No. 21-14045

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Coy Evans, et al,

Plaintiffs/Appellants,

v.

Ocwen Loan Servicing, LLC,

Defendant/Appellee.

Appeal from the United States District Court
for the Southern District of Florida

No. 9:18-cv-81394
The Honorable Robin L. Rosenberg, U.S. District Court Judge

APPELLANT'S OPENING BRIEF

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No. 21-14045
Coy Evans, et al v. Ocwen Loan Servicing, LLC

Certificate of Interested Persons and Corporate Disclosure Statement

Appellants submit that the following persons and entities have an interest in the outcome of this case, listed alphabetically:

1. Adams, Jeffrey, *Appellant*
2. Adams, Joseph M., *Counsel for Appellants*
3. Beach, Jason M., *Counsel for Appellee*
4. Brown, Bernard, *Appellant*
5. Dudley, Albert, *Appellant*
6. Evans, Coy, *Appellant*
7. Giello, Michael, *Appellant*
8. Hunton, Andrews, Kurth, LLP, *Counsel for Appellee*
9. Jupin, Katherine, *Appellant*
10. Jupin, Victoria, *Appellant*
11. Lattanzio, James, *Appellant*
12. Law Office of Joseph M. Adams, *Counsel for Appellants*
13. Malouf, Aliza, *Counsel for Appellee*

14. Maney & Gordon, P.A., Counsel for Appellants

15. Mitchell, David P., *Counsel for Appellants*

16. Neba, George, *Appellant*

17. Ocwen Loan Servicing, LLC, *Appellee*

18. Otero, Brian V., *Counsel for Appellee*

19. Oudyk, Timothy, *Appellant*

20. Pearson, Wendy, *Appellant*

21. Picuri, Debra, *Appellant*

22. Robinson, Stanley, *Appellant*

23. Rosenberg, Hon. Robin L., *U.S. District Court Judge*

24. Scioli, Haylie, *Appellant*

25. Swanson, Edrei, *Counsel for Appellee*

26. Sweeney, James, *Appellant*

27. Zehner, Dawn, *Appellant*

I hereby certify, pursuant to 11th Circuit Rule 26.1-3(b), that to the best of my knowledge, no publicly traded company or corporation has an interest in the outcome of the case or appeal.

Statement Regarding Oral Argument

Appellants respectfully request oral argument in this appeal, which concerns the district court's Order granting Appellees' Motion to Dismiss the Amended Consolidated Complaint, with prejudice. Because this appeal involves the interpretation of federal statutory text, and the application of holdings by the United States Supreme Court and a prior panel of this Court to the factual allegations asserted in the operative Complaint, Appellants submit that oral argument will assist the Court in analyzing the relevant record materials and deciding the complex legal issues presented in this appeal.

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Jurisdictional Statement

Appellants brought the consolidated action below against Appellee Ocwen Loan Servicing, LLC ("Ocwen"), asserting violations of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, *et seq*. ("TCPA") and the Florida Consumer Collection Practices Act, Fla. Stat. § 559.55, *et seq*. ("FCCPA"). The United States District Court for the Southern District of Florida had jurisdiction under 28 U.S.C. § 1331. *See Mims v. Arrow Fin. Servs.*, LLC, 565 U.S. 368, 377, 132 S.Ct. 740, 181 L.Ed.2d 881 (2012) (holding that "federal and state courts have concurrent jurisdiction over private suits arising under the TCPA").

On November 16, 2021, Appellants timely filed their Notice of Appeal. Doc 78. This appeal is from the District Court's Order Granting Ocwen's Motion to Dismiss dated October 21, 2021. Doc 77. This Court has jurisdiction under 28 U.S.C. § 1291.

Statement of the Issues

This appeal arises from the District Court's order granting Ocwen's Motion to Dismiss the Appellants' Amended Consolidated Complaint, with prejudice. As to Appellants' TCPA claim, the court held that Appellants failed to sufficiently allege that Appellee initiated the telephone calls at issue using an artificial or prerecorded voice, or an "automatic telephone dialing system" ("ATDS") as defined by the TCPA. The court failed to acknowledge Appellants' allegations that Defendant violated the TCPA by initiating calls using a prerecorded message without their prior express consent. Finally, the court declined to exercise supplemental jurisdiction of Appellants' state-law FCCPA claim.

Issue:

Whether the District Court erred in granting Ocwen's Motion to Dismiss Appellants' TCPA claim by (1) erroneously interpreting the TCPA's statutory text defining an ATDS, (2) erroneously interpreting the scope of the Supreme Court's holding in *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021), (3) failing to adhere to this Court's prior panel precedent in *Glasser v. Hilton Grand Vacations Co., LLC*, 948 F.3d 1301 (11th Cir. 2020), (4) ignoring Appellants' allegations that Defendant violated the

TCPA by initiating calls using a prerecorded message without their prior express consent, and (5) failing to accept Appellants' allegations as true and evaluate all plausible inferences derived from those facts in favor of the Appellants.

Standard of Review:

Because this appeal involves a challenge to an order granting a motion to dismiss, the standard of review is *de novo*. *Lucas v. Fox News Network, LLC*, 248 F.3d 1180 (11th Cir. 2001) ("We review a dismissal for failure to state a claim *de novo*"). "The standard of review for a motion to dismiss is the same for the appellate court as it was for the trial court." *Id*. (citation omitted). "A motion to dismiss will be granted only when the movant demonstrates 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id*. (quoting *Conley v. Gibson,* 355 U.S. 41, 45-56, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)).

Statement of the Case

This action was originally filed by Appellant Coy Evans on October 16, 2018. Doc 1. The Complaint by Appellant Evans was the first of several similar lawsuits filed against Appellee Ocwen in the U.S. District Court for the Southern District of Florida, asserting similar claims for violation of the TCPA, and filed by the same original counsel for plaintiffs at the time. Those actions were subsequently consolidated and stayed by the district court on January 14, 2019, pending guidance by the FCC concerning the interpretation of the type of equipment that qualifies as an ATDS under the TCPA. Doc 41.

On April 19, 2021, the parties filed a Joint Status Report, advising the district court that the FCC had not yet issued any guidance, but that the Supreme Court had recently issued its decision in Facebook v. Duguid, 141 S.Ct. 1163 (2021), and requested that the stay be lifted by the Court and that the cases be consolidated into a single case for purposes of pretrial matters in common to all cases. Doc 54.

On May 19, 2021, the district court entered its Order Opening Case, thereby lifting the stay that was previously entered, and directing the plaintiffs to file a consolidated amended complaint. Doc 57.

On July 23, 2021, Appellants filed their Amended Consolidated Complaint (Doc 66) which asserted, in relevant part, a claim against Ocwen for violation of the TCPA, and included the following factual allegations relevant to their TCPA claim, in pertinent part:

> 20. Plaintiffs know that some or all of the calls the Defendant made to Plaintiffs' cellular telephone number were made using an "automatic telephone dialing system" (ATDS) which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator (including but not limited to a predictive dialer) or an artificial or prerecorded voice; and to dial such numbers as specified by 47 U.S.C. § 227(a)(1).
>
> 24. Specifically, Defendant called Plaintiffs using the "Aspect" dialing system, which consists of functionally complimentary hardware and software components, including an integrated and interconnected database server that has the capacity to generate tables of 10-digit random and sequential numbers and then dial those numbers using outbound dialing software. Moreover, the "Aspect" dialing system uses its integrated random and sequential number generator functions to sort the telephone numbers that will be called during outbound call campaigns, and to determine the dialing sequence used during said calling campaigns. As such, the "Aspect" dialing system possessed at all material times the inherent and present capacity to operate as an ATDS as defined by the TCPA.
>
> 26. Plaintiffs received prerecorded messages from Defendant.
>
> 27. Defendant placed calls to Plaintiffs using an artificial or prerecorded voice in violation of 47 U.S.C. § 227(b)(1)(A).

> 30. On several occasions since Defendant's campaign of calls began, Plaintiffs spoke with Defendant's representatives by phone and instructed Defendant's agent(s) to stop calling their cellular telephone numbers.
>
> 31. During the aforementioned calls with Defendant's agents/representatives, Plaintiffs unequivocally revoked any express consent Defendant may have had for placement of telephone calls to Plaintiffs' aforementioned cellular telephone numbers by the use of an automatic telephone dialing system or a pre-recorded or artificial voice.
>
> 32. Each subsequent call the Defendant made to the Plaintiffs' aforementioned cellular telephone numbers was done so without the "express consent" of the Plaintiff.
>
> 37. Defendant has a corporate policy to use an automatic telephone dialing system or a pre-recorded or artificial voice, just as they did to the Plaintiffs' cellular telephone numbers in this case, with no way for the consumer, or Defendant, to remove the number.
>
> 58. Defendant willfully and/or knowingly violated the TCPA with respect to Plaintiffs by repeatedly placing non-emergency calls to their aforementioned cellular telephone numbers using an automated telephone dialing system and/or prerecorded or artificial voice message without Plaintiff's prior express consent, and after Plaintiff instructed Defendant to discontinue calling Plaintiffs, as specifically prohibited by the TCPA, 47 U.S.C. §227(b)(1)(A)(iii).

Doc 66, ¶¶ 20, 24, 26, 27, 30-32, 37, 58.

On August 23, 2021, Ocwen filed its Motion to Dismiss the Amended Consolidated Complaint, arguing, in relevant part, that Appellants failed to state a TCPA claim because the Amended

Consolidated Complaint failed to plausibly allege that Ocwen used an ATDS or a prerecorded voice message to call the Appellants. Doc 67.

On October 1, 2021, Appellants filed their Response in Opposition to Ocwen's Motion to Dismiss. Doc 75. On October 21, 2021, Ocwen filed its Reply in Further Support of its Motion to Dismiss. Doc 76.

On October 21, 2021, the district court entered its Order Granting Defendant's Motion to Dismiss, with prejudice. Doc 77. In its order, the district court held that the Appellants' allegations concerning the dialing system used by Ocwen to initiate the calls did not qualify as an ATDS as defined by the Supreme Court's decision in *Facebook, Inc. v. Duguid,* 141 S. Ct. 1163 (2021). Critically, the district court's order completely disregarded the portion of Appellants' TCPA claim that was predicated on the allegations that Ocwen called using a prerecorded message.

With regard to the Appellants' ATDS allegations, the district court noted that the Supreme Court summarized the issue before it in *Duguid* as follows:

> The question before the Court is whether that definition encompasses equipment that can "store" and dial telephone numbers, even if the device does not "us[e] a random or sequential number generator." It does not. To qualify as an "automatic telephone dialing system," ***a device must have the capacity*** either to store a telephone number using a

> random or sequential generator or to produce a telephone number using a random or sequential number generator.

Doc 77, pg. 2 (quoting *Duguid*, 141 S.Ct at 1167) (emphasis added).

From this, the district court concluded that "[t]he Supreme Court defined the narrow class of machines that qualifies as an autodialer under the TCPA—only a machine that ***utilizes*** a random or sequential number generator and places a call using the same can qualify as an autodialer." Doc 77, pgs. 2-3 (emphasis added). The court held that "[t]his definition differs from the broad definition sought by plaintiff which classified any machine with the *capacity* to generate random numbers as an autodialer." *Id*. at pg. 3 (emphasis in original). The district court held that "under this broad definition, even a cell phone would qualify as an autodialer." *Id*. "Distilled down," the court continued, "the plaintiff requested a definition of autodialer that would include any device that possessed the capability to dial a phone number without human intervention." *Id*.

The district court's order goes on to note that "Plaintiffs argue that [*Duguid*] does not preclude their claims because [*Duguid*] left open the possibility that a machine with the capacity to generate random or sequential phone numbers still qualifies as an

autodialer, even if it did not use the random number generation as part of a specific phone call." *Id*. at pg. 4. The order continues: "The [c]ourt does not agree with the Plaintiffs' position for three reasons," which can be summarized as (1) the text of the *Duguid* decision, (2) the *Duguid* decision's rejection of the notion that dialing without human intervention is the hallmark of an autodialer, and (3) other district court cases which reached similar conclusions. *Id*.

On November 16, 2021, Appellants timely filed their Notice of Appeal. Doc 78. This appeal follows. For the reasons explained below, Appellants submit that the district court erred in granting Ocwen's motion to dismiss with prejudice, and the district court's order (Doc 77) should accordingly be reversed by this Court.

Summary of the Argument

In the challenged order on appeal, the district court significantly misapplied and misinterpreted the applicable law and factual allegations. The District Court erred in concluding that the allegations in the Complaint did not sufficiently allege that telephone dialing system used by Ocwen to place the calls at issue constituted an ATDS under the TCPA, and erred in ignoring Appellants' allegations that Ocwen violated

the TCPA by initiating calls using a prerecorded message without Appellants' prior express consent.

First, the district court's conclusion that Appellants failed to allege the use of an ATDS was predicated on its misinterpretation of the scope of the Supreme Court's decision in *Duguid*, which the district court interpreted as holding that a dialing system *must always* dial random or sequential telephone numbers to qualify as an ATDS for any given call. Consequently, the district court's misinterpretation of the Supreme Court's decision effectively re-writes the statutory text of the TCPA by eliminating the word "capacity" from the definition of an ATDS, thereby violating one of the cardinal canons of statutory construction and disregarding this Court's prior panel precedent in *Glasser v. Hilton Grand Vacations Co., LLC*, 948 F.3d 1301 (11th Cir. 2020).

Second, the district court's Order Granting Ocwen's Motion to Dismiss the Amended Consolidated Complaint with prejudice completely overlooked Appellants' alternative basis for Ocwen's TCPA liability, predicated on the allegations that Ocwen initiated the calls at issue using a prerecorded message without their prior express consent, in violation of 47 U.S.C. § 227(b)(1)(A). The district court's failure to even

acknowledge the Appellants' alternative basis for TCPA liability in its order dismissing Appellants' TCPA claim with prejudice is clear error on its face.

Argument

I. The District Court Erred in Concluding that Appellants Failed to Allege the Use of an ATDS

A. The District Court Misinterpreted the Scope of Duguid

The TCPA provides that "[t]t shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

> (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—
>
> > (iii) to any telephone number assigned to a … cellular telephone service [];

47 U.S.C. § 227(b)(1). The statute defines an "automatic telephone dialings system" ("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) (emphasis added).

In the challenged order on appeal, the district court made a number of interpretive errors concerning the Appellants' allegations and arguments concerning Ocwen's use of an ATDS, and the scope of the Supreme Court's decision in *Duguid* as applied to the Appellants' allegations and arguments regarding that component of Appellants TCPA claim. Specifically, the district court improperly concluded that the Supreme Court's holding in *Duguid* stands for the proposition that "only a machine that ***utilizes*** a random or sequential number generator and places a call using the same can qualify as an autodialer." Doc 77, pgs. 2-3 (emphasis added). Read in context, the *Duguid* decision includes no such holding. The district court's order incorrectly interprets certain language in the reasoning of the *Duguid* decision as an express holding that the term "capacity" has been written out of the statutory definition of an ATDS.

By way of example, the district court states: "the text of [Duguid] is clear: 'In sum, Congress' definition of an autodialer requires **that in all cases**, whether storing or producing numbers to be called, the equipment in question **must use a random or sequential number generator**.'" Doc 77, at pg. 5 (emphasis in original) (quoting *Duguid*, 141 S.Ct. at

1170)). But the district court's conclusion fails to assign proper context to the quoted passage. While the language may appear to speak in absolutes, that is simply because it was dealing with the closed factual universe involved in the question presented on certiorari. That being, whether the proper interpretation of the phrase "using a random or sequential number generator" in the statutory ATDS definition modifies both antecedent terms—"store" and "produce"—or only "produce." In other words, whether a dialing system qualifies as an ATDS even if it only has the capacity to dial numbers from a stored list, but lacks the capacity to "store" telephone numbers to be called "using a random or sequential number generator" or to "produce" telephone numbers to be called "using a random or sequential number generator."

As the *Duguid* decision states in introducing the conflict among the circuits giving rise to its decision to grant certiorari, it rejected the interpretation that a device "need only have the capacity to 'store or produce numbers to be called' and 'to dial such numbers automatically.'" *Duguid*, 141 S.Ct. at 1168. The Court then states as follows, in explaining its reason for granting certiorari:

> We granted certiorari to resolve a conflict among the Courts of Appeals regarding whether an autodialer must have the

> capacity to generate random or sequential phone numbers. We now reverse the Ninth Circuit's judgment.

Id. at 1168-69.

The Court then proceeds to couch its ultimate conclusion in the context of the competing arguments before it:

> Facebook argues the clause 'using a random or sequential number generator' modifies both verbs that precede it ('store' and 'produce'), while Duguid contends it modifies only the closest one ('produce'). We conclude that the clause modifies both, specifying how the equipment must either 'store' or 'produce' telephone numbers. Because Facebook's notification system neither stores nor produces numbers 'using a random or sequential number generator,' it is not an autodialer.

Id. at 1169.

Thus, when viewed in the context of the above quoted argumentative framework, it becomes clear that the language the district court extracted from *Duguid* as standing for the proposition that a device only qualifies as an ATDS if it dials randomly or sequentially generated telephone numbers was merely used by the Supreme Court to emphasize its *reasoning* for interpreting the phrase "random or sequential number generator" as modifying both "store" and "produce" rather than only "produce." To that end, as this Court has previously observed: "[t]he Supreme Court reminds us that '[t]there is, of course, an important

difference between the holding in a case and the reasoning that supports that holding.'" *Atl. Sounding Co. v. Townsend*, 496 F.3d 1282, 1284 (11th Cir. 2007), *aff'd and remanded*, 557 U.S. 404, 129 S. Ct. 2561, 174 L. Ed. 2d 382 (2009) (quoting *Crawford-El v. Britton,* 523 U.S. 574, 118 S.Ct. 1584, 1590, 140 L.Ed.2d 759 (1998)). Furthermore, as addressed in more detail *infra*, this Court has on several occasions emphasized the principle that "[o]bedience to a Supreme Court decision is one thing, extrapolating from its implications a holding on an issue that was not before that Court in order to upend settled circuit law is another thing." *Id*. (quoting *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.*, 475 F.3d 1228, 1230 (11th Cir.2007)).

Clearly, the issue before the Supreme Court in *Duguid* did not involve the question presented here—whether a dialing system that possesses the *capacity* to perform the statutory functions of an ATDS, but does not used those functions for a given call, still qualifies as an ATDS with regard to calls in which those functions are not used. The district court's conclusion that *Duguid* answers that specific question in the negative not only fails to consider the language of the decision within the expressly limited context of the competing arguments that framed the

issue that was before the Supreme Court, it also violates one of the cardinal cannons of statutory construction by rendering the statutory term "capacity" in the ATDS definition entirely meaningless.

"It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *United States v. Garcon*, 997 F.3d 1301, 1305 (11th Cir. 2021) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) ("We are 'reluctant to treat statutory terms as surplusage in any setting' [] and we decline to do so here") (internal citations omitted))); *see also Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166, 125 S. Ct. 577, 583, 160 L. Ed. 2d 548 (2004) (if statute were read as proposed, "then Congress need not have included the explicit 'during or following' condition. In other words, Aviall's reading would render part of the statute entirely superfluous, something we are loath to do").

Not only does the Supreme Court's decision in *Duguid* lack an express holding that the term "capacity" should be disregarded by courts when interpreting whether equipment qualifies as an ATDS, its

conclusion states precisely the contrary, affirming that a device is indeed defined by its "capacity" to perform the requisite statutory functions:

> To qualify as an "automatic telephone dialing system," ***a device must have the capacity*** either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator.

Duguid, 141 S.Ct at 1167.

The district court's order also completely misconstrues Appellants' allegations and the arguments advanced by Appellants in their memorandum in opposition to the motion to dismiss. By way of example, the district court's order states that under "the broad definition sought by the plaintiff which classified any machine with the *capacity* to generate random numbers as an autodialer … even a cell phone would qualify as an autodialer." Doc 77 at pg. 3. The order further states: "Distilled down, the plaintiff requested a definition of autodialer that would include any device that possessed the capability to dial a phone number without human intervention." *Id*. No reading of Appellants' allegations or supporting arguments could support the district court's aforementioned characterizations.

To begin with, as the record makes clear, Appellants' never so much as suggested—nonetheless requested—a definition of an ATDS that remotely resembles the "distilled down" definition the district court represented in the above quoted passage from the order. The Appellants plainly requested that an ATDS be defined according to its express statutory language, which defines an ATDS as equipment having the *capacity* to perform the statutory functions, not equipment that *must utilize* those functions in every covered call. Because the latter interpretation, which the district court adopted in dismissing Appellants' TCPA claim, renders the term "capacity" void, and because the term "capacity" has not been removed from the statute by an act of Congress or an express ruling to that effect by the Supreme Court, the district court's holding was erroneous, and should be reversed by this Court. Furthermore, as explained below, the district court's interpretation was erroneous in that it ignored this Court's binding decision in *Glasser*, which was cited by the Supreme Court with approval in *Duguid*.

B. This Court's Prior Panel Precedent Rule Requires Reversal

Under this Court's prior precedent rule, "a panel cannot overrule a prior one's holding even though convinced it is wrong." *United States v.*

Steele, 147 F.3d 1316, 1317–18 (11th Cir. 1998) (citing *Cargill v. Turpin,* 120 F.3d 1366, 1386 (11th Cir.1997) ("The law of this circuit is 'emphatic' that only the Supreme Court or this court sitting en banc can judicially overrule a prior panel decision."), *cert. denied,* 523 U.S. 1080, 118 S.Ct. 1529, 140 L.Ed.2d 680 (1998); *United States v. Hogan,* 986 F.2d 1364, 1369 (11th Cir.1993) ("[I]t is the firmly established rule of this Circuit that each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled en banc, or by the Supreme Court.").

Furthermore, "[u]nder [the] prior panel precedent rule, a later panel may depart from an earlier panel's decision only when the intervening Supreme Court decision is 'clearly on point.'" *Townsend*, supra, 496 F.3d at 1284 (quoting *Garrett v. Univ. of Ala. at Birmingham Bd. of Trustees,* 344 F.3d 1288, 1290-92 (11th Cir.2003) (concluding that an intervening Supreme Court decision did not "implicitly overrule" a prior circuit decision because the cases dealt with different issues and were not "clearly inconsistent").

As this Court observed in *Townsend*, "[t]he Supreme Court reminds us that '[t]here is, of course, an important difference between the holding

in a case and the reasoning that supports that holding.'" *Id.* (quoting *Britton,* supra, 523 U.S. 574, 118 S.Ct. at 1590). "So, that the reasoning of an intervening high court decision is at odds with that of our prior decision is no basis for a panel to depart from our prior decision." *Id.* Critically, in *Townsend*, this Court observed its prior recognition of the principle that **"[o]bedience to a Supreme Court decision is one thing, extrapolating from its implications a holding on an issue that was not before that Court in order to upend settled circuit law is another thing."** *Id.* (emphasis added) (quoting *Main Drug,* supra, 475 F.3d at 1230) (concluding that the Supreme Court's determination that the time requirement in Fed.R.Crim.P. 33 was not jurisdictional did not "relieve[] us from the obligation to follow our prior panel decisions holding that the requirements of Appellate Rule 5 are jurisdictional"); *also citing Smith v. GTE Corp.,* 236 F.3d 1292, 1303 (11th Cir.2001) ("[W]e categorically reject any exception to the prior panel precedent rule based upon a perceived defect in the prior panel's reasoning or analysis as it relates to the law in existence at that time."); *Fla. League of Prof'l Lobbyists, Inc. v. Meggs,* 87 F.3d 457, 462 (11th Cir.1996) ("[W]e are not at liberty to disregard binding case law

that is so closely on point and has been only weakened, rather than directly overruled, by the Supreme Court.").

Against this backdrop of authority, it must be observed that the sole issue before the Supreme Court in *Duguid*—for which it granted certiorari in order to resolve a circuit court split—was the narrow issue of whether the phrase "using a random or sequential number generator" in the statutory text defining an ATDS applied to both "store" and "produce" as this Court concluded in *Glasser*, or only to "produce" as the Ninth Circuit concluded in *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1053 (9th Cir. 2018). As the Supreme Court expressly stated:

> We granted certiorari to resolve a conflict among the Courts of Appeals regarding whether an autodialer must have the ***capacity*** to generate random or sequential phone numbers. We now reverse the Ninth Circuit's judgment.

Duguid, 141 S.Ct at 1168-69 (emphasis added).

Notably, the scope of the term "capacity" was not part of the issue forming the circuit court split, and it was not before the Supreme Court in *Duguid* and played no role in the Supreme Court's analysis or decision. Thus, the issue of whether a dialing system that possesses the requisite statutory "capacity to store or produce telephone numbers to be called, using a random or sequential number generator, and to dial such

numbers" nevertheless qualifies as an ATDS if it does not use those statutory functions for a given call, was not reached by the Supreme Court in *Duguid*, and any conclusion to the contrary would be "extrapolating from its implications a holding on an issue that was not before that Court[.]" *Townsend*, 496 F.3d at 1284. Such an extrapolated holding would upend this Court's settled law in *Glasser*, in which the prior panel of this Court was faced with interpreting the statutory definition of an ATDS under the TCPA.

The thoroughly reasoned decision in *Glasser* held that the phrase "using a random or sequential number generator" modified both of the preceding terms—"store" and "produce"—as opposed to just the last antecedent "produce," just as the Supreme Court held in *Duguid*. *Glasser*, 948 F.3d at 1306. Importantly, in rejecting the appellant's argument that such an interpretation "makes hash of several exemptions in the statute," the Glasser court held that "[t]he statute, moreover, applies to devices that have the 'capacity' to identify randomly generated numbers; *it does not require that capacity to be used in every covered call*." *Id.* at 1312 (emphasis added).

A plain reading of the Supreme Court's decision in *Duguid* does not support a conclusion that it overruled any aspect of this Court's prior panel precedent in *Glasser*. To the contrary, the *Duguid* decision specifically cited *Glasser* as among the circuit court decisions with which it concurred. *Duguid*, 141 S.Ct. at 1175, n. 4; *see also id*. at 1173 (Alito, J., concurring in the judgment). As such, there is no express basis to conclude that the Supreme Court abrogated the *Glasser* panel's holding that the TCPA "applies to devices that have the capacity to identify randomly generated numbers; it does not require that capacity to be used in every covered call." *Glasser*, 948 F.3d at 1312. Moreover, the express language of the Supreme Court's decision in *Duguid* also specifically concluded that:

> To qualify as an "automatic telephone dialing system," ***a device must have the capacity*** either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator.

Duguid, 141 S.Ct at 1167.

Clearly, then, on its face, the Supreme Court's decision in *Duguid* did not intend to eliminate the the term "capacity" from the statutory definition of an ATDS nor overturn this Court's reasoned application of

the term "capacity" to mean that where a device possesses the requisite statutory functions, the TCPA "does not require that capacity to be used in every covered call." *Glasser*, 948 F.3d at 1312. The district court's conclusion that the *Duguid* decision stands for the proposition that a device must always dial random or sequential telephone numbers to qualify as an ATDS for a given call, rather than the "capacity" to do so, therefore conflicts with both the Supreme Court's express language in *Duguid* and this Court's prior panel precedent in *Glasser*. Accordingly, the district court's order dismissing Appellants' TCPA claim should be reversed by this Court.

II. The District Court Erred by Ignoring Appellants' Alternative Basis for TCPA Liability

Perhaps the most glaringly obvious error in the challenged district court order was the failure of the district court to acknowledge Appellants' allegations that Ocwen violated the TCPA by initiating calls to the Appellants' cellular telephone numbers using a prerecorded message without prior express consent, in violation of 47 U.S.C. § 227(b)(1)(A). This alternative basis for TCPA liability under section 227(b)(1) is completely independent of the use of an ATDS—a conclusion

that was made clear by this Court in *Glasser*, where it emphasized as follows in rejecting the appellants argument:

> Recall that § 227(b)(1) makes callers liable if they make calls 'using an automatic telephone dialing system *or an artificial or prerecorded voice*.' This alternative basis for liability covers every exemption the plaintiffs worry about.

Glasser, 948 F.3d at 1311-12 (emphasis in original).

Although this alternative basis for TCPA liability was alleged by Appellants in the operative Complaint, and was briefed by both parties in their filings with the district court on Ocwen's Motion to Dismiss, the district court made no mention whatsoever of this alternative basis for TCPA liability in its order granting Ocwen's Motion to Dismiss with prejudice. Because this theory of TCPA liability was alleged by Appellants, and presents an alternative basis for TCPA liability that is independent of the use of an ATDS, it is axiomatic that the district court committed error in dismissing Appellants' TCPA claim with prejudice, without making any reference to this alternative theory of liability or any determinations regarding the sufficiency of Appellants' allegations in support thereof, and without affording Appellants leave to amend.[1]

[1] Because the district court did not address this alternative basis for TCPA liability in its order, it is unknown whether the district court was persuaded by Ocwen's argument concerning the sufficiency of Appellants' allegations regarding the use of a

Conclusion

For the foregoing reasons, Appellants respectfully request that this Honorable Court reverse the decision of the district court and remand this case for proceedings consistent therewith, including directions to vacate the order of dismissal, and grant such other relief as this Court deems just and proper.

Respectfully Submitted,

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prerecorded voice. However, it should be noted that Appellants' response in opposition to Ocwen's Motion to Dismiss submitted an exhibit consisting of deposition testimony by Ocwen's Rule 30(b)(6) witness in a previous TCPA case, testifying that Ocwen utilizes a prerecorded message on every call placed by its dialing system, in order to enhance the plausibility of the allegations of the complaint, and also specifically requested leave to amend if the district court were inclined to determine that Appellants' allegations were not sufficient to survive dismissal under Rule 12(b)(6). Doc 75, pgs. 17, 29. It should also be noted that the court had not previously dismissed any iteration of the complaint prior to issuing the order on appeal. To that end, Fed. R. Civ. P. 15(a)(2) provides that "[t]he Court should freely give leave [to amend] when justice so requires." Therefore, even to the extent the district court considered Plaintiffs' allegations insufficient to state a claim that Ocwen used a prerecorded message in violation of the TCPA without so stating, it was error to dismiss the TCPA claim with prejudice prior to granting Plaintiffs' leave to amend in order to remedy any such perceived insufficiency.

Certificate of Compliance

hereby certify that the following statements are true:

1. This brief complies with the type-volume limitations imposed by Federal Rule of Appellate Procedure 32(a)(7)(B)(i). It contains 5,186 words, excluding the parts of the brief exempted by Federal Rule 32(f).

2. This brief complies with the typeface and typestyle requirements of Federal Rule 32(a)(5) and 32(a)(6). It has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2016 in 14-point Century Schoolbook font.

3. The text of the brief filed with the Court via CM/ECF is identical to the text of the paper copies, and that the latest version of Windows Defender has been run on the files containing the electronic version of this brief and no virus has been detected.

/s/ *David P. Mitchell*
David P. Mitchell

Certificate of Service

I hereby certify that on this 3rd day of February, 2022, I caused Appellant's Opening Brief to be filed with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system, which will automatically send notice of said filing to all counsel of record. I further certify that all parties to this case are represented by counsel of record who are CM/ECF participants.

/s/ *David P. Mitchell*
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