No. 20-418

IN THE

Supreme Court of the United States

MELANIE GLASSER,

Petitioner,

v.

HILTON GRAND VACATIONS CO., LLC,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

Jeffrey R. Johnson
JONES DAY
51 Louisiana Ave. N.W.
Washington, DC 20001

Shay Dvoretzky
Counsel of Record
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave. N.W.
Washington, DC 20005
(202) 371-7370
shay.dvoretzky@skadden.com

Counsel for Respondent
Hilton Grand Vacations Co., LLC

QUESTIONS PRESENTED

1. In *Facebook, Inc. v. Duguid*, No. 19-511 (U.S.), this Court will decide whether an "automatic telephone dialing system," 47 U.S.C. § 227(b)(1), must have the capacity to generate random or sequential numbers, or instead whether a device that merely dials from a stored list also qualifies as an ATDS. The first question presented is: Should this case be held for *Facebook* even though Glasser also lost on the independent ground that the equipment used to contact her could not dial without human intervention?

2. The equipment used to contact Glasser could not place any call unless an individual dialing agent clicked "Make Call" to initiate that call. The second question presented is: Does the equipment used to call Glasser require sufficient human intervention to disqualify it as an ATDS?

CORPORATE DISCLOSURE STATEMENT

Hilton Grand Vacations Company, LLC, is a subsidiary of Hilton Grand Vacations Inc., a publicly traded company. Capital Group Cos. Inc. owns more than 10% of the stock of Hilton Grand Vacations Inc.

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INTRODUCTION

The Telephone Consumer Protection Act of 1991 makes it generally unlawful to place unconsented calls to wireless numbers "using any automatic telephone dialing system," 47 U.S.C. § 227(b)(1)(A), defined 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," *id.* § 227(a)(1). From its enactment until about twenty years ago, this ATDS provision had little effect on ordinary business communications; everyone agreed that it covered only equipment that could generate random or sequential numbers, and few if any legitimate businesses used such indiscriminate methods to reach current or even potential customers.

In 2003, however, the FCC began suggesting that the ATDS provision covers, not just random or sequential number generators, but *any* device that calls automatically from a list—or, as the FCC sometimes put it, that dials numbers without "human intervention." The FCC's musings (and the rise of wireless communications) put businesses to a choice. On the one hand, businesses could continue using automated dialing equipment and risk TCPA litigation, knowing that most courts had held that they had to apply the FCC's approach, however dubious, in private litigation. On the other hand, they could use more expensive, less efficient equipment that required human intervention and therefore complied with the FCC's expansive views.

Respondent Hilton Grand Vacations Company took the latter path. With its Intelligent Mobile Connect System, "no call goes out" "[u]nless and until

[an] employee presses" the "[M]ake [C]all" button. Pet. App. A at 21. Because of that fact, the district court, applying the FCC's test, held that the IMC System was not an ATDS because of "the agent's human intervention in initiating the calling process." Pet. App. B at 11. The Eleventh Circuit agreed. "The telephone equipment in [Glasser's] case required human intervention and thus was not an 'automatic' dialing system." Pet. App. A at 20.

That holding ends this case. In *Facebook, Inc. v. Duguid*, this Court will decide Glasser's first question presented: whether the ATDS provision covers equipment that "automatically dial[s] telephone numbers stored in a list." Pet. i; *see* Pet. i–ii, *Facebook, Inc. v. Duguid*, No. 19-511, 2019 WL 5390116 (U.S. Oct. 17, 2019) (alterations and quotation marks omitted). But even if the Court answers that question in Glasser's favor, she would still lose, because HGV's equipment requires human intervention. Glasser tries to overcome this fatal obstacle by adding a question about human intervention, but there is no disagreement among the courts on that topic, and it would be premature to resolve any disagreement on that front anyway. The petition should be denied.

STATEMENT OF THE CASE

1. As just mentioned, the TCPA generally makes it unlawful to place unconsented calls to wireless numbers "using any automatic telephone dialing system," and it defines an "automatic telephone dialing system" 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), (b)(1)(a). In its earliest orders, the FCC recognized that this provision covers only equipment that "randomly or sequentially generate[s] numbers," not equipment that places calls "directed to [a] specifically programmed contact number[]." *In re Rules & Regs. Implementing the TCPA*, 10 FCC Rcd. 12391, 12400 (1995); *see also In re Rules & Regs. Implementing the TCPA*, 7 FCC Rcd. 8752, 8776 (1992) (the ATDS provision "clearly do[es] not apply to functions like 'speed dialing[]' [or] 'call forwarding[]' … because the numbers called are not generated in a random or sequential fashion").

As once-common random or sequential dialing equipment faded from use, however, the FCC began to suggest that the statute broadly covers any equipment capable of dialing automatically from a list. In 2003, it suggested that all "predictive dialer[s]"—which automatically call a group of numbers at once, using an algorithm to "predict[]" the number of agents available to handle the answered calls—qualify as ATDSs. *See In re Rules & Regs. Implementing the TCPA*, 18 FCC Rcd. 14014, 14092–93 (2003). In an attempt to justify that result as a statutory matter, the FCC said that the "basic function" of predictive dialers is the same as the random or sequential number generators of yore: "to dial numbers without human intervention." *Id.* at 14092. *But see id.* at 14092–93 (suggesting that predictive dialing software qualifies *when it is* "*paired with*" random or sequential dialing ability (emphasis added)). The FCC repeated this suggestion about human intervention in subsequent orders. *See, e.g.*, *In re Rules & Regs. Implementing the TCPA*, 23 FCC Rcd. 559, 566 (2008) (same).

In 2015, the FCC issued its most recent statement on the ATDS definition. *See In re Rules & Regs. Implementing the TCPA*, 30 FCC Rcd. 7961, 7973–76 (2015) ("2015 TCPA Ruling"). But it didn't do a great job there either. It gave contradictory answers to the essential question: whether a device can qualify as an ATDS if it simply "dial[s] from a set list of numbers," rather than "'creating and dialing' a random or arbitrary list" itself. *ACA Int'l v. FCC*, 885 F.3d 687, 702 (D.C. Cir. 2018). Indeed, the FCC even gave contradictory answers about its own human intervention test. On the one hand, the Commission reiterated prior statements that the "basic function" of an ATDS is to "dial numbers without human intervention." 2015 TCPA Ruling, 30 FCC Rcd. at 7973. On the other hand, the FCC refused to "clarify[] that a dialer is not an autodialer unless it has the capacity to dial numbers without human intervention." *Id.* at 7976. Given these self-contradictions, the D.C. Circuit vacated "the Commission's treatment of those matters" for "fail[ing] to satisfy the requirement of reasoned decisionmaking." *ACA Int'l*, 885 F.3d at 703.

2. Hilton Worldwide, Inc. is the world's leading hospitality company, with more than 5,000 properties worldwide. Since 1992, Hilton has worked with Hilton Grand Vacations Company, LLC to market discounted vacation packages and timeshares. Dist. Ct. Dkt. 81 at 6.

HGV does not market those products en masse. Instead, it focuses its outbound telephone marketing program on loyal Hilton customers. *Id.* Those customers include select repeat Hilton guests, who have shown their preference for the Hilton family of

hotels through previous stays. *Id.* It also includes those who have joined the Hilton HHonors loyalty program, where members earn points by staying at Hilton properties that they can then exchange for exclusive offers, vacation deals, and discounted future stays. *Id.*; Dist. Ct. Dkt. 81-3 ¶ 10; Dkt. 98-3 at 5–9; Dkt. 125 at 8–10. During its phone calls, HGV offers these customers significantly discounted vacations at Hilton-brand hotels in exchange for the chance to share ownership opportunities with them during their stay. Dist. Ct. Dkt. 81 at 6. Again, HGV does not and has never cold-called non-Hilton customers to sell Hilton's products. *Id.*

HGV has always complied with the ATDS provision. Most basically, HGV has never used equipment with the capacity to generate random or sequential numbers—it does not cold-call anyone, let alone random strangers. *Id.* But HGV has *also* tried to comply with the FCC's (ever-changing, always confused) view of the statute. Specifically, HGV has ensured that its equipment requires "human intervention" to place calls.

As relevant to the calls at issue here, HGV did so through the use of the Intelligent Mobile Connect System. The IMC System relies on two kinds of agents: dialing agents (who manually initiate calls) and selling agents (who handle answered calls). When a dialing agent logs into his computer, the interface provides him with the name and number of a specific customer to be contacted next, as well as a button labeled "Make Call." Dist. Ct. Dkt. 98-8 at 7; Dkt. 98-10. The interface presents other information as well, including the number of seller agents already connected to customers, the number available to take

the next call, and the number of customers on hold. Dist. Ct. Dkt. 98-8 at 7; Dkt. 98-10.

If the dialing agent presses "Make Call," then the IMC System instructs a server to immediately dial the number. But such an instruction comes only if the dialing agent presses the button. "[C]alls cannot be made unless an agent clicks on the screen and forwards a telephone number to the server to be called." Pet. App. B at 11; *see* Pet. App. A at 21 ("Unless and until the [dialing agent] presses th[e] ["Make Call"] button, no call goes out."). After that point, the IMC System transfers any answered call to a selling agent ready to take it. Dist. Ct. Dkt. 98-3 at 27; Dkt. 98-6 at 3.

3. Petitioner Melanie Glasser is a longtime member of the HHonors Program and a frequent guest at Hilton brand hotels. Dist. Ct. Dkt. 81-3 ¶ 12. In April 2016, she sued HGV on behalf of a putative class of those who had received allegedly unlawful telephone calls from HGV. HGV moved for summary judgment. In that motion (filed before the D.C. Circuit vacated the FCC's interpretation of the ATDS provision in *ACA International*), HGV argued that the IMC System did not qualify as an ATDS under the FCC's human-intervention test because human operators initiated each and every call. *See* Dist. Ct. Dkt. 98 at 15–25.

The district court (in a decision issued after *ACA International* came down) granted HGV's request. It agreed with Glasser that *ACA International* left the FCC's pre-2015 rulings intact; indeed, it held that it was bound by those rulings under the Hobbs Act. Pet. App. B at 5 n.5, 6–7; *see PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051 (2019)

(reserving judgment on this question). The district court also held, however, that "[t]he undisputed facts demonstrate that human intervention was required before a cell number could be dialed by [HGV's] system." Pet. App. B at 5. "Since it is undisputed that calls cannot be made unless an agent clicks on the screen and forwards a telephone number to the server to be called, [HGV's] 'point-to-click' system does not constitute an autodialer system under the TCPA." Pet. App. B at 11.

For good measure, the district court also rejected Glasser's argument that the IMC System was a "predictive dialer" as defined by the FCC's orders, which Glasser seemed to understand as an independent basis for TCPA liability. "Nothing in the evidence … demonstrate[d] that the IMC System used a predictive algorithm or function to engage in predictive dialing." Pet. App. B at 12. Rather, because "the evidence show[ed] that human intervention is necessary for numbers to be dialed," the IMC System was "the antithesis of a predictive dialer." Pet. App. B at 13.

4. The Eleventh Circuit affirmed. The panel—in an opinion authored by Judge Sutton (sitting by designation) and joined by Judge William Pryor, Jr.—first held that the court was not bound by the FCC's pre-2015 statements. "[T]he D.C. Circuit, in a Hobbs Act proceeding of its own, wiped the slate clean." Pet. App. A at 16; *see also id.* (noting that *ACA International* "reviewed the relevant parts of the orders and 'set aside the Commission's treatment of those matters'" (quoting *ACA Int'l*, 885 F.3d at 703)).

The panel then considered the text, context, history, and scope of the ATDS provision. *See* Pet.

App. A at 5–20. It concluded that the ATDS provision covers only equipment that "randomly or sequentially generate[s] numbers," not equipment that "automatically call[s] a stored list." Pet. App. A at 2, 20. Because HGV's "phone system" does not use "randomly or sequentially generated numbers," "the Act does not cover [it]." Pet. App. A at 2–3.

The panel also held, however, that "*[e]ven if* the statute covers devices that can automatically dial a stored list of non-randomly generated numbers, [HGV's] device *still* would not qualify." Pet. App. A at 20 (emphasis added). It was an "accepted assumption" among the parties that, whatever else "auto-dialers" must do, they must "*automatically* dial the numbers." Pet. App. A at 21 (emphasis in original). But the IMC System "requires a human's involvement before it places any calls"; it was "undisputed" that "calls cannot be made unless an agent … forwards a telephone number to the server to be called." Pet. App. A at 20.

The panel then rejected Glasser's claim that the "human tasks associated with these systems [are] so immaterial that they should not matter" in assessing "whether the device automatically dials numbers." Pet. App. A at 21. "[T]h[e] system demands far more from its human operators than just 'turning on the machine or initiating its functions.'" *Id.* (quoting *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052–53 (9th Cir. 2018)). Instead, "[a]n employee's choice initiates every call." Pet. App. A at 22. "Yes, the system dials the numbers itself. But no one would think that telling a smartphone to dial the phone number of a stored contact … means the smartphone has automatically dialed the number." *Id.* "Human

intervention is necessary there, just as it is here, to initiate the call." *Id.*

Judge Martin concurred in relevant part. She would have held that "a machine may qualify as an autodialer based solely on its ability to store numbers," whether or not those numbers were randomly or sequentially generated. Pet. App. A at 25. But she "concur[red] in the majority's decision to affirm the grant of summary judgment" to HGV. Pet. App. A at 35. She "believe[d] the majority [wa]s correct when it h[eld] that there is too much human intervention in the Intelligent Mobile Connect system … to qualify it as an autodialer." *Id.*

5. In July 2020, this Court granted review of the second question presented in *Facebook*, "[w]hether the definition of ATDS in the TCPA encompasses any device that can 'store' and 'automatically dial' telephone numbers, even if the device does not 'us[e] a random or sequential number generator." 2020 WL 3865252 (U.S. July 9, 2020) (mem.); Pet. ii, *Facebook*, 2019 WL 5390116. Glasser filed her petition in September 2020.

REASONS FOR DENYING THE PETITION

I. THERE IS NO REASON TO HOLD FOR *FACEBOOK* ON GLASSER'S FIRST QUESTION PRESENTED.

Glasser spends most of her petition explaining why this Court should consider her first question presented, whether "the ATDS definition must be read to encompass list-based autodialers." Pet. 35–36; *see* Pet. 14–36. But the Court already granted certiorari on that question in *Facebook*, two months before Glasser filed her petition. As a result, while HGV of course disagrees with Glasser about whether

the Eleventh Circuit resolved this question correctly, there is little point in rehashing that debate. The Court will resolve it soon anyway, and the briefing there proves that Judge Sutton here—like then-Judge Barrett in *Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458 (7th Cir. 2020)—got it right.

The only question is whether the Court's resolution of that question in *Facebook* might affect Glasser's case. It cannot. Glasser agrees that, whatever else an ATDS must be capable of doing, it "must have the capacity to dial telephone numbers automatically"—that is, to dial without "human intervention." Pet. 36. But both lower courts here held that HGV's equipment lacked that ability. *See, e.g.*, Pet. App. A at 20 ("The telephone equipment in [Glasser's] case required human intervention and thus was not an 'automatic' dialing system in the first place"); Pet. App. B at 5 ("The undisputed facts demonstrate that human intervention was required before a cell number could be dialed by [HGV's] system."). Indeed, the district court reached that conclusion even though it believed it was *bound by the FCC's older statements about the statute*, the same interpretation that Glasser here promotes. *See* Pet. App. B at 7. So even if Duguid prevails on this question in *Facebook*, Glasser would still lose here.

II. GLASSER'S QUESTION ABOUT HUMAN INTERVENTION DOES NOT MERIT REVIEW.

Recognizing this fatal flaw in her attempt to piggyback off of *Facebook*, Glasser also briefly asks this Court to consider whether the IMC System possessed the requisite "[d]egree of '[h]uman [i]ntervention'" to qualify as an ATDS. Pet. 36. But

that splitless, soon-to-become-irrelevant question does not warrant certiorari.

A. There Is No Circuit Split on Human Intervention.

Glasser contends that the circuits disagree about the kinds of human intervention that prevent equipment from qualifying as an ATDS: In the Second, Seventh, and Ninth Circuits, "human intervention *prior to* the dialing of the telephone numbers" does not count, whereas in the Eleventh Circuit, it does. Pet. 36 (emphasis in original). Glasser is mistaken. Like the decisions that Glasser cites, the Eleventh Circuit focused on intervention in the dialing process, not intervention prior to and unrelated to it.

1. From first to last, the Eleventh Circuit focused its inquiry on whether human beings were involved in the IMC System's dialing process. It began its analysis by contrasting dialers that "*automatically* dial the numbers" with HGV's equipment, which "requires a human's involvement before it places any calls." Pet. App. A at 20–21 (emphasis in original). It then focused on the "role" that "humans play" in "placing calls" using the IMC System. Pet. App. A at 21. As it noted, the IMC System "demand[ed] far more from its human operators than just 'turning on the machine or initiating its functions'"—pre-dialing steps that "would occur before an[y] auto-dialer begins operating." *Id.* (quoting *Marks*, 904 F.3d at 1052–53). Instead, the IMC System "requires meaningful human interaction *to dial telephone numbers*," because "[a]n employee's choice initiates every call." Pet. App. A at 22 (emphasis added); *see also* Pet. App. A at 21 ("Far from automatically dialing phone

numbers, this system requires a human's involvement to do everything except press the numbers on a phone."); Pet. App. A at 22 ("Human intervention is necessary … to initiate the call.").

Glasser's contrary reading seizes on a single phrase: The Eleventh Circuit "stands alone," she says, "in adopting a narrower view of 'automatic' dialing in which a dialer is removed from the scope of the statute if there is 'human involvement *before* it places any calls.'" Pet. 37 (quoting Pet. App. A at 20) (emphasis in petition). But as just explained and as the rest of its opinion demonstrates, the Eleventh Circuit used that phrase to distinguish between automatic and non-automatic *dialing*, not to suggest that unrelated pre-dialing intervention suffices. Indeed, it expressly disclaimed that view by stating that having to turn on the machine or press "go" would not suffice. *See* Pet. App. A at 21.

Glasser also claims that the Eleventh Circuit erred in thinking that the intervention in *this* case sufficed, because clicking "Make Call" sends a signal to a server rather than directly opening a line for the dialing agent. Pet. 37–38. The Eleventh Circuit explained why this counts as human dialing just as much as it is human dialing when someone "tell[s] a smartphone to dial the phone number of a stored contact." Pet. App. A at 22. More importantly for present purposes, Glasser's technical, case-specific dispute about whether there was intervention in the IMC System's dialing process does not merit this Court's time.

2. The Eleventh Circuit's decision does not conflict with those of the Second, Seventh, or Ninth Circuits. Each of the cases that Glasser cites involved

a mass texting platform. *See Duran v. La Boom Disco, Inc.*, 955 F.3d 279 (2d Cir. 2020); *Blow v. Bijora, Inc.*, 855 F.3d 793 (7th Cir. 2017); *Marks*, 904 F.3d at 1052–53. The defendants in those cases argued that the human intervention involved in marketing through such systems—entering the numbers to be called, drafting the message to be sent, and kickstarting the mass delivery—qualified as sufficient human intervention. But the courts disagreed. As *Blow* explained, in such systems, "human involvement is in fact unnecessary at the precise point of action barred by the TCPA: using technology to 'push' the texts to an aggregator that sends the messages out simultaneously to hundreds or thousands of cell phone users at a predetermined date or time." 855 F.3d at 802. Or as *Duran* put it, "clicking 'send' or some similar button—much like flipping an 'on' switch—is not the same thing as [individualized] dialing, since it is not the actual or constructive inputting of numbers to make an individual telephone call or to send an individual text message." 955 F.3d at 289; *see also Marks*, 904 F.3d at 1052–53 (rejecting the argument that "any human intervention whatsoever" suffices because every autodialer must be turned on).

This case is different. Here, the human intervention occurs at what *Blow* called the "precise point of action": The IMC System "requires meaningful human interaction *to dial telephone numbers*." Pet. App. A at 22 (emphasis added). And here, unlike in these mass texting cases, pressing "Make Call" cannot be compared to flipping an autodialer's on switch or instructing it to call a thousand numbers. Instead, "[u]nless and until the

employee presses this button" for *each call*, "no call goes out." Pet. App. A at 21. *Duran, Blow*, and *Marks* do not conflict with the Eleventh Circuit's treatment of much different technology here.

In fact, *Duran* expressly distinguished mass texting platforms from devices that place calls one at a time, even when they do so with a computer's help. As Glasser notes, *Duran* held that clicking "send" to blast out mass texts did not count as intervention in the dialing process; "[w]hen a person clicks 'send' in such a program, he may be instructing the system to dial the numbers, but he is not actually dialing the numbers himself." Pet. 38 (quoting 955 F.3d at 289). But *Duran* also explained that "selecting a 'contact' from a digital phonebook"—an act indistinguishable from pressing "Make Call" on the IMC System—*does* count as individualized dialing with human intervention. 955 F.3d at 289 n.39 "Clicking on a name in a digital phonebook to initiate a call or text is a form of speed-dialing or constructive dialing," precisely because by doing so "one is constructively dialing the attached number" rather than "telling [an] ATDS to go ahead and dial a separate list of contacts, often numbering in the hundreds or thousands." *Id.* In light of this distinction, Glasser would not prevail even in those circuits that she prefers.

B. It Would Be Premature To Address Human Intervention Now Anyway.

Even if there were disagreement about the requisite kind of human intervention, now would not be the time to resolve it. Most obviously, the Court's impending decision in *Facebook* could render that question academic. If the Court holds that the ATDS provision covers only equipment with the capacity to randomly or sequentially generate numbers, then virtually no existing devices will qualify as ATDSs, whether or not they also dial automatically. This Court should not waste its time meting the bounds of human intervention because of the remote possibility that callers might dust off 1980s-era phones.

But even if Duguid (and Glasser) prevail on their broader reading of the statute in *Facebook*, it would still be too soon to address human intervention. Unlike the ATDS issue, the circuits have not thoroughly assessed the possible approaches to human intervention, let alone come to reasoned disagreement about those approaches. If the question remains relevant after *Facebook*, lower courts should be given a chance to grapple with it in the first instance.

Similarly, it makes little sense to consider this issue now in light of anticipated action from the FCC. The FCC has twice already sought comment on questions related to human intervention. *See Public Notice: Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the TCPA in Light of the D.C. Circuit's* ACA International *Decision*, 33 FCC Rcd. 4864, 4865–66 (2018) (asking whether an ATDS must "dial numbers without human intervention"); *Public Notice: Consumer and*

Governmental Affairs Bureau Seeks Further Comment on Interpretation of the TCPA in Light of the Ninth Circuit's Marks v. Crunch San Diego, LLC *Decision*, 33 FCC Rcd. 9429, 9429–30 (2018) (asking if smartphones have the capacity to "automatically" dial numbers). It is likely to do so again after this Court's decision in *Facebook*. Of course, what the FCC has to say about the ATDS provision could materially shape its scope, whether through the absolute deference that some courts have applied to FCC orders in light of the Hobbs Act, the lesser (but still powerful) form of deference applied under *Chevron*, or the "power to persuade" recognized in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). There is no need for the Court to intervene before the FCC has a chance to respond to *Facebook*.

C. Glasser Is Wrong About Human Intervention in This Case.

Finally, Glasser contends that the decision below must be wrong about human intervention; otherwise, callers could circumvent the FCC's supposed limits on predictive dialers. *See* Pet. 38–39. Of course, the ATDS provision restricts only random or sequential number generators, not devices that dial automatically from a list, and so even true predictive dialers do not qualify. But Glasser's argument fails on its own terms, because the IMC System is not a predictive dialer. "Nothing in the evidence … demonstrate[d] that the IMC System used a predictive algorithm or function to engage in predictive dialing." Pet. App. B at 12. And far from dialing numbers simultaneously, "the evidence show[ed] that human intervention is necessary for [each of the] numbers to be dialed." Pet. App. B at 13.

Glasser contends that the IMC System is the functional *equivalent* of a predictive dialer because the dialing agent does not wait on the line after clicking "Make Call"; instead, the system listens for answered calls and transfers them to available selling agents. *See* Pet. 38–39. That is not true as a factual matter; the IMC System did not allow dialing agents to initiate calls when there were no available selling agents to handle them. Dist. Ct. Dkt. 124 at 27.

More importantly, that supposed fact has nothing to do with *human intervention*. Imagine if HGV had hired Billy Joel to manually dial numbers as quickly as possible, with each call routed to selling agents so that he could focus on dialing. Such a setup could undoubtedly lead to awkward pauses and dropped calls if the talented Mr. Joel reached customers faster than those agents could handle. But no one would doubt that it required human intervention—the Piano Man himself placed every single call. That is exactly what happens in the IMC System: An individual dialing agent clicks "Make Call" to begin every interaction, even though other people handle the resulting conversations.

* * *

HGV went to considerable expense to comply with the FCC's and the plaintiffs' bar's extravagant view of the TCPA. That decision has now paid off; no matter what this Court decides about the ATDS provision in *Facebook*, HGV's victory on the alternative ground of human intervention will remain secure. Because Glasser provides no reason for this Court to address human intervention at all—let alone now, before lower courts and the FCC have had a chance to

respond to its impending decision—Glasser's petition should be denied.

CONCLUSION

The petition for certiorari should be denied.

January 29, 2020

Respectfully submitted,

Jeffrey R. Johnson
JONES DAY
51 Louisiana Ave. N.W.
Washington, DC 20001

Shay Dvoretzky
Counsel of Record
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave. N.W.
Washington, DC 20005
(202) 371-7370
shay.dvoretzky@skadden.com

Counsel for Respondent
Hilton Grand Vacations Co., LLC