22-1726

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MARINA SOLIMAN, on behalf of herself and all others similarly situated,
Plaintiff-Appellant,

v.

SUBWAY FRANCHISE ADVERTISING FUND TRUST, LTD.,
Defendant-Appellee,

Does, 1 through 20, inclusive, and each of them.
Defendant,

On Appeal from the United States District Court for the
District of Connecticut in Case No. 3:19-cv-00592-JAM
Judge Jeffrey A. Meyer

APPELLANT MARINA SOLIMAN'S PETITION FOR REHEARING EN BANC

LAW OFFICES OF TODD M. FRIEDMAN, P.C.
Todd M. Friedman (SBN 216752)
Adrian R. Bacon (SBN 280332)
21031 Ventura Blvd, Suite 340
Woodland Hills, CA 91364
Phone: 323-306-4234
Fax: 866-633-0228
tfriedman@toddflaw.com
abacon@toddflaw.com

WOCL & LEYDON, L.L.C.
Brenden P. Leydon, Esq. (CT16026)
80 Fourth Street
Stamford, CT 06905
Telephone: (203) 324-6164
Facsimile: (203) 324-1407
BLeydon@tooherwocol.com
FEDERAL BAR NO.: CT16026
ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

RULE 35 STATEMENT AND INTRODUCTION 1

STANDARD OF REVIEW 5

STATEMENT OF THE CASE…………………………………………………..5

REASONS FOR EN BANC REVIEW……………………………………….8

I. The Definition of ATDS is an Important Developing Question of Law…8

II. *En Banc* Rehearing Should Be Granted to Correct Inconsistencies Between the Panel Majority's Opinion, *Facebook* and the Plain Text of the TCPA ………………………………………..………………………...10

III. Judge Nardacci's Well-Reasoned Dissent Demonstrates a Split Among Courts Interpreting ATDS That Should Be Addressed *En Banc*…..………15

CONCLUSION...17

CERTIFICATE OF COMPLIANCE 19

CERTIFICATE OF SERVICE 20

TABLE OF AUTHORITIES

Cases

ACA International v. Federal Communications Commission, 885 F.3d 687 (D.C. Cir. 2018) 10

Atkinson v. Pro Custom Solar LCC, No. SA-21-cv-178-OLG, 2021 WL 2669558 (W.D. Tex. June 16, 2021) 18

Bank v. Digital Media Solutions, Inc., No. 22-cv-293- 2023WL 1766210 (E.D.N.Y. Feb. 3, 2023) 18

Barr v. American Association of Political Consultants, Inc., 140 S.Ct. 2335 (2020) 8

Daschbach v. Rocket Mortg., LLC, No. 22-cv-346-JL, 2023 WL 2599955 (D.N.H. Mar. 22, 2023) 19

Facebook, Inc. v. Duguid, 141 S.Ct. 1163 (2021) .... passim

Marks v. Crunch San Diego, LLC, 904 F.3d 1041 (9th Cir. 2018) 4, 9, 11, 14

Montanez v. Future Vision Brain Bank, LLC, 536 F.Supp.3d 828 (D. Colo. 2021) 18

Soliman v. Subway Franchisee Advertising Fund Trust, Ltd., No. 22-1726-cv, 2024 WL 2097361 (2d Cir. May 10, 2024) .... passim

Statutes

47 U.S.C. § 227(a)(1)(A) 12

Other Authorities

18 FCC Rcd. 14014 (2003) 8

23 F.C.C. Rcd. 559 (Jan. 4, 2008) 8

30 F.C.C. Rcd. 7961 (2015) 8

7 FCC Rcd. 8752 (F.C.C. September 17, 1992) 8

Telemarketing Practices: Hearing Before the Subcomm. On Telecomm.s & Fin. Of the H. Comm. On Energy & Commerce on H.R. 628, H.R. 2131, & H.R. 2184, 101st Cong. 111 (1991) 15

Rules

F.R.A.P. 40(a)(1)....................5

F.R.A.P. 35(a) 5

F.R.A.P. 35(b) 5

F.R.A.P. 35(c) 5

RULE 35 STATEMENT AND INTRODUCTION

The panel majority erroneously affirmed the District Court's order dismissing Marina Soliman's class action complaint alleging that Subway violated the Telephone Consumer Protection Act ("TCPA"). In so doing, the panel majority adopted a deeply flawed interpretation of the definition of an Automatic Telephone Dialing System ("ATDS"), the implications of which are far-reaching.

Simply put, there is no such thing as a random or sequential *telephone* number generator. Random and sequential number generators, however, do exist, predate the TCPA, and have been used by software engineers for generations to automate technology—including in the automation of telephone calls. The panel majority arrived at its erroneous conclusion by using syntax and grammar to dissect conjoined terms which when read together describe a well-defined piece of technology. As an illustration, if Congress regulated "cellular telephones" courts would never seriously consider splitting that term into two separate words, consulting dictionaries and canons of construction and asking whether the word "cellular" meant "relating to or consisting of living cells." Everybody knows what a cell phone is. And while not everybody knows what a random number generator or a sequential number generator are, it is nonetheless a matter of record that when enacting the TCPA, *Congress* was aware of what a number generator is and chose to include that piece of technology in its definition of ATDS. Unfortunately,

hampered by a limited understanding of this technology, courts have grappled with convoluted canons of construction rather than a plain technical meaning thereby leading to a nonsensical interpretation of an important consumer privacy statute, effectively excising the ATDS restriction out of the TCPA. Again, there is no such thing as a random or sequential *telephone* number generator.

The panel majority held that to qualify as an ATDS, equipment must use a random or sequential number generator to create the telephone number to be called. But, as Judge Nardacci pointed out in her dissent,[1] this conclusion is directly contrary to the plain text of the TCPA and Supreme Court precedent. The majority improperly added the word "telephone" into a known technical tool "random or sequential number generator," that appears in the statute. Rather than give this technical phrase its straightforward technical meaning, the majority instead concluded that a random or sequential number generator must mean equipment that creates telephone numbers itself—equipment that does not exist and was not the target of Congress's enactment of the TCPA. Justice Sotomayor—writing for a unanimous Supreme Court—explicitly stated that Soliman's technical

[1] Judge Nardacci is not an outlier. Judge VanDyke, in *Brickman v. U.S.*, raised similar qualms with the Ninth Circuit's interpretation of ATDS. 56 F.4th 688, 691–693 (9th Cir. 2022). These dissenting judges are correct in their critique. Their opinions demonstrate an emerging split that will have to be decided by the Supreme Court. The Second Circuit's full panel should weigh in before that happens.

reading of a random or sequential number generator would qualify as an ATDS, yet such technology would not be considered an ATDS under this Court's holding. That is reason enough to grant *en banc* review. Soliman petitions for rehearing so this Court can correct this flawed interpretation consistent with Supreme Court precedent, and weigh in on an important and developing question of law.

The panel majority completely abandoned the disjunctive test written into the statute and articulated by the Supreme Court. Although the statute—and the Supreme Court—states that an ATDS is technology that can, using a random or sequential number generator, either store or produce telephone numbers to be called, the majority opinion of the panel requires that an ATDS create telephone numbers. "Store or produce" does not mean "create." That is plain as day. There is no basis in the law for the majority to have rewritten the statute in such a manner, especially when a random number generator and a sequential number generator are known tools used by software engineers building automated telephone dialing equipment, and a random or sequential telephone number generator has never existed.

While various courts across the country have followed the flawed logic of the majority panel, dozens more have agreed with Judge Nardacci's reasoning. Yet no circuit-level court has heard this issue *en banc*. While it seems likely the Supreme Court will resolve this issue eventually, there is no guarantee that it will

do so in this case. For this Court to maintain consistency with existing Supreme Court precedent it must review Soliman's appeal *en banc* before that happens, and critically evaluate the panel majority's flawed opinion.

Soliman's appeal presents an ideal fact pattern for this Court to clarify these issues. Soliman incorporated actual dialer code in her briefing containing a sequential number generator, explained how the technology works and how such code is programmed to both store and produce telephone numbers to be called automatically by the SMS blasting platform *en masse* with no human involvement. This case lends strong factual support to Judge Nardacci's dissent which emphasizes that a number generator is a well understood tool used in software engineering and should be proscribed its technological definition. Soliman's appeal also gives factual specificity to what the Supreme Court referred to in *Facebook, Inc. v. Duguid's* footnote 7. 141 S.Ct. 1163, 1172 n.7 (2021).

The Supreme Court in *Facebook* was concerned that *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018) failed to require a random or sequential number generator in its definition of ATDS. Soliman identified the number generator, just as the Supreme Court required. Yet, the panel majority affirmed the dismissal of her complaint, going directly against the Supreme Court's instructions in *Facebook*. *En banc* rehearing should be granted so this Court can secure uniformity in its decisions and correct the plain error of the panel majority.

STANDARD OF REVIEW

F.R.A.P. 35 permits *en banc* determination when "(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." F.R.A.P. 35(a). A petition should address whether a decision conflicts with Supreme Court or Circuit-level authority, whether consideration by the full court is necessary to secure uniformity of the court's decisions, and whether the proceeding involves questions of exceptional importance. F.R.A.P. 35(b). Rehearing *en banc* must be requested within 14 days after the entry of judgment. F.R.A.P. 35(c); F.R.AP. 40(a)(1).

STATEMENT OF THE CASE

On April 22, 2019, Marina Soliman filed a class action Complaint alleging that Subway violated the TCPA by sending to her cellular telephone, and those of others similarly situated, telemarketing text messages using an ATDS. Soliman alleged that these solicitation text messages were blasted out *en masse* using an SMS blaster, which is a traditional campaign-based dialing platform that automatically sends thousands of text messages to thousands of people with the click of a button and was used in this fashion to automatically dial Soliman.

Soliman further alleged that the SMS blaster was programmed with source code that relied upon sequential number generators to both store and produce the

telephone numbers that the system called. Soliman's briefing contained a specific example of such a sequential number generator coded into the operation of an SMS blaster alleged to function identically to the one used by Subway:

```
730 if (!this.recordList.isEmpty()) {
731 this.recordNumber++;
732 final String comment = sb == null ? null :
sb.toString();
733 result = new CSVRecord(this,
this.recordList.toArray(Constants.EMPTY_STRING_AR
RAY),
comment,
734 this.recordNumber, startCharPosition);
735 }
736 return result;
737 }
```

APX-27.

Soliman explained exactly how this code functions and utilizes number generators:

> These lines of code, and specifically the "++" in line 731, generate sequential numbers as part of a loop, used to store and produce telephone numbers, which are thereafter mass-blasted text messages to thousands of consumers in mere seconds, without any human intervention whatsoever.

Id.

Subway's telemarketing text messages were sent to consumers without prior express consent, as Soliman (and putative class members) had revoked consent to be contacted by Subway, which Subway ignored. Thus, Subway was mass-dialing

thousands of consumers without consent, just as Congress intended to prohibit with the TCPA.

The District Court erred by dismissing Soliman's ATDS allegations. According to the District Court, Soliman's claims failed "because when the Act refers to a 'random or sequential number generator,' it means a generator of random or sequential telephone numbers." But this is inconsistent with the Supreme Court's test, set forth in *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021) ("*Facebook*"). *Facebook* does not exclude the dialing software used to dial Soliman, which utilizes number generators in the code to both store and produce the telephone numbers to be called. Thus, the District Court's ruling contravenes the instructions of the Supreme Court.

Soliman appealed, and a divided panel affirmed, agreeing with the District Court's reasoning. Judge Nardacci dissented, arguing that the panel majority's opinion was not supported by the plain text of the statute, the Supreme Court's precedent in *Facebook*, or the underlying purposes of the TCPA. Judge Nardacci is right—the majority opinion of the panel is flawed. It misapplied the Supreme Court's instructions in *Facebook*. Its holding is inconsistent with the plain text of the TCPA. Soliman alleged the dialing software used a sequential number generator to both store and produce telephone numbers to be called. Nothing more is required under the text of the TCPA and under *Facebook*.

REASONS FOR *EN BANC* REVIEW

I. THE DEFINITION OF ATDS IS AN IMPORTANT DEVELOPING QUIESTION OF LAW.

"Americans passionately disagree about many things. But they are largely united in their disdain for robocalls. The Federal Government receives a staggering number of complaints about robocalls—3.7 million complaints in 2019 alone." *Barr v. American Association of Political Consultants, Inc*., 140 S.Ct. 2335 (2020). The TCPA is such an important and oft-litigated statute that the Supreme Court, for the first time ever in *Barr*, severed an unconstitutional provision of a statute that otherwise would have been struck down on First Amendment grounds. The Supreme Court issued an opinion the following year on the definition of ATDS. *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021). Since *Facebook*, there have been multiple Circuit-level opinions further defining ATDS. And the Supreme Court will likely be asked to weigh in yet again. This is inevitable, because Americans continue to be bombarded by robodialers, and litigation will continue until the issues in this case are resolved.

How ATDS is defined is a question that has seen a great deal of litigation in the thirty years of the statute. There are four FCC Orders defining the statute.[2] The Ninth Circuit has issued four decisions on the question in the past several

[2] See 7 FCC Rcd. 8752 (F.C.C. September 17, 1992); 18 FCC Rcd. 14014 (2003); 23 F.C.C. Rcd. 559 (Jan. 4, 2008); 30 F.C.C. Rcd. 7961 (2015).

years.[3] Other circuits have also weighed in.[4] And the D.C. Circuit similarly addressed the issue and the FCC's Rules.[5] While *Facebook* brought some clarity to the statute, it left open the questions raised by Soliman in her appeal.

As the D.C. Circuit stated, referring to whether an ATDS must self-generate phone numbers, "[t]he choice between the interpretations is not without practical significance." *ACA International v. Federal Communications Commission*, 885 F.3d 687, 703 (D.C. Cir. 2018). That practical significance is straightforward—there is no such thing as an ATDS if the majority opinion of the panel is allowed to stand. But if Soliman and Judge Nardacci's view is correct, only phone calls and text messages which are blasted out thousands at a time by unmanned computers would qualify as an ATDS. And even amongst these exceptionally intrusive calls, only those made without consent are unlawful. Virtually every American has received such telephone calls. Most receive them daily. With so much litigation, involving fortune 500 companies, the FCC, and affecting every American's privacy rights, this is clearly a question of great legal significance.

---

[3]See *Facebook, Inc. v. Duguid*, 592 S.Ct. 1163 (2021); *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018); *Borden v. eFinancial, LLC*, 53 F.4th 1230 (9th Cir. 2022); and *Brickman v. U.S.*, 56 F.4th 688 (9th Cir. 2022).

[4] *Panzarella v. Navient Solutions, Inc.*, 37 F.4th 867 (3rd Cir. 2022); *Beal v. Outfield Brew House, LLC*, 29 F.4th 391 (8th Cir. 2022).

[5] *ACA International v. Federal Communications Commission*, 885 F.3d 687 (D.C. Cir. 2018).

The implications of the panel's majority opinion are wide sweeping. It would effectively write the ATDS provisions out of the TCPA. This is because neither autodialers today, nor in 1991, use number generators to create the telephone numbers they dial. Autodialers have not self-generated *telephone* numbers since the 1960s—decades before the TCPA was enacted. The deluge of robocalls received by consumers will only increase under the panel majority's formulation of an ATDS. And Americans will be left with no legal recourse for the violation of their privacy rights because no autodialer in use today would qualify as an ATDS under the opinion of the panel majority. Such a result cannot possibly be what Congress intended. Because this case presents an important issue of law, e*n banc* review should be granted.

II. *EN BANC* REHEARING SHOULD BE GRANTED TO CORRECT INCONSISTENCIES BETWEEN THE PANEL MAJORITY'S OPINION, *FACEBOOK* AND THE PLAIN TEXT OF THE TCPA

In *Facebook*, the Supreme Court refined the definition of ATDS, reigning in courts that had applied the TCPA too broadly. *Facebook* did three things. First, *Facebook* struck down *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018), which required only that an ATDS have the capacity to store and automatically dial telephone numbers, eliminating the requirement of random or sequential number generators. *See Facebook*, 141 S. Ct. at 1170. Second,

Facebook made it clear that an ATDS must have the capacity to either store or produce telephone numbers to be called, using a random or sequential number generator. *Id.* at 1173. And third, *Facebook* explained how a system might store telephone numbers using a number generator. *Id.* at 1172 n.7:

> [A]s early as 1988, the U.S. Patent and Trademark Office issued patents for devices that used a random number generator to store numbers to be called later . . . For instance, an autodialer might use a random number generator to determine the order in which to pick phone numbers from a preproduced list. It would then store those numbers to be dialed at a later time.

Id. (emphasis added). This is exactly what Soliman alleged and briefed, both before the District Court and the panel—that Subway's autodialer used a sequential number generator to store telephone numbers, and used a random or sequential number generator to produce telephone numbers from that stored list and determine the order in which they would be dialed. APX-27; 128–131

The panel majority ignored *Facebook*, holding that "'number' in the TCPA refers to 'telephone number,' and not to coding or indexing numbers created by a random number generator." *Soliman v. Subway Franchisee Advertising Fund Trust, Ltd.*, No. 22-1726-cv, 2024 WL 2097361, at *5 (2d Cir. May 10, 2024). But this holding—that an ATDS must create telephone numbers—is plainly contrary to *Facebook*. The majority panel misconstrued Soliman's allegations and how number generators operate. What is telling is that a system which operates exactly

as described by Justice Sotomayor in footnote seven would not be an ATDS according to the panel majority. That is unfathomable, given that *Facebook* was a unanimous opinion of the Court.

The panel majority's opinion mangles the text of the statute. The majority identifies three instances where the word "number" is used in the definition of ATDS. *Id.* at *4. The first is a reference to "*telephone* numbers to be called." *Id.*; 47 U.S.C. § 227(a)(1)(A) (emphasis added). And the third reference states that an ATDS can dial such numbers. *Id.* Reasoning that these two references to "numbers" mean telephone numbers, the panel majority concluded that the second reference to the word "number"— "using a random or sequential number generator,"—must also refer to telephone numbers. *Id.*

This reasoning is deeply flawed. First, in 47 U.S.C. § 227(a)(1)(A), Congress used the word "telephone" when referencing telephone numbers to be called but did not use the word "telephone" when describing a number generator in the second part of that sentence. If Congress intended for the phrase "random or sequential number generator" to refer to telephone numbers, surely it would have included the word "telephone" before the word "number," as it did a few words earlier in the statute. But it did not. Why then, did the majority panel add language to the statute?

Second, the panel majority's opinion eliminates the disjunctive test articulated in the statute—the statute says "to store or produce" not "to create."[6] But according to the panel majority, using a random or sequential number generator to store telephone numbers does not satisfy the test for ATDS. *Id.* at *7–8. For the majority order of the panel to be consistent with the statute, ATDS would need to be defined as "equipment that has the capacity—(A) to create telephone numbers to be called, using a random or sequential telephone number generator; and (B) to dial such numbers." This is not what the statute or the Supreme Court's interpretation of it say. It excises half of the disjunctive test from the statute and adds other words to the statute. Ironically, this is the same interpretive error that the Ninth Circuit committed in *Marks* (excising "random or sequential number generator" from the statute and adding "automatically" to the statute) which led to the *Facebook* decision.

Third, the panel majority's interpretation is a result of a complete misunderstanding of the technology at issue. Put simply, a "random or sequential number generator" refers two to two specific pieces of software code. Judge

[6] Relying on *Facebook*, the panel majority argues that the word "produce" means "creating the telephone number in the first place." *Soliman*, 2024 WL 2097361 at *7. There is no support for this position in *Facebook*. *See Facebook,* 141 S.Ct. at 1172. Even if this were the correct interpretation of the word "produce," the panel majority is still wrong because an ATDS can also "store" telephone numbers using a number generator.

Nardacci recognized this in dissent. *Soliman,* 2024 WL 2097361 at *10. But instead of giving this technical phrase its technical meaning, the panel majority took a misguided grammatical approach and dissected the phrase into individual words. This is no different than a court interpreting "manual transmission" in a statute concerning automobiles by looking at the words "manual" and "transmission" separately, consulting dictionaries, and concluding that the statute concerned sending mail via carrier pigeon. Likewise, a court would never seriously consider parsing the term "cellular telephone" into two separate words and thereafter question whether the correct statutory definition of cellular might be "relating to or consisting of living cells."

These would not be considered by courts because judges as lay persons are familiar with manual transmissions and cellular telephones.[7] But when faced with a less familiar technology—the random or sequential number generator, which was explicitly adopted by Congress in its technological parlance as shown by the Congressional record[8]—this common sense was thrown out the window.

---

[7] Again, ironically, Soliman's position regarding the definition of artificial voice was disregarded by the majority panel for this commonsense reasoning as its justification. Why then did the panel inconsistently not apply such logic and common sense when interpreting the ATDS provision of the statute?

[8] *See Telemarketing Practices: Hearing Before the Subcomm. On Telecomm.s & Fin. Of the H. Comm. On Energy & Commerce on H.R. 628, H.R. 2131, & H.R.*

Soliman has provided examples of a sequential number generator Subway used to store and produce telephone numbers to be called by the SMS blaster. She can point to the number generator and explain what it does, just as the Supreme Court instructed in *Facebook*. However, if the panel majority's opinion is allowed to stand, lower courts must disregard these facts and consider a completely different test—whether the system self-generates telephone numbers. Until a full panel corrects this error, the Second Circuit will be on the wrong side of Supreme Court precedent. *En banc* review is necessary to correct this error.

III. JUDGE NARDACCI'S WELL-REASONED DISSENT DEMONSTRATES A SPLIT AMONG COURTS INTERPRETING ATDS THAT SHOULD BE ADDRESSED *EN BANC*

Notable in this discourse is the split emerging across a plethora of courts. Judge Nardacci's dissent underscores this disagreement among judges, and she is not alone. For example, the Ninth Circuit recently issued two conflicting ATDS orders: *Borden* and *Brickman*. *Borden* was issued first and supports Subway's position. *See generally Borden*, 53 F.4th 1230. However, a few weeks later the *Brickman* court followed *Borden* on "law of the circuit" principles, while including a strong concurrence from Judge VanDyke, refuting *Borden's* reasoning.

2184, 101st Cong. 111 (1991) (statement of Tracy Mullen, Senior Vice President, Government Affairs, National Retail Merchants Association).

Brickman, 56 F.4th at 691–693. Judge VanDyke's opinion supports Soliman's position and suggests disagreement within the Ninth Circuit about the validity of *Borden*. *Id.*

Agreeing with Judge VanDyke's concurrence in *Brickman*, Judge Nardacci's dissent identifies five reasons why the majority committed error. First, Judge Nardacci points out that the majority "reads the word 'telephone' into the phrase 'random or sequential number generator,'" even though a "random or sequential number generator" is logically distinct from a telephone number. *Soliman*, 2024 WL 2097361 at *10. Second, Judge Nardacci reasoned—correctly—that the panel majority's interpretation renders the word "store" in the ATDS definition superfluous. *Id.* Third, Judge Nardacci stated that the majority's interpretation renders the defense of prior express consent superfluous because nobody could ever consent to being called by equipment that randomly creates their telephone number *Id.* at *11. Fourth, Judge Nardacci agreed that the panel majority's opinion was inconsistent with *Facebook*. *Id*. And finally, Judge Nardacci argued in dissent that the majority did not give the phrase "random or sequential number generator" its technical meaning. *Id.*

Dozens of judges—including some within this circuit—have penned similar orders. *See, e.g., Bank v. Digital Media Solutions, Inc.*, No. 22-cv-293- 2023WL 1766210 (E.D.N.Y. Feb. 3, 2023) (rejecting the concept of a random telephone

number generator, and declining to adopt a standard for ATDS that requires telephone number generation); *Montanez v. Future Vision Brain Bank, LLC*, 536 F.Supp.3d 828, 837–838 (D. Colo. 2021); *Atkinson v. Pro Custom Solar LCC*, No. SA-21-cv-178-OLG, 2021 WL 2669558, at *1 (W.D. Tex. June 16, 2021); *Daschbach v. Rocket Mortg., LLC*, No. 22-cv-346-JL, 2023 WL 2599955, at *11 (D.N.H. Mar. 22, 2023). Despite this disagreement, however, no circuit-level court has heard this issue *en banc*.

Judge Nardacci's well-reasoned dissent recites a correct reading of the law and, more importantly, a compelling criticism of the panel majority's opinion. While the Supreme Court may need to step in to clarify this issue nationally, this Court can—and should—review Soliman's case *en banc* and correct the faulty interpretation adopted by the panel majority to assure uniformity within the Second Circuit.

CONCLUSION

The majority opinion of the panel is deeply flawed and directly contrary to Supreme Court precedent. This is the exact situation for which *en banc* review exists. Soliman's case carries a fact pattern which would meaningfully inform the interpretation of ATDS. While *en banc* review is rarely granted, it should be granted here.

Dated: May 24, 2024

Respectfully Submitted,

BY: /s/ Adrian R. Bacon
ADRIAN R. BACON
TODD M. FRIEDMAN

ATTORNEYS FOR APPELLANT

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 35(b)(2) and (3)

I certify pursuant to Fed. R. App. P. 35(b)(2) that the attached Petition for Rehearing En Banc for the Appellant Marina Soliman complies with the type-volume limitation of Fed. R. App. P. 35(b)(2) as it is proportionately spaced, has a typeface of 14 points, and contains 3,893 words.

Dated: May 24, 2024

Respectfully Submitted,

BY: /s/ Adrian R. Bacon
ADRIAN R. BACON
TODD M. FRIEDMAN

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I, Adrian R. Bacon, certify that on May 24th, 2024, the Appellant's Petition for Rehearing En Banc was e-filed through the CM/ECF System, registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF system sends an email notification of the filing to the parties and counsel of record listed above who are registered with the Court's EMC/ECF system. A copy of the e-filed documents were sent, via the EMC/ECF system.

LAW OFFICES OF TODD M. FRIEDMAN

BY: /s/ Adrian R. Bacon
Adrian R. Bacon, Esq.