Case No. 19-2043

United States Court of Appeals
For the Sixth Circuit

SUSAN A. ALLAN; JESSICA A. WILSON,
Plaintiffs-Appellees,

versus

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY,
d.b.a. American Education Services (AES),
Defendant-Appellant.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
CIVIL ACTION NO. 2:14-CV-00054-GJQ

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

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 19-2043 Case Name: Allan, et al. v. PHEAA

Name of counsel: Tara Twomey

Pursuant to 6th Cir. R. 26.1, National Consumer Law Center, National Association of Consumer Advocates and Consumer Federation of America
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No. All Amici are non-profit organizations that are not subsidiaries or affiliates of any publicly owned corporations.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Not aware of any publicly owned corporations, not a party to the appeal, that have direct financial interest in the outcome of this case, other than those that may have already been disclosed by the Plaintiffs and Defendant.

CERTIFICATE OF SERVICE

I certify that on January 13, 2020 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Tara Twomey

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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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 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 the 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 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.

CONSENT

The parties have consented to the filing of this *amicus* brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Appellant's Avaya autodialer placed 353 automated phone calls to the Appellees' cellular telephones. This "predictive dialer" placed the calls acting in an entirely autonomous fashion by (1) generating and storing a list of numbers to call and then (2) dialing the numbers from that list, while no human was on the line. The district court correctly ruled this system is an "Automatic Telephone Dialing System" (ATDS) as defined by the Telephone Consumer Protection Act (TCPA). 47 U.S.C. § 227(a)(1).

Appellant asks this Court to reverse, contending that even a fully automated and computer controlled dialer like the Avaya system does not qualify as an ATDS unless it "randomly or sequentially generates," arbitrary phone numbers out of thin air.

Appellant's interpretation of the statute does not stand up to close scrutiny. Even in 1991, when Congress enacted the TCPA, telemarketers routinely used *list-based* autodialers to engage in *targeted* (i.e., not arbitrary) advertising campaigns. *See* Bills to Amend the Communications Act of 1934: Hearing before the Subcomm. On Telecommc'ns and Fin. Of the House Comm. On Energy and Commerce, 102 Cong. 9, 2 (1991) (statement of Rep. Markey).

Indeed, the testimony before Congress showed that *predictive dialers*, like the Avaya system at issue here, were commonly used to autodial numbers *from a list* even in 1991. *See* The Automated Telephone Consumer Protection Act of 1991: Hearing before the Subcomm. On Commc'ns, S. Hrg. 102-960, 16 (July 24, 1991) ("between 30 to 40 percent of the national telemarketing firms are using them this year.") (Stmt. Of Robert S. Bulmash).

To ensure these list-based systems were covered, Congress defined ATDS to encompass *both* autodialers that dial targeted telephone numbers *stored* in a list (the "store" prong) *and* autodialers that dial arbitrary numbers *produced* by a random or sequential number generator (the "produce" prong). *See* 47 U.S.C. § 227(a)(1) (an ATDS is 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.")(emphasis added).

Textual analysis of the statutory language confirms this interpretation for numerous reasons, but most importantly: Appellant's interpretation would render the

"store" prong entirely superfluous. The "produce" prong is always satisfied whenever an autodialer *generates* random or sequential telephone numbers to be called. If, as Appellant contends, the ATDS definition is limited to systems that generate random or sequential telephone numbers, then it simply *never matters* whether a system can "store" telephone numbers. The "produce" prong *will already be satisfied* by the use of a number generator, leaving the "store" prong with no purpose whatsoever.

Textual analysis aside, the Federal Communications Commission has repeatedly interpreted the ATDS definition to encompass list-based predictive dialers for more than fifteen years. The FCC's longstanding interpretation of ATDS is not invalid, as Appellant asserts, and serves as persuasive, even if not binding, authority to support affirming the district court's decision in this case.

The TCPA's clear purpose is to protect the privacy interests of the American consumer by preventing robocalls from "proliferat[ing] beyond our control." 137 Cong. Rec. 9,840 (1991) (statement of Sen. Hollings). The ATDS interpretation offered by Appellants would eviscerate those protections. It would no longer cover, for example, a robocaller who downloaded an electronic list of every phone number within a particular area code and then robocalled those numbers. Although this caller would be calling random *people*, this system would not use a random number generator and so under the Appellant's interpretation would evade coverage. This example shows why the list-based systems used by roughly a third of robocallers in 1991 have entirely replaced systems that generate arbitrary phone numbers to call. Now, in our

data-driven economy, virtually anyone can use their laptop to easily and cheaply download, store, and then mine massive amounts of data to develop targeted calling campaigns.

Robocalls are plaguing everyday Americans. The Court should interpret the TCPA to serve its purpose, not to leave it toothless. As the FCC recognized in 2003, removing equipment "from the definition of [ATDS] simply because it relies on a given set of numbers would lead to an unintended result." *In re Rules and Regulations Implementing the TCPA*, 18 FCC Rcd. 14014, ¶ 133 (July 3, 2003) (2003 Order). The Court should follow this guidance and avoid those unintended results here.

ARGUMENT

I. THE TCPA MUST BE LIBERALLY CONSTRUED TO SERVE ITS PURPOSE: RELIEF FROM ROBOCALLS

> *"Owning a telephone does not give the world the right and privilege to assault the consumer with machine-generated telephone calls." 137 Cong. Rec. 9,840 (1991) (statement of Sen. Hollings).*

A. Automated Calls to Cell Phones Assault Americans Daily

Even in 1991, the "[e]vidence compiled by the Congress indicate[d] 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) (note to 47 U.S.C. § 227) (emphasis added). As Senator Hollings, the sponsor of the TCPA, forcefully stated: "[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).

Congress thus enacted the TCPA with a clear purpose: to protect the privacy interests of the American consumer by preventing robocalls from "proliferat[ing] beyond our control." 137 Cong. Rec. 9,840 (1991) (statement of Sen. Hollings); *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 problem has only become worse. At the time of the TCPA's enactment in 1991, an estimated 18,000,000 calls were received per day; in 2019, roughly 147,300,000 calls are received each day. YouMail, *Robocall Index* (2019). *See* https://robocallindex.com/. The total number of robocalls jumped from a little over 30 billion in 2017 to almost 48 billion in 2018—an increase of over 50% in just one year. YouMail, Historical Robocalls by Time (2019). Despite the TCPA, over *four billion* robocalls are now made *every month*.

This scourge threatens not only our privacy, but also the viability of the telephone as a useful means of communication. As Senator Brian Schatz has noted, "robocalls have turned us into a nation of call screeners" and this could become a "significant economic issue." *Illegal Robocalls: Calling all to Stop the Scourge: Hearing before*

the S. Comm. on Com., Sci., and Transp., 116th Cong. (Apr. 11, 2019) [hereinafter *S. Hearing on Illegal Robocalls*].[1] The truth is, many people now refuse to answer calls from unfamiliar sources, sometimes leading to harmful results. *See, e.g.*, Tim Harper, *Why Robocalls are Even Worse Than You Thought*, Consumer Reps. (May 15, 2019) (reporting delays in medical treatment because people no longer respond to calls from medical specialists)[2]; Tara Siegel Bernard, *Yes, It's Bad. Robocalls, and Their Scams, Are Surging*, N.Y. Times (May 6, 2018) (reporting that one doctor ignored a call from the emergency room because he assumed it was a robocall).[3]

In one survey, 70 percent of respondents said they stopped answering calls from numbers they do not recognize to avoid robocalls. Consumer Reports, *What Have You Done in Response to Robocalls?* (Dec. 2018).[4] As a result, robocallers simply dial more numbers in an effort to reach the same number of live people. Elaine S. Povich, *States Try to Silence Robocalls, But They're Worse Than Ever*, Pew Research Ctr. (July 25, 2018).[5]

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[1] https://www.commerce.senate.gov/public/index.cfm/hearings?ID=5A66BB4E-777B-4346-AA5F-CAB536C54862.

[2] https://www.consumerreports.org/robocalls/why-robocalls-are-even-worse-thanyou-thought

[3] https://www.nytimes.com/2018/05/06/your-money/robocalls-rise-illegal.html.

[4] https://www.consumerreports.org/robocalls/mad-about-robocalls/

[5] https://www.pewtrusts.org/en/research-andanalysis/blogs/stateline/2018/07/25/states-try-to-silence-robocalls-buttheyreworse-than-ever.

As the number of robocalls continue to rise, so has the number of complaints from the public. 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 Appellant used a predictive dialer to automatically dial numbers from a stored list. "[P]redictive dialers store preprogrammed numbers or receive numbers from a computer database and then dial those numbers in a manner that maximizes efficiencies for call centers." *2003 Order*, 18 FCC Rcd. at 14091. Thus, predictive dialers are not only capable of quickly dialing millions of calls, they "initiate phone calls while telemarketers are talking to other consumers, [and] 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." *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1114 (11th Cir. 2014).

For more than fifteen years, the FCC has repeatedly ruled that list-based predictive dialers qualify as ATDS under the TCPA. *2003 Order*, 18 FCC Rcd. at 14014, ¶ 133; *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd 559, 566 (January 4, 2008) ("2008 Order"); *In re Rules and Regulations Implementing the Telephone Consumer Protection Act*, 27 FCC Rcd. 15391, 15392, n.5 (November 29, 2012) ("2012 Order"); *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991* (2015 Declaratory Ruling), 30 FCC Rcd. 7961, 7972 ¶ 10 (2015).[6] And even now when there is debate over whether the FCC's orders remain valid, the only Circuit Court of Appeals to interpret the statutory text has concluded that the FCC was right—the ATDS definition encompasses list-based dialing systems. *See Marks v. Crunch San Diego, L.L.C.*, 904 F.3d 1041 (9th Cir. 2018).

Were this Court to reach the opposite conclusion, nearly two decades of TCPA jurisprudence would be flipped on its head and the most common form of autodialer would suddenly be unregulated by the TCPA's ATDS provisions.

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). Accordingly, the statutory definition of ATDS should be

[6] The 2015 order was vacated by *ACA International v. Federal Communications Commission,* 885 F.3d 687 (D.C. Cir. 2018), but the FCC's prior orders are still valid as shown below.

interpreted liberally in light of the TCPA's purpose. "[T]he TCPA was enacted to solve a problem . . . It would be dispiriting beyond belief if courts defeated Congress' obvious attempt to vindicate the public interest with interpretations that ignored the purpose, text, and structure of this Act at the behest of those whose abusive practices the legislative branch had meant to curb." *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 663 (4th Cir. 2019). This 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 AVAYA PREDICTIVE DIALER IS AN ATDS

A. The FCC's Rulings on Predictive Dialers

Congress gave the FCC the authority to "prescribe regulations to implement" the TCPA. 47 U.S.C. § 227 (b)(2); *see also id.* § 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."). In 2002, the FCC issued a Notice of Proposed Rulemaking expressly requesting comment on list-based predictive dialers: "whether a predictive dialer that dials telephone numbers using a computer database of numbers falls under the TCPA's restrictions on the use of autodialers." *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 17 FCC Rcd. 17459, 17474, ¶ 24 (2002). After considering comments from industry and consumers, the FCC answered the question in the affirmative. *2003 Order*, 18 FCC Rcd. at 14092-93.

In 2008, the FCC rejected a petition asking it to rule that a predictive dialer qualifies as an ATDS "only when it randomly or sequentially generates telephone numbers, not when it dials numbers from customer telephone lists." *2008 Order*, 23 FCC Rcd. at 566, ¶ 12. The FCC rejected the request and affirmed its prior order, reiterating that the exclusion of list-based autodialers "would be inconsistent with the avowed purpose of the TCPA and the intent of Congress in protecting consumers from such calls." *Id.* at ¶ 14. The Commission reiterated the same ATDS interpretation again in 2012. *2012 Order*, 27 FCC Rcd. at 15392, n.5 (affirming application to systems that dial "from a database of numbers.").

For years, the Courts of Appeals relied on these orders when addressing predictive dialers. *See e.g., Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 638-39 (7th Cir. 2012); *Mais*, 768 F.3d at 114; *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012). The TCPA's application to predictive dialers was well settled.

Then came the FCC's confusing 2015 Order. The D.C. Circuit vacated that order because it was internally inconsistent. *ACA Int'l,* 885 F.3d at 701-03. The current dispute arises because the import of *ACA International* is unclear.

ACA International expressly recognized that the FCC's 2003 order "made clear that, while some predictive dialers cannot be programmed to generate random or sequential phone numbers, they still satisfy the statutory definition of an ATDS." 885 F.3d at 702 (emphasis added). But *ACA International* also found that the 2015 Order

contained confusing and seemingly contradictory statements on this point. *Id.* First, the 2015 Order stated that "we affirm our previous statements" concerning ATDSs, "including when the caller is calling a set list of consumers," and "reiterate that predictive dialers, as previously described by the Commission, satisfy the TCPA's definition of 'autodialer' for the same reason." *2015 Order*, 30 FCC Rcd. at 7972, ¶ 10. But, then, the 2015 Order included statements that appeared inconsistent with the purported reaffirmation that predictive dialers which cannot generate random or sequential numbers are ATDSs. *See id.* at ¶ 16 ("autodialers need only have the 'capacity' to dial random and sequential numbers, rather than the 'present ability' to do so.")

This internal inconsistency lead the D.C. Circuit to vacate the 2015 Order:

> "So which is it: does a device qualify as an ATDS only if it can generate random or sequential numbers to be dialed, or can it so qualify even if it lacks that capacity? The 2015 ruling, while speaking to the question in several ways, gives no clear answer (and in fact seems to give both answers). It might be permissible for the Commission to adopt either interpretation. But the Commission cannot, consistent with reasoned decisionmaking, espouse both competing interpretations in the same order [singular] . . ."

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

Nowhere does the court say that it is vacating the FCC's prior orders on predictive dialers, which the court expressly recognized were indeed "clear" on the issue. Thus, *ACA International* did not find those prior orders to be invalid, as Appellant contends here. *See Maes v. Charter Commun.*, 345 F. Supp. 3d 1064, 1068

(W.D. Wisc. 2018) ("[T]he flaw in the 2015 ruling was not that it reaffirmed the 2003 order, but that it both reaffirmed the 2003 order and contradicted it."); *Duran v. La Boom Disco, Inc.*, 369 F. Supp. 3d 476, 489 (E.D.N.Y. 2019) ("Only the 2015 Order contained a contradiction."); *Jiminez v. Credit One Bank, N.A.*, 2019 U.S. Dist. LEXIS 53096, *17 (S.D.N.Y. 2019) ("While some courts have interpreted the D.C. Circuit's discussion of its jurisdiction . . . as expanding the scope of the court's ruling, these courts ignore the actual language of the D.C. Circuit's subsequent analysis of the issue, which does not ultimately implicate the validity of the FCC's prior orders.")

Appellant wrongly claims that this Court resolved the issue in *Gary v. TrueBlue, Inc.*, 786 F. App'x 555, 556 (6th Cir. 2019) (unpublished), arguing that "*Gary* confirmed that because of *ACA International*, this Court need not defer to the FCC's understanding of the capacity and functions of an autodialer." Appellant's Br. at 30. But this Court's opinion in *Gary* did no such thing. This Court did not decide the issue, but instead held only that the appellant in *Gary* had not explained how he satisfied even the FCC's interpretation of ATDS. *Gary*, 786 F. App'x at 557 ("Even if these orders define an ATDS as broadly as Gary suggests, Gary has not explained how TrueBlue's system functions in a way that would satisfy this definition.").

Amici understand that other courts have disagreed about the continued validity of the FCC's 2015 orders in light of *ACA International*, but even assuming those orders are no longer binding, they at the very least provide guidance and important background for this Court's interpretation of the statutory text.

B. The Plain Language of ATDS Encompasses Systems that Automatically Dial Telephone Numbers Stored in a List

ATDS is defined by the TCPA 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 ruled in 2003 that predictive dialers, which automatically dial stored lists of telephone numbers, qualify as ATDS regardless of whether they can 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).

The Ninth Circuit's *Marks* decision is the only federal appellate decision to do a textual analysis of the operative language and, based on an independent reading of the statute alone, reached the same conclusion. *Marks*, 904 F.3d at 1052 ("we conclude 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.")

The District Court in this case was right to follow this decision here. *Marks* is not an outlier as Appellant contends. Numerous other courts have adopted the same interpretation of ATDS. *See, e.g, Gonzalez v. Hosopo Corp.*, 371 F. Supp. 3d 26, 34 (D. Mass. 2019); *Getz v. DIRECTV, LLC*, 359 F. Supp. 3d 1222, 1229 (S.D. Fla. 2019); *Adams v. Ocwen Loan Servicing, LLC*, 366 F. Supp. 3d 1350, 1355 (S.D. Fla. 2018); *Heard v. Nationstar Mortg. LLC*, 2018 U.S. Dist. LEXIS 143175, *15-18 (N.D. Ala. 2018); *Espejo v. Santander Consumer United States, Inc.*, 2019 U.S. Dist. LEXIS 98445, *22 (N.D. Ill. 2019).

Appellant attempts to rely on *Gary*, wrongly claiming that "[t]his Court has held that . . . the statute requires a showing that the system has the capacity to randomly or sequentially dial or text phone numbers.'" Appellant's Br. at 33. But *this Court* did not hold anything like this, it just pointed out that district court had held this, and that the plaintiff in *Gary* had not explained how the system at issue in that case could meet the ATDS definition the plaintiff was using. *This Court* never stated any agreement with this point. *Gary*, 786 F. App'x at 557.

Appellant also relies on *Dominguez v. Yahoo, Inc.*, 629 F. App'x. 369 (3rd Cir. 2015) (unpublished) (Dominguez I) and *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3rd Cir. 2018) (Dominguez II), but the *Dominguez* case has little persuasive value. The unpublished ruling in *Dominguez I* does not engage in any statutory analysis and instead is premised on the confusing and (now vacated) 2015 order, which the court found was "hardly a model of clarity" and read as taking "a middle-of-the road view."

Dominguez I, 629 F. App'x. at 372. When Dominguez returned to the Third Circuit for *Dominguez II*, the court again did no textual analysis and simply assumed its prior decision was still good law, even though the FCC order on which it was based had since been vacated. *Dominguez II*, 894 F.3d at 119. Thus, *Dominguez* provides little guidance for this Court's interpretation of the statutory text.

1. Appellant's Interpretation of ATDS Violates the Cardinal Principle of Statutory Interpretation

The Supreme Court has repeatedly held that "[w]e must give effect to every word of a statute wherever possible." *Ransom v. FIA Card Servs.*, 562 U.S. 61, 70 (2011). This is the "cardinal principle of statutory construction" that has guided courts for hundreds of years. *See Market Co. v. Hoffman*, 101 U.S. 112, 115 (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.")

Appellant's interpretation of ATDS, which *always* requires the capacity to produce telephone numbers with a random or sequential number generator, is an impermissible reading of the statute because it renders the Store Prong entirely superfluous. To be clear, whenever an autodialer generates random or sequential telephone numbers to be called, the Produce Prong is satisfied. Limiting the ATDS definition only to those systems that can generate random or sequential telephone numbers means that it *never matters* whether a system can "store" telephone numbers

at all; the "produce" prong is satisfied, but the "store" prong is not. *See Gonzalez*, 371 F. Supp. 3d at 34 (reaching the same conclusion).

Reading the Store Prong as unmodified by the clause "using a random or sequential number generator" is the only way to give the Store Prong operative effect. The Court should affirm the district court's judgment for this reason alone. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (reversing judgment because, "under respondent's rendition of § 2244(d)(2), Congress' inclusion of the word 'State' has no operative effect on the scope of the provision.")

2. Appellant's Interpretation Distorts the Plain Meaning of "Store"

Even putting the rule against superfluity aside, Appellant's reading of the statute, in which the clause "using a random or sequential number generator" modifies both the Store Prong and the Produce Prong, makes little sense of the Store Prong. One can see how telephone numbers can be *produced* by using a random or sequential number generator, but Appellant fails to explain how telephone numbers can be "*stored*" by "*using* a random or sequential number *generator*." By any common understanding, storage and generation are distinct functions. Even in Appellant's primary authority (*Dominguez*), the court acknowledged that it could not reconcile how "… a number can be stored (as opposed to produced) using a 'random or sequential number generator.'" *Dominguez I*, 629 F. App'x. at 372 n.1.

Given the plain meaning of the words "store" and "produce," it is most natural to read the clause "using a random or sequential number generator" as modifying the Produce Prong only.

3. The Statutory Context Shows Congress Intended to Regulate List-Based Dialers

Appellant's interpretation of ATDS would also cause other portions of the statute to be nonsensical or superfluous. These surrounding provisions show that Congress intended to regulate list-based autodialers.

First, the TCPA does not prohibit all calls made with an ATDS: it provides an affirmative defense for ATDS calls made with "the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A)(iii). If the ATDS definition included only systems that dial arbitrary telephone numbers produced out of thin air, then there would never be any opportunity to assert a consent defense. The Autodialed calls would almost never reach parties who had 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. And as Appellant here acknowledges, debt collectors "would have no interest in randomly calling borrowers." Appellant's Br. at 15.

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*. *See In re Rules and Regulations Implementing the TCPA*, 18 FCC Rcd. 14014, ¶ 12 (July 3, 2003)) (2003 Order); *Mais,* 768 F.3d at 114.

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 there 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* 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. 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.

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 the treble damages provision would also be rendered meaningless.

4. The Legislative History Shows Congress Intended to Regulate List-Based Autodialers

Appellant incorrectly contends that "indiscriminate random or sequential dialing" was "the specific problem that led to the passage of the TCPA." Appellant's Br. at 37. The legislative history shows that Congress's concerns were not so limited and it clearly intended to regulate list-based dialers as well.

First, Congress was concerned about the sheer number of nuisance calls unleashed upon the public by automated dialing systems. *See Automated Telephone Consumer Protection Act*, 102 S. Rpt. 178 (October 8, 1991) ("The growth of consumer complaints about these calls has two sources: the increasing number of telemarketing firms in the business of placing telephone calls, and the advance of technology which

makes automated phone calls more cost-effective … "the machines are used by more than 180,000 solicitors to call more than 7 million Americans every day" and have "the capacity to dial as many as 1,000 telephone numbers each day."); *see also Telephone Advertising Consumer Rights Act*, 102 S. Rept. 177 (October 8, 1991) ("Many firms use these machines even when using 'live' persons to deliver the message to a potential customer. These machines reduce the amount of time that each person must spend dialing numbers and waiting for the call to be answered. For instance, a telemarketer may only employ three persons for every six automatic dialers because of the high proportion of calls that are never answered.")

Second, Congress was concerned that a burgeoning consumer data market was resulting in *targeted* calls placed to "lists which are [] bought or sold without restriction . . ." Bills to Amend the Communications Act of 1934: Hearing before the Subcomm. on Telecommc'ns and Fin. Of the House Comm. On Energy and Commerce, 102 Cong. 9, 2 (1991) (statement of Rep. Markey); *see also id.* ("[T]he reason for the proliferation of such unsolicited advertising over our Nation's telecommunications network is that companies can now target their marketing . . . the reason why these unsolicited telemarketers can target individual homes is simple; corporate America has your number.") (emphasis added).

Congress further recognized that the industry was pairing these lists with automated dialers:

> "Modern telemarketing software organizes information on current and prospective clients into databases designed to support businesses in every aspect of telephone sales-all with the objective of bringing the company's product or service to the customer most likely to purchase it."

House Report 102-317, 1st Sess. pp. 7-8 (emphasis added). Indeed, Congress was well aware that list-based predictive dialers were commonly used even in 1991. S. 1462, The Automated Telephone Consumer Protection Act of 1991: Hearing before the Subcomm. on Commc'ns of the Senate Comm. On Commerce, Sci., & Transp. 102d Cong. 43, 16 (July 24, 1991) ("between 30 to 40 percent of the national telemarketing firms are using them this year.") (Stmt. Of Robert S. Bulmash).

That is why Congress drafted the ATDS provision in the disjunctive to cover both systems that *store* telephone numbers to be called for targeted dialing campaigns and systems that *produce* arbitrary phone numbers for dialing.

5. Appellant's Interpretation Allows for Trivial Circumvention of the Statute

Finally, even if Appellant was correct (it is not) that Congress was concerned only about the dialing of random or sequential phone numbers, its interpretation would still undermine the purpose of the statute. It would allow any robocaller to avoid liability under the TCPA by simply autodialing from a massive list of numbers. Even a robocaller that *wanted to* autodial completely arbitrary phone numbers could easily circumvent the statute. A telemarketer could dial from a list of literally every phone number in the United States. Today's computers could easily store such a list.

Or, if they wanted to target a particular city, they could limit their list to only those numbers beginning with a particular area code. The FCC was correct when it held in 2003 that removing equipment "from the definition of [ATDS] simply because it relies on a given set of numbers would lead to an unintended result." *2003 Order*, 18 FCC Rcd. 14014 at ¶ 133.

C. Everyday Smartphones are Not ATDSs

ACA International vacated the FCC's 2015 Order over concerns that its interpretation of "capacity" (not at issue here) was so broad as to be "untenable" – under that broad view, "all smartphones qualify as autodialers because they have the inherent 'capacity' to gain ATDS functionality by downloading an app" even if such an app was never used. *ACA Int'l*, 885 F.3d at 700 ("a smartphone … has only a 'theoretical potential' to function as an autodialer by downloading an app."). The problem was not that some smartphones could be ATDSs when used as such after the addition of specialized software, but instead that a broad reading of "capacity" would render all smartphones ATDSs even if they weren't used to autodial.

Nothing in the District Court's decision here, or in the Ninth Circuit's decision in *Marks*, is inconsistent with that ruling. They adopted no view of capacity whatsoever. *See Marks,* 904 F.3d at 1053 n.9 ("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").[7]

Everyday smartphones do not qualify as ATDSs under the District Court's ruling. Smartphones are not manufactured with any inherent features that make them ATDSs. To begin, everyday smartphones do not *automatically dial* telephone numbers; they require a human user to place the calls. "[B]y referring to the relevant device as an 'automatic telephone dialing system,' Congress made clear that it was targeting equipment that could engage in automatic dialing[.]" *Marks*, 904 F. 3d at 1052; *see also ACA Int'l*, 885 F.3d at 703.

And unlike predictive dialers, smartphones 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; *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.").

[7] FCC Chairman Pai has clearly articulated that he reads the term "capacity" 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, a smartphone would qualify as an ATDS only if the user had actually downloaded and used a mass-dialing app to engage in autodialing.

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).

In any event, a caller that has been robodialing on a massive scale 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. In the speculative and highly unlikely event that somebody is ever sued for violating the TCPA through the ordinary use of a smartphone,[8] the court in that case can address (1) whether the statute even applies and (2) whether the statute can be *constitutionally applied* to such conduct. The fact that a statutory provision might have some conceivably unconstitutional application does not render the entire statutory scheme invalid. Instead, it would "be declared invalid to the extent that it reaches too far, but otherwise left intact." *Brockett v. Spokane Arcades*, 472 U.S. 491, 504 (1985). Thus, any concerns about the application of the TCPA to smartphones do not justify adopting

[8] The only case *amici* have found involving a smartphone concerned an employee of the defendant who downloaded a telemarketing app to his smartphone in order to telemarket gym memberships: 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.)

an excessively narrow interpretation of the ATDS definition. The Court should not throw out the baby with the bathwater.

CONCLUSION

For all of these reasons, *amici* urge this court to affirm the District Court's ruling.

Respectfully submitted,

s/ Tara Twomey

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January 13, 2020

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January 13, 2020

s/ Tara Twomey
TARA TWOMEY
Counsel for Amici Curiae

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 Sixth Circuit by using the appellate CM/ECF system on January 13, 2020. 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

ADDENDUM

ADDENDUM
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This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of Appeals 3rd Cir. App. I, IOP 5.1, 5.3, and 5.7.
United States Court of Appeals,
Third Circuit.

Bill H. DOMINGUEZ, on behalf of himself and all others similarly situated, Appellant
v.
YAHOO, INC.

No. 14–1751.
|
Argued: Nov. 21, 2014.
|
Filed: Oct. 23, 2015.

Synopsis

Background: Consumer who had received more than 27,000 unwanted text messages from Internet company on his cellular telephone filed putative class action against the company alleging violations of Telephone Consumer Protection Act (TCPA). The United States District Court for the Eastern District of Pennsylvania, Michael M. Baylson, J., 8 F.Supp.3d 637, granted company summary judgment. Consumer appealed.

Holding: The Court of Appeals, Ambro, Circuit Judge, held that genuine issue of material fact as to whether company's system was an "automated telephone dialing" system under the TCPA precluded summary judgment.

Vacated and remanded.

West Headnotes (1)

[1] **Federal Civil Procedure** Consumer protection and unfair trade practices, cases involving

Genuine issue of material fact as to whether Internet company's system used to send text messages to consumers' cellular telephones was an "automatic telephone dialing system" under the Telephone Consumer Protection Act (TCPA) precluded summary judgment on consumers' class action claim against the company for violations of the Act based on receipt of unwanted text messages. Telephone Consumer Protection Act of 1991, § 3(a), 47 U.S.C.A. § 227(a)(1).

20 Cases that cite this headnote

***370** Appeal from the United States District Court for the Eastern District of Pennsylvania, (D.C. Civil Action No. 2–13–cv–01887), District Judge: Honorable Michael M. Baylson.

Attorneys and Law Firms

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Before: AMBRO, SCIRICA, and ROTH, Circuit Judges.

OPINION [*]

AMBRO, Circuit Judge.

Bill Dominguez appeals the District Court's grant of summary judgment in favor of Yahoo!, Inc. on his claim that Yahoo violated the Telephone Consumer Protection Act (the "TCPA"), 47 U.S.C. § 227, by sending him approximately 54 unsolicited text messages per day over the course of 17 months. We decide whether the District Court correctly concluded that no reasonable juror could find Yahoo's text-messaging system to qualify as an "automatic telephone dialing system" under the statutory definition. In light of the intervening statutory interpretation by the Federal Communications Commission ("FCC"), we vacate and remand for further proceedings.

I. BACKGROUND

In December 2011 Dominguez bought a cell phone that came with a reassigned telephone number. The previous owner of the number had subscribed to an email-notification service offered by Yahoo. That service sent a text message to the owner's phone number every time an email was sent to the owner's linked Yahoo email account. Because the previous owner never cancelled his subscription when the number was reassigned, Dominguez inherited the prior owner's text-message notifications when he bought his new phone. Each time a new email reached the previous owner's inbox, Yahoo's system sent a text-message notification to Dominguez's phone.

In short order the messages began piling up. Dominguez first unsuccessfully tried to put a halt to them by unsuccessfully replying "stop" and "help" to some ***371** texts. Then he sought out Yahoo's customer service for help but was told that the company could not stop the messages and that, as far as Yahoo was concerned, the number would always belong to the previous owner. Having exhausted the company route, Dominguez called a representative from the FCC, who then participated in another call (with Dominguez on the line) to Yahoo's customer service. When this too failed to stop the messages, Dominguez filed complaints with the FCC and the Federal Trade Commission, yet again to no avail.

Having received 27,809 text messages over 17 months, Dominguez filed a putative class action under the TCPA, which forbids "any person within the United States ... 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 ['autodialer'] ... to any telephone number assigned to a ... cellular telephone service." 47 U.S.C. § 227(b)(1)(A)(iii). A successful plaintiff under the TCPA is entitled to $500 in damages per violation. 47 U.S.C. § 227(b)(3)(B). Therefore, Dominguez stands to win $13,904,500. Yahoo moved for summary judgment. It argued that the statute requires an "autodialer" to have "a random or sequential number generator,"

Id. § 227(a)(1)(A) & (B), and its text-messaging system did not generate numbers at all; instead, it dialed numbers from a compiled list.

In response, Dominguez argued that, while one meaning of "sequential" is "in numerical sequence," an autodialer might also meet the statutory definition if it dials *non-sequential* numbers in a *sequential* manner (*i.e.,* by placing them in a queue and dialing them one at a time). Alternatively, he argued that the FCC has interpreted the statute to cover "any equipment" with the *capacity* to "generate numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated or come from calling lists." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 ("2003 FCC Ruling"),* 18 FCC Rcd. 14,014, 14,092 (July 3, 2003) (emphasis added).

The District Court sided with Yahoo on both issues. First, the Court agreed that the phrase "random or sequential" refers to the types of numbers (random or sequential ones), not the manner they are dialed. Second, it rejected the FCC's interpretation as contrary to the TCPA's plain language and inapplicable outside the narrow context of "predictive dialers." Finding no evidence that Yahoo's system could generate random or sequential numbers, the Court awarded summary judgment in Yahoo's favor, and Dominguez appealed.

Finally, after briefing and oral argument and while this case was under submission, the FCC issued a declaratory ruling and order in July 2015 further clarifying the meaning of an autodialer. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 2015 WL 4387780, at *5–*6 (F.C.C. July 10, 2015) ("2015 FCC Ruling"). Both parties submitted letters under Federal Rule of Appellate Procedure 28(j) apprising us of this ruling.

II. DISCUSSION

The only issue on appeal is whether a reasonable trier of fact could find Yahoo's system qualifies as an "automatic telephone dialing system" (the term "ATDS" or "autodialer" for short). We start with the statute itself. The TCPA defines an "autodialer" as "equipment which has the capacity (A) to store or produce telephone ***372** numbers to be called, using a *random or sequential number generator;* and (B) to dial such numbers." 47 U.S.C. § 227(a)(1) (emphasis added). The statute's reference to a "random or sequential number generator" reflects that, when the statute was enacted in 1992, telemarketers typically used autodialing equipment that either called numbers in large sequential blocks or dialed random 10–digit strings. Thus, the FCC initially interpreted the statute as specifically targeting equipment that placed a high volume of calls by randomly or sequentially generating the numbers to be dialed.

That interpretation changed as telemarketers' dialing technology evolved. Around the turn of this century, the FCC took note that "the evolution of the teleservices industry ha[d] progressed to the point where ... [it was] far more cost effective" to dial from stored databases of numbers rather than generate them randomly or sequentially. 2003 FCC Ruling, 18 FCC Rcd. at 14,093. In light of these advancements, the FCC sought comment on whether to update its interpretation. *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991,* 17 FCC Rcd. 17,459, 17,474 (2002). The reaction was mixed. While some commenters argued that the statutory text plainly defined an autodialer by its capacity to generate random or sequential numbers, others contended that limiting the statute to antiquated technology would gut the statute and eviscerate its protections.

In a series of declaratory rulings—the most recent being the one referred to above in July 2015, *see* 2015 FCC Ruling, 2015 WL 4387780, at *5–*6—the FCC appeared to take a middle-of-the road view. Although hardly a model of clarity, its orders (as we interpret them) hold that an autodialer must be able to store or produce numbers that *themselves* are randomly or sequentially generated "even if [the autodialer is] not presently used for that purpose." *Id.* at *5. But importantly, in the most recent ruling the FCC also clarified that neither "present ability" nor the use of a single piece of equipment is required. Thus, so long as the equipment is part of a "system" that has the latent "capacity" to place autodialed calls, the statutory definition is satisfied.

Turning to our case, we apply the normal burden-shifting framework applicable at the summary-judgment stage of litigation. "Summary judgment is appropriate only where, drawing all reasonable inferences in favor of the nonmoving party, there is no

genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." *Lexington Ins. Co. v. W. Pa. Hosp.,* 423 F.3d 318, 322 n. 2 (3d Cir.2005). The party seeking summary judgment bears the initial burden of production. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (White, J., concurring) (plurality opinion). It is only once this showing is made that the burden shifts to the non-moving party, who must then demonstrate the existence of a genuine issue of material fact with respect to each element of the cause of action for which it bears the burden of proof. *Id.* at 324, 106 S.Ct. 2548.

Although we agree with the District Court's definition of "random or sequential" number generation (*i.e.,* the phrase refers to the numbers themselves rather than the manner in which they are dialed) [1] and its holding that the statutory ***373** definition does in fact include such a requirement, [2] we disagree that the record supports the entry of summary judgment in Yahoo's favor. The only evidence Yahoo can point to that is probative of whether its equipment has the requisite capacity is the conclusory affidavit of its expert Ajay Gopalkrishna, who states that "[t]he servers and systems affiliated with the Email SMS Service did not have the capacity to store or produce numbers to be called, using a random or sequential number generator, and to call those numbers." Not only does this restating of the statutory definition amount to nothing more than a legal conclusion couched as a factual assertion, *compare with* 47 U.S.C. § 227(a)(1) ("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."), it begs the question of what is meant by the word "capacity." Because this is an issue of heightened importance in light of the 2015 FCC Ruling, and the District Court did not previously have the benefit of the FCC's ruling in addressing the issue, [3] remand is appropriate to allow that Court to address more fully in the first instance whether Yahoo's equipment meets the statutory definition.

Finally, in remanding for further briefing and factual development (if appropriate), we recognize that Yahoo asserts in a footnote of its brief that both parties agree it is the equipment's "present capacity" that is relevant to the statutory definition. Despite the significant clarification on the meaning of "capacity" provided by the FCC, we believe remand is still the appropriate course of action. Moreover, the District Court may consider on remand whether Dominguez properly preserved this issue (and how any "waiver" might be affected by the intervening 2015 FCC Ruling).

* * * * * *

For the above reasons, we vacate the opinion of the District Court and remand for further proceedings.

All Citations

629 Fed.Appx. 369, 63 Communications Reg. (P&F) 1074

Footnotes

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

1 To the extent the District Court held otherwise, we clarify that the statutory definition is explicit that the autodialing equipment may have the capacity to store *or* to produce the randomly or sequentially generated numbers to be dialed. We acknowledge that it is unclear how a number can be *stored* (as opposed to *produced*) using a "random or sequential number generator. To the extent there is any confusion between the parties on this issue (or whether Yahoo's equipment meets this requirement in Dominguez's case), the District Court may address it on remand.

2 Because we reject Dominguez's claim that the FCC has interpreted the autodialer definition to read out the "random or sequential number generator" requirement, we need not reach his argument regarding the Hobbs Act, which gives "[t]he court of appeals ... exclusive jurisdiction to ... determine the validity of ... all final orders of the [FCC]." 28 U.S.C. § 2342.

3 The meaning of capacity is only very briefly addressed in a footnote of the District Court's decision. *See Dominguez v. Yahoo!, Inc.,* 8 F.Supp.3d 637, 641 n. 8 (E.D.Pa.2014) ("Recently, courts and commentators have observed that many modern technological devices, including smartphones, could store or produce numbers and dial such numbers without human intervention if outfitted with the

requisite software. Thus, they have drawn a distinction between a system's present capacity (as currently designed) and its potential capacity.”).

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786 Fed.Appx. 555
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 6th Cir. Rule 32.1.
United States Court of Appeals, Sixth Circuit.

Kevin GARY, Plaintiff-Appellant,
v.
TRUEBLUE, INC., dba Labor Ready, Inc., dba PeopleReady, Inc., Defendant-Appellee.

No. 18-2281
|
FILED September 05, 2019

Synopsis

Background: Employee brought action against staffing company, alleging text messages sent by company violated the Telephone Consumer Protection Act (TCPA). The United States District Court for the Eastern District of Michigan, Gershwin A. Drain, J., 346 F.Supp.3d 1040, granted company summary judgment. Employee appealed.

[Holding:] The Court of Appeals held that staffing company's system was not an automatic telephone dialing system, as would violate TCPA.

Affirmed.

West Headnotes (1)

[1] **Telecommunications** Illegal or improper purposes

Staffing company's system that sent text messages to employees to alert them of job opportunities was not an "automatic telephone dialing system," and therefore, messages did not violate the Telephone Consumer Protection Act (TCPA), where system lacked ability to randomly or sequentiality dial or text employees. Communications Act of 1934 § 227, 47 U.S.C.A. § 227(a)(1).

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Attorneys and Law Firms

Kevin Gary, Detroit, MI, pro se.

Jonathan A. Singer, Michael Blumenfeld, Timothy Hurley, Attorney, Nelson, Mullins, Riley & Scarborough, Baltimore, MD, for Defendant-Appellee.

Before: NORRIS, SILER, and SUTTON, Circuit Judges.

***556** ORDER

Kevin A. Gary, a pro se litigant from Michigan, appeals the district court's grant of summary judgment to the defendant, TrueBlue, Inc., in his civil suit alleging violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

TrueBlue, which operated as People Ready, Inc., and Labor Ready, Inc., is a staffing company that used a messaging platform called WorkAlert to send texts about potential jobs to people who signed up for the service. Gary signed up in 2011, at which time he signed a form consenting to receive alerts on his phone about job opportunities. He alleged that he has received over 5600 text messages from TrueBlue, despite his having revoked his consent to receive texts several times. He sued under the TCPA, which creates a private right of action, *see* 47 U.S.C. § 227(b)(3), for violating the Act's prohibition against using an "automatic telephone dialing system" ("ATDS") to text someone who has not given "prior express consent," 47 U.S.C. § 227(b)(1)(A)(iii); *see also Keating v. Peterson's Nelnet, LLC*, 615 F. App'x 365, 370 (6th Cir. 2015). After engaging in discovery, both parties moved for summary judgment. The district court denied Gary's motion, *Gary v. TrueBlue, Inc.*, No. 17-CV-10544, 2018 WL 3647046 (E.D. Mich. Aug. 1, 2018), and granted TrueBlue's, *Gary v. TrueBlue, Inc.*, 346 F. Supp. 3d 1040 (E.D. Mich. 2018). The district court held that there was no genuine dispute that TrueBlue's texting system was not an ATDS under the TCPA, and thus the company was not liable under the Act. *Id*. at 1047.

Gary appeals the district court's judgment for TrueBlue. He asks this court to reverse and remand. He does not seek review of the district court's denial of his own motion for summary judgment.

We review a district court's grant of summary judgment de novo. *Huckaby v. Priest*, 636 F.3d 211, 216 (6th Cir. 2011). Summary judgment is appropriate when, viewing the evidence in the light most favorable to the non-moving party, *see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), "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).

The TCPA defines an ATDS as "equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). Congress empowered the Federal Communications Commission ("FCC") to prescribe regulations to implement the TCPA. 47 U.S.C. § 227(b)(2).

The district court determined that Gary submitted no evidence that TrueBlue used an ATDS. TrueBlue offered sworn testimony that its WorkAlert service "lack[ed] the capability to randomly or sequentially dial or text potential workers." *Gary*, 346 F. Supp. 3d at 1044. In response, Gary asserted ***557** that TrueBlue combined its WorkAlert system with a "third-party aggregate" called mBlox. *Id*. He presented "a series of documents he obtained from the Internet" to show that mBlox had the capacity to randomly generate phone numbers and thus was an ATDS. *Id*. at 1045. The district court noted that Gary "provide[d] no additional commentary on th[ese] article[s], and therefore, ask[ed] the Court to make the inferential leap that th[ese] document[s] prove[d] mBlox can randomly generate and text phone numbers." *Id*. The court also pointed out that Gary "had the opportunity to add mBlox as a co-defendant, conduct discovery to see how mBlox interacts with [TrueBlue's] WorkAlert system, and even obtain evidence directly from mBlox to see how these ... programs [referenced in Gary's articles] operate within its system. [He] did none of these things." *Id*. (citation omitted).

Gary also argued that TrueBlue's system qualified as an ATDS because it could operate without human intervention. But the district court ruled that "the TCPA does not prohibit the use of devices with automated functions. *See* 47 U.S.C. § 227(a)(1). Instead, the statute requires a showing that the system has the capacity to randomly or sequentially dial or text phone numbers." *Id*. at 1046. The court held that Gary had "not made such a showing." *Id*.

Finally, Gary argued that TrueBlue's system was an ATDS just because it sent messages through a web browser. *Id*. He cited the FCC's 2015 ruling, which stated that "the equipment used to originate Internet-to-phone text messages to wireless numbers

via email or via a wireless carrier's web portal is an 'automatic telephone dialing system' as defined in the TCPA." *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 8018 (F.C.C. July 20, 2015), *set aside in part by ACA Int'l v. Fed. Commc'ns Comm'n*, 885 F.3d 687 (D.C. Cir. 2018). The district court rejected this argument, citing a case on point, *Blow v. Bijora, Inc.*, 191 F. Supp. 3d 780, 788 (N.D. Ill. 2016), *aff'd on other grounds*, 855 F.3d 793 (7th Cir. 2017), as well as the D.C. Circuit case that set aside the FCC's definition of "capacity," *ACA Int'l*, 885 F.3d at 703. *Gary*, 346 F. Supp. 3d at 1046-47. The court held that there was still no evidence that TrueBlue's system could randomly or sequentially text phone numbers. *Id*. at 1047.

Gary now raises four arguments. First, he asserts that the district court erred by not considering the FCC's orders from before 2015 to have been binding. Under these orders, Gary believes that TrueBlue's system qualifies as an ATDS. But Gary has not shown that this is true. Even if these orders define an ATDS as broadly as Gary suggests, Gary has not explained how TrueBlue's system functions in way that would satisfy this definition.

In his second argument, Gary maintains that we should remand the case because TrueBlue qualifies as a telemarketer and the district court needs to make findings consistent with this determination. Gary cites no authority for this proposition, let alone why this determination would be relevant to this case. We decline to take his invitation.

Gary next argues that the district court erred in holding that there was no genuine dispute that TrueBlue's use of a web-based system was not enough to qualify it as an ATDS. But the district court correctly explained why the evidence Gary pointed to was insufficient on this front, noting that he submitted unhelpful, general internet articles that did not create a genuine dispute about the matter.

In his final argument, Gary asserts that the district court mistakenly relied on his ***558** outdated consent to receive texts from TrueBlue. The district court's decision, though, was not based on Gary's having given his consent. The court determined that TrueBlue's system did not qualify as an ATDS, obviating any need to resolve whether he had given his "prior express consent." 47 U.S.C. § 227(b)(1)(A).

Accordingly, we **AFFIRM** the district court's judgment.

All Citations

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