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 Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE CREDIT UNION NATIONAL ASSOCIATION, INC. IN SUPPORT OF PETITIONER

MICHAEL H. PRYOR
BROWNSTEIN HYATT FARBER SCHRECK, LLP
1155 F Street N.W.
Washington, DC 20004
(202) 296-7353

JULIAN R. ELLIS, JR.
Counsel of Record
MATTHEW C. ARENTSEN
JESSE D. SUTZ
BROWNSTEIN HYATT FARBER SCHRECK, LLP
410 17th Street
Suite 2200
Denver, CO 80202
(303) 223-1100
jellis@bhfs.com

Counsel for Amicus Curiae

November 20, 2019

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

REGULATIONS AND RULEMAKINGS

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES **Page(s)**

TABLE OF AUTHORITIES—Continued

Page(s)

INTEREST OF AMICUS CURIAE[1]

The Credit Union National Association, Inc. (CUNA) is the largest trade association in the United States serving America's credit unions and the only national association representing the entire credit union movement. CUNA represents nearly 5,500 federal and state credit unions, which collectively serve 115 million members.

Credit unions are not-for-profit, member-owned, democratically run institutions in which members not only receive financial services, but play a significant role in governance as well. This unique relationship thus demands a number of communications between the credit union and its members on matters from governance, to financial education, to critical alerts and informational calls on account status. Members expect and welcome these informational communications.

Credit unions seeking to comply with the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, confront a fractured and confusing legal landscape where any misstep—such as inadvertently calling a wrong number, misapplying one of the many content-based exemptions, or using modern telephone systems—could lead to strict liability for uncapped statutory damages ranging from $500 to $1500 *per* call or text message. TCPA class action awards often reach into the tens of millions of dollars. In light of the staggering

---

[1] Counsel for Amicus Curiae states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No other person or entity made a monetary contribution to the preparation or submission of this brief. All parties have consented to its filing of this brief. Timely notice was provided to all parties.

statutory damages, and with no good faith exception to liability, TCPA lawsuits have become ubiquitous. The ever-present threat of litigation severely hampers credit unions' ability to communicate with their members.

Navigating this complex and opaque legal and regulatory quagmire is particularly problematic for the thousands of small credit unions that serve rural or economically disadvantaged communities underserved by traditional banking institutions. Nearly half of all credit unions employ five or fewer full time employees. Over 25% of credit unions have less than $10 million in assets, and credit unions with less than $100 million in assets account for over 72% of all credit unions in the United States.

To avoid potentially crippling TCPA litigation, credit unions have abandoned efficient calling technologies. Notifications of critical importance to members—such as notices of past due payments or fraud alerts—are delayed or not made at all. The TCPA, as currently implemented, harms credit union members, who not only must forgo valuable information but who—as member-owners of the credit unions—also bear the burden of costly TCPA lawsuits. CUNA thus has a keen and unique interest and perspective on the issues raised in the Petition.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's decision in *Duguid v. Facebook, Inc.*, 926 F.3d 1146 (9th Cir. 2019), is fundamentally flawed. Not only did the Ninth Circuit find the TCPA unconstitutional yet provide no relief to the challenger, the court erred in concluding that severance of the federal debt collection provision left behind a content-neutral statute. To the contrary, the TCPA is

rife with content-based restrictions. These range from distinguishing between non-commercial and commercial calls to ultra-fine distinctions among different categories of health-related messages. These distinctions, particularly when coupled with the Ninth Circuit's overbroad definition of an "automatic telephone dialing system" (ATDS), chill important speech, including the frequently time-sensitive communications that members expect and often welcome from their credit unions.

The TCPA's constitutionality is inextricably linked to the definition of an ATDS. The Ninth Circuit's erroneous "severability" analysis caused it to ignore Facebook's overbreadth challenge, and the merits of that challenge necessarily turn on what devices constitute an ATDS. The constitutional analysis takes on added dimensions if an ATDS includes every modern smart phone, as the Ninth Circuit concluded. A constitutional challenge to the TCPA's autodialing prohibition and the proper scope of an ATDS thus should be considered together, and this case presents a unique vehicle for the Court to do so. By failing to undertake an appropriate textual analysis, misreading the legislative history and context of the TCPA, and ignoring the Federal Communications Commission's (FCC) earlier guidance, the Ninth Circuit adopted an expansive and erroneous definition of an ATDS that threatens to find every American that owns a smart phone a TCPA violator in waiting. This Court should grant certiorari and reverse the Ninth Circuit's statutory interpretation.

ARGUMENT

I. Severance Does Not Leave a Content-Neutral Statute, But Rather a Statute Riddled With Content-Based Distinctions that Chills Protected Speech.

A. The TCPA Is Strewn with Content-Based Distinctions.

Having found the TCPA a content-based restriction on speech that failed strict scrutiny, the Ninth Circuit severed the offending debt collection provision ostensibly leaving behind "the same content-neutral TCPA" that it had previously upheld in *Moser*[2] and *Gomez*.[3] *Duguid*, 926 F.3d at 1157. That decision was wrong.

The remaining TCPA is riddled with content-based distinctions. Take the provision at issue in *Moser*, 47 U.S.C. § 227(b)(1)(B), which bars "any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message" absent consent, an emergency, or "unless the call . . . is exempted by rule or order by the Commission under paragraph (2)(B)." 46 F.3d at 972 (quoting 47 U.S.C. § 227(b)(1)(B)).[4] As indicated by the last clause, Congress outsourced to the FCC the job of crafting exemptions while "be[ing] careful to ensure that its rules are fully consistent with the first amendment." 137 Cong. Rec. 16206 (1991) (statement of Sen. Hollings). Despite this

---

[2] *Moser v. FCC*, 46 F.3d 970, 975 (9th Cir. 1995).

[3] *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 876–77 (9th Cir. 2014), *aff'd on other grounds*, 136 S. Ct. 663 (2016).

[4] The provision at issue here, § 227(b)(1)(A)(iii), was not at issue in *Moser*. *Moser* also did not reach the content-based distinctions promulgated by the FCC at Congress's direction. 46 F.3d at 973.

admonition, the TCPA expressly authorizes the FCC to make content-based distinctions for residential calls that favor noncommercial calls over commercial calls and between disfavored telemarketing and other types of permitted commercial calls. 47 U.S.C. § 227(b)(2)(B).

The FCC has followed suit. For calls to residential lines (but not for cell phone calls), the FCC exempted calls "not made for a commercial purpose," commercial calls that do not include "any unsolicited advertisement," and calls from an entity with which the residential telephone subscriber had an established business relationship. *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991,* 7 FCC Rcd. 8752, 8754–55 (1992) (*1992 TCPA Order*); 47 C.F.R. § 64.1200(c) (1992). All but the last of these exemptions patently "draws distinctions based on the message a speaker conveys." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). For example, the FCC clarified "that the exemption for non-commercial calls from the prohibition on prerecorded messages to residences includes calls conducting research, market surveys, political polling or similar activities which do not involve solicitation."*1992 TCPA Order*, 7 FCC Rcd. at 8774, ¶ 41. Under this framework, residential prerecorded calls to inform a credit union member of a late loan payment, obtain input on governance, or collect a debt would be permitted, but a call to advertise a credit union's services absent consent (or at this time an established business relationship) could lead to liability. All of these various distinctions "target speech based on its communicative content." *Reed*, 135 S. Ct. at 2226.

Assessed under contemporary First Amendment jurisprudence—particularly as established in *Reed*—

the TCPA as initially implemented would readily be declared content-based and subject to strict scrutiny. But it gets worse. The FCC later abandoned the arguably content-neutral business relationship exemption for prerecorded residential calls, reverting to a pure content-based restriction on such calls. In other words, prerecorded residential calls containing any telemarketing content are barred absent consent, but prerecorded calls that are exclusively "non-commercial" or that do not contain an advertisement are permitted. *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991*, 27 FCC Rcd. 1830, 1846, ¶ 39 (2012) (*2012 TCPA Order*).

Although the content-based exemptions described above apply only to residential calls, Congress also authorized the FCC to exempt certain calls to cell phones. 47 U.S.C. § 227(b)(2)(C). Specifically, the TCPA authorizes exemptions for cell phone calls made without a charge to the end user,[5] subject to conditions the FCC may find necessary to protect privacy rights. *Id.*[6] Rather than utilizing this authority in a content-neutral manner—by, for example, exempting all free calls—the FCC has developed a further set of content-based exemptions for calls to cell phones using an ATDS or prerecorded or artificial voice. These

---

[5] Without charge means the cell phone subscriber is not assessed a per minute charge or will have the call or text count against the subscriber's plan minutes or texts. *Cargo Airline Ass'n Petition for Declaratory Ruling*, 29 FCC Rcd. 3432, 3436, ¶ 12 (2014).

[6] Congress added this section after enactment of TCPA and after the FCC, in the *1992 TCPA Order*, exempted communications between a wireless carrier and their subscriber that was free of charge. *Cargo Airline Ass'n*, 29 FCC Rcd. at 3434 n.25.

exemptions include free wireless calls conveying: (1) a package being delivered;[7] (2) financial fraud or identify theft; (3) steps consumers can take to prevent or remedy harm caused by data breaches; (4) actions needed to arrange for receipt of money transfers; and (5) health-related appointment confirmations and reminders, wellness checkups, hospital pre-registration instructions, pre-operative instructions, lab results, post-discharge follow-up intended to prevent readmission, prescription notifications, and home healthcare instructions. *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 8024–26, 8031, ¶¶ 129–33, 146 (2015) (*2015 TCPA Order*). Thus, the content, rather than the method, of the free call or text dictates whether it is permitted.

The FCC also conditioned the manner of consent on the content of the call, requiring prior *written* consent for "autodialed or prerecorded *telemarketing* calls" but allowing other, less-onerous forms of consent for "*non-telemarketing, informational* calls, such as those by or on behalf of tax-exempt non-profit organizations, calls for political purposes, and calls for other noncommercial purposes, including those that deliver purely informational messages such as school closings." *2012 TCPA Order*, 27 FCC Rcd. at 1841, ¶ 28. The FCC established an additional content-based exemption in its 2012 Order. It exempted "prerecorded health-care calls to residential lines that are subject to HIPAA," but non-HIPAA related health-care calls remain restricted. *Id*. at 1856, ¶ 65.

"Content-based laws—those that target speech based on its communicative content—are presumptively

---

[7] *Cargo Airlines Ass'n*, 29 FCC Rcd. at 3432, ¶ 1.

unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226. Courts, including the Ninth Circuit, have rejected such content-based distinctions. *See, e.g.*, *Victory Processing, LLC v. Fox*, 937 F.3d 1218, 1229 (9th Cir. 2019) (concluding state anti-robocall statute restricting automated calls promoting a political campaign was content-based and violated the First Amendment); *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015) (concluding state anti-robocall statute was content-based because it "applies to calls with a consumer or political message but does not reach calls made for any other purpose"); *Lysaght v. New Jersey*, 837 F. Supp. 646, 648 (D.N.J. 1993) (enjoining state statute that "explicitly distinguishes between commercial and non-commercial speech"); *Moser v. Frohnmayer*, 845 P.2d 1284, 1291 (Or. 1993) (invalidating under state constitution a state statute that restricted commercial calls but not other types of calls).

Any suggestion that the TCPA, minus the debt collection provision, is a content-neutral statute is belied by this history of accruing layer upon layer of exemptions based solely on the communicative content of the communication. The Ninth Circuit erred by severing the debt collection provision on the assumption that the remainder of the statute was content-neutral.

B. The TCPA Chills Speech and Harms Consumers.

Determining whether a call is compliant with the TCPA has become a fraught exercise. Credit unions—many of which are small entities with limited staff and resources—must make a number of determinations when calling one of their members, any of which could

be determinative of TCPA liability: whether the content of the call falls within an exception; whether a telephone number is a landline phone or cell phone (because different content-based exemptions apply to residential versus cell phones); whether consent has somehow been revoked; whether a telephone number still belongs to the account holder or has been reassigned; or whether a calling device qualifies as an ATDS. This compliance puzzle is exponentially compounded by the current chaos surrounding the definition of an ATDS. As addressed further below, the unlawfully overbroad definition adopted in *Marks*,[8] and reaffirmed in the decision below, creates potential liability every time a credit union seeks to communicate with its members using modern dialing technologies.

There is no question that the current regulatory regime chills speech. A substantial number of credit unions are small businesses with limited staff and resources. It was thus no surprise to CUNA that more than three-fourths (76%) of credit unions responding to a CUNA survey reported that it is "very difficult" (30%) or "somewhat difficult" (46%) to determine whether their communications are compliant with the TCPA. *See Comments of the Credit Union Nat'l Ass'n*, CG Docket No. 18–152, CG Docket No. 02–278, at 3 (Oct. 17, 2018), *available at* https://bit.ly/2Kvv1Ks. The same survey found that 35% of credit unions curtailed or stopped texting their members, even though texting is highly efficient and often a preferred method of communication. *Id.* at 3–4. And three-fourths (75%) of credit unions that had used some form of an automated voice messaging system in the past have curtailed or ceased using such communications.

---

[8] *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018).

Id. at 4. Unsure of whether equipment would qualify as an ATDS, credit unions devolve to manually dialing members or mailing letters rather than sending texts.

As a result, important notifications are delayed or not made at all. Instead of being protected, consumers are being harmed by not timely receiving notifications, such as debt payment relief options following natural disasters or late payment notices.[9] Delinquencies that might otherwise be resolved with a timely payment reminder instead are reported to credit bureaus, and loans may be unnecessarily charged off.[10] Defining an ATDS to include equipment that automatically dials specific, preprogrammed numbers of customers compels entities to seek exemptions to communicate safely with their own customers—a circumstance never contemplated when Congress enacted the TCPA. *See* H.R. Rep. No. 102-317, at 17 (1991) ("The Committee does not intend for [the TCPA] restriction to be a barrier to the normal, expected or desired communications between businesses and their customers. For example, a retailer, insurer, banker or other creditor would not be prohibited from using an automatic dialer recorded message player to advise a customer (at the telephone number provided by the customer) that an ordered product had arrived, a service was scheduled or performed, or a bill had not been paid.").

---

[9] *Am. Airlines Fed. Credit Union Notice of Ex-Parte Presentation*, CG Docket No. 18–152, CG Docket No. 02–278 (May 17, 2019) (*AAFCU Letter*), *available at* https://bit.ly/32Z1q2n; *Fed. Housing & Finance Agency Notice of Ex-Parte Presentation*, CG Docket No. 02-278 (Apr. 27, 2019) (seeking exemption to notify homeowners impacted by natural emergencies of available assistance), *available at* https://bit.ly/2OsIMui.

[10] *AAFCU Letter* at 3.

II. Clarity from the Court Is Needed to Provide a Definition of ATDS that Effectuates Congress's Intent and Brings Uniformity to the TCPA's Fractured Landscape.

The Ninth Circuit's ruling in *Marks*, reaffirmed in the decision below, was wrong. By concluding that "an ATDS need not be able to use a random or sequential generator to store numbers—it suffices to merely have the capacity to 'store numbers to be called' and 'to dial such numbers automatically,'" the Ninth Circuit's definition sweeps in nearly all modern cell phones. *Duguid*, 926 F.3d at 1151 (quoting *Marks*, 904 F.3d at 1053). This expansive definition is unworkable and defies established canons of statutory construction and the TCPA's legislative history. It also disregards the FCC's pre-2003 rulings.

Although most courts outside of the Ninth Circuit apply a strict textual definition of an ATDS, others have followed *Marks*. This fractured approach to interpreting a central piece of the TCPA creates a compliance nightmare for good-faith callers, like credit unions, leaving them to speculate whether their calls and texts will subject them to costly litigation. The Court has the opportunity to resolve this legal morass and provide a workable definition that is true to the TCPA's plain meaning and purpose.

A. The Ninth Circuit Failed to Apply Familiar Canons of Construction.

Marks began its statutory analysis of an ATDS by criticizing both parties for "fail[ing] to make sense of the statutory language without reading additional words into the statute." 904 F.3d at 1050. Despite this rebuke, the court then adopted the exact

interpretation of ATDS advanced by Marks, disregarding well-established canons of construction. *Id.*

The question for the Ninth Circuit was whether the phrase "using a random or sequential number generator" modified both the verbs "to store or produce" or only the verb "produce" within the definition of an ATDS. *Id.* at 1049–51. Although the Ninth Circuit began with the plain language of the statute, it then dispatched with this axiomatic requirement by erroneously finding "the statutory language is ambiguous." *Id.* at 1050–51. Rather than jumping directly to legislative history and context, the court should have wrestled more with the plain language of the TCPA and applied familiar rules of statutory construction.

The "punctuation canon" provides that "a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one [where the phrase] is separated from the antecedents by a comma." *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996, 1000 (9th Cir. 2017) (quoting *Davis v. Devanlay Retail Grp., Inc.*, 785 F.3d 359, 364 n.2 (9th Cir. 2015)) (collecting circuit court cases). Relevant to an ATDS, the canon commands that the clause "using a random or sequential number generator" modifies both "store" and "produce." This cannon of statutory construction is consistent with the "completely ordinary way that people speak and listen, write and read." *Lockhart v. United States*, 136 S. Ct. 958, 970 (2016) (Kagan, J., dissenting). In other words, contrary to *Marks*, a device is not an ATDS if it merely has the capacity "to store numbers to be called . . . and to dial such numbers." 904 F.3d at 1052. The Ninth Circuit's definition instead describes the capacity of every modern cellphone, the ordinary use of which Congress surely did not intend to proscribe.

The Ninth Circuit couched its avoidance of a plain reading of the TCPA—and rejection of the Third Circuit's textual analysis of an ATDS—in the faulty notion that there was a "linguistic problem" as to how a number can be stored (as opposed to produced) using a random or sequential number generator. *Id*. at 1052 n.8. Other courts, however, have not struggled with this interpretation. Properly understood, "[t]he word 'store' ensures that a system that generated random numbers and did not dial them immediately, but instead stored them for later automatic dialing (after, for example, some human intervention in activating the stored list for dialing) is an ATDS." *Johnson v. Yahoo!, Inc.*, 346 F. Supp. 3d 1159, 1162 n.4 (N.D. Ill. 2018). Thus, "[t]he phrase 'using a random or sequential number generator' applies to the numbers to be called,"—specifically, it describes how they were generated for calling—"and an ATDS must either store or produce those numbers (and then dial them)." *Id.* at 1162. There is no technical basis to assume equipment that generates random or sequential numbers cannot also store them. *Comments of Noble Sys. Corp.*, CG Docket No. 18–152, CG Docket No. 02–278, at 11–16 (Oct. 16, 2018), *available at* https://bit.ly/2CQEmrY.

This Court should correct the Ninth Circuit's flawed construction of ATDS, which is inconsistent with the TCPA's plain text and the technical reality of the calling technology Congress sought to limit.

B. The Legislative History Supports the Plain Reading of an ATDS.

Legislative history confirms that Congress intended to narrowly define an ATDS as equipment that randomly or sequentially generates numbers to be dialed, not equipment that calls from programmed lists.

Congress's primary concern was to protect privacy in the home, *Duguid,* 926 F.3d at 1149, particularly from calls delivering a prerecorded message.[11] It thus barred calls to residential lines "using an artificial or prerecorded voice to deliver a message." 47 U.S.C. § 227(b)(1)(B). Such calls were dialed automatically,[12] yet Congress did not bar the use of ATDS to make calls to homes. That the ATDS restriction was not primarily aimed at privacy is readily confirmed by the fact that Congress did not even apply that ban to residential calls, the preeminent privacy concern animating the TCPA.

Rather, Congress restricted use of ATDS only with respect to a discrete set of recipients that would be particularly harmed through sequential or random dialing, such as emergency numbers, tying up all the phones in a business, or calling wireless numbers that resulted in substantial costs to the called party.[13] 47

---

[11] *See, e.g.*, *Marks*, 904 F.3d at 1044 ("automated telephone calls that deliver an artificial or prerecorded voice message are more of a nuisance and a greater invasion of privacy than calls placed by 'live' persons" (quoting S. Rep. No. 102-178, at 4 (1991))); *id*. ("[T]hese automated calls cannot interact with the customer except in preprogrammed ways, do not allow the caller to feel the frustration of the called party' and deprive customers of the 'ability to slam the telephone down on a live human being.'" (quoting S. Rep. No. 102-178, at 4 & n. 3)).

[12] A number of states had already placed restrictions on the use of devices that automatically delivered prerecorded messages to homes using equipment commonly called "automatic dialing and announcing devices" or ADADs that were often expressly defined as equipment "that dials programmed numbers." *See Moser*, 845 P.2d at 1285 (quoting Or. Rev. Stat. § 759.290). Congress defined ATDS differently, referencing only randomly or sequentially generated numbers.

[13] Unlike calls to residential phones, which did not result in added charges, cell phone users were charged for incoming calls,

U.S.C. § 227(b)(1)(A)(i)–(iii); 227(b)(1)(D) (barring use of ATDS "in such a way that two or more telephone lines of a multi-line business are engaged simultaneously"). The harm to calling these types of numbers was aggravated by the use of prerecorded messages—which, with the technology at the time could seize telephone lines—but that concern was separately addressed through the ban on prerecorded or artificial voice calls. § 227(b)(1) (barring use of "any [ATDS] *or* an artificial or prerecorded voice" (emphasis added)). To be sure, ATDS could also deliver prerecorded messages, but the ATDS ban sought to preclude particularly the use of prerecorded randomly or sequentially generated automatic calls.[14] Systems that lack random or sequential number generators—such as systems that call specific consumers from lists—do not pose the threats the TCPA sought to mitigate by restricting use of ATDS.

---

often at substantial rates. Justin Hurwitz, *Telemarketing, Technology, and the Regulation of Private Speech: First Amendment Lessons from the FCC's TCPA Rules*, 84 Brooklyn L. Rev. 1, 8–9 (2018).

[14] *See, e.g.*, 137 Cong. Rec. 18785 (1991) (statement of Sen. Pressler) ("[Autodialers can] deliver a prerecorded message to thousands of sequential phone numbers. This results in calls to hospitals, emergency care providers, unlisted numbers and paging and cellular equipment. . . . There have been many instances of auto-dial machines hitting hospital switchboards and sequentially delivering a recorded message to all telephone lines."); H.R. Rep. No. 102-317, at 10 (1991) ("Telemarketers often program their systems to dial sequential blocks of telephone numbers, which have included those of emergency and public service organizations . . . [o]nce a phone connection is made, automatic dialing systems can 'seize' a recipient's telephone line and not release it until the prerecorded message is played.").

Congress was well aware of the distinctions between dialing systems that called randomly generated numbers as opposed to programmable systems that typically were used to call existing customers. For example, one witness testified at a hearing on a precursor bill:

> There is . . . a sharp technological distinction between 'random' or 'sequential' number generation and 'programmable' number generation. . . . Programmable equipment enables a business to transmit a standard . . . message quickly to a large number of telephone subscribers . . . with whom the sender has a prior business relationship.

Telemarketing Practices: Hearing on H.R. 628, H.R. 2131, and H.R. 2184 Before the Subcomm. on Telecomm. & Fin. of the Comm. on Energy & Commerce, 101st Cong. 40–41 (1989) (statement of Richard A. Barton, Senior V.P., Direct Mktg. Ass'n). A law professor commenting on the same bill explained: "The definition of 'automatic telephone dialing system' . . . is quite limited: it only includes systems which dial numbers sequentially or at random. That definition does not include newer equipment which is capable of dialing numbers gleaned from a database." *Id.* at 71–72 (statement of Robert L. Ellis); *see also* 137 Cong. Rec. 11310 (1991) (statement of Rep. Markey) ("automatic dialing machines place calls randomly, meaning they sometimes call unlisted numbers, or numbers of hospitals, police and fire stations.").

It is apparent that Congress expressly considered—and rejected—defining an ATDS in a way that would include devices that neither randomly nor sequentially generated the number to be called.

C. *Marks* Ignores the FCC's Pre-2003 Interpretation that an ATDS Must Randomly or Sequentially Generate Numbers.

The court in *Marks* correctly concluded that *ACA International*[15] struck the Commission's rulings from 2003 until the *2015 TCPA Order* interpreting the definition of an ATDS to include predictive dialers that call numbers from lists.[16] The Ninth Circuit erroneously concluded, however, that there is thus no FCC guidance on the issue. In truth, the D.C. Circuit's rejection of the Commission's 2003 to 2015 expansive views of the functions of an ATDS underscores the correctness of the Commission's initial interpretation of the TCPA, which is otherwise consistent with the statute's plain text and legislative history.

In his dissenting comments to the *2015 TCPA Orde*r, which erroneously defined an ATDS similar to *Marks*, Chairman Pai explained the Commission's original understanding that an ATDS must have the functionality to randomly or sequentially generate numbers:

> When the Commission first interpreted the statute in 1992, it concluded that the prohibitions on using automatic telephone dialing systems "clearly do not apply to functions like

---

[15] *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

[16] "A predictive dialer is an automated dialing system that uses a complex set of algorithms to automatically dial consumers' telephone numbers in a manner that 'predicts' the time when a consumer will answer the phone and a telemarketer will be available to take the call." *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991*, 18 FCC Rcd. 14,014, 14022, ¶ 8 n.31 (2003).

> 'speed dialing,' 'call forwarding,' or public telephone delayed message services[], because the numbers called are not generated in a random or sequential fashion." Indeed, in that same order, the Commission made clear that calls not "dialed using a random or sequential number generator . . . are not autodialer calls."[17]

In a 1995 order, the Commission again confirmed that equipment that cannot generate random or sequential numbers to be dialed is not an ATDS. In the context of addressing an issue regarding calls to collect debts, the Commission ruled that debt collection calls are not autodialer calls because "autodialed" calls are "calls dialed to numbers generated randomly or in sequence."[18] Debt collection calls—like the myriad informational calls and texts credit unions make to their members—are not made to arbitrarily dialed numbers but instead are made to consumer numbers derived from lists.[19]

Correcting *Marks* would restore the Commission's original interpretation that an ATDS must have the capacity to generate random or sequential numbers, which is consistent with the statute's plain language and Congressional intent.

---

[17] *2015 TCPA Order*, 30 FCC Rcd. at 8074 (dissenting statement of Comm'r Pai) (quoting *1992 TCPA Order*, 7 FCC Rcd. at 8773, ¶ 39).

[18] *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991*, 10 FCC Rcd. 12391, 12400, ¶ 19 (1995).

[19] *See id.*

D. *Marks* and *Duguid* Have Created a Split of Authority, Leaving TCPA Compliance Often to Guesswork.

The Ninth Circuit's decisions split with the Third and D.C. Circuits. To be sure, the Ninth Circuit expressly rejected the Third Circuit's holding in *Dominguez*,[20] and the court's decision conflicts directly with the D.C. Circuit's decision.

In striking down the FCC's prior ambiguous and expansive definition of an ATDS, the D.C. Circuit concluded that "[t]he TCPA cannot reasonably be read to render every smartphone an ATDS subject to the Act's restrictions, such that every smartphone user violates federal law whenever she makes a call or sends a text message without advance consent." *ACA Int'l*, 885 F.3d at 697. Yet the Ninth Circuit has done just that. Specifically, despite accepting that the D.C. Circuit set aside the FCC's overbroad and vague definition of an ATDS, the Ninth Circuit still went on to adopt the exact type of overbroad and vague definition that the D.C. Circuit invalidated because it could include smartphones. *Id*. at 696–97.

The Ninth Circuit's broad definition of an ATDS is exacerbated by the fact that numerous courts across the country (including in the Ninth Circuit) have concluded "that the TCPA applies to calls from a device that can perform the functions of an autodialer, regardless of whether it has actually done so in a

---

[20] *Dominguez ex rel. Himself v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018) (affirming summary judgment against the plaintiff because he could not produce "any evidence that creates a genuine dispute of fact as to whether . . . had the present capacity to function as an autodialer by generating random or sequential telephone numbers").

particular case." *King v. Time Warner Cable Inc.*, 894 F.3d 473, 480 (2d Cir. 2018); *see also Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009). Quite absurdly, under the Ninth Circuit's expansive ATDS definition, a consumer could face TCPA liability for making a routine call or text *without* actually using his or her cell phone's automated features.

In addition to creating a split with the D.C. and Third Circuits, *Marks* has also caused fracturing at the district court level. Courts within the same district have issued conflicting decisions. For example, in *Espejo v. Santander Consumer USA, Inc.*, the Northern District of Illinois found "because . . . automatically dials numbers from a set customer list, it falls within the definition of an ATDS," No. 11 C 8987, 2019 WL 2450492, at *8 (N.D. Ill. June 12, 2019), whereas months earlier, another court in the district found "equipment that merely has the ability to dial numbers from a stored list, as opposed to producing numbers using a random or sequential number generator, does not qualify as an ATDS," *Folkerts v. Seterus, Inc.*, 17 C 4171, 2019 WL 1227790, at *6 (N.D. Ill. Mar. 15, 2019). A similar intra-district split has occurred in the Southern District of Florida. *Compare Adams v. Ocwen Loan Servicing, LLC*, 366 F. Supp. 3d 1350, 1355 (S.D. Fla. 2018) (agreeing with the *Marks* definition), *with Johnson v. Capital One Servs.*, No. 18-cv-62058-BLOOM/Valle, 2019 WL 4536998, at *3–4 (S.D. Fla. Sept. 19, 2019) (granting summary judgment because the plaintiff failed to create an issue of fact as to whether the dialing system had the capacity to randomly or sequentially generate the numbers called).

The Ninth Circuit's interpretation has created an unworkable legal minefield for those—like credit

unions—seeking to ensure their telephone systems are lawful. The lack of uniformity between federal courts also encourages forum shopping and gamesmanship, as plaintiffs and their attorneys will continue to push for the most favorable venue while unfairly burdening industry and the courts. Clarity around the definition of an ATDS is crucial not only to credit unions' ability to communicate with their members, but also their economic viability. Because credit unions' members are also their owners, damaging class action litigation against credit unions hurts the consumers the TCPA is intended to protect. Plainly, that was not what Congress intended. By granting certiorari and providing a common sense interpretation of an ATDS moored to the statutory text, this Court can stem the chilling effect vexatious TCPA litigation has on credit unions and other good-faith callers.

CONCLUSION

For the foregoing reasons, the Credit Union National Association, Inc. respectfully requests that this Court grant certiorari.

Respectfully submitted,

MICHAEL H. PRYOR
BROWNSTEIN HYATT
FARBER SCHRECK, LLP
1155 F Street N.W.
Washington, DC 20004
(202) 296-7353

JULIAN R. ELLIS, JR.
Counsel of Record
MATTHEW C. ARENTSEN
JESSE D. SUTZ
BROWNSTEIN HYATT
FARBER SCHRECK, LLP
410 17th Street
Suite 2200
Denver, CO 80202
(303) 223-1100
jellis@bhfs.com

Counsel for Amicus Curiae

November 20, 2019