives us new mountains to climb but no new scenery to view. The cited excerpt says nothing

about what Congress thought of the meaning of an auto-dialer. If anything, the legislative history hurts Evans and Glasser, as there is plenty of evidence that Congress wanted the statute to eradicate machines that dialed randomly or sequentially generated numbers. That indeed seems to have been the be-all and end-all of the law. *See, e.g.*, *H.R. 1304 & 1305, Hearing Before the Subcomm. On Telecomms. & Fin. of the H. Comm. on Energy & Commerce*, 102d Cong. 1 (1991) (statement of Chairman Edward J. Markey).

Evans and Glasser say our interpretation makes hash of several exemptions in the statute. Why would the statute exempt calls to consenting recipients from liability if the statute covers just randomly or sequentially generated numbers? *See* 47 U.S.C. § 227(b)(1). (There are not likely to be a lot of consented-to calls from randomly generated numbers.) And why would anyone ever use an auto-dialer to call people about a debt owed to the federal government, another exemption from liability? *Id.* (Debt collection usually involves non-randomly identified people.) Good questions both. But they submit to shared answers. Recall that § 227(b)(1) makes callers liable if they make calls "using an automatic telephone dialing system *or an artificial or prerecorded voice*." *Id.* (emphasis added). This alternative basis for liability covers every exemption the plaintiffs worry about. The statute, moreover, applies to devices that have the "capacity" to identify

randomly generated numbers; it does not require that capacity to be used in every covered call.

Evans and Glasser persist that, if we do not interpret § 227 to prohibit devices that automatically call a stored list of numbers, nothing will stand in the way of telemarketers who wish to inundate citizens with solicitations and scams. Not true. The Act's prohibition on artificial or prerecorded voices means that telemarketers who dial lists of telephone numbers have three options. They may obtain consumers' consent to robocalls. They may connect each potential customer with a human representative. Or they may face liability under the Act. That's a fair balancing of commercial and consumer interests—one Congress is free to revisit but hardly one that is implausible.

B.

Glasser's lawsuit raises another problem: The telephone equipment in her case required human intervention and thus was not an "automatic" dialing system in the first place. Even if the statute covers devices that can automatically dial a stored list of non-randomly generated numbers, Hilton's device still would not qualify. Keep in mind that the system requires a human's involvement before it places any calls. Glasser R.132 at 10–11 ("[I]t is undisputed that calls cannot be made unless an agent . . . forwards a telephone number to the server to be called.").

This reality cannot be squared with the accepted assumption that auto-dialers must *automatically* dial the numbers.

Consider the details of Hilton's system: Intelligent Mobile Connect. Each week, a Hilton marketing team creates a set of parameters about whom they want sales agents to contact. The team programs the system with these criteria, and the system selects customer records that fit the bill. The system then sends these numbers to Hilton employees who review the telephone numbers in a computer application. On their screens, the employees see a telephone number and button labeled "make call." Unless and until the employee presses this button, no call goes out. Once the button is pressed, the system dials the number and connects anyone who answers with a sales agent. Far from automatically dialing phone numbers, this system requires a human's involvement to do everything except press the numbers on a phone.

Glasser does not deny that humans play this role in placing calls. And she does not deny that the statute extends only to "automatic," not human dialing. She instead deems the human tasks associated with these systems so immaterial that they should not matter to our analysis of whether the device automatically dials numbers or not. But this system demands far more from its human operators than just "turning on the machine or initiating its functions," *Marks*, 904 F.3d at 1052–53, steps we agree would occur before an auto-dialer begins operating. The

technology before us requires meaningful human interaction to dial telephone numbers: An employee's choice initiates every call. Yes, the system dials the numbers itself. But no one would think that telling a smartphone to dial the phone number of a stored contact (or several contacts) means the smartphone has automatically dialed the number. Human intervention is necessary there, just as it is here, to initiate the call.

IV.

Our interpretation of § 227 resolves Glasser's case and most of Evans' case. All that's left are a few concerns the Agency has about the district court's decision to award Evans treble damages for thirteen of the thirty-five calls she received.

For this subset, the court concluded that the Agency used an artificial or prerecorded voice to contact Evans. Remember that using recordings to call someone without her consent is an independent basis for liability under the Act. 47 U.S.C. § 227(b)(1)(A). Our preceding discussion about auto-dialers, then, doesn't bear on this ruling. Nor does it matter for the district court's other decisions, including its decision that the Agency's use of recordings amounted to a willful violation of the Act and warranted treble damages.

A district court may grant summary judgment to a party when "there is no genuine dispute as to any material fact" and the party "is entitled to judgment as a

matter of law." Fed. R. Civ. P. 56(a). We review such decisions with fresh eyes. *Newcomb v. Spring Creek Cooler Inc.*, 926 F.3d 709, 713 (11th Cir. 2019).

No error occurred. Even taking the evidence in "a light most favorable" to the Agency, all the facts point towards its use of recorded messages. *Id.* First off, the Agency does not deny that it called Evans. And each of the thirteen calls she received came from the same number, a number the Agency admittedly owns. Looking at the transcripts of these calls, they all bear the hallmark of a recording—an identical message. Each concludes with the same phrase: "Again, our number is [Telephone Number]." Evans R.35-3 at 4–8. Evans also managed to show that the Agency's call log matches her own, down to the minute. Every record bears the same notation: "Left Answering Machine Message." Evans R.30-14 at 4–43. Taken together, there's more than enough to conclude the Agency used a recording to contact Evans thirteen times.

The Agency responds that we should not consider Evans' evidence of the recordings because she failed to properly authenticate her submissions. But the Agency failed to raise the point below. It fails anyway. The Agency claims that Evans needed to submit an affidavit along with her evidence, but the Federal Rules eliminated that requirement ten years ago. *See* Fed. R. Civ. P. 56(c); Fed. R. Civ. P. 56 advisory committee's note to 2010 amendment; Charles Alan Wright et al. 10A *Federal Practice and Procedure* § 2722 at 396–401 (4th ed. 2016). Evans

met her authentication burden when she offered testimony to support her submissions. *See In re Int'l Mgmt. Assocs., LLC*, 781 F.3d 1262, 1267 (11th Cir. 2015).

As for the court's conclusion that the Agency willfully violated the Act, we see no error there either. The Agency admitted Evans contacted a representative and revoked her consent to be called. Despite this interaction, the record shows the Agency kept contacting Evans and kept playing her recordings. The Agency knowingly used prohibited technology to contact someone it knew had revoked her consent. That's a willful violation of the Act. *See Lary v. Trinity Physician Finan. & Ins. Servs.*, 780 F.3d 1101, 1107 (11th Cir. 2015).

The Agency offers no good reason why we should see it differently. It instead repeats its arguments about the court's decision on Evans' evidence, claiming that the "error" causes problems far downstream. But the district court made no mistake when it considered her evidence, leaving the Agency without a leg to stand on.

V.

We **AFFIRM** the judgment in Glasser's case and **AFFIRM IN PART** and **REVERSE IN PART** the judgment in Evans' case.

MARTIN, Circuit Judge, concurring in part and dissenting in part:

As I read the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, the system used by the Pennsylvania Higher Education Assistance Agency ("PHEAA") to make 35 calls to Tabitha Evans qualified as an automatic telephone dialing system ("autodialer" or "ATDS"). I therefore respectfully dissent from the majority's reversal of the grant of summary judgment to Ms. Evans. I agree with the majority opinion in all other respects.

I.

The TCPA defines an autodialer 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." Id. § 227(a)(1). Construing this provision, the majority holds that a device qualifies as an autodialer only if it can "(1) store telephone numbers using a random or sequential number generator and dial them or (2) produce such numbers using a random or sequential number generator and dial them." Maj. Op. at 6. I think this interpretation is mistaken. I do not read the statute to require that a device must randomly or sequentially generate numbers in order to qualify as an autodialer. Rather, I understand that a machine may qualify as an autodialer based solely on its ability to store numbers.

A. THE APPROACH TAKEN BY THE MAJORITY AND PHEAA RELIES ON AN IMPLAUSIBLE DEFINITION OF "STORE."

I will start by accepting the premise of the majority opinion that the phrase "using a random or sequential number generator" does not modify only the word "produce."[1] See Maj. Op. at 6–7. The statutory language in question then reads as follows: "the capacity to store . . . telephone numbers to be called, using a random or sequential number generator." The majority apparently reads this provision to mean that a device must have the capacity to store telephone numbers using a random or sequential number generator. See Maj. Op. at 8–9. Indeed, the majority opinion says that the text of the statute compels this result.

It must be said that the language of this prong of the TCPA makes little sense. For example, how does it happen that telephone numbers can be stored by way of a random or sequential number generator? The majority's construction of § 227(a)(1) requires this. Yet the only function we really know to be performed by a random or sequential number generator is that it generates numbers. I appreciate the majority's candor in recognizing "the oddity of 'stor[ing]' telephone numbers using a random number generator." Maj. Op. at 8 (alteration in original). But it never explains how numbers are actually stored "using" a random or sequential number generator.

[1] I agree with the majority that the last antecedent canon does not apply here.

PHEAA prevails on appeal because the majority adopts a tortured definition of "store." Under the majority's interpretation of the TCPA, storage using a random or sequential number generator is something that happens whenever a number is generated, regardless of whether it is dialed immediately or saved for later. See Maj. Op. at 8 ("The key reality is that it is difficult to think of dialing equipment that can 'produce' telephone numbers and 'dial' them but lacks the 'capacity' to 'store' them. Somewhere between identification and production, storage occurs.").[2] But from when the TCPA was enacted through today, "store" has meant "[t]o reserve or put away for future use." American Heritage Dictionary (5th ed. 2020), https://ahdictionary.com/word/search.html?q=store; see also Webster's New International Dictionary 2252 (3d ed. 1993) (defining "store" to mean "to record (information) in an electronic device (as a computer) from which the data can be obtained as needed"). So I read the majority's approach as distorting "store" beyond its plain and ordinary meaning. For example, when I hand my credit card to a cashier, he does not "store" it. The cashier may briefly hold my card, but he does not intend to retain it indefinitely and does not need it

[2] The majority also says that under its reading of the TCPA, "[s]ometimes storage would happen; sometimes it wouldn't." Maj. Op. at 9. This raises another set of questions. Does storage always happen when a number is generated, thus undermining the majority's reading of the regulatory record? Or does it occur only when a number is made available for later dialing, something that would call into question the majority's otherwise broad reading of "store"?

for later use. Yet under the majority's interpretation, the cashier's brief handling of my card would be an instance of "storage."

I do not think "store . . . using a random or sequential number generator" means, as the majority opinion posits, that a "device employs [a] number generator as part of the storage process," a process that supposedly occurs every time a number generator is used. See Maj. Op. at 8. The Court would be better off acknowledging that "store . . . using a random or sequential number generator" does not make sense, and thus avoiding the gymnastics required to give meaning to this phrase.

B. MS. EVANS'S APPROACH AVOIDS SURPLUSAGE AND MAKES SENSE IN THE CONTEXT OF THE STATUTE.

In order to reach the same outcome without giving "store" an implausible meaning, the majority could add words to define ATDS as "equipment which has the capacity (A) to store [telephone numbers produced using a random or sequential number generator] or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." See Marks v. Crunch San Diego, LLC, 904 F.3d 1041, 1050–51 (9th Cir. 2018), petition for cert. dismissed, 139 S. Ct. 1289 (2019). Indeed, Ms. Evans's approach also requires adding words to the statute to define ATDS as "equipment which has the capacity (A) to [i] store [telephone numbers to be called] or [ii] produce telephone numbers to be called, using a random or sequential number generator; and (B) to

dial such numbers." See id. at 1050. Under either approach, there is a recognition of the ambiguity of the statutory text. See id. at 1051. But I believe Ms. Evans's interpretation should prevail on the grounds that it avoids surplusage, harmonizes the challenged language with other aspects of the TCPA, and aligns with the Ninth Circuit's approach in Marks.

1. Surplusage

Under either way of looking at the majority's approach—whether through the majority's above-discussed interpretation of "store" or through the addition of words to the TCPA to avoid interpreting "store" in an anomalous fashion—"storage" happens any time a device randomly or sequentially generates a number. As the majority admits, this interpretation "run[s] into superfluity problems." Maj. Op. at 9. After all, what work is there for the "produce" prong of the ATDS definition to do now? That is to say, I see no difference between randomly or sequentially generating a number incidental to storage on the one hand, and "produc[ing] telephone numbers to be called, using a random or sequential number generator," § 227(a)(1), on the other.

The majority recognizes this shortcoming but excuses the problem by saying its approach is the "least superfluous" one. Maj. Op. at 9. Not so. There is no surplusage problem if one reads the statute to say that an autodialer must either (1) store telephone numbers, or (2) produce telephone numbers using a number

generator. Because we may not "needlessly read[] a statute in a way that renders . . . certain language superfluous," this point supports Ms. Evans's argument. See Barton v. U.S. Att'y Gen., 904 F.3d 1294, 1300 (11th Cir. 2018).

2. Statutory Context

The approach preferred by PHEAA and the majority also renders certain aspects of the TCPA's substantive reach nonsensical. For example, the TCPA permits calls using an autodialer "made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A)(iii). Under PHEAA's definition, such calls could only be made if the number to be called was generated randomly or sequentially. But again, this interpretation makes no sense because a debt-collection call is made to a specific person, presumably to collect a specific debt. Similarly, the TCPA exempts calls "made with the prior express consent of the called party," § 227(b)(1)(A), which again reflects Congress's assumption that an autodialed call can be made to a particular number. Both of these provisions reflect a meaning of autodialer that includes calls to be made from a preprogrammed list of numbers. See Marks, 904 F.3d at 1051 n.7 (listing "[o]ther provisions in the statute [that] prohibit[] calls to specified numbers").

The majority opinion tries to reconcile these provisions by pointing to the prohibition against using an autodialer to call "any emergency telephone line" including "any '911' line." § 227(b)(1)(A)(i). The majority says this provision

would make no sense if the ATDS definition did not require some random or sequential generation. Maj. Op. at 10. However, the record of this case gives us no information about how random or sequential number generators work. Do these devices generate any conceivable phone number, or only numbers that are in service (i.e., numbers with valid area codes and leading digits)? And given that such a device presumably generates numbers with ten digits (including an area code), not three, would the random generation of a number with the area code "911" result in a call to an emergency 911 line, or would the call not go through (since "911" is, of course, not a valid area code)? I think it unwise to rest the interpretation of a federal statute on an unclear, hypothetical application of that law to a narrow and unique set of circumstances.[3]

Because we must "construe statutes in such a way to 'give effect, if possible, to every clause and word,'" S. Co. v. FCC, 293 F.3d 1338, 1346 (11th Cir. 2002) (quoting Williams v. Taylor, 529 U.S. 362, 404, 120 S. Ct. 1495, 1519 (2000)), the full context of § 227 supports the conclusion that PHEAA used an autodialer to call Ms. Evans.

[3] Also, to the extent "any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency" or "any guest room or patient room of a hospital," § 227(b)(1)(A)(i)–(ii), can be reached through a conventional phone number, it seems reasonable to assume such a call could come from a preprogrammed list just as easily as the number could be randomly generated.

3. Other Judicial Decisions

The majority says its restrictive interpretation of the statute is supported by several other courts. In ACA International v. FCC, 885 F.3d 687 (D.C. Cir. 2018), the D.C. Circuit struck down a 2015 FCC ruling in which the agency said a device's "capacity" includes its "potential functionalities."[4] Id. at 695. The D.C. Circuit's holding was partially based on its worry that, under an expansive definition of "capacity," every smartphone would qualify as an autodialer. See id. at 697–98. The majority raises this fear and even repurposes it: "Suddenly an unsolicited call using voice activated software (think Siri, Cortana, Alexa) or an automatic 'I'm driving' text message could be a violation worth $500." Maj. Op. at 14. But what may have been a reasonable worry in ACA International doesn't exist here. Neither situation hypothesized by the majority involves the

[4] My reading of the TCPA as a statutory matter renders it unnecessary to decide whether ACA International vacated all the FCC's TCPA-related rulings or just the 2015 order. See Golan v. FreeEats.com, Inc., 930 F.3d 950, 960 n.8 (8th Cir. 2019) ("We agree with the FCC not because we believe we are bound to do so but because we find this portion of their interpretation of the statute to be persuasive."). But I wish to note my disagreement with the majority's contention that the FCC's 1992 and 1995 TCPA-related orders answer the question before us. See Maj. Op. at 11. The 1992 order did not do anything more than restate the statutory definition of ATDS and note without analysis that certain calling features would "appear" not to be ATDS because they did not involve random or sequential number generation. In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 FCC Rcd. 8752, 8776–77 ¶ 47, 8792 (1992). The 1995 order, meanwhile, did not address the question before us at all; the substantive TCPA provision at issue there concerned only systems that use artificial or prerecorded voice messages, not autodialers. In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 10 FCC Rcd. 12,391, 12,400 ¶ 19 (1995) (citing 47 U.S.C. § 227(d)(3)(A)).

simultaneous dialing of numbers, plural. See § 227(a)(1). And making a call or sending a text message via voice command would almost certainly involve too much human intervention to qualify as being autodialed. See Marks, 904 F.3d at 1052–53; see also Duran v. La Boom Disco, Inc., 369 F. Supp. 3d 476, 490–92 (E.D.N.Y. 2019) (discussing other cases and holding that a device is not an autodialer if "a user determines the time at which" a message is sent), appeal filed, No. 19-600 (2d Cir. Mar. 8, 2019). The majority's concern is therefore misplaced.

Meanwhile, the Third Circuit seems to have assumed that an autodialer must be able to generate random numbers. See Dominguez v. Yahoo, Inc., 894 F.3d 116, 120 (3d Cir. 2018). However, the court gave no analysis about how it arrived at this assumption, so I am not swayed by its conclusion. And it is true that some district courts agree with the majority's position, but it is also true that some do not. See, e.g., Gonzalez v. HOSOPO Corp., 371 F. Supp. 3d 26, 34 (D. Mass. 2019); Adams v. Ocwen Loan Serv., LLC, 366 F. Supp. 3d 1350, 1355 (S.D. Fla. 2018); see also Richardson v. Verde Energy USA, Inc., 354 F. Supp. 3d 639, 649–50 (E.D. Pa. 2018) (stating that, "were [it] writing on a blank slate," the court would hold for the plaintiff, but it was bound by Dominguez to hold otherwise).

The only Court of Appeals decision that addresses and grapples with the precise question before us is Marks, in which the Ninth Circuit held "that the statutory definition of ATDS includes a device that stores telephone numbers to be

called, whether or not those numbers have been generated by a random or sequential number generator." 904 F.3d at 1043. The Marks court first found the text of § 227(a)(1)(A) to be ambiguous, and then concluded that the plaintiff's reading is preferable based on the surrounding provisions in the TCPA that allow an autodialer to call selected numbers. See id. at 1050–52. The majority says Marks was "a thoughtful opinion" but rejects it because the Ninth Circuit's reading of the statute "looks more like surgery . . . than interpretation." Maj. Op. at 17–18 (quotation marks omitted). As I have already explained, this operation cannot be completed (to either side's satisfaction) without some minimally invasive procedures.

C. CONCLUSION

Happily, I think the majority is right to say that its decision does not declare open season for "telemarketers who wish to inundate citizens with solicitations and scams." See Maj. Op. at 19–20. As this case demonstrates, the alternative method of liability for calls made using an artificial or prerecorded voice is not illusory. But while the sky is not necessarily falling, I think it unfortunate that the majority has closed the courthouse door to a broad swath of consumers who—like Ms. Evans—have suffered the very harm for which Congress provided recourse. I would affirm the District Court's grant of summary judgment to Ms. Evans.

II.

Because I would affirm the grant of summary judgment to Ms. Evans, I would hold PHEAA liable for all 35 calls she received. But although I am the odd man out as to PHEAA's liability for the entire universe of calls, I join the majority in affirming the District Court's finding of liability for the 13 calls that were made using a prerecorded voice (and the District Court's decision to treble damages on that basis).

III.

Finally, I concur in the majority's decision to affirm the grant of summary judgment to Hilton in Glasser v. Hilton Grand Vacations Co. I believe the majority is correct when it holds that there is too much human intervention in the Intelligent Mobile Connect system, which Hilton used to call Ms. Glasser, to qualify it as an autodialer. On this basis, I agree summary judgment was proper.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

MELANIE GLASSER, individually and on behalf of all others similarly situated

Plaintiff,

v. **Case No: 8:16-cv-952-JDW-AAS**

HILTON GRAND VACATIONS COMPANY, LLC.

Defendant.
_____/

ORDER

BEFORE THE COURT are Defendant's Motion for Summary Judgment (Dkt. 98) and Plaintiff's opposition (Dkt. 104). Also before the Court are Plaintiff's Motion for Class Certification (Dkt. 91), Defendant's Response (Dkt. 93), and Plaintiff's Reply (Dkt. 94). Upon consideration, Defendant's Motion for Summary Judgment (Dkt. 98) is **GRANTED**. Plaintiff's Motion for Class Certification (Dkt. 91) is **DENIED** as moot.

Background

In this action alleging violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* ("TCPA"), Plaintiff alleges that between October 16, 2013 and April 2, 2014, Hilton Grand Vacations Company, LLC used an automated telephone dialing system ("ATDS") to make telemarketing calls to her cell phone without her consent.[1] (Dkt. 1 ¶ 13). She brings this action on

[1] Plaintiff's Complaint alleges that the automated calls occurred "[t]hroughout the month of February 2016." (Dkt. 1 ¶ 13). Notwithstanding, both parties discuss a date range of "between October 16, 2013 and April 2, 2014."

behalf of herself and all others similarly situated, seeking class action certification, injunctive relief, actual and statutory damages, and attorney's fees and costs.

Standard

Summary judgment is appropriate if Defendant shows "there is no genuine dispute as to any material fact and [it] is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *Hickson Corp. v. N. Crossarm Co., Inc.*, 357 F.3d 1256, 1260 (11th Cir. 2004) (moving party bears initial burden of showing, by reference to materials on file, that there are no genuine disputes of material fact that should be decided at trial) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The facts are viewed and reasonable inferences are drawn in the light most favorable to Plaintiff, the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007). On the other hand, "'[i]f no reasonable jury could return a verdict in favor of the nonmoving party, there is no genuine issue of material fact and summary judgment will be granted.'" *Lima v. Fla. Dep't of Children & Families*, 627 F. App'x 782, 785-86 (11th Cir. 2015) (quoting *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 459 (11th Cir.1994)).

Automatic Telephone Dialing System

In its motion, Defendant contends that Plaintiff has not shown that it used an ATDS to make the calls to her cell phone, an essential element of a cause of action under §227(b)(1)(A). (Dkt. 98, p. 3). More specifically, Defendant contends that it is entitled to summary judgment because the technology it used to call Plaintiff's cell phone, the Intelligent Mobile Connect system ("IMC System"), required human intervention before a call could be made, contrary to the statutory definition of an automatic telephone dialer system. (Id. at p. 12 ¶ 3). Defendant maintains that the undisputed facts show that before a call could be made, a customer's record, including, the customer's cell number, appeared on the agent's computer screen, and the agent then clicked on the

"Make Call" button on the screen to initiate the call. Plaintiff counters that although Defendant's agents clicked on the "Make Call" button to initiate a call, that only placed the number in a queue to be called, and a computer actually dialed the number. According to Plaintiff, human intervention was therefore not required to dial the number. (Dkt. 104, pp. 2, 18).

The Undisputed Facts

Eric Beekman, Defendant's Senior Director of Customer Relationship Management and Contact Management Marketing, testified that calls were placed manually by employees clicking a "Make Call" button on the IMC System computer screen (the IMC Desktop Application). (Dkt. 118, Beekman Dep., at 82:17-23, 101:20-21, 102:21-22, 103:20-24). Those employees are referred to as "manual dialing marketing agents." (Id. at 78:20-21). When an agent clicks on the "Make Call" button, "the phone number will be attempted to be dialed" through the IMC System. (Id. at 102:2-22).

Rian Logan, a technical sales consultant with Genesys[2], described the IMC System's capabilities. (Dkt. 119, Logan Dep., at 8:8, 12:1-4). According to Logan, that system was incapable of automatically launching calls. (Id. at 85:7-11, 128:17-25, 131:8-12). Rather, an "agent actually initiates the manual dial." (Id. at 46:3-4). According to Logan:

- The IMC System utilizes a business software automation tool called "Interaction Process Automation." (Id. at 20:24-25, 21:1-9, 21:19-21, 23:9-25, 24:1-25, 25:1-8).

[2] Genesys purchased Interactive Intelligence Inc. in 2016. (Dkt. 119, Logan Dep., at 9:3-5). Interactive Intelligence Inc. developed and licensed the IMC System to Defendant. (Dkt. 104-14). Prior to working at Genesys, Logan worked as a technical sales consultant for Interactive Intelligence Inc. (Dkt 119, Logan Dep., at 8:18-22).

- Interaction Process Automation handles the workflow function of retrieving and presenting a customer's record (name and phone number) to a console operator. (Id. at 24:15-21, 36:1-10, 68:2-8, 68:17-20, 129:19-24).
- Once the console operator receives a "work form" on their screen, *i.e.*, a number to dial, "[t]he console operator must click to dial." (Id. at 24:13-21, 46:12-23, 68:17-20, 129:17-21).
- When the "make call" button is pressed, a call is launched. (Id. at 46:12-23, 71:18-23, 72:3-4).
- "The media servers . . . then use call analysis to determine if it's a live speaker or not, . . . [it] will determine if it's a busy signal, an answering machine or live speaker. . . . If it's a live speaker, its transferred to a waiting agent." (Id. at 24:21-25, 25:1-2).
- The calls are made through the Public Switched Telephone Network and technically categorized as Voice Over IP[3] calls. (Id. at 23:9-20, 24:13-21, 57:4-7).
- The console operators are making "human-based" decisions as they "control the pace" of the calls and by "connecting available agents to people . . . ." (Id. at 102:7-15, 103:2-15, 131:19-25).
- "If there are no available agents [and] you click the "make call" button, it will not make a call." (Id. at 112:1-2).

[3] Voice Over Internet Protocol is a technology that transmits voice calls using a broadband internet connection instead of a regular phone line. Voice Over Internet Protocol (VoIP), Fed. Comm. Commission, https://www.fcc.gov/general/voice-over-internet-protocol-voip (last visited August 15, 2018).

Accordingly, and as Logan explained, although these operators were "not ten-digit dialing" or "keying in all the 10 digits," they were manually clicking a button to initiate dialing. (Id. at 46:13-23, 74:6-7, 127:22-24).

Discussion

The basic function and defining characteristic of an ATDS is "the capacity to *dial numbers without human intervention*." *In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rcd. 14014, 14091 ¶ 132 (2003 FCC Ruling) (emphasis added). This defining characteristic of an ATDS resolves the dispute in this case. The undisputed facts demonstrate that human intervention was required before a cell number could be dialed by Defendant's system. Accordingly, the system is not, by definition, an ATDS under the TCPA.

The TCPA prohibits any person from "mak[ing] any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a . . . cellular telephone service." 47 U.S.C. § 227(b)(1)(A).[4] To prevail on her TCPA claim, therefore, Plaintiff must show that Defendant called her cell phone using an ATDS. Her claim turns on whether Defendant's IMC System constitutes an "automatic telephone dialer system."

The TCPA defines an "automatic telephone dialer system" as "equipment that has the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator; and . . . to dial such numbers." § 227(a)(1)(A)-(B).[5] This includes equipment that

[4] The TCPA was enacted in response to evidence "that automated or prerecorded calls are a nuisance and an invasion of privacy." *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1117 (11th Cir. 2014) (quoting TCPA §2(9), (13), 105 Stat. at 2394, 2395).

[5] The FCC has issued numerous rulings interpreting what qualifies as an ATDS. *See In the Matter of Rules & Regulations Implementing the Tel.Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, 7971-7978, ¶¶ 10-24 (2015 FCC Ruling); *In the Matters of Rules & Regulations Implementing the Tel. Consumer Prot. Act of* 1991, 27 F.C.C. Rcd. 15391, 15399 (2012 FCC Ruling); 2008 *In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*,

has "the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers." *Id.*

The FCC has, on numerous occasions, confirmed this definition. *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C. Rcd. 15391, 15392 ¶ 2 n.5 (2012 FCC Ruling); *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 23 F.C.C. Rcd. at 566 ¶ 13 (2008 FCC Ruling). Most recently, on March 16, 2018, the FCC issued a ruling purporting to clarify and effectively expand the definition of an ATDS. *See In the Matter of Rules & Regulations Implementing the Tel.Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961 (2015 FCC Ruling). However, that "effort to clarify the types of calling equipment that fall within the TCPA's restrictions" was set aside in *ACA Int'l v. Fed. Commc'n Comm'n*, 885 F.3d 687, 691-92 (D.C. Cir. 2018).[6] The court concluded that the FCC's definition of an ATDS constituted an "unreasonably expansive interpretation of the statute." *Id.* at 692 ("The Commission's understanding would appear to subject ordinary calls from any conventional smartphone to the Act's coverage, an unreasonably expansive interpretation of the statute.").[7]

Relevant here, *ACA Int'l* left intact earlier FCC rulings that "the 'basic function' of an autodialer is to dial numbers without human intervention:"

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23 F.C.C. Rcd. at 566 ¶ 13 (2008 FCC Ruling); *In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rcd. 14014, 14091-93 ¶¶ 131-134 (2003 FCC Ruling). As noted, an FCC Ruling has the force of law and a district court is without jurisdiction to consider its validity. *Mais*, 768 F.3d at 1121-22.

[6] *ACA Int'l* involved a consolidated appeal from several Circuits. Although not expressly addressed by the Eleventh Circuit, other circuits have held that when an FCC order is appealed in several jurisdictions and combined for review in one circuit, the circuit decision is binding. *See Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 467 (6th Cir. 2017); *Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1057 (9th Cir. 2008) (referring to Eleventh Circuit decision addressing validity of an FCC order).

[7] *Keim v. ADF Midatlantic, LLC*, No. 12-80577, 2015 WL 11713593, at *6 (S.D. Fla. Nov. 10, 2015), cited by Plaintiff, relied on the 2015 FCC Order in rejecting the human intervention test. In light of *ACA Int'l*, *Keim* is of questionable value.

> For instance, the ruling states that the "basic function" of an autodialer is the ability to "dial numbers without human intervention." 2015 Declaratory Ruling, 30 FCC Rcd. at 7973 ¶ 14; *id.* at 7975 ¶ 17. Prior orders had said the same. 2003 Order, 18 FCC Rcd. at 14,092 ¶ 132; 2008 Declaratory Ruling, 23 FCC Rcd. at 566 ¶ 13. That makes sense given that "auto" in autodialer—or, equivalently, "automatic" in "automatic telephone dialing system," 47 U.S.C. § 227(a)(1)—would seem to envision non-manual dialing of telephone numbers.
>
> But the Commission nevertheless declined a request to "clarify[ ] that a dialer is not an autodialer unless it has the capacity to dial numbers without human intervention." 2015 Declaratory Ruling, 30 FCC Rcd. at 7976 ¶ 20. 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. Those side-by-side propositions are difficult to square.

Id. at 703.

In sum, the holding in *ACA Int'l*, the statutory definition of an ATDS, and prior FCC rulings interpreting that definition provide the necessary guidance in determining whether Defendant's IMC System is an ATDS. *See 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 the 2015 Declaratory Ruling."). As noted, the focus is on whether the system had "the capacity to *dial numbers without human intervention*." *In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rcd. 14014, 14091 ¶ 132 (2003 FCC Ruling) (emphasis added). Defendant's IMC System did not have that capacity.

Although Plaintiff acknowledges "clicker agents" initiate the calling process by clicking the "Make Call' button, she argues that internal software on the server dials the numbers, rather than humans, and that "human intervention is not only not required at the point in time at which the number is dialed, it is not possible as the number is dialed later." (Dkt. 104, pp. 8, 14). Specifically, she argues that "[e]very single call in the IMC System is automatically dialed by computer software from a queue of telephone numbers," "while no human being is on the phone." (Id. at pp. 12-13). She

contends that "[t]he clicker agents do not have the ability to confirm whether or not telephone numbers are 'correct' before submitting those numbers to the dialer queue . . . [and] the 'Make Call button' does not launch a call or dial a telephone number." (Id. at p. 13). *ACA Int'l* effectively rejects that contention.

In its discussion of the statutory requirement that an autodialer have the "capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers," the court found that the "ruling's reference to 'dialing random or sequential numbers' means generating those numbers and then dialing them" and observed "that the ruling distinguishes between use of equipment to 'dial random or sequential numbers' and use of equipment to 'call[ ] a set list of consumers.'" *ACA Int'l*, 885 F.3d at 702.[8] The court concluded that "it follows that the ruling's reference to 'dialing random or sequential numbers' means *generating those numbers and then dialing them*" and "[t]he Commission's prior declaratory rulings reinforce that understanding." *Id.* (emphasis added). It follows that Plaintiff's focus on the dialing of the numbers is misplaced. Nothing in the record demonstrates that Defendant's IMC System generated numbers and then called them.[9]

[8] Indeed, in pointing out one inconsistency in the ruling's clarification of the definition of an autodialer, the court pondered: "So which is it: does a device qualify as an ATDS only if it can generate random or sequential numbers to be dialed, or can it so qualify even if it lacks that capacity? The 2015 ruling, while speaking to the question in several ways, gives no clear answer (and in fact seems to give both answers).It might be permissible for the Commission to adopt either interpretation. But the Commission cannot, consistent with reasoned decisionmaking, espouse both competing interpretations in the same order. " *Id.* at 703.

[9] The undisputed evidence demonstrates that Defendant compiled a list of telephone numbers belonging to "Hilton honors members," "customers of Hilton through book reservations," and its "current owner base." (Dkt. 118, Beekman Dep., at 25:17, 18; 27:2). This list was "scrubbed" once a week to exclude landline numbers from being called, to insure that only cell numbers were called. (Id. at 49:16-22, 60:20-22). Individual records were pulled from this list and presented to manual dialing marketing agents via the IMC System. (Id. at 105:2-6, 105:17-25-106:1-2, 136:24-25-137:1-15).

The Experts

In addition to the testimony of Beekman and Logan, Defendant relies on the opinion of its expert, Kenneth Sponsler, in support of its contention that human intervention is necessary before a call is placed on the IMC System. To formulate his opinion, Sponsler conducted onsite inspections of the IMC System and conferred with the architects and operators of the system. (Dkt. 121, Sponsler Dep., at 47:11-14, 49:10-17, 50:9-11). According to Sponsler, in general, on the IMC System, "dial flow is a manual process." (Id. at 94:21-22). The CIC database stores telephone numbers. (Id. at 67:21-23). Names and numbers are presented to the agents, [through the IMC Desktop Application] who then click the "Make Call" button. (Id. at 68:7-12, 84:23-25, 84:1). Prior to clicking this button, the phone numbers have not made it to the process that dials numbers. (Id. at 68:19-25). Software on the CIC server dials the number. (Id. at 56:16-21, 57:1-2).

Sponsler testified that the agents do not have to dial every customer whose phone number displays on their screen, but rather "it is the option that the agent has to either make the call or not." (Id. at 85:11-13:21-22). "It's very manual . . . . It's the agents that are making [sic] clicking and observing the console and seeing if there are available agents or not and making the decision to call." (Id. at 93:23-25, 94:1-2). The IMC System does not control the dial rate, the agents do. (Id. at 63:17-25).

According to Sponsler, "human intervention in this case is the human intervention step to dial." (Id. at 101:9-10, 102:11-12). He identified three components which demonstrate that Defendant's system is not an ATDS: (1) ". . . no call can ever be placed without human intervention for each and every call;" (2) "the system is not capable of dialing from a list of numbers;" and (3) "the system does not produce or store numbers that have been randomly or sequentially generated

and didn't dial them." (Id. at 95:4-14). Sponsler's opinion is consistent with the testimony of Beekman and Logan, individuals with personal knowledge of the IMC System.

Based on the undisputed testimony of Beekman and Logan, and confirmed by Sponsler's opinion, human intervention is required before a phone call could be placed by Defendant's IMC System. Indeed, for purposes of summary judgment, independent of Sponsler's opinion, as explained by Beekman and Logan, Defendant's "manual dialing marketing agents" were *integral* to initiating each phone call.

The opinion of Plaintiff's expert, Randall Snyder, does not alter this finding. Nor does it create a material issue of fact.[10] While acknowledging that human intervention is necessary in the calling process, (Dkt. 104-3, Snyder Expert Report, at ¶¶ 59, 63, 64; Dkt. 120, Snyder Dep., at 115:10-15, 152:10-13, 164:3-4), Snyder focuses on when the calls are actually dialed, rather than the agents pushing the "Make Call" button to initiate the calling process. (Dkt. 104-3, ¶ 64 ("There is no doubt that some human agency is involved in this process, . . . but this human agency is not involved in the process of dialing telephone numbers.")). According to Snyder, since the software function on the CIC server dials the number, the IMC System dials numbers without human intervention. (Id. at ¶ 2).

[10] Snyder's opinion notwithstanding, summary judgment is not precluded. *See Buckler v. Israel*, 680 F. App'x 831, 835-36 (11th Cir. 2017); *Evers v. General Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985) quoting *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 672-73 (D.C. Cir. 1977) ("Rule 703 was intended to broaden the acceptable bases of expert opinion, but it was not intended, as appellants seem to argue, to make summary judgment impossible whenever a party has produced an expert to support its position."); *see also Am. Key Corp. v. Cole Nat'l Corp.*, 762 F.2d 1569 (11th Cir. 1985) (finding that summary judgment for defendant proper and no error in assigning "little weight" to plaintiff's expert because his affidavits did not create a material issue of disputed fact).

Snyder's opinion, like Plaintiff's argument, fails to appreciate the integral part that human intervention plays in the calling process.[11] *ACA Int'l* makes it clear that an autodialer must *both* generate the numbers and dial them. Accordingly, it matters not that the computer actually dials the number forwarded to it by the clicking agent. Rather, the focus is on the agent's human intervention in initiating the calling process. Since it is undisputed that calls cannot be made unless an agent clicks on the screen and forwards a telephone number to the server to be called, Defendant's "point-to-click" system does not constitute an autodialer system under the TCPA.[12]

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[11] Similarly, in *Marshall v. CBE Group, Inc.*, No. 2:16-cv-02406, 2018 WL 1567852, at *7 (D. Nev. Mar. 30, 2018), the district court found that defendant's system did not constitute an ATDS. Snyder was plaintiff's expert in *Marshall*. *Id.* at *6.

> Snyder asserts that the [system] is really designed to perform the function of providing telephone numbers to a dialing system, one at a time by clicking an icon. Therefore, 'the clicker agent who is clicking [] is not performing any type of dialing process; rather, the clicker agent is simply causing a telephone number to be supplied to the [system] to be automatically dialed by that system."

Id. The district court noted the significance of "human intervention" in the ATDS analysis, and acknowledged other district court rulings with respect to similar "point-and-click" systems. *Id.* at *7. The court found that the clicker agent's actions were "*integral* to initiating outbound calls." *Id.* (emphasis added). I agree with this reasoning.

[12] Several district courts in this Circuit have found that dialing systems which require agents to use "point and click" technology to initiate calls are not autodialers because "human intervention" is required to make such calls. *See Maddox v. CBE Group, Inc.*, No. 1:17-cv-1909, 2018 WL 2327037, at *5 (N.D. Ga. May 22, 2018) (holding that the "FCC's interpretation requires 'human intervention,' not that agents dial all ten digits of a phone number manually" and that the "focus is on whether the system can automatically dial a phone number, not whether the system makes it easier for a person to dial the number."); *Reyes v. BCA Fin. Services*, 312 F. Supp. 3d 1308 (S.D. Fla. 2018) (acknowledging the reasoning in *Marshall* and noting the importance of factoring in the "human-intermediary utility before placing a call" when analyzing the human intervention requirement); *Pozo v. Stellar Recovery Collection Agency, Inc.*, 8:15-cv-929, 2016 WL 7851415, at *3 (M.D. Fla. Sept. 2, 2016) ("Dialing systems which require an agent to manually initiate calls do not qualify as autodialers under the TCPA."); *Strauss v. CBE Group, Inc.*, 173 F. Supp. 3d 1302, 1310-11 (S.D. Fla. 2016) (granting summary judgment in favor of defendant whereby an agent manually initiated calls by clicking a computer mouse, and noting "human intervention is essential at the point and time that the number is dialed"); *Estrella v. Ltd Fin. Servs., LP*, 8:14-cv-2624, 2015 WL 6742062, at *3 (M.D. Fla. Nov. 2, 2015) (granting summary judgment for defendant where the evidence demonstrated that "the calls were placed manually with the use of human intervention through a 'point and click function'"; *Gaza v. LTD Fin. Servs., L.P.*, 8:14-cv-1012, 2015 WL 5009741, at *1, 4 (M.D. Fla. Aug. 24, 2015) (holding that the calls were placed manually with human intervention when an agent used their computer mouse to click on the phone number to launch the call); *Wilcox v. Green Tree Servicing, LLC*, 8:14-cv-1681, 2015 WL 2092671 (M.D. Fla. May 5, 2015) (denying summary judgment for defendant but stating that "if an agent selects a number to be called," and the system "responds by dialing that number that the agent selects," it can be said that the call was "made as a result of human intervention.").

District courts across the country have consistently issued similar rulings. *See Ammons v. Ally Fin., Inc.*, --- F.

Finally, Plaintiff argues that the IMC System is a predictive dialer under the TCPA. "A predictive dialer is an automated dialing system that uses a complex set of algorithms to automatically dial consumers' telephone numbers in a manner that 'predicts' the time when a consumer will answer the phone and a telemarketer will be available to take the call." *In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rcd. 14014, 14022 n.31 (2003 FCC Ruling). A predictive dialer may fall within the TCPA's definition of an ATDS, even though it may not "store or produce telephone numbers to be called, using a random or sequential number generator." *Id.* at ¶ 133.

Nothing in the evidence, however, demonstrates that the IMC System used a predictive algorithm or function to engage in predictive dialing. Indeed, the undisputed evidence demonstrates that the IMC System did not have the functionalities of a predictive dialer.[13] Rather, the evidence

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Supp. 3d ---, No. 17-cv-505, 2018 WL 3134619, at *7 (M.D. Tenn. June 27, 2018) (collecting cases where it was found that human intervention was necessary in the dialer's initiation of calls); *Marshall*, No. 2:16-cv-02406, 2018 WL 1567852, at *7 (The court held that the clicker agents' actions were integral to initiating calls despite plaintiff's expert's contention that these agents were simply placing telephone numbers into a system to be automatically dialed later.); *Smith v. Stellar Recovery, Inc.*, No. 15-cv-11717, 2017 WL 1336075, at *6 (E.D. Mich. Feb. 7, 2017) (finding that the system requires agents to initiate each individual call and granting summary judgment in favor of defendant); *Manuel v. NRA Grp., LLC*, 200 F. Supp. 3d 495, 501-02 (M.D. Pa. 2016), *aff'd* 722 F. App'x 141 (3d Cir. Jan. 12, 2018) (explaining that "point and click systems requiring users to manually initiate each call uniformly necessitate human involvement").

Other courts have held that the human intervention either occurred too early or late in the process. *See Somogyi v. Freedom Mortgage Corporation*, No. 17-6546, 2018 WL 3656158, at *6 (D. N.J. Aug. 2, 2018) (human intervention occurred before the number was selected or dialed by operation of the algorithm); *Ammons*, --- F. Supp. 3d ---, No. 17-cv-505, 2018 WL 3134619, at *7 ("As a matter of common sense, having operators standing by...to take a connected call is not 'human intervention' in the dialer's initiation of calls."); *Morse v. Allied Interstate, LLC*, 65 F. Supp. 3d 407, 410 (M.D. Pa. 2014) (human intervention was not required when the system loaded thousands of numbers into the dialer to be called and then transferred the call upon a human answering); *Sterk v. Path, Inc.*, 46 F. Supp. 3d 813, 819 (N.D. Ill. 2014) (the only human intervention identified prior to sending a text message was the "collection of numbers for [the system's] database of numbers").

[13] Human intervention is likewise a key-factor in analyzing predictive dialers. *See In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rcd. 14014, 14091 ¶132 (The FCC's clarification incorporating "human intervention" into the interpretation is directly discussed in the section of the Ruling entitled "Predictive Dialers."). *See also Brown v. NRA Group, LLC*, 6:14-cv-610, 2015 WL 3562740, at *2 (M.D. Fla. June 5, 2015) ("[T]o determine whether a given dialer is a predictive dialing system, and therefore an automated telephone dialing system under the TCPA, the primary consideration under the FCC order is whether human intervention is required

shows that the "clicker agents" control the pace of the calling based on what they observe at their workstations.

As noted, Plaintiff's expert, Snyder, acknowledges that the calls are initiated when the "Make Call" button is clicked, and "[e]ach click provides a telephone number to the dialing system so that those numbers can be dialed by that system, thus initiating outbound telephone calls." (Dkt. 104-3, Snyder Expert Report, at ¶ 59); *see also* (Dkt. 120, Snyder Dep., at 117:8-20 (If the "Make Call" button is not clicked, "the number would not be presented to the dialing system and the dialing system wouldn't dial that number.")).While Snyder professes not to know what constitutes human intervention, the evidence shows that human intervention is necessary for numbers to be dialed, the antithesis of a predictive dialer.[14]

Accordingly, Plaintiff's claim that Defendant placed calls to her cell phone using an ATDS without her consent in violation of the TCPA fails as a matter of law. Defendant's Motion for Summary Judgment (Dkt. 98) is **GRANTED**.

Motion for Class Certification

"The burden of establishing the propriety of class certification rests with the advocate of the class" *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1187 (11th Cir. 2003). Before determining whether to certify a class, the merits of the underlying claim may be considered. *Telfair v. First Union Mortgage Corp.*, 216 F.3d 1333, 1343 (11th Cir. 2000). Where, as here, the underlying claim of the proposed class is dismissed by summary judgment, "the issue of class certification is moot." *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1297 (11th Cir. 2005). *See Telfair*,

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at the point in time at which the number is dialed.").

[14] Snyder testified "I don't necessarily know what human intervention is." (Dkt. 120, Snyder Dep., at 83:1-5).

216 F.3d at 1343 ("With no meritorious claims, certification of those claims as a class action is moot.").

Plaintiff proposes a class of:

> All persons in the United States whose cellular telephone number Defendant called using the IMC System between October 16, 2013 and April 2, 2014 where the IMC system recorded a result of either "Connected" or Machine." (Dkt. 91, p. 2).

Plaintiff's proposed class, like her individual claim, relies on Defendant's use of an ATDS to place calls. Since Defendant's IMC System is not an ATDS, Plaintiff's Motion for Class Certification is **DENIED** as moot.

Conclusion

Accordingly, Defendant's Motion for Summary Judgment (Dkt. 98) is **GRANTED**. Plaintiff's Motion for Class Certification (Dkt. 91) is **DENIED** as moot. The Clerk is directed to enter judgment in favor of Defendant, Hilton Grand Vacations Company, LLC and against Plaintiff, Melanie Glasser.

DONE AND ORDERED this 24th day of September, 2018.

/s/ James D. Whittemore

JAMES D. WHITTEMORE
United States District Judge

Copies to: Counsel of Record

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14499-JJ

MELANIE GLASSER,
individually and on behalf of all others similarly situated,

Plaintiff - Appellant,

versus

HILTON GRAND VACATIONS COMPANY, LLC,

Defendant - Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILLIAM PRYOR, MARTIN, and SUTTON*, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

*Honorable Jeffrey S. Sutton, United States Circuit Judge for the Sixth Circuit, sitting by designation.

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