No. 20-__

IN THE SUPREME COURT OF THE UNITED STATES

ALI GADELHAK,
PETITIONER
v.
AT&T SERVICES, INC.,
RESPONDENT

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

---

PETITION FOR A WRIT OF CERTIORARI

KEITH J. KEOGH
Counsel of Record
TIMOTHY J. SOSTRIN
KEOGH LAW, LTD.
55 W. Monroe St., Ste. 3390
Chicago, IL 60603
312-726-1092
keith@keoghlaw.com

Counsel for Petitioner
August 17, 2020

QUESTION 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's computer program sent him automated text messages asking him, in a language he did not understand, to participate in a survey. The district court entered judgment for the Respondent on the grounds that the dialing system used to send the messages does not qualify as an ATDS, and the Seventh 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 question presented is whether this definition encompasses only systems that autodial telephone numbers generated using a random or sequential number generator, or whether those restrictions also apply to systems that autodial telephone numbers stored in a list, like the system used by Respondent in this case.

The Court recently granted a petition for a writ of certiorari to consider the same question in *Facebook, Inc. v. Duguid*, No. 19-511, 2020 U.S. Lexis 3559 (July 9, 2020).

PARTIES TO THE PROCEEDINGS

Ali Gadelhak is Petitioner here and was Plaintiff-Appellant below.

AT&T Services, Inc. is Respondent here and was Defendant-Appellee below.

STATEMENT OF RELATED PROCEEDINGS

Gadelhak v. AT&T Services, Inc., No. 19-1738 (7th Cir.) (opinion issued and judgment entered February 19, 2020; petition for rehearing denied March 19, 2020; mandate issued March 27, 2020).

Gadelhak v. AT&T Services, Inc., No. 1:17-cv-01559 (N.D. Ill.) (memorandum opinion and order granting motion for summary judgment and final judgment entered March 29, 2019).

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

OPINIONS AND ORDERS ENTERED BELOW

The Seventh Circuit's opinion is reported at 950 F.3d 458 and reproduced at App. A, and its order denying Petitioner's petition for rehearing en banc is unreported but available at 2020 U.S. App. LEXIS 8774 and reproduced at App. C.

The district court's memorandum opinion and order granting Respondent's motion for summary judgment is unreported but available at 2019 U.S. Dist. LEXIS 55200 and reproduced at App. B.

JURISDICTIONAL STATEMENT

The Seventh Circuit issued its opinion on February 19, 2020. Petitioner filed a petition for rehearing en banc on March 4, 2020 and the Seventh Circuit denied the petition on March 19, 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 a foundational provision of the Telephone Consumer Protection Act (TCPA) regulating automated voice calls and text messages 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 systems that 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). Such list-based autodialers were commonly used by telemarketers in 1991 when Congress enacted the TCPA. *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 had already upgraded their list-based dialers to include highly advanced predictive dialing capabilities).

On the other hand, three other circuit courts have recently 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 for businesses and emergency care centers such as hospitals. 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 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 list-based autodialers 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 list-based autodialers are covered by the Act. The ruling below threatens to reverse decades of precedent and gives a green light to telemarketers who will suddenly be free to initiate billions of automated voice calls and text messages to a public that is already fed up with these calls. One would be hard pressed to find a single telemarketer that uses a system to just randomly dial numbers. Generating arbitrary phone numbers simply makes no sense in a data driven economy where computers can easily and cheaply store massive amounts of data, and bulk consumer data is available to virtually anyone who wants it. Thus, a ruling exempting list based dialing systems from the TCPA would eviscerate the TCPA.

A. 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). The testimony before Congress indicated that, even in 1991, thirty to forty percent of telemarketers were already using highly advanced "Predictive Dialers," which not only dialed numbers from a database automatically, but dialed them at an algorithmically determined rate to maximize the number of successful connections. *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). Thus, the percentage of telemarketers using list-based dialing systems in 1991 was significantly more than thirty to forty percent.

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).

Moreover, consumers were complaining that autodialers made the nuisance and invasion of privacy of unsolicited calls even worse. "[T]he automated calls will

not disconnect the line for a long time after called party hangs up the phone, preventing the called party from placing his or her own calls" and "they do not respond to human voice commands." S. REP. NO. 102-178, at 2 (1991).

"*Some* automatic dialers" were even being programmed to generate and dial sequential blocks of telephone numbers, "thereby tying up all the lines of a business and preventing any outgoing calls." *Ibid* (emphasis added). Others were programming their dialers to call random telephone numbers, which resulted in calls to unlisted phone numbers and, sometimes, emergency telephone lines. *Ibid.* ("Having an unlisted number does not prevent those telemarketers that call numbers randomly or sequentially.")

Congress acted by banning the use of an 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 both systems 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 when the TCPA was enacted.

To ensure that these restrictions are enforced, the Act authorizes the Federal Communications Commission to prescribe additional regulations implementing its provisions, 47 U.S.C. § 227(b)(2), and authorizes a private right of action for statutory damages to any person who receives a call made in violation of the statute or the FCC's regulations. 47 U.S.C. § 227(b)(3).

B. Factual Background and Proceedings Below

Petitioner initiated this action after receiving several automated and unsolicited text messages from Respondent asking him in Spanish, which he did not understand, to participate in a survey. App. A at 2. These text messages were sent by a computer program, known as the AT&T Customer Rules Feedback Tool, or TACRFT. App. B at 2. Respondent's Market Research Organization created TACRFT to send automated text message surveys, and advertisements for Respondent's smartphone app, to cellular telephone numbers stored in the account records of its affiliate companies. *Ibid.* It is undisputed that this computer program, rather than any human being, both creates the list of cellular telephone numbers that will be called, and automatically sends pre-programmed text messages to the telephone numbers stored in that list. App. B at 2-3.

Petitioner is not a customer of Respondent or any of its affiliates and his number is on the Nation Do Not Call list. App. B at 3. Respondent's computer program nevertheless sent him five automated text messages because his cellular

telephone number somehow came to be stored in the account records of one of Respondent's affiliates. *Ibid.*

In February 2017, Petitioner filed a civil complaint against Respondent in the United States District Court for the Northern District of Illinois, alleging that Respondent's text messages violated the TCPA. *Ibid.* The district court had had federal question jurisdiction pursuant to 28 U.S.C § 1331.

At the time that Plaintiff filed his complaint, the TCPA's application to list-based dialing systems like Respondent's TACRFT system was well established. The Federal Communications Commission had repeatedly confirmed that list-based dialing systems, like Respondent's TACRFT system, qualified as ATDSs under the statute. *See 2003 Order*, 18 FCC Rcd. at 14091-93 ¶¶131-33 ("The statutory definition contemplates autodialing equipment that either stores or produces number"); *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, circuit courts across the country had also confirmed the TCPA's application to list-based autodialers, citing the FCC's orders. *See Blow v. Bijora*, 855 F.3d 793, 800-802 (7th Cir. 2017); *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).

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.")

Misreading *ACA International* to invalidate all of the FCC's prior orders concerning list-based dialing systems, Respondent filed a motion for summary judgment in the district court, contending that its TACRFT system is not an ATDS. App. B. at 1. Respondent argued the TCPA was never intended to apply to list-based autodialers and the statutory definition of ATDS was strictly limited to only those systems that generate arbitrary telephone numbers out of thin air by using a random or sequential number generator. App. B. at 11. Respondent argued further the Seventh Circuit's decision in *Blow* was no longer good law because the FCC orders on which it relied had been vacated. App. B. at 8. The district court agreed with Respondent on both points and entered judgment for Respondent. App. B. at 17. On appeal, the Seventh Circuit affirmed. It ruled that the TCPA does not apply to systems that autodial telephone numbers stored in a "customer database" and instead applies only to those systems that "generate random or sequential numbers" for dialing. App. A. at 2; *id.* at 19-20.

REASONS FOR GRANTING REVIEW

The Court should grant certiorari for two reasons. 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." App. A at 11-12. The court acknowledged that its interpretation renders those words superfluous, but rejects a competing interpretation that resolves the superfluity because the court believed that the grammar would be too awkward. App A. at 14-15. 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 16. 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. The Court should grant certiorari to resolve this circuit split and bring uniformity to the law.

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

1. 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 list-based dialing systems 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 11, quoting *Pinkus v. Sirius XM Radio, Inc.*, 319 F. Supp. 3d 927, 938 (N.D. Ill. 2018); *see also Marks*, 904 F.3d at 1052, n. 8 ("it is unclear how a number can be stored (as opposed to produced) using 'a random or sequential number generator.") (quoting *Dominguez v. Yahoo, Inc.*, 629 F. App'x 369, 372 n.1 (3d Cir. 2015). "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.

Second, if the phrase were instead read to modify both "store" and "produce," which is the circuit court's interpretation, then the word "store" suddenly becomes superfluous. To see why, ask what does a random or sequential number generator do? It *produces* numbers. *Ibid.* Accordingly, 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 left for the words "store or" to do.

In other words, there is no reason to put the words "store or" in the definition of ATDS if 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").

2. This Court has repeatedly held that 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 render the "store" term superfluous, but concluded it "is not a deal breaker" because "it is plausible that Congress chose some redundancy" in some sort of "ill-conceived . . . belt-and-suspenders approach." App A. at 12. (citations omitted). The problem with this speculation is two-fold. First, the rule against superfluity "cannot be overcome by judicial speculation as to the subjective intent of various legislators[.]" *Bilski v. Kappos*, 561 U.S. 593, 608 (2010). Second, the circuit court's speculation is, in fact, disproven by the legislative history, which shows clearly why Congress chose to include the words "store or".

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. 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 that predictive dialers evolved from standard list-based dialing systems, the percentage of telemarketers using list-based autodialers in 1991 is far more than thirty to forty percent.

Then, representative Markey put it 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, the circuit court's reading of "store" as being superfluous is contradicted by the legislative history, which shows that the word has an obvious purpose: to cover the 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.

3. The circuit court acknowledged Petitioner's interpretation of ATDS, under which list-based dialing systems are covered by the statute, would resolve the superfluity problem by giving meaning to the word "store." App. A. at 14. But it rejected that interpretation as "ungrammatical." App. A. at 16. Specifically, 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." App. A. at 10, quoting *Glasser*, 948 F.3d at 1306. Accordingly, because the phrase "telephone numbers to be called" was the direct object of both "store" and "produce,"

the circuit court believed "it would be unnatural" to "splice" those two verbs by having the phrase "using a random or sequential number generator" modify only the latter verb. App. A. at 14, citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 148-149 (2012) ("Series-Qualifier Canon").

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 "contort the [] text almost beyond recognition" (App. A. at 14) 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. The ATDS definition is no different. It is not a "judicial rewrite" (App. A. at 15) to simply conclude that "using a random or sequential number generator" does not modify "store," especially when "the phrase is an admittedly imperfect fit for the verb 'store' to begin with. App A. at 14.

That is why the so-called "series-qualifier canon" canon cited by the circuit court 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.

4. The statutory context of the TCPA also confirms its application to list-based autodialers and precludes the circuit's interpretation. First, 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 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.

Second, "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 list-based dialing systems 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.

Congress thus knew that the statute applied to list-based dialing systems 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.")

This amendment is akin to the amendment addressed in *Tex. Dep't of Hous. & Cmty. Affairs. v. Inclusive Cmtys Project, Inc.*, 135 S. Ct. 2507, 2520 (2015). The issue in that case was whether the Fair Housing Act allowed for "disparate-impact" claims. *Id.* at 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.

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

The only other reason the circuit court rejected Petitioner's interpretation of the statute was the unfounded concern that "it would create liability for every text message sent from an iPhone." App. A. at 16. The circuit court reached this conclusion because iPhones apparently have an obscure "Do Not Disturb While Driving" feature: "If someone sends you a message [while this feature is turned on], they receive an automatic reply letting them know that you're driving." *Ibid.*

As an initial matter, the ATDS definition drafted in 1991 should not be limited based on smartphone technology that did not exist until decades later. Doing so would eviscerate the TCPA by allowing virtually all telemarketing calls and ignore Congress' concerns concern that list based dialing systems were making targeted telemarketing calls without consent when the TCPA was enacted.

Moreover, the functionality the court was concerned with simply does not turn an iPhone into an 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. The iPhone's "do not disturb" feature does not work as an autodialer – 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" (App. A. at 16) 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 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 simply 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.

C. The Circuit Court's Interpretation Allows Telemarketers to Easily Circumvent the Statute

The circuit court's view is also untenable because it would allow telemarketers to easily circumvent the statute. As an initial matter, virtually every telemarketer uses a list rather than dialing random telephone numbers and there is little evidence of any case brought under the TCPA involving a system that actually produced random telephone numbers. But even if a telemarketer wanted to dial random telephone numbers, it could easily use a list to do so. A telemarketer could simply purchase a list of, for instance, every valid telephone number in the United States, a particular state, or perhaps a list containing only those valid numbers beginning with a particular area code. A system that automatically dials telephone numbers from that list would not be an ATDS under the circuit court's view because it didn't utilize a random or sequential number generator. Yet the result is completely random and automated telephone calls made when there is no connection between the caller and the call recipient. Telemarketers employing such a list would be free to unleash billions of calls upon the public with reckless abandon.

Similarly, a system operated by Alphabet, Inc., that dials from a preset list containing only the telephone numbers of every person using Google to search the internet, would also not be covered. That system would also be dialing from a "preset list" containing millions of telephone numbers. One might be inclined to

spot a difference in that the Alphabet system, and Respondent's system here, are calling numbers believed to be affiliated with the users of their services. Yet that distinction is already accounted for in the statute via the affirmative defense of "prior express consent," which allows business to use automatic dialing systems to call customers who have given prior express consent to be called. 47 U.S.C. § 227(b)(1)(A). If Congress did not intend for its ATDS prohibitions to apply to calls made by businesses to numbers believed to belong to their customers, it could have easily drafted statutory language to exclude such uses of automatic dialing systems. Instead of doing that, it created a consent defense that would have been *unnecessary* if the prohibitions did not apply in the first place.

The mere use of a stored "list" does not prevent the dialing of random, or indeed completely arbitrary telephone numbers, and is therefore a pointless way to divide regulated and unregulated autodialers.

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. And while there are three circuit courts that agree with Petitioner, the fact remains three other circuit courts, including the court below, have adopted a contrary interpretation of the statute. 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.

CONCLUSION

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

Respectfully Submitted,

KEITH J. KEOGH
Counsel of Record
TIMOTHY J. SOSTRIN
KEOGH LAW, LTD.
55 W. Monroe St., Ste. 3390
Chicago, IL 60603
312-726-1092
keith@keoghlaw.com

Counsel for Petitioner
August 17, 2020

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 19-1738

ALI GADELHAK, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

AT&T SERVICES, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:17-cv-1559 — **Edmond E. Chang**, *Judge*.

ARGUED SEPTEMBER 27, 2019 — DECIDED FEBRUARY 19, 2020

Before WOOD, *Chief Judge*, and KANNE and BARRETT, *Circuit Judges*.

BARRETT, *Circuit Judge*. The wording of the provision that we interpret today is enough to make a grammarian throw down her pen. The Telephone Consumer Protection Act bars certain uses of an "automatic telephone dialing system," which it defines as equipment with the capacity "to store or produce telephone numbers to be called, using a random or

sequential number generator," as well as the capacity to dial those numbers. We must decide an issue that has split the circuits: what the phrase "using a random or sequential number generator" modifies.

We'll save the intense grammatical parsing for the body of the opinion—here, we'll just give the punchline. We hold that "using a random or sequential number generator" modifies both "store" and "produce." The system at issue in this case, AT&T's "Customer Rules Feedback Tool," neither stores nor produces numbers using a random or sequential number generator; instead, it exclusively dials numbers stored in a customer database. Thus, it is not an "automatic telephone dialing system" as defined by the Act—which means that AT&T did not violate the Act when it sent unwanted automated text messages to Ali Gadelhak.

I.

This dispute stems from AT&T's "Customer Rules Feedback Tool," a device that sends surveys to customers who have interacted with AT&T's customer service department. Using this tool, AT&T sent Chicago resident Ali Gadelhak five text messages asking survey questions in Spanish. But Gadelhak is neither an AT&T customer nor a Spanish speaker, and his number is on the national "Do Not Call Registry." Annoyed by the texts, Gadelhak brought a putative class action against AT&T for violating the Telephone Consumer Protection Act, which Congress enacted in 1991 to address the problem of intrusive telemarketing.

With some exceptions not relevant here, the Act prohibits the use of an "automatic telephone dialing system" to call or text any cellular phone without the prior consent of the

recipient, as well as to call certain hospital numbers. 47 U.S.C. § 227(b)(1). An "automatic telephone dialing system" is defined 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); *see also Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 667 (2016) (clarifying that text messages are covered). The success of Gadelhak's suit depends on whether AT&T's feedback tool meets this definition. Unfortunately, the awkward statutory wording, combined with changes in technology, makes this a very difficult question.

At the time that the Telephone Consumer Protection Act was passed, telemarketers primarily used systems that randomly generated numbers and dialed them, and everyone agrees that such systems meet the statutory definition. But that's not how AT&T's customer feedback tool works. The system, like others commonly used today, pulls and dials numbers from an existing database of customers rather than randomly generating them. (Given that its tool pulls exclusively from its customer database, AT&T posits that Gadelhak received messages because of a typographical error.) Determining whether such systems meet the statutory definition has forced courts to confront an awkwardness in the statutory language that apparently didn't matter much when the statute was enacted: it's not obvious what the phrase "using a random or sequential number generator" modifies. The answer to that question dictates whether the definition captures

only the technology that predominated in 1991 or is broad enough to encompass some of the modern, database-focused systems.

II.

Before we analyze the merits, though, we must address the preliminary matter of Gadelhak's standing to bring this suit. The doctrine of standing is rooted in Article III of the U.S. Constitution, which limits the federal judicial power to resolving "Cases" or "Controversies." U.S. CONST. art. III, § 2. To satisfy the standing requirement, the plaintiff must claim "to have suffered an injury that the defendant caused and the court can remedy." *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 333 (7th Cir. 2019). If a plaintiff lacks standing, a federal court lacks jurisdiction.

While AT&T does not challenge Gadelhak's standing, we have an independent obligation to confirm our jurisdiction before adjudicating a case. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990). To be sure, the obligation to verify our jurisdiction in every case does not mean that we have to discuss it in every opinion. Here, though, the question whether plaintiffs like Gadelhak have standing is difficult enough to have divided the circuits. The Eleventh Circuit has held that the receipt of an unwanted automated text message is not a cognizable injury under Article III because it is insufficiently "concrete." *Salcedo v. Hanna*, 936 F.3d 1162, 1172 (11th Cir. 2019). The Second and Ninth Circuits have come out the other way. *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 92–93 (2d Cir. 2019); *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1042–43 (9th Cir. 2017). Given the split, it is important for us to show our work.

To qualify as "concrete," an injury must be "real" rather than "abstract"—that is, "it must actually exist." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). A "bare procedural violation" does not qualify, even if it gives rise to a statutory cause of action. *Id.* at 1549. That is so because Article III cabins Congress's authority to create causes of action, and suits involving abstract injuries lie beyond "the judicial Power." U.S. CONST. art. III, § 1. Thus, Gadelhak's standing to sue is not settled by the fact that the Telephone Consumer Protection Act authorizes his suit. *See* 47 U.S.C. § 227(b)(3). It depends on whether the unwanted texts from AT&T caused him concrete harm or were merely a technical violation of the statute.

To determine whether the texts caused concrete harm, we look to both history and Congress's judgment. As the Court has explained, "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo*, 136 S. Ct. at 1549. And because Congress is particularly suited "to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important." *Id.*

We'll start with history. The common law has long recognized actions at law against defendants who invaded the private solitude of another by committing the tort of "intrusion upon seclusion." RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977). In rejecting standing in a similar case, the Eleventh Circuit suggested that the tort of intrusion upon seclusion addressed only invasions of privacy like eavesdropping and spying, which pose a different kind of harm altogether. *Salcedo*, 936 F.3d at 1171. We see things differently. Courts have also recognized liability for intrusion upon

seclusion for irritating intrusions—such as when "telephone calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff." RESTATEMENT § 652B cmt. d; *see id.* cmt. b, illus. 5; *see also Carey v. Statewide Fin. Co.*, 223 A.2d 405, 406–07 (Conn. Cir. Ct. 1966); *Housh v. Peth*, 133 N.E.2d 340, 344 (Ohio 1956); *Household Credit Servs., Inc. v. Driscol*, 989 S.W.2d 72, 84–85 (Tex. App. 1998). The harm posed by unwanted text messages is analogous to that type of intrusive invasion of privacy.

Now, for Congress's judgment. In passing the Act, Congress decided that automated telemarketing can pose this same type of harm to privacy interests. Pub. L. No. 102-243, § 2, 105 Stat. 2394, 2394 (1991) (explaining in the findings that "[u]nrestricted telemarketing … can be an intrusive invasion of privacy" and characterizing telemarketing as a "nuisance"). While Congress cannot transform a non-injury into an injury on its say-so, that is hardly what it did here. Instead, Congress identified a modern relative of a harm with long common law roots. And Gadelhak claims to have suffered the very harm that the Act is designed to prevent. *Cf. Melito*, 923 F.3d at 92–93 (reaching the same conclusion).[1]

[1] The Eleventh Circuit maintains that Congress was concerned with the harm posed by unwanted telephone calls, not text messages. *Compare Salcedo*, 936 F.3d at 1172 (no standing in a TCPA suit over an unwanted text message), *with Cordoba v. DirectTV, LLC*, 942 F.3d 1259, 1270 (11th Cir. 2019) (finding injury-in-fact in a TCPA suit alleging unwanted calls). We don't share the view that the two are "categorically distinct." *Salcedo*, 936 F.3d at 1172. The undesired buzzing of a cell phone from a text message, like the unwanted ringing of a phone from a call, is an intrusion into peace and quiet in a realm that is private and personal. This is the very harm that Congress addressed.

The Eleventh Circuit treated the injury in its case as abstract partly because common law courts generally require a much more substantial imposition—typically, many calls—to support liability for intrusion upon seclusion. *See, e.g.*, *Sofka v. Thal*, 662 S.W.2d 502, 511 (Mo. 1983). But when *Spokeo* instructs us to analogize to harms recognized by the common law, we are meant to look for a "close relationship" in kind, not degree. *See* 136 S. Ct. at 1549. In other words, while the common law offers guidance, it does not stake out the limits of Congress's power to identify harms deserving a remedy. Congress's power is greater than that: it may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Id.* (alteration in original) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992)). A few unwanted automated text messages may be too minor an annoyance to be actionable at common law. But such texts nevertheless pose the same *kind* of harm that common law courts recognize—a concrete harm that Congress has chosen to make legally cognizable.[2] *Van Patten*, 847 F.3d at 1043.

[2] The Eleventh Circuit arguably limited its holding to the receipt of one text message in violation of the Act, *see Salcedo*, 936 F.3d at 1174 (J. Pryor, J., concurring in judgment only), suggesting that it might come out differently in a case in which a greater number of texts strengthened the analogy to the common law tort. The Second Circuit, by contrast, did not even mention the number of texts at issue in *Melito*, 923 F.3d at 92–93, and the Ninth Circuit held that standing existed in *Van Patten* when the defendant allegedly sent only two texts, 847 F.3d at 1041–43. For the reasons we've explained, we agree with the Second and Ninth Circuits that the number of texts is irrelevant to the injury-in-fact analysis.

We therefore agree with the Second and Ninth Circuits that unwanted text messages can constitute a concrete injury-in-fact for Article III purposes.

III.

With standing out of the way, we turn to the merits. We previously addressed the same provision in *Blow v. Bijora, Inc.*, 855 F.3d 793 (7th Cir. 2017), but at that time, a 2015 FCC Order interpreting the Act was on the books. We held that "absent a direct appeal to review the 2015 FCC Order's interpretation," the Hobbs Act required us to adopt the FCC's definition of an "automatic telephone dialing system." *Id.* at 802; *see* 28 U.S.C. § 2342(1). But since we decided *Blow*, there has been just such a "a direct appeal to review" the FCC Order: the D.C. Circuit struck down the 2015 FCC interpretation in *ACA International v. FCC*, 885 F.3d 687, 695 (D.C. Cir. 2018). And contrary to Gadelhak's assertion, *ACA International* did not leave prior FCC Orders intact. Instead, the D.C. Circuit clarified that its review also covered "the agency's pertinent pronouncements"—its prior Orders. *Id.* at 701. Neither *Blow* nor any FCC Order binds us in this case. *See Glasser v. Hilton Grand Vacations Co.*, Nos. 18-14499 & 18-14586, 2020 WL 415811, at *6 (11th Cir. Jan. 27, 2020); *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1049–50 (9th Cir. 2018); *see also Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 119 (3d Cir. 2018) (implicitly reaching the same conclusion by declining to defer to any FCC Order). We therefore interpret the statute's text as though for the first time.

There are at least four ways of reading the statutory definition of an "automatic telephone dialing system." First, the phrase "using a random or sequential number generator" might modify both *store* and *produce*, which would mean that

a device must be capable of performing at least one of those functions using a random or sequential number generator to qualify as an "automatic telephone dialing system." This is how the Third and Eleventh Circuits interpret the statute. *Dominguez*, 894 F.3d at 119; *Glasser*, 2020 WL 415811, at *2.[3] Second, the phrase might describe the *telephone numbers* themselves, specifying that the definition captures only equipment that dials randomly or sequentially generated numbers. This is how the district court interpreted the provision. Third, the phrase might limit only the word *produce*, which would mean that the definition captures not only equipment that can produce numbers randomly or sequentially, but also any equipment that can simply store and dial numbers. This is the Ninth Circuit's interpretation. *Marks*, 904 F.3d at 1052. Finally, the phrase could describe the manner in which the telephone numbers are *to be called*, regardless of how they are stored, produced, or generated. Some courts—including the district court in this case—have alluded to this possibility, although none has adopted it. *See, e.g.*, *Glasser*, 2020 WL 415811, at *7.

---

[3] In *Dominguez v. Yahoo, Inc.* (*Dominguez II*), the Third Circuit explained that after *ACA International*, it would revert to the interpretation it had adopted before the 2015 FCC Order. 894 F.3d at 119. Before the Order, the court had held that the definition covered equipment that "may have the capacity to store or to produce the randomly or sequentially generated numbers to be dialed," and then asked the district court on remand to consider how a number can be stored using a random number generator. *Dominguez v. Yahoo, Inc.* (*Dominguez I*), 629 F. App'x 369, 372 n.1 (3d Cir. 2015) (emphasis omitted). *Dominguez I* is not perfectly clear about which interpretation it applies, but the remand suggests that it reads "using a random or sequential number generator" to describe how the numbers may be stored or produced—consistent with the first interpretation that we summarize.

A.

We begin with the interpretation adopted by the Third and Eleventh Circuits. Under their reading, the phrase "using a random or sequential number generator" modifies both "store" and "produce," defining the means by which either task must be completed for equipment to qualify as an "automatic telephone dialing system." That is, the statute addresses:

> 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.

AT&T advocates this reading, which would exclude its customer feedback tool because the tool lacks the capacity either to store or to produce telephone numbers using a number generator. Instead, the tool dials numbers only from a customer database.

This interpretation is certainly the most natural one based on sentence construction and grammar. As the Eleventh Circuit explained, "[w]hen 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." *Glasser*, 2020 WL 415811, at *2. The placement of the comma before "using a random or sequential number generator" in the statute further suggests that the modifier is meant to apply to the entire preceding clause. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 150 (2012). That clause is driven by the two

verbs, "to store or produce." The sentence's construction thus seems to encourage applying the phrase "using a random or sequential number generator" to both verbs.

But this first interpretation runs into a problem: as one district court wrote, "it is hard to see how a number generator could be used to 'store' telephone numbers." *Pinkus v. Sirius XM Radio, Inc.*, 319 F. Supp. 3d 927, 938 (N.D. Ill. 2018). AT&T counters that a device that generates random numbers and then dials them does, technically, "store" such a number for the fleeting interval between those two functions. While that may be true as a technical matter, as a matter of ordinary usage it's hard to say that the random number generator is "storing" in any notable way. More persuasive, however, is the point that some systems "store" randomly generated numbers for much longer than a few fleeting moments. The record before the FCC reveals that at the time of the statute's enactment, devices existed with the capacity to generate random numbers and then store them in a file for a significant time before selecting them for dialing.[4] *See* Noble Systems Corp., Comments in Response to the FCC's Request for Comments of the Interpretation of the TCPA in Light of the 9th Circuit's Decision in *Marks v. Crunch San Diego* 12–15 (Oct. 16, 2018), https://ecfsapi.fcc.gov/file/1016271761504/Noble_System_Comments_FCC_DA18-1014_FINAL.pdf. The capacity for storage is more central to such a device's function.

Gadelhak responds that if the Act had meant to capture random-generation devices defined by their storage

[4] For a more fulsome history of the statute and the FCC's regulations interpreting it, see both *Glasser*, 2020 WL 415811, at *4–5, and *Marks*, 904 F.3d at 1043–48.

capacities, it needn't have used the word "store" at all. After all, such a device also necessarily can "produce" numbers using a number generator, rendering the "store" option in the statute superfluous. That surplusage is not a deal-breaker. *See* SCALIA & GARNER, *supra*, at 176–77 ("Sometimes drafters *do* repeat themselves and *do* include words that add nothing of substance, either out of a flawed sense of style or to engage in the ill-conceived but lamentably common belt-and-suspenders approach."). Given the range of storage capacities among telemarketing devices at the time of enactment, it is plausible that Congress chose some redundancy in order to cover "the waterfront." *Glasser*, 2020 WL 415811, at *3.

Notwithstanding the difficulties posed by this interpretation, we think that the language bears it. But because of those difficulties, we proceed to consider whether any of the other possibilities fares better.

B.

The district court favored the next option: that "using a random or sequential number generator" modifies the "telephone numbers" that are dialed. Since the telephone numbers themselves obviously lack the capacity to "us[e]" a number generator, the phrase really describes the means by which telephone numbers are *generated*, as follows:

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

Under this interpretation, an "automatic telephone dialing system" is equipment with the capacity to store or produce telephone numbers generated using a random or sequential number generator as well as the capacity to dial those numbers. Because AT&T's system cannot generate random strings of numbers for itself and instead dials only existing numbers from AT&T accounts, the district court held that it could not satisfy the statutory definition.

The district court's interpretation avoids the problems associated with the word "store." But it has a problem of its own: the grammatical structure of the sentence. The phrase "using a random or sequential number generator" is an adverbial phrase with an elided preposition—it means "[by] using a random or sequential number generator." As an adverbial phrase that describes how something is to be done, it cannot modify a noun in this context. So, to arrive at its reading, the district court had to insert a significant word into the statute that simply isn't there. Although the district court's version of the statute is clearer and therefore tempting, "our task is to interpret the words of Congress, not add to them." *Evans v. Portfolio Recovery Assocs., LLC*, 889 F.3d 337, 346 (7th Cir. 2018) (citation omitted). The words of Congress, as written, do not permit this second interpretation.

C.

Gadelhak presses the third option: that the phrase "using a random or sequential number generator" modifies only the equipment's capacity to "produce." With emphasis, the definition would read:

> 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.

To Gadelhak, it doesn't matter that AT&T's system cannot generate random or sequential ten-digit numerical strings. As he sees it, the capacity to produce numbers using a random number generator is only one means of meeting the statutory definition. Gadelhak argues that the disjunctive "or" in "store or produce" means that an "automatic telephone dialing system" need not produce numbers at all. Since "using a random or sequential number generator" modifies only "produce," Gadelhak argues that all equipment with the capacity to store telephone numbers to be called and to dial those numbers qualifies as an automatic telephone dialing system. This is the interpretation that the Ninth Circuit adopted in *Marks v. Crunch San Diego*.

This interpretation eliminates the problem of the first one—that the phrase is an admittedly imperfect fit for the verb "store." And it does not require us to add a word to the statute as the second one does. But Gadelhak's approach has a fatal flaw of its own: it requires us to contort the statutory text almost beyond recognition. Everyone agrees that "telephone numbers to be called" is the object of both "store" and "produce." That makes sense because "produce" is not set off from "store" in the text, either with the infinitive "to" or with a comma. *See* SCALIA & GARNER, *supra*, at 148–49. It would be unnatural, then, to splice "store" and "produce" to have the final phrase, "using a random or sequential number generator," modify only the latter verb. Gadelhak asks us to reorder the sentence to separate "store" and "produce" but to clarify

that "telephone numbers" is the object of both. That would be a significant judicial rewrite.

Nonetheless, Gadelhak maintains that the statutory structure requires this reading. He emphasizes that the statute carves out a defense for recipients who have given their prior express consent. *See* 47 U.S.C. § 227(b)(1)(A) (authorizing the use of an automatic telephone dialing system for calls or texts "made with the prior express consent of the called party"). If an "automatic telephone dialing system" is defined by its capacity to generate numbers at random, Gadelhak says, it would be impossible for a party ever to take advantage of the consent defense except by coincidence. He explains that a caller could not know in advance whether the telephone number, having been randomly generated, would belong to a party who had previously consented to being called. *See also Marks*, 904 F.3d at 1051 (adopting this argument). But as another court explained, "it is possible to imagine a device that both has the capacity to generate numbers randomly or sequentially and can be programmed to avoid dialing certain numbers …." *Pinkus*, 319 F. Supp. 3d at 939. Gadelhak's rationale for choosing an atextual interpretation is therefore unpersuasive.

Gadelhak has one last card to play: he insists that Congress blessed his interpretation of the statute when it amended the Act in 2015. At that time, the D.C. Circuit had not yet struck down the 2015 FCC Order interpreting the statute in Gadelhak's favor. Gadelhak asserts that Congress essentially ratified that interpretation when it amended the statute in 2015 to add an exception for government debt collection and declined to amend the definition in any other respect. *See* Pub. L. No. 114-74, § 301, 129 Stat. 584, 588 (2015). We reject

this argument, as has every circuit to consider it. *See Glasser*, 2020 WL 415811, at *6 (collecting cases). Congressional failure to act does not necessarily reflect approval of the status quo. *See Alexander v. Sandoval*, 532 U.S. 275, 292 (2001). And in any event, the FCC's interpretation of the statute was hardly settled at the time of the congressional amendment—in 2015, the D.C. Circuit was already reviewing *ACA International*. It is therefore particularly difficult to attribute acquiescence to Congress's actions that year.

Finally, it is worth noting the far-reaching consequences of Gadelhak's ungrammatical interpretation: it would create liability for every text message sent from an iPhone. That is a sweeping restriction on private consumer conduct that is inconsistent with the statute's narrower focus. Gadelhak argues that to qualify as an "automatic telephone dialing system" a device need only have the "capacity … to store … telephone numbers" and then to call or text them automatically. Every iPhone today has that capacity right out of the box. An iPhone of course can store telephone numbers; it can also send text messages automatically, for example by using the "Do Not Disturb While Driving" function. *See How to Use Do Not Disturb While Driving*, APPLE (Sept. 19, 2019), https://support.apple.com/en-us/HT208090 ("If someone sends you a message [while this feature is turned on], they receive an automatic reply letting them know that you're driving."). Every iPhone, then, has the necessary capacities to meet the statutory definition. That means that under Gadelhak's interpretation, every call or text message sent from an iPhone without the prior express consent of the recipient could subject the sender to a $500 fine. *See* 47 U.S.C. § 227(b)(3)(B). Considering the statute as a whole, that result makes little sense. The Act's other provisions address narrow conduct much more likely to

be performed by telemarketers than by private citizens—for example, the use of "an artificial or prerecorded voice." *Id.* § 227(b)(1)(A). The definition of an "automatic telephone dialing system" would be an outlier within the statutory scheme if it were to capture such a wide swath of everyday conduct.

D.

There is one final possibility: that "using a random or sequential number generator" modifies how the telephone numbers are "to be called." On this reading, an "automatic telephone dialing system" is:

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

In other words, the definition captures devices with the capacity to store or to produce telephone numbers that will be dialed by a random or sequential number generator. The record does not fully explain whether AT&T's system has the necessary capabilities to be considered an "automatic telephone dialing system" under this definition; neither party advanced this reading and other courts have only danced around it. *See*, *e.g.*, *Glasser*, 2020 WL 415811, at *7 (identifying this interpretation as "plausible" but rejecting it without comment).

A close look convinces us that this fourth possibility is also inferior to the first interpretation. Congress chose to insert a comma between "to be called" and "using a random or

sequential number generator." And "[a] qualifying phrase separated from antecedents by a comma is evidence that the qualifier is supposed to apply to all the antecedents instead of only to the immediately preceding one." WILLIAM N. ESKRIDGE JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 67–68 (2016) (citation omitted). The comma separating "to be called" and "using a random or sequential number generator" therefore indicates that the modifier refers to the entire clause that precedes it—a clause driven by the verbs "store" and "produce"—rather than the phrase immediately adjacent to it.

Of course, we are mindful that "a purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning." *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993). We tread especially carefully here, since the comma seems to be ungrammatical under any interpretation. As mentioned above, "using a random or sequential number generator" is an adverbial phrase. To be more specific, it is a *restrictive* adverbial phrase, because it provides information that is essential to the meaning of the sentence. The grammar and style treatise of record dictates that a comma is inappropriate for a restrictive adverbial phrase found at the end of a sentence. THE CHICAGO MANUAL OF STYLE ¶ 6.31 (17th ed. 2017).

But we have reason to be confident that the comma before the modifier deliberately separates it from "to be called." A modifying clause following a comma tends not to modify the very last antecedent before it when that antecedent is "integrated" into a singular unit. *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1077 (2018) (citation omitted). In the

context of autodialing, the phrase "telephone numbers to be called" has consistently been used as an integrated unit. A 1986 patent for a method of randomizing telephone numbers, for example, contains five references to "numbers to be called." U.S. Patent No. 4,741,028 (filed July 30, 1986). The phrase was also common in the state antitelemarketing statutes that preceded the federal legislation. Across statutes with different sentence structures and different scopes, the phrase "telephone numbers to be called" appears again and again. *See, e.g.*, MASS. GEN. LAWS ch. 159 § 19B (1986); MISS. CODE ANN. § 77-3-451 (1989); N.Y. GEN. BUS. LAW § 399-p (1988). These uses suggest that "telephone numbers to be called" is a single noun unit characterized by the purpose of the numbers. The comma, therefore, seems to have been a deliberate drafting choice to separate the modifying clause from the words that immediately precede it.

Satisfied that "using a random or sequential number generator" does not describe how the numbers are "to be called," we are left again with the first interpretation. It is admittedly imperfect. But it lacks the more significant problems of the other three interpretations and is thus our best reading of a thorny statutory provision. We therefore hold that the phrase "using a random or sequential number generator" describes how the telephone numbers must be "stored" or "produced."

* * *

The district court held that AT&T's system did not qualify as an "automatic telephone dialing system" because it lacked the capacity to generate random or sequential numbers. Although we adopt a different interpretation of the statute, under our reading, too, the capacity to generate random or

sequential numbers is necessary to the statutory definition. The district court's judgment is therefore AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ALI GADELHAK, on behalf of himself and all others similarly situated,	)	
Plaintiff,	)	No. 17-cv-01559
v.	)	
	)	Judge Edmond E. Chang
AT&T SERVICES, INC.,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Ali Gadelhak brought this proposed class action after he received automated text messages from Defendant AT&T Services, Inc. (AT&T), allegedly in violation of the Telephone Consumer Protection Act (TCPA).[1] Gadelhak and AT&T now cross-move for summary judgment. The motions present the parties' disagreement over the proper definition of the statutory term "automated telephone dialing system," and whether AT&T employed one when it sent text messages to Gadelhak and others. For the reasons explained below, the Court grants AT&T's motion and denies Gadelhak's motion.

I. Background

In deciding cross motions for summary judgment, the Court views the facts in the light most favorable to the respective non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). So when the Court

[1]This Court has subject matter jurisdiction over the case under 28 U.S.C. § 1331 and 29 U.S.C § 1132.

evaluates Gadelhak's summary judgment motion, AT&T gets the benefit of reasonable inferences; conversely, when evaluating AT&T's motion, the Court gives Gadelhak the benefit of the doubt.

AT&T is a major telecommunications corporation. R. 22, Answer ¶¶ 6, 7. Since around 2015, AT&T has engaged in a program called the AT&T Customer Rules Feedback Tool, also known (at least to the parties) as "TACRFT." R. 70.8, Lyon Dep. at 12:9-12; R. 52.2, Lyon Dec. ¶2. According to AT&T, the program sends surveys to customers of its corporate affiliates—DIRECTV, for example—via text message in order to assess customers' recent interactions with service representatives. Lyon Dec. ¶¶ 2-4. At the end of each survey, AT&T also includes an advertisement for its smartphone application, MyAT&T. R. 70.5, Abel Dep. at 69:21-25.

AT&T employs an automated process to select the numbers to which it sends the TACRFT surveys. First, a computer system for each AT&T affiliate identifies customer accounts that have engaged in qualifying transactions with a customer service representative. Lyon Dep at 35:7-13, 36:15-37:13; Lyon Dec. ¶ 5. Then, each of those computer systems sends a list of the phone numbers associated with each flagged account to AT&T's Market Research Organization for further processing. Lyon Dep. at 139:21-24. The list of these phone numbers is known as the Gross Sample List. *Id.* at 139:21-140:6. This list includes every phone number associated with a flagged account, rather than just the phone number that engaged in the qualifying transaction. Lyon Dep. at 21:6-22:2; R. 74, Def.'s Resp. PSOF ¶¶ 7, 8. Once the Gross Sample List is compiled, a computer system within the Market Research

Organization narrows down the list to one number for each account by (1) removing any non-cellular numbers; and (2) selecting the first cellular number listed for each account. Lyon Dep. at 140:7-25; R. 74.3, Lyon Dec. II ¶¶ 3-6. This pared-down list is then sent to AT&T's outside vendor, Message Broadcast, who sends out pre-programmed text-message surveys previously drafted by AT&T. Lyon Dep. at 57:14-16, 130:13-20; R. 70.7, Joiner Dep. at 63:6-12. It is undisputed that a computer, not a human, compiles the list of telephone numbers to which these surveys are directed. Def.'s Resp. PSOF ¶¶ 9-11.

Plaintiff Ali Gadelhak lives in Chicago, Illinois and is not a customer of AT&T or any AT&T affiliate. R. 70.9, Gadelhak Dep. at 81:7-82:4, 84:2-85:14; Def.'s Resp. PSOF ¶ 38. Gadelhak registered his cell phone number with the Do Not Call list in May 2014. Gadelhak Dep. at 76:12-77:24. Nonetheless, in July 2016, Gadelhak received five text messages from AT&T asking survey questions in Spanish. Lyon Dec., Ex. A, Gadelhak Call Log; Gadelhak Dep., Ex. 33. AT&T insists that TARCRFT is designed to send text messages only to AT&T customers, so Gadelhak's number must have been erroneously listed on an AT&T account. Lyon Dec. ¶ 5; Def.'s Resp. PSOF ¶ 41.

In February 2017, Gadelhak brought this proposed class action against AT&T for violations of the Telephone Consumer Protection Act. Gadelhak alleges that AT&T "negligently, knowingly, and/or willfully contacted" him via text message using an automated telephone dialing system (ATDS) "without his prior consent." R. 20, Compl. ¶ 1. He also alleges that AT&T did the same to others, on whose behalf

Gadelhak brings class allegations. *Id.* ¶¶ 34, 35, 39. Both parties now move for summary judgment, content to litigate class certification (if Gadelhak were to prevail) after a decision on summary judgment. In its motion, AT&T asserts that it did not use an ATDS to send a text message to Gadelhak and thus did not violate the TCPA. R. 51, Def.'s Br. at 1. For his part, Gadelhak asks the Court to declare as a matter of law that AT&T's TACRFT system employs an ATDS. R. 71, Pl.'s Br. at 1-2. Much of the parties' dispute boils down to whether the D.C. Circuit's opinion in *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) nullified previous FCC orders defining the term ATDS and, if so, what is the proper definition of that statutory term under the plain language of the TCPA.

II. Legal Standard

Summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine issue of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In evaluating summary judgment motions, courts must "view the facts and draw reasonable inferences in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007) (cleaned up).[2] The Court "may not weigh conflicting evidence or make credibility determinations," *Omnicare, Inc. v. UnitedHealth Grp., Inc.*, 629 F.3d

[2]This opinion uses (cleaned up) to indicate that internal quotation marks, alterations, and citations have been omitted from quotations. *See* Jack Metzler, *Cleaning Up Quotations*, 18 Journal of Appellate Practice and Process 143 (2017).

697, 704 (7th Cir. 2011) (cleaned up), and must consider only evidence that can "be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). The party seeking summary judgment has the initial burden of showing that there is no genuine dispute and that they are entitled to judgment as a matter of law. *Carmichael v. Village of Palatine*, 605 F.3d 451, 460 (7th Cir. 2010); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Wheeler v. Lawson*, 539 F.3d 629, 634 (7th Cir. 2008). If this burden is met, the adverse party must then "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256.

II. Analysis

A. Statutory and Regulatory History of the TCPA

To start, it is necessary to set forth the TCPA's framework. Enacted in 1991, the TCPA generally prohibits making calls using "any automatic telephone dialing system or an artificial or prerecorded voice." 47 U.S.C. § 227(b)(1)(A). The statute 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." § 227(a)(1). This general prohibition has three exceptions: (1) calls made with "prior express consent;" (2) emergency calls; and (3) calls made to collect government debts. § 227(b)(1)(A).

The FCC has the authority to promulgate regulations implementing the TCPA. *See ACA International*, 885 F.3d at 693. In 2003, the FCC promulgated regulations that interpreted the term ATDS to include "equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when

a sales agent will be available to take calls." *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991* (2003 Order), 18 FCC Rcd. 14014, 14091-93 ¶¶ 131-133 (2003). The Commission referred to these types of devices as "predictive dialers" and explained that they have "the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers." *Id.* at 14091 ¶ 131. According to the 2003 Order, telemarketers may have primarily relied on dialing equipment "to create and dial 10-digit telephone numbers arbitrarily" in the past, but "to exclude… equipment that use[s] predictive dialing software from the definition of [ATDS] simply because it relies on a *given* set of numbers would lead to an unintended result." *Id.* at 14092 ¶¶ 132, 133 (emphasis added). The Commission reasoned that it made little sense to permit calls to "wireless numbers… when the dialing equipment is paired with predictive dialing software and a database of numbers," but prohibit calls "when the equipment operates independently of such lists and software packages." *Id.* ¶ 133.

The Commission affirmed this interpretation in 2008, explaining that the 2003 Order "found that, based on the statutory definition of [ATDS], the TCPA's legislative history, and current industry practice and technology, a predictive dialer falls within the meaning and definition of autodialer and the intent of Congress." *See In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991* ("2008 Declaratory Ruling"), 23 FCC Rcd. 559, 566 ¶ 13 (2008). Although a party to the 2008 proceeding urged the FCC to find that a "predictive dialer meets the definition of autodialer only when it randomly or sequentially generates telephone numbers, not when it dials

numbers from customer telephone lists," *id.* at 566 ¶ 12 (emphasis added), the Commission disagreed, stating that nothing presented by the party "warrant[ed] reconsideration of [the 2003] findings." *Id.* at 567 ¶ 14.

Seven years later, the Commission revisited and again reaffirmed its earlier take: "predictive dialers, as previously described by the Commission, satisfy the TCPA's definition of 'autodialer.'" *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991* (2015 Declaratory Ruling), 30 FCC Rcd. 7961, 7972 ¶ 10 (2015). The Commission compared predictive dialers to dialers that "utilize random or sequential numbers instead of a list of numbers" and stated that both "retain the capacity to dial thousands of numbers in a short period of time." *Id.* at 7973 ¶ 14. In the Commission's view, any device that "generally has the capacity to store or produce, and dial random or sequential numbers… even if it is not presently used for that purpose, including when the caller is calling a set list of consumers," met the definition of "autodialer" under the TCPA. *Id.* at 7972 ¶ 10.

Under the Hobbs Act, this Court, sitting as a district court, does not have the authority to invalidate the FCC's rulings, because "[t]he court of appeals … has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part) or to determine the validity of all final orders of the [FCC]." 28 U.S.C. § 2342(1); *see also* 47 U.S.C. § 402(a) (making § 2342(1) applicable to FCC regulations promulgated under the TCPA); *Blow v. Bijora*, 855 F.3d 793, 802 (7th Cir. 2017).[3] In *ACA International*,

[3]The Supreme Court is considering this interpretation of the Hobbs Act in *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, No. 17-1705 (oral argument heard on March 25, 2019). That particular dispute does not impact the Court's holding here.

however, the D.C. Circuit consolidated several Hobbs Act petitions for review of the 2015 Declaratory Ruling and invalidated the Commission's interpretation of ATDS, because it "fail[ed] to satisfy the requirement of reasoned decisionmaking." 885 F.3d at 703. The D.C. Circuit explained that the 2015 Declaratory Ruling adopted two irreconcilable definitions of the term ATDS: "A basic question raised by the statutory definition is whether a device must *itself* have the ability to generate random or sequential telephone numbers to be dialed. Or is it enough if the device can call from database of telephone numbers generated elsewhere? The Commission's ruling appears to be of two minds on the issue." *Id.* at 701 (emphasis in original). Despite this holding, the D.C. Circuit declined to define ATDS in its own terms, but stated that it was 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. So the D.C. Circuit invalidated the 2015 Declaratory Ruling.

B. *ACA International*'s Scope

In this case, neither party disputes that the Commission's 2015 Declaratory Ruling was overturned and invalidated by *ACA International*. Def.'s Br. at 8; Pl.'s Br. at 15. AT&T, however, argues that the opinion also invalidated the Commission's prior rulings defining ATDS, Def,'s Br. at 8-11, while Gadelhak asserts that the case's holding is limited to the 2015 Declaratory Ruling, Pl.'s Br. at 15-20. A close read of *ACA International* and the 2015 Declaratory Ruling make clear that AT&T has the better argument.

It is true that the petitions in *ACA International* sought review only of the 2015 Declaratory Ruling, but the petitions zeroed-in on four specific aspects of the order. *ACA International*, 885 F.3d at 693-94. Most pertinent to this case was the Commission's interpretation of what functions a system needs to have in order to qualify as ATDS. On that question, the Commission argued "that the issue was resolved in prior agency orders—specifically, declaratory rulings in 2003 and 2008," and that it was too late to "raise a challenge [to those orders] by seeking review of a more recent declaratory ruling that essentially ratifies the previous ones." *Id.* at 701. The D.C. Circuit disagreed and proceeded to review all "pertinent pronouncements" from the Commission on the subject. *Id.* The court determined that "[t]he agency's prior rulings left significant uncertainty about the precise functions an autodialer must have the capacity to perform," and then also set aside the Commission's "treatment" of the qualifying functions of an ATDS. *Id.* at 701, 703.

The Commission's own language in the 2015 Declaratory Ruling also bolsters the interpretation that *ACA International* nullified the FCC's previous pronouncements defining ATDS. The 2015 Declaratory Ruling states that the Commission "reaffirm[s]" previous statements, and refers specifically to the 2003 Declaratory Ruling. 2015 Declaratory Ruling, 30 FCC Rcd. at 7971 ¶ 10 & n. 39*; see also ACA International*, 885 F.3d at 694 ("The Commission reaffirmed prior orders deciding that 'predictive dialers'—equipment that can dial automatically from a given list of telephone numbers using algorithms to predict 'when a sales agent will be available'—qualify as autodialers.").

Moreover, the D.C. Circuit's concern in *ACA International*—that the 2015 Declaratory Ruling, "in describing the functions a device must perform to qualify as an autodialer, fails to satisfy the requirement of reasoned decisionmaking"—equally applies to the 2003 and 2008 orders. 885 F.3d at 703. The 2003 Order made clear that the Commission saw a difference between generating and dialing random or sequential numbers, on the one hand, and dialing from a list of numbers on the other. 2003 Order, 18 FCC Rcd. at 14092 ¶ 132*; see also ACA International*, 885 F.3d at 702. But it then went on to state that, "to exclude from these restrictions equipment that use predictive dialing software from the definition of 'automated telephone dialing equipment' simply because it relies on a given set of numbers would lead to an unintended result." *Id.* at 14092 ¶ 133. The 2008 Declaratory Ruling held the same, as it simply "affirm[ed]" the interpretation of ATDS promulgated in the 2003 Order. 2008 Declaratory Ruling, 23 FCC Rcd. at 566 ¶ 12. With the Commission's repeated affirmations of the prior orders, this Court holds, as other courts in this District have, that *ACA International* invalidated the Commission's understanding of the term ATDS as articulated in the 2015 Declaratory Ruling, as well as the 2008 Declaratory Ruling and the 2003 Order. *See Pinkus v. Sirius XM Radio, Inc.*, 319 F. Supp. 3d 927, 935 (N.D. Ill. 2018); *Johnson v. Yahoo!, Inc.*, 346 F. Supp. 3d 1159, 1161 (N.D. Ill 2018).

C. Defining ATDS Under the TCPA

Because *ACA International* invalidated the Commission's prior orders defining the term ATDS—and also declined to articulate their own definition of the term—the

Court moves on to interpreting the TCPA unburdened by the Commission's definitions. Here, the pertinent question is really whether predictive-dialing devices that lack the capacity to generate numbers either randomly or sequentially, and instead only dial numbers from a predetermined list, meet the statutory definition of ATDS. AT&T argues that the statutory text dictates a "no" answer, Def.'s Br. at 11-13, while Gadelhak asserts that a device "that *stores* telephone numbers to be called and automatically dials those numbers falls within [the] statutory definition," Pl.'s Br. at 6 (emphasis in original).

The Court "must begin with [the TCPA's] text and assume that the ordinary meaning of that language accurately expresses the legislative purpose." *Our Country Home Enters., Inc. v. Comm'r*, 855 F.3d 773, 791 (7th Cir. 2017) (interpreting 28 U.S.C. § 6330(c)(4)(A)) (cleaned up). In other words, the Court must give the TCPA its plain meaning. *Coleman v. Labor & Indus. Review Comm'n of Wis.*, 860 F.3d 461, 473 (7th Cir. 2017). To do so, the Court begins with "the language of the statute itself," attending to "the specific context in which that language is used." *Scherr v. Marriott Int'l, Inc.*, 703 F.3d 1069, 1077 (7th Cir. 2013) (cleaned up) (quoting *McNeill v. United States*, 563 U.S. 816, 819 (2011)). And it must "accord words and phrases their ordinary and natural meanings and avoid rendering them meaningless, redundant, or superfluous." *Scherr*, 703 F.3d at 1077 (cleaned up).

Under the TCPA, an ATDS has "the capacity to store or produce telephone numbers to be called, using a random or sequential number generator," and then call the numbers. 47 U.S.C. § 227(a)(1). Gadelhak asserts that the phrase "using a

random or sequential number generator" modifies only the verb "produce," and has no effect on the verb "store." Pl.'s Br. at 7. Gadelhak cites to the Ninth Circuit opinion in *Marks v. Crunch San Diego, LLC* to support this argument. *Id. (*citing 904 F.3d 1041, 1051-52 (9th Cir. 2018)). In *Marks*, the Ninth Circuit defined ATDS as "equipment which has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers." 904 F.3d at 1053. The court came to this conclusion after examining § 227(a)(1), other provisions of the TCPA, and the legislative history of the statute. *Id.* at 1050-53. This Court respectfully disagrees with the Ninth Circuit's holding in *Marks* and Gadelhak's argument here.

At the outset, Gadelhak's reading of § 227(a)(1) is difficult to square with the plain language of that provision. Both "store" and "produce" are transitive verbs, meaning both require an object. *Pinkus*, 319 F. Supp. 3d at 937-38. Here, that object is "telephone numbers to be called." § 227(a)(1). And the phrase "using a random or sequential number generator" modifies neither "store" nor "produce," but instead actually modifies "telephone numbers to be called." *Id.* This is evidenced by the phrase's position immediately after "telephone numbers to be called." *Id.* Put another way, the most sensible reading of the provision is that the phrase "using a random or sequential number generator" describes a required characteristic of the *numbers* to be dialed by an ATDS—that is, *what* generates the numbers.

To resist this interpretation, Gadelhak points to other provisions in the TCPA. As he discusses in his brief, there are two exceptions to the prohibition against

automated calls that, it is true, do lead one to question whether calls dialed from a predetermined list are covered. Pl.'s Br. at 8-10. First, there is an exception for calls made with the prior consent of the called party. 47 U.S.C. § 227(b)(1)(A). Gadelhak, citing *Marks*, argues that there is no way to take advantage of this exception without dialing from a list of telephone numbers belonging to consenting individuals. Pl.'s Br. at 9 (citing *Marks*, 904 F.3d at 1051). Put another way, the exemption seems to imply that calling from a predetermined list of numbers qualifies a device as an ATDS, but that when the list is of those individuals who have given their consent, it is exempted from the prohibition. What Gadelhak overlooks though, is that the consent exception is drafted in such a way that it also applies to calls made using an artificial or prerecorded voice—not just those made using an ATDS. 47 U.S.C. § 227(b)(1)(A). So the consent exception still does have an effect—it does not suffer the embarrassment of being nugatory—even if ATDS does not cover systems that dial from preset lists. The consent exception does not undermine the non-preset-list interpretation of ATDS.

The second exception on which Gadelhak relies is for calls "made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A)(iii). But the same reasoning applies to undermine the persuasiveness of the inference to be drawn from this exception: it also applies to calls made with an artificial or prerecorded voice. 47 U.S.C. § 227(b)(1)(A). So, again, the federal-debt

exception can co-exist with a definition of ATDS that does not cover calls to a preset list.[4]

Similarly, Gadelhak's argument that Congress ratified the Commission's construction of the TCPA when it added the federal-debt exception in 2015, but left the definition of ATDS unchanged, is insufficient to overcome the plain meaning of the statutory definition of ATDS. The D.C. Circuit's review of the 2015 Declaratory Ruling was already pending at the time of Congress's amendment. *See ACA v. FCC*, Case No. 15-1211 (D.C. Cir.), Dkt. No. 1 (July 10, 2015) (Petition for Review); Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301, 129 Stat. 584, 588 (Nov. 2, 2015). As a result, there was no "consistent judicial construction" at the time of the amendment, precluding any conclusions about Congress's approval of the Commission's interpretation of the statute. *See Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 350-51 (2005).

Gadelhak's final argument is that the Court's reading of § 227(a)(1) renders the word "store" superfluous, "because any number that is stored using a random or sequential number generator must logically also have been produced using a random or sequential number generator." Pl.'s Br. at 11. At the outset, even if this were true, it would not, by itself, justify disregarding the plain meaning of the provision. "The canon against surplusage is not an absolute rule." *Marx v. General Revenue Corp.*,

[4]It must also be said that, as time marches on and Congress adds to and amends a statutory framework in piecemeal provisions, at some point it is not surprising that provisions are added as fail-safe measures to broadly prevent the statute's application in a particular setting. This might be an instance where Congress simply wanted to guarantee that the TCPA, which set a statutory damages minimum for violations (and per violation), would never be applied to attempts to collect a debt owed to the federal government.

568 U.S. 371, 385 (2013). More important, the Court's interpretation does not actually render "store" superfluous. The word's presence in the provision ensures that systems that generate numbers randomly or sequentially, but then store the numbers for a period of time before dialing them later after a person has intervened to initiate the calls, are still covered by the statutory definition of ATDS. All in all, none of Gadelhak's arguments are persuasive; instead, the numbers stored by an ATDS must have been generated using a random or sequential number generator.

D. Application to AT&T's TACRFT Program

Gadelhak concedes that the system employed by AT&T for its TACRFT program "generates a list of telephone numbers to be called via automated computer processes." Pl.'s Br. at 12. Based on this description, AT&T's system is not an ATDS as defined in the statute. Gadelhak makes the additional argument, though, that "AT&T's dialing system also uses a random number generator to produce telephone numbers to be called." *Id.* at 13. In support of this assertion, Gadelhak cites to deposition testimony from AT&T's Director-Market Research & Analysis, Kerry Lyon. *Id.*; Lyon Dep. at 141:22-143:19; Lyon Dec. ¶ 1. Lyon stated that, when AT&T's system was confronted with an account that had more than one cellular phone number listed, he was not sure how the system chose which cellular number to call: "[I]t could be randomized, I'd have to look at the code." Lyon Dep. at 143:16-17. Gadelhak latched onto this comment as proof that AT&T's system was generating telephone numbers randomly. Lyon, however, later submitted a declaration in which

he clarified that the AT&T system "selects the first eligible wireless number to send the survey system." Lyon Dec. II ¶ 5.

Even so, Gadelhak continued to argue that Lyon's testimony was proof that AT&T's system at least had *the capacity* to generate numbers randomly, because it was able to "randomly" select numbers to dial from the compiled list of accounts. Pl.'s Br. at 13 ("Plaintiff pointed to the deposition testimony of Kerry Lyon, who testified that when the initial list of telephone numbers contains multiple telephone numbers for the same account, the computer randomly selects one of those numbers to receive the text message and thus randomly generates that number for dialing."). But the D.C. Circuit already explained that numbers must necessarily "be called in *some* order—either in a random or some other sequence." *ACA International*, 885 F.3d at 702 (emphasis in original). Accordingly, the phrase "using a random or sequential number generator" would be meaningless if it simply referred to the order in which calls were made. Moreover, the organization of the provision does not support a reading where "using a random or sequential number generator" refers to the order numbers from a list are dialed. Otherwise, the provision would read "to store or produce telephone numbers to be called; and to dial such numbers, using a random or sequential number generator." Based on the record evidence, there is no genuine dispute that AT&T's system cannot *generate* telephone numbers randomly or sequentially—as those terms are used in the TCPA—and thus it is not an ATDS and is not prohibited.

IV. Conclusion

For the reasons discussed, Gadelhak's motion for partial summary judgment is denied and AT&T's motion for summary judgment is granted. Final judgment shall be entered. The status hearing of April 4, 2019 is vacated.

ENTERED:

s/Edmond E. Chang
Honorable Edmond E. Chang
United States District Judge

DATE: March 29, 2019

APPENDIX C

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

March 19, 2020

Before

DIANE P. WOOD, *Chief Judge*

MICHAEL S. KANNE, *Circuit Judge*

AMY C. BARRETT, *Circuit Judge*

No. 19-1738

ALI GADELHAK, on behalf of himself and all others similarly situated,
Plaintiff-Appellant,

v.

AT&T SERVICES, INC.
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:17-cv-1559

Edmond E. Chang,
Judge.

O R D E R

Plaintiff-Appellant filed a petition for rehearing en banc on March 4, 2020. No judge in regular active service has requested a vote on the petition for rehearing en banc*, and all of the judges on the panel have voted to deny rehearing.

Accordingly, IT IS ORDERED that the petition for rehearing en banc is DENIED.

* Judges Joel M. Flaum and Ilana D. Rovner took no part in the consideration of the petition for rehearing en banc.