No. 19-511

In the Supreme Court of the United States

FACEBOOK, INC.,
Petitioner,
v.
NOAH DUGUID, ET AL.
Respondents.

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

BRIEF FOR HEALTHCARE COMPANIES AS AMICI CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici are healthcare companies that depend on telephonic outreach by call representatives to inform their members of important information about their health care and benefits.

Aetna, a CVS Health business, serves an estimated 34 million people with information and resources to help them make better-informed decisions about their health care. Aetna offers a broad range of traditional, voluntary, and consumer-directed health insurance products and related services, including medical, pharmacy, dental, and behavioral health plans, and medical management capabilities, Medicaid health care management services, workers' compensation administrative services, and health information technology products and services. Aetna's customers include employer groups, individuals, college students, part-time and hourly workers, health plans, health care providers, governmental units, government-sponsored plans, labor groups, and expatriates.

The California Association of Health Plans ("CAHP") is a statewide trade association representing 45 public and private health care service

[1] Pursuant to Supreme Court Rule 37.3, amici certify that all parties have consented to the filing of this brief. Pursuant to Rule 37.6, amici certify that no counsel for a party authored this brief in whole or in part, and no persons other than amici or their counsel made a monetary contribution to its preparation or submission.

plans that collectively provide coverage to over 28 million Californians. CAHP members include health plans regulated by the California Department of Managed Care (DMHC) and Department of Health Care Services (DHCS) to provide Medicare, Commercial, and Medicaid (Medi-Cal) benefits. CAHP members routinely conduct outreach to enrollees – including through telephone calls – to comply with state and federal requirements.

Molina Healthcare, Inc. is a healthcare management organization that provides services to families and individuals who qualify for government-sponsored programs like Medicare and Medicaid. Through its locally operated health plans in fourteen states and Puerto Rico, Molina serves approximately 3.3 million members.

United HealthCare Services, Inc. ("United") is one of the largest healthcare companies in the United States. It offers or administers health benefits for over 45 million people in all 50 states and several U.S. territories. United's network of providers includes 1.3 million physicians and other healthcare professionals, and more than 6,000 hospitals and other facilities. Its programs include employer-sponsored plans, plans for veterans, Medicare (for older and disabled individuals), and Medicaid (for low-income individuals) in most states. United also partners with Optum, Inc., an affiliated company, to coordinate patient care, manage pharmacy benefits, use technology and data analytics, and improve the affordability of care.

To conduct the necessary outreach to members, amici regularly rely on dialing equipment that is the subject of the interpretative dispute before the Court. Certain amici also have been or currently are defendants in class action lawsuits brought under the Telephone Consumer Protection Act (TCPA) that are based in part on an interpretation of the ATDS prohibition that the Third, Seventh, and Eleventh Circuits properly reject and the Second, Sixth, and Ninth Circuits have incorrectly adopted. Amici therefore have a direct and substantial interest in the Court's interpretation of this provision.

SUMMARY OF ARGUMENT

I. Companies that offer health-benefit plans regularly call their members to help them with their healthcare needs and to ensure their members understand, use, and maintain their coverage. Amici make tens of millions of such calls annually. Those calls must be timely and tailored to a diverse set of plans, government requirements, and healthcare needs. Many of these calls are legally mandated or strongly supported by state and federal agencies.

Cell phones also are increasingly the preferred telephone number provided by members. They are often the only contact number for particularly vulnerable members—such as members dual-eligible for Medicare and Medicaid—who often lack stable housing that would allow other forms of urgent contact.

Given that amici often must make a high volume of calls, amici do not (and cannot) make calls by having call representatives enter phone numbers manually. Instead, for many calls they use various types of dialing equipment to ensure timely outreach. This equipment dials member-provided phone numbers and connects whomever picks up to a live representative. The equipment does not "us[e] a random or sequential number generator" "to store or produce telephone numbers," since amici use the equipment to call phone numbers their members have already provided to them.

II. The TCPA prohibits making "any call (other than a call made for emergency purposes or made with the express prior consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice" to specified types of phone numbers, including cell phone numbers. 47 U.S.C. § 227(b)(1)(A). The Ninth Circuit interprets "automatic telephone dialing system" to encompass any equipment with the capacity to store and dial numbers, including smartphones and equipment used by amici to make critical healthcare calls.

The text, structure, and legislative history all make clear that this interpretation is wrong. Instead, as the Third, Seventh, and Eleventh Circuits recognize, an ATDS must have the capacity to "store or produce numbers to be called, *using a random or sequential number generator*." By interpreting that qualifier to apply only to the verb "produce" and not "store," the decision below effectively read that qualifier out of the

statute, and thereby swept in a vast number of phone calls that Congress did not intend to proscribe. Congress's primary target was prerecorded messages without prior consent, referred to by Senator Hollings in introducing the Senate bill, as the "scourge of modern civilization." To Congress, such calls posed unique harms that justified treating them differently from calls by live representatives. The prohibition on ATDS calls addresses the additional harms that Congress perceived from random and sequential dialing.

The Ninth Circuit's interpretation also should be rejected because it would render the ATDS prohibition unconstitutional. Emphasizing that it was mindful of the First Amendment in crafting the TCPA's prohibitions, Congress offered a constitutional justification for the relevant provision that rested on the distinction between prerecorded messages and calls involving live persons. Congress offered no justification for prohibiting the use of technology that simply stores and dials numbers to make live voice calls without using a random or sequential number generator. Such a prohibition would not be narrowly tailored to address the interests identified in the legislative record, and the Court should adopt the interpretation Congress defended, not the unconstitutionally overbroad one it did not.

III. The Ninth Circuit's interpretation would suppress a significant amount of speech in a way that Congress did not intend. Further, it would increase the cost of telephonic healthcare outreach by penaliz-

ing the use of efficient equipment that makes it possible to connect live representatives to members. Misinterpretation of the ATDS provision has significantly contributed to the explosion of TCPA litigation that has resulted from call recipients' use of class actions to aggregate $500-$1,500 per-call statutory damages claims for millions of calls. Congress established such penalties with small-claims enforcement in mind, not class actions, but the threat of ruinous liability from combining the two now regularly induces large settlements from defendants, including where they have strong defenses and equally strong grounds for opposing class certification.

The situation of health-benefits plans illustrates how far TCPA litigation has deviated from Congress' intent. Such plans have consent to call and text their members on their cell phones for matters concerning their health care and benefits. Further, whether because they are health insurance companies or because of the nature of their calls, they have additional defenses and justifications for opposing class certifications that are unavailable to others. Yet non-member class-action plaintiffs still seek billions of dollars in liability in an attempt to exploit legal uncertainty over "wrong number" calls that were intended for members but unavoidably reach non-members given the number of calls, the frequency of cell phone number "churn," and the current absence of a reliable recycled cell phone number database.

Reversing the decision below will not eliminate TCPA class action litigation or even "wrong number"

TCPA litigation. Regardless of its outcome, Congress's primary concern—non-emergency calls using pre-recorded messages without prior consent—will remain prohibited, as will other provisions such as the prohibition on unsolicited fax advertising. Nevertheless, reversal is necessary to correct a serious misinterpretation of the TCPA that has expanded its scope well beyond what Congress intended.

ARGUMENT

I. Amici Use Dialing Equipment That Does Not Use Random or Sequential Number Generators for Critical Health Care Outreach to Members by Call Representatives.

A. Amici's calls serve vital healthcare needs.

Amici make tens of millions of calls annually to provide their members with critical information about their health care and benefits. Once the calls are connected, members typically speak with specially-trained employees of amici who are able to discuss individual health issues with members.

Many such calls are at the government's behest or tailored to help members navigate the requirements for government benefits. Outreach to low-income Medicaid members is one example. Most Medicaid beneficiaries must reapply annually for a subsidy that allows them to afford coverage and purchase prescription drugs despite their limited resources. *See, e.g.*, Memorandum from Jerry Mulcahy, Director, Centers

for Medicare & Medicaid Services, to Part D Sponsors re Re-determination of Part D Low-Income Subsidy Eligibility for 2020, at 2 (Aug. 22, 2019).[2] CMS thus "expects Plan D sponsors [such as amici] to reach out by phone or mail to every member" who does not qualify automatically for subsidy, even providing a "Model Outbound Script for Calls." *Id.* at 4, 6. CMS also requires amici to contact Medicare members for annual Health Risk Assessments, assessing various aspects of members' health status. *See, e.g.*, Centers for Medicare & Medicaid Services (CMS), *Medicare-Medicaid Capitated Financial Alignment Model Reporting Requirements*, at 21, 24, 28 (Nov. 1, 2019).[3] Many states also require amici to contact their Medicaid members for the same purpose. *See, e.g.*, Fla. Stat. Ann. § 641.545; Cal. Welf. & Inst. Code § 14182.17(d)(2)(A).

Amici also call their members for any number of purposes designed to address their health care and coverage. For example, amici contact members to inform them of gaps in care, including in areas such as breast cancer, colorectal screening, flu shots, annual wellness exams, diabetic and retinal eye exams, and osteoporosis management. Amici likewise contact

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[2] Available at https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/2019%2520redeem%2520plan%2520letter%2520final_1.pdf.

[3] Available at https://www.cms.gov/Medicare-Medicaid-Coordination/Medicare-and-Medicaid-Coordination/Medicare-Medicaid-Coordination-Office/FinancialAlignmentInitiative/MMPInformationandGuidance/Downloads/CoreReportingReqsCY2020.pdf.

their members to ensure medication efficacy and adherence.

In addition, amici call parents to help them apply for Children's Health Insurance Program (CHIP) benefits to obtain healthcare coverage for their children. They also make calls to millions of Americans who qualify for both Medicare and Medicaid. Many of these "dual-eligible" members are age 65 or older, have cognitive impairments, suffer from several chronic conditions, and make less than $10,000 per year. *See* Amanda Cassidy, *Care for Dual Eligibles*, Health Affairs 1–3 (June 13, 2012). Amici often also call dual-eligible members to welcome them to the program, explain the complex annual recertification requirements, check on their health, and educate them about their benefits.

B. Making healthcare calls without the use of dialers would be logistically impractical and cost prohibitive.

Dialers facilitate tens of millions of healthcare calls annually to members by call representatives. Without the ability to dial members' numbers with such equipment, timely healthcare outreach by live representatives on the necessary scale and in the necessary time frame is logistically impractical and cost prohibitive given the number of additional steps for every call live representatives would have to make. These steps include (1) reviewing a list of phone numbers and associated member information; (2) confirming it is daytime in the intended recipient's time zone;

(3) inputting the intended recipient's phone number; (4) waiting as the call dials and the phone rings; and (5) resolving the call by manually recording data if the call hits a busy tone, full voicemail box, out-of-service number, or other unsuccessful result, waiting for an answering machine message to end and leaving a voicemail, or speaking to the call recipient.

Dialers eliminate all but part of step five. The dialing equipment dials phone numbers that amici's members provide, which are loaded into the system when necessary to call them.[4] When a member answers, the equipment instantly connects that person to a live representative. The representative's time is used efficiently by the equipment's ability to dial several numbers at once, based on the number of representatives available, and to transfer a call to them only when someone (or something) picks up. The equipment also automatically logs unsuccessful calls without the need for the representative to do so.

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[4] It does not use "a random or sequential number generator." 47 U.S.C. § 227(a)(1)(A); *cf., e.g.*, Decl. of Joshua Cherkasly, *Hagood v. Portfolio Recovery Assocs., LLC*, No. 3:18-cv-1510 (May 17, 2019), Doc. 36-3, at 6-7 (detailing four steps needed to generate numbers using Avaya Proactive Contact, which is dialing equipment also used by United); *Panzarella v. Navient Sols.*, LLC, No. 18-cv-3735, 2020 WL 3250508, at *1 n.1, *3 (E.D. Pa. June 16, 2020) (holding that Genesys, which is dialing equipment also used by Optum, lacks the capacity to generate numbers).

II. The Ninth Circuit's Interpretation of "Automatic Telephone Dialing System" is Incorrect.

A. The TCPA's text, structure, and legislative history foreclose the Ninth Circuit's interpretation.

1. *The text and structure of 47 U.S.C. § 227(a)(1) foreclose the Ninth Circuit's interpretation.*

This case requires the Court to interpret the term "automatic telephone dialing system," defined 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." 47 U.S.C. § 227(a)(1).

As interpreted by the Ninth Circuit, the TCPA prohibits calls to cell phones using any equipment that has the capacity to store and dial numbers, regardless of whether it uses a random or sequential number generator. As shown in detail by Petitioner and the United States, as well as the Third, Seventh, and Eleventh Circuits, the statutory text and canons of construction foreclose that interpretation. *See* Br. for Petitioner at 21-43; Br. for the United States as Respondent Supporting Petitioner at 15-24. Amici do not expand on that analysis.

Rather, amici point here to certain aspects of the TCPA's structure and legislative history (see next subsection) that similarly foreclose the Ninth Circuit's interpretation. Both show that Congress enacted this

provision to address the particular harms it identified from calls using artificial and prerecorded messages without consent and calls to randomly or sequentially generated numbers.

Congress prohibited calls using prerecorded messages without prior consent and without regard for content or recipient, other than exempting calls for emergency purposes and FCC-exempted calls. 47 U.S.C. § 227(b)(1)(A), (B). By contrast, Congress generally permitted live calls with or without prior consent.

Specifically, it permitted non-ATDS live calls of any type to cell phones and emergency lines. It also permitted ATDS calls to residences and all live noncommercial calls and even live telemarketing calls where the recipient has not opted out. Congress's general willingness to permit live calls undermines an interpretation that would encompass any equipment that can store and dial numbers. Such equipment just makes it more cost-efficient to make the live calls that Congress otherwise permitted. Further, the only prohibition that applies to ATDS calls alone addresses calls that occupy multiple lines of a business—a concern related to random or sequential dialing. 47 U.S.C. § 227(b)(1)(D).

Understanding the ATDS prohibition as limited to equipment that uses a random or sequential number generator also explains why Congress did not prohibit ATDS calls to residences but did prohibit them to other categories of numbers—*i.e.*, calls to emergency

numbers, lines at hospitals and elderly homes, and numbers assigned to mobile and pager services. As documented throughout the legislative record, randomly or sequentially dialed calls to numbers in these categories posed a heightened risk of harm. *See* Section II(A)(2) *infra*.

Congress's findings (Section 2 of Pub. L. 102-243) further demonstrate its simultaneous concern with addressing the harms caused by prerecorded messages without consent while limiting infringement of noncommercial speech and "legitimate" telemarketing activities. They show no concern for technology that just facilitated live calls by storing and dialing numbers from preexisting lists.

The first nine findings address telemarketing generally and the importance of balancing "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade" in a way "that protects the privacy of individuals and permits legitimate telemarketing practices." The remaining six address Congress's justification for prohibiting what it referred to as "automated or prerecorded calls"—*i.e.*, calls that used either a prerecorded message or an artificial computer voice.[5] Nothing suggests that Congress viewed equipment that just facilitated otherwise

[5] The words "automated or prerecorded telephone calls" necessarily referenced the limitations on calls that use an artificial or prerecorded voice to deliver the message. Finding 12 states that "Banning such automated or prerecorded telephone calls *to the home*" other than in emergency situations "is the only effective means of protecting telephone consumers from this nuisance and

permissible live calls as an "illegitimate" telemarketing practice.

Further, those findings show that Congress was mindful of constitutional restrictions in crafting the statute and did not understand the law to impose significant restrictions on noncommercial speech other than prerecorded messages and the associated concerns with line seizure that the legislative record linked to prerecorded messages and random and sequential dialing. Finding (8) states that the "Constitution does not prohibit restrictions on *commercial* telemarketing solicitations," and that "[i]ndividuals' privacy rights, public safety interests, and *commercial* freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices."[6]

Congress's only express justification for restricting *non*-commercial speech (Finding 12) applied to calls with prerecorded or artificial voice messages. Specifically, Congress found that "residential subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and invasion of privacy." The findings also show Congress's concern over the public safety risks of line seizure. *See* Pub. L. 102-243 § 2(5) (referring in "Congressional Findings" to "the

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privacy invasion." The prohibition on ATDS calls without consent does not apply to calls to the home.

[6] This is in part a question of constitutional avoidance, *see* Section II(B), but not exclusively, given the statutory structure and Congress's express references to the Constitution in the text.

risk to public safety" from "when an emergency or medical assistance line is seized"); *see also* Section II(B) *infra*. By contrast, Congress nowhere sought to justify a prohibition on use of technology that facilitates calls (noncommercial or otherwise) by live representatives to preexisting lists of numbers.

Each of these aspects of the statutory structure—the concern with prerecorded messages, the mindfulness over not preventing "legitimate" telemarketing practices or noncommercial speech, the categories of prohibited ATDS calls, the absence of any proffered justification for prohibiting technology that just stored and dialed numbers, and the fact that Congress did not prohibit manually dialed live calls to cell phones—favors the interpretation that Congress intended the ATDS prohibition to address the special harms caused by random or sequential dialing, rather than any and all speech by live callers using any device that simply stored and dialed numbers.

By contrast, nothing in the statutory structure favors the Ninth Circuit's reading. The Ninth Circuit devotes only limited attention to the TCPA's structure, asserting that the exceptions for prior consent and government debt collection are inconsistent with reading the ATDS prohibition as limited to devices that use randomly or sequentially generated phone numbers. *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1050-51 (9th Cir. 2018). This argument ignores that the prohibitions on ATDS calls and prerecorded messages appear in the same provision. Thus, it is

irrelevant whether the exceptions would apply sensibly to a prohibition on random and sequentially dialed calls when they indisputably make sense as exceptions to the prohibition on prerecorded messages. *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1311–12 (11th Cir. 2020).[7] Further, equipment that could generate random numbers also could be programmed to avoid certain numbers. *Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458, 466-67 (7th Cir. 2020).

2. *Legislative history and contemporary understanding foreclose the Ninth Circuit's interpretation.*

The legislative history of the TCPA likewise confirms that Congress intended the provisions to target the harms caused by calls with prerecorded messages without prior consent and the additional harm from random and sequential dialing. As explained in the Senate Committee Report, Congress found that

> [i]t is clear that automated telephone calls that deliver an artificial or prerecorded voice message are more of a nuisance and a greater

[7] The Sixth Circuit asserts that there "is no basis at all in the statute for the Eleventh Circuit's bald assertion that the consent exception does not apply to automated calls." *Allan v. Pennsylvania Higher Educ. Assistance Agency*, 968 F.3d 567, 575 (6th Cir. 2020). But the Eleventh Circuit makes no such assertion. Instead, the Court observes correctly that the prerecorded messages prohibition "covers every exemption" and thus explains why those exceptions are there regardless of their relevance to the ATDS prohibition. *Glasser*, 948 F.3d at 1312.

> invasion of privacy than calls placed by 'live' persons. These automated calls cannot interact with the customer except in preprogrammed ways, do not allow the caller to feel the frustration of the called party, fill an answering machine tape or a voice recording service, and do not disconnect the line even after the customer hangs up the telephone.

S. Rep. No. 102-178, 102d Cong., 1st Sess. 2 (1991), at 4-5.[8] The chief sponsor of the Senate bill (Sen. Hollings) thus explained: "The bill *does not ban the message*: it bans the means to deliver that message—*the computerized* ***voice***." 137 Cong. Rec. 18123 (1991) (emphasis added); *see also S. 1462, The Automated Telephone Consumer Protection Act of 1991; S. 1410, The Telephone Advertising Consumer Protection Act; and S. 857, Equal Billing for Long Distance Charges Before the Subcomm. on Commc'n of the S. Comm. on Commerce, Science, and Transportation*, 102nd Cong. 3 (1991) (hereafter "Sen. Hr'g Test.") (statement of Sen. Hollings) (describing a call with a prerecorded message stating, "Now that is an example of the automated calls that this Senator is concerned with, *not the live, conversational solicitations*. My particular bill and its thrust is to the *automated, mechanically generated* type calls") (emphasis added). It was "the computerized call that generates the most significant

[8] As introduced in July 1991, S. 1462 contained the same definition of ATDS and the same prohibition as the final TCPA as to making any call to a cell phone "using any automatic telephone dialing system" or "an artificial or prerecorded voice."

consumer outrage," and "computerized call" meant that a computer was delivering the message.[9]

The legislative history also focuses on the particular harm to public safety caused by random and sequential dialing, generally when combined with use of prerecorded messages. This concern appears throughout committee reports, floor statements of the laws' sponsors, and hearing testimony. *See* S. Rep. No. 102-178, at 2 ("some automatic dialers will dial numbers in sequence, thereby tying up all the lines of a business and preventing outgoing calls"); H.R. Rep. No. 102-317, 102d Cong., 1st Sess. 10 (1991) ("Telemarketers often program their systems to dial sequential blocks of telephone numbers, which have included those of emergency and public service organizations, as well as unlisted telephone numbers"). Such calls were particularly harmful, Congress found, because of their capacity to seize multiple lines of an organization until the prerecorded message plays. *Id.* (the capability to "'seize' a recipient's telephone line and not release it until the prerecorded message is played, even when the called party hangs up," makes "these

[9] As the source for the claim of what sorts of calls caused outrage, Senator Hollings referred to the testimony of Steve Hamm from the South Carolina Department of Consumer Affairs. Mr. Hamm made this point graphically clear at the hearing when he stated that "[o]ne of the constant refrains" he had received from consumers and business leaders who have gotten these kinds of computerized calls is that they wish they had the ability to slam the telephone down on a live human being . . . slamming a phone down on a computer just doesn't have the same sense of release." Sen. Hr'g Test. at 9.

systems not only intrusive, but, in an emergency, potentially dangerous as well").[10]

Testimony before the House and Senate by a board member and the president of the mobile telecommunications industry's trade association identified significant public safety harms from random and sequential dialing to blocks of cellular and pager networks. As one witness stated:

> It is really rough when you come to work every day with the objective of giving service when you have outside influences that alter that objective. When

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[10] *See also* Sen. Hr'g Test. at 7 (statement of Sen. Pressler) ("Due to advances in autodialer technology machines can be programmed to deliver a prerecorded message to thousands of sequential phone numbers. . . . There are many examples of autodial machines hitting hospital switchboards and sequentially delivering a recorded message to all phone lines. In some instances, the calling machine does not release the called party's line until the recorded message has ended. This renders the party's phone inoperable. In an emergency situation this can create a real hazard."); 102 Cong. Rec. H11313 (1991) (statement of Rep. Roukema) ("I have been contacted by a number of physicians in my district who have justifiably complained that their office emergency lines, typically reserved for critical cases, are being clogged with unsolicited computer calls"); *id*. at H11314 (statement of Rep. Markey) ("the process, which has resulted in the provision being built into this legislation . . . will protect . . . tens of thousands of physicians and emergency personnel across the country [] from having their lines stopped by these junk calls"); Sen. Hr'g Test. at 33–34 (statement of Richard Barton, Senior Vice President, Direct Marketing Ass'n) ("We think as far as S. 1462 is concerned—Chairman Hollings' bill—that it has the proper focus. It clearly identified the specific problems with what we call ADRMP machines, the recorded message machines, and fax problems, things such as line seizure and the prerecorded messages not providing proper identification.").

> I say outside influences, I'm talking about autodialers that seize up our blocks of numbers.

H.R. 1304 and 1305, Bills to Amend the Communications Act of 1934 to Regulate the Use of Telephones in Making Commercial Solicitations and to Protect the Privacy Rights of Subscribers Before the Subcomm. on Telecommc'n and Fin. H. Comm. on Energy and Commerce, 102nd Cong. 110-11 (1991); *see also* Sen. Hr'g Test. at 46 ("[M]ost importantly, sequential calling by automatic dialing systems can effectively saturate mobile facilities—thereby blocking provision of service to the public. Because mobile carriers obtain large blocks of consecutive phone numbers for their subscribers, automatic dialer transmitted calls can run through whole groups of paging and cellular numbers at one time.").

Congressman Markey's statement just prior to passage of the final bill succinctly summarized these concerns:

> Automatic dialing machines, on the other hand, have the capacity to call 20 million Americans during the course of a single day, *with each individual machine delivering a* ***prerecorded message*** to 1,000 homes.
>
> In addition, *automatic dialing machines* ***place calls randomly***, meaning they sometimes call unlisted numbers, or numbers of hospitals, police and fire stations, causing public safety problems.

137 Cong. Rec. 35302 (1991) (emphasis added).

Consistent with this approach, in a section of the Senate Committee Report entitled "Constitutional Concerns," the Committee defended the provision's constitutionality because it "regulates the manner (that is, *the use of an artificial or prerecorded voice*) of speech," and stated that because of the various harms caused by such calls, "it is legitimate and consistent with the constitution to impose greater restrictions on automated calls *than on calls placed by 'live' persons.*" S. Rep. No. 102-178, at 5 (emphasis added).

By contrast, Congress offered no constitutional justification for prohibiting calls by live representatives without prior consent or by technology that just facilitates such calls. Those calls did not involve the particular harms Congress was targeting and used to justify the prohibitions.

Finally, the legislative history makes clear that Congress' concern for the equipment used was closely related to its concern over prerecorded messages. The Senate Committee Report references automatic dialer recorded message players ("ADRMPs") and also contains one reference to automatic dialing and announcing devices ("ADADs"). As the Report explains, "These machines automatically dial a telephone number *and deliver to the called party an artificial or pre-*

recorded voice message." S. Rep. 102-178, at 2 (emphasis added).[11] Congress's focus on the delivery of prerecorded messages in its discussion of the equipment at issue further confirms that (i) Congress's concern in enacting the ATDS prohibition was not live calls to stored lists of numbers and (ii) it was instead concerned with the closely related additional harm from randomly or sequentially dialed calls, which compounded the harms from prerecorded messages without prior consent.

The grammatically correct reading of the TCPA's prohibition on ATDS is therefore also the one that is most consistent with Congress's intent as reflected by the statutory structure and legislative history. Congress did not understand itself to be restricting technologies that merely enabled more calls by live operators to lists of preexisting customers. Instead, Congress was ensuring that a live person delivered

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[11] The original House Bill (introduced as the Telephone Advertising Consumer Rights Act) included the capacity to deliver prerecorded messages as part of the definition of ATDS. H. Rep. 102-317 at 2 (defining ATDS as equipment "which has the capacity . . . (C) to deliver, without initial live operator assistance, a prerecorded voice message to the number dialed, with or without manual assistance"). Likewise, the House Committee Report explained that "[a]utomatic dialing systems (automatic telephone dialers coupled with recorded message players) ensure that a company's message gets to potential customers in the exact same way, every time, without incurring the normal cost of human intervention." *Id.* at 6. The Report also uses the term "automatic dialing systems" as interchangeable with the term "automatic dialer recorded message player." *Id.* at 10.

the call, and that callers did not use equipment that posed the risks of random or sequential dialing.

Indeed, Senator Hollings explained that "[a]ll this legislation requires is that when a person is called at home, there must be a live person at the other end of the line." 137 Cong. Rec. 30822 (1991); *see also id.* (stating that consent from the owner of a cellular phone "could be obtained by a live person who simply asks the called party whether he or she agrees to listen to a recorded message").

Likewise, one witness who favored extending the bill's approach to calls to residences to its provisions on automated calls likewise stated, "It is worth noting that S. 1462 *does* ***not*** *restrict sales pitches* ***delivered by people, as opposed to tape recordings***." Sen. Hr'g Test. at 42 (statement of Michael Jacobson, Cofounder, Ctr. For the Study of Commercialism) (emphasis added).

The FCC likewise did not construe the ATDS provision to apply to live calls to preexisting lists of numbers. Instead, "the Commission explained that certain technologies would not qualify as auto-dialers under the Act because the numbers these devices called 'are not generated in a random or sequential fashion'—a baseline for all covered calls." *See Glasser*, 948 F.3d at 1308 (quoting *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd. 8572, 8576 (1992)).

B. The Court should reject the Ninth Circuit's interpretation to avoid the constitutional problems it would create.

Principles of constitutional avoidance also favor Petitioner's interpretation and require rejection of the Second Circuit's and Ninth Circuit's interpretation of the ATDS prohibition. *See generally Zadvydas v. Davis*, 533 U.S. 678 (2001); *see also Bartlett v. Strickland*, 556 U.S. 1, 21–22 (2009) ("To the extent there is any doubt whether § 2 calls for the majority-minority rule, we resolve that doubt by avoiding serious constitutional concerns under the Equal Protection Clause"). The Ninth Circuit's interpretation poses serious constitutional concerns that adoption of Petitioner's interpretation would avoid.

First, as discussed above, the specific constitutional justifications Congress offered for the statutory prohibitions at issue addressed the harms from prerecorded messages, which it understood random or sequential dialing to exacerbate. *See, e.g.*, S. Rep. No. 102-178, at 4-5. Even if there were ambiguity, the Court should choose the interpretation for which Congress sought to offer a constitutional justification.

Further, the Court should decline to adopt an interpretation for which Congress did not offer such a justification, both because Congress did not intend that interpretation and because such an interpretation lacks the congressional findings necessary to sustain it under a heightened scrutiny standard. *See Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180,

199 (1997); *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 766 (1996) (both looking to legislative history for congressional justifications in applying heightened scrutiny). The Court also should decline to adopt such an interpretation where, as here, Congress was demonstrably mindful of the need to justify restrictions on noncommercial speech, yet it failed to justify the massive restriction on live noncommercial speech that would result from the Ninth Circuit's interpretation.

Second, and related, as interpreted by the Ninth Circuit, the provision is not narrowly tailored to serve a substantial government interest, even apart from its applicability to smartphones. *See generally Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) ("Even making the assumption that the statute is content neutral and thus subject to intermediate scrutiny, the provision cannot stand. In order to survive intermediate scrutiny, a law must be narrowly tailored to serve a significant governmental interest."). Congress had a significant record documenting concerns with calling using random or sequential number generators. By contrast, under the Ninth Circuit's interpretation, the ATDS prohibition would require prior consent for all unsolicited, non-emergency speech to cell phones using any equipment that can store or dial numbers. That restriction would not be narrowly tailored either when applied to modern smartphones or when applied to the technology that was available at the time.

Such a law could not be justified by the fact that a cell phone owner might be charged for the call because, among other things, the law applies even where the cell phone owner is *not* charged for the call. A year after the statute was enacted, Congress provided that the FCC "*may,* by rule or order, exempt from the requirements of paragraph 1(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone services that are not charged to the called party." Telephone Disclosure And Dispute Resolution Act, Pub. L. No. 102-556, 106 Stat. 4181, 4194-95 (Oct. 28, 1992), enacted as 47 U.S.C. § 277(b)(2)(C) (emphasis added). It therefore did not require it to do so, nor did it justify prohibiting such calls. The Ninth Circuit's interpretation thus requires the conclusion that Congress chose to subject a large amount of constitutionally protected speech to bureaucratic inertia and $500-$1,500 per-call penalties in the interim.

Also, whatever charges apply would apply to manually-dialed calls by live representatives, and yet Congress did not prohibit those calls. Further, the Senate Committee Report finds that the charges would be far less when unaccompanied by prerecorded messages. *See* S. Rep. No. 102-178 at 4 n.4 (1991) ("When 'live' persons place these telemarketing calls they usually hang up soon after realizing that the called party is not personally available, thus minimizing payment.").

Nor could other concerns such as privacy justify applying the provision beyond randomly or sequentially dialed calls. As already discussed, Congress made no attempt to justify a prohibition on the use of

technology that just stores and dials numbers and makes it more efficient to make live calls that Congress permitted. Instead, Congress generally permitted live calls, including all non-ATDS calls to cell phones and all noncommercial calls by call representatives to homes without prior consent regardless of whether the calls are made with an ATDS. The reason is that "[c]alls do not adversely affect the privacy interests of residential subscribers" so long as they are non-telemarketing. 7 FCC Rcd. 8752, 8782 (1992).[12] If anything, privacy interests are even stronger in the home. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) ("In the privacy of the home, . . . the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.").

Further, the TCPA permits all noncommercial faxes without prior consent even though it found that such faxes shift significant costs to recipients. *See Missouri ex rel Nixon v. American Blast Fax, Inc.*, 323 F.3d 649, 654-55 (8th Cir. 2003) (citing evidence from legislative record). Congress explained that non-commercial calls "are less intrusive to customers because they are more expected." *See id.* at 655-56 (citing H.R. Rep. 102-317, at 16). Such a finding presumably would apply to calls to cell phones as well.

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[12] *See also In the Matter of the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd. 2736, 2737 (1992) (the TCPA's aim "is to protect consumers from unrestricted telemarketing, which can be an intrusive invasion of privacy."); *see* Telephone Consumer Protection Act of 1991, § 2, Pub. L. No. 102-243, 105 Stat. 2394 (Congressional findings).

III. The Ninth Circuit's Interpretation Would Stifle Speech, Increase Healthcare Costs, and Threaten Unwarranted and Exorbitant Financial Liability.

Adopting the Ninth Circuit's misinterpretation of the TCPA will foreclose vast amounts of various types of speech that otherwise would have happened where it is not feasible for companies or individuals to obtain advance consent or to hire live representatives to deliver the message. Moreover, it will increase the cost of other speech that will still occur but could be much more efficiently delivered through use of the prohibited technology. It even could make companies indifferent between prerecorded messages and use of automatic dialers to make live calls or send text messages even though prerecorded messages without prior consent were indisputably Congress's primary concern in enacting the TCPA.

In addition, the TCPA currently forces companies to risk astronomical liability even where they must make the calls, have consent to call members and customers, have other strong defenses and justifications for opposing class certification, and call only the numbers their members or customers have provided.

This threat exists because Congress imposed statutory damages for violations of the TCPA ranging from $500-$1,500 per call, and attorneys bring class actions seeking to aggregate those claims across what

can be millions of calls.[13] Even a low risk of class certification and liability must be taken seriously in these circumstances, and as a result, even companies with meritorious defenses and strong bases for opposing class certification face extreme pressure to settle.

For example, in *In re Capital One Telephone Consumer Protection Act*, 80 F. Supp. 3d 781, 791-92 (N.D. Ill. 2015), a case brought under the provision at issue here, the Court concluded that "Plaintiffs would probably face an uphill battle proceeding to trial and, once there, obtaining relief," and "there was a very real possibility that Plaintiffs may recover nothing." Yet the defendant settled for $75,455,099. *Id.* at 787.

As another example, in *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 228–29 (N.D. Ill. 2016), the Court held that the plaintiffs "would face significant obstacles in continuing to litigate this case," including (i) a defense on which another defendant in the same district had obtained summary judgment and (ii) "serious obstacles to a contested class certification." *Id.* at 228. Yet the defendant faced up to

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[13] In setting the statutory damages amount, Congress appears neither to have anticipated nor intended that TCPA actions would be brought as class actions. Instead, with individual enforcement in mind, Congress added a provision allowing lawsuits to be brought in state court, including small claims court, to "make it easier for consumers to recover damages from receiving these computerized calls." 137 Cong. Rec. 30821 (1991). *See also id.* ("Small claims court or a similar court would allow the consumer to appear before the court without an attorney."). Further, it included a provision allowing enforcement by state attorneys general and later allowed a provision allowing for large FCC fines. *See* 47 U.S.C. §§ 227(b)(4),(g)(1).

$16.1-$48.4 *billion* in liability, *id.*, involving a proposed Settlement Class of 32,297,356*, id.* at 221. This amount was so ruinous as to be an incentive for both the plaintiff and the defendant to agree to a settlement of $34 million to avoid the burdens the defendant's bankruptcy would have imposed on both of them. *Id.* at 228; s*ee also, e.g., Wilkins v. HSBC Bank Nevada, N.A.*, 2015 WL 890566, at *12 (N.D. Ill. Feb. 27, 2015) (settled for $39,975,000).

The TCPA's statutory damages penalties have made it a major source of class-action litigation where representative plaintiffs who may have received only a single call can seek certification of classes that can reach millions of calls. Amicus United alone has faced and currently faces nationwide class actions for calling cell phones—two of which are brought by serial litigants who together have filed over 80 TCPA lawsuits. *See, e.g.*, Am. Countercls. at ¶ 3, *Perrong v. Golden Rule Insurance Company and American Select Partners, LLC*, No. 19-cv-01940 (S.D. Ind. Oct. 8, 2019), ECF No. 38 (college student plaintiff who has filed over 50 other TCPA cases); *Morris v. UnitedHealthcare Ins. Co.*, 2016 WL 7115973, at *6 (E.D. Tex. Nov. 9, 2016) (enterprising plaintiff who has "thought about franchising his TCPA lawsuits" and filed at least 36), *report and recommendation adopted*, 2016 WL 7104091 (E.D. Tex. Dec. 6, 2016).[14] In all the

[14] Two pending cases are based in part on the provision at issue. *See Matlock v. United Healthcare Services, Inc.*, No. 2:13-cv-02206 (E.D. Cal.); *Samson v. United Healthcare Services, Inc.*, 2:19-cv-00175 (W.D. Wash.). In a third, the plaintiff narrowed

United suits, the calls at issue were intended to reach members to help them with healthcare needs such as diabetic care, compliance with state requirements for retaining Medicaid coverage, prescription refills, flu shots, and more.

Companies may face putative class action lawsuits even when (as is the case with amici) they intend to call only the numbers that customers provide them for the purpose. This is because cell phone holders frequently change their numbers, and those numbers are then reassigned without the company's knowledge. *See* FCC, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services ¶ 27, FCC 17–126 (Sept. 27, 2017) (annual churn rate of 26.3%).

As a result of this frequent cell phone "churn" and numerous other obstacles, the FCC has recognized that "the most careful caller, after employing all reasonably available tools to learn about reassignments, 'may nevertheless not learn of reassignment before placing a call to a new subscriber.'" *ACA Int'l v. Fed. Commc'ns Comm'n*, 885 F.3d 687, 705 (D.C. Cir. 2018) (quoting *In re Rules and Regulations Implementing the TCPA of 1991*, 30 FCC Rcd. 7961, 8009 (2015)

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the proposed class to prerecorded messages solely to avoid a stay pending the Court's decision in this case. *Marden's Ark, Inc. v. UnitedHealth Group, Inc.*, No. 19-cv-1653, Doc. 67 (D. Minn.).

(2015 Order)).[15] Because every change can result in an inadvertent call to a non-member TCPA litigant, and because healthcare companies have millions of members who require frequent calls about their health care needs, such calls have exposed United and many other companies to class action lawsuits based upon the type of calls described above.

Lawsuits based on 47 U.S.C. § 227(b)(1)(A) are quite common. So are so-called wrong number class actions involving calls to reassigned numbers, and even though certification of such classes is typically unwarranted for a number of reasons, *see, e.g.*, *Hunter v. Time Warner Cable Inc.*, 2019 WL 3812063, at *11–17 (S.D.N.Y. Aug. 14, 2019) (Oetken, J.), some courts have certified such classes, and as already explained, the costs and risks of litigating to that point and beyond are significant. *See, e.g.*, *Knapper v. Cox*

[15] The FCC is at work on a reassigned numbers database that, once completed, will provide a safe harbor defense for companies that meet the FCC's requirements for consulting the database. *See* FCC, Wireline Competition Bureau and Consumer and Governmental Affairs Bureau Seek Comment on Technical Requirements for Reassigned Numbers Database, DA 20-105 (Jan. 24, 2020); *cf.* FCC, Consumer and Governmental Affairs Bureau Establishes Guidelines for Operation of The Reassigned Numbers Database, DA 20-423 (Apr. 16, 2020) (latest FCC update on database; offering only three pages of guidance). The FCC also has yet to resolve the question of what standard applies to reassigned calls made prior to the completion of the database. It previously recognized a one call safe harbor, but the D.C. Circuit struck that provision down in *ACA Int'l*, 885 F.3d at 705–06, and the FCC has yet to issue new guidance on the question.

Commc'ns, Inc., 329 F.R.D. 238, 247 (D. Ariz. 2019) (certifying class).[16]

The situation of healthcare benefits companies like amici is instructive because healthcare companies have defenses and related additional grounds for opposing certification that others do not. For example, the McCarran Ferguson Act preempts the TCPA where it impairs state law as it does in many states. Further, the TCPA exempts calls made "for emergency purposes," which the FCC defines "broadly rather than narrowly" consistent "with the legislative history and the intent of the TCPA." 47 U.S.C. § 227(b)(1)(A); *In the Matter of the TCPA of 1991*, 7 FCC Rcd. 2738, 2753 (1992) ("*1992 Order*") (proposing exemption).[17] And as indicated above, other TCPA defendants also face disputed issues of consent and revocation of consent that amici do not.

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[16] *See also Abdeljali v. Gen. Electric Capital Corp.*, 306 F.R.D. 303 (S.D. Cal. 2015); *Johnson v. Navient Sols, Inc.*, 315 F.R.D. 501 (S.D. Ind. 2016); *Krakauer v. DISH Network L.L.C.*, 311 F.R.D. 384 (M.D.N.C. 2015); *Brown v. DirecTV, LLC*, 330 F.R.D. 260 (C.D. Cal. 2019); *West v. California Servs. Bureau, Inc.*, 323 F.R.D. 295 (N.D. Cal. 2017) (certifying such classes).

[17] The emergency exemption includes "calls made necessary in any situation affecting the health and safety of consumers." *1992 Order*, 7 FCC Rcd. at 2753; 47 C.F.R. § 64.1200(f)(4). This "include[s] situations in which it is in the public interest to convey information to consumers concerning health or safety, whether or not the event was anticipated or could have been anticipated." *1992 Order*, 7 FCC Rcd. at 2738. The FCC by regulation has provided a separate exception for certain health-care messages that meet seven particular requirements. *See 2015 Order*, 30 FCC Rcd. at 8031–32 (listing types of calls and conditions), *aff'd in part by ACA Int'l*, 885 F.3d at 710–14.

But these defenses often do not allow healthcare or other companies to obtain dismissal of the named plaintiffs' claims at the pleading stage, and as noted, certain of the defenses do not apply outside the health-insurance industry. And as those cases head into discovery and class certification, the cost of fighting them is millions of dollars and thousands of hours diverted from amici's healthcare mission and the mission of various other companies. This cost multiplies when summed across the healthcare industry at large. Ultimately, these costs must be borne by all members and increase the cost of healthcare to all Americans.

Rejection of the Ninth Circuit's position will not definitively end the problem. For example, this petition does not implicate the prohibition on prerecorded messages without prior consent or other provisions. It will, however, eliminate an interpretation that deters protected speech, increases healthcare costs, and threatens companies throughout the country with enormous unwarranted liability that goes far beyond what Congress intended.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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