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, AND UNITED STATES OF AMERICA

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

BRIEF FOR RETAIL LITIGATION CENTER, INC., NATIONAL RETAIL FEDERATION, AND RESTAURANT LAW CENTER AS AMICI CURIAE SUPPORTING PETITIONER

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BRIEF FOR RETAIL LITIGATION CENTER, INC., NATIONAL RETAIL FEDERATION, AND RESTAURANT LAW CENTER AS AMICI CURIAE SUPPORTING PETITIONER

The Retail Litigation Center, Inc., the National Retail Federation, and the Restaurant Law Center respectfully submit this brief as amici curiae in support of petitioner.[1]

INTEREST OF AMICI CURIAE

The Retail Litigation Center, Inc. ("RLC") is the only trade organization solely dedicated to representing the retail industry in the courts. The RLC's members include many of the country's largest and most innovative retailers. Collectively, they employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the RLC has participated as an amicus in more than 150 judicial proceedings of importance to retailers. Its amicus briefs have been

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice before the due date of the intention of amici to file this brief. All parties have consented to the filing of this brief.

favorably cited by multiple courts, including this Court. *See*, *e.g.*, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013).

The National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers from the United States and more than 45 countries. NRF empowers the industry that powers the economy. Retail is the nation's largest private-sector employer, contributing $3.9 trillion to annual GDP and supporting one in four U.S. jobs—52 million working Americans. For over a century, NRF has been a voice for every retailer and every retail job, educating and communicating the powerful impact retail has on local communities and global economies. NRF regularly submits amicus curiae briefs in cases raising significant legal issues for the retail community.

The Restaurant Law Center is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. This labor-intensive industry is comprised of over one million restaurants and other foodservice outlets employing 15 million people—approximately 10 percent of the U.S. workforce. Restaurants and other foodservice providers are the nation's second-largest private-sector employers. Through amicus participation, the Restaurant Law

Center provides courts with the industry's perspective on legal issues that have the potential to significantly impact its members and their industry. One critical issue for the industry is the proper interpretation and application of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.* ("TCPA"), which regulates all businesses that communicate with customers by phone or text messages. Such communications are commonplace and essential in the foodservice industry and provide a range of welcome benefits to consumers and time-sensitive information to industry employees and others. The Restaurant Law Center's amicus briefs have been cited favorably by state and federal courts, most recently by the majority in an Eleventh Circuit en banc decision. *See Lewis v. Governor of Ala.*, 944 F.3d 1287, 1303 n.15 (11th Cir. 2019) (en banc).

Amici and their members have a significant interest in the outcome of this case. Many of amici's members communicate with their customers by phone and text message. Consumers value and affirmatively seek out those communications. But amici's members have increasingly found themselves the targets of abusive TCPA litigation, much of it brought by professional plaintiffs and counsel who have advocated for and exploited an expansive interpretation of an "automatic telephone dialing system" ("ATDS"). That interpretation sweeps in communications that have never been considered "robocalls."

This case will directly impact the volume and nature of TCPA litigation faced by amici's members. The statutory definition of an ATDS plays a critical gate-keeping role in the TCPA's liability scheme. Yet the Ninth Circuit adopted an interpretation of the ATDS provision that departs from the statute's text and arguably encompasses virtually all modern phone technology, regardless of its connection to the technology Congress sought to limit. That interpretation has opened the floodgates for an onslaught of class action TCPA lawsuits against legitimate businesses engaging in important communications with their customers and caused a torrent of pre-litigation demand letters threatening TCPA class actions absent prompt settlement. The environment created by this interpretation compels retailers and restaurants to choose between forgoing communications valued by consumers or exposing themselves to potentially crushing TCPA liability given the statutory damages framework. Amici and their members thus will be directly and significantly affected by this Court's decision in this case.

INTRODUCTION AND 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 Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2343 (2020) (plurality opinion). Congress enacted the TCPA in 1991 in response to "a torrent of vociferous consumer complaints about intrusive robocalls" that "wake us up in the morning" and "interrupt our dinner at night." *Id.* at 2344 (quoting 137 Cong. Rec. 30,821 (1991) (statement of Sen. Hollings)).

This case, however, is not about the "robocalls" that Congress intended to curb when it tied the TCPA's restriction to an ATDS that continually generates random or sequential phone numbers—like a casino slot machine—until it hits a "jackpot" and delivers a generic solicitation to the unwitting person who answers the phone. Instead, the decision below sweeps in important communications that consumers *want and need*, like appointment reminders, order confirmations, shipping and delivery notifications, curbside pickup information, prescription refill reminders, promotional messages from familiar businesses, customer service and satisfaction surveys, loyalty program alerts, and security notifications.

Challenges to these types of valued and expected communications are not what makes the TCPA popular with consumers. But the potential for such lawsuits has made the statute popular with a group of

plaintiffs' class action lawyers and professional TCPA plaintiffs who have been enriched at the expense of businesses and consumers. Today, the statute is primarily used not to challenge the robocalls that Congress intended to curb, but instead as a vehicle to leverage fees from legitimate businesses seeking to engage with their own customers using modern technology.

The Ninth Circuit's interpretation here conflates these valued communications with the pernicious robocalls that Congress intended to control. According to the Ninth Circuit (and other courts following its approach), virtually all technology capable of storing and automatically dialing telephone numbers might be an ATDS. That means that every call from such devices potentially subjects the caller to statutory damages under the TCPA.

This interpretation untethers the TCPA from the kind of indiscriminate robocalling technology it was intended to regulate. As a result, businesses must use more expensive and slower methods to convey basic information to their customers. Some conscientious retailers and restaurants trying to follow the law—particularly small and risk-averse businesses—may cease sending communications that the vast majority of their customers desire rather than risk facing abusive TCPA class action lawsuits. Indeed, some already have. Additionally, applying a consent procedure intended for robocalls using ATDS technology to normal business-customer communications can cause

confusion, since customers may think they are agreeing to receive unsolicited robocalls. These consequences hurt *consumers*—a result Congress never intended.

Retailers and restaurants share consumers' frustration with illegal and unwanted robocalls. These robocalls distract consumers from commercial communications they *do* want. And robocallers often engage in spoofing activities that mimic the telephone numbers of family, friends, and legitimate businesses, fostering consumer confusion and damaging businesses' reputations.

Nonetheless, the Ninth Circuit's atextual view of the ATDS definition is not the solution to the robocall problem, and consumers would not be "bombarded every day with nonstop robocalls" if this Court rejects it. *AAPC*, 140 S. Ct. at 2356. Retailers and restaurants (like other legitimate businesses) have no desire, and no incentive, to alienate their customers by engaging in the unwanted and intrusive practices that motivated the TCPA's enactment. Just the opposite.

Indeed, other statutory and regulatory guardrails protect consumers from unwanted calls. For instance, the TCPA's separate prohibitions on calls placed using an artificial or prerecorded voice and calls to numbers on the National Do Not Call Registry safeguard consumers from unwanted telephone solicitations. And the FCC has ample tools to address spoofing, indiscriminate dialing, and other egregious practices.

Overturning the Ninth Circuit's view would restore the TCPA to its intended scope: to reach equipment with random or sequential number generation functionality. This result would allow consumers to receive information they want and provide predictability to companies seeking to send valued communications. And it would halt the transformation of the TCPA "from a statutory rifle-shot targeting specific companies that market their services through automated random or sequential dialing into an unpredictable shotgun blast covering virtually all communications devices." *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 8075 (2015) ("*2015 FCC Order*") (Pai, Comm'r, dissenting). This Court should reverse.

ARGUMENT

I. THE NINTH CIRCUIT'S ERRONEOUS READING OF THE ATDS DEFINITION HAS SIGNIFICANT ADVERSE CONSEQUENCES

The Ninth Circuit's incorrect interpretation of the statutory ATDS definition sweeps valuable consumer communications not targeted by Congress into the TCPA's liability net. Businesses today are threatened with massive damages for trying to provide their customers with information that bears no resemblance to the randomly or sequentially generated calls that motivated the TCPA's passage. As a result, transmission of information that consumers want and need is being chilled and punished by crippling classwide statutory damages.

These adverse consequences flow from the misinterpretation of the ATDS definition, which plays a central role in the TCPA's operation. Specifically, the TCPA generally makes it unlawful "to make any call * * * using any automatic telephone dialing system" to any cellular telephone. 47 U.S.C. § 227(b)(1)(A).[2] That prohibition excepts only "call[s] made for emergency purposes" and calls "made with the prior express consent of the called party." *Ibid.*[3] The TCPA in turn defines an ATDS as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." *Id.* § 227(a)(1).

The Ninth Circuit reads the ATDS definition to include any device that "merely ha[s] the capacity to 'store numbers to be called' and 'to dial such numbers automatically.'" Pet. App. 6 (quoting *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1053 (9th Cir. 2018)). The Second and Sixth Circuits later adopted the Ninth Circuit's reading. *Duran v. La Boom Disco, Inc.*, 955 F.3d 279, 287 (2d Cir. 2020); *Allan v. Pa. Higher*

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[2] The Federal Communications Commission ("FCC") has interpreted "call[s]" to include text messages. *AAPC*, 140 S. Ct. at 2344 n.1 (citing *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14,014, 14,115 (2003)).

[3] The automated-call prohibition also contains an exception for calls "made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A)(iii). But this Court recently invalidated that exception as violating the First Amendment. *AAPC*, 140 S. Ct. at 2356.

Educ. Assistance Agency, 968 F.3d 567, 580 (6th Cir. 2020).

As described below, that interpretation misreads the statute, and the TCPA's consent defense does not offset the error. But amici start by discussing the tremendous practical harm caused by the Ninth Circuit's erroneous reading of the statutory ATDS definition.

A. The Ninth Circuit's Atextual ATDS Interpretation Expands The TCPA's Scope To Include Business Communications Valued By Consumers

Today, calls and texts to consumers from businesses and other organizations are integral to our daily routines. To provide these valuable communications to consumers, many businesses rely on modern technology that may store and automatically dial curated lists of mobile numbers—a function that is distinctly different from randomly generating numbers. Given the size and footprint of amici's businesses, these business-consumer communications are not feasible without some technology. Moreover, such communications have become increasingly important in the current public-health emergency, as businesses (including retailers and restaurants) and consumers alike seek to minimize face-to-face interactions. Consider a week in the life of a hypothetical consumer named Claire:

- On Monday, Claire wakes up to a text message from her son's school with a list of the remote-learning lessons planned for that day. *See*

Carlene Reyes, *Texting for Education: Why Schools Are Turning to SMS*, Zipwhip (July 17, 2020), https://www.zipwhip.com/blog/sms-software-for-schools.

- Tuesday morning, Claire receives a text message from her dentist, reminding her of an upcoming appointment and informing her of the office's screening procedures and safety precautions. When arriving for her appointment, she waits in her car until she receives another text telling her to enter the dentist's office. *See* Alanna Quillen, *Your Next Visit to the Dentist Will Feel Different Due to Protections Against COVID-19*, NBC DFW (May 11, 2020), https://www.nbcdfw.com/news/local/how-your-next-visit-to-the-dentist-will-feel-different/2367211.

- That afternoon, Claire gets a text message from her local coffee shop with a buy-one-get-one-free coupon, as well as a text message from her usual lunch spot with a discount offer. *E.g.*, Starbucks, *When Will I Receive Special Offers and Discounts?*, https://customerservice.starbucks.com/app/answers/detail/a_id/1883/kw/discount (last updated Aug. 11, 2017); Subway, *Rewards & Deals*, https://www.subway.com/en-US/Promotions (last visited Aug. 24, 2020).

- On Wednesday, Claire receives a text message from her pharmacy, reminding her to refill a prescription and notifying her that another prescription is ready for pickup. *E.g.*,

Walgreens, *Rx Text Alerts*, https://www.walgreens.com/topic/pharmacy/text-alerts.jsp (last visited Aug. 5, 2020).

- During lunch on Thursday, Claire receives a text message confirming her order of a gift for her friend, providing tracking information for the shipment, telling her how many loyalty points she earned, and notifying her of an upcoming sale. *E.g.*, Macy's, *How Can I Sign Up for Delivery Text Notifications?*, https://www.customerservice-macys.com/app/answers/list/c/3 (last visited July 27, 2020); Jo-Ann Fabric and Craft Stores, *JoAnn2Go Messages*, https://www.joann.com/sms-terms.html (last visited July 27, 2020).

- Later that day, Facebook automatically texts Claire that a new device is attempting to access her account. She does not recognize the device, so she changes her password and secures her account using the instructions in the notification. *See* Pet. App. 5.

- After logging off her work computer Friday evening, Claire calls and orders food from her favorite Italian restaurant. She heads over to the restaurant's parking lot and avoids waiting for her food in the foyer. Instead, she receives an "order ready" text while in the parking lot telling her to pull up for her order, which is placed contactless in the back seat. *See*, *e.g.*, Danny Klein, *Post-Coronavirus: A Changed Restaurant Customer with New Expectations*, FSR Mag., https://www.fsrmagazine.com/

consumer-trends/post-coronavirus-changed-restaurant-customer-new-expectations (June 2020).

- On Saturday, Claire orders a stand mixer for her weekend baking project. A few hours later, she receives a text message from the store notifying her that her purchase is ready for curbside pickup. *See*, *e.g.*, Bed Bath & Beyond, *How Curbside Pickup Works*, https://www.bedbathandbeyond.com/store/static/curbside (last visited July 27, 2020).

- Sunday afternoon, Claire receives a text message from her bank about suspected unauthorized use of her account. *E.g.*, Bank of America, *Set Up Custom Alerts*, https://www.bankofamerica.com/online-banking/mobile-and-online-banking-features/manage-alerts (last visited July 27, 2020).

- That night, Claire receives a text message from her employer providing new COVID-19 employee safety protocols. *Ulery v. AT&T Mobility Servs., LLC*, No. 20-cv-2354 (D. Colo. Aug. 7, 2020), ECF No. 1.

Americans rely on countless communications like these, and they typically begin with "stor[ing] numbers to be called" and "dial[ing] such numbers automatically." The Ninth Circuit's interpretation threatens to transform them into calls made by an ATDS and thus potential TCPA violations.

B. The Ninth Circuit's ATDS Interpretation Fuels Abusive And Counterproductive TCPA Litigation

Plaintiffs' lawyers have exploited courts' atextual ATDS interpretations, together with the TCPA's uncapped statutory damages and private right of action provisions, to target communications very different from the robocalls that motivated the TCPA's enactment. As a result, compliance-minded retailers and restaurants are vulnerable to abusive TCPA class actions and pre-litigation settlement demands no matter what calling or texting technology they use.

When Congress enacted the TCPA in 1991, it intended to allow individual consumers to vindicate their rights and recover small sums in small claims courts without the assistance of lawyers. *See* 137 Cong. Rec. 30,821 (statement of Sen. Hollings) ("Small claims court or a similar court would allow the consumer to appear before the court without an attorney."). The TCPA thus provides statutory damages of $500 for each violation, and up to three times that amount for willful violations. 47 U.S.C. § 227(b)(3)(B). This damages amount was "set to be fair to both the consumer and the telemarketer." 137 Cong. Rec. 30,821.

But what was originally meant to be a shield for consumers has become a sword for lawyers. Indeed, "the TCPA has become the poster child for lawsuit abuse." *2015 FCC Order*, 30 FCC Rcd. at 8073 (Pai, Comm'r, dissenting). The number of new TCPA cases filed each year has skyrocketed from 14 in 2007 to

more than 3,000 in 2019. Stuart L. Pardau, *Good Intentions and the Road to Regulatory Hell: How the TCPA Went from Consumer Protection Statute to Litigation Nightmare*, 2018 U. Ill. J.L. Tech. & Pol'y 313, 322; WebRecon LLC, *WebRecon Stats for Dec 2019 and Year in Review* (Jan. 28, 2020), https://webrecon.com/webrecon-stats-for-dec-2019-and-year-in-review-how-did-your-favorite-statutes-fare.

Rather than seeking to redress the genuine consumer grievances the TCPA was enacted to address, many of these lawsuits are built solely to extract money from businesses. Indeed, much litigation under the TCPA is brought by professional plaintiffs and counsel who specialize in manufacturing and magnifying potential liability. *Bridgeview Health Care Ctr., Ltd. v. Clark*, 816 F.3d 935, 941 (7th Cir. 2016) (observing that TCPA litigation "has blossomed into a national cash cow for plaintiff's attorneys" (internal quotation marks omitted)). TCPA actions are often "attorney driven." *LaGuardia v. Designer Brands, Inc.*, No. 19-cv-1568, 2020 WL 2463385, at *8 (S.D. Cal. May 7, 2020). Just 44 law firms filed over 1,800 TCPA lawsuits in a recent 17-month period—about 60% of all TCPA cases filed during that time. U.S. Chamber Inst. for Legal Reform, *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits* 11 (2017). And the recoveries in these lawsuits largely redound to the benefit of plaintiffs' attorneys rather than the consumers they purport to represent. As of late 2016, TCPA class members received an average of

$4.12, while the average take-home for TCPA plaintiffs' lawyers was $2.4 million. Pardau, *supra*, at 322.

TCPA plaintiffs' firms and professional litigants use a variety of tactics to manufacture claims of noncompliance:

- Buying dozens of cell phones and requesting area codes for regions where debt collection calls are common. *See Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782, 798-99, 801 (W.D. Pa. 2016); *see also infra* pp. 25-26.

- Repeatedly purchasing pre-paid phone minutes to keep receiving phone calls. *See Garcia v. Credit One Bank, N.A.*, No. 18-cv-191, 2020 WL 4431679, at *3 (D. Nev. July 31, 2020) ("Instead of taking the steps necessary to stop the alleged injury (the unwanted calls)," plaintiff "took steps to allow the continuance of the injury while building a record to facilitate a later claim").

- Publishing phone numbers on multiple online directories to induce businesses to place allegedly unwanted calls. Cross-Complaint at 12, *Alan v. BrandRep, Inc.*, No. 16-cv-1040 (C.D. Cal. Aug. 5, 2016), ECF No. 9 (plaintiff "was operating an active ongoing business or fake business listed with his phone numbers * * * in order to lobby calls to his cell phone so that he may subsequently misrepresent that he never gave consent to call his phone in order to make out a private right of action under the TCPA and/or DNC").

- Hiring staff to log calls in order to file hundreds of suits. *See Kinder v. Allied Interstate, Inc.*, No. E047086, 2010 WL 2993958, at *1 (Cal. Ct. App. Aug. 2, 2010).

- Porting a repeating digit phone number from a landline to a cell phone and making hundreds of thousands of dollars as a result. *See* Tr. of Hr'g on Pl.'s Standing at 12:3-5, *Konopca v. Macy's Inc.*, No. 15-cv-1547 (D.N.J. Feb. 20, 2017), ECF No. 56.

- Asking law firm employees to text "JOIN" to unknown company numbers. Petition of SUMOTEXT Corp. for Expedited Clarification or, in the Alternative, Declaratory Ruling, CG Docket No. 02-278, at 4-6 (FCC Sept. 3, 2015).

- Circumventing the opt-out mechanism of retail text message programs in order to revoke consent in a deliberately ineffective manner. *See Epps v. Earth Fare, Inc.*, No. 16-cv-8221, 2017 WL 1424637, at *2, *5 (C.D. Cal. Feb. 27, 2017) (defendant's messages instructed "Text STOP to end," but plaintiff purported to revoke consent by responding, *e.g.*, "I would appreciate [it] if we discontinue any further texts"); *see also*, *e.g.*, *Epps v. Gap, Inc.*, No. 17-cv-3424 (C.D. Cal. filed May 5, 2017) (similar); *Rando v. Edible Arrangements Int'l, LLC*, No. 17-cv-701, 2018 WL 1523858, at *1-2 (D.N.J. Mar. 28, 2018) (defendant's messages instructed to reply "STOP to cancel," but plaintiff purported to revoke consent by responding, *e.g.*, "I want to confirm that I have been removed off your contacts").

- Soliciting clients using questionable means. *See*, *e.g.*, *Reliable Money Order, Inc. v. McKnight Sales Co.*, 704 F.3d 489, 491-93 (7th Cir. 2013) (plaintiffs' firms used a confidential document produced in one lawsuit to solicit new clients and file over 100 additional suits); *C-Mart, Inc. v. Metro. Life Ins. Co.*, No. 13-cv-80561, 2014 WL 12300313, at *1 (S.D. Fla. July 14, 2014) ("[I]t appears that [plaintiff] is serving as a pawn for [its law firm's] class action suit" because, *e.g.*, plaintiff's representative "testified that he has no recollection of receiving the facsimile at issue in this case" and had "never even heard of" defendants).

This state of affairs would have been unimaginable to the Congress that enacted the TCPA several decades ago. Congress set out to enable consumers to bring individual suits in small claims courts against unscrupulous telemarketers over unwanted dinnertime phone calls using equipment that autogenerated and dialed random or sequential telephone numbers. Thus, the TCPA was intended to cover calls where there was no connection between the caller and the recipient. But today, the TCPA instead sustains an entire industry of serial plaintiffs extracting substantial settlements from legitimate companies under the threat of crushing class action litigation. The "primary beneficiaries" of the TCPA now are "trial lawyers, not the American public." *2015 FCC Order*, 30 FCC Rcd. at 8073 (Pai, Comm'r, dissenting).

C. The Ninth Circuit's ATDS Interpretation Prompts Lawsuits Over Valuable Communications

This explosion in TCPA litigation has paralleled the rise of modern communication technologies far different from those that motivated the TCPA's enactment in 1991. Even though many businesses are attempting to reach only *their own* customers with important and beneficial communications similar to those sent to "Claire" in the examples above, they have become TCPA defendants simply because those communications involve storing and automatically dialing mobile numbers. "Rather than focus on the illegal telemarketing calls that consumers really care about," TCPA plaintiffs and law firms "target useful communications between legitimate businesses and their customers." *2015 FCC Order*, 30 FCC Rcd. at 8073 (Pai, Comm'r, dissenting); *see also* Justin (Gus) Hurwitz, *Telemarketing, Technology, and the Regulation of Private Speech: First Amendment Lessons from the FCC's TCPA Rules*, 84 Brook. L. Rev. 1, 57-58 (2018) ("Very frequently this litigation targets firms that are attempting to engage in legitimate business in compliance with the TCPA.").

Companies in diverse sectors of the economy have been targeted by recent TCPA litigation over such valued consumer communications:

- Pharmacies are frequent targets of TCPA lawsuits for calling or texting their customers to remind them to pick up their prescriptions or to consider flu shots. *See*, *e.g.*, *Lindenbaum v.*

CVS Health Corp., No. 17-cv-1863, 2018 WL 501307 (N.D. Ohio Jan. 22, 2018); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483 (N.D. Ill. 2015) ($11 million class settlement); *Lowe v. CVS Pharm., Inc.*, No. 14-cv-3687 (N.D. Ill. filed May 20, 2014) ($15 million class settlement); *Rooney v. Rite Aid Headquarters Corp.*, No. 14-cv-1249 (S.D. Cal. filed May 20, 2014).

- Akira, a Chicago-based apparel retailer, sent text messages to inform its customers of promotions, discounts, and in-store special events. *Blow v. Bijora, Inc.*, 855 F.3d 793, 796 (7th Cir. 2017). Customers could opt in to receive such messages by providing their phone number to in-store representatives, texting an opt-in number posted in stores, or filling out an opt-in card. *Ibid.* A customer filed a class action lawsuit against the retailer, seeking over $1.8 billion in statutory damages. *Id.* at 797. After six years of costly litigation, the retailer prevailed on the ground that the customer had affirmatively consented to receiving the text messages by texting "AKIRA" to an opt-in number. *Id.* at 803-05.

- The Los Angeles Lakers asked fans to send texts with personalized messages to be displayed on the arena's jumbotron. *Emanuel v. Los Angeles Lakers, Inc.*, No. 12-cv-9936, 2013 WL 1719035, at *1 (C.D. Cal. Apr. 18, 2013). A fan attending a game sent a text message to the team and received a single text message confirming that his request had been received. *Ibid.* In response, he brought a class action

lawsuit against the team under the TCPA. *Ibid.*

- A guest at Caesars Palace hotel provided his cell phone number to the receptionist while checking in. *Castillo v. Caesars Entm't Corp.*, No. 18-cv-2297, 2019 WL 4855353, at *1 (D. Nev. Sept. 30, 2019). Shortly thereafter, he received a text from the hotel's virtual concierge service telling him to "[t]ext me for hotel information, towels, housekeeping requests and more." *Ibid.* Based on that text, he brought a putative class action lawsuit under the TCPA. *Ibid.*

- A plaintiff consented to receive six text messages each month from Papa John's, such as promotional offers and coupon codes. Complaint at 4-6, *Flores v. Papa John's USA, Inc.*, No. 20-cv-1672 (C.D. Cal. Feb. 20, 2020). One month, Papa John's allegedly sent him seven texts, so the plaintiff brought a TCPA class action lawsuit against the restaurant. *Id.* at 4, 6-7.

D. The Ninth Circuit's ATDS Interpretation Discourages Communications Consumers Want

Congress did "not intend for th[e] restriction" on calls using an ATDS "to be a barrier to the normal, expected or desired communications between businesses and their customers." H.R. Rep. No. 102-317, at 17 (1991). Yet the Ninth Circuit's incorrect reading of the ATDS definition does exactly that—it discourages

beneficial communications that consumers want and expect.

For several reasons, it is no answer that consent and other defenses exist to TCPA liability. *See* 47 U.S.C. § 227(b)(1)(A). First, many courts treat consent as an affirmative defense, *e.g.*, *Breda v. Cellco P'ship*, 934 F.3d 1, 4 n.4 (1st Cir. 2019), and "[t]he issue of consent is ordinarily a factual issue," *Schweitzer v. Comenity Bank*, 866 F.3d 1273, 1280 (11th Cir. 2017). That means consent may not be a basis for summary judgment, much less dismissal on the pleadings. *E.g.*, *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1254 (11th Cir. 2014); *Weed v. SunTrust Bank*, No. 17-cv-3547, 2018 WL 2100590, at *3 (N.D. Ga. May 7, 2018). Years of discovery and millions of dollars in litigation expenses may be required before a consent affirmative defense can dispose of a case that never should have been initiated because the defendant did not use an ATDS. *See*, *e.g.*, *Blow*, 855 F.3d at 803-05.

Second, plaintiffs' lawyers often argue that exempt communications—like prescription notifications, *2015 FCC Order*, 30 FCC Rcd. at 8031, and "informational calls" with oral consent, *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 FCC Rcd. 1830, 1841 (2012)—should be treated instead as "dual-purpose calls" on the theory that they are also "intended to offer property, goods, or services for sale either during the call, or in the future," *id.* at 1842. As with consent, it may not be possible to defeat such an argument on the pleadings, even if it lacks merit—thus requiring years of costly discovery and litigation. *See*,

e.g., *Flores v. Access Ins. Co.*, No. 15-cv-2883, 2017 WL 986516, at *8 (C.D. Cal. Mar. 13, 2017); *Meyer v. Bebe Stores, Inc.*, No. 14-cv-267, 2015 WL 431148, at *3-4 (N.D. Cal. Feb. 2, 2015).

Third, applying the prior express written consent requirement for ATDS autogenerated "telemarketing calls" to routine communications between businesses and customers discourages consumers from agreeing to receive communications they value. Under FCC rules on ATDS communications, such consent requires express disclosure to consumers that the consented-to calls "will be done *with autodialer equipment*." *2015 FCC Order*, 30 FCC Rcd. at 8012-13 (emphasis added); *see also* 47 C.F.R. § 64.1200(a)(2), (f)(8)(i)(A). The Ninth Circuit's expansive interpretation of ATDS may compel businesses to give such disclosures merely because they use any technology to call their customers from a stored list of numbers. But the required use of the term "autodialer equipment" when seeking consent may give customers the mistaken impression that they are being solicited to consent to receiving indiscriminate robocalls. Similarly, consumers who believe they are declining to receive ATDS autogenerated robocalls are in fact forgoing expected communications from businesses that use technology to call from a list of stored numbers.

Fourth, the consent defense often fails to protect businesses that, reasonably and in good faith, believe their intended recipient has consented to receive communications. It is more common than this Court might expect for a consumer to provide her mobile phone

number to a business with consent to be contacted, but for the consented-to calls or texts to be received by someone else. Sometimes this occurs because the consumer mistakenly provided the wrong number. More frequently, it happens because the original owner who consented to contact at that number cancels her phone service without porting the phone number to a new mobile service provider. In that situation, the customer's relinquished phone number is reassigned to another person. The latter scenario is increasingly common: "[M]illions of wireless numbers are reassigned each year." *ACA Int'l v. FCC*, 885 F.3d 687, 705 (D.C. Cir. 2018). So, for example, if Claire canceled her mobile phone service, her number could be reassigned to another customer, who might continue to receive some of the text messages for Claire described above.

Critically, retailers and restaurants currently have no way to know that the phone number in their database—once owned by a consumer who legitimately consented to receiving texts from the company—was reassigned by the cellular provider. *2015 FCC Order*, 30 FCC Rcd. at 8093 (O'Rielly, Comm'r, dissenting in part and approving in part) ("There is simply no realistic way for a company to comprehensively determine whether a number has been reassigned.").[4]

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[4] In December 2018, the FCC undertook to create a database of reassigned numbers. *Advanced Methods to Target & Eliminate Unlawful Robocalls*, 33 FCC Rcd. 12,024, 12,029 (2018). But almost two years later, the agency is still in the early stages of establishing the database, with no clear date for its completion. *See*, *e.g.*, *Consumer and Governmental Affairs Bureau Announces*

Plaintiffs and their lawyers intentionally exploit that information gap on wrong or recycled numbers to bring suit. *Id.* at 8091; *see id.* at 8073 (Pai, Comm'r, dissenting). In one instructive example, a plaintiff boasted that she had purchased no fewer than 35 cell phones for the sole purpose of attracting calls to reassigned numbers that she could convert into lucrative TCPA claims. *Stoops*, 197 F. Supp. 3d at 798-99, 801. She made a point of choosing area codes in economically depressed areas, hoping she would thus receive more frequent debt collection calls attempting to reach customers who previously had those phone numbers. *Id.* at 799. According to her deposition testimony, she transported her shoebox full of cell phones and call logs with her at all times (even on vacations) as part of her TCPA business:

> Q. Why do you have so many cell phone numbers?
>
> A. I have a business suing offenders of the TCPA * * *. It's what I do.
>
> Q. So you're specifically buying these cell phones in order to manufacture a TCPA? In order to bring a TCPA lawsuit?
>
> A. Yeah.

Compliance Date for Reassigned Numbers Database Rules, CG Docket No. 17-59 (FCC July 2, 2020) (requiring voice service providers to begin maintaining records of reassigned numbers, but noting that the database is not yet "established" and that the FCC has merely "issued a request for proposals for an Administrator to build and operate" the database).

Id. at 788, 798-99; *see also* Jessica Karmasek, *Filing TCPA Lawsuits: 'It's What I Do,' Says Professional Plaintiff with 35 Cell Phones*, Forbes (Aug. 25, 2016), https://www.forbes.com/sites/legalnewsline/2016/08/25/filing-tcpa-lawsuits-its-what-i-do-says-professional-plaintiff-with-35-cell-phones. Other examples abound of serial TCPA plaintiffs using similar tactics to manufacture TCPA liability. *See*, *e.g.*, John O'Brien, *Phoney Lawsuits: Man Has Filed 80 Lawsuits and Uses Sleuthing Skills to Track Down Defendants*, Forbes (Nov. 1, 2017), https://www.forbes.com/sites/legalnewsline/2017/11/01/phoney-lawsuits-man-has-filed-80-lawsuits-and-uses-sleuthing-skills-to-track-down-defendants (describing plaintiff who owns three cell phones for the purpose of filing TCPA lawsuits).

Under the plain text of the statutory ATDS definition, there is no reassigned-number liability trap for legitimate businesses—they do not use equipment that autogenerates and dials random or sequential telephone numbers. But the Ninth Circuit's interpretation effectively relieves plaintiffs of the need to establish that threshold ATDS requirement, and instead shifts the burden to defendants to establish consent or another exception. Given this difficulty, conscientious businesses may conclude that the only way to protect themselves is to forgo *all* texts, even those that are truly valued by most consumers like Claire. Indeed, some retailers have already done so. *See*, *e.g.*, Letter from Abercrombie & Fitch Co., CG Docket No. 02-278, at 4 (FCC May 13, 2015) (noting that "Abercrombie has eliminated the distribution of text messages to

particular customers based solely on their carriers" because "the only way to avoid TCPA liability altogether for calls or texts related to reassigned numbers is to cease communicating").

That result does not benefit consumers. It harms them. Patients could run out of medicine or miss doctor's appointments; retail and restaurant customers might not receive delivery notifications, earned discounts, or loyalty points; and credit card holders may not be notified of potential fraud. The Ninth Circuit's interpretation of an ATDS thus hurts the very consumers Congress enacted the TCPA to protect.

E. The Ninth Circuit's ATDS Interpretation Is Not Necessary To Protect Consumers From Robocalls

It is emphatically "[n]ot true" that "nothing will stand in the way of telemarketers who wish to inundate citizens with solicitations and scams" unless the ATDS provision is interpreted "to prohibit devices that automatically call a stored list of numbers." *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1312 (11th Cir. 2020) (Sutton, J.). To the contrary, many statutory and regulatory provisions protect consumers from unwanted and intrusive calls.

The TCPA itself provides many such protections. To start, correctly construed, the automated-call prohibition still protects consumers from random or sequential calls—the types of calls that motivated Congress to enact the TCPA. *See AAPC*, 140 S. Ct. at 2348 ("The continuing robocall restriction proscribes *tens of*

millions of would-be robocalls that would otherwise occur *every day*."). Further, separate from the automated-call prohibition—and thus regardless of the scope of the ATDS definition—the TCPA prohibits most calls to cell phones using "an artificial or prerecorded voice." 47 U.S.C. § 227(b)(1)(A). The TCPA also proscribes telephone solicitations to numbers on the National Do Not Call Registry. *Id.* § 227(c). Consumers also can request to be added to individual companies' internal do not call lists. *Cf. id.* § 227(c)(1)(A). And the recent TRACED Act, which amended the TCPA, requires service providers to implement anti-spoofing call-authentication technologies and instructs the FCC to study additional measures to reduce illegal robocalls and spoofed calls. *See* Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act, Pub. L. No. 116-105, 133 Stat. 3274 (Dec. 30, 2019).

Other statutes and regulations also provide robust mechanisms to address unwanted calls. The Telemarketing Sales Rule ("TSR") administered by the Federal Trade Commission, like the TCPA, prohibits telemarketing calls to numbers on the National Do Not Call Registry or individual telemarketers' do not call lists. 16 C.F.R. § 310.4(b)(1)(iii). It also proscribes a wide range of other deceptive and abusive telemarketing practices. For instance, the TSR prohibits telemarketing calls that deliver a prerecorded message unless the recipient has specifically provided written consent to receive prerecorded calls, *id.* § 310.4(b)(1)(v)(A), and limits the times at which telemarketers can place calls,

id. § 310.4(c). Further, federal statutes such as the Fair Debt Collection Practices Act safeguard consumers from specific types of unwanted calls. *See*, *e.g.*, 15 U.S.C. § 1692c(c) (requiring debt collectors to cease communicating with consumers upon request). Individual states also have enacted laws that regulate telemarketing and collections calls. *See*, *e.g.*, N.Y. Gen. Bus. Law § 399-z(9) (requiring telemarketers to inform recipients that they may request to be added to the caller's do not call list).

Rejecting the Ninth Circuit's ATDS interpretation thus would not cause "tens of millions of consumers" to be "bombarded every day with nonstop robocalls." *AAPC*, 140 S. Ct. at 2356. Instead, it would enable retailers, restaurants, and other legitimate businesses to send communications their customers want and value without risking arbitrary and massive liability in TCPA lawsuits.

II. THE NINTH CIRCUIT'S INTERPRETATION OF THE ATDS PROVISION IS WRONG AND SHOULD BE OVERTURNED

The Ninth Circuit's reading of the ATDS definition is as wrong as it is harmful. A device that merely dials from a stored list of numbers is not an ATDS.

Once again: subject to exceptions, the TCPA makes it unlawful "to make any call * * * using any automatic telephone dialing system" to any cellular telephone. 47 U.S.C. § 227(b)(1)(A). The TCPA defines an ATDS as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using

a random or sequential number generator; and (B) to dial such numbers." *Id.* § 227(a)(1).

As the Third, Seventh, and Eleventh Circuits have correctly concluded, this text unambiguously requires that both "stor[ing] * * * telephone numbers to be called" *and* "produc[ing] telephone numbers to be called" be performed "using a random or sequential number generator." *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018); *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 460 (7th Cir. 2020); *Glasser*, 948 F.3d at 1304-05. Thus, an ATDS must be capable of generating random or sequential telephone numbers and dialing those numbers. *E.g.*, *Gadelhak*, 950 F.3d at 469. Equipment that merely makes calls to a predetermined list of stored telephone numbers—rather than a list of numbers generated randomly or sequentially—is not an ATDS. *E.g.*, *Glasser*, 948 F.3d at 1306.

The Ninth Circuit, however, incorrectly reads the statute to define an ATDS as "equipment which has the capacity—(1) to store numbers to be called"—full stop—"*or* (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers." *Marks*, 904 F.3d at 1052 (emphasis added); *see* Pet. App. 6. Under that reading, any equipment with the capacity both to "store" telephone numbers and to "dial" them is an ATDS. It need not include any "random or sequential number generator" at all. Amici support the detailed arguments in petitioner's brief on how erroneous that interpretation is and make only three brief points here.

First, the Ninth Circuit's interpretation violates longstanding statutory-construction principles. Under basic rules of grammar, "using a random or sequential number generator" modifies both "produce" *and* "store." "When two conjoined verbs ('to store or produce') share a direct object ('telephone numbers to be called'), a modifier following that object ('using a random or sequential number generator') customarily modifies both verbs." *Glasser*, 948 F.3d at 1306; *Gadelhak*, 950 F.3d at 464.

Second, the TCPA's legislative history confirms the text's plain import. There is "plenty of evidence" in "the legislative history" that Congress was specifically concerned with the harm caused by "machines that dialed randomly or sequentially generated numbers," not with the innocuous practice of merely storing numbers to be dialed. *Glasser*, 948 F.3d at 1311. For instance, the Senate Report cited complaints that "some automatic dialers will dial numbers in sequence, thereby tying up all the lines of a business and preventing any outgoing calls." S. Rep. No. 102-178, at 2 (1991).

Finally, the Ninth Circuit's statutory construction needlessly creates a grave overbreadth problem. In that court's view, even a smartphone is an ATDS—all such devices can "store numbers to be called" and "dial such numbers." *Marks*, 904 F.3d at 1052. Indeed, the Ninth Circuit conceded that its "gloss on the statutory text" could "not avoid capturing smartphones." Pet. App. 8-9. As the D.C. Circuit recognized, however, "[i]f every smartphone qualifies as an ATDS, the statute's restrictions on autodialer calls assume an eye-popping sweep." *ACA Int'l*, 885 F.3d at 697. The First

Amendment would not "allow Congress to punish every unsolicited call to a cell phone." *Glasser*, 948 F.3d at 1310. Construing the ATDS definition according to its plain terms avoids that constitutional defect.

* * *

The Court should reject the Ninth Circuit's atextual interpretation of an ATDS, which is harming consumers and fueling counterproductive TCPA litigation.

CONCLUSION

For these reasons and those in the petitioner's brief, the judgment should be reversed.

Respectfully submitted,

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