

No. 19-511

IN THE
Supreme Court of the United States

FACEBOOK, INC.,

Petitioner,

—v.—

NOAH DUGUID, *et al.*,

Respondents,

—and—

UNITED STATES OF AMERICA,

Respondent-Intervenor.

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

**BRIEF OF *AMICUS CURIAE* MAIN STREET ALLIANCE
ON BEHALF OF RESPONDENT NOAH DUGUID**

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INTEREST OF *AMICUS CURIAE*¹

Main Street Alliance (“Main Street”) is a national network of state-based small-business coalitions that provides its members with a platform to express views on issues affecting their businesses and local economies. Main Street has affiliates in 13 states. Its work encompasses a broad range of issues affecting the business community, including matters relating to access to capital and equal opportunities for wealth building. Main Street’s members include approximately 30,000 small businesses across the country.

Small businesses, in particular, are negatively impacted by robocalls, which require them to answer useless calls that tie up their phone lines, interrupt real work, and lower productivity. The interruptions have real economic consequences that have the potential to impact their bottom lines. For this reason, much like individual consumers, small businesses rely upon the protections of the Telephone Consumer Protection Act (“TCPA”). The questions presented in this case are therefore of great importance to Main Street and its members because interpreting the TCPA in a way that narrows the prohibitions on calls made using automatic dialing systems (“ATDS”) will likely lead to an increase in robocalls, thus exacerbating the problems small businesses already experience as a result of such calls.

¹ Pursuant to Rule 37.6, counsel for all parties have provided written consent to the filing of this brief. 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.

SUMMARY OF ARGUMENT

Small businesses are a central pillar of the nation's economy, employing tens of millions of Americans, and making outsized contributions to innovation and local economies. Like individual consumers, small businesses suffer from the nuisance of robocalls made through the use of automatic dialing systems. But, unlike individual consumers who can simply ignore calls from unknown or unfamiliar numbers, small businesses must answer every call, not knowing whether they are legitimate business calls or a robocalls. The time spent answering robocalls affects both the productivity and profitability of small businesses. Consequently, small businesses rely on the protections of the TCPA, without which, they would likely be inundated with even more robocalls than they already are.

Congress passed the TCPA specifically for the purpose of protecting the public from the nuisance presented by robocalls. As a remedial statute, the TCPA must be interpreted broadly and in a way that gives effect to its purpose. Facebook urges an interpretation of the TCPA that would permit companies to make more unwanted robocalls than they already do. Such an outcome would be contrary to Congress's aims when it passed the TCPA. Amicus therefore respectfully asks this Court to reject Facebook's suggested interpretation of the statute and affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

ARGUMENT

I. SMALL BUSINESSES ARE CRITICAL TO THE NATION'S ECONOMY

Small businesses are the “lifeblood of the U.S. economy,” representing 99.9 percent of all U.S. businesses and accounting for 44 percent of U.S. economic activity, according to the Small Business Administration (SBA). The SBA estimates that, as of 2018, there were 30.2 million small businesses employing a total of 58.9 million workers, nearly half of the country’s private sector workforce. Small businesses drive innovation, employing more than 40 percent of high-tech workers in the U.S. and producing 13 times as many patents per employee than larger firms.²

In addition to the national economy, small businesses play an equally important role in their local communities, helping to stimulate economic growth by providing employment opportunities, contributing to the local tax base, and buying goods and services from local sources. This creates a “virtuous cycle of local spending” that results in more tax revenue, more jobs for residents, and more investments in infrastructure and education.³ Compared to the effect of larger businesses, communities with thriving small businesses report

² Karen Mills & Brayden McCarthy, *The State of Small Business Lending: Credit Access During the Recovery and How Technology May Change the Game*, 10 (Harvard Bus. Sch. Working Paper, No. 15-004, July 22, 2014).

³ American Booksellers Association & Civic Economics, *Indie Impact Study Series: Las Vegas, New Mexico*, Las Vegas First Independent Business Alliance (Summer 2012), available at http://www.lvfiba.org/Las_Vegas_Client_120717.pdf.

stronger local economies characterized by higher income growth, lower levels of poverty, and more employee retention during economic downturns.⁴

Thus, the importance of small businesses to both the national and local economies cannot be overstated. The health and well-being of small businesses is vital to the health and well-being of the nation.

II. LIKE INDIVIDUALS, SMALL BUSINESSES ARE PLAGUED BY UNWANTED ROBOCALLS

Increasingly, as cellphones have become ubiquitous and more technologically advanced, small businesses are using them as their primary means of phone communication. The upside of using cellphones for business purposes is that they offer accessibility and flexibility.⁵ The downside is that, much like individuals, small businesses have been inundated with robocalls.

In 1991, Senator Fritz Hollings described robocalls as “the scourge of modern civilization.” 137 Cong. Rec. 30821 (1991). He explained that such calls “wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall.” *Id.* Although the urge is understandable, ripping the phone out of the wall—or refusing to

⁴ Giuseppe Moscarini & Fabien Postel-Vinay, *The Contribution of Large and Small Employers to Job Creation in Times of High and Low Employment*, 102 Am. Econ. Rev. 2509 (Oct. 2012).

⁵ Julia Forneris, *The Advantages of Cellular Phones in Business*, Houston Chronicle, available at <https://smallbusiness.chron.com/advantages-cellular-phones-business-4016.html>

answer one's cellphone—is not an option for small businesses, which rely on phone communications with customers and clients for their very livelihood, needing them to both maintain existing customer relationships and bring in new customers.

Indeed, 76 percent of small business owners report that, unlike individuals, they feel obligated to answer the phone every time it rings, so as not to miss a call⁶; for each call could potentially be a supplier, a distributor, a contractor, customer, or potential client—or the call could be a typical sales robocall. Consequently, “[f]or small businesses, dealing with robocalls is a much bigger problem than for individuals.”⁷ Answering robocalls often “means hours and hours in the course of a week or month answering useless calls, interrupting real work, lowering productivity.”⁸ In this respect, robocalls are incredibly expensive for small businesses. A 2014 study found that answering robocalls wasted nearly 20 million hours a year for small businesses in the United States, translating to losses of about \$475 million annually.⁹ These numbers likely are significantly higher now, as robocalls have become

⁶ *Businesses Get Robocalls Every Day at an Average Cost of \$9.46 Per Call*, GlobeNewswire, November 6, 2019, available at <https://markets.businessinsider.com/news/stocks/survey-finds-84-of-small-businesses-get-robocalls-every-day-at-an-average-cost-of-9-46-per-call-1028664387#>.

⁷ Rhonda Abrams, *How to Reduce Robocalls at Small Businesses*, USA Today, July 31, 2019.

⁸ *Id.*

⁹ Eileen Brown, *Spam phone calls cost US small businesses half a billion dollars in lost productivity*, ZDNet, Feb. 20, 2014, available at <https://www.zdnet.com/article/spam-phone-calls-cost-us-small-businesses-half-a-billion-dollars-in-lost-productivity/>

more pervasive. Indeed, the number of calls grew to 54.6 billion in 2019, up 108% compared to the previous year.¹⁰ A 2019 survey of 500 small business owners and managers found that 84 percent received robocalls every day, with 54 percent receiving five or more such phone calls per day, at an average cost of \$9.46 per call.¹¹ For a small business with multiple lines that receives 50 robocalls per day, the annual impact in lost productivity is approximately \$118,000.¹²

In addition to the ever-increasing volume of robocalls, they are also getting more sophisticated, with robocallers using new tactics to trick callers and improve the success rates of their calls. These tactics include using artificial intelligence that can simulate conversational dialogue when a call is answered and techniques such as “neighbor spoofing,” a practice in which the number that displays on caller ID is altered to make the call appear to be a local call. These tactics make it more difficult to distinguish between legitimate calls and robocalls, thus increasing the burdens on small businesses.

It should be noted that some robocallers target small businesses specifically, as was the case in *Johnson v. Comodo Group, Inc.*, 2020 WL 525898 (D.N.J. Jan. 31, 2020), where the district court

¹⁰ *US Spam Calls Grew 108% in 2019 as Anti-Robocall Bill Moves to Senate for Approval*, BusinessWire, December 13, 2019, available at <https://www.businesswire.com/news/home/20191213005058/en/US-Spam-Calls-Grew-108-in-2019-as-Anti-Robocall-Bill-Moves-to-Senate-for-Approval>

¹¹ *Businesses Get Robocalls Every Day at an Average Cost of \$9.46 Per Call*, *id.*

¹² *Id.*

certified a class of call recipients after the defendant targeted owners of websites with expiring SSL certificates to make sales calls to sell them new SSL certificates. The defendant created a database of call recipients by using a computer program to search the internet and download phone numbers of website owners, and then used a predictive dialer to make multiple calls to more than 34,000 distinct phone numbers. The class representative alone received seven phone calls and three prerecorded voicemails. He continued to receive calls even after he spoke with one of defendant's sales agents asking to be removed from the call list and was marked as "do-not-call" by the agent. *Id.* at *1.

The impact of robocalls on small businesses is felt not only in the wasted time and expense of answering robocalls. Robocalls have also had the effect of making it immeasurably harder for small businesses to use the phone to reach existing and potential customers. The calls are such a nuisance that people are increasingly conditioned to ignore them by not answering their phones. In 2019, *Consumer Reports* conducted a survey that found 70 percent of Americans will not answer their phone when they do not recognize the incoming number.¹³ As Alex Quilici, CEO of YouMail, a visual voicemail and robocall blocking software, aptly explained: "What's unfortunately happened is that this robocall epidemic is putting the phone call into a death spiral. You'll pick up your call from a friend. You might pick up a call from something that's got a caller name, but

¹³ Octavio Blanco, *Mad About Robocalls?*, *Consumer Reports*, April 02, 2019, available at <https://www.consumerreports.org/robocalls/mad-about-robocalls/>

that's it. . . . It really negatively impacts legitimate business.”¹⁴

III. THE PURPOSE OF THE TCPA IS TO PROTECT CONSUMERS FROM THE NUISANCE OF ROBOCALLS

Because robocalls can have such detrimental impacts on their productivity and bottom lines, small businesses rely on the protections and prohibitions contained in the TCPA. The TCPA was passed in the face of voluminous consumer complaints about the proliferation of robocalls. It is a remedial statute enacted “to protect consumers from the nuisance, invasion of privacy, cost, and inconvenience that autodialed and prerecorded calls generate,” *In re Rules Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Red. at 7979-80. To accomplish this goal, the TCPA prohibits or limits robocalls in various ways including, inter alia, prohibiting robocalls “to any telephone number assigned to a . . . cellular telephone service.” 47 U.S.C. § 227(b)(1)(A)(iii). This prohibition makes no distinction between cellphones being used for personal or business use.

The “primary purpose of the TCPA was to protect individuals from the harassment, invasion of privacy, inconvenience, nuisance, and other harms associated with unsolicited, automated calls.” *Parchman v. SLM Corp.*, 896 F.3d 728, 738 (6th Cir. 2018); see also *In the Matter of Rules and Regulations Implementing*

¹⁴ Riley Panko, *The Impact of Robocalls on Business Phone Communication*, Clutch, July 17, 2019, available at <https://clutch.co/call-centers/answering-services/resources/impact-robocalls-business-phone-communication#:~:text=Robocalls%20Can%20Negatively%20Impact%20Legitimate%20Business%20Communication,with%20customers%20over%20the%20phone.>

the Telephone Consumer Protection Act of 1991, SoundBite Communications, Inc., 27 FCC Rcd. 15391-92 ¶ 2 (Nov. 26, 2012) (discussing TCPA's purpose of protecting consumers against unwanted contact from automated dialing systems). At the time of the TCPA's creation, Senator Hollings noted that if an avenue for private redress was not provided to consumers, the abuses wrought by unregulated automated transmissions would "undoubtedly continue." See 137 Cong. Rec. S16204-01, at *4. The TCPA's prohibition against robocalls was "the only effective means of protecting telephone consumers from this nuisance and privacy invasion." *Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2343 (2020).

IV. THE TCPA MUST BE INTERPRETED IN A WAY THAT GIVES EFFECT TO ITS PURPOSE OF PROTECTING CONSUMERS, INCLUDING SMALL BUSINESSES

The purpose of the TCPA would be completely undermined if it is given the construction that Facebook urges. As Respondents correctly note, such a construction "would limit the TCPA's application to just a 'small universe of rapidly obsolescing robocalling machines.'" Respondents' Brief at 2 (quoting Pet. 14). To limit the TCPA's application to a handful of machines that are used with decreasing frequency would weaken the prohibition on automatic dialing systems at the same time that robocalls are becoming more prevalent, more sophisticated, and more difficult to detect and evade.

Adopting Facebook's construction would also greatly frustrate the deterrent effect of the TCPA, allowing robocallers to avoid liability by merely

dialing from stored numbers rather than random or sequentially generated numbers. It defies logic and legislative intent to interpret the statute in such a way. Whether a robocaller calls a small business from a list of stored numbers or a computer-generated number matters not at all to a business whose phone lines are tied up by unwanted calls. The manner in which the calls are made does not make them more or less of an intrusive nuisance. A small business's productivity and bottom line are no less impacted by calls made from a stored number than they are from a computer-generated number.

It is well-settled that a remedial statute “should be liberally construed and should be interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers.” *Scarborough v. Atl. Coast Line R. Co.*, 178 F.2d 253, 258 (4th Cir. 1949). To adopt Facebook's construction of an ATDS would run counter to that maxim and allow wrongdoers to get away with the very conduct the statute was meant to prohibit.

As the Court noted in *Barr*, Congress has spent “nearly 30 years” attempting to “fight back” against robocalls. 140 S. Ct. at 2343. Despite these efforts, the volume of robocalls has only continued to increase, as have the “vociferous consumer complaints” about them. *Id.* at 2344. Nevertheless, the TCPA's “continuing broad prohibition of robocalls amply demonstrates Congress's continuing interest in consumer privacy.” *Id.* at 2348. As recently as last year, Congress was still grappling with the problems caused by robocalls, stating in a 2019 House Committee Report that “Americans are receiving more unlawful robocalls than ever before,” an estimated 48 billion such calls in 2018 alone. H.R. Rep. No. 116- 173, at 11 (2019). The Senate estimated

“that in 2019, nearly 50 percent of all calls to mobile phones will be scam robocalls,” and that “robocalls are likely to increase and continue to be a major concern for consumers.” S. Rep. No. 116-41, at 2 (2019).

It is apparent that Congress still believes that the “scourge” of robocalls is getting worse, not better. As such, it is difficult to fathom any justification for neutering the TCPA by construing it in a way that would weaken its prohibitions rather than strengthen them. To do so would likely lead to a proliferation of robocalls, as companies that place automated calls would be less constrained by the prohibitions that are currently in place. The impact on small businesses would be particularly detrimental, threatening their productivity and profitability.

CONCLUSION

Amicus respectfully urges that the Court should reject Facebook’s attempt to narrow the TCPA’s prohibition against unwanted ATDS calls by limiting them to “a small universe of rapidly obsolescing robocalling machines,” and affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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