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A (Solicited) Call for Clarity: The Definition of Automatic Telephone Dialing System After *Gadelhak*

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A (SOLICITED) CALL FOR CLARITY: THE DEFINITION OF AUTOMATIC TELEPHONE DIALING SYSTEM AFTER *GADELHAK*

Abstract: In 2020, in *Gadelhak v. AT&T Services*, the United States Court of Appeals for the Seventh Circuit upheld the Northern District of Illinois's ruling that a tool that sends text message surveys to consumers was not an automatic telephone dialing system under the Telephone Consumer Protection Act of 1991. The Seventh Circuit reached this decision by rendering a different interpretation for the statutory definition of an automatic dialer than the district court. *Gadelhak* widened an already substantial circuit court split regarding what technologies the Act covers. This Comment evaluates the strengths and shortcomings of the Seventh Circuit's narrow interpretation of the statutory definition of an automatic telephone dialing system. It also discusses the potential impact of the Ninth Circuit's 2019 case, *Facebook, Inc. v. Duguid*, which explores the same issue, as the Supreme Court of the United States prepares to decide it.

INTRODUCTION

Homer Simpson observes the Springfield police arresting a local rogue in a back-alley raid.[1] As the officers discard a large collection of telephonic equipment, Homer asks about an odd piece of machinery. Chief Wiggum informs Homer that the device is an autodialer, which the arrested man used to conduct a telemarketing scheme. After Wiggum departs, Homer takes the autodialer home and initiates his own scam by using a pre-recorded message to convince recipients of his calls to send one dollar to his nom-de-guerre, "Happy Dude," in exchange for eternal bliss. The police finally catch Homer after his ploy frustrates every resident of Springfield. In the epilogue of the story, Homer uses the autodialer one last time to complete a court order to call everyone in town and apologize, his new message urging everyone willing to forgive him to send one dollar to his new alias, "Sorry Dude."[2]

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[1] *The Simpsons: Lisa's Date with Density* (Fox Broad. Co. television broadcast Dec. 15, 1996).

[2] *Id.* Characteristically, Homer ignores both warnings from Chief Wiggum about the seriousness of illegal robocalling, and also inquiries and objections about use of the autodialer from Homer's wife, Marge. *Id.* Noting that the machine has every Springfield phone number stored within it, Homer activates the device, causing it to dial numbers automatically and in sequential order. *Id.* Homer's antics incense his friends and neighbors to such an extent that Wiggum himself shoots the autodialer several times out of pure rage when the police finally catch Homer. *Id.*

Like all great satire, this episode of *The Simpsons* illuminates a dark niche of our culture, exposing it and clamoring for its revision.[3] Receipt of unsolicited, machine-generated "robocalls" has exasperated consumers on a massive scale for decades.[4] Despite efforts by lawmakers to limit the use of equipment to conduct mass call and text campaigns, both the Federal Trade Commission (FTC) and the Federal Communications Commission (FCC) report that autodialer calls continue to produce a huge number of consumer complaints annually.[5] Frustration is so high that there is some bipartisan support for total reconfiguration of the Telephone Consumer Protection Act (TCPA), the law that governs unsolicited autodialer calls.[6]

Modern technology is at the heart of the problem.[7] When Congress passed the TCPA in 1991, telemarketers mainly conducted autodialer calls using machines that simply produced and called numbers at random.[8] Today, telemarketers employ more advanced tools.[9] Modern internet-based call mechanisms

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[3] *See* Michael Honig, *10 Best Satires*, PUBLISHERS WKLY. (Aug. 12, 2016), https://www.publishersweekly.com/pw/by-topic/industry-news/tip-sheet/article/71167-10-best-satires.html (discussing the historical use of satire to expose disreputable characteristics and traits); *The Simpsons: Lisa's Date with Density*, *supra* note 1 (using satire to illustrate frustration relating to receipt of unsolicited robocalls)

[4] *See* ACA Int'l v. FCC, 885 F.3d 687, 691 (D.C. Cir. 2018) (noting that receipt of unsolicited autodialed calls has been a common consumer complaint for years, and that Congress attempted to confront the problem by passing the Telephone Consumer Protection Act nearly thirty years ago).

[5] *Id.* at 692; *National Do Not Call Registry Data Book for Fiscal Year 2019*, FED. TRADE COMM'N, https://www.ftc.gov/reports/national-do-not-call-registry-data-book-fiscal-year-2019 [https://perma.cc/88LE-DTZ7]. In 2019, the FTC reported nearly 5.5 million complaints from consumers who received autodialer calls despite enormous consumer participation on the FTC's "do not call" archive. *National Do Not Call Registry Data Book for Fiscal Year 2019*, *supra*. As of the end of 2019, the "do not call" archive contained 240 million telephone numbers. *Id.* The FTC created the registry as a free service to consumers, and it prohibits solicitors from calling registered numbers except in limited circumstances, such as when the consumer authorizes to receipt of such calls or in emergency situations. *See ACA Int'l*, 885 F.3d at 692–93 (providing examples of the "do not call" archive's exceptions). The FCC further reports that robocalls and other telemarketing activities are the single most common consumer issue submitted for review. *See* Corky Siemaszko, *In the Era of Endless Robocalls, Why Telemarketers Persist*, NBC NEWS (Dec. 9, 2018), https://www.nbcnews.com/news/us-news/era-endless-robocalls-why-telemarketers-persist-n943831 [https://perma.cc/8ZH6-PB7B] (stating that unsolicited telephone calls are both the most frequent consumer grievance the FCC receives and also a primary concern of FCC Chairman Ajit Pai (quoting Will Wiquist, spokesman for the FCC)).

[6] *See* Siemaszko, *supra* note 5 (demonstrating that both political parties support changing the TCPA (quoting state Rep. Ryan Hatfield from Evansville, Ill.)).

[7] *See Bureau of Consumer Protection*, FED. TRADE COMM'N BUREAU OF CONSUMER PROT., https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection [https://perma.cc/5W57-V68U] (last visited Oct. 3, 2020) (suggesting that modern technology is responsible for the increased volume of autodialer calls because it is efficient and cost effective for companies to engage in in mass outreach campaigns).

[8] *See* Gadelhak v. AT&T Servs., 950 F.3d 458, 461 (7th Cir. 2020) (discussing the type of technology telemarketers used in the early 1990s); *see also ACA Int'l*, 885 F.3d at 691 (providing that Congress passed the TCPA in 1991).

[9] *See* FED. TRADE COMM'N BUREAU OF CONSUMER PROT., *supra* note 7 (demonstrating the incredible capacity of modern equipment that can contact huge batches of numbers in a single minute).

can make far more calls, target far more people, and evade law enforcement tracking and detection far more effectively than equipment of the past.[10] Such resources have emboldened even legitimate companies and sales personnel to rely heavily on robocalling equipment and techniques.[11]

Consumers have two options for relief from receipt of unsolicited robocalls: the consumer market, including service providers, and the courts.[12] The consumer market provides some recourse for stopping unwanted calls, but it is highly regulated and making use of its services requires smartphone users to pay extra money and have substantial product acumen.[13] Thus, although the consumer market remains an intriguing source of reprieve for consumer frustration regarding robocalls, it is unlikely to produce a panacea to the problem.[14]

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[10] *See Robocalls*, FED. TRADE COMM'N BUREAU OF CONSUMER PROT., https://www.consumer.ftc.gov/features/feature-0025-robocalls [https://perma.cc/4JJG-YCB4] (last visited Oct. 3, 2020) (discussing how internet technology allows illegal telemarketers to evade authorities).

[11] *See, e.g.*, Siemaszko, *supra* note 5 (illustrating telemarketing efforts that the Los Angeles Philharmonic and the Los Angeles Opera use). Once implemented, internet-based call technology is extremely cost-efficient and users can modify it to coerce or even trick a recipient into answering a call. *See id.* (discussing how illegal call campaigns can mimic telephone numbers the recipient may recognize to induce the recipient into accepting a robocall). Telemarketing has an extremely low success rate. *See id.* (citing data from a division of the Association of National Advertisers, the former Direct Marketing Association suggesting calls are unsuccessful over 90% of the time). As a result, telemarketing companies may incentivize, or even require, salespeople to use robocalling equipment to meet production quotas. *See id.* (implying that telemarketers may increase the number of successful calls by increasing the number of total calls).

[12] *See* Mike Snider, *Robocalls Could Be Blocked by Phone Companies Under Proposed Rules, FCC Chairman Says*, USA TODAY (May 15, 2019), https://www.usatoday.com/story/tech/news/2019/05/15/robocall-fcc-rule-would-let-phone-companies-automatically-block-spam/3678856002 [https://perma.cc/L6XV-L7A8] (demonstrating how service providers can implement tools that allow smartphones and home phones to obstruct calls from unfamiliar numbers); *see, e.g.*, *Gadelhak*, 950 F.3d at 460 (providing one example of how individuals look to the courts to resolve autodialer issues).

[13] *See* Kim Komando, *3 Reasons Robocalls Are Hard to Stop and 5 Things to Do About Them*, USA TODAY (May 30, 2019) https://www.usatoday.com/story/money/2019/05/30/robocalls-annoying-but-there-ways-stop-them/1278242001 [https://perma.cc/MK7U-HNAA] (discussing several popular smartphone applications that prevent unwanted calls); Snider, *supra* note 12 (discussing the FCC's evaluation of some technology that telephone providers offer to their subscribers to reject robocalls). The FCC limits the ability of telephone providers to reject unsolicited phone calls proactively. Snider, *supra* note 12. Consumers of modern smartphones often have the means to program their phones to obstruct calls, but such capability generally requires individual consumers to be diligent in manually "teaching" their phones which numbers to permit and which to deny. *See How to Stop Annoying Robocalls and Scam Calls for Good*, KIM KOMANDO, https://www.komando.com/safety-security-reviews/how-to-stop-annoying-robocalls/540682 [https://perma.cc/778Q-87W3] (discussing how a user of each major smartphone brand can block future calls from numbers that have previously called the user's phone). Smartphone applications—known as apps—offer additional safeguarding, but apps are often not out-of-the-box features of smartphones and instead require a consumer to research and potentially purchase them at additional cost. *See id.* (enumerating the different apps available to subscribers of each of the four major cell phone carriers).

[14] *See* Komando, *supra* note 13 (explaining how there is still a need for regulation because consumer solutions are highly fragmented and individualized).

Courts can supply solutions that the market cannot, but courts are divided on which devices fit the statutory definition of an autodialer.[15] The split derives from two key problems.[16] First, courts have unanimously held that the statutory definition of an automatic telephone dialing system (ATDS) has severe grammatical problems.[17] Second, courts have the extremely difficult task of determining how to apply a legal definition to technology that did not exist at the time Congress wrote the statutory language and that continues to evolve in unpredictable ways.[18]

The United States Court of Appeals for the Second, Fourth, Sixth, and Ninth Circuits have adopted a very broad definition of an ATDS, opening the floodgates for litigation against telemarketers and robocallers, but also making

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[15] *See* Randall Hack & Brian Hays, *Second Circuit Adds to the TCPA Chaos*, JD SUPRA (Apr. 27, 2020), https://www.jdsupra.com/legalnews/second-circuit-adds-to-the-tcpa-chaos-71708 [https://perma.cc/9C4M-ZVTQ] (discussing the extent of the circuit split on the breadth of the statutory definition of an autodialer).

[16] *See Gadelhak*, 950 F.3d at 461 (explaining the difficulty of the court's task due to the ambiguity of the statutory definition of an autodialer and the ongoing advancement of equipment).

[17] *See id.* at 460 (characterizing the statutory language as likely to infuriate a devotee of grammar); *see also* 47 U.S.C. § 227(a)(1) (providing the disputed language of the statutory definition of an ATDS). The FCC issued an order in 2015 in an attempt to clarify the TCPA's definition of an ATDS. *See* ACA Int'l v. FCC, 885 F.3d 687, 691 (D.C. Cir. 2018) (illustrating that re-visiting the definition was one of several efforts the FCC made as part of a larger endeavor to evaluate the TCPA's ban on using robocalling equipment to make unsolicited calls). In 2018, in *ACA International v. Federal Communications Commission*, the D.C. Circuit exacerbated this issue by vacating the FCC's 2015 Order but not indicating whether it was also vacating any previous FCC orders regarding the TCPA definition of an ATDS. 885 F.3d at 692; *see Gadelhak*, 950 F.3d at 463 (detailing how *ACA International* abrogates not just the 2015 FCC Order's interpretation, but all previous FCC Order interpretations as well). *But see* Duran v. La Boom Disco, Inc., 955 F.3d 279, 286 (2d Cir. 2020) (illustrating the Second Circuit's view that *ACA International* only abrogates the 2015 FCC Order's interpretation on the issue, and not the 2003, 2008, or 2012 Orders' interpretations). Following *ACA International*, courts other than the Second Circuit have treated the definition of an ATDS under the TCPA as a question of first impression. *See, e.g.*, *Gadelhak*, 950 F.3d at 463 (maintaining that the instant case represents the Seventh Circuit's attempt to decipher the statutory language of an ATDS as if it had never done so before). As a result, the circuit courts have not provided consensus on what the statutory definition of an ATDS means. *Id.* at 463–64.

[18] *See Gadelhak*, 950 F.3d at 461 (noting that the technology that existed at the time Congress passed the TCPA fit fairly neatly into the statutory definition but that modern technology does not). Although Congress has repeatedly amended the TCPA, Congress has never adjusted how the TCPA characterizes an autodialer. Marks v. Crunch San Diego, L.L.C., 904 F.3d 1041, 1045 (9th Cir. 2018). In 2018, in *Marks v. Crunch San Diego, L.L.C.*, the Ninth Circuit explored whether a specific text messaging method qualified as an ATDS under the TCPA. *Id.* at 1043. Applying new call technology to an old definition is challenging because the modern ATDS and the modern personal smartphone share many common attributes and functionalities. *See ACA Int'l*, 885 F.3d at 696 (identifying the slippery slope that exists in classifying a device as an ATDS based on its "capacity" to meet the statutory definition, rather than on its present suitability, because all modern smartphones have the potential for use as an ATDS, if so modified). Thus, courts must avoid applying pyrrhic definitions of an ATDS—that is, those that are so broad as to encompass common use of personal smartphones on a universal scale. *See id.* at 698 (implying that an interpretation that exposes all modern smartphones to the statute creates considerable practical problems).

personal smartphone usage vulnerable to the statute.[19] The United States Courts of Appeals for the Third and Eleventh Circuits have adopted a much narrower view, protecting smartphones from exposure to the statute, but also broadening the scope of legal robocalls.[20] With its 2020 holding in *Gadelhak v. AT&T Services*, the United States Court of Appeals for the Seventh Circuit joined the discussion.[21] Five months later, the Supreme Court of the United States granted *certiorari* to *Facebook, Inc. v. Duguid*, a Ninth Circuit case that also questions the correct interpretation of an ATDS under the TCPA.[22] The Court heard *Facebook* on December 8, 2020, and the opinion is currently pending.[23]

Part I of this Comment provides context for the Seventh Circuit's decision in *Gadelhak* by supplying the legal framework, factual background, and procedural history of the case.[24] Part II discusses the holding in *Gadelhak* and its place within the present circuit split on the definition of an ATDS under the statute.[25] Finally, Part III analyzes the Seventh Circuit's interpretation of the statutory definition of an ATDS and discusses the possible impact of *Face-*

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[19] *See* Hack & Hays, *supra* note 15 (noting that the broad definition, which includes any device that can store numbers that it later calls, engages the same slippery slope application to smartphones that the D.C. Circuit vacated the 2015 FCC Order's interpretation to avoid); *see also* Allan v. Pa. Higher Educ. Assistance Agency, 968 F.3d 567, 578–80 (6th Cir. 2020) (illustrating the Sixth Circuit's view that the broad definition is correct and that the D.C. Circuit's holding in *ACA International* resolved the slippery slope issue); *Marks*, 904 F.3d at 1052 (holding that the best way to interpret the statute is to apply a broad definition).

[20] *See* Hack & Hays, *supra* note 15 (illustrating that the Eleventh Circuit followed the D.C. Circuit's reasoning in *ACA International* by holding that the 2015 FCC Order's interpretation exposes every call that one smartphone makes to another without consent to potential liability under the TCPA). The narrow reading of the definition holds that an ATDS under the TCPA must use a random or sequential number generator either to produce numbers or to store them. *See* Glasser v. Hilton Grand Vacations Co., 948 F.3d 1301, 1307 (11th Cir. 2020) (demonstrating that the placement of a comma between the verb phrase describing storage and production and the participle phrase describing use of the generator indicates that Congress intended the use of the generator to apply to both of the preceding verbs).

[21] *See Gadelhak*, 950 F.3d at 464–66 (describing how several courts' decisions have contributed to the circuit split).

[22] *Facebook, Inc. v. Duguid*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/facebook-inc-v-duguid/ (last visited Mar. 3, 2020). *Facebook* hinges on similar facts as *Gadelhak* and asks the Court to decide whether an ATDS under the TCPA must use a random or sequential number generator to store telephone numbers for later calling. *See* Duguid v. Facebook, Inc., 926 F.3d 1146, 1149–50 (9th Cir. 2019) (providing the factual context of Duguid's complaint). Like Ali Gadelhak, Noah Duguid is not a consumer of Facebook, the product for which the defendant company contacted him. *Id.* at 1150. The unsolicited communiques in Duguid's case were text messages to his personal cell phone. *Id.* Facebook added Duguid's number to its call system via uncertain means. *Id.* Duguid filed a putative class action in response to defendant's conduct. *Id.*; *see also Gadelhak*, 950 F.3d at 460 (providing the facts of Gadelhak's putative class action against AT&T).

[23] SCOTUSBLOG, *supra* note 22.

[24] *See infra* notes 27–66 and accompanying text.

[25] *See infra* notes 67–88 and accompanying text.

book, where the Supreme Court of the United States will evaluate and provide a final ruling on the issue.[26]

I. The Legal Context of *Gadelhak v. AT&T Services*

In 2015, in response to numerous appeals to explain the meaning of the TCPA's disputed phrase, "using a random or sequential number generator," the FCC furnished an order providing guidance on how to interpret the phrase.[27] In 2018, in *ACA International v. Federal Communications Commission*, the United States Court of Appeals for the D.C. Circuit vacated the FCC's 2015 Order, paving the way for courts to form their own opinions regarding what devices the TCPA prohibits.[28] Section A of this Part offers a brief history of the FCC's attempts to clarify the definition of an ATDS under the TCPA.[29] Section B presents the factual background of the Seventh Circuit's 2019 case, *Gadelhak v. AT&T Services*.[30] Section C details the procedural history of *Gadelhak*.[31]

A. FCC's Definition of an ATDS

The TCPA proscribes telemarketers from using an ATDS to contact consumers except under limited exceptions.[32] The statute exclusively uses various forms of the verb to "call" when referencing prohibited conduct.[33] In 2016, in *Campbell-Ewald Co. v. Gomez*, the Supreme Court of the United States held that the TCPA's statutory restrictions on the use of an ATDS also pertain to text

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[26] *See infra* notes 89–105 and accompanying text.

[27] *See* ACA Int'l v. FCC, 885 F.3d 687, 693 (D.C. Cir. 2018) (describing the FCC's rationale for re-evaluating the TCPA definition of an ATDS by re-examining the meaning of the disputed phrase); *see also* 30 FCC Rcd. 7961, 7964 ¶ 2 (2015) (providing the official purpose of the 2015 Order).

[28] *See ACA Int'l*, 885 F.3d at 692 (vacating the FCC's 2015 Order); *see, e.g.*, Gadelhak v. AT&T Servs., 950 F.3d 458, 463 (7th Cir. 2020) (indicating that the court felt compelled to evaluate the statutory definition of an ATDS without consideration of either the 2015 FCC Order or any of its own previous interpretations).

[29] *See infra* notes 32–49 and accompanying text.

[30] *See infra* notes 50–57 and accompanying text.

[31] *See infra* notes 58–66 and accompanying text.

[32] Gadelhak v. AT&T Servs., No. 17-cv-01559, 2019 WL 1429346, at *2 (N.D. Ill. Mar. 29, 2019) (citing 47 U.S.C. § 227(b)(1)(A)), *aff'd*, 950 F.3d 458 (7th Cir. 2020). The statute's enumerated exceptions include: (1) calls made after the consumer gave explicit authorization; (2) calls made under emergency circumstances; and (3) calls made for the purpose of securing financial obligations the call recipient owes to the government. *Id.* The Supreme Court of the United States has since ruled that the third exception is unconstitutional on First Amendment grounds and has severed it from the rest of the TCPA. Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2356 (2020). The statute also proscribes use of an "artificial or pre-recorded voice" to contact consumers, with the same exceptions applying. *Gadelhak*, 2019 WL 1429346, at *2. That proscription is not relevant to the instant case, as AT&T's communications to Gadelhak consisted of unsolicited text messages. *See id.* (illustrating that AT&T's method of communication to Gadelhak was via text message, not a prerecorded voice call).

[33] Restrictions on Use of Telephone Equipment, 47 U.S.C. § 227(b)(1)(A).

messages.[34] As a result, the viability of claims against robocalling practices often rests largely on whether the equipment used to make the calls satisfies the statutory definition of an ATDS.[35]

The TCPA establishes three criteria for evaluating whether equipment used in a call campaign meets the definition of an ATDS: (1) production; (2) generation; and, (3) actuation.[36] First, a device must be able to "store or produce" the phone numbers targeted for a call campaign.[37] Second, a device must use a "random or sequential number generator."[38] Third, a device must be able to call the same phone numbers it stores or produces.[39] Although these requirements may seem straightforward, courts have repeatedly held that the grammatical structure of the statute invokes ambiguity concerning the second requirement.[40] Consequently, the FCC has made numerous attempts to clarify the definition.[41]

In 2015, the FCC issued an order to elucidate the meaning of ATDS under the TCPA.[42] The FCC determined that the definition does not only encompass a device's extant faculty to store or generate numbers to dial; rather, it also engages a device's prospective fitness for such functions.[43] Thus, the FCC ex-

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[34] *See* Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 667 (2016) (holding that a text message fits within the TCPA definition of a "call" to a mobile telephone number); *see also Gadelhak*, 950 F.3d at 460–61 (noting that the definition of an ATDS includes text messages (first citing 47 U.S.C. § 227(a)(1); and then citing *Campbell-Ewald Co.*)). The Ninth Circuit agreed. *See*, Duguid v. Facebook, Inc., 926 F.3d 1146, 1149 (9th Cir. 2019) (noting that a text message is synonymous to an actual call under the statute).

[35] *See, e.g.*, *Gadelhak*, 950 F.3d at 461 (determining the issue of whether AT&T's tool fulfills the statutory definition of an ATDS).

[36] 47 U.S.C. § 227(a)(1).

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *See, e.g.*, *Gadelhak*, 950 F.3d at 460 (identifying that the statutory definition's source of ambiguity derives from uncertainty regarding the function of the clause "using a random or sequential number generator").

[41] *See* Gadelhak v. AT&T Servs., No. 17-cv-01559, 2019 WL 1429346, at *3 (N.D. Ill. Mar. 29, 2019) (providing a concise history of recent FCC considerations regarding the definition of an ATDS), *aff'd*, 950 F.3d 458 (7th Cir. 2020). The FCC updated its definition of an ATDS in 2003 to include devices that could call numbers from a database, even if the machines could not store or generate numbers. *Id.*; *see also* 18 FCC Rcd. 14,014, 14,091–93 ¶¶ 132–33 (2003) (providing the FCC's 2003 evaluation of the TCPA definition of an ATDS in light of advancing equipment). In 2008, the FCC reiterated its position, citing a need to ensure the definition applied to modern devices and present trade usage. *Id.*; *see also* 23 FCC Rcd. 559, 566 ¶¶ 12–13 (2008) (providing the FCC's 2008 upholding of its 2003 expansion of the TCPA definition of an ATDS).

[42] *See* ACA Int'l v. FCC, 885 F.3d 687, 693 (D.C. Cir. 2018) (describing that the Commission issued the Order, despite dissent from two Commissioners, in response to twenty-one submissions for the FCC resolve the opacity of the TCPA's definition of an ATDS); *see also* 30 FCC Rcd. 7961, 7964 ¶ 2 (2015) (providing that the FCC issued the Order in response to twenty-one independent solicitations for explication on the TCPA's definition of an ATDS).

[43] *ACA Int'l*, 885 F.3d at 695. Prospective fitness can derive from modification to or upgrade of the device. *Id.* It seems that the FCC was attempting to bridge the gap between the statutory definition

tended the definition of ATDS to devices that *could* meet the requirements of the statutory definition, even if they were not *presently* capable of meeting the requirements.[44]

Many parties immediately contested the FCC's seemingly limitless expansion of the definition of an ATDS under the 2015 Order.[45] In 2018, in *ACA International v. Federal Communications Commission*, the D.C. Circuit abrogated the FCC's 2015 Order.[46] In vacating the FCC's Order, the court found the FCC's potentiality argument suspect under a slippery slope paradigm.[47] Although *ACA International* established that the FCC's 2015 definition of an ATDS could not stand, the case did not provide further clarification as to how

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and modern technology through this line of reasoning. *See id.* at 695–96 (noting that the FCC's reasoning was driven both by an understanding that attributes of modern equipment are inherently mutable and that the term "capacity" invokes ideas of evolution and change). The FCC recognized that modern equipment is primarily software-based, whereas the statute was written primarily for hardware devices. *See id.* (discussing reliance of modern technology on software-based modifications). As such, modern devices are likely equipped with the ability to turn certain functions on and off and to acquire new capabilities through download or other data-transfer means. *See id.* (demonstrating the FCC's understanding that modern software-based devices contain functional flexibility that older hardware-based technology does not). Consequently, a modern device's capacity to meet the definition of an ATDS is potentially transient. *See id.* (discussing the ability to modify devices).

[44] *See Gadelhak*, 2019 WL 1429346, at *3 (stating the FCC's firm position that a device's ability to meet the statutory definition of an ATDS could derive from either the device's present or future functionality); *see also* 30 FCC Rcd. 7961, 7965 ¶ 2 (2015) (providing the FCC's 2015 Order that stated that present capacity is not determinative of whether a device is an ATDS under the TCPA).

[45] *See* Hack & Hays, *supra* note 15 (stating that the 2015 Order exposed many new parties to the definition and those parties immediately objected to the FCC's new interpretation). The 2015 Order's interpretation of the TCPA's definition of an ATDS effectively imposed the definition on any equipment that could potentially function an ATDS, even if it could do so only through considerable modification or use of software manufactured entirely independent of the equipment itself. *See* Eric J. Troutman, *Dangerous TCPA Win: Court Grants Defendant MSJ on ATDS Issue but Suggests Manually Dialed Calls Can Violate TCPA*, TCPAWORLD (Mar. 18, 2019), https://tcpaworld.com/2019/03/18/dangerous-tcpa-win-court-grants-defendant-msj-on-atds-issue-but-suggests-manually-dialed-calls-can-violate-tcpa [https://perma.cc/63GY-W739] (discussing the United States District Court for the Northern District of Illinois's post-*ACA International* rejection of the FCC's 2015 Order in its analysis in *Folkerts v. Seterus*, No. 17 C 4171, 2019 U.S. Dist. LEXIS 42347, at *18 (N.D. Ill. Mar. 15, 2019)).

[46] 885 F.3d 687, 692 (D.C. Cir. 2018); *see also* 30 FCC Rcd. 7961, 7965 ¶ 2 (2015) (providing the FCC's expansion of the statutory definition under the 2015 Order).

[47] *See ACA Int'l*, 885 F.3d at 697 (expressing concern about exposing all smartphones to statutory liability); *see also* 30 FCC Rcd. 7961, 7965 ¶ 2 (2015) (providing the FCC's expanded interpretation under the 2015 Order). Specifically, the court held that the FCC's reasoning was indefensible because it exposed modern smartphones to regulation under the TCPA, an unacceptably far-reaching result. *ACA Int'l*, 885 F.3d at 698. The court reasoned that if a device meets the definition of an ATDS merely if it has the *potential* to operate according to the statutory requirements, then all smartphones satisfy the FCC's criteria because all smartphones can function as an ATDS by downloading certain apps. *Id.* at 697. The court ruled that the FCC's 2015 Order was arbitrary and capricious by extending the TCPA's reach to ordinary people. *See id.* at 700 (citing to the arbitrary and capricious standard in *U.S. Postal Service v. Postal Regulatory Commission*, 785 F.3d 740, 754 (D.C. Cir. 2015), to note that for the FCC Order's interpretation of an ATDS to stand, it must justify why certain technologies fit the definition, but other technologies with similar functionalities do not).

both courts and market actors should interpret the definition.[48] Since *ACA International*, the FCC has been working to determine if it will espouse a narrow or expansive definition pursuant to the D.C. Circuit's expressed concerns.[49]

B. Factual Background of Gadelhak

The TCPA prohibits the use of an ATDS to make unauthorized calls to residential or wireless telephone numbers and empowers the FCC to impose the restrictions of the Act.[50] In *Gadelhak v. AT&T Services*, the United States District Court for the Northern District of Illinois held that a program known as the "AT&T Customer Rules Feedback Tool" does not meet the TCPA's definition of an ATDS.[51] Telecommunications giant AT&T uses the feedback tool to transmit text messages with customer service surveys to patrons of AT&T's commercial partners.[52]

The plaintiff, Ali Gadelhak, was neither a customer of AT&T nor a client of any of AT&T's corporate affiliates.[53] Further, Gadelhak added his mobile

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[48] *See* Hack & Hays, *supra* note 15 (noting that *ACA International* does not say how to interpret the TCPA definition). Further, courts are split as to whether *ACA International* merely vacates the FCC's 2015 Order, or if it abrogates all of the FCC's interpretations of an ATDS previous to 2015 as well. *See id.* (discussing the Second Circuit's unique holding that the 2003, 2008, and 2012 FCC Orders are still effective); *see also* 30 FCC Rcd. 7961, 7965 ¶ 2 (2015) (providing the expanded interpretation outlined in the FCC's 2015 Order). Regardless of how they interpret the statutory definition, most courts read *ACA International* as vacating *all* previous FCC orders on the TCPA's definition of an ATDS. *See* Hack & Hays, *supra* note 15 (discussing the Second Circuit's continued validation of the FCC orders prior to 2015); *see also* Dominguez v. Yahoo, Inc., 894 F.3d 116, 119 (3d Cir. 2018) (declining to consider any previous FCC order in light of the D.C. Circuit's holding in *ACA International*). The lone exception is the Second Circuit, which maintains that *ACA International* only abrogated the 2015 Order and had no effect on the FCC's orders prior to 2015. *See* Hack & Hays, *supra* note 15 (noting the Second Circuit's continued deference to the FCC's earlier orders); *see also* Duran v. La Boom Disco, Inc., 955 F.3d 279, 286 (2d Cir. 2020) (holding that *ACA International* only abrogated the 2015 FCC Order, but left the 2003, 2008, and 2012 rules intact).

[49] *See* Hack & Hays, *supra* note 15 (explaining that the FCC requested feedback between May 2018 and October 2018 regarding what definition it should embrace but has yet to implement any changes).

[50] *See ACA Int'l*, 885 F.3d at 692 (identifying that the statute prohibits devices that can dial numbers automatically). Congress also passed the Telemarketing and Consumer Fraud and Abuse Prevention Act in 1994, to bolster the effort to resolve consumer complaints about telemarketing and to enable the FTC to control telemarketing activities. *See id.* (discussing the regulatory powers the Telemarketing and Consumer Fraud and Abuse Prevention Act gave the FCC).

[51] *See Gadelhak*, 950 F.3d at 465 (providing the procedural history of the case); *see also* Gadelhak v. AT&T Servs., No. 17-cv-01559, 2019 WL 1429346, at *1 (N.D. Ill. Mar. 29, 2019) (describing the court's grant of summary judgment in favor of AT&T), *aff'd*, 950 F.3d 458 (7th Cir. 2020).

[52] *See Gadelhak*, 2019 WL 1429346, at *1 (discussing the feedback tool's function). The questionnaire also markets an AT&T smartphone application to patrons of AT&T's commercial partners. *Id.* Although DIRECTV is named as an example of one such commercial partner, plaintiff Ali Gadelhak was not a consumer of AT&T, DIRECTV, or any associated business of AT&T when he began receiving text messages from the tool. *See id.* at *2 (stating that Gadelhak is not a member of AT&T's clientele, nor is he a patron of AT&T's associated businesses).

[53] *Gadelhak*, 2019 WL 1429346, at *2.

telephone number to the FTC's "do not call" registry in 2014.[54] Despite Gadelhak's attempts to avoid unsolicited calls and text messages, AT&T sent five such text surveys to Gadelhak in July 2016 alone.[55] In response, Gadelhak filed a putative class action against AT&T in the Northern District of Illinois, citing infringement of the TCPA.[56] AT&T maintained that, because they designed the tool to contact only customers of AT&T and its affiliates, the contact list must have included Gadelhak's number due to an error.[57]

C. Procedural History of Gadelhak

The district court in *Gadelhak* reasoned that the case turned on whether the court could find that a device that could only call *from an existing catalog*

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[54] *Id.*

[55] *Id.*

[56] *Id.* Gadelhak received the questionnaire in Spanish, yet he did not speak Spanish. *Gadelhak*, 950 F.3d at 460. Gadelhak believed that AT&T engaged in similar activity with other consumers and, thus, brought a class action. *Gadelhak*, 2019 WL 1429346, at *2. A putative class action is a lawsuit that an individual or a small cohort of individuals files with the belief that a broader assemblage has suffered the same harm. *Putative*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Class Action*, *id.*

[57] *Gadelhak*, 2019 WL 1429346, at *2. AT&T suggested that a "typographical" error caused AT&T to include Gadelhak's number on the contact list. *Gadelhak*, 950 F.3d at 461. AT&T uses a collaboration of automated procedures to determine which telephone numbers will receive a texted survey. *Gadelhak*, 2019 WL 1429346, at *1. A computer system first tags accounts based on recent customer activity. *See id.* (noting that activity that marks accounts for survey transmission includes specific types of engagements with certain identified employees of any AT&T affiliate). The system then generates a "gross sample list" of all telephone numbers belonging to all tagged accounts and sends the raw data to a second computer system. *See id.* (noting that the gross sample list contains any number affiliated with a tagged customer, not simply the telephone number the customer used to communicate with a customer service representative). The second computer system reduces the gross sample list down to a single number to text per customer by identifying the customer's primary mobile telephone number. *See id.* (illustrating that in determining what telephone number to text, the system also eliminates any telephone numbers that do not connect to cellular phones). Finally, the second computer system outsources the expurgated list to a third-party broadcasting group, that, in turn, transmits AT&T's surveys to the targeted customers. *Id.* Both parties agree that the processes that identify and compile numbers to receive text surveys are entirely computer-driven—independent of human involvement. *Id.* Given that the TCPA imposes strict liability, AT&T's argument that it contacted Gadelhak by mistake is possibly a defense strategy against the case's class certification. *See* Richard Benenson & Al Mottur, *Some TCPA Class Action Defense Strategies*, LAW360 (Feb. 5, 2016), https://www.law360.com/articles/755371/some-tcpa-class-action-defense-strategies [https://perma.cc/AXW8-9D8B] (explaining the need for a unique defense strategy due to the strict liability nature of the TCPA). Defenses to TCPA liability, at least at the summary judgment stage, often involve arguments either that the plaintiff authorized contact or that the defendant did not conduct automated dialing. *Id.* Gadelhak never provided consent to contact, and there is no doubt that AT&T's text message campaign involved automation. *See Gadelhak*, 2019 WL 1429346, at *2 (providing that Gadelhak was never a patron of AT&T to provide consent and that neither party argued that AT&T conducted manual calls). If these defenses are not available, the defendant may choose to challenge the plaintiff's presumed membership in a class. BENENSON & MOTTUR, *supra*. To the extent that AT&T could establish that it contacted Gadelhak due to a data entry mistake, it could pose a defense to class certification based on ascertainability. *Id.*; *see also Gadelhak*, 950 F.3d at 461 (establishing AT&T's assertion that its contact list included Gadelhak's number due to a typing mistake).

of numbers was an ATDS under the TCPA.[58] Gadelhak argued that AT&T's tool met the statutory definition because the tool had the ability both to store and to dial telephone numbers.[59] Defendant AT&T argued that the tool's mode of operation existed outside the scope of activities the statute prohibits.[60]

The district court recognized that the natural language of the statute must guide the court's ruling and that the court's decision would turn on the meaning of the phrase "using a random or sequential number generator."[61] Although Gadelhak argued that the phrase pertained only to the verb "produce," the court determined that the phrase affects neither verb.[62] Instead, the court found that the phrase pertained to the numbers themselves.[63] Specifically, the court found that AT&T's tool was not an ATDS because it did not dial randomly or sequentially-created numbers but, rather, numbers produced via more deliberate means.[64] Gadelhak appealed the district court's decision to the Seventh Circuit.[65] The Seventh Circuit affirmed the district court, though it ultimately disagreed with the district court's opinion that the disputed phrase modified the telephone numbers.[66]

II. THE SEVENTH CIRCUIT'S HOLDING IN *GADELHAK V. AT&T SERVICES*

In 2020, the United States Court of Appeals for the Seventh Circuit decided *Gadelhak v. AT&T Services* and provided a comprehensive analysis of each

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[58] *See Gadelhak*, 2019 WL 1429346, at *5 (noting this question's importance because AT&T's tool could not produce numbers on its own but called numbers on a previously assembled index).

[59] *Id.* Gadelhak maintained that the disputed clause, "using a random or sequential number generator," only pertains to the verb to "produce" and has no impact whatsoever on the verb to "store." *Id.* Thus, Gadelhak argued that the definition of an ATDS includes: (1) devices that can produce numbers via a random or sequential number generator; and (2) devices that can simply store numbers for later calling, whether by using a random or sequential number generator or not. *See id.* (noting that Gadelhak referenced *Marks v. Crunch San Diego, L.L.C.*, 904 F.3d 1041, 1051–52 (9th Cir. 2018), to assert his interpretation of an ATDS).

[60] *See id.* (noting that AT&T argues that the statutory language does not cover AT&T's use of the tool). AT&T asserted that because its tool merely calls numbers from a pre-made index, and thus does not use a number generator at all, it cannot meet the TCPA's definition of an ATDS. *Gadelhak*, 950 F.3d at 464.

[61] *Gadelhak*, 2019 WL 1429346 at *5.

[62] *Id.*

[63] *Id.*

[64] *Id.* at *7; *see also Gadelhak*, 950 F.3d at 465 (providing the Seventh Circuit's perspective that the district court reached the correct result in holding that AT&T's tool is not an ATDS under the TCPA, notwithstanding the lower court's incorrect interpretation of the statutory definition).

[65] *Gadelhak*, 950 F.3d at 458.

[66] *See id.* at 469 (explaining the Seventh Circuit's view that both its reading and the district court's reading of the disputed phrase, though different, require functionalities that AT&T's tool does not have).

of the possible interpretations of the TCPA's definition of an ATDS.[67] Section A of this Part discusses how other circuit courts have interpreted the definition of an ATDS under the TCPA.[68] Section B discusses how the Seventh Circuit, in *Gadelhak*, determined that an ATDS includes any device that uses a random or sequential number generator either to store or produce telephone numbers for later calling.[69]

A. The Circuit Split on the TCPA Definition of an ATDS

The TCPA definition of an ATDS is ambiguous regarding how to interpret the phrase "using a random or sequential number generator."[70] The Seventh Circuit heard *Gadelhak* after the D.C. Circuit, in 2018, vacated the 2015 FCC Order on the disputed phrase in *ACA International v. Federal Communications Commission*.[71] As such, the Seventh Circuit felt free to examine the state of the circuit split without deference to the FCC and to decide for itself what the phrase actually means.[72] In so doing, the Seventh Circuit closely scrutinized four options for interpreting the phrase and noted which interpretive frameworks previously informed the decisions of the different federal circuit courts.[73] The United States Courts of Appeals for the Third and Eleventh Cir-

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[67] *See* Gadelhak v. AT&T Servs., Inc, 950 F.3d 458, 463–68 (7th Cir. 2020) (providing the Seventh Circuit's detailed explication of four possible interpretations of the TCPA phrase "using a random or sequential number generator").

[68] *See infra* notes 70–80 and accompanying text.

[69] *See infra* notes 81–88 and accompanying text.

[70] *Gadelhak*, 950 F.3d at 460. The Seventh Circuit's opinion in *Gadelhak* wasted no time identifying the grammatical source of ambiguity in the TCPA definition of an ATDS. *See id.* (pinpointing the grammatical issue that is the source of the dispute in the opening lines of the opinion). The definition indicates that, to be an ATDS, a device must be able either to store or produce telephone numbers and be able to dial the same numbers that it stores or produces. *See id.* at 460–61 (quoting the statutory definition of ATDS as found in 47 U.S.C. § 227(a)(1)). The definition is unclear as to how to apply the phrase "using a random or sequential number generator." *Id.* at 460. How the courts interpret the phrase is determinative in establishing the reach of the TCPA. *Id.* at 461. The court recognized that an expansive reading could subject unintended technology to the statute, whereas a narrow reading could fail to keep the statute relevant as technology continues to evolve. *See id.* (describing the types of technology that the statutory definition will cover, depending on its interpretation).

[71] *See Gadelhak*, 950 F.3d at 463 (providing the 2020 date of the Seventh Circuit's ruling of *Gadelhak*); ACA Int'l v. FCC, 885 F.3d 687, 687 (D.C. Cir. 2018) (providing the 2018 date of the D.C. Circuit's ruling of *ACA International*).

[72] *See Gadelhak*, 950 F.3d at 463 (illustrating that the Seventh Circuit approached its decision in *Gadelhak* by establishing its own interpretation of the disputed phrase); *see also ACA Int'l*, 885 F.3d at 692 (providing the D.C. Circuit's abrogation of the 2015 FCC Order); Gadelhak v. AT&T Servs., No. 17-cv-01559, 2019 WL 1429346, at *5 (N.D. Ill. Mar. 29, 2019) (rendering the district court's its own interpretation of an ATDS without deferring to any FCC order), *aff'd*, 950 F.3d 458 (7th Cir. 2020).

[73] *Gadelhak*, 950 F.3d at 463. The Seventh Circuit hinted that there could feasibly be even more possibilities but provided no further exposition on what those might be. *See id.* (stating that there are, at minimum, four possible interpretations of the disputed phrase). The first possibility is that the phrase applies to both the verb to "store" and the verb to "produce." *Id.* Via this reading, a device that

cuits applied a predominately grammatical analysis of the statutory definition of an ATDS, which they held denotes a narrow application of the term.[74] Under such a reading, a device must use a random or sequential generator *either* to store numbers *or* to produce them to meet the statutory definition of an ATDS.[75] If the device calls numbers from a list compiled and stored via other means, that device is not an ATDS and is not subject to the TCPA.[76]

The United States Court of Appeals for the Sixth Circuit noted that interpreting the disputed phrase as modifying both verbs makes the most grammatical sense.[77] The United States Courts of Appeals for the Second and Ninth Circuits held that reading the phrase as modifying only the verb to "produce" requires consideration of factors beyond the text.[78] In determining that the dis-

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uses a random or sequential number generator either to store numbers *or* to produce them (or both) would satisfy the definition of an ATDS under the TCPA. *Id.* The second possibility is that the phrase modifies neither verb, but rather the noun phrase, "telephone numbers," that structurally connects the verbs to the disputed clause. *Id.* at 463–64. The court indicated that this reading suggests that a device would fit the definition of an ATDS provided that the numbers were fashioned for calling via the random or sequential generator. *See id.* at 464 (discussing the second possible interpretation). The third possibility is that the phrase modifies only the verb nearest to the disputed phrase and that it has no bearing whatsoever on number storage. *See id.* (discussing the third possible interpretation). The verb nearest the disputed phrase is "to produce." *Id.* The court noted that if such an interpretation is the correct reading, then there are two possibilities for a device to meet the definition of an ATDS. *Id.* First, a device could use a random or sequential number generator to manufacture numbers that it later calls. *Id.* Second, a device could simply have the capability to store numbers, whether via a random or sequential generator or not, and also have the capacity to call. *Id.* Reading the disputed phrase this way provides a substantial expansion to the statutory language because it has the potential to classify a device that merely stores numbers as an ATDS even if it is does not use a random or sequential generator *at all*. *See id.* (describing the types of equipment that the third possible interpretation can capture). The fourth possibility is that "using a random or sequential number generator" refers to how the numbers are dialed. *Id.* The court's inclusion of this possibility seems largely academic. *See id.* (noting that no courts have adopted the fourth possible interpretation). Although the court does diligently consider and discuss this option, it prefaces its analysis by noting that no court has ever formally espoused this possibility, despite the fact that some have previously suggested it. *Id.*

[74] *See* Glasser v. Hilton Grand Vacations Co., 948 F.3d 1301, 1306–07 (11th Cir. 2020) (applying primarily a structural verb-object analysis to reach its conclusion); Dominguez v. Yahoo, Inc., 894 F.3d 116, 121 (3d Cir. 2018) (holding that the plaintiff could demonstrate neither that the defendant used a random or sequential generator to store numbers nor that the defendant used a random or sequential generator to produce numbers).

[75] *See, e.g.*, *Gadelhak*, 950 F.3d at 463 (holding that use of a random or sequential number generator to store or produce numbers is essential for a device to meet the statutory definition).

[76] *See id.* (requiring a random or sequential number generator to store or produce numbers in order for the statutory definition of an ATDS to apply).

[77] *See* Allan v. Pa. Higher Educ. Assistance Agency, 968 F.3d 567, 572 (6th Cir. 2020) (noting the Sixth Circuit's recognition that interpreting the disputed phrase as modifying both verbs follows a specific grammatical rule).

[78] *See* Duran v. La Boom Disco, Inc., 955 F.3d 279, 285 (2d Cir. 2020) (holding that the TCPA's exceptions to prohibited ATDS activities hint that Congress conceptualized the definition as including devices that can simply store numbers for subsequent calling); Marks v. Crunch San Diego, L.L.C., 904 F.3d 1041, 1051 (9th Cir. 2018) (holding that contextual and structural factors were necessary considerations in determining the best meaning of the disputed phrase). In deciding *Gadelhak*, the Seventh Circuit maintained a reading of the disputed clause as modifying both verbs because doing so

puted phrase modifies only the verb to "produce," all of these courts held that grammar is not the sole arbiter of the issue.[79] Instead, these courts gave considerable weight to legislative intent and practical impacts in addition to syntactical concerns.[80]

B. The Seventh Circuit's Definition of an ATDS Under the TCPA

Following *ACA International*, the Seventh Circuit did not need to defer to custom or precedent regarding the definition of an ATDS.[81] Faced with navigating uncharted waters, the court began by identifying what the phrase could mean and then focused its opinion on exhaustively evaluating the advantages and disadvantages of each possible interpretation.[82] The court recognized that

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is the least problematic means of working with the statute's awkward construction. 950 F.3d at 468. By contrast, the Sixth Circuit in 2020, in *Allan v. Pennsylvania Higher Education Assistance Authority*, clearly understood that it could not justify breaking with this interpretation on the basis of grammar alone, but it instead looked to other, more practical considerations in rendering a decision. *See* 968 F.3d at 576–77 (discussing at length the impact of modern database call systems on consumers and the need to adopt a definition that includes such technologies).

[79] *See, e.g.*, *Allan*, 968 F.3d at 579 (explaining that the grammatical interpretation cannot stand); *Duran*, 955 F.3d at 284 (identifying that the chief problem of the grammatical interpretation is that it renders the verb to "store" superfluous); *Marks*, 904 F.3d at 1051 (looking beyond the text of statute for interpretive strategies). The Sixth Circuit appeared to view grammar as one-third of the strategy for interpreting this particular statutory ambiguity, with contemplation of legislative intent being another third, and observation of practical considerations being the final third. *See Allan*, 968 F.3d at 578–80 (describing methods of statutory interpretation).

[80] *See Allan*, 968 F.3d at 579–80 (noting the importance of the consent exception to the proscription of robocalling equipment, especially in determining Congressional intent); *Duran*, 955 F.3d at 284 (focusing chiefly on the verb redundancy of the grammatical interpretation); *Marks*, 904 F.3d at 1051 (discussing, inter alia, the historical background of Congressional drafting and passing of the TCPA). The *Allan* court was especially diligent in addressing the concern that a broad definition would potentially include smartphones in the definition of an ATDS. *See* 968 F.3d at 578 (providing a detailed analysis of its understanding of the reduced potentiality of smartphone exposure following *ACA International v. Federal Communications Commission*). The court noted that, although this is a valid point, it was effectively laid to rest in 2018, in *ACA International v. Federal Communications Commission*, when the D.C. Circuit vacated the 2015 FCC Order's interpretation. *See id.* (providing the court's opinion that the D.C. Circuit resolved the issue of smartphone exposure in *ACA International*); *see also* ACA Int'l v. FCC, 885 F.3d 687, 692 (D.C. Cir. 2018) (rejecting the 2015 FCC Order's assertion that a device could meet the TCPA's definition of an ATDS based on its potential, rather than just its present, capabilities). The *Allan* court held that the D.C. Circuit's rejection of the potential capacity argument prevents smartphones from exposure to the statute even under a broad TCPA definition of an ATDS. 968 F.3d at 578–79.

[81] *See Gadelhak*, 950 F.3d at 463 (indicating that the court felt it did not need to follow either its previous decision in *Blow v. Bijora, Inc.*, 855 F.3d 793 (7th Cir. 2017), or any previous FCC Order's interpretation of the definition of an ATDS under the TCPA). The Seventh Circuit decided *Blow* by following the FCC's 2015 interpretation of the TCPA definition of an ATDS, which the court felt was appropriate given that, at that time, the D.C. Circuit had not yet heard *ACA International*. *See id.* (providing the rationale for deciding *Blow* according to the 2015 FCC Order); *see also Blow*, 855 F.3d at 802 (interpreting an ATDS prior to *ACA International*).

[82] *See Gadelhak*, 950 F.3d at 463–64 (evaluating the four possible interpretations of an ATDS); *see also supra* note 73 and accompanying text (explaining the *Gadelhak* court's consideration of each

none of the potential interpretations were unassailable and determined that it must therefore decide which reading is the least problematic.[83]

The court held that only the first possible interpretation, that the disputed phrase applies to both the verb to "store" and the verb to "produce," survives scrutiny, even if it does not do so unscathed.[84] The court found that such a reading does not require any strain or leaps of grammatical logic.[85] By comparison, the court held that each of the other three interpretations requires either breaking rules of syntax or ignoring common grammatical sense.[86] The court

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possible reading). In its appellate role, the court addressed a fairly straightforward inquiry: did it agree with the district court's reading of the disputed phrase, and, if not, did its own construction of the phrase require a reversal of the district court's holding? *See id.* at 469 (holding that the district court's interpretation is incorrect but, regardless, AT&T's tool is not an ATDS under the TCPA).

[83] *Id.* at 465.

[84] *Id.* at 468. Ultimately, the court was able to find only mild defects in this interpretation, but at least one fatal flaw in each of the other three readings. *See id.* at 465–68 (describing the major issues with each of the other three possible interpretations).

[85] *See id.* at 464 (noting that the first interpretation is the most intuitive possible interpretation and referencing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 150 (2012)). The court concluded that the statutory definition's basic structural composition promotes this interpretation. *Id.*

[86] *See id.* at 465–68 (describing the major issues with each of the other three possible interpretations). In considering the second possibility, that the disputed phrase pertains to the telephone numbers, the court found that a reader could reasonably develop such an interpretation only by ignoring grammar rules or adding words to the statute. *Id.* at 465–66. The court noted that this was the district court's interpretation, but that it had to alter the phrase to make the desired reading work. *Id.* at 466. The instant court determined that, because the disputed phrase begins with a present participle (with an implied 'by'), it is an adverbial phrase. *Id.* at 465. An adverbial phrase cannot apply to a noun here; it must instead modify a verb or verbs. *Id.* at 465–66. For the phrase to modify the telephone numbers, it is necessary to convert the disputed phrase from an adverbial phrase to an adjectival phrase. *Id.* at 465–66. The Seventh Circuit suggested converting the phrase by supplanting the implied "by" with the past participle "generated." *Id.* at 465. The court noted that, although this added language would help to resolve confusion about the disputed phrase, it is not within the purview of the courts to insert language that the legislature did not intend. *Id.* at 466. Next the court considered the third possibility—that the phrase applies only to the verb to "produce" and has no effect on the verb to "store." *Id.* The court could not reconcile the suggestion that the telephone numbers were the objects of both verbs with the idea that somehow the subsequent adverbial phrase only applied to one of them. *Id.* Viewing the entire statement in the aggregate, readers can understand the verbs as occupying the first part of the statement, the telephone numbers as occupying the middle part, and the disputed phrase as occupying the last part. *Id.* The court noted that for this interpretation to work, the reader must allow for the middle part to modify both verbs, but for the last part to modify only one, even though there is nothing in the text to distinguish the verbs from one another with respect to objects or modifiers. *Id.* The court found that this simply does not follow fundamental grammar rules. *Id.* Finally, the court considered the fourth possibility—that the disputed phrase pertains to how devices dial numbers. *Id.* at 467–68. The court applied a structural analysis to determine that the phrase must pertain to all, not merely to some, of the language prior to it. *See id.* at 468 (noting that when a comma separates a modifying phrase from several forgoing objects, that construction indicates that the phrase modifies *all* of those objects, not just the one closest to the comma, and referencing WILLIAM N. ESKRIDGE JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 67–68 (2016)). The court concluded that the use of commas to construct the statement as a group of smaller clauses does not permit the reader to apply the disputed clause to a phrase that comes after it in the text. *Id.*

found that the primary disadvantage of the first interpretation was that it potentially rendered the verb to "store" unnecessary.[87] Although certainly a noteworthy problem, the court held that this was not of the same egregious scale and weight as usurping the fundamental rules of language and grammar.[88]

III. THE CALL FOR CLARITY: CHARACTERIZING THE SEVENTH CIRCUIT'S INTERPRETATION AND PREPARING FOR POSSIBLE PREEMPTION

In 2020, the United States Circuit Court of Appeals for the Seventh Circuit established, in *Gadelhak v. AT&T Services*, that it preferred a strictly textualist interpretation of the TCPA's definition of an ATDS rather than a reading centered on legislative intent.[89] Section A of this Part discusses the strengths and weaknesses of the Seventh Circuit's interpretive strategy in *Gadelhak*.[90] Section B analyzes the implications of *Gadelhak* on the United States Supreme Court's possible interpretations of the statutory definition of an ATDS in the pending 2020 Ninth Circuit case, *Facebook, Inc. v. Duguid*.[91]

A. Merits and Shortcomings of the Seventh Circuit's Textualist Reading

Gadelhak established that the United States Court of Appeals for the Seventh Circuit is firmly committed to a textualist approach to the interpretation of the TCPA's definition of an ATDS, joining the United States Courts of Appeals for the Third and Eleventh Circuits.[92] Although a textualist approach has merit,

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[87] *See id.* at 464 (noting that "number *stor[age]*" seems inconsistent with the functionality of a "number *generator*" (emphasis added) (quoting *Pinkus v. Sirius XM Radio, Inc.*, 319 F. Supp. 3d 927, 938 (N.D. Ill. 2018))). The court evaluated this issue from two distinct vantage points. *See id.* at 464–65 (evaluating from both a grammatical and a linguistic perspective). First, there is the purely grammatical perspective, from which the court discusses whether "storing" numbers is even a task that random or sequential number generators are capable of doing. *Id.* The court finds plausibility in this, given that there is a considerable time delay between number generating and number calling in some devices. *Id.* at 465. Such a protocol requires some form of "storage," even if only in the non-conventional sense of the term. *Id.* Second, there is the linguistic perspective, from which the court evaluates the plaintiff's argument that this interpretation does not require use of the verb to "store" in any way. *Id.* The court concedes that as a possibility, but also recognizes that the legislature could have intended some amount of verbosity in an attempt to apply the definition to the gamut of technologies. *Id.*

[88] *See id.* at 468 (holding that the first interpretation is the least problematic reading).

[89] *See* 950 F.3d 458, 464–68 (7th Cir. 2020) (illustrating the Seventh Circuit's method of precise grammatical analysis when considering the ambiguity within the TCPA's definition of an ATDS).

[90] *See infra* notes 92–102 and accompanying text.

[91] *See infra* notes 103–105 and accompanying text.

[92] *See Gadelhak*, 950 F.3d at 464–68 (focusing on the grammatical structure of the statutory definition of an ATDS); *see also* Glasser v. Hilton Grand Vacations Co., 948 F.3d 1301, 1306 (11th Cir. 2020) (stating that the disputed phrase "using a random or sequential number generator" modifies both the verb "to store" and the verb "to produce"); Dominguez v. Yahoo, Inc., 894 F.3d 116, 119 (3d Cir. 2018) (deciding to maintain its traditional position that the disputed phrase applies both to number generation and number storage). In *Gadelhak*, the Seventh Circuit committed to a purely textualist

rigid loyalty to such a strategy here produces results that neither properly effectuate the original intent of the legislature nor evolve as societal demands require.[93] By comparison, the circuit courts that apply an originalist framework can address two key rationales of the discussion that the textualist interpretations largely disregard.[94] First, the originalist reading more convincingly engages the TCPA's exceptions to the prohibited use of an ATDS.[95] Second, the

methodology. *See Gadelhak*, 950 F.3d at 464–68 (analyzing the possible technical interpretations of the phrase "using a random or sequential number generator"). The analytical approach of the *Gadelhak* opinion revealed that the court viewed the interpretation of the disputed phrase as a purely grammatical exercise, and almost all of the analysis is devoted to a punctilious review of the text. *See id.* (evaluating the grammatical readings of the text). The Third and Eleventh Circuits, however, would not be as content with a primarily textualist analysis, such as the Seventh Circuit's in *Gadelhak*. *See Glasser*, 948 F.3d at 1309–10 (recognizing the issues with an expansive interpretation); *Dominguez*, 894 F.3d at 119–20 (focusing on the present capacity issue of *ACA International v. FCC*). To the contrary, the Eleventh Circuit in particular seemed far more concerned about the limitless reach that a broad interpretation of the disputed phrase would imbue upon the statutory definition than was the Seventh Circuit. *See Glasser*, 948 F.3d at 1309–10 (referencing the same concerns the D.C. Circuit expressed in *ACA International*, as well as First Amendment concerns).

[93] *See* Marks v. Crunch San Diego, L.L.C., 904 F.3d 1041, 1051–52 (9th Cir. 2018) (noting that a strict evaluation of the statutory language cannot generate a satisfactory outcome, and that other interpretive methods are necessary). Congress has never changed the statutory language defining an autodialer under the TCPA. *Id.* at 1045. Congress has, however, granted exemptions to some specific types of activities that the statutory definition would otherwise cover, such as the use of robocalling equipment to conduct mass outreach campaigns to individuals who had previously given permission. *Id.* at 1051. The implication is that if Congress had intended the definition to be extremely narrow, and if Congress was steadfast in its opinion that the text is incontrovertible in its authority, Congress would likely have amended the statutory definition as exemptions to it developed. *See id.* (noting that the presence of exemptions in the TCPA suggests that a device that can simply call numbers from a database fits the definition of an ATDS). Moreover, if such were the case, Congress almost certainly would have amended a statutory definition that is inextricably entwined with rapidly developing technology at least once over the course of almost thirty years. *See id.* at 1051–52 (reasoning that the fact that Congress added exceptions to the TCPA without changing the definition of an ATDS suggests that Congress felt that the correct reading was the broad interpretation, not the narrow one).

[94] *Compare* Duran v. La Boom Disco, Inc., 955 F.3d 279, 284–85 (2d Cir. 2020) (discussing both the exceptions to which the ATDS proscriptions do not apply, and the fact that the textualist interpretation renders the verb to "store" unnecessary), *with Gadelhak*, 950 F.3d at 460–65 (discussing the exception issue for the most part as ancillary to grammatical concerns and largely sidestepping the point about reducing the verb to "store" to a useless redundancy).

[95] *See Marks*, 904 F.3d at 1052 (illustrating the court's view that Congress's inclusion of exceptions in the TCPA, without amending the definition of an ATDS, suggests that the definition, when properly read, allows for such exceptions). Specifically, the statute permits the use of an ATDS under emergency circumstances or when the intended recipient of a call has explicitly authorized contact. *Id.* at 1045. In 2015, Congress provided a third exception via the Bipartisan Budget Act, which permitted use of an ATDS to dial numbers where the intended call recipient owed a monetary balance to the federal government. *See* Duguid v. Facebook, Inc., 926 F.3d 1146, 1149 (9th Cir. 2019) (providing a brief history of this third exception). The Supreme Court of the United States has severed this exception from the rest of the TCPA as an unconstitutional infringement of the First Amendment because the exception gives preference to speech related to the repayment of financial obligations over other types of speech. *See* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2356 (2020) (ruling on the debt collection exception on free speech grounds). Both sides of the circuit split agree that if use of a random or sequential number generator modifies both "store" and "produce," a device would meet

originalist interpretation provides a clearly discernable function to the verb to "store," whereas the textualist reading renders the verb effectively meaningless.[96]

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the statutory definition of ATDS so long as it uses a generator to conduct *either* of those tasks. *See, e.g.*, Allan v. Pa. Higher Educ. Assistance Agency, 968 F.3d 567, 572 (6th Cir. 2020) (discussing the implications of such a reading if it applies to devices that store numbers without a number generator); *Gadelhak*, 950 F.3d at 468 (noting the court's opinion that the statutory definition engages either number storage or production). If this is true, it is unclear why the exceptions are necessary. *See Marks*, 904 F.3d at 1051–52 (providing a brief history of the exceptions and noting that, despite the need for exceptions, Congress has not amended the actual TCPA definition of an ATDS). Critical to the functioning of any law is Congress's ability to amend it to suit changing circumstances and considerations and for the law to remain clear such that judicial interpretation is not always necessary. *See* Quintin Johnstone, *An Evaluation of the Rules of Statutory Interpretation*, 3 U. KAN. L. REV. 1, 8–9 (1954) (reiterating that Congress is in a more suitable position than the judiciary to adapt to changing circumstances). Pursuant to these goals, a reading of the definition of an ATDS must give weight to the exceptions. *See Marks*, 904 F.3d at 1052 (reasoning that because Congress added the exceptions but did not simultaneously amend the definition of an ATDS, Congress intended the exceptions to work within the framework of the TCPA's original language as well as the FCC's interpretation of it). Numbers of individuals contacted in emergencies or who have previously consented to contact are not randomly or sequentially compiled, nor would such numbers be stored using a generator. *See id.* at 1051 (illustrating the practical *non sequitur* of contacting a targeted demographic using a random or sequential call technique). Agencies compile these numbers independent of a generator; the numbers are a sub-category of the agency's total call campaign, distilled from the larger volume of numbers by a process that is anything but random or sequential. *Id.* at 1051 n.7. Further, originalist interpretations question whether producing numbers with a random or sequential generator and storing them are separate processes. *See Duran*, 955 F.3d at 284 (suggesting the practical assumption that a number generator would store the same numbers it produces). If a generator produces a number, the generator must store the number in some capacity, even if the generator immediately queues the number for calling. *Gadelhak*, 950 F.3d at 464. This is fundamental to the argument that it is unnecessary for the statute to include both producing numbers using a random or sequential generator and storing numbers by the same method. *See Duran*, 955 F.3d at 284 (discussing how the textualist reading of an ATDS eliminates the need to include the word "store" in the statutory definition). The textualist response notes only that generators sometimes hold numbers queued for calling for prolonged periods of time and that such activity represents a form of storage. *See Gadelhak*, 950 F.3d at 464–65 (giving examples of machines that store for extended periods before calling). Thus, for an interpretation of the statutory definition of an ATDS to grant proper consideration to the exceptions, the interpretation must concede that Congress intended for a device that stores numbers without the use of a number generator to fit within the definition of an ATDS. *See Marks*, 904 F.3d at 1051–52 (discussing the implications of Congress choosing to add the exceptions but choosing not to amend the statutory definition).

[96] *Duran*, 955 F.3d at 284. There is a question as to whether a random or sequential number generator is even capable of storing numbers in the manner the legislature envisioned in enacting the statute. *See Allan*, 968 F.3d at 572 (noting that it is difficult to understand how a device used to generate numbers could also store them) (quoting *Gadelhak*, 950 F.3d at 464)). The Seventh Circuit addressed this question in *Gadelhak* by posing the hypothetical yet realistic scenario where the period between the generator producing a number and actually calling the number is prolonged in duration, requiring the device to store the number in some fashion. *Gadelhak*, 950 F.3d at 465. In so doing, the *Gadelhak* court failed to consider that the question does not really engage an issue of fact; rather, it is primarily rhetorical. *Allan*, 968 F.3d at 572–73. The point in raising the question is to illustrate that the words "generator" and "produce" relate to the same basic functionality of creation; storage is an altogether different concept. *Id.* Thus, it makes perfect etymological sense for the disputed phrase to apply only to "produce," even if the manner in which it does so does not conform perfectly to the rules

Although an originalist reading engages these rationales more compellingly than a textualist reading, neither model persuasively distinguishes an ATDS from modern smartphones.[97] The potential exposure of smartphones to

of grammar. *Id.* Further, even if a generator can store numbers, it seems far more likely that the device would store the numbers it actually generated, rather than numbers it imported from an external source, such as manually-compiled lists of numbers selected for calling. *See Duran*, 955 F.3d at 284 (noting that it makes sense that a device that produces numbers could also store them in some way); *see also Allan*, 968 F.3d at 573 (explaining that if a generator is capable of storage, it would do so as a complementary process to the device's primary purpose). The textualist response to these problems is to suggest that the legislature recognized the highly technical nature of robocalling and intentionally included unnecessary synonyms to ensure the statutory definition applied to the breadth of available technologies. *See Gadelhak*, 950 F.3d at 465 (noting that including extra words can be indicative of a cover-all-bases approach); *Glasser*, 948 F.3d at 1307 (same). "Sometimes drafters *do* repeat themselves and *do* include words that add nothing of substance, either out of a flawed sense of style or to engage in the ill-conceived but lamentably common belt-and-suspenders approach." *Gadelhak*, 950 F.3d at 465 (quoting SCALIA & GARNER, *supra* note 85, at 176–77). Although this point is well-founded, it fails to resolve the key practical question: does the TCPA target *the act* of storing numbers for an en-masse call campaign or does it merely target *the use of a generator* to do so? *See Allan*, 968 F.3d at 573 (giving a hypothetical example of how an autodialer can avoid the Seventh Circuit's definition). The question of targeting exposes a significant weakness of the textualist approach. *Id.* If a device can mass produce, mass store, and mass call numbers, but does not utilize a generator to do so, the textualist reading holds that such a device is not an ATDS; thus, the TCPA does not prohibit its use. *Id.* Congress passed the TCPA to safeguard the privacy of domiciliary telephone consumers. *See Duguid*, 926 F.3d at 1149 (noting the legislative purpose of the TCPA); *see also* Howard E. Berkenblit, *Can Those Telemarketing Machines Keep Calling Me?—The Telephone Consumer Protection Act of 1991 After* Moser v. FCC, 36 B.C. L. REV. 85, 95–96 (1994) (noting that Congress passed the TCPA to protect against several intrusions to personal privacy and personal safety, including usurpation of answering machine resources and tying up of telephone lines during emergencies). The textualist reading provides a safe harbor for telemarketers to the detriment of both consumers and the TCPA. *See Allan*, 968 F.3d at 573 (noting that under the textualist reading, an actor engaged in robocalling could avoid liability under the TCPA simply by using two different systems: one to generate numbers and one to house and call them).

[97] *Compare Allan*, 968 F.3d at 578 (discussing how the key issue is whether the device specifically operates as an autodialer), *with Gadelhak*, 950 F.3d at 467 (explaining the practical impact of the broader interpretation, which exposes smartphones to the statute), *and Glasser*, 948 F.3d at 1309–10 (offering an additional example of voice activation technology, such as Siri, Alexa, and Cortana, placing calls that the broad definition would cover). Admittedly, this is a difficult problem, though the courts agree that they must resolve it for the TCPA to remain effective against contemporary robocalling techniques. *See, e.g.*, *Allan*, 968 F.3d at 578 (noting the significant role that the evolution of technology has in determining the best interpretation of the statutory definition). The FCC has also faced frustration in clarifying the definition. *See Marks*, 904 F.3d at 1045–46 (demonstrating the FCC's repeated efforts to clarify the definition). In *ACA International v. Federal Communications Commission*, in 2018, the D.C. Circuit made it clear that it was concerned both that the 2015 FCC Order's interpretation had the potential for devastating overreach to individual consumers and, also, that the FCC had attempted to skirt that issue by playing to proponents of both sides of the discussion. *See* 885 F.3d at 702–03 (holding that the FCC's position was untenable because it simultaneously adopted contrary positions on what the statutory definition means). In rendering its opinion in *ACA International*, the D.C. Circuit was particularly cautious of the fact that the FCC's 2015 Order simultaneously maintained that an ATDS was both any device that uses a random or sequential generator to produce numbers, and also any device that could use a non-generator-manufactured list. *See id.* (taking issue with the FCC for not directly resolving the question of what functionality defines an ATDS). To the D.C. Circuit, and to the average person unfamiliar with the technical workings of autodialers, these

the statute is a slippery slope.[98] Thus, the textualist approach is far safer as the scope of its narrow definition extends only to devices that are autodialers in the most conventional sense, sparing personal smartphones from liability.[99] The originalist response often cites back to the D.C. Circuit's 2018 decision in *ACA International v. Federal Communications Commission* and holds that a modern smartphone is not an ATDS solely because it does not have the innate ability to contact numbers it stores without human involvement.[100] Although this approach allows the statute to extend to modern robocalling devices, it has the potential to be overly dismissive of an issue with such highly technical considerations.[101] Further, the approach fails to characterize and evaluate presently-

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seem like contrary characteristics and, thus, the 2015 FCC Order fails to provide clarity on this issue. *See id.* (noting that the D.C. Circuit vacated the 2015 FCC Order partly because the Order sanctioned two contradictory interpretations of the statutory definition of an ATDS).

[98] *See Glasser*, 948 F.3d at 1309 (agreeing with the D.C. Circuit's rejection of the 2015 FCC Order's interpretation of the statutory definition of an ATDS on the basis that the Order's definition broadens the scope of applicable devices to unacceptable levels (quoting *ACA Int'l*, 885 F.3d at 698)).

[99] *See Allan*, 968 F.3d at 578–79 (illustrating the potential reach of the more expansive definition). The textualist argument hinges on the fact that, although smartphones do not have the innate capacity to use random or sequential generators either for number storage or number production, they *do* rely heavily on the ability to store telephone numbers that users import to them for later calling or texting. *See id.* at 578 (summarizing the Eleventh and Seventh Circuits' example of default smartphone technology that could satisfy the definition of an ATDS under the broad reading (first quoting *Glasser*, 948 F.3d at 1309; and then quoting *Gadelhak*, 950 F.3d at 467)). For the textualist, this makes the originalist reading unsustainable because it exposes personal telephonic devices to regulation under the TCPA, even if they were never designed to function as an ATDS for en-masse autodialing. *See Gadelhak*, 950 F.3d at 467 (noting that personal smartphone use is outside the scope of the TCPA's purpose). The textualist argument would be far more convincing, however, if the D.C. Circuit had not previously addressed this issue by rejecting the idea that a device could be an ATDS if it had the capability for modification as such, even if it did not have the present ability to meet the statutory definition. *Allan*, 968 F.3d at 578.

[100] *See Allan*, 968 F.3d at 578–79 (explaining that because the TCPA only implicates automatic processes, it does not cover manual smartphone calls and texts). The FCC maintained that a device should meet the definition of an ATDS even if it is not currently engaged in a prohibited process, but nonetheless has the ability to so engage if altered or augmented (including via software). *See id.* at 578 (illustrating that all smartphones have the potential for upgrades or modifications to operate as the type of devices the TCPA prohibits (quoting *ACA Int'l*, 885 F.3d at 696 (D.C. Cir. 2018))). The D.C. Circuit denied this idea in *ACA International*, holding that such an idea stretched the statute far beyond what the Legislature had intended. *Id.* Thus, for the originalist, if a smartphone does not currently function as an ATDS, it is not subject to the TCPA; future capabilities of the smartphone are irrelevant. *Id.* Critics of the present function argument assert that it relies too heavily on the D.C. Circuit's opinion in *ACA International* and too blithely dismisses the ability of stock smartphone technology to store numbers and call them without human engagement. *See id.* (holding that the textualist concern on this issue is wholly unsubstantiated because of the D.C. Circuit's decision on *ACA International* (quoting *Gadelhak*, 950 F.3d at 467)). This is surprising, given how hard the originalist strategy fights to include storage of numbers without use of a generator into the definition of an ATDS. *See Duran*, 955 F.3d at 286–87 (illustrating the originalist argument that Congress intended an expansive reading of the TCPA to limit certain telemarketing activities).

[101] *See Allan*, 968 F.3d at 579 (focusing only on presently available technology and how current users deploy it).

available technologies properly and disregards the manner in which communications technology is likely to continue to develop.[102]

B. Possible Preemption by the Supreme Court of the United States

The Supreme Court of the United States will soon clarify the definition of an ATDS under the TCPA, as the Court looks to decide *Facebook, Inc. v. Duguid*.[103] The case derives from the United States Court of Appeals for the Ninth Circuit, which had previously held that the originalist, expansive definition of an ATDS is correct.[104] If the Supreme Court holds that a strictly textualist reading is proper, *Gadelhak* could be exceptionally influential in the Court's opinion, as *Gadelhak* focuses almost entirely on grammatical analysis.[105]

CONCLUSION

The Seventh Circuit took the safe route in *Gadelhak*. The court ruled that the correct definition of an ATDS under the TCPA derives from the purest possible grammatical reading of the language, which the court felt effectuates the written words and prevents statutory overreach as much as possible. Although

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[102] *See id.* (dismissing the seriousness of broadening the definition to certain smartphone capabilities based on the phones' current operations).

[103] *Facebook Inc. v. Duguid*, SCOTUSBLOG, *supra* note 22.

[104] *See* Duguid v. Facebook, Inc., 926 F.3d 1146, 1151 (9th Cir. 2019) (holding that the definition of an ATDS in *Marks v. Crunch San Diego, L.L.C.*, 904 F.3d at 1052, controls). Facebook argued for a narrower definition, citing the slippery slope paradigm that the broad definition potentially extends to smartphones. *Id.* Facebook further argued that it stored numbers for contact only in the event of a suspected privacy or security breach. *Id.* To Facebook, such security protocols are *reactive* efforts and, because the TCPA defines an ATDS as equipment that generates or stores numbers to be called on *enterprising* terms, the definition does not apply to Facebook's activities here. *Id.* at 1151–52. The court was unmoved, holding that Facebook's distinctions did not alter the statutory definition of an ATDS. *Id.* at 1152. It is noteworthy, however, that the Ninth Circuit considered the definition within the context of evaluating whether Duguid's complaint was sufficient to survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6); it did not provide an analysis of the merits of Duguid's claim. *Id.*

[105] *See Gadelhak*, 950 F.3d at 463–64 (illustrating that the *Gadelhak* opinion is a precise examination of each possible interpretation according to its grammatical and syntactical merits). Notably, recent Supreme Court appointee and Seventh Circuit Judge Amy Coney Barrett is the author of the *Gadelhak* opinion. *See id.* at 460 (noting the opinion's authorship); Amy Howe, *Barrett Nomination Moves to Senate Floor*, SCOTUSBLOG, https://www.scotusblog.com/2020/10/barrett-nomination-moves-to-senate-floor/ [https://perma.cc/U5RZ-P363] (last visited Oct. 26, 2020). Given that *Gadelhak* repeatedly cited *Marks* as the controlling case of the Ninth Circuit on the issue, and the fact that *Gadelhak* makes no mention whatsoever of *Duguid*, *Gadelhak* provides no insight on whether the Seventh Circuit felt that *Duguid* provides any unique contributions to the circuit split worthy of consideration. *See Gadelhak*, 950 F.3d at 466 (focusing only on the *Marks* interpretation in the Ninth Circuit). Should the Supreme Court uphold the Ninth Circuit's ruling in *Facebook*, the Supreme Court's decision will preempt the Seventh Circuit's holding in *Gadelhak*. *See* U.S. CONST. art. VI, cl. 2. (stating that Supreme Court decisions preempt lower court rulings); *see also Gadelhak*, 950 F.3d at 463–64 (demonstrating the Seventh Circuit's meticulous grammatical analysis in determining the TCPA definition of an ATDS).

these are reasonable objectives, the holding in *Gadelhak* is ultimately unsatisfying, as it fails to engage the legitimate strengths of a more expansive definition and frustratingly limits TCPA protections to equipment that is either obsolete or soon will be. The court did not need to commit so strictly to textual analysis, particularly at the expense of finding middle ground between offering protection to consumers from modern robocalling systems and exposing personal smartphones to the statute. As a result, *Gadelhak* merely chooses a side and wastes the opportunity to provide fresh ideas to an issue that will soon be decided by the Supreme Court of the United States.

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