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* THE HOME DEPOT, INC. IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—Continued

Page(s)

Statutes

Other Authorities

TABLE OF AUTHORITIES—Continued

Page(s)

INTEREST OF *AMICUS CURIAE*[1]

The Home Depot, Inc. ("Home Depot") is the world's largest home improvement retailer, selling a wide assortment of building materials, home improvement products, and more. The company provides a range of services such as installation and equipment rental. Home Depot operates nearly 2,000 retail stores throughout the United States, and also maintains a network of distribution and fulfillment centers linked—along with its retail stores—to a number of e-commerce websites. The company seeks to provide its customers with a seamless experience that includes physical and digital retail options as well as home-improvement services.

To do so, Home Depot communicates frequently with its customers on a wide range of topics, and—both by necessity and to ensure the highest level of customer service—it uses phone calls and text messages for many of those communications. Some of those communications inform customers that their orders are ready for delivery or pickup, or that equipment they wanted to rent has become available. Some involve scheduling of services, coordination of service delivery, account security, or safety information. And some, indeed, involve marketing; Home Depot has found that

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[1]No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief. Counsel for petitioner and respondent provided written consent to the filing of this brief under Rule 37(3)(a).

many of its customers desire personalized information about new products and services. In short, customer communications enable Home Depot to serve the customer.

But like many other companies its size, Home Depot faces persistent allegations of Telephone Consumer Protection Act ("TCPA") violations, based on the alleged use of automatic telephone dialing systems ("auto-dialers") when it contacts people for the sorts of reasons just described. Home Depot does not engage in spam telemarketing or the sort of intrusive mass robocalling that the TCPA was meant to combat. Yet the threat of TCPA liability for engaging in ordinary, reasonable customer communications remains.

Home Depot has an interest in ensuring the TCPA's auto-dialer restrictions do not stretch beyond their original meaning, so that Home Depot and other businesses focused on outstanding customer service can communicate with customers without inordinate fear of the strict liability imposed by the TCPA. It submits this *amicus* brief to inform the Court about the experience and concerns of one company—like so many others in the United States—that tries every day to comply with the TCPA, yet faces a continuous threat of undeserved and seemingly unavoidable liability.

SUMMARY OF ARGUMENT

"A-always, B-be, C-closing. Always be closing."[2] That infamous 1992 mantra, reflecting the incessant pressure to contact potential customers

[2] *Glengarry Glen Ross* (New Line Cinema, 1992).

and push products and services no one ever requested, captures the distaste that many Americans felt for telemarketing 30 years ago. Advances in telecommunications had fed the growth of a particularly intrusive form of marketing, in which a company would call large blocks of phone numbers to deliver an advertising message. These mass advertising calls interrupted recipients' privacy and cluttered their phone lines; in some cases, persistent calls from advertisers even blocked access to 911 lines.

This was an acute problem, and Congress enacted a specific, targeted solution. It defined "automatic telephone dialing system" to mean equipment that could call lists of numbers generated sequentially or at random; and it prohibited calls using such devices to emergency lines, to hospitals, and to cell phones. To achieve speedy and certain compliance, Congress imposed a drastic remedy: Any call violating this rule incurred an automatic $500 penalty, owed to the call recipient—strict liability, no questions asked about the caller's intentions or business practices.

The TCPA's auto-dialer prohibition was effective, and devices of that sort became obsolete. But instead of accepting that victory, the Federal Communications Commission ("FCC," the implementing agency) explored whether the statute could be stretched to cover new and different technology. That reach has now given cover to thousands of lawsuits against companies that were not using random or sequential dialing, many of which were not even telemarketing at all. The Ninth Circuit version of the statute now before the

Court deems any device an auto-dialer if it can store a list of numbers and call them automatically—as essentially all modern calling equipment can. Thus, a provision that was originally meant to bring a swift end to a specific and particularly unpleasant practice has been stretched into a broad-spectrum law requiring prior consent before calling cell phones.

The practical problems are immense. Whereas compliance with the original auto-dialer prohibition was straightforward—an auto-dialer was a costly piece of equipment useful only for the intrusive telemarketing that Congress prohibited—a business cannot comply easily (or perfectly) with the new version. Interpreting whether a given person has consented to be called is a source of uncertainty and risk. Phone numbers—especially cell phone numbers—regularly change hands, and the person being called at a given number is sometimes not the person who consented. The range of vendors and third parties that make calls on a company's behalf present a further difficulty. If the auto-dialer rule covers essentially every calling device they might use, it becomes necessary to scrutinize their activities so closely as to be impracticable.

This is not what Congress intended. The clearest sign is the $500 strict-liability penalty. The TCPA allows defenses for most of its other restrictions, and it permits the FCC to create exceptions to them by rule. The auto-dialer provision is special in those regards, a status that shows how keenly Congress wanted auto-dialer marketing to stop immediately. Yet the activities reached by

the Ninth Circuit's expansion of the statute are ordinary customer communications for consumer-facing businesses across the economy. It is not plausible that Congress would have reserved its most automatic and strict sanction in the statute for the provision that is—as the Ninth Circuit applies the law—the most difficult to comply with.

Finally, the Ninth Circuit's interpretation raises serious First Amendment concerns this Court can and should avoid. Under its expansive reading, nearly every modern phone is an auto-dialer. And the TCPA prohibits any person—not just a business making a commercial call, *any* person—from using an auto-dialer to call a cell phone without prior express consent. That sweeping restriction would be an unreasonable restriction on the means and manner of communicating, contrary to the First Amendment. It is far more likely that Congress meant simply to prohibit one specific, limited-purpose tool, overwhelmingly used for advertising in one particular manner.

ARGUMENT

I. THE NINTH CIRCUIT'S INTERPRETATION HAS STRETCHED THE AUTO-DIALER PROHIBITION FAR BEYOND ITS ORIGINAL PURPOSE.

A. Congress enacted the TCPA to combat aggressive telemarketing.

In 1991, Americans were fed up with dinner-time phone calls hawking products they had never heard of and had no interest in buying. Due to a rapid decrease in telecommunications costs and advances in technology, "[t]he use of the telephone

to market goods and services to the home" had become "pervasive," accounting for more than 18 million calls each day. Telephone Consumer Protection Act of 1991 ("TCPA"), Pub. L. No. 102-243, § 2, 105 Stat. 2394 (congressional findings); *see also* H.R. Rep. No. 101-633, at 2 (1990) ("[W]ith the rapid decrease in the cost of telecommunications and the adoption of sophisticated telemarketing tools by businesses around the country, the number of unsolicited telemarketing practices has increased overwhelmingly").

Many of these calls were not even targeted to the particular recipient, as telemarketers "primarily used systems that randomly generated numbers and dialed them." *Gadelhak v. AT&T Servs.*, 950 F.3d 458, 461 (7th Cir. 2020). The telephone had become a tool for mass, indiscriminate advertising. But unlike many other forms of mass marketing (*e.g.*, radio or television), a consumer could not avoid this sort of nuisance by simply turning it off. Unplugging the phone—though perhaps necessary for a peaceful dinner—interfered with its important ordinary function.

This "proliferation" of "intrusive, nuisance calls" not only "outraged" consumers but also endangered public safety. H.R. Rep. No. 102-317, at 2 (1991). "Telemarketers often program[med] their systems to dial sequential blocks of telephone numbers, which have included those of emergency and public service organizations. Once 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, even when the called party hangs up." *Id.*

at 10. First responders reported incidents in which random or sequential dialing systems "call[ed] and seiz[ed] the telephone lines of public emergency services, dangerously preventing those lines from being utilized to receive calls from those needing emergency services." *Id.* at 24. In addition to annoying unsuspecting consumers, randomly or sequentially dialed calls thus also threatened to clog emergency telephone lines with the aural equivalent of junk mail.

Congress responded by enacting the TCPA, which narrowly targeted these specific abuses. The Act prohibited "any person within the United States" from, *inter alia*:

(1) "mak[ing] any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice" to an emergency line, hospital room, or "any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call"; or

(2) "initiat[ing] any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party" (unless the call was placed for emergency purposes).

TCPA § 3(a), 105 Stat. at 2395–96.[3] Banning these types of unsolicited calls was necessary, Congress explained, because it was "the only effective means of protecting telephone consumers from this nuisance and privacy invasion." TCPA § 2, 105 Stat. at 2394–95 (congressional findings).

Congress emphasized that it "[did] not intend for this restriction to be a barrier to the normal, expected, or desired communications between businesses and their customers." H.R. Rep. No. 102-317, at 17. "[W]here the called party has in essence requested the contact by providing the caller with their telephone number for use in normal business communications," Congress recognized that the privacy concerns underlying the Act were not implicated. *Id.* at 13; *see also* H.R. Rep. No. 101-633, at 7 (explaining that advanced telecommunications technology could "serve a useful purpose and eliminate costly labor" where there is a "prior existing relationship" between the parties).

Congress thus struck a "balance" between "individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade" by limiting the Act's prohibitions to indiscriminate, non-consensual calls. TCPA §§ 2, 3, 105 Stat. at 2394–96. The prohibition "does not apply when the called party has provided the telephone number of such a line to the caller for use in normal

[3]The Act also prohibited junk faxes and the use of "an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously." TCPA § 3(a), 105 Stat. at 2396.

business communications." H.R. Rep. No. 102-317, at 17. "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." *Id.*

B. Compliance with the auto-dialer prohibition, as originally intended, was straightforward.

To comply with the Act, consumer-facing businesses therefore had to ensure that they did not use the prohibited systems—*i.e.*, prerecorded messages to residential phone lines, junk faxes, and random or sequentially dialed calls to emergency lines, hospital rooms, or cell phones—without consent. But this prohibition did not extend to "normal business communications," which were targeted to the particular customer and therefore did not engender the same types of complaints as indiscriminate telemarketing. *See* H.R. Rep. No. 102-317, at 14 (explaining that "the absence of any current or prior dealings with the caller was the source of many objections").

The FCC, the agency responsible for administering and implementing the Act, contemporaneously understood that the auto-dialers were meant to address pervasive, indiscriminate telemarketing. That is the activity that Congress identified as the problem, and that is the practice that the Act specifically targeted.

The FCC's first rules under the TCPA confirmed this understanding, "attempt[ing] to balance the privacy concerns which the TCPA seeks to protect, and the continued viability of beneficial and useful business services." Rules and Regulations Implementing the TCPA, 7 FCC Rcd. 8752, 8754 (1992). In response to concerns that businesses might "unintentionally incur liability" by placing auto-dialed calls "to individuals who provided a number at one of the 'prohibited destinations'" or whose "numbers have been changed without notification," the FCC "emphasize[d]" that businesses "will not violate our rules by calling a number which was provided as one at which the called party wishes to be reached." *Id.* at 8768–69.

The FCC further clarified that telephone services such as "speed dialing," "call forwarding," and "voice messaging services" were not prohibited by the auto-dialer provision, "because the numbers called are not generated in a random or sequential fashion." *Id.* at 8776. The FCC reaffirmed this interpretation three years later, concluding that certain debt collection calls were not subject to the auto-dialer restriction because they "are not directed to randomly or sequentially generated telephone numbers, but instead are directed to the specifically programmed contact numbers for debtors." Rules and Regulations Implementing the TCPA, 10 FCC Rcd. 12391, 12400–01 (1995).

These rules recognized that the concept of randomly or sequentially generated numbers was central to the concept of an auto-dialer. What

made those systems simultaneously so useful to mass telemarketers and so intrusive and annoying to recipients was precisely that the numbers were generated without reference to the individuals using the numbers. For example, an auto-dialer targeting the D.C. market might call every possible phone number within a particular exchange (such as (202) 479-XXXX).[4] By calling all those numbers, the system could send a marketing message to every phone in that area, even if some of the numbers turned out not to be connected or belonged to recipients like emergency services that should be called only for specific purposes. Or, if for reasons of time, resources, or strategy, the marketer did not want to call every number in a particular exchange, the auto-dialer might call a random sample of numbers within each targeted exchange. Either way, the marketer could spread a message indiscriminately without having to know people's phone numbers in advance.

In any case, the focus was on the fact that the numbers called were random or sequential, as opposed to associated with individuals the caller was trying to reach. Speed dialing and the other features that the FCC addressed did not involve such randomly or sequentially generated numbers, because they used technology to call numbers that were linked to the people being called. Moreover, a caller using a speed dialer—or, today, using cus-

[4] "Sequential" most naturally refers to the numbers' coming in sequence: (202) 479-1000, (202) 479-1001, (202) 479-1002, etc.

tomer relations software—would have received information that a given person should be reached at a particular phone number, and the purpose of the call would be to reach that person. Technologies like these are thus the opposite of the auto-dialer concept that underlay the TCPA.

Compliance with the auto-dialer restrictions, as properly understood and as explained by the FCC in its early TCPA rules, was relatively straightforward. The capability to generate and call a random or sequential list of phone numbers was a specialized function that required either purpose-built circuitry or intentional software programming—and thus, equipment developed, to some degree, to carry out that function. What ordinary phone user, then or now, inadvertently has a phone that can generate or store, and then call, a random or sequential list of numbers? To use an auto-dialer, in that sense of the term, a business would have to invest in obtaining or using the device. It would know it had done so, and it would know which of its personnel had access to the equipment. So to comply with the auto-dialer restrictions, a business could, straightforwardly enough, not use an auto-dialer. Or it could, if it wanted to use an auto-dialer for some purposes, obtain the equipment but also maintain policies and enforce calling protocols for use of that specialized equipment.

C. TCPA litigation has expanded to attack ordinary customer communications.

"[F]or the first dozen years of the [TCPA's existence," "[e]veryone seemed to accept this interpretation" of the auto-dialer restriction as limited to indiscriminate dialing. *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1308 (11th Cir. 2020) (Sutton, J., sitting by designation). The FCC and businesses alike viewed the generation of numbers "in a random of sequential fashion" as "a baseline for all covered calls." *Id*.

This "common understanding" began to "dissipate," however, in 2003, when the FCC sought to extend the auto-dialer restriction to new technologies. *Id.* at 1308–09. With the advent of "predictive dialers," telemarketing companies "switch[ed] from using machines that dialed a high volume of randomly or sequentially generated numbers" to more targeted systems that "merely dialed numbers from a database" of "predetermined potential customers." *Id*.

In response, the FCC tried to sweep these new systems under the auto-dialer prohibition, even though they did not rely upon random or sequential number generation. *Id.* at 1308 (discussing TCPA Rules & Regulations, 18 FCC Rcd. 14014, 14091 (2003)). In doing so, however, the FCC failed to effectively grapple with the statutory definition of an "automatic telephone dialing system"—suggesting, in the same order, both that a device *must* have the capacity to "generate and dial random or sequential numbers" to qualify as an auto-dialer, and that "equipment can meet the statutory definition even if it *lacks* that capacity."

ACA Int'l v. FCC, 885 F.3d 687, 702 (D.C. Cir. 2018) (emphasis added).

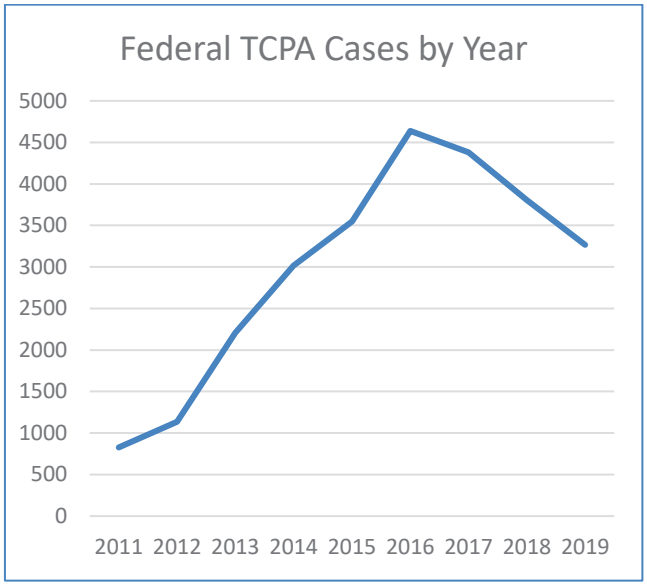
The FCC's attempt to "pour new wine into old skin" eventually failed,[5] *Glasser*, 948 F.3d at 1308–09, but it nonetheless sparked extensive litigation about the scope of the TCPA's auto-dialer concept. These efforts to expand the reach of the auto-dialer restrictions left "affected parties . . . in a significant fog of uncertainty." *ACA Int'l*, 885 F.3d at 703.

These efforts also brought the specter of TCPA liability to businesses far removed from the intrusive, mass-scale telemarketing that Congress meant to address. In *Mims v. Arrow Financial Services*, this Court held that federal courts have jurisdiction over TCPA claims. 565 U.S. 368 (2012). In response to concerns that opening the doors to federal court would lead to an "enormous potential volume of TCPA cases," the *Mims* petitioner assured this Court that such claims would make up no more than an "*infinitesimal percentage*" of the civil docket. *See* Petitioner's Reply Brief, *Mims v. Arrow Fin. Servs.*, 565 U.S. 368 (2012), at 11–12 (emphasis added) (asserting defendants' warnings of a flood of TCPA litigation were "farfetched" and assumed "a shocking degree of noncompliance"). That assurance made sense if the auto-dialer restrictions applied only to calling

[5]The D.C. Circuit ultimately set aside the FCC's Order, holding the "lack of clarity" in the agency's description of "the functions a device must perform to qualify as an auto-dialer fail[ed] to satisfy the requirement of reasoned decisionmaking." *ACA Int'l*, 885 F.3d at 703.

random or sequential numbers—a practice that was specific to the form of indiscriminate telemarketing that the TCPA originally targeted.

In fact, however, after this Court's January 2012 decision in *Mims*, the federal courts witnessed an explosion in TCPA litigation:



Source: WebRecon Stats for Dec. 2019 & Year in Review, available at https://webrecon.com/webrecon-stats-for-dec-2019-and-year-in-review-how-did-your-favorite-statutes-fare/.

Federal courts now deal with thousands of TCPA cases each year. This flood is the predictable result of expanding the scope of auto-dialer liability. For example, of over 3,100 new TCPA cases filed in 2017, 35.7% were against companies in the financial industry, 18.1% against those in debt collection, and 8.4% against those in the

health sector.[6] These industries—collectively accounting for more than half of that year's new cases—are particularly unlikely to use random or sequential dialing. They need to make their calls to specific people, such as individuals being contacted about financial issues.[7]

Thus, the expanded interpretation of "automatic telephone dialing system" is driving TCPA liability into industries and markets where, before the FCC's adventure in interpretation, auto-dialing in the TCPA sense was not a significant concern. These new types of defendants are companies that, under the original understanding of the TCPA, had little to fear because they do not engage in indiscriminate telemarketing and are not using its hallmark equipment. Now they face a

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[6]U.S. Chamber Institute for Legal Reform, *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits* 7 (Aug. 2017).

[7]Meanwhile, the decrease in new cases visible in the graph for 2018 and 2019 probably reflects the demise of the FCC's rule adopting the expanded auto-dialer concept. The D.C. Circuit invalidated that rule in March 2018. *ACA Int'l*, 855 F.3d 687. Then in June 2018, the Third Circuit issued *Dominguez v. Yahoo, Inc.*, which reverted to prior Third Circuit precedent narrowly construing the auto-dialer provision. 894 F.3d 116, 119 (3d Cir. 2018). In the wake of those decisions, a number of district courts dismissed cases that were based on the expanded auto-dialer concept. Pet. 32–33 & n.3 (citing cases). These developments likely caused the decrease in new TCPA filings. There is no reason to think that usage of random or sequential dialing decreased substantially during the relevant period.

wave of multi-million-dollar lawsuits for ordinary customer communications.[8]

The irony is that random and sequential dialers became obsolete long ago. *See ACA Int'l*, 885 F.3d at 699 (rejecting FCC's argument that auto-dialer provision must be interpreted broadly or else "little or no modern dialing equipment would fit the statutory definition"). Current telemarketing technology involves more targeted advertising, in which a company uses the information available from data brokers to identify consumers for specific messages. Telemarketers call actual phone numbers for actual people, focusing their advertising on the individuals they want to reach. No longer does a telemarketer need to generate a random or sequential list of possible phone numbers to spread an indiscriminate phone ad.

Given that technology has moved away from the practices Congress originally targeted, the natural consequence should be fewer TCPA cases under these provisions—and perhaps renewed legislative attention to the technologies of concern to citizens receiving unwanted mobile calls or text messages today. Instead, a law originally intended "to eradicate machines that dialed randomly or sequentially generated numbers" is being used "to fill a legislative gap in coverage created by new communication technology." *Glasser*, 948 F.3d at 1309, 1311. This new generation of

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[8]As noted above, each call made using an auto-dialer without the recipient's consent incurs an automatic $500 penalty at a minimum. For willful violations, the penalty triples. 47 U.S.C. § 227(b)(3).

TCPA cases attacks the use of any automated equipment, not of random or sequentially generated numbers. The flawed decision below should represent the high-water mark of this trend. The Ninth Circuit interpreted the auto-dialer definition to cover *every* device that can store a list of numbers and call the numbers automatically—without reference to whether the list is random or sequential, or on the other hand represents an individual's personal contacts.

On that interpretation, every smart phone is an auto-dialer, not to mention the sorts of customer relations management ("CRM") software that are necessities at consumer-facing businesses. These systems store customer-provided contact information, along with other information (for example, order details) depending on a business's particular usage. If a company wants to call a customer for any reason, it will surely pull the number from a CRM system of some sort. And given modern communications technology, the CRM system will likely play some role in initiating the call. Though decidedly not the practices the TCPA sought to address when passed in 1991, these are the sorts of standard business operations that much current-day TCPA litigation attacks.

II. THE NINTH CIRCUIT'S EXPANSIVE INTERPRETATION MAKES TCPA COMPLIANCE UNPREDICTABLE AND INORDINATELY EXPENSIVE.

To provide the level of service demanded by consumers today, companies like Home Depot obviously must be able to communicate efficiently

and directly with their own customers. To avoid unnecessary expense and delay, companies often use CRM software to ensure a reliable means of reaching—whether by call, text, or voice message—the phone number provided by the customer.

Unsurprisingly, this basic customer service practice is common across consumer-facing businesses today. In shipping or delivering orders, software enables companies to notify customers via voice or text message (as customers prefer in today's just-in-time consumer environment). When a business wants to inform a customer about security issues, such as unusual activity in a customer account, use of CRM-based automated calling is important to get the message across as fast as possible. And when companies want to tell customers about payment problems, they will often use CRM to ensure the information being conveyed is accurate, secure, and sensitive to customer financial concerns.

Because CRM software uses customer-provided, stored contact information to generate and send such messages, the basic tools that modern, consumer-facing businesses use to ensure a high level of customer service *also* likely fall within the Ninth Circuit's expansive concept of auto-dialers. The same would be true of store announcements or service alerts that the company might send to its own customers. As the decision below demonstrates, the Ninth Circuit's interpretation apparently even reaches targeted security alerts—messages that are obviously intended to provide an

important benefit to the recipient, and bear no resemblance to the type of pervasive, indiscriminate telemarketing that gave rise to the TCPA. *See* Pet. Br. 50. Under the Ninth Circuit's expansive interpretation of the auto-dialer prohibitions, a company could not send such messages without risking liability under the TCPA.

That the statute exempts calls made with the recipient's prior express consent, 47 U.S.C. § 227(b)(1)(A), does not do much to ameliorate that risk. Prior express consent is a compliance nightmare. Under the original understanding of the TCPA, a business could avoid TCPA liability by simply not acquiring or using the specialized equipment to dial random or sequential numbers. By contrast, under the Ninth Circuit's reading, a company must obtain consent from customers that provide their phone numbers; store records of those consents alongside the numbers; rigorously maintain those records; and consider the possibility that a given individual might withdraw consent.[9] A statute originally meant to prohibit a particular form of abusive telemarketing becomes a

[9]As just one example, Home Depot recently faced seven-figure liability in a class action where the lead plaintiff admitted she gave her phone number to a Home Depot-affiliated service provider for purposes of marketing calls. She wrote her number on a contact card that she filled out at an advertising kiosk. The trial court determined that Home Depot could be liable nonetheless, because the plaintiff had not expressed her consent to receive *auto-dialer* calls. Tr. of Ct.'s Op. on Defs.' Mot. for Summ. J. pp. 9–10, *Manopla v. Home Depot USA, Inc.*, No. 15-1120 (D.N.J. Sept. 29, 2017) ("*Manopla* Op.").

broad-spectrum privacy rule governing wide swaths of ordinary customer communication.

Several other features of the TCPA illustrate why compliance with the Ninth Circuit's interpretation would be virtually impossible for consumer-facing businesses:

- **Strict liability/lack of good-faith defense**: The TCPA imposes strict liability for violating the auto-dialer prohibitions. No proof of negligence is required, and a business's good-faith efforts to comply give it no defense. 47 U.S.C. § 227(b). "[A]ny person within the United States" who makes "any call (other than a call made for emergency purposes or made with the prior express consent of the called party)" using an ATDS to "any telephone number assigned to a . . . cellular telephone service" is liable for damages—regardless of whether the caller took reasonable measures to ensure the recipient had previously provided consent.

If the auto-dialer provision applies to any call made using CRM software or a smart phone, this strict liability standard is untenable for consumer-facing businesses. To adhere to the Ninth Circuit's version of the TCPA, businesses must at a minimum implement complex compliance systems to ensure that no call to a cell phone exceeds the scope of a previously granted consent, but even that is not enough. Mistakes will happen: in data entry, in maintaining the records of consent or of withdrawal of consent, in interpreting a customer's consent or withdrawal of consent, or in categorizing (as against the scope of a consent) a particular communication.

Such errors have incredibly expensive consequences—$500 per call (and $500 per text message[10]). The imposition of a steep, strict liability shows that Congress cannot have meant to cover every type of automated calling equipment a business might use. Congress's goal was to stamp out swiftly a practice in a particular industry that it identified plainly and that defendants could readily avoid. The auto-dialer strict-liability regime makes much less sense for a restriction that, under the Ninth Circuit's interpretation, covers a wide range of ordinary business practices and requires companies to limit their communications on the basis of a customer-by-customer assessment of consent.

The structure of other features in the TCPA confirms that Congress would not have imposed the auto-dialer strict liability if it had meant a broad-spectrum restriction—because Congress actually didn't use strict liability for the other broader provisions in the TCPA. Notably, the TCPA instructed the FCC to develop a do-not-call list, in which an individual could register his or her phone number with a request that companies not call it for advertising purposes. 47 U.S.C. § 227(c). If a company calls a number on the list, the person called can sue for $500 statutory damages; but "implement[ing], with due care, reason-

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[10] *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009)) (holding a text message counts as a "call" for TCPA purposes).

able practices and procedures to effectively prevent" such missteps is a defense to liability. *Id.* § 227(c)(5).

The Ninth Circuit's interpretation of the auto-dialer provision is more sweeping than the do-not-call rule; it covers all calls from any sort of automated system to any cell phone, whether for marketing or for any other purpose. The efforts needed to attempt compliance with the Ninth Circuit's rule are more complex; a company must record consent from each person it contemplates calling, and record the scope of that consent with respect to the wide variety of reasons it might communicate with customers. Had Congress contemplated that the auto-dialer rule would operate so broadly, it would surely have provided a "good-faith efforts" defense as it did for the do-not-call-registry in the same statute. That it did not, and mandated strict liability instead, signals that the auto-dialer provision is a simpler, narrower prohibition with which Congress expected companies to comply readily—and quickly.

- **Wrong numbers**: Companies like Home Depot rely upon contact information provided by their own customers. A company cannot ensure that such information will always be perfectly up-to-date or correct. "[T]here is no dispute that millions of wireless numbers are reassigned each year," as subscribers switch providers or change their numbers. *ACA Int'l*, 885 F.3d at 705. Thus, "even 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.'"

Id. (quoting Rules and Regulations Implementing the TCPA, 30 FCC Rcd. 7961, 8009 (2015)). And in doing so, the caller would have just violated the TCPA—at least under the Ninth Circuit's expansive interpretation.

The FCC itself recognized the difficulty, particularly in light of the strict-liability regime. It reasoned that the reassignment of a phone number automatically extinguished the consent provided by the prior subscriber. 30 FCC Rcd. at 7999–8001. But, acknowledging that strict liability would be harsh for a business's call to a number that the company did not even known was reassigned, the FCC cobbled together a fix: "[C]allers who make calls without knowledge of reassignment and with a reasonable basis to believe that they have valid consent to make the call should be able to initiate one call after reassignment as an additional opportunity to gain actual or constructive knowledge of the reassignment." *Id.* at 8000. The FCC stated that regardless of what information that call produced—calling a phone and reaching an automated voicemail does not necessarily reveal who the current subscriber is—the business would be "deem[ed] . . . to have constructive knowledge" of the reassignment after one call. *Id.* Further elaborating this creative solution, the FCC clarified that "a single caller includes any company affiliates, including subsidiaries," all of which collectively are allowed to make one call to a reassigned number. *Id.* at 8000 n.261.

As the D.C. Circuit recognized, the FCC's one-call concept was not a rational solution; and the

real problem was the deeper infirmities in the agency's interpretation of the TCPA. *ACA Int'l*, 885 F.3d at 706–07. "The Commission allowed for that one liability-free call, rather than impose 'a traditional strict liability standard,' because it interpreted a caller's ability under the statute to rely on a recipient's 'prior express consent' to 'mean reasonable reliance.' And when a caller has no knowledge of a reassignment, the Commission understandably viewed the caller's continued reliance on the prior subscriber's consent to be 'reasonable.'" *Id.*

But the FCC failed to explain why reasonable reliance would cease after a single phone call, since "[t]he first call or text message . . . might give the caller no indication whatsoever of a possible reassignment (if, for instance, there is no response to a text message, as would be the case with or without a reassignment)." *Id.* at 707. If a customer provides a cell phone number to a company, the company would often not know if—or when—that number no longer belongs to the customer. Subsequent calls would thus (unwittingly) reach a new subscriber who has not consented to the call.

The end result is that wrong-number cases continue to proliferate, because a company that is in good faith calling a number that its customer provided might instead be calling a stranger—and incurring strict $500-a-call liability.

The wrong-number problem demonstrates again that strict liability makes sense only if the auto-dialer restriction is limited to equipment that dials random or sequential numbers. A com-

pany can obviously control whether it uses an automatic dialer to place random or sequential calls to unsuspecting consumers, and assumes the risk of liability if it does so. Strict liability makes little sense if the auto-dialer provision extends to any device capable of storing and then dialing cell phone numbers, such as CRM software. A company cannot communicate with its own customers without using such tools. And it cannot use them without occasionally reaching wrong or reassigned cell phone numbers.

Here again, the imposition of strict liability shows that Congress meant auto-dialers to be clearly identifiable special-purpose equipment. If auto-dialers include common-use business communications systems and even ordinary cell phones, then Congress was imposing strict liability for incidents that by their nature sometimes happen accidentally. It is unlikely Congress meant to do that.

- **Vicarious liability for vendors and agents**: This strict liability standard is particularly onerous for consumer-facing companies because it extends not only to calls placed by the company itself, but also to calls placed by any "agent" of the company. *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 674 (2016) ("[The FCC] has ruled that, under federal common-law principles of agency, there is vicarious liability for TCPA violations . . . and we have no cause to question it."). In addition to ensuring that its own communications systems comply with the auto-dialer restriction, companies must therefore also ensure that vendors, third-party service providers, and

advertising and marketing firms working on their behalf also comply with these restrictions.[11]

But as noted above, it would be virtually impossible for the company itself to comply with the TCPA as interpreted by the Ninth Circuit, given the problem of wrong or reassigned cell phone numbers. Doubly so for potential "agents" of the company, whose telecommunications systems are not under the direct control of the company. Even a company that imposes stringent requirements on its vendors and service providers cannot know whether and how those requirements are always followed—at least not without imposing sky-high monitoring costs out of step with market conditions and any reasonable assessment of consumers' actual costs and benefits. Suppose, for example, a company strictly requires that a service provider's field representatives make calls only from dedicated systems linked to a consent database. Any time one of those employees uses a cell phone to text or call a customer without verifying the prior express consent, in the Ninth Circuit's view the service provider and the company hiring it face a potential $500 TCPA penalty.

These realities, in conjunction with the Ninth Circuit's expansive interpretation of an auto-

[11]The *Manopla* case cited above, *see supra* n.9, illustrates this problem as well. The company that actually called the plaintiff was selling its own products, but as a Home Depot-affiliated service provider used Home Depot's logo on the contact card the plaintiff filled out. The district court held that Home Depot could face vicarious liability in that situation. *Manopla* Op. at 11.

dialer, render it practically impossible for consumer-facing companies to conduct business without serious risk of facing litigation for alleged TCPA violations. Retailers are therefore left with the Hobson's choice of foregoing routine communications with their own customers, or taking on the risk of TCPA liability and nuisance suits every time a text or voice message accidentally reaches a wrong or reassigned cell phone number, as inevitably happens sometimes.

This dilemma does not benefit consumers either, as the specter of TCPA liability for routine business communications imposes additional costs on retailers and discourages socially beneficial communications. This case, for example, involves text messages sent by Facebook to alert users that an unrecognized browser was attempting to access their account. *Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1150 (9th Cir. 2019). Consumers obviously benefit from security alerts notifying them that their accounts or personal information may have been compromised, but companies cannot send such alerts without occasionally reaching a wrong or reassigned phone number. Interpreting the auto-dialer provision to reach such targeted communications disincentives companies from providing such services, and thus ultimately harms consumers.

III. THE DEFINITION OF "AUTOMATIC TELEPHONE DIALING SYSTEM" MUST BE READ NARROWLY TO AVOID VIOLATING THE FIRST AMENDMENT.

The discussion above shows the immense practical problems that result from an expansive conception of auto-dialers—problems that Congress did not intend when it enacted the TCPA, and that demonstrate how far the Ninth Circuit has strayed beyond what Congress meant when it defined the term. If those concerns were not enough, the Court should also bear in mind the serious constitutional issues that arise from the Ninth Circuit's reading of the statute. As interpreted by the Ninth Circuit, the TCPA amounts to an almost complete ban on the use of cell phones for commercial speech, an interpretation that both goes far beyond the bounds of congressional intent and that raises First Amendment concerns.

Last Term, the Court addressed a content-based restriction in the TCPA. The auto-dialer restrictions exempt calls to collect government debt and the Court easily recognized that prohibiting certain calls to cell phones but allowing those debt-collection calls constitutes a "content-based restriction on speech." *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2346 (2020).

The statute also constitutes a restriction on the time, place, and manner of speech. To be sure, Home Depot's calls to customers are primarily for commercial purposes. Commercial speech receives less stringent protection than some other speech, but it is still protected. *Matal v. Tam*, 137

S. Ct. 1744, 1764 (2017). Even for commercial speech, "[t]he regulatory technique may extend only as far as the interest it serves." *Id.* (alteration in original).

Moreover, the TCPA sweeps far more broadly. Nothing in the auto-dialer prohibition limits it to marketing or to commercial speech. To reiterate: "It shall be unlawful for *any person* . . . to make *any call* (other than . . . with the prior express consent of the called party) using any automatic telephone dialing system . . . to *any telephone number* assigned to a . . . cellular telephone." 47 U.S.C. § 227(b)(1)(A) (emphasis added).

The government can, of course, "impose reasonable restrictions on the time, place, or manner of protected speech. *McCullen v. Coakley*, 573 U.S. 464, 477 (2014) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). But such restrictions must be "narrowly tailored to serve a significant governmental interest." *Id.* The expansive Ninth Circuit version of the TCPA fails that standard. Congress stated its concerns when it enacted the TCPA: "Unrestricted telemarketing . . . can be an intrusive invasion of privacy and . . . a risk to public safety." Pub. L. 102-243, § 2(5), 105 Stat. at 2394. Meanwhile the Ninth Circuit reads the auto-dialer restriction to apply to essentially every phone and every phone call—telemarketing or otherwise—because every phone in common use today has the capability that for the Ninth Circuit makes a phone an auto-dialer, namely the capacity to store telephone numbers to

be called.[12] *See Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 (9th Cir. 2018); *Duguid*, 926 F.3d at 1151–52. That is simply the functionality of having a contact book.

Truly, the Ninth Circuit version of the TCPA prohibits nearly every call—by a business or by anybody else—to a cell phone. That goes far, far beyond addressing the focused privacy and safety concerns that Congress expressed. Any call from a phone that has a contact book may also be a violation, even if the caller had actually dialed the number by hand. In short, the Ninth Circuit's interpretation makes an enormous swath of modern phone communication unlawful. Actual liability comes mainly to companies that place substantial volumes of calls. But the prohibition is universal, and so is the exposure to $500-a-call liability.

The Ninth Circuit, perhaps recognizing the staggering implications of its interpretation, tried to cabin it by adding a qualification that an auto-dialer must be able to dial the stored numbers "automatically." *Marks*, 904 F.3d at 1053. This gloss is atextual. An auto-dialer, as the statute defines it, is a device that has the "capacity" to "store or produce telephone numbers . . . , using a random or sequential number generator," and "to dial such numbers." 47 U.S.C. § 227(a)(1). Nothing in the

[12] By 2018, 94% of adults in the United States used a cell phone, and 81% used a smart phone. Pew Research Center, Smartphone Ownership Is Growing Rapidly Around the World, But Not Always Equally 3 (Feb. 2019).

definition suggests that the dialing has to be automated. At best, the statute states what numbers the device is able to call: "such numbers," meaning the numbers that the device has "stored" or "produced." If, as the Ninth Circuit has held, any storage of numbers will do, then any dialing of those stored numbers must also qualify a phone as an auto-dialer. The court below rejected the specific type of automation that Congress had in mind—namely, "using a random or sequential number generator"—because it thought that clause should modify only "produce" and not "store." *See* Pet. Br. 27. Then, ironically, the court developed its own notion of automation that it said modifies a different phrase—"dial such numbers"—for which Congress provided no qualification at all. Rewriting the statute this way is not legitimate.

Worse, even this revision of the TCPA would not actually mitigate the constitutional problem. Phones with storage functions also make automatic calls. The ubiquitous contact book functions in modern phones are not storing the numbers so that a user can write them down and dial them by hand. A phone user selects a contact, and then the phone dials the number. That is automatic dialing. Perhaps, one might say, it is not "automatic" in the way the Ninth Circuit contemplated. But ever more elaborate judicial revision of the statute would be even more inappropriate for the courts.

Whatever the Ninth Circuit meant by the requirement of an ability to dial a call automatically, the First Amendment risk remains. This

risk to free speech is yet another reason to reject overbroad interpretations of the term "automatic telephone dialing system." "[C]ourts should, if possible, interpret ambiguous statutes to avoid rendering them unconstitutional." *United States v. Davis*, 139 S. Ct. 2319, 2332 n.6 (2019). That notion is "[o]f long lineage," *id.* (citing *Parsons v. Bedford*, 28 U.S. 433, 448–49 (1830) (Story, J.)), and it is particularly sensible in this context. Out of the respect due to another branch, the Court should hesitate to presume that Congress really intended the broad, disturbing prohibition on speech that the Ninth Circuit has found in the TCPA. In fact, Congress contemplated the First Amendment implications of what it undertook, and accordingly framed its interest narrowly: "The Constitution does not prohibit restrictions on commercial telemarketing solicitations." Pub. L. 102-243, § 2(8), 105 Stat. at 2394. The Court should read the auto-dialer prohibition to be consonant with that statement. Congress's method to limit telemarketing solicitations was simply to restrict the use of specialized dialing technologies that were used mainly for intrusive telemarketing, not to regulate all calls to cell phones.

If the TCPA had said straightforwardly that no person may call a cell phone without prior express consent, such a prohibition would likely violate the First Amendment. That is not what the TCPA says, but solely because the auto-dialer prohibition covers only the dialing of phone numbers stored or produced by "a random or sequential number generator." 47 U.S.C. § 227(a)(1). That limitation is the key feature of the entire auto-

dialer prohibition. To avoid these serious constitutional concerns, the Court should read the definition of "automatic telephone dialing system" to employ the "random or sequential number generator" limitation across its scope.

CONCLUSION

The Court should therefore reverse the decision below.

Respectfully submitted.

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