

# ATDS, WTF?

## Where are we on the TCPA's autodialer definition

The Telephone Consumer Protection Act (TCPA) provides a (deceptively?) simple definition of an Automatic Telephone Dialing System (ATDS):

The term “automatic telephone dialing system” means equipment which has the capacity—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.

When Congress enacted the TCPA, the definition of an ATDS was specifically intended to regulate equipment that dialed random telephone numbers or large sequential blocks of telephone numbers, so as to protect consumers who had unlisted telephone numbers. S. REP. 102-178, at 1-2 (“Having an unlisted number does not prevent those telemarketers.”); H.R. REP. 102-317, at 10 (discussing the ability of an ATDS to “dial sequential blocks of telephone numbers”). The Federal Communications Commission, which has rulemaking authority relating to the TCPA, issued orders in 1992 and 1995 endorsing this interpretation: dialing equipment must be capable of generating random or sequential blocks of telephone numbers to be an ATDS.

But in 2003 the FCC changed course, and then spent the better part of 15 years muddying the waters as to the definition of an ATDS. In 2003, 2008 and 2015, the FCC issued orders indicating that the phrase “using a random or sequential number generator” plays an optional role in the definition of an ATDS, allowing that even dialing from a fixed list of numbers could qualify. And in 2015 it issued an order indicating that “capacity” has no logical limit, as it included even potential future capacity. The FCC also waffled back and forth as to whether “human intervention” in the process of dialing defeats a finding that an ATDS was used. As one court observed, the FCC was “allergic to brevity and clarity” in these

orders with respect to the ATDS definition; a sentiment echoed by many other courts during this timeframe.

On March 16, 2018, in its *ACA International v. FCC* decision, the D.C. Circuit issued a ruling overhauling much of the FCC’s prior orders, rejecting the FCC’s expansive view of the term “capacity” and finding that the FCC impermissibly issued orders simultaneously holding that a “random or sequential number generator” was both necessary and unnecessary. The D.C. Circuit also ruled that the FCC’s failure to explain whether human intervention defeats a finding of an ATDS was similarly nonsensical. The Court thus sent the FCC back to the drawing board, holding that the FCC’s efforts “fails to satisfy the requirement of reasoned decisionmaking.”

Ever since the *ACA International* decision, district and circuit courts have since taken it upon themselves to pick up the “muddy waters” mantle from the FCC, failing to reach a consensus on the definition of an ATDS. The post-ACA landscape has left four critical issues impacting the definition of an ATDS:

- First, what did *ACA International* do? The decision, technically, was on appeal from the FCC’s 2015 Order. Did it leave the 2003 and 2008 Orders intact? If so, is the prior guidance from 2003 and 2008 about dialing from lists of numbers (without random or sequential number generators) still valid?
- Second, what does “capacity” mean?
- Third, assuming the *ACA International* ruling vacated the FCC’s 2003 and 2008 Orders as well, is the “random or sequential number generator” element necessary?
- Fourth, even if random or sequential number generation is not necessary, does human intervention still take equipment outside of the scope of an ATDS?

The map and chart that follow set forth where Circuits currently stand on the ATDS issue.

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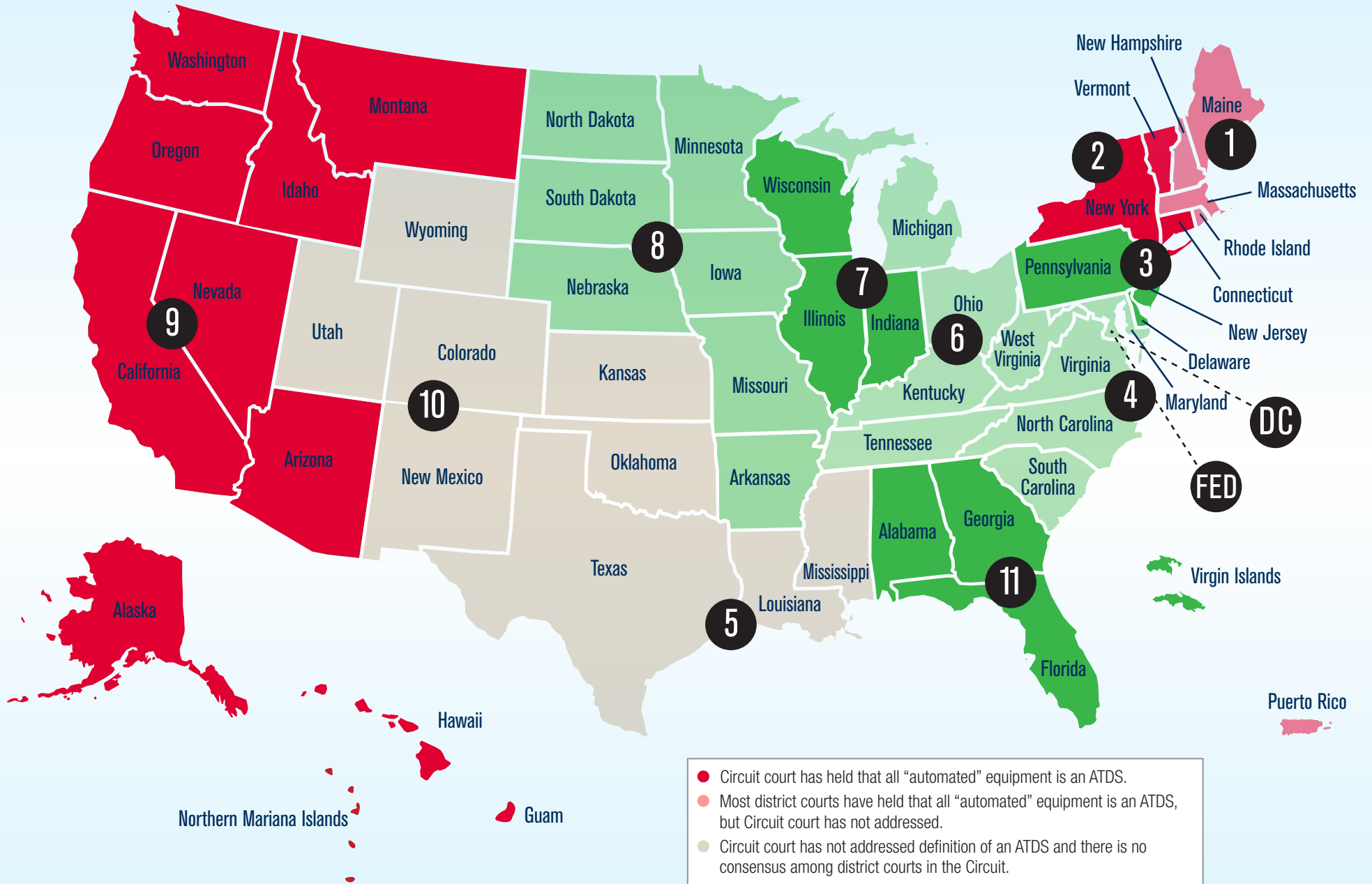
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# TCPA Battle Lines Drawn: Where federal courts stand on the definition of an ATDS



- Circuit court has held that all “automated” equipment is an ATDS.
- Most district courts have held that all “automated” equipment is an ATDS, but Circuit court has not addressed.
- Circuit court has not addressed definition of an ATDS and there is no consensus among district courts in the Circuit.
- Most district courts have held that an ATDS is limited to equipment that can generate random/sequential numbers, but Circuit court has not addressed.
- Circuit court has held that an ATDS is limited to equipment that can generate random/sequential numbers.

## The chart below highlights where the courts stand on the TCPA's Autodialer Definition

Court	Cases	What Did ACA Accomplish?	"Capacity"	"Random or Sequential"	"Human Intervention"
FCC	The FCC has issued two requests for notice and comment on remand from <i>ACA International</i> . Both comment periods have closed. The FCC has not yet ruled.	TBD	TBD	TBD	TBD
Supreme Court	The petition in <i>Duguid v. Facebook</i> , No. 19-511 is pending. The Supreme Court could take up the ATDS definition in this appeal, which comes from the Ninth Circuit. <sup>1</sup>	TBD	TBD	TBD	TBD
First Circuit					
Second Circuit	<i>Duran v. La Boom Disco</i> , – F.3d –, 2020 WL 1682773 (2d Cir. April 7, 2020) <i>King v. Time Warner Cable Inc.</i> , 894 F.3d 473, 476 (2d Cir. 2018)	In <i>Duran</i> , the Court held (and is the only Circuit to do so) that <i>ACA International</i> only invalidated the pertinent parts of the FCC's 2015 Order, leaving prior FCC Orders untouched.	In <i>King</i> , the Court made clear that "capacity" refers to the <i>current</i> capacity of equipment absent modification.	In <i>Duran</i> , the Court held that dialing from a human-created list could still qualify as an ATDS. The use of a random or sequential number generator is unnecessary.	In <i>Duran</i> , the Court recognized that human intervention could defeat a finding of an ATDS, but held that the human intervention had to occur at the point of dialing each number.
Third Circuit	<i>Dominguez v. Yahoo, Inc.</i> , 894 F.3d 116 (3d Cir. 2018) <i>Smith v. Navient Solutions, LLC</i> , No. 19-3025 (appeal pending)	The <i>Dominguez</i> decision did not expressly resolve this issue. Many courts have viewed <i>Dominguez</i> as implying ACA invalidated the FCC's relevant guidance from 2015, 2008 and 2003.	Only <i>present</i> capacity is relevant.	An ATDS must have the capacity to generate random or sequential numbers and dial them.	TBD (this issue was not addressed)
Fourth Circuit					
Fifth Circuit					

(continued)

<sup>1</sup>The Supreme Court is also presently evaluating the constitutionality of the TCPA's automated calling provisions under the First Amendment in *Barr v. American Association of Political Consultants*, No. 19-631.

Court	Cases	What Did ACA Accomplish?	“Capacity”	“Random or Sequential”	“Human Intervention”
Sixth Circuit	<i>Gary v. TrueBlue, Inc.</i> , 786 F. App’x 555 (6th Cir. 2019) [*Gary was unpublished and is not binding precedent in the Sixth Circuit] <i>Allan v. Pennsylvania Higher Education Assistance Agency</i> , No. 19-2043 (appeal pending)	The Court in <i>Gary</i> did not expressly resolve this issue, but affirmed the district court’s order that held ACA set aside the FCC’s relevant pronouncements from 2015, 2008 and 2003.	The Court in <i>Gary</i> did not expressly resolve this issue, but affirmed the district court’s order that indicated that it was rejecting the FCC’s broad definition of “capacity.”	The Court in <i>Gary</i> did not expressly resolve this issue, but affirmed the district court’s order that adopted a plain language reading of the ATDS definition.	TBD (this issue was not addressed)
Seventh Circuit	<i>Gadelhak v. AT&amp;T Servs., Inc.</i> , 950 F.3d 458 (7th Cir. 2020)	<i>ACA International</i> vacated the relevant pronouncements from the FCC’s 2015, 2008 and 2003 Orders.	The Court did not expressly resolve this, but implicitly adopted a current capacity test.	An ATDS must store or produce phone numbers using a random or sequential number generator.	TBD (this issue was not addressed)
Eighth Circuit					
Ninth Circuit	<i>Marks v. Crunch San Diego, LLC</i> , 904 F.3d 1041 (9th Cir. 2018)	<i>ACA International</i> vacated the relevant pronouncements from the FCC’s 2015, 2008 and 2003 Orders.	The Court expressly declined to resolve this issue.	The Court determined that an ATDS includes equipment that can dial automatically from a stored list.	The Court indicated human intervention could defeat a finding that an ATDS was used, but it would have to come at the point of dialing the numbers.
Tenth Circuit					
Eleventh Circuit	<i>Glasser v. Hilton Grand Vacations Co., LLC</i> , 948 F.3d 1301 (11th Cir. 2020)	<i>ACA International</i> vacated the relevant pronouncements from the FCC’s 2015, 2008 and 2003 Orders.	The Court did not expressly resolve this, but implied that only current capacity is relevant.	An ATDS must store or produce phone numbers using a random or sequential number generator.	The Court found that human intervention at the point of placing each call would defeat a finding of an ATDS.
D.C. Circuit					