No. 18-14586

United States Court of Appeals
For the Eleventh Circuit

TABITHA EVANS,
Plaintiff-Appellee,

v.

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY,
Defendant-Appellant.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
CIVIL ACTION NO. 3:16-CV-00082-TCB

BRIEF OF AMICI CURIAE NATIONAL CONSUMER LAW CENTER, CONSUMER FEDERATION OF AMERICA, AND NATIONAL ASSOCIATION OF CONSUMER ADVOCATES IN SUPPORT OF APPELLEE AND URGING AFFIRMANCE

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April 1, 2019

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Circuit Rules 26.1-1, 26.1-2, and 26.1-3, Amici hereby identifies the judges, attorneys, and persons that have an interest in the outcome of this case.

1. Alston & Bird LLP (Law Firm of Appellant's Counsel)
2. Batten, Timothy C. (U.S. District Judge, Northern District of Georgia)
3. Carter, Carolyn (NCLC Attorney)
4. Consumer Federation of America (Amicus Curiae)
5. Delus, Judith M. (Counsel for Plaintiff)
6. Dickerson, Derin B. (Counsel for Defendant/Appellant)
7. Evans, Tabitha (Plaintiff/Appellee)
8. Hill, Adam (Counsel for Appellee)
9. Krohn & Moss, LTD (Law Firm of Appellee's Counsel)
10. Law Office of Judith Delus, P.A. (Law Firm of Appellee's Counsel)
11. Mize, Jr., Gerald L. (Counsel for Defendant)
12. National Association of Consumer Advocates (Amicus Curiae)
13. National Consumer Law Center (Amicus Curiae)
14. Patel, Tejas S. (Counsel for Defendant/Appellant)

15. Pennsylvania Higher Education Assistance Agency (Defendant/Appellant)

16. Saunders, Margot (NCLC Attorney)

17. Twomey, Tara (Counsel for Amici Curiae)

No other trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations, including subsidiaries, conglomerates, affiliates, parent corporations, publicly held corporations, or other identifiable legal entities related to Amici have an interest in the outcome of this appeal.

The National Consumer Law Center (NCLC) operates as a tax-exempt organization under the provisions of section 501(c)(3) of the Internal Revenue Code. It has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

The National Association of Consumer Advocates (NACA) is tax-exempt under section 501(c)(6) of the Internal Revenue Code. It has no parent corporation, nor has it issued shares or securities.

Consumer Federation of America (CFA) is a non-profit, non-stock corporation. It has no parent corporations, no publicly held corporations have ownership interests in it, and it has not issued shares.

April 1, 2019

Respectfully submitted,

s/ Tara Twomey

TARA TWOMEY
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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

STATUTES:

OTHER AUTHORITIES:

STATEMENT OF INTEREST OF AMICI CURIAE

The National Consumer Law Center (NCLC) is a Massachusetts non-profit corporation established in 1969 and incorporated in 1971. It is a national research and advocacy organization focusing specifically on the legal needs of low-income, financially distressed, and elderly consumers. The National Association of Consumer Advocates (NACA) is a non-profit membership organization of law professors, public sector lawyers, private lawyers, legal services lawyers, and other consumer advocates. Consumer Federation of America (CFA) is an association of non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education.

All three *Amici* are consumer protection organizations that work to protect consumers from the scourge of unwanted robocalls. *Amici* have advocated extensively on behalf of consumers, to protect their interests related to robocalls, before the Federal Communications Commission (FCC), and before the federal courts. Their activities have included numerous filings and appearances before the FCC urging strong interpretations of the Telephone Consumer Protection Act (TCPA). *Amici* have also filed numerous amicus briefs before the federal courts of appeals representing the interests of consumers regarding the TCPA.

STATEMENT UNDER FEDERAL RULE OF APPELLATE PROCEDURE 29(a)(4)(E)

Amici state: (1) no party or parties' counsel authored this brief in whole or in part; (2) no party or parties' counsel has contributed any money that was intended to fund preparing or submitting the brief; and (3) no person other than *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

STATEMENT OF ISSUES

This appeal involves a number of issues, including whether Appellant Pennsylvania Higher Education Assistance Agency (PHEAA) is liable for making prerecorded calls to Appellee Tabitha Evans' cell phone without her consent; whether it was proper to assess treble damages against PHEAA; and whether PHEAA used an "automatic dialing system," or ATDS, to place its calls. Amici will address only the last of these issues, and will focus only on the question of whether the definition of an automated telephone dialing system under the Telephone Consumer Protection Act includes systems that store and dial from a list.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Telephone Consumer Protection Act (TCPA) was passed by Congress to provide essential privacy protections from the intrusion of unwanted autodialed or prerecorded calls to cell phones. The law prohibits autodialed calls to cell phones without the prior express consent of the person called, except in the case of an emergency or for calls to collect federal government debt. Despite the TCPA, over four *billion* robocalls are now made *every month*, many of which are unwanted and illegal. Because the TCPA is remedial in nature, it is entitled to a liberal construction to protect consumers.

The predictive dialer used to call Appellee Tabitha Evans (Ms. Evans) stores numbers and dials them automatically from a list while no human being is on the line. *Amici* urge this Court to hold that these automated dialers are included in the definition of an automatic telephone dialing system (ATDS) under the TCPA. The consequence of a ruling that they do not meet that definition would be to unleash a tsunami of unwanted robocalls to cell phones.

The TCPA defines an ATDS as equipment that "has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). This definition contemplates two types of systems: those that store numbers and dial them automatically, and those that generate numbers and dial them automatically. The debate is whether the clause "using a random or sequential number generator"

modifies only the word "produce," to apply only to the second type of system, which generates and dials numbers, or whether that clause also modifies the word "store," to apply to a system that stores and dials numbers.

Numbers can certainly be "produced" using a random or sequential number generator. But numbers cannot be *stored* using a generator. Moreover, the last antecedent rule says that a limiting clause or phrase "should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart v. Thomas*, 540 U.S. 20, 26, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003). Applying this rule to section 227(a)(1)(A), the phrase "using a random or sequential number generator" only modifies the word "produce" rather than the word "store." Thus, the statute should be interpreted to encompass a device that stores numbers and then dials them, without any requirement of use of a random or sequential number generator.

In addition, interpreting the TCPA's definition of an ATDS to exclude systems which store numbers and then dial them automatically cannot be correct, as this would cause other portions of the statute to be nonsensical or superfluous. For example, the law does not prohibit all calls made with an ATDS; it allows calls made with an ATDS when the called party has consented to receive them. If the definition includes only systems that dial telephone numbers produced randomly or sequentially from thin air, rather than dial from a stored database of inputted numbers, the prohibition against autodialed calls to consumers who had not consented to receive them would be meaningless. Only if the prohibition encompasses calls made from a

stored list of numbers, for which the caller will know whether it has obtained consent, does the prohibition make sense.

ARGUMENT

I. TO ADDRESS SKYROCKETING ROBOCALLS, THE TCPA MUST BE LIBERALLY CONSTRUED TO ACCOMPLISH ITS PURPOSE OF PROTECTING CONSUMERS.

A. Automated Calls to Cell Phones Assault Americans Daily.

The TCPA is an essential privacy protection law intended to protect consumers from the intrusions of unwanted automated and prerecorded calls to cell phones. As was forcefully stated by Senator Hollings, the sponsor of the TCPA, 47 U.S.C. § 227, "[c]omputerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall." 137 Cong. Rec. S16204, S16205 (Nov. 7, 1991). *See also* S. Rep. 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.").

The congressional findings accompanying the TCPA repeatedly stress the purpose of protecting consumers' privacy:

> (5) Unrestricted telemarketing, however, can be an *intrusive invasion of privacy* and, when an emergency or medical assistance telephone line is seized, a risk to public safety.

> (6) Many consumers are outraged over the proliferation of *intrusive*, nuisance calls to their homes from telemarketers.
>
> * * *
>
> (10) Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a *nuisance and an invasion of privacy*.

Pub. L. 102-243, § 2, 105 Stat. 2394 (1991) (found as a note to 47 U.S.C. § 227) (emphasis added).

Except in the case of an emergency, and with an exception for calls to collect federal government debt, the TCPA permits autodialed calls to cell phones *only if* the consumer has given "prior express consent" to receive them. 47 U.S.C. § 227(b)(1)(A)(iii*)*.

Both the number of robocalls and the number of complaints by consumers increase every year. Industry data shows that the number of robocalls made each month increased from 831 million in September 2015 to 4.7 ***billion*** in December 2018—a 466% increase in three years. After nearly 48 billion robocalls in 2018, YouMail estimates that 2019 robocall totals will exceed 60 billion at the current rate of growth. *See* www.robocallindex.com.

Many of these calls are unwanted, unconsented to, and illegal, as evidenced by the huge number of complaints filed with government agencies about intrusive robocalls. Complaints concerning unwanted robocalls filed with the FTC grew from just over 3 million in 2015 to over 5.7 million in 2018. *See* Federal Trade Commission,

Do Not Call Registry Data Book 2018: Complaint Figures by Year, available at https://www.ftc.gov/policy/reports/policy-reports/commission-staff-reports/national-do-not-call-registry-data-book-fy-9. This rise in complaints is consistent with an increased use of intrusive and disruptive robocall technology.

B. The TCPA Must Be Construed to Further Its Consumer Protection Purposes.

Like many other robocallers, the caller in this case used a predictive dialer to call Ms. Evans. Given the wide use of autodialers, this court's decision on whether these automated dialers are included in the definition of an automated telephone dialing system under the TCPA will have a significant impact. If this court upholds the decision below, and agrees with the Ninth Circuit's decision in *Marks v. Crunch San Diego, L.L.C.*, 904 F.3d 1041 (9th Cir. 2018), unwanted robocalls made without the consent of the called party will decrease. If, instead, the court sides with the petitioner, and interprets predictive dialers to fall outside the parameters of the statutory definition, the number of unwanted and unstoppable robocalls will continue to escalate.

It is well established that the TCPA is a remedial statute that should be given a liberal construction to further its purpose of protecting consumers' privacy and stopping unwanted, intrusive calls. *See, e.g., Parchman v. SLM Corp.,* 896 F.3d 728, 738-739 (6th Cir. 2018); *Daubert v. NRA Grp., L.L.C.*, 861 F.3d 382, 390 (3d Cir. 2017); *Van Patten v. Vertical Fitness Grp.*, 847 F.3d 1037, 1047–48 (9th Cir. 2017); *Leyse v. Bank of Am.*, 804 F.3d 316, 327 (3d Cir. 2015); *Gager v. Dell Fin. Servs., L.L.C.*, 727 F.3d 265,

271 (3d Cir. 2013); *Carlton & Harris Chiropractic, Inc. v. PDR Network, L.L.C.*, 883 F.3d 459, 474 (4th Cir. 2018) (quoting *Scarborough v. Atl. Coast Line R. Co.*, 178 F.2d 253, 258 (4th Cir. 1949)), *cert. granted*, 139 S.Ct. 478 (Nov. 13, 2018). Accordingly, the statutory definition of ATDS should be interpreted liberally in light of the TCPA's purpose to protect consumers' privacy and to stop unwanted telephone calls. The principle of liberal construction is all the more important because of the effect on consumers that the Court's decision will have in this case.

II. THE DIALER USED BY APPELLANT MEETS THE DEFINITION OF AN ATDS.

A. The Statutory Language Itself Supports Interpreting an ATDS to Include a Dialer that Stores and Dials Numbers.

The fundamental question in this case is whether the predictive dialer used by the defendant is an automatic telephone dialing system (ATDS). This term is defined by the TCPA as:

> (1) . . . 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).

Ms. Evans' brief correctly argues that this definition must be interpreted to encompass a predictive dialer such as the one PHEAA used to make its calls to her. This conclusion is mandated by the FCC's clear and unequivocal 2003 and 2008 orders, which—as articulated in Ms. Evans' brief—were not overruled by the D.C.

Circuit in *ACA International v. Federal Communications Commission,* 885 F.3d 687 (D.C. Cir. 2018). However, the statute itself dictates the same result: automated systems that dial from a list are clearly covered under the TCPA's definition of an ATDS.

As the briefs of both Appellant and Appellee make clear, the key question in interpreting the ATDS definition (47 U.S.C. § 227(a)(1)(A)) is whether a system must use "a random or sequential number generator" to qualify. There are clearly two types of systems contemplated in the statutory definition – those that store and dial numbers automatically, and those that produce and dial numbers automatically. The debate is whether the clause "using a random or sequential number generator" modifies only the word "produce," to apply only to the second type of system, which generates and dials numbers, or whether that clause also modifies the word "store," to apply to a system that stores and dials numbers.

Numbers can certainly be "produced" using a random or sequential number generator. But numbers cannot be *stored* using a generator. Moreover, the last antecedent rule says that a limiting clause or phrase "should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart v. Thomas*, 540 U.S. 20, 26, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003). Applying this rule to section 227(a)(1)(A), the phrase "using a random or sequential number generator" only modifies the word "produce" rather than the word "store." Thus, the statute should be interpreted to encompass a device that stores numbers and then dials them,

without any requirement that the device must use a random or sequential number generator.

In other words, must a system that stores numbers also have generated them—either to be stored or to be dialed? Storage is an entirely separate function from generation of numbers. In fact, it is not possible for a system to *store* numbers using a number generator. Those two functions are mutually exclusive. If the system already has the numbers in it (stored), then there would be no need for it to produce or generate the numbers. While some decisions have expressed the view that a system can be an ATDS only if it uses a random and sequential number generator, *not one* of these decisions provides a satisfactory explanation of how one can use such a generator to *store* numbers. *See, e.g.*, *Thompson-Harbach v. USAA Fed. Savings Bank*, 2019 WL 148711 (N.D. Iowa Jan. 9, 2019) (concluding that "using a random or sequential number generator" modifies both "produce" and "store," without suggesting an explanation for how something can be stored using a random or sequential number generator).

It is a traditional canon of statutory interpretation 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." *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001), which in turn quotes *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115-116, 25 L. Ed. 782 (1879)). The ATDS definition includes

the disjunctive "or," meaning that an ATDS must include a system that *stores* telephone numbers, without having *produced* them. *See Bourff v. Rubin Lublin, L.L.C.*, 674 F. 3d 1238, 1241 (11th Cir. 2016) (explaining "or" in a similarly worded consumer protection statute). Since numbers cannot be stored using a random or sequential number generator, the term "store" is essentially read out of the statute if the phrase "using a random or sequential number generator" modifies both "store" and "produce."

B. Several Provisions of the TCPA Require a Holding that a Predictive Dialer is an ATDS.

Interpreting the TCPA's definition of an ATDS to exclude systems that store numbers and then dial them automatically cannot be correct, as this would cause other portions of the statute to be nonsensical or superfluous.

First, the TCPA does not prohibit all calls made with an ATDS: it allows ATDS calls to be made when a party has consented to receive them. 47 U.S.C. § 227(b)(1)(A)(iii). If the definition included only systems that dial telephone numbers produced randomly or sequentially from thin air, rather than dial from a stored database of inputted numbers, the prohibition of autodialed calls to consumers who had not consented to receive them would be meaningless. Autodialed calls would always reach parties who had not consented, because the calls would go to numbers that had been randomly generated. Callers would have consent for calls to autodialed numbers only as a matter of sheer coincidence, if ever. Only if the prohibition encompasses calls made to a stored list of numbers, for which the caller will know

whether it has obtained consent, does the prohibition make sense. As the Ninth Circuit stated, "[t]o 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." *Marks,* 904 F.3d at 1051.

Second, the TCPA prohibits use of an autodialer to call emergency telephone lines, patient rooms in hospitals, and other sensitive numbers. 47 U.S.C. § 227(b)(1)(A)(i), (ii). As the Ninth Circuit held, "[i]n order to comply with such restrictions, an ATDS could either dial a list of permitted numbers (as allowed for autodialed calls made with the prior express consent of the called party) or block prohibited numbers when calling a sequence of random or sequential numbers. In either case, these provisions indicate Congress's understanding that an ATDS was not limited to dialing wholly random or sequential blocks of numbers, but could be configured to dial a curated list." *Marks,* 904 F.3d at 1051 n.7.

Third, the 2015 Budget Act created an exemption for the use of an ATDS to make calls "solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A)(iii). Congress would have had no reason to enact this exception if it had not understood the statute to apply to equipment that dials from a list of numbers, such as a list of numbers of individuals who owe debts to the United States. The federal government is certainly not making debt collection calls to random numbers, but is calling from a list of debtors.

Indeed, as noted by the Ninth Circuit, Congress's 2015 amendment to the TCPA, without amending the ATDS definition, suggests ratification of the FCC's longstanding interpretation of the term to include devices that dial numbers from a stored list. *Marks*, 904 F.3d at 1052; *see also 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.") At that point, the statute's application to list-based dialing systems had been well established for *over twelve years* and was binding under the Hobbs Act. *See In re Rules and Regulations Implementing the TCPA*, 18 FCC Rcd. 14014, ¶ 12 (July 3, 2003)) (2003 Order); *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 110, 114 (11th Cir. 2014).

Thus, Congress knew that the statute applied to list-based dialing systems used by the government's debt collectors and 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.

This amendment is akin to one considered by the Supreme Court in *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507 (2015). The issue in that case was whether the Fair Housing Act allowed for "disparate-impact" claims. *Id.* at 2513. Like this case, 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. The Supreme 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 therefore ratified the FCC's prior interpretation.

Fourth, the TCPA prohibits use of an autodialer in a way that ties up multiple lines of a multi-line business. 47 U.S.C. § 227(b)(1)(D). If an autodialer is defined merely as one that dials numbers in a random or sequential order, not from a list, it would be impossible to implement this prohibition because a caller calling numbers produced out of thin air would have no way of ensuring that it was not tying up a business's multiple lines.

Finally, the TCPA permits an award of treble damages if a violation is willful or knowing. 47 U.S.C. § 227(b)(3). If numbers were generated out of thin air, rather than from a list, a caller could never *know* it was calling an emergency line or a cell phone, so this provision would also be rendered meaningless.

C. Interpreting the Definition of ATDS to Include Systems that Store and Dial Numbers Does Not Conflict with the D.C. Circuit's Decision in *ACA International.*

Appellant incorrectly argues that following the Ninth Circuit's interpretation in *Marks* would conflict with the D.C. Circuit's opinion in *ACA International.* 885 F.3d 687 (D.C. Cir. 2018). It claims that including in the definition of ATDS all systems that store and dial numbers from a list would cause all smart phones to be swept into the definition. It is true that one of the concerns that led the D.C. Circuit to set aside the Federal Communication Commission's 2015 Order, (*In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. 7961 (F.C.C. July 2015)), was that the Order appeared to sweep in the ordinary use of a smartphone, which the D.C. Circuit held would be overbroad. However, the FCC's 2015 Order relied on a broad interpretation of the term "capacity" in the ATDS definition to encompass both present capacity and potential future capacity, and it was this interpretation that the *ACA International* court viewed as sweeping in smartphones. In other words, the *ACA International* court was concerned with the ease with which a smartphone could *be turned into* a system with autodialing functions: "a smartphone … has only a "theoretical potential" to function as an autodialer by downloading an app." *ACA International,* 885 F.3d at 700.

However, neither the Ninth Circuit's opinion in *Marks* nor the position argued in this brief relies on a broad interpretation of "capacity" to determine that devices that dial from a list are covered in the ATDS definition. *See Marks,* 904 F.3d at 1053

n.9 ("Because we vacate the district court's decision on this ground, we decline to reach the question whether the device needs to have the current capacity to perform the required functions or just the potential capacity to do so"). The *Marks* court interprets the statutory language in the TCPA to include equipment that automatically dials numbers from a stored list, without reference to its potential capacity.

Notably, the court in *ACA International* did not in any way disavow the interpretation that equipment which stores and dials numbers is an ATDS. The court was critical only of the 2015 Order's lack of clarity on this point:

> So which is it: does a device qualify as an ATDS only if it can generate random or sequential numbers to be dialed, or can it so qualify even if it lacks that capacity? The 2015 ruling, while speaking to the question in several ways, gives no clear answer (and in fact seems to give both answers). *It might be permissible for the Commission to adopt either interpretation.*

ACA Int'l, 885 F.3d at 702-03 (emphasis added).

If the word "capacity" is interpreted to mean only the functionality of the system at the time the calls are made, smartphones would not be covered. FCC Chairman Pai has clearly articulated that he reads the term "capacity" in the TCPA's definition of an ATDS to encompass only the system's actual functionalities *at the time the call is made.* 2015 Order, at 8075 (Dissenting Statement of Commissioner Ajit Pai). Using Chairman Pai's articulation of the term, the potential ability of a system to perform the functions of an ATDS at some time in the future, if significant additional software or hardware were added to one of the systems on the smartphone, is not relevant. The fact that apps *could be* downloaded to the phone would not make the

phone an ATDS unless the user has downloaded and *used* such an app. Likewise, any special software that could enable mass dialing would not make the smartphone an ATDS unless it has been installed on the phone.

Smartphones—just like all computers—do have the *potential* capacity to be part of a system that could be an ATDS. But smartphones are not manufactured with any inherent features that make them ATDSs. Unlike predictive dialers, they cannot make simultaneous calls to a batch of numbers automatically from a stored list, nor do they dial numbers while no human being is on the line, which creates the problem of "dead air" and abandoned calls inherent to predictive dialers. *See Mais*, 768 F.3d at 1114 ("Predictive dialers, which initiate phone calls while telemarketers are talking to other consumers, frequently abandon calls before a telemarketer is free to take the next call. Using predictive dialers allows telemarketers to devote more time to selling products and services rather than dialing phone numbers, but the practice inconveniences and aggravates consumers who are hung up on.") (quoting *2003 Order* at 14022); *see also In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 2005 FCC Lexis 1158, *41-42 (February 8, 2005) ("The record before us revealed that consumers often face 'dead air' calls and repeated hang-ups resulting from the use of predictive dialers."). Moreover, as calls are made from a smartphone only when the caller who is going to speak to the called party scrolls through the list, chooses a number or name, and presses the call button (or when the human manually inputs the number to be called). That capability does not make the smartphone an ATDS. As

Chairman Pai has noted, the Commission has already explicitly held that "speed dialing" does not fall within the definition of an ATDS. 2015 Order at 8074, ¶ 17, 2015 Order (Dissenting Statement of Commissioner Ajit Pai, at 8074); *see also In Re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, 7 FCC Rcd. 8752, 8776, para. 47 (F.C.C. Oct. 16, 1992).

Additionally, a smartphone cannot send mass texts (as opposed to group texts with modest limits on their number) without downloading an app or connecting to an Internet program. The only case *amici* have found in which a smartphone was used to send mass texts involved a user who downloaded an app: the smartphone did not come with this capability. *See Wanca v. LA Fitness Int'l, L.L.C.*, No. 11 CH 4131 (19th Jud. Cir. Lake County, Ill.) (defendants had downloaded a mass texting application to an iPhone and used that to telemarket). Accordingly, a smartphone will be considered part of an automated telephone dialing system for the purpose of sending mass texts *only when the smartphone actually has an app or additional software added to it, or has connected to a web-based mechanism to send texts en masse.*

In any event, the D.C. Circuit's concerns about the potential that smartphones used for ordinary personal purposes might be swept in by the broad definition of ATDS in the FCC's 2015 Order should be of no concern to a court that is determining whether something other than a smartphone is an ATDS. Overbreadth is a legitimate concern in a rulemaking proceeding or an appeal therefrom, because the rulemaker should be concerned about all persons and entities that a definition might

encompass. But in litigation between two private parties the court's concern should center on the parties before it. A caller that has been robodialing consumers' cell phones with a predictive dialer should not be heard to complain about the potential that an ordinary smartphone user might be charged with violating the TCPA. That objection should be left to the smartphone user. Addressing this sort of issue outside a rulemaking proceeding, a declaratory ruling, or an appeal from an agency's pronouncement would amount to issuing an advisory opinion on an issue not necessary to the case before the court.

CONCLUSION

For all of these reasons, *amici* urge this court to endorse the Ninth Circuit's analysis in *Marks*, and to conclude, as *Marks* did, that "the statutory definition of ATDS is not limited to devices with the capacity to call numbers produced by a 'random or sequential number generator,' but also includes devices with the capacity to dial stored numbers automatically." *Marks* at 1052 . This definition includes the predictive dialer used by the petitioner in this case.

Respectfully submitted,

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April 1, 2019

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Garamond font. This document complies with the word limit of Federal Rule of Appellate Procedure 27(d)(2)(a) because, excluding parts of the documents are exempted by Federal Rule of Appellate Procedure 32(f), this document contains 4,780 words.

April 1, 2019

s/ Tara Twomey
TARA TWOMEY
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on April 1, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Tara Twomey
TARA TWOMEY
Counsel for Amici Curiae