UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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August Term 2023

(Submitted: October 24, 2023 Decided: May 10, 2024)

Docket No. 22-1726-cv

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MARINA SOLIMAN, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

*Plaintiff-Appellant,*

v.

SUBWAY FRANCHISEE ADVERTISING FUND TRUST, LTD.,

*Defendant-Appellee,*

AND DOES, 1 THROUGH 20, INCLUSIVE, AND EACH OF THEM,

*Defendants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Before: CHIN AND PARK, *Circuit Judges,* and NARDACCI, *District Judge*.[*]

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[*] Judge Anne M. Nardacci, of the United States District Court for the Northern District of New York, sitting by designation.

Appeal from a judgment of the United States District Court for the District of Connecticut (Meyer, *J.*), granting defendant-appellee's motion to dismiss for failure to state a claim. Plaintiff-appellant received a marketing text message to her cell phone sent by an automated system using a pre-existing list of telephone numbers. She alleged that the text message violated the Telephone Consumer Protection Act, 47 U.S.C. § 227. The district court concluded that the statute did not apply and dismissed the first amended complaint.

AFFIRMED.

Judge Nardacci concurs in part and dissents in part in a separate opinion.

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- and -

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CHIN, *Circuit Judge*:

Plaintiff-appellant Marina Soliman sued defendant-appellee Subway Franchisee Advertising Fund Trust, Ltd. ("Subway") for damages based on a text message she received on her cell phone offering her a free bag of potato chips. She contended that the text message, which was generated by an automatic dialing system using a pre-existing list of telephone numbers, violated the Telephone Consumer Protection Act of 1991 (the "TCPA"), 47 U.S.C. § 227. Because we conclude that the text message did not violate the TCPA, we affirm the order of the district court (Meyer, *J.*) granting Subway's motion to dismiss and its judgment dismissing the first amended complaint.

## *STATEMENT OF THE CASE*

### I. *Facts*

As alleged in the first amended complaint (the "Complaint"), the facts are as follows:

Prior to December 1, 2016, Subway sent one or more automated marketing text messages to Soliman's cell phone. On December 1, 2016, Subway sent another automated marketing text message to Soliman's cell phone, which read:

> FREE CHIPS RULE! Right now @SUBWAY, get ANY bag of chips FREE with a sub purchase. Exp 12/6: http://mfon.us/rk6srrfdjue HELP/STOP call 8447887525

Joint App'x at 127.

Soliman responded to the message by texting "STOP." Subway immediately responded with a computer-generated response advising Soliman that she had been "unsubscribed from all programs" and that she would "no longer receive any text alerts." *Id*. Nonetheless, on December 5, 2016, Subway sent another automated text message to Soliman's cell phone, stating:

> Your weekly SUBWAY offer is waiting, Don't miss out! Expires 12/6: http://mfon.us/rk6srrfdjue HELP/STOP call 8447887525

*Id*.

Subway sent the text messages to Soliman's cell phone using "short message script" ("SMS") technology. Subway used an automated text-messaging system that was able to "dial telephone numbers stored as a list or in a database without human intervention." *Id*. at 128. Subway had contracted with Mobivity to provide SMS text-messaging services, and Mobivity employed a "blast platform" that used:

> an algorithm whereby a random or sequential number generator, similar to a randomization formula or sequential dialing formula, selects which number to dial from the stored list of numbers, and

> sequences those numbers in order to automatically dial the numbers and send ou[t] text messages *en masse*.

*Id*. at 128, 130-31.

We note additional facts that are not alleged in the Complaint but that are undisputed:

Subway's system did not generate telephone numbers, as Subway's system used a "stored" or pre-existing list of telephone numbers. Nor was Soliman's cell phone number *generated* by Subway's system. Rather, as we noted in a prior decision in this matter, Soliman submitted her cell phone number to Subway earlier in the year by taking advantage of an offer to have Subway "deals" sent "directly" to her phone. *Soliman v. Subway Franchisee Advert. Fund Tr., Ltd.*, 999 F.3d 828, 831-32 & n.1 (2d Cir. 2021).[1] She did so by texting "Subway" to the code provided in a Subway advertisement, thereby providing Subway with her cell phone number. She received an immediate response from Subway and then texted her zip code back, thereby confirming her consent to receiving Subway offers through her cell phone. *Id*. at 832.

## II. *Prior Proceedings*

[1] The earlier appeal involved the enforceability of an arbitration provision on Subway's website. We held that Soliman was not bound by the arbitration clause because the terms were not reasonably "clear and conspicuous." 999 F.3d at 830.

On April 22, 2019, Soliman filed this putative class action below. She filed the Complaint on July 29, 2021, alleging that Subway's December 5, 2016 text sent to her cell phone violated the TCPA in two ways: (1) by using an automatic telephone dialing system and (2) by using an "artificial or prerecorded voice." *See* 47 U.S.C. § 227(b)(1)(A)(iii). Subway moved to dismiss the Complaint pursuant to Fed. R. Civ. P. Rule 12(b)(6) on August 30, 2021.

On July 18, 2022, the district court issued an order granting Subway's motion to dismiss, concluding that both claims failed. *Soliman v. Subway Franchisee Advert. Fund Tr., Ltd.*, No. 19-cv-592 (JAM), 2022 WL 2802347 (D. Conn July 18, 2022). First, the district court held that the TCPA only bars the use of a dialing system that randomly or sequentially generates *telephone* numbers, and not a system that relies on a stored list of pre-existing telephone numbers and only generates indexing or other coding numbers.[2] Second, the district court held that the TCPA's prohibition on the use of an "artificial or prerecorded voice" did not apply to text messages. *Id*. at *2-3. Judgment dismissing the Complaint was entered accordingly on July 18, 2022.

[2] Soliman argues that certain numbers used in an SMS blaster's programming code are "generated" in a fashion that renders that device an ATDS. We will refer to these sorts of numbers as "coding numbers. "

This appeal followed.

## *DISCUSSION*

We review a decision to grant a motion to dismiss under Fed. R. Civ. P. 12(b)(6) *de novo*. *See Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 230 (2d Cir. 2016).

### I. *The TCPA*

The TCPA provides in pertinent part:

> It shall be unlawful for any person . . . 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* . . . to any telephone number assigned to a . . . cellular telephone service.

47 U.S.C. § 227 (b)(1)(A)(iii) (emphases added). An "automatic telephone dialing system" -- or "ATSD" -- 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.

47 U.S.C. § 227(a)(1).

In creating the TCPA, Congress sought to address the "proliferation of intrusive, nuisance calls" made by telemarketers. *ACA Int'l v. FCC*, 885 F.3d

687, 692 (D.C. Cir. 2018) (citing Tel. Consumer Prot. Act of 1991, Pub. L. No. 102-243, § 2(6)-(7), 105 Stat. 2394). Of particular concern were automated calls to emergency services, "such as hospitals and fire and police stations," calls that "w[ould] not disconnect the line for a long time after the called party h[u]ng[] up the phone, thereby preventing the called party from placing his or her own calls," and calls placed by "automatic dialers [that would] dial numbers in sequence, thereby tying up all the lines of a business [with multiple, sequential lines] and preventing any outgoing calls." S. Rep. No. 102-178, at 2 (1991). The TCPA thus prohibits the use of an ATSD to call certain "emergency telephone line[s]" and lines for which the "party is charged for the call," 47 U.S.C. § 227(b)(1)(A)(i), (iii), and it also bars using an ATSD "in such a way that two or more telephone lines of a multi-line business are engaged simultaneously," *id*. § 227(b)(1)(D). *See generally Facebook, Inc. v. Duguid*, 592 U.S. 395, 399-400 (2021) (discussing purpose of TCPA).

Here, the district court held that Subway's actions did not violate the TCPA because the system used by Subway to send the text message (1) is not an ATSD as defined by the TCPA and (2) does not use an artificial or prerecorded voice.

## II. *Automated Dialing Systems*

The first issue turns on the definition of an ATSD. Soliman argues that the definition includes a system that autodials numbers randomly drawn from a *pre-existing* list of telephone numbers. In other words, she argues that the definition encompasses a dialing system that does *not* generate the telephone numbers itself, but instead uses telephone numbers drawn from, for example, a list of telephone numbers submitted by consumers signing up for a program or benefit. She contends that the phrase in the statutory definition -- "using a random or sequential number generator" -- refers not to generating a *telephone* number but to generating *any* number used to store or produce telephone numbers in the SMS blaster's programming code.

In contrast, Subway argues that the definition encompasses only systems that generate *telephone* numbers, and that systems utilizing pre-existing lists of telephone numbers are not covered. The district court concluded, based both on rules of statutory interpretation and the Supreme Court's decision in *Duguid*, 592 U.S. at 395, that the system employed by Subway was not an automatic telephone dialing system covered by the TPCA because it did not generate telephone numbers.

The courts that have addressed the issue have reached conflicting results. Three circuits -- the only circuit courts to consider the issue -- have held that the TCPA covers only ATSDs that generate *telephone* numbers, that is, systems that do not rely on pre-existing lists of telephone numbers. *See Borden v. eFinancial, LLC*, 53 F.4th 1230, 1231 (9th Cir. 2022) (holding that ATSDs "must generate and dial random or sequential *telephone* numbers under the TCPA's plain text" in a case involving an autodialer that selected telephone numbers from a pre-existing list of numbers); *Panzarella v. Navient Sols., Inc.*, 37 F.4th 867, 881-82 (3d Cir. 2022) (holding section 227(b)(1)(A)(iii) not violated where autodialing system called telephone numbers from "specific, curated borrower lists," that were not "randomly or sequentially produce[d] or store[d]"); *Beal v. Outfield Brew House, LLC*, 29 F.4th 391, 393 (8th Cir. 2022) (holding that "an automated marketing system that sends promotional text messages to phone numbers randomly selected from a database of customers' information" is not an ATSD within meaning of TCPA).

Other courts -- district courts only and one concurring judge on the Ninth Circuit -- have reached a different conclusion. *See, e.g., Scherrer v. FPT Operating Co.*, No. 19-cv-03703-SKC, 2023 WL 4660089, at *3 (D. Colo. July 20,

2023) ("this Court finds an autodialer that stores a list of telephone numbers using a random or sequential number generator to determine the dialing order is an ATSD under the TCPA"); *Libby v. Nat'l Republican Senatorial Comm.*, 551 F. Supp. 724, 729 (W.D. Tex. 2021) (holding that complaint stated a claim under TCPA where system used a random or sequential number generator to select telephone numbers from a stored list); *see also Brickman v. United States*, 56 F.4th 688, 691 (9th Cir. 2022) (VanDyke. *J.*, concurring) (concurring based on circuit precedent but concluding that "it does not follow that a 'random or sequential number generator' in the TCPA's autodialer definition must be limited to a tool that produces only *telephone* numbers").

We conclude, based on principles of statutory interpretation and the Supreme Court's decision in *Facebook, Inc. v. Duguid*, that the TCPA does not apply here.

**A.** ***Statutory Interpretation***

When interpreting a statutory provision, we begin with the words of the statute. *See, e.g.*, *Zepeda-Lopez v. Garland*, 38 F.4th 315, 320 (2d Cir. 2022) (citing *Nwozuzu v. Holder*, 726 F.3d 323, 327 (2d Cir. 2013)); *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345 (2d Cir. 2003) ("Every exercise in statutory construction

must begin with the words of the text."). If the words of a statute are clear, we are to construe the statute according to the plain meaning of its words. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) ("It is well established that 'when the statute's language is plain, the sole function of the courts -- at least where the disposition required by the text is not absurd -- is to enforce it according to its terms.'" (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000))); *Rubin v. United States*, 449 U.S. 424, 430 (1981).

If, however, the terms are ambiguous or unclear, we may consider legislative history and other tools of statutory construction. *Greenery Rehab. Grp., Inc. v. Hammon*, 150 F.3d 226, 231 (2d Cir. 1998). "The text's plain meaning can best be understood by looking to the statutory scheme as a whole and placing the particular provision within the context of that statute." *Saks*, 316 F.3d at 345; *see also Kar Onn Lee v. Holder*, 701 F.3d 931, 936 (2d Cir. 2012) ("[W]e consider not only the bare meaning of the critical word or phrase but also its placement and purpose in the statutory scheme.") (quoting *Holloway v. United States*, 526 U.S. 1, 6 (1999)).

Here, we consider first the words of the statute and second the context in which the words appear.

**1. *The Words***

The TCPA provides that an "automatic telephone dialing system . . . 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 words are no model of clarity, but we conclude that the better reading of the words is that an "automatic telephone dialing system" is one that generates *telephone* numbers. *See Borden*, 53 F.4th at 1231; *Panzarella*, 37 F.4th at 881-82.

There are three references to the word "number" (in the singular or plural) in section 227(a)(1). The first -- "telephone numbers to be called" -- unquestionably refers to telephone numbers. So too does the third, which states that an ATDS can "dial such numbers. " One "dials" a phone number, not a coding or index number. And the "such" in "dial such numbers" is a straightforward reference to the "telephone numbers to be called. " It would not make sense for the word "number" in this context to mean anything other than *telephone* numbers.

The remaining reference -- to a "number generator" -- is less clear, but it would be incongruous for "numbers" to refer to telephone numbers in the

first and third mention in the statute, but not the second. *See Pulsifer v. United States*, 144 S. Ct. 718 (2024) ("In a given statute, the same term usually has the same meaning and different terms usually have different meanings."). Accordingly, we conclude that the better reading of the word "number" in the phrase "number generator" is that it refers to generating the telephone numbers to be called and dialed.

**2. *The Context***

We consider also the context in which the words appear, in two respects: first, the use of the word "number" in other parts of the TCPA; and, second, the broader context of the purpose of the TCPA.

**a. *The Word "Number"***

When engaging in statutory interpretation, courts are to consider the statutory scheme as a whole, and "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme -- because the same terminology is used elsewhere in a context that makes its meaning clear." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a 'fundamental canon of statutory construction that the words of a statute

must be read in their context and with a view to their place in the overall statutory scheme.'" (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989))).

An examination of other references in the TCPA to the word "number" supports the interpretation that "number" in the definition of an ATDS refers to "telephone number" and not to a coding or indexing number *See Borden*, 53 F.4th at 1233 ("[T]he TCPA uses both 'telephone number' and 'number' interchangeably throughout the statute to mean telephone number, suggesting that in the definition section all uses of 'number' mean telephone number."). In the Do-Not-Call-Database section, for example, the TCPA bars solicitations directed "to the telephone number of any subscriber included in such database." 47 U.S.C. § 227(c)(3)(F). The TCPA then provides that regulations shall "prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify methods for protection of the privacy rights of persons whose *numbers* are included in such database." *Id.* § 227(c)(3)(K) (emphasis added). Here, "numbers" clearly refers to "telephone numbers," not an index of numbers.

Similarly, in the discussion of "[c]aller identification service," the TCPA provides:

> The term "caller identification service" means any service or device designed to provide the user of the service or device with the telephone number of, or other information regarding the origination of, a call made using a voice service or a text message sent using a text messaging service. Such term includes automatic *number* identification services.

47 U.S.C. § 227(e)(8)(B) (emphasis added). The reference to "number" here is also to a telephone number, not an index number that dictates the order in which telephone numbers are called. Again, the use of the word "number" here the interpretation that "number" in "random or sequential number generator" must refer to "telephone number."

There are, of course, references to the word "number" elsewhere in the TCPA where the context makes clear that the reference is to quantity and not telephone number (or index or coding numbers). For example, "number" is used in expressions such as "number of complaints" (section 227(b)(2)(G)(i)(I), (h)(2)(A)), "number of citations" (section 227(h)(2)(B)), "number of notices" (section 227(h)(2)(C)) "number of final orders" (section 227(h)(2)(D)), and "number of calls" (section 227(h)(2)(F), (G)). While it is true that courts ordinarily presume that "identical words used in different parts of the same act are intended to have

the same meaning," *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 319 (2014), the presumption of consistent usage "'readily yields' to context, and a statutory term . . . 'may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.'" *Id.* at 320 (quoting *Env't Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007)). With the exception of these obvious references to "number" as "quantity," "number" in the TCPA refers to "telephone number," and not to coding or indexing numbers created by a random number generator.

**b. *The Purpose of the Statute***

A consideration of the broader context of the TCPA must also include consideration of its purpose: to protect against automatic systems that, by generating telephone numbers automatically, could tie up the telephone lines of public emergency services and businesses with sequentially numbered telephone lines, or otherwise result in tying up a called party's line. *See Duguid*, 592 U.S. at 399, 405 (citing H.R. Rep. No. 102-317, at 24 (1991)). These concerns are not implicated by a system that uses a pre-existing list of telephone numbers that are not automatically or randomly generated, but that are drawn from other sources, including, as here, from consumers themselves who voluntarily

provided them. *See Borden*, 53 F.4th at 1234-35 ("Using a random or sequential number generator to select from a pool of customer-provided phone numbers would not cause the harms contemplated by Congress. Public emergency services (such as police or fire departments) would presumably not be in these customer-provided lists. And if an autodialer called the phone numbers on its customer list sequentially, it would likely not reach the sequential numbers often assigned to a single business . . . ."). As the Supreme Court observed, "[e]xpanding the definition of an autodialer to encompass any equipment that merely stores and dials telephone numbers would take a chainsaw to these nuanced problems when Congress meant to use a scalpel." *Id*. at 405.

**3. *Soliman's Additional Arguments***

Soliman makes three additional arguments that warrant discussion.

First, Soliman argues that if the TCPA were read to bar only the automatic dialing of randomly generated telephone numbers -- leaving companies free to call people on pre-exisiting lists -- then "Do Not Call" lists would be rendered meaningless because one cannot consent to a call that is randomly generated. **[Blue at 34-37]** We disagree that such an interpretation would render Do Not Call lists meaningless. When this legislation was drafted

in 1991, contemplating the establishment of "a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations," Congress envisioned creating the capacity to prevent autodialers from calling telephone numbers in the database. 47 U.S.C. § 227(c)(3). The TCPA provides that the regulations governing the database will "specify the methods by which such objections shall be collected and added to the database" and "prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database." *Id.* § 227(c)(3)(D), (F). There is nothing in the language of the TCPA to suggest that randomly generated telephone numbers -- to the extent they appear on a Do Not Call list -- will not be protected.

Second, Soliman argues that FCC regulations support her position. Specifically, she points to the discussion of "predictive dialers" in a 2003 FCC order. *See* In re Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 18 FCC Rcd. 14014, 14091 (2003) ("2003 FCC Order"). In it, the FCC defined predictive dialers as equipment that "has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers." *Id*. The FCC found that predictive dialers "fall[] within

the meaning and statutory definition of 'automatic telephone dialing equipment' and the intent of Congress," even though they use numbers from a database. 2003 FCC Order at 14093.

The D.C. Circuit has addressed the issues raised by the FCC regulations in its decision in *ACA International,* 885 F.3d at 699. As the court explained,

> 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 a database of telephone numbers generated elsewhere?

*Id.* at 701. The court recognized that the Commission's ruling was less than clear. *Id.* ("The Commission's ruling appears to be of two minds on the issue."). After analyzing the Commission's reasoning supporting both positions, the court held that "the Commission's ruling, in describing the functions a device must perform to qualify as an autodialer, fails to satisfy the requirement of reasoned decisionmaking." *Id.* at 703.[3] We agree that the FCC orders shed little light on

[3] In *ACA International*, regulated entities sought review of a 2015 FCC Order discussing"which sorts of automated dialing equipment are subject to the TCPA's restrictions on unconsented calls." *Id.* at 691. The court held that because ordinary smartphones could qualify as automatic telephone dialing systems under the 2015 FCC Order, they could thus be subject to the restrictions and penalties of the TCPA. *Id.* at 692. The court concluded that this was too broad an interpretation of the TCPA and therefore set aside part of the 2015 FCC Order. *Id.*

the issue before us, and thus we give them little weight in our analysis. *See id.* at 703 ("The order's lack of clarity about which functions qualify a device as an autodialer compounds the unreasonableness of the Commission's expansive understanding of when a device has the 'capacity' to perform the necessary functions.").

Third, Soliman argues that "number generator" is a term of art in the industry, and must be given its technical meaning. Appellant's Reply Br. at 10-11. A "number generator," she says, is a programming tool used to generate random or sequential series of numbers, but not necessarily telephone numbers. *Id.* Soliman's reading, however, is contrary to the ordinary meaning of the text. *See Duguid*, 592 U.S. at 406-07. That ordinary meaning, considered in light of the Supreme Court's holding in *Duguid*, which we turn to next, supports our conclusion that the provision requires an autodialer to generate telephone numbers to be covered by the TCPA.

**B. *Facebook v. Duguid***

The district court also held that the Supreme Court's decision in *Duguid* does not support Soliman's position. *Soliman*, 2022 WL 2802347, at *2-3. We agree. In *Duguid*, the Supreme Court considered "whether an autodialer

must have the capacity to generate random or sequential *phone* numbers." *Duguid*, 592 U.S. at 401-02 (emphasis added). Its discussion supports the conclusion that "random or sequential" numbers must refer to telephone numbers. *See, e.g., id.* at 399 ("This case concerns 'automatic telephone dialing systems' (hereinafter autodialers), which revolutionized telemarketing by allowing companies to dial random or sequential blocks of *telephone* numbers automatically." (emphasis added)).

The Court noted that Congress passed the TCPA to combat annoying telemarketing calls to consumers and businesses, particularly systems that could dial random or sequential blocks of telephone numbers automatically and tie up telephone lines of public emergency services and all the lines of businesses with sequentially numbered phone lines. *Id.* at 399-400. Clearly, the "autodialer" the Supreme Court envisioned the TCPA covering is one that can generate random or sequential telephone numbers, not a system that calls random or sequential phone numbers from pre-existing lists of telephone numbers generated in other ways.

The Supreme Court in *Duguid* also addressed whether the definition of an automatic telephone dialing system "encompasses equipment that can

'store' and dial telephone numbers, even if the device does not 'us[e] a random or sequential number generator.'" 592 U.S. at 399. The Court held that to qualify as an automatic telephone dialing system, "a device must have the capacity either to store a *telephone number* using a random or sequential [number] generator or to produce a *telephone number* using a random or sequential number generator." *Id.* (emphases added). Thus, "produce" means creating the telephone number in the first place. *See Beal*, 29 F.4th at 394 (holding that a system that "does not generate phone numbers to be called . . . does not 'produce telephone numbers to be called' for purposes of § 227(a)(1) of the TCPA").

Accordingly, the district court here correctly held that, based on this analysis, *Duguid* does not support the interpretation that an automatic telephone dialing system includes a system that does not randomly or sequentially generate telephone numbers but simply dials telephone numbers from pre-existing lists. *Soliman*, 2022 WL 2802347, at *2-3.

Soliman understandably relies on footnote 7 of *Duguid*, which appears at first glance to support her position. *See* 592 U.S. at 407 n.7. There, the Supreme Court discussed a system that sounds similar to the one used by Subway, namely, one that randomly selects telephone numbers from a pre-

existing list of numbers. This footnote was part of a discussion addressing Duguid's argument that the Court should use a construction that "accords with the 'sense' of the text." *Id.* at 406. Duguid insisted that the most sensible construction of the TCPA applied the phrase "'using a random or sequential number generator' to modify only 'produce,'" not "store," as definitions of "generator" often include the word "produce," but not "store." *Id.* Duguid also argued that the "technical meaning of a 'random number generator' invoked ways of producing numbers, not means of storing them." *Id.*

The Court reasoned that this approach might be more compelling if "applying the traditional tools of interpretation led to a linguistically impossible or contextually implausible outcome." *Id.* at 406-07 (quotation marks omitted). But it was linguistically possible to "store" numbers using a random number "generator" and, in fact, patents had been issued for "devices that used a random number generator to store numbers to be called later (as opposed to using a number generator for immediate dialing)." *Id.* at 407. The Court then inserted this footnote:

> Duguid argues that such a device would necessarily "produce" numbers using the same generator technology, meaning "store or" in § 227(a)(1)(A) is superfluous. "It is no superfluity," however, for Congress to include both functions in the autodialer definition so as

> to clarify the domain of prohibited devices. *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 544, n.7, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1994). For instance, an autodialer might use a random number generator to determine the order in which to pick phone numbers from a preproduced list. It would then store those numbers to be dialed at a later time. See Brief for Professional Association for Customer Engagement et al. as *Amici Curiae* 19. In any event, even if the storing and producing functions often merge, Congress may have "employed a belt and suspenders approach" in writing the statute. *Atlantic Richfield Co. v. Christian*, 590 U. S. ——, ——, n.5, 140 S. Ct. 1335, 1350, n.5, 206 L. Ed. 2d 516 (2020).

*Id.* at 407 n.7. This footnote, however, merely notes that one could employ an autodialer to both "store" and "produce" telephone numbers, as two separate functions. It says nothing about whether the numbers on the preproduced list were randomly generated in the first place. And it does not mean that if the telephone numbers were *not* originally created by a random number generator, then the use of a random number generator to pick the pre-existing number is sufficient to meet the definition of an ATDS.[4] *See Borden*, 53 F.4th at 1235 ("Using a random or sequential number generator to select from a pool of customer-provided phone numbers would not cause the harms contemplated by Congress.

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[4] Even if Footnote 7 did suggest that such a device meets the definition of an ATDS, that result would be in serious tension with *Duguid*'s text. A stray example in a footnote must yield to the opinion's main text; doubly so when Footnote 7 itself conceded that Congress "may have employed a belt and suspenders approach in writing the statute." *Duguid*, 592 U.S. at 407 n.7 (internal quotation marks omitted).

. . . The [*Duguid*] Court's discussion of these risks would make no sense if the autodialer definition were not tailored to equipment capable of sequential or random generation of telephone numbers."); *accord Beal*, 29 F.4th at 395-96 ("Like other courts, we do not believe the Court's footnote indicates it believed systems that randomly select from non-random phone numbers are Autodialers.").[5] When read in the context of the entire opinion, footnote 7 does not support Soliman's position. Thus, this argument is unavailing.

**III.** ***"Artificial or Prerecorded Voice"***

Soliman argues that Subway's text message violated the provision of the TCPA that makes it unlawful for "any person . . . to make any call . . . using . . . an artificial or prerecorded voice." 47 U.S.C. § 227(b)(1)(A). The district court correctly held that a text message is not a "voice."[6]

Once again, we first consider whether the meaning of the statute is clear from its text. In doing so, we consider the ordinary meaning of the words

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[5] *But see Scherre v. FPT Operating Co.*, 2023 WL 4660089, at *3 (collecting cases discussing footnote 7 and holding that an ATDS is not limited to a "telephone-number generator").

[6] While Soliman has waived her argument that automated text messages use a prerecorded voice, she still argues that they use an "artificial voice." Appellant's Br. at 14 n.11.

at issue at the time the statute was drafted. *See Perrin v. United States*, 444 U.S. 37, 42 (1979).

Common sense tells us that "voice" -- especially in the context of a statute regulating telephones -- will ordinarily refer to a sound produced by a human being. This tracks the dictionary definition of "voice" when the TCPA was enacted in 1991 is "sound produced by vertebrates by means of lungs, larynx or syrinx, and various buccal structures." *Voice* (def. 1a) , Webster's Third New International Dictionary (1993); *accord Voice* (def. 1a), American Heritage Dictionary (1991) ("sound produced by the vocal organs of a vertebrate, esp. by those of a human being"); *Voice* (1a), Webster's II New Riverside University Dictionary (1994) (same). While it is true that "voice" can be defined broadly to include more than the human voice (like a metaphoric voice), that is not the ordinary meaning of "voice." *See Trim v. Reward Zone USA LLC*, 76 F.4th 1157, 1162 (9th Cir. 2023) ("The ordinary meaning of 'voice' when the TCPA was enacted . . . was a '[s]ound formed in or emitted from the human larynx in speaking.'"(quoting *Voice* (def. 1a), Oxford English Dictionary (2d ed. 1989))). Just because a definition is "broad enough to encompass one sense of a word

does not establish that the word is *ordinarily* understood in that sense." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 568 (2012).

The language of the TCPA itself also makes clear Congress meant "voice" to mean something audible, not a text message. As the district court noted, the TCPA defines "caller identification information" as information "regarding the telephone number of, or other information regarding the origination of, a call made using *a voice service or a text message* sent using a text messaging service." 47 U.S.C. § 227(e)(8)(A) (emphasis added). Clearly, Congress considered a "voice service" and a "text messaging service" to be distinct categories.

The use of the word "voice" in other parts of the TCPA further supports the interpretation that a text message is not an artificial voice. For example, section 227(d)(3) discusses "[t]echnical and procedural standards," including "[a]rtificial or prerecorded voice systems." The section provides:

> [t]he Commission shall prescribe technical and procedural standards for systems that are used to transmit any *artificial* or prerecorded *voice* message via telephone. Such standards shall require that . . . (B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system *that the called party has hung up*, to allow the called party's line to be used to make or receive other calls.

47 U.S.C. § 227(d)(3) (emphases added). This is clearly referring to a telephone call, not a text message, as one cannot hang up on a text. *Accord Trim*, 76 F.4th at 1162.

Accordingly, the district court did not err in holding that a text is not an "artificial voice." *Accord Trim*, 76 F.4th at 1161 ("We hold that Congress clearly intended 'voice' in 47 U.S.C. § 227(b)(1)(A) to encompass only audible sounds, because the ordinary meaning of voice and the statutory context of the TCPA establish that voice refers to an audible sound.").

## *CONCLUSION*

For the foregoing reasons, the judgment of the district court is AFFIRMED.