No. 19-511

IN THE

Supreme Court of the United States

FACEBOOK, INC.,

Petitioner,

v.

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

Respondent,

and

UNITED STATES OF AMERICA,

Respondent-Intervenor.

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

BRIEF OF *AMICI CURIAE* LIFE INSURANCE DIRECT MARKETING ASSOCIATION, AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, AND CONSUMER CREDIT INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Life Insurance Direct Marketing Association ("LIDMA") is a non-profit organization dedicated to supporting businesses and professionals that directly sell life insurance products to consumers. LIDMA is the primary voice for life insurance direct response industry producers, carriers, business partners and exam companies. LIDMA's members include insurance companies, insurance agents and insurance brokers (agents and brokers are collectively referred to as "insurance producers") who market insurance to consumers and businesses and provide related services.

American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA members represent all sizes, structures, and regions—protecting families, communities, and businesses in the U.S. and across the globe.

Consumer Credit Industry Association ("CCIA", collectively LIDMA, APCIA, and CCIA will be referred to as the "Insurance Associations") is a non-profit national trade association of insurance companies and other financial service providers that manufacture, sell or service consumer credit insurance and other consumer

1. Pursuant to Rule 37.6, counsel for all parties have provided written consent to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, *amici's* members, or *amici's* counsel made a monetary contribution to fund its preparation or submission.

asset and debt protection products and services typically provided in connection with consumer credit transactions whether or not insurance. Its member insurance companies account for a significant majority of the national volume written for these lines of business.

The Insurance Associations have a substantial interest in this case because their members have been or are subject to being names as defendants in lawsuits filed in jurisdictions across the country under the Telephone Consumer Protection Act ("TCPA"). While cell phones have become one of the primary—and preferred— means by which a policyholder may be reached, there is not an efficient or cost-effective approach to sending such messages without risking lawsuits under the TCPA as currently interpreted by the Second, Sixth, and Ninth Circuits.

Accordingly, the Insurance Associations on behalf of their members have a substantial and particular interest in this case because the Ninth Circuit's interpretation of the definition of an automatic telephone dialing system ("ATDS") prevents the Insurance Association's members from effectively communicating important—though not emergency—messages to policyholders and consumers without facing potential TCPA lawsuits.

INTRODUCTION

Helping businesses and families protect themselves from financial risk caused by unexpected accidents, catastrophes, and other losses is essential to getting businesses and people back on their feet after an accident or death. Property, casualty, and life insurers, as well

as insurance producers, regularly contact their current customers and consumers who have expressed an interest in purchasing insurance. These are not the random or sequentially dialed calls to individuals with no relationship to the caller that the TCPA's prohibition against using random or sequential number generators was designed to prevent. Insurers and insurance producers call customers with renewal reminders and reminders of premium payments to prevent customers from losing coverage. They call about new products and discounts to help consumers save money. They call with updates on claims to keep customers who have suffered a loss up-to-date on the status of their claims. Customers and consumers welcome these calls because they help ensure that their businesses and families are protected. The TCPA was never intended to prohibit these kinds of calls simply because the telephone numbers are stored in a database.

In an increasingly digital world, more and more businesses and consumers use cell phones as their primary and preferred method of contaict. Class action plaintiffs' lawyers have exploited the TCPA to target, among others, insurance companies and insurance producers, threatening millions of dollars in liability for placing calls to the cell phone numbers provided by customers and consumers. While insurers and insurance producers endeavor to only contact customers and consumers who have consented to receiving calls, they should not be broadlty subject to liability under the TCPA if their efforts occasionally result in calls reaching individuals or businesses who have not consented as a result of clerical error in entering a telephone number or because a telephone number has been reassigned. The TCPA as re-written by the Ninth Circuit threatens to stifle important calls between insurance

companies, insurance producers and customers intended to assist businesses and individuals in protecting their property and families.

SUMMARY OF ARGUMENT

The Insurance Associations' interest in this case arises from the application of the TCPA to their member insurance companies and insurance producers. Insurers and insurance producers store telephone numbers of their customers and prospective customers in computer databases and on employees' smartphones. They make targeted telephone calls to these businesses and individual to sell insurance, renew policies, provide and obtain information to update coverages, and handle insurance claims.

Congress enacted the TCPA to target specific types of telephone calls—calls that play a prerecorded message and calls made to emergency telephone numbers, hospital rooms, and wireless numbers generated by a random or sequential number generator. The TCPA defines "autodialer" 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). The definition requires two separate and distinct components joined by the conjunctive "and," signifying that both components must be present. The Ninth Circuit's attempt to re-write the definition of an ATDS broadens what is covered by the definition beyond what was intended by Congress, essentially drawing in all dialing systems that store telephone numbers, and completely ignores the plain language of the statute which requires the dialing

equipment to have the capacity to generate random or sequential telephone numbers to qualify as an ATDS.

The Ninth Circuit's holding that the definition of an ATDS covers any telephone that can store telephone numbers and dial those numbers raises serious practical and constitutional concerns. Such a broad definition would convert every smartphone and virtually every modern telephone into an ATDS and expose companies and individuals to significant statutory damages under the TCPA for telephone calls on a daily basis. There is simply no support either in the plain language of the statute or in the legislative history for the proposition that Congress intended to make routine, every day calls from one cellphone to another unlawful. Prohibiting calls between smartphones serves no legitimate governmental purpose and would have a chilling effect on communications that consumers want and need.

This Court should reverse the Ninth Circuit's decision and adopt the narrow definition of an ATDS that is grounded in the plain language of the ATDS definition which only covers equipment that has the capacity to use a random or sequential number generator. Limiting TCPA violations based on ATDS calls by random and sequential telephone number generators reflects the balance struck by Congress of protecting certain types of telephone numbers from being tied up on random or sequential number dialers or that shift costs to the consumer while still protecting the practical and constitutional rights of individuals and companies to communicate with consumers, using efficient and preferred communication tools, to provide vital services and products.

ARGUMENT

I. The Ninth Circuit Removed the Automatic from Automatic Telephone Dialing System

The TCPA makes it unlawful to make any call to any emergency telephone line, guest room or patient room, or to 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 using an ATDS without the prior express consent of the called party. 47 U.S.C. § 227(b)(1)(A). The TCPA defines an "automatic telephone dialing system" ("ATDS") as "equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). The "automatic" component included in the definition is the ability of the system to generate random or sequential telephone numbers. The Ninth Circuit's rearticulation of the ATDS definition eliminates the automatic component for systems that dial stored telephone numbers. The court held that to qualify as an ATDS, the system "need only have the 'capacity' to store numbers to be called." Pet.App. 8 (quoting 447 U.S.C. § 227(a)(1)). Clearly an interpretation of "*automatic* telephone dialing system" that does not require any automatic capacity require ignores moth the plain text and congressional intent.

In an effort to solve the problem that an ADS no longer has to be automatic when it calls stored numbers under the Ninth Circuit's re-writing definition, the Ninth Circuit and other courts improperly have added the

word "automatically" to the end of subsection (B) of the statutory definition which addresses calling the numbers: The Ninth Circuit rewrote the definition as "equipment which has the capacity—[A](1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—[B] and to dial such numbers automatically." Pet.App.4 (quoting *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1053 (9th Cir. 2018)). *See also Duran v. La Boom Disco, Inc.*, 955 F.3d 279, 287-90 (2d Cir. 2020) (ATDS must have the capacity to dial numbers "without human intervention"). But the word "automatically" does not appear in the statutory definition. It is well settled that courts may not rewrite statutes by adding or subtracting words. *See 62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596 (1951) (courts are not "to add nor to subtract, neither to delete nor to distort" the words Congress has used); *Blount v. Rizzi*, 400 U.S. 410, 419 (1971) ("[I]t is for Congress, not this Court, to rewrite the statute.") If Congress had wanted to ban all dialing systems that dialed numbers automatically, it would have done so.

II. The Ninth Circuit's Erroneous Re-Write of the Statute Has Significant Practical and First Amendment Consequences

To impose restrictions on the time, place, or manner of protected speech, the government must show that the restrictions are (1) justified without reference to the content of the regulated speech, (2) narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternative channels for communication of the information. *Ward v. Rock Against Racism*, 491 U.S.

781, 791 (1989). In an increasingly digital world, the Ninth Circuit's definition of an ATDS that goes beyond the plain wording of the statute would apply broadly to smartphone calls and cannot be justified as serving any governmental interest, or be narrowly tailored to accomplish such purpose. Prohibiting the use of smartphones to call cellphones without prior express or written consent for sales calls creates significant obstacles to the ability to communicate with cellphone-only consumers and businesses.

A. The Ninth Circuit's Interpretation Would Turn Every Smartphone into an ATDS

The first step in any overbreadth analysis is to determine what the statute covers. *U.S. v. Stevens*, 559 U.S. 460, 474 (2010). The Ninth Circuit's proposed interpretation of an ATDS is clearly overbroad. The Ninth Circuit held that the TCPA covers every smartphone and most other modern telephone equipment because they can store numbers to be called. Pet.App. 8-9. According to the Pew Research Center, 96% of Americans own a cellphone and 81% own smartphones. Pew Research Center, Mobile Fact Sheet (June 12, 2019), https://pewrsr.ch/31csbS5. Almost 60% of households do not even have a landline anymore, relying on their cellphones for all communications. Richter, Felis, Landline Phones Are a Dying Breed (Jun. 15 2020) https://www.statista.com/chart/2072/landline-phones-in-the-united-states/. The Ninth Circuit's interpretation would turn every smartphone user into potential TCPA violators, depending on whether the caller obtained the cellphone number directly from the called party.

This expansive definition of an ATDS would also turn regular business calls into TCPA violations. In 2014, a survey conducted by AT&T found that 94% percent of small businesses used smartphones to conduct business. Nearly half of small business owners with smartphones use them to conduct business seven days a week. Survey Finds Mobile Technologies Saving U.S. Small Businesses More Than $65 Billion a Year (May 14, 2015) https://about.att.com/story/survey_finds_mobile_technologies_saving_us_small_businesses_more_than_65_billion_a_year.html. Using smartphones allows business owners and their employees to work remotely.

Assurances from the Government or the plaintiffs' bar that they would never file suit over individual calls between friends or businesses does not save the Ninth Circuit's overbroad definition. As this Court has explained: "We should not uphold an unconstitutional statute merely because the Government promises to use it responsibly." *Stevens*, 559 U.S. at 480. Rather, such assurances are an implicit acknowledgment of the constitutional problems with the Ninth Circuit's re-write of the statute. *Id.*

B. Prohibiting Calls from Smartphones to Cellphones Does Not Advance Any Legitimate Governmental Interest

A time, place, or manner regulation may not burden substantially more speech than is necessary to further the government's legitimate interests. The government may not regulate speech in such a way that a substantial portion of the burden on speech does not serve to advance its goals. *See Frisby v. Schultz*, 487 U.S. 474, 485 (1988) ("A complete ban can be narrowly tailored but only if each

activity within the proscription's scope is an appropriately targeted evil"). If the means chosen by the government are substantially broader than necessary to achieve the government's interest, the regulation is not valid. *Ward*, 491 U.S. at 799-800. *See also Stevens*, 559 U.S. at 473 (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n. 6 (2008)) (law may be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.").

The Ninth Circuit justified its application of the definition of ATDS to smartphones by arguing that it "supports the TCPA's animating purpose—protecting privacy." Pet.App. 9. Prohibiting friends, acquaintances, and businesses from using their smartphones to make calls or send text messages to cellphones does not advance any privacy interest, nor is it targeted at the evil of unsolicited calls from marketers with whom the consumer has no relationship. Under the Ninth Circuit's reading, a sales person sitting at her desk is free to use her landline (if she still has one) to call a prospect but would violate the prospect's privacy interest if she used her smartphone to make the same call. A business man would need to wait until he returned to his office to return a call to a consumer who called to buy a product because calling from outside the office using a smartphone might be perceived to invade the privacy of the consumer. The Court should not interpret the ATDS statute in a way that would lead to such absurd results.

Adopting the limited definition of an ATDS based on the plain language of the statute that targets systems that have the capacity to generate random and sequential

telephone number and to dial those numbers is clearly the correct approach, since it avoids sweeping people who are simply going about their daily lives into the dragnet of TCPA violations.

C. An Expansive Definition of an ATDS Will Have a Chilling Effect on Communications Consumers Want and Need

The insurance industry provides a perfect example of the harm to consumers from making calls to customers unlawful and highlights the types of communications that should not be covered by the TCPA. Individuals and businesses want and need to buy insurance. The majority of insurance is still sold through independent brokers who offer products from more than one insurer and insurance agents who are affiliated with one insurer. Insurance Information Institute, Facts + Statistics: Distribution Channels (2020), https://www.iii.org/fact-statistic/facts-statistics-distribution-channels. Small insurance agencies with less than $150,000 in revenue accounted for 35% of all agencies. *Id.* Consumers find insurance agents and vice versa through a variety of channels including referrals from friends and business associates, responding to mailings, seeing advertisements, and lead prospecting. Prohibiting insurance agents from using their smartphones to call potential customers and insisting that all calls be made from a landline serves no legitimate government purpose and imposes barriers on speech.

Insurance also involves an ongoing relationship between consumers and their insurers, and insurance producers. Insurance policies must be renewed every year.

Circumstances may change for a particular policyholder during the term of a policy that may require additional, different, or less insurance. Individuals suffer losses and need to file claims. Often after a major loss from a building fire, hurricane, or other disaster, a cell phone is the only way to reach the policyholder.

Industry surveys of policyholders have shown that insurance consumers want and expect their insurance companies and insurance producers to call them. Customers want to learn about special deals and promotions, update policies, and receive help making sure that their coverages are up-to-date so that their businesses and families are protected. *See* Reimaging Customer Relationships: Key Findings from the EY Global Consumer Insurance Survey 2014, pp. 32-33, https://www.ey.com/Publication/vwLUAssets/ey-2014-global-customer-insurance-survey/$FILE/ey-global-customer-insurance-survey.pdf; Wassink, Bernhard, Castagnetta, Avril, Metz, Simon, Life Insurance Distribution at a Crossroads (2015), p. 5 ("consumers want more contact with their agent/carrier"), https://www.the-digital-insurer.com/wp-content/uploads/2016/01/636-ey-life-insurance-distribution-at-a-crossroads.pdf. Insurers are developing programs that automatically alert the insurer or the agent when a policy is about to lapse or is up for renewal and adds the customer to a list to be called. CHSI Technologies, Four Insurtech Trends in 2019 for Small Insurers (Aug. 8, 2019), https://chsiconnections.com/four-insurtech-trends-in-2019-for-small-insurers/#:~:text=It%20is%20the%20driving%20force,schedule%20contact%20with%20the%20insured%3B&text=Policy%20selection%2C%20which%20suggests%20coverage,based%20on%20recent%20life%20events.

Insurers have also been developing automated programs to make the claims process easier and quicker to meet the demands of an increasingly digital customer base. Customers want speed and transparency in the claims process. Why Claims Service Matters (2014), p. 5 https://www.accenture.com/t20150523T041505__w__/us-en/_acnmedia/Accenture/Conversion-Assets/Microsites/Documents15/Accenture-Insurance-Claims-Survey-Web.pdf. Customers want to be able to communicate with their insurers and insurance agents using the customers' preferred channels. *Id.* The automated claims programs are designed to send real time notifications to customers informing them of claim events and the status of their claims. Dwyer, Katie, Improving the Claims Experience (Jan. 10, 2018), https://riskandinsurance.com/improving-claims-experience/.

The Ninth Circuit's expansive reading of the definition of an ATDS goes beyond the plain language of the statute. The court's interpretation imposes roadblocks unduly preventing insurers and insurance producers from calling their customers. The TCPA was designed to target specific technology in use in 1991 that was harmful to consumers – automated prerecorded messages and systems that dialed random or sequentially generated telephone numbers. The restrictions on random and sequential number generators have been a resounding success. If Congress wishes to craft new legislation targeted at any of the new technologies it knows how to do so. But the courts should not step in to re-write statutes to cover new technology not contemplated at the time a statute was written.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Ninth Circuit and hold that the definition of an ATDS is limited to systems that have the capacity to generate random or sequential telephone numbers.

Respectfully submitted,

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