NO. 19-511

IN THE

Supreme Court of the United States

FACEBOOK, INC.,

Petitioner,

v.

NOAH DUGUID, INDIVIDUALLY AND ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent,

and

UNITED STATES OF AMERICA,

Respondent-Intervenor.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL CONSUMER LAW CENTER, CONSUMER FEDERATION OF AMERICA, AND CONSUMER REPORTS IN SUPPORT OF RESPONDENT DUGUID

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INTEREST OF *AMICI CURIAE*[1]

The **National Consumer Law Center** (NCLC) is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low-income and elderly consumers. Attorneys for NCLC have advocated extensively to protect consumers' interests related to robocalls before the United States Congress, the Federal Communications Commission (FCC), and the federal courts. These activities have included testifying in numerous hearings before various congressional committees regarding how to control invasive and persistent robocalls, appearing before the FCC to urge strong interpretations of the Telephone Consumer Protection Act (TCPA), filing *amicus* briefs before the federal courts of appeals representing the interests of consumers regarding the TCPA, and publishing a comprehensive analysis of the laws governing robocalls in National Consumer Law Center, *Federal Deception Law*, Chapter 6 (3d ed. 2017), updated at *www.nclc.org/library*.

The **Consumer Federation of America** (CFA) is an association of nearly 300 non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education. As a research organization, CFA investigates consumer issues, behavior, and attitudes through surveys, focus groups, investigative reports, economic analysis, and policy analysis. The findings of such research are published in reports that assist

[1] Pursuant to Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *Amici* and their counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.3(a), counsel for all parties have consented to the filing of this brief.

consumer advocates and policymakers as well as individual consumers. As an advocacy organization, CFA works to advance pro-consumer policies on a variety of issues before Congress, the White House, federal and state regulatory agencies, state legislatures, and the courts. As an educational organization, CFA disseminates information on consumer issues to the public and news media, as well as to policymakers and other public interest advocates. CFA has participated repeatedly in comments to the FCC on a wide variety of issues concerning the Telephone Consumer Protection Act and has made recommendations to the FCC regarding robocalls and other TCPA issues as a member of the FCC's Consumer Advisory Council.

Consumer Reports (CR) is an expert, independent, non-profit organization, founded in 1936, that works side by side with consumers for a fairer, safer, and healthier world, fueled by trusted research, journalism, advocacy, and insights. CR reaches nearly 20 million people each month across print and digital media properties, and uses its labs, auto test center, and survey research center to rate thousands of products and services annually. CR has been active for decades on a wide range of policy issues affecting consumers, including protecting consumers from unwanted robocalls. It is a leading supporter of the Telephone Consumer Protection Act, and of the recently enacted TRACED Act. CR also has worked with state legislators to augment the TCPA protections at the state level. CR staff regularly meets with FCC officials, files comments in FCC proceedings, and files *amicus* briefs, all in support of a strong TCPA and strong protections against unwanted robocalls.

SUMMARY OF ARGUMENT

"Americans passionately disagree about many things. But they are largely united in their disdain for robocalls." *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2343 (2020). Unwanted robocalls [2] significantly invade the privacy of Americans, diminish the usefulness of cellular telephones, and threaten public safety.

Congress sought to protect consumers, businesses, and telecommunications systems from these unwanted and intrusive calls by enacting the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227. The linchpin of the TCPA is the prior consent requirement. Congress specifically intended to safeguard Americans from abusive calls by permitting autodialed calls to protected lines only with the prior express consent of the called party, except in emergencies. In Congress's view, the prior consent requirement balanced individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade in a way that protects the privacy of individuals and permits legitimate communication practices.[3]

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[2] The FCC uses the term "robocall" to mean "calls made either with an automatic telephone dialing system ('autodialer') or with a prerecorded or artificial voice." *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, CG Docket No. 02-278, Report and Order, 30 FCC Rcd. 7961, at ¶1, n.1. (F.C.C. July 10, 2015).

[3] Pub. L. 102–243, § 2(9), 105 Stat. 2394 (1991). *See also* Pub. L. 102–243, § 2(15), 105 Stat. 2394 (1991) ("(15) The Federal Communications Commission should consider adopting reasonable restrictions on automated or prerecorded calls to businesses as well as to the home, consistent with the constitutional protections of free speech.")

The elegance of this construct, which requires consent for calls to cell phones and other protected numbers, is that it gives the people *being called* control over their phones. But consent has no significance if, as Petitioner argues, the only type of automatic telephone dialing system (ATDS) covered by the TCPA is one that generates numbers from thin air. The caller would have no way of ensuring that calls randomly dialed by an ATDS only reached parties who had consented to receive those calls. A consent requirement is only relevant if the caller has a list of stored numbers for parties who have consented to autodialed calls. Accordingly, the Ninth Circuit correctly rejected Petitioner's argument that the ATDS definition encompass only equipment that generates and automatically dials random or sequential telephone numbers.

The current problem is not with the TCPA, as Petitioner and its *amici* argue. The TCPA is not out-of-date as some claim. Indeed, Congress just passed language updating and strengthening the statute in 2019.[4] The precipitating "problem" is that callers want to make cheap robocalls, billions of them, without worrying about having consent.

Notwithstanding the hyperbolic language of Petitioner and its *amici*, the problem is also not the TCPA's application to smartphones. Smartphones are simply small computers, which standing alone do not have the ability to robocall people *en masse*. However, if companies pair smartphones, like any other computers, with autodialing software and then

[4] Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act, Pub. L. No. 116-105, 133 Stat. 3274 (2019) (TRACED Act).

make automated calls, the TCPA restrictions apply, as they should. And, the FCC clearly has the regulatory authority to interpret which systems are appropriately captured by the definition of ATDS.

Finally, the problem is not class action lawsuits. Rather, it is the unrelenting robocalls, the lack of effort by callers to determine if they have the consent of the called party, and their failure to stop making robocalls after requested, that drives the litigation.

If the Court rules as Petitioner proposes and interprets the ATDS definition to encompass only equipment that generates and automatically dials random or sequential telephone numbers, the consequence will be that autodialed calls and texts to all cell phones and the other protected lines will be virtually unstoppable. Business cell phones will effectively be unprotected from *all* automated texts and *all* automated calls that do not include a prerecorded voice.[5] The primary safeguard against the constant invasion of privacy—consent—will fall. As consent will no longer be required to make these calls, withdrawing consent will be ineffective, and begging for the calls to stop will not bring relief. Callers that refuse to stop when asked will not be subject to either private or public enforcement. In essence, the Petitioner's position would render the TCPA's restriction on autodialing meaningless.

[5] This brief uses "prerecorded" as a shorthand term for calls that use either a prerecorded or artificial voice.

ARGUMENT

I. Robocalls Are Cheap, Profitable, and Invasive.

Bill Dominguez tried to stop the flood of text messages from Yahoo. He replied "stop" and "help" to some of the text messages. He asked Yahoo's customer service for assistance. The messages did not stop. He asked the Federal Communications Commission (FCC) to help. Its efforts were futile. The text messages kept coming. Only after Mr. Dominguez filed a TCPA lawsuit did the messages finally end. By that point he had received ***27,809 unwanted text messages*** from Yahoo. *Dominquez v. Yahoo, Inc.*, 629 Fed. Appx. 369, 370 (3d Cir. 2015), *on remand*, 2017 WL 390267 (E.D. Pa. Jan. 27, 2017), *aff'd*, 894 F.3d 116 (3d Cir. 2018).

The negative impacts of unwanted robocalls are borne by Americans on a daily basis. As noted by FCC Chairman Pai, consumers complain:

> "'[R]obocalls…have become a major nuisance to the point where I don't answer any calls unless I know the number—and [I] have missed some very important calls…because of that.'
>
> 'I receive so many robocalls that I don't answer the phone unless I recognize the number.'
>
> 'I now find that my cell phone is becoming useless as a telephone.'"[6]

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[6] Ajit Pai, FCC Chairman, "Blocking and Tackling Robocalls" (May 15, 2019) (describing a few of the roughly 630 complaints that the FCC receives daily about unwanted robocalls), *available at* https://www.fcc.gov/news-events/blog/2019/05/15/blocking-and-tackling-robocalls.

These narratives are heard over and over again as the number of unwanted robocalls has exploded in recent years. Internet-powered phone systems have made it easy and cheap for scammers, spoofers, telemarketers, debt collectors, and others to make millions of automated calls. Services like Message Communications offer 125,000 minutes of robocalls for a mere $875—meaning that if each targeted consumer listens to the call for an average of three seconds and then hangs up, the robocall campaign would reach 2.5 million consumers. [7] A single telemarketing calling campaign can involve millions of nonconsensual, autodialed calls. *See, e.g.*, *McCurley v. Royal Seas Cruises, Inc.*, 2019 WL 1383804 (S.D. Cal. Mar. 27, 2019) (634 million calls using an ATDS to 2.1 million consumers to sell cruises); *Golan v. Veritas Entm't, LLC*, 2017 WL 3923162, at *1 (E.D. Mo. Sept. 7, 2017) (film studio made 3,242,493 unsolicited calls to promote film using an ATDS), *aff'd sub nom. Golan v. FreeEats.com, Inc.*, 930 F.3d 950 (8th Cir. 2019); *Ott v. Mortgage Investors Corp. of Ohio, Inc.,* 65 F. Supp. 3d 1046 (D. Or. 2014) (3.5 million people called to refinance V.A. mortgages).

Creditors and debt collectors also make over a billion calls to consumers every year. [8] Using autodialers, these companies can call "more than 1

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[7] MessageCommunications, Voice Broadcasting Pricing / Rates, *available at* http://www.voicebroadcasting.us/Pricing.html.

[8] ACA International White Paper, Methodological and Analytical Limitations of the CFPB Consumer Complaint Database 7 (May 2016), *available at* https://www.acainternational.org/assets/research-statistics/aca-wp-methodological.pdf.

million people an hour for less than a penny per call."[9] Mirella Covarrubias knows the bane of autodialed debt collection calls that would not stop. She was subjected to at least 1,401 calls, often multiple calls on a single day, even though she repeatedly asked the defendant to stop calling. *Covarrubias v. Ocwen Loan Servicing, LLC*, 2018 WL 5914239 at *1 (C.D. Cal. Mar. 7, 2018).

Worse, debt collectors often relentlessly call the wrong person. Amber Goins received frequent calls from a debt collection firm acting on behalf of Walmart in hopes of collecting a debt owed by Kenya Johnson. Ms. Goins told the callers countless times that she was not Kenya Johnson and that she did not know anyone by that name. Each time, the callers assured her that her number would be removed from their list, but it wasn't; the wrong number robocalls kept coming. Plaintiff's Motion for Class Certification, *Goins v. Wal-Mart Stores, Inc. dba Walmart and Palmer Recovery Attorneys, P.L.L.C.*, Case No. 6:17-cv-00654 (M.D. Fla. filed Mar. 6, 2018) (case terminated Apr. 26, 2018).

The soaring number of complaints to government agencies demonstrates the extent to which unwanted automated calls significantly invade the privacy of Americans, diminish the usefulness of cellular telephones, and threaten public safety.[10] In

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[9] Annie Nova, *Robocalls about your bills can pour in every day, all day,* CNBC Personal Finance (Mar. 16, 2019), *available at* https://www.cnbc.com/2019/03/16/robocalls-about-your-bills-can-pour-in-every-day-all-day.html.

[10] Pub. L. 102–243, § 2, 105 Stat. 2394 (1991) ("(5) Unrestricted telemarketing, however, can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety."

2009, the FTC received about 756,000 robocall complaints; by 2019, that number had nearly quintupled to 3.7 million.[11] In August 2020 alone, Americans were subjected to 3.7 *billion* robocalls; in total, they were bombarded with over 58 *billion* robocalls in 2019.[12]

Congress sought to protect consumers, [13] businesses, and telecommunications systems from these unwanted and intrusive calls by enacting the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227. In enacting the TCPA, Congress not only expressed its concern about the invasion of Americans' privacy, but also recognized the potential threat to public safety caused by robocalls.[14] The law's primary safeguard against abusive calls is the requirement that the called party provide prior express consent for autodialed or prerecorded calls except in emergency situations. In Congress's view, the prior consent requirement balanced "(i)ndividuals' privacy rights, public safety interests, and

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[11] Federal Trade Comm'n, Biennial Report to Congress Under the Do-Not-Call Registry Fee Extension Act of 2007, at 3 (Dec. 2019), *available at* https://www.ftc.gov/system/files/documents/reports/biennial-report-congress-under-do-not-call-registry-fee-extension-act-2007-operation-national-do-not/p034305dncreport2019.pdf.

[12] YouMail Robocall Index, Historical Robocalls By Time, *available at* https://robocallindex.com/history/time. (last accessed Oct. 16, 2020).

[13] Pub. L. 102–243, § 2(6), 105 Stat. 2394 (1991) ("(6) Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.").

[14] Pub. L. 102–243, § 2(5), 105 Stat. 2394 (1991) ("(5) Unrestricted telemarketing, however, can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety."

commercial freedoms of speech and trade…in a way that protects the privacy of individuals and permits legitimate telemarketing practices."[15]

If the Court rules as Petitioner proposes and interprets the TCPA's definition of automatic telephone dialing system (ATDS)[16] to encompass only equipment that generates and automatically dials random or sequential telephone numbers—equipment that is no longer in use—the consequence will be that autodialed calls will be virtually unstoppable. The primary safeguard against the constant invasion of privacy and threat to public safety—consent—will fall. Consent will no longer be required to make these calls, withdrawing consent will be ineffective, and begging for the calls to stop will not bring relief. Callers that refuse to stop when asked will not be subject to either private or public enforcement. In essence, the Petitioner's position renders the TCPA's protection against autodialed calls meaningless.

II. Narrowing the Definition of ATDS as Petitioner Proposes Would Radically Reduce Protections for Consumers and Businesses.

The TCPA's protections against unwanted calls are set out in four sections:

1. Section 227(b)(1)(A) restricts calls to protected lines such as hospital lines, police emergency and poison control center lines, and cell phones. Calls to these protected lines made either with

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[15] Pub. L. 102–243, § 2(9), 105 Stat. 2394 (1991). *See also* Pub. L. 102–243, § 2(15), 105 Stat. 2394 (1991).

[16] 47 U.S.C. § 227(a)(1).

an ATDS or using a prerecorded voice are prohibited unless the caller has prior express consent from the called party or the calls are made for emergency purposes.

2. Section 227(b)(1)(B), as implemented by FCC regulations, [17] prohibits calls to residential lines (landlines and cell phones that are used as residential phones) from telemarketing calls that are made using a prerecorded voice unless the caller has prior express written consent.

3. Section 227(c), as implemented by FCC regulations, [18] prohibits callers from calling residential lines (including cell phones used for residential purposes) registered with the national do-not-call registry—which applies only to telemarketing calls.

4. Section 227(1)(D) protects multi-line businesses from having two or more telephone lines engaged simultaneously by calls using an ATDS.

As a consequence, the protections against unwanted calls are different based on the type of line being called, the type of message, and the method used to make the call.

1. Residential landlines are protected a) against prerecorded telemarketing calls

[17] 47 C.F.R. § 64.1200(a)(3).

[18] 47 C.F.R. § 64.1200(c).

unless the caller has prior express written consent, and b) from any type of telemarketing call, including hand-dialed live calls, if the line is registered on the do-not call registry. These protections are not at issue in this case.

2. Residential cell phones, like residential landlines, are protected from telemarketing calls to numbers on the do-not-call list. In addition, cell phones have protection against all prerecorded calls, not just telemarketing calls, made without prior express consent. And, third, cell phones are protected against ATDS calls (including text messages), regardless of content, unless the caller has prior express consent, or the call is made for emergency purposes. **It is this third protection that is at issue in this case.**

3. Hospital, poison control, and health care facility lines are protected against ATDS calls (including text messages) and prerecorded calls, regardless of content, unless the caller has prior express consent, or the calls are made for emergency purposes. **This protection against ATDS calls is at issue in this case.**

4. Business landlines are mostly unprotected from unwanted calls unless the lines are "protected lines" (hospital, poison control, etc.). However, section 227(b)(1)(D) does protect business

landlines from callers using an ATDS "in such a way that two or more telephone lines of a multi-line business are engaged simultaneously." Because this restriction applies only to callers using an ATDS, **the limited protection afforded business landlines is at issue in this case**.

5. Business cell phones are protected against calls using prerecorded voice and ATDS calls (including text messages), regardless of content, unless the caller has prior express consent, or the call is made for emergency purposes. (The restrictions applicable to residential lines regarding telemarketing calls are not generally applicable to cell phones used for business purposes. *See, e.g., Mattson v. Quicken Loans, Inc.*, 2019 WL 7630856 (D. Or. Nov. 7, 2019).) **The protection against ATDS calls and texts to business cell phones is at issue in this case.**

Changing the definition of ATDS as Petitioner suggests would radically expand the number of unwanted robocalls and automated texts to Americans' cell phones. More importantly, they will be unstoppable. For the following automated texts and calls, prior express consent would no longer be required:

No Limitations on Autodialed Non-telemarketing Calls to Cell Phones. The ATDS restrictions currently protect cell phone users from an onslaught of non-telemarketing calls such as debt collection calls, wrong number calls, fundraising calls,

or business survey calls. But, under the Petitioner's narrow definition of ATDS, these calls will not be covered, and there will be no prior express consent requirement. To understand the consequence, one needs to look only at the unremitting blitz of robocalls to residential landlines, whose protections under the TCPA are much weaker than those for cell phones.[19] One of the largest telephone companies in the U.S.—Verizon, which serves both cellular and residential customers—reports that its average residential customer receives over *twice* as many unwanted robocalls as its average cell phone customer.[20] If cell phones were shielded only by a similarly-limited set of protections, users would be defenseless against the increasing barrage of robocalls.

No Restrictions for Telemarketing Texts and Autodialed Calls with Live Operators to Business Cell Phones. The restrictions against telemarketing calls and texts apply only to cell phones that are considered residential lines. Under Petitioner's view, business cell phones will have *no* protections from any automated live calls or texts of any kind, at any time—even telemarketing calls and texts. The result will unquestionably be a swarm of unwanted and

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[19] There is no restriction on autodialed calls to residential telephone numbers, and prerecorded calls are restricted only if made for telemarketing purposes. *See* 47 U.S.C. § 227(b)(1)(B); 47 C.F.R. § 64.1200(a)(3).

[20] *See* Letter of Christopher D. Oatway, Verizon, to J. Patrick Webre, Consumer & Governmental Affairs Bureau, Fed. Commc'ns Comm'n, *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59; *Call Authentication Trust Anchor*, WC Docket No. 17-97 (filed Feb. 28, 2020). Verizon compared the volumes of unwanted calls to wireless (cellular) and wireline (residential) customers using the same algorithms those services use to identify unwanted calls.

unstoppable calls and texts to the cell phones used for business purposes. Yet, small businesses are increasingly dependent on mobile phones. AT&T reports that 94% of small businesses use smartphones to conduct business, and that two-thirds of small business owners say that their business could not survive without wireless technology.[21]

Unstoppable Alerts and Reminders. Consumers will no longer have control over alerts and reminders. Currently, alerts and reminders may be sent to consumers under the TCPA if the caller has prior express consent from the called party. Many businesses from dry cleaners and pharmacies to grocery stores and financial institutions, obtain consumer consent and provide helpful alerts and reminders. But what if the consumer no longer wants to receive these types of messages? Under the Ninth Circuit's definition of an ATDS, these messages would be covered by the TCPA, and the consumer would have the right to revoke consent and stop the texts. *Marks v. Crunch San Diego, L.L.C.,* 904 F.3d 1041 (9th Cir. 2018). But if the ATDS definition only covers automated dialers that call numbers generated randomly or sequentially, these messages would not be covered and consumers would have no mechanism to enforce a "stop" request.

Autodialed Scam Calls and Texts to Cell Phones Would No Longer Require Consent. Although state and federal laws prohibiting fraud apply to scam

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[21] *See* AT&T, Survey Finds Mobile Technologies Saving U.S. Small Businesses More Than $65 Billion a Year (May 14, 2014), *available at* https://about.att.com/story/survey_finds mobile_technologies_saving_us_small_businesses_more_than_65_billion_a_year.html.

calls, which make up 40% of all robocalls,[22] it is much easier for both government enforcement agencies and telephone providers to stop scam robocalls based on the lack of consent for those calls. Eliminating the consent requirement for callers who use an ATDS to make scam calls would remove an essential weapon of telephone service providers [23] and government entities seeking to curtail these scams.[24]

III. Petitioner's Proposed Interpretation of the ATDS Definition Runs Counter to Congress's Intent to Allow Autodialed Calls If Made With the Called Party's Consent.

A. Congress Intended to Allow Autodialed Calls If Made With the Called Party's Consent.

The language of the TCPA is unequivocal in applying the prior express consent requirement to autodialed calls. It prohibits "any call (other than a call made…with the prior express consent of the called party) using any automatic telephone dialing system *or* an artificial or prerecorded voice." 47 U.S.C. § 227(b)(1)(A) (emphasis added). Congress's

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[22] YouMail Robocall Index, Robocalls by Category, *available at* https://robocallindex.com (last accessed Oct. 16, 2020).

[23] *See, e.g.,* Press Release, Federal Commc'ns Comm'n, FCC Takes Action to Protect Consumers From Spam Robotext Messages (Dec. 12, 2018), *available at* https://docs.fcc.gov/public/attachments/DOC-355527A1.pdf.

[24] *See, e.g.,* Press Release, Federal Commc'ns Comm'n, FCC to Robocallers: There Will Be No More Warnings (May 1, 2020), *available at* https://docs.fcc.gov/public/attachments/DOC-364109A1.pdf (agency drops citation requirements and extends statute of limitations period during which robocallers can be fined).

use of the word "or" shows that the prior express consent requirement applies both to autodialed calls and to prerecorded calls.

The statutory language is irrefutable evidence that Congress envisioned a system in which callers would be able to make autodialed calls to parties who had consented. The legislative history confirms this point. When the final version of the bill that became the TCPA was presented to the House on November 26, 1991, Congressman Matthew Rinaldo of New Jersey, one of its bipartisan co-sponsors, stated: "In addition to addressing these serious health and safety concerns, the bill would prohibit autodialed calls to anyone that has not given the caller express consent."[25]

The progression of the bills that became the TCPA also shows that Congress acted very deliberately in allowing autodialed calls if made with the called party's consent. The legislation that finally became the TCPA had origins in three different bills. In the House, the "Telephone Advertising Consumer Rights Act" (H.R. 1304) was introduced on March 6, 1991.[26] In July 1991, the "Telephone Advertising Consumer Rights Act" (S. 1410) was introduced in the Senate, followed by the "Automated Telephone Consumer Protection Act" (S. 1462).[27] After a number of changes to the three bills and negotiations between the House and Senate, various provisions from each bill were incorporated into S. 1462, which was passed

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[25] 137 Cong. Rec. H11307, 11311 (Nov. 26, 1991) (statement of Mr. Rinaldo).

[26] *See* 137 Cong. Rec. E793 (1991).

[27] *See* 137 Cong. Rec. S8991-93 (1991).

as the "Telephone Consumer Protection Act" and signed into law on December 20, 1991.

The original version of S. 1410 defined ATDS exactly the same as the current law does, but flatly prohibited all calls that used an ATDS and were made to protected lines, without any exception for calls made with consent:

> *It shall be unlawful for any person within* the United States by means of telephone-
>
> …
>
> (3) to make any call using any automatic telephone dialing system, or an artificial or prerecorded voice-
>
> (A) to any emergency telephone line or pager of any hospital, medical physician or service office, health care facility, or fire protection or law enforcement agency; or
>
> (B) to any telephone number assigned to paging or cellular telephone service.[28]

The original of the companion bill, S. 1462, contained an identical prohibition against these calls made with an ATDS.[29] However, when the bills were heard on the floor of the Senate, the outright prohibition against autodialed calls to these protected lines was changed to *allow* the calls, but only with "the prior express consent of the called party" or "for emergency

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[28] 137 Cong. Rec. 30817 (1991) (S. 1410 § 3(b)), *available at* https://www.govinfo.gov/content/pkg/GPO-CRECB-1991-pt21/pdf/GPO-CRECB-1991-pt21-2-2.pdf. (Emphasis added).

[29] *Id.* at 30820 (S. 1462, § 2(b)).

purposes."[30] The amendments to the bills that became the TCPA demonstrate the Senate's specific intent to allow autodialed calls with the called party's consent.

The evolution of the House bill demonstrates the same point in a different manner. In the original House bill, H.R. 1304, the definition of an ATDS required that the equipment have the capacity to deliver a prerecorded voice message.[31] The House prohibition was thus narrower than the Senate's, because by definition, H.R. 1304 restricted calls from equipment only if the equipment had the capacity to autodial *and* use a prerecorded voice. However, after negotiations between the House and the Senate, the House abandoned its version of the bill and acceded to the Senate's amended version. That version removed the requirement that an ATDS use a prerecorded voice and applied the requirement for prior express consent to calls made either with an ATDS *or* with a prerecorded voice. This progression shows that the House, like the Senate, made a deliberate decision to allow autodialed calls if made with the consent of the called party—a decision that would be inexplicable if members expected that no caller would ever be able to make such calls legally.

Allowing autodialed calls with the called party's consent makes sense from a public policy perspective. While consumers strongly object to unwanted calls, many consumers want to receive certain calls or text messages, such as appointment

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[30] *Id.* at § 30823 (S. 1462, § 2(b)(1)(A)); 137 Cong. Rec. 30818 (1991) (S. 1410 § 3(b)),

[31] *See* H.R. 1304, 102d Cong., 1st Sess. (as introduced on Mar. 6, 1991), *available at* https://www.congress.gov/bill/102nd-congress/house-bill/1304/text.

reminders from health care providers and low-balance alerts from their bank. Of the 3.8 billion robocalls made in the month of September, 988 million were reminders and alerts.[32] The consent requirement enables consumers to receive these calls without being bombarded with autodialed calls that they do *not* want and ensures that they have the ability to stop the calls when they no longer want to receive them.

B. The Only Way Calls From an ATDS Can Be Made With Consent is If the Callers Are Storing Numbers and Calling From Lists.

The narrow ATDS interpretation that Petitioner espouses is inconsistent with Congress's view that autodialed calls are permissible with prior express consent. Petitioner's interpretation would render this consent requirement for autodialed calls essentially meaningless, applying only to a null set.

First, as the Ninth Circuit stated in *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 (9th Cir. 2018), "[t]o take advantage of this permitted use, an autodialer would have to dial from a list of phone numbers of persons who had consented to such calls, rather than merely dialing a block of random or sequential numbers." If the ATDS definition includes only telephone numbers produced randomly or sequentially from thin air, rather than dialed from a stored database of numbers, prior consent would be meaningless. Autodialed calls would almost always reach parties who had not consented, because the dialed numbers would have been conjured up by the

[32] YouMail Robocall Index, Robocalls by Category, *available at* https://robocallindex.com/.

ATDS. The called parties' consent to autodialing would be a matter of sheer coincidence.

The prior consent requirement only makes sense if an ATDS encompasses calls made from a stored list of numbers, as only then will the caller know that it is calling persons who have provided consent. While the Ninth Circuit's decision in *Marks* was the first to adopt this reasoning, the Second and Sixth Circuits have also found this logic persuasive. *Duran v. La Boom Disco, Inc.*, 955 F.3d 279 (2d Cir. 2020); *Allan v. Pennsylvania Higher Educ. Assistance Agency,* 968 F.3d 567, 575 (6th Cir. 2020). As the Sixth Circuit pointed out in the context of the exception created by Congress in 2015 for calls to collect government debt, those "are calls made to known recipients. These calls are dialed from a stored list of numbers because the debt-collection industry uses known numbers, not random numbers." *Allan,* 968 F.3d at 576 (citations omitted).

Similarly, as the Second Circuit pointed out, if an ATDS calls only numbers generated randomly, that would mean "that an ATDS must reach such debtors only by calling numbers derived from random or sequential number generators? That result is highly unlikely, for it would be highly inefficient—requiring the Government to call numbers haphazardly until it luckily found someone who owed it money." *Duran,* 955 F.3d at 285.

Second, the TCPA prohibits use of an autodialer to call emergency telephone lines, patient rooms in hospitals, and other sensitive numbers. 47 U.S.C. § 227(b)(1)(A). As the Ninth Circuit held, "[i]n order to comply with such restrictions, an ATDS could either dial a list of permitted numbers (as allowed for

autodialed calls made with the prior express consent of the called party) or block prohibited numbers when calling a sequence of random or sequential numbers. In either case, these provisions indicate Congress's understanding that an ATDS was not limited to dialing wholly random or sequential blocks of numbers but could be configured to dial a curated list." *Marks,* 904 F.3d at 1051 n.7. *Accord Duran,* 955 F.3d at 285; *Allan,* 968 F.3d at 575.

Third, the 2015 Budget Act created an exemption for the use of an ATDS to make calls "solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A)(iii). While this exemption has been struck down as unconstitutional, *see Barr v. Am. Ass'n of Political Consultants, Inc.,* 140 S. Ct. 2335 (2020), it still shows Congress's understanding of the TCPA. Congress would have had no reason to enact this exception if it had not understood and intended the statute to apply to equipment that dials from a list of numbers, such as a list of numbers of individuals who owe debts to the United States. *See Allan,* 968 F.3d at 575.

Fourth, the TCPA prohibits use of an autodialer in a way that ties up multiple lines of a multi-line business. 47 U.S.C. § 227(b)(1)(D). If an autodialer were defined merely as one that dials numbers in a random or sequential order, not from a list, it would be impossible to implement this prohibition because a caller calling numbers produced out of thin air would have no way of ensuring that it was not tying up a business's multiple lines.

Finally, the TCPA permits an award of treble damages if a violation is willful or knowing. 47 U.S.C. § 227(b)(3). If numbers were generated out of thin air,

rather than from a list, a caller could never *know* it was calling an emergency line or a cell phone, so this provision would also be rendered meaningless.

IV. The Calling Industry's Claims About the TCPA's Application to Text Messages and Smartphones and About Over-Litigation Are Wrong.

A. Congress Has Explicitly Covered Automated Texts as Calls Requiring Consent.

Text messaging as we now know it was introduced in the United States in 2000.[33] However, when Congress enacted the TCPA in 1991, it restricted "calls," not *voice* calls, and it explicitly applied the restriction to pagers, treating them exactly like cell phones. 47 U.S.C. § 227(b)(1)(A)(iii). Pagers were primitive text messaging systems: they enabled a message, originally consisting just of a telephone number, to be sent through the telecommunications system to the recipient.[34] By 1990, the year before the TCPA was enacted, a pager could receive up to four lines of alphanumeric text.[35]

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[33] Federal Commc'ns Comm'n, *In re* Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, 17 FCC Rcd. 12985, 13051 (July 3, 2002).

[34] *See* Mary Bellis, ThoughtCo., *History of Pagers and Beepers* (Sept. 10, 2018), *available at* https://www.thoughtco.com/history-of-pagers-and-beepers-1992315.

[35] *See* Brian Santo, IEEE Spectrum, The Consumer Electronics Hall of Fame: Motorola Advisor Pager (Jan. 3, 2019), *available at* https://spectrum.ieee.org/consumer-electronics/gadgets/the-consumer-electronics-hall-of-fame-motorola-advisor-pager

By including pagers in the autodial prohibition, Congress unambiguously expressed concern not just about voice calls, but also about technology that enabled text messages to be sent to wireless devices.

As text messaging grew in popularity, the FCC affirmed that the statute applied to text messages:

> We affirm that under the TCPA, it is unlawful to make *any call* using an automatic telephone dialing system or an artificial or prerecorded message to any wireless telephone number. …This encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls, provided the call is made to a telephone number assigned to such service.[36]

In 2019, when it passed the TRACED Act, Congress unambiguously endorsed the FCC's inclusion of texts as calls restricted under section 227(b). The TRACED Act added a new subsection to the TCPA requiring the FCC to issue regulations to facilitate information sharing to address unwanted

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[36] *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, CG Docket No. 02-278, Report and Order, 18 FCC Rcd. 14014, at ¶ 165 (July 3, 2003) (footnotes omitted). The FCC reiterated this conclusion in 2012, *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, CG Docket No. 02-278, Report and Order, 27 FCC Rcd. 1830, at ¶ 4 (Feb. 15, 2012), and 2015, *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, CG Docket No. 02-278, Report and Order, 30 FCC Rcd. 7961, at ¶¶ 27, 107–108, 111–115 (July 10, 2015), *appeal resolved*, *ACA Int'l v. Fed. Commc'ns Comm'n*, 885 F.3d 687 (D.C. Cir. 2018) (setting aside two parts of 2015 ruling but leaving this portion undisturbed).

robocalls and spoofed calls. The new section explicitly extends to both calls and text messages sent in violation of the statute.

> Sec. 10. Stop Robocalls.
> (a) Information Sharing Regarding Robocall and Spoofing Violations. —
>
> Section 227 of the Communications Act of 1934 (47 U.S.C. 227) is amended by adding at the end the following:
> "(i) Information Sharing. —
> "(1) In general.--Not later than 18 months after the date of the enactment of this subsection, the Commission shall prescribe regulations to establish a process that streamlines the ways in which a private entity may voluntarily share with the Commission information relating to--
> "(A) a call made or **a text message sent in violation of subsection (b)**; . . . .[37]

Text messages could violate subsection (b) only if they are considered calls covered by the TCPA. It is clear that Congress continues to treat text messages as calls under the TCPA.

The TRACED Act is additionally corroborative because it follows the FCC's repeated rulings that the TCPA applies to text messages. Where an agency's statutory construction has been fully brought to the attention of the public and Congress, and Congress has not sought to alter that interpretation although it

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[37] Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act, Pub. L. No. 116-105, § 10(a) 133 Stat. 3274 (2019) (TRACED Act) (emphasis added).

has amended the statute in other respects, then a court may presume that the agency correctly discerned Congress's intent. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535, 102 S. Ct. 1912, 72 L. Ed. 2d 299 (1982); *see also Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 536, 135 S. Ct. 2507, 192 L. Ed. 2d 514 (2015). Moreover, this Court has held that a text message to a cell phone, undisputedly "qualifies as a 'call' within the compass of § 227(b)(1)(A)(iii)." *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 156, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016). And many circuit courts of appeals have held that the TCPA applies to text messages. *See Blow v. Bijora*, 855 F.3d 793, 798 (7th Cir. 2017); *Murphy v. DCI Biologicals Orlando, L.L.C.*, 797 F.3d 1302 (11th Cir. 2015); *Keating v. Peterson's Nelnet, L.L.C.*, 615 Fed. Appx. 365 (6th Cir. 2015); *Gager v. Dell Fin. Servs., L.L.C.*, 727 F.3d 265, 269 n.2 (3d Cir. 2013); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009).

B. Smartphones Are Not Being Used to Violate the TCPA.

The briefs of Petitioner and its *amici* repeatedly claim that if the definition of an ATDS encompasses devices that store and dial numbers, everyone with a cell phone will be subject to the TCPA's damages. *See also Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 467 (7th Cir. 2020); *Glasser v. Hilton Grand Vacations Co., L.L.C.,* 948 F.3d 1301, 1309 (11th Cir. 2020). This theoretical issue is a red herring, not a genuine concern.

Smartphones are small computers that—just like desktop computers—permit users to do all sorts

of things, including launching applications that make tens of thousands of calls. But unless partnered with additional capabilities, smartphones do not make calls *en masse*.[38] As the Sixth Circuit noted: "To the extent that companies use smart phone autodialer software to call or message recipients *en masse,* that would be covered. But the standard, non-automatic message or call would not create TCPA liability." *Allan,* 968 F.3d at 579.

Moreover, computers of any size, including smartphones, can be paired with a dialer that generates numbers randomly or sequentially just as easily as they can be paired with dialers that dial from lists. As a result, a smartphone could be transformed by such pairing into an ATDS under *either* Petitioner's or Respondent's proposed ATDS definition.

No one from the calling industry in this or related litigation has pointed to any case in which an individual making calls on a smart phone has been liable under the TCPA. This lack of evidence shows that this argument is a hyperbolic concern, without any real justification.

Even if there were some non-hypothetical concern about the TCPA's application to the ordinary use of a smartphone, the FCC has authority to "prescribe regulations to implement the requirements of subsection (b)." 47 U.S.C. § 227(b)(2). The FCC has already promulgated regulations and declaratory

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[38] While a smartphone can dial one number automatically using, for example, a Do Not Disturb function, the ATDS definition requires that the system be capable of automatically dialing multiple numbers. 47 U.S.C. § 227(a)(1)(B) (dial such *numbers*) (emphasis added).

orders that clarify aspects of the TCPA. Indeed, the FCC currently has pending a proceeding on the issue of whether the ordinary use of a smartphone falls within the TCPA.[39] The FCC clearly has the tools under the TCPA to delineate when a smartphone used in the ordinary way (i.e., not to make numerous identical calls to many people) is not an ATDS.

C. The Problem is Robocallers' Abuse of the Telecommunications System, Not Class Actions.

Robocallers like to point to the numbers of class actions as fodder for their claim that TCPA rules are out of control and the ATDS definition needs to be so narrowed that it would be meaningless. But the numbers of lawsuits are an indication of the surfeit of unwanted and nonconsensual calls, not an indication of abusive litigation.

While the annual number of robocalls increased 348% in just four years, from 13 billion in 2015 to over 58 billion in 2019,[40] and complaints to the FTC and FCC increased by 48%,[41] the number of

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[39] *See* Public Notice, Federal Communications Commission, Consumer and Governmental Affairs Bureau Seeks Comments on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision, CG Docket Nos. 18-152 and 02-278 (Rel. May 14, 2018, a*vailable at* https://ecfsapi.fcc.gov/file/0514497027768/DA-18-493A1.pdf.

[40] The 2015 number is derived from the average number of calls in the eight months for which totals are provided. YouMail Robocall Index, Historical Robocalls Through Time, *available at* https://robocallindex.com/history/time

[41] Federal Trade Comm'n, National Do Not Call Data Book 2019 (Oct. 2019), *available at* https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-data-book-

TCPA cases filed actually *decreased* by 11% during this same period.[42] Litigation to stop unwanted robocalls is simply not keeping up with the flood of unwanted robocalls or the surge in consumer complaints.

The low cost of making robocalls makes it less expensive for callers to keep making the calls rather than engaging the systems available to ensure they are complying with the law and calling only people who have consented. It is not hard for callers to protect themselves. For example, private compliance mechanisms have been available for years that allow businesses to ensure they are not calling wrong numbers.[43] And the FCC has established a reassigned number database, which will soon provide a safe harbor from TCPA liability for callers that use it and still reach wrong numbers.[44] When in doubt, callers

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fiscal-year-2019/dnc_data_book 2019.pdf; Federal Commc'ns Comm'n. Consumer Complaints Data, *available at* https://opendata.fcc.gov/d/vakf-fz8e/visualization.

[42] WebRecon, Web Recon Stats for Dec 2019 and Year in Review, *available at* https://webrecon.com/webrecon-stats-for-dec-2019-and-year-in-review-how-did-your-favorite-statutes-fare/ (last accessed Oct. 13, 2020).

[43] *See, e.g.,* Active Prospect: TrustedForm ("TrustedForm is a lead certification product that helps you comply with regulations like the TCPA by documenting consumer consent"), *available at* https://activeprospect.com/products/trustedform/?utm_medium=cpc&utm_source=google&utm_campaign=search-tf-tcpacompliance.

[44] *See* Public Notice, Federal Commc'ns Comm'n, CGB Announces Compliance Date for Reassigned Numbers Database Rules (July 2, 2020), *available at* https://www.fcc.gov/document/cgb-announces-compliance-date-reassigned-numbers-database-rules.

can reach out to consumers or businesses without using an autodialer.

Moreover, Congress has been well aware of the callers' complaints about supposedly "burdensome litigation," yet all of Congress's attention in recent years has been focused on addressing the problem of unwanted robocalls, not dealing with any so-called "meritless" lawsuits. Just last year, with the passage of the TRACED Act, Congress reiterated the need for the TCPA's restrictions against automated calls to cell phones as necessary to maintain trust in the communications system:

> The rising tide of illegal robocalls has quickly turned from a nuisance to a real threat on the way we all view and use our telephones...These calls all undermine the public's trust in our phone system.[45]

Even as the TRACED Act made its way to passage, the callers were making it quite clear that they wanted changes to the TCPA specifically to narrow the definition of ATDS, to shield them from liability for making automated calls. Both chambers of Congress were well aware of this effort,[46] and of the issue in this case.[47] Yet Congress did not find it

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[45] 165 Cong. Rec. H9244 (Dec. 4, 2019) (statement of Mr. Pallone).

[46] *See, e.g.,* Statement of U.S. Chamber Inst. for Legal Reform (Apr. 18, 2018), *available at* https://www.commerce.senate.gov/services/files/7B94454D-D7C5-4231-AD32-E53F8080685F.

[47] Legislating to Stop the Onslaught of Annoying Robocalls: Hearing Before the Subcomm. on Commc'ns and Tech. of the House Comm. on Energy and Commerce, 166th Cong., 1st

warranted to narrow the definition of ATDS, even though it was amending the TCPA just a year after the *Marks* decision, and six months after the Ninth Circuit had reaffirmed the ruling in the present case. [48] As Congress found the calling industry's arguments about "litigation abuse" unpersuasive, so too should this Court.

The fear of lawsuits serves as one of the few constructive deterrents to businesses engaged in robocalling. Knowing that there are consequences for violating the law provides an incentive to comply. These consequences also help even the playing field between those businesses that strive to comply with the law, and those that are careless, or worse. Without effective deterrents against bombarding Americans with unwanted calls, businesses that abuse consumers by repeatedly calling them would have an unjust advantage in the marketplace.

Sess. (Apr. 30, 2019) (prepared testimony of Margot Saunders, National Consumer Law Center), *available at* https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Testimony_Saunders.pdf.

[48] The Ninth Circuit filed its decision on June 13, 2019. *Duguid v. Facebook, Inc.*, 626 F.3d 1146 (9th Cir. 2019). The TRACED Act was passed on December 30, 2019. Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act, Pub. L. No. 116-150, 133 Stat. 3274 (Dec. 30, 2019).

CONCLUSION

Petitioner's proposed definition of an ATDS is inconsistent with the statutory language and history of the TCPA. Importantly, Congress's prior express consent requirement becomes virtually meaningless under that narrow definition.

Every person in the United States with a cell phone already receives a barrage of unwanted robocalls, texts and scam calls every week, notwithstanding the TCPA's protection. One can only imagine the nightmare if the TCPA and its prior consent requirement no longer serves to check these invasive calls and messages. We urge the Court to reject Petitioner's interpretation of an ATDS and uphold the decision of the Ninth Circuit Court of Appeals in the case below.

Respectfully submitted,

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