No. 19-511

IN THE

Supreme Court of the United States

FACEBOOK, INC.,

Petitioner,

v.

NOAH DUGUID, ET AL.,

Respondent.

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

BRIEF OF *AMICUS CURIAE* DR. HENNING SCHULZRINNE IN SUPPORT OF RESPONDENT NOAH DUGUID

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INTEREST OF *AMICUS CURIAE*[1]

Professor Henning Schulzrinne is Julian Clarence Levi Professor of Computer Science at Columbia University. He received his undergraduate degree in economics and electrical engineering from the Darmstadt University of Technology, Germany, his MSEE degree as a Fulbright scholar from the University of Cincinnati, Ohio and his Ph.D. from the University of Massachusetts in Amherst, Massachusetts. He was a member of technical staff at AT&T Bell Laboratories, Murray Hill and an associate department head at GMD-Fokus (Berlin), before joining the Computer Science and Electrical Engineering departments at Columbia University, New York. From 2004 to 2009, he served as chair of the Department of Computer Science. He co-authored many of the network protocols that are currently used by carriers to place phone calls.

From 2010 to 2011, Professor Schulzrinne was an Engineering Fellow at the Federal Communications Commission (FCC), and he served two stints as Chief Technology Officer of the FCC (2011-2014; 2016-2017). Through his work, Professor Schulzrinne has an expertise in telecommunications, computers and computer systems, and familiarity with the Communications Act generally, the TCPA more specifically, and the consumer protection goals in these acts.

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[1] Pursuant to Rule 37.3(a), counsel for all parties consented in writing to the filing of this brief. No counsel for any party authored this brief in any part, and no person or entity other than Amicus or his counsel made a monetary contribution to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

"The TCPA, at least before the wordy analysis of lawyers, courts, and agencies gets to it, simply prohibits 'automatic' dialing" without consent. *Hunt v. 21st Mortg. Corp.*, 2013 WL 12343953, at *4 (N.D. Ala. Oct. 28, 2013) (finding "[t]here is no need for deeply technical interpretations" of "automatic telephone dialing system").

The Ninth Circuit's holding that a system that *stores* telephone numbers need not also *produce* such numbers squares with the plain reading of "store *or* produce." When the TCPA was enacted, systems which automatically dialed stored numbers had long been in use, and Congress enacted the TCPA to require that users of such systems obtain consent before calling specified telephone numbers and to give recipients of such calls without consent the right to seek an injunction to stop the calls and a modest remedy of $500 for the violation. 47 U.S.C. § 227(b)(1)(A); (b)(3).

The problem with automated dialers is that they call thousands of numbers at an instant and often result with nobody on the caller's end of line, whether because they use a prerecorded voice or result in "dead air" or abandoned calls. *In re TCPA Rules & Regulations*, 18 FCC Rcd. 14014, 14101 (2003). Consumers who experience the nuisance of receiving these automated calls have no way of knowing the technical intricacies and capabilities of the sophisticated dialing systems used to make the calls. Overly technical interpretations of the TCPA that require expensive telecommunications experts to physically examine the deeply technical capabilities

of dialing systems undermines both the purposes of the TCPA and its consumer-focused, small claims enforcement mechanism.

Smartphones do not cause these problems because smartphones, as ordinarily used, do not *automatically* dial telephone numbers. Even if smartphones had evolved to encroach upon what Congress outlawed in 1991, the correct response is for Congress or the FCC to exempt such technology. *See ACA Int'l v. FCC*, 885 F. 3d 687, 699 (D.C. Cir. 2018) ("The agency presumably could, if needed, fashion exemptions preventing a result under which every uninvited call or message from a standard smartphone would violate the statute.")

ARGUMENT

I. The TCPA is Congress' Answer to the Robocall Epidemic.

A. The TCPA's Coverage of Autodialers Calling *Stored* Telephone Numbers is Essential to Protect Privacy and Stop Denial of Service Attacks.

"Voluminous consumer complaints about abuses of telephone technology—for example, computerized calls dispatched to private homes—prompted Congress to pass the TCPA. Congress determined that federal legislation was needed because telemarketers, by operating interstate, were escaping state-law prohibitions on intrusive nuisance calls." *Mims v. Arrow Fin. Svcs., LLC*, 132 S. Ct. 740, 744 (2012).

Rather than outlaw such autodialers entirely, Congress required users to obtain consent, absent an emergency, to call emergency lines, hospital and elder

care guest rooms, cell phones, and other specific types of telephone lines. 47 U.S.C. § 227(b)(1)(A).[2] Additionally, Congress prohibited using an autodialer in a way that would simultaneously engage multiple lines of a multi-line business. 47 U.S.C. § 227(b)(1)(D). Finally, Congress granted the FCC the authority to implement technical and procedural standards to regulate problematic uses of autodialers. 47 U.S.C. § 227(d)(1)(A).

According to the Department of Homeland Security, autodialers *specifically* targeting emergency lines, including 911, in telephony denial of service attacks remain a real problem. Homeland Security, Partnering to Prevent TDoS Attacks, (accessed October 22, 2020), available at https://www.dhs.gov/science-and-technology/blog/2018/07/09/partnering-prevent-tdos-attacks. "These attacks pose significant risks to banks, schools, hospitals, and even government agencies. When banks are attacked, customers are denied access to their accounts[.]" *Id.*

Fortunately, the TCPA gave States, consumers, and businesses a real tool to stop these calls. Consumers and businesses can file an action for damages, seek an injunction enforceable by contempt, or both. 47 U.S.C. § 227(b)(3). States can do the same. 47 U.S.C. § 227(g). These tools are the best deterrent to such calls and the most efficient method to stop them.

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[2] Such consent is easily obtained by the consumer's voluntary provision of a telephone number, and the FCC has encouraged caller's to include consent in terms and conditions. *In re ACA Int'l Decl. Ruling*, 23 FCC Rcd. 559, 564-65, n.37 (2008).

B. Autodialed Calls Result in Hangups and "Dead Air."

Autodialers often result in no connection to a human representative and no message. Predictive dialers which automatically dial stored telephone numbers using timing algorithms to predict when the caller's agent may be available to take a call are of particular concern. According to the FCC:

> [P]redictive dialers are responsible for the vast majority of abandoned telemarketing calls--both hang-ups and "dead air" calls. Individual consumers report receiving between three and ten hang-up calls each day. Consumers often feel harassed or aggravated by "dead air" calls. Many describe the burdens these calls impose on individuals with disabilities, who often struggle to answer the telephone. Hang-ups and "dead air" calls also can be frightening for the elderly. Consumers complain that they do not have an opportunity to request placement on a company's do-not-call list when predictive dialers disconnect calls. Abandoned calls can also interfere with Internet usage or simply tie-up telephone lines for people telecommuting or operating businesses out of the home.

In re TCPA Rules & Regulations, 18 FCC Rcd. 14014, 14101 (2003).

Predictive dialers allow the caller to set an abandonment rate. Higher abandonment rates are more efficient for the caller, but they result in more

"dead air" and hangup calls. *Id.* at 14022, n.32. Although the FCC has implemented rules to limit abandoned calls caused by predictive dialers, the FCC's authority is itself limited to "automatic telephone dialing systems." See 47 U.S.C. § 227(d)(1)(A)(prohibiting using an ATDS in a manner which does not comply with the technical and procedural standards prescribed by the FCC).

C. Congress was Aware of Autodialers Targeting Stored Numbers.

Autodialers calling stored telephone numbers were in existence and in use in 1991 when the TCPA was enacted. For example, U.S. Patent No. 4,829,563 (issued May 9, 1989) describes a predictive dialer similar to the one the FCC discussed in 2003. *In re TCPA Rules & Regulations*, 18 FCC Rcd. 14014, 14091-93 (2003). In fact, autodialing systems which automatically dialed stored telephone numbers existed as early as the 1960's. *See, e.g.,* U.S. Patent No. 3,274,346 (issued Sept. 20, 1966) ("This invention relates generally to an automatic telephone dialing apparatus, and more particularly to a system and apparatus for use in conjunction with conventional dial telephones for automatically successively dialing and delivering a prerecorded message to each of a plurality of predesignated telephone numbers."); U.S. Patent No. 3,445,601 (issued May 20, 1969) ("[I]t is a primary object of the present invention to provide an automatic telephone dialing and message delivery system which is capable of (1) automatically dialing a prerecorded series of numbers…").

By the time the TCPA was enacted, telemarketers routinely used autodialers to call "lists which are [] bought or sold without restriction." *See*

Bills to Amend the Communications Act of 1934: Hearing before the Subcomm. On Telecommc'ns and Fin. Of the House Comm. On Energy and Commerce, 102 Cong. 9, 2 (1991) (statement of Rep. Markey). According to testimony, "30 to 40 percent of the national telemarketing firms are using them this year." S. 1462, The Automated Telephone Consumer Protection Act of 1991: Hearing before the Subcomm. On Commc'ns, S. Hrg. 102-960, 16 (July 24, 1991) (Stmt. Of Robert S. Bulmash). Put simply, autodialers which automatically dialed stored telephone numbers were well understood by 1991 and were of particular concern to Congress when enacting the TCPA.

D. Congress Intended the TCPA to be Simple to Apply.

"The TCPA, at least before the wordy analysis of lawyers, courts, and agencies gets to it, simply prohibits 'automatic' dialing… If equipment automatically dials numbers, it cannot be used to call cell phones." *Hunt v. 21st Mortg. Corp.*, 2013 WL 12343953, at *4 (N.D. Ala. Oct. 28, 2013) (finding "[t]here is no need for deeply technical interpretations" of "automatic telephone dialing system"). Consumers who receive autodialed calls recognize the call is autodialed by hearing "dead air" or noticing that the call was abandoned, but they are generally not experts in dialing technology and lack knowledge of the intricacies and technical capabilities of the dialing systems used by the calling party. *See, e.g., Sessions v. Barclays Bank Delaware*, 317 F. Supp. 3d 1208, 1213, n.4 (2018) ("[W]ithout discovery, it would be nearly impossible for a plaintiff to gather sufficient information to allege with specificity the type of dialer used by a defendant.") quoting *Hashw v. Dept. Stores Nat'l Bank*, 986 F. Supp. 2d 1058,

1061, n.2 (D. Minn. 2013). It was never intended that the recipients of such calls would need to engage expensive experts on autodialing technologies in order to recover $500 for an autodialed call made without consent. *See Keyes v. Ocwen Loan Servicing, LLC,* 335 F. Supp. 3d 951, 957 (E.D.Mich. 2018) (excluding testimony regarding the Aspect predictive dialer because the witness did not personally inspect the system).

When holding that federal courts have concurrent jurisdiction over TCPA claims, this Court recognized that Senator Hollings, the TCPA's sponsor, "no doubt believed that mine-run TCPA claims would be pursued most expeditiously in state small-claims court." *Mims v. Arrow Fin. Svcs., LLC*, 132 S. Ct. 740, 752 (2012). This observation was based upon Senator Hollings' statement that:

> Small claims court or a similar court would allow the consumer to appear before the court without an attorney. The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer. However, it would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than the potential damages. I thus expect that the States will act reasonably in permitting their citizens to go to court to enforce this bill.

137 Cong. Rec. 30821-30740, 822 (1991).

While various *Amici* in support of Facebook discuss various class actions in Federal Court, which this Court acknowledged in *Mims*, this Court

correctly countered that ordinary, small claims cases for $500 are unlikely to ever be filed and litigated in Federal Court. *Mims*, 132 S. Ct. at 753. Overly technical interpretations of the TCPA that require expensive telecommunications experts to physically examine the technical capabilities of dialing systems undermines both the purposes of the TCPA and its consumer-focused, small claims enforcement mechanism. It defies belief that Congress would have intended the narrow interpretation espoused by Facebook while also intending that recipients of such calls be able to proceed in small claims court without counsel.

II. Ordinary Smartphone Usage is Not Subject to the TCPA.

A. The D.C. Circuit's Concern with Smartphones was Alleviated when it Discarded the FCC's Expansive Interpretation of Capacity.

In 2018, the D.C. Circuit set aside the FCC's expansive interpretation of the word "capacity" to include both current and future configurations. *See ACA Int'l v. FCC*, 885 F. 3d 687, 695-700 (2018). The D.C. Circuit held that interpreting the word "capacity" to include potential modifications was too broad and would sweep ordinary smartphones under the TCPA. *Id.* Seizing on this, Facebook, its supporting *Amici*, and the United States express concern that smartphones could be swept into the definition of an automatic telephone dialing system if the Ninth Circuit was affirmed. Of course, there is no evidence that people have been sued for standard use of consumer smartphones. The reason is simple — they don't autodial. As the dissent in *Glasser v.*

Hilton Grand Vacations Co., LLC recognized, these concerns are merely hypothetical. 948 F. 3d 1301, 1317 (2020).

Of course, smartphones, like any computer, could download autodialing software, no matter which functions were necessary to make a system an automatic telephone dialing system. A simple search for random number generator in a smartphone app store will produce numerous results. Importantly, however, the Circuits have been unified since the D.C. Circuit's decision in *ACA Int'l* that "capacity" is limited to its present configuration. Both the Second and the Sixth Circuit, which follow the approach of the Ninth Circuit below, have held as much. *See King v. Time Warner Cable*, 894 F. 3d 473, 481 (2018)("[W]e conclude that the term 'capacity' in the TCPA's definition of a qualifying autodialer should be interpreted to refer to a device's current functions, absent any modifications to the device's hardware or software."); *Allan v. Penn. Higher Ed. Assistance Agency*, 968 F. 3d 567, 578 (6th Cir. 2020)("That means that use of a cell phone would be subject to a fine under the TCPA only if it *actually* is used as an ATDS."). Because ordinary smartphone usage is not autodialing, it is not subject to the TCPA.

B. Ordinary Smartphone Usage is Not Automatic Dialing.

Ordinary smartphone usage is not autodialing, so the hypothetical parade of horribles put forth by Facebook and its supporting *Amici* cannot materialize. Factory default smartphone applications require a human to cognitively select numbers to call, whether by touch or voice command. They do not

automatically dial stored contacts. As the Second Circuit noted:

> Clicking on a name in a digital phonebook to initiate a call or text is a form of speed-dialing or constructive dialing that is the functional equivalent of dialing by inputting numbers. When we save a contact in a smartphone, we are merely instructing the phone to replace the 10-digit phone number with a single button (i.e. one can click on the name "John" to accomplish the same task as inputting all 10 digits of John's number). The contact card in a smartphone is a proxy or a shortcut for a number (just like the single digit "0" was traditionally a proxy for dialing the operator). When one clicks on the card, one is constructively dialing the attached number. Therefore, when one sends a text message using a smartphone—which involves clicking on the card and *then* clicking a "send" button—one has already accomplished the dialing.
>
> However, when one clicks on the "send" button in the programs at issue here, one is not dialing a particular attached number beforehand or afterwards. Simply put, the "send" button, unlike a contact card, is not a short-cut for dialing a particular person. Rather, clicking "send" is accomplishing a different task altogether: it is telling the ATDS to go ahead and dial a

> separate list of contacts, often numbering in the hundreds or thousands.

Duran v. La Boom Disco, Inc., 955 F. 3d 279, 289, n.39 (2nd Cir. 2020).

Even the automatic "I'm driving" text feature only texts a single response to an individual call, and it only does so as a result of the initial caller triggering the system to return a call. That's neither automatic nor unsolicited. *Cf. In re Soundbite Decl. Ruling*, 27 FCC Rcd. 15391, 15397-98 (2012) (finding that a single confirmatory message in response to an opt-out request is subject to prior consent). The word "automatic" implies both "without direct human intervention" and "high volume." *See, e.g., In re TCPA Rules & Regulations*, 18 FCC Rcd. 14014, 14092 (2003) (recognizing that "autodialers can dial thousands of numbers in a short period of time" and that the "basic function of such equipment [is] the capacity to dial numbers without human intervention."). It is the party who initiates the initial incoming call that triggers this call, and it only makes one call at a time. *See Glasser*, 948 F. 3d at 1317 (Martin, J., dissenting) ("Neither situation hypothesized by the majority involves the simultaneous dialing of numbers, plural.") citing § 227(a)(1)(B) ("dial such numbers" [plural]). Such a feature does not automatically call stored telephone numbers; it merely returns a text message to the incoming caller's number identification relayed by the caller through the carrier.

Even if smartphones had evolved to encroach upon what Congress outlawed in 1991, which they have not, the correct response would be for Congress

or the FCC to address it. *See ACA Int'l v. FCC*, 885 F. 3d 687, 699 (D.C. Cir. 2018)(recognizing that the FCC has authority to exempt smartphone usage). The ubiquity of a device first released 16 years after the TCPA was enacted should not be used to interpret what Congress meant in 1991.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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