

NO. 20-723

In The Supreme Court of the United States

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY,

Petitioner,

v.

SUSAN ALLAN and JESSICA WILSON,

Respondents,

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

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

Adam T. Hill
The Law Offices of Jeffrey Lohman, P.C.
28544 Old Town Front Street, Suite 201
Temecula, CA 92590
Telephone: (657) 236-3525
AdamH@jlohman.com

Counsel for Respondents

QUESTION PRESENTED

The Telephone Consumer Protection Act (“TCPA”) prohibits using an automatic telephone dialing system (“ATDS”) or an artificial or prerecorded voice to call a cellular telephone without the prior express consent of the called party. 47 U.S.C. § 227(b)(1)(A). An ATDS is defined in 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).

Respondents filed a lawsuit against Petitioner after it used its Avaya Proactive Contact system to place 353 automated collection calls to their cellular telephones after they revoked consent. The district court entered judgment for Respondents, finding the Avaya Proactive Contact system was an ATDS because it had the capacity to store telephone numbers and automatically dialed those numbers. The Sixth Circuit affirmed.

The question presented is:

Whether an ATDS, as it pertains to the TCPA, encompasses devices that can automatically dial any telephone numbers, including telephone numbers stored in a list, or whether an ATDS is limited to systems that only store or produce telephone numbers that are randomly or sequentially generated to be automatically dialed.

Respondents Susan Allan and Jessica Wilson do not oppose Petitioner Pennsylvania Higher Education Assistance Agency's Petition for a Writ of Certiorari. While Respondents disagree with Petitioner's argument and believe the Sixth Circuit correctly found that an ATDS includes any system that automatically dials telephone numbers—regardless of whether those telephone numbers are stored in the system or are produced by the system using a random or sequential number generator—Respondents also recognize a circuit split exists on this issue which should be resolved. This case exemplifies the importance of the TCPA and the Sixth Circuit's ruling should be upheld.

Congress enacted the TCPA in 1991 in response to “[v]oluminous consumer complaints about abuses of telephone technology.” *Mims v. Arrow Fin. Servs.*, 565 U.S. 368, 132 S.Ct. 740, 744, 181 L. Ed. 2d 881 (2012). Senator Holdings, sponsor of the TCPA, commented that “[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). “In plain English, the TCPA prohibited almost all robocalls to cell phones.” *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2344, 207 L. Ed. 2d 784 (2020).

The statute 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). Predictive dialers have explicitly qualified as ATDSs since 2003. *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 23 F.C.C. Rcd. 559, 566, ¶ 12 (2008) (“[W]e affirm that a predictive dialer constitutes an automatic telephone dialing system and is subject to the TCPA's restrictions on the use of autodialers.”); *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18

FCC Rcd. 14014, 14093, ¶ 133 (2008) (“[T]he Commission finds that a predictive dialer falls within the meaning and statutory definition of ‘automatic telephone dialing equipment’ and the intent of Congress.”); *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, 7971, ¶ 10 (2015) (We also reiterate that predictive dialers, as previously described by the Commission, satisfy the TCPA’s definition of “autodialer” for the same reason.”).

A predictive dialer is “equipment that dials numbers and, when certain computer software is attached, also assists ... in predicting when [an] agent will be available to take calls” *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rcd. 14014, 14091, ¶ 131 (2003).

However, in 2018, the D.C. Circuit in *ACA Int’l v. Fed. Commc’ns Comm’n*, 885 F.3d 687 (D.C. Cir. 2018), set aside portions of the FCC’s 2015, creating disagreement over whether prior FCC orders remained binding authority. *Compare Duran v. La Boom Disco, Inc.*, 955 F.3d 279, 286 (2d Cir. 2020) (“[D.C. Circuit’s] decision to set aside the 2015 Order did not invalidate any prior Orders”), and *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 119 (3d Cir. 2018) (“In light of the D.C. Circuit’s holding, we interpret the statutory definition of an autodialer as we did prior to the issuance of 2015 Declaratory Ruling”) *with Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1049 (9th Cir. 2018) (“...the D.C. Circuit vacated the FCC’s interpretation of what sort of device qualified as an ATDS”).

With no clear binding authority, circuit courts have reached conflicting conclusions as to whether an ATDS is any equipment that automatically dials telephone numbers or whether an ATDS requires a random or sequential number generator. *Compare 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”), and *Duran*, 955 F.3d at 287 (“we hold that an ATDS may call numbers from stored lists”) with *Glasser v. Hilton Grand Vacations Co., LLC*, 948 F.3d 1301, 1306-11 (11th Cir. 2020), and *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 469 (7th Cir. 2020) (“the capacity to generate random or sequential numbers is necessary to the statutory definition”).

The issue raised by Petitioner concerns the Sixth Circuit’s interpretation that the definition of an ATDS includes systems that automatically dial telephone numbers, even if those numbers are stored in the system rather than randomly or sequentially generated. Pet. at 13. As held by the Sixth Circuit, “a stored-number device like the Avaya system here qualifies as an ATDS.” *Allan v. Pa. Higher Educ. Assistance Agency*, 968 F.3d 567, 580. Thus, Petitioner seeks review of the TCPA in order to validate its conduct to “send in the robots” and place 353 unwanted, and unconsented, robocalls to Respondents. *Barr*, 140 S. Ct. at 2364.

This case embodies the reason the TCPA exists and provides a model for the Court’s consideration to ensure the TCPA’s protections for individuals who are on the receiving end of a constant barrage of robocalls is upheld. As such, the petition should be granted.

Respectfully submitted,

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/s/ Adam T. Hill
Adam T. Hill
The Law Offices of Jeffrey Lohman, P.C.
28544 Old Town Front Street, Suite 201
Temecula, CA 92590
Telephone: (657) 236-3525
AdamH@jlohman.com

Counsel for Respondents