No. _____

In The
Supreme Court of the United States

LA BOOM DISCO, INC.,

Petitioner,

v.

RADAMES DURAN, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Telephone Consumer Protection Act ("TCPA") prohibits calls made to a cellular phone without consent using an "automatic telephone dialing system" ("ATDS"), which is defined as "equipment which has the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator . . . and to dial such numbers." 47 U.S.C. § 227(a)(1). In *Duran v. La Boom Disco, Inc.*, the Second Circuit concluded an ATDS encompasses any device that can store and dial telephone numbers—even if it cannot store or produce them "using a random or sequential number generator," as required by the statute. It also disregarded significant human intervention required to send a text message through the devices, ignoring the "automatic" requirement.

This decision—which conflicts with opinions from the Third, Seventh, and Eleventh Circuits—expands the TCPA's application to almost any call from any modern smartphone. This Court has already granted certiorari to address the proper interpretation of an ATDS in *Duguid v. Facebook, Inc.* This appeal should be consolidated with that one, but is also independently worthy of review to address the level of automation required to constitute an ATDS, as well as whether the Second Circuit violated the Hobbs Act by relying upon Federal Communications Commission orders invalidated by the D.C. Circuit.

The questions presented are:

1. Does the statutory definition of ATDS encompass any device that can "store" telephone numbers,

QUESTIONS PRESENTED—Continued

even if the device does not "us[e] a random or sequential number generator"?

2. Does a device that requires significant human intervention to initiate telephone calls and/or send text messages qualify as "automatic" under the TCPA?

3. Is the Hobbs Act violated when a circuit court of appeals relies upon orders by the Federal Communications Commission that were previously invalidated by another circuit court of appeals presiding over an appeal of an Federal Communications Commission ruling under the Hobbs Act?

PARTIES TO THE PROCEEDING

La Boom Disco, Inc. is Petitioner here and was Defendant-Appellee below.

Radames Duran, individually and on behalf of himself and all others similarly situated, is Respondent here and was Plaintiff-Appellant below.

CORPORATE DISCLOSURE STATEMENT

La Boom Disco, Inc. is not a publicly traded corporation and it has no parent company. No publicly traded company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

Duran v. La Boom Disco, Inc., No. 19-600 (2d Cir.) (opinion issued and judgment entered April 7, 2020; mandate issued May 19, 2020).

Duran v. La Boom Disco, Inc., 17-cv-6331 (ARR) (E.D.N.Y.) (order granting summary judgment issued February 25, 2019).

There are no additional proceedings in any court that are directly related to this case.

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This case presents two questions of critical and far-reaching importance relating to the scope of the TCPA, involving the interpretation of the terms (i) "random or sequential number generator" and (ii) "automatic" under the statute. It also raises important questions concerning the application of the Hobbs Act.

With respect to the statutory interpretation, the Second Circuit applied the TCPA's prohibition on the use of an ATDS to text messages sent by La Boom Disco ("LBD") to customers who provided their telephone numbers to it. It also concluded that the equipment used was "automatic," notwithstanding that these telephone numbers were uploaded by human beings into the text platforms at issue, and that the human users then also: (i) determined and created the content of the text message; and (ii) took the action required, pressing "send" just as one would do when sending a text from a smartphone, to send the messages. The Second Circuit's broad interpretation violates basic statutory construction principles and is in recognized conflict with the Third, Seventh and Eleventh Circuits. It also expanded the definition of an ATDS in a manner that captures every smartphone in America and subjects millions of Americans to the up-to $1,500-per-call statutory damages for communications made with their smartphones every day. Indeed, the Second Circuit reached a result that the D.C. Circuit described as "unreasonable," "impermissible," and "untenable." *ACA Int'l v. FCC*, 885 F.3d 687, 697-98 (D.C. Cir. 2018). While this Court has already granted

certiorari to address the appropriate interpretation of the "random or sequential number generator" requirement under the TCPA, this case presents a vehicle to resolve what level of human intervention is permissible for a device to be considered "automatic." Thus, certiorari should be granted in this case to allow the Court to provide more comprehensive guidance concerning the scope of the TCPA's much-litigated prohibition on ATDS calls.

This Court should also grant certiorari to address the circumstances under which a Hobbs Act violation occurs. Under the Hobbs Act, a "court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the Federal Communications Commission made reviewable." 28 U.S.C. § 2342(1). In *ACA*, the D.C. Circuit was vested with this exclusive authority to review the Federal Communications Commission ("FCC")'s guidance with respect to the definition of an ATDS and it expressly invalidated that guidance. 885 F.3d at 701. The Second Circuit, however, ignored this binding precedent and continued to rely upon the invalidated portions of those orders to conclude that the technology at issue qualifies as an ATDS. *Duran v. La Boom Disco, Inc.*, 955 F.3d 279, 285-86 (2d Cir. 2020). This Court should grant review to confirm the circumstances under which a violation of the Hobbs Act occurs.

OPINIONS BELOW

The Second Circuit's decision is reported at 955 F.3d 279 and is reproduced at App. 1. The Second Circuit reversed the decision of the United States District Court for the Eastern District of New York that granted summary judgment in favor of defendant and dismissed Plaintiff's claim. This decision was reported at 369 F. Supp. 3d 476 and is reproduced at App. 27.

JURISDICTION

The Second Circuit issued its opinion on April 7, 2020. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case seeks to resolve conflicts among six Circuit Courts of Appeals and numerous District Courts affecting the interpretation of the term "automatic telephone dialing system," which is defined under the TCPA as "equipment which has the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator; and . . . to dial such numbers."

This case also seeks to clarify the circumstances under which a violation of the Hobbs Act occurs, under which, pursuant to 28 U.S.C. § 2342(1), "the court of

appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the" FCC.

STATEMENT OF THE CASE

A. The Telephone Consumer Protection Act

1. In 1991, "[a]lmost thirty years ago, in the age of fax machines and dial-up internet" and long before the first smartphones, Congress "took aim at unsolicited robocalls" by enacting the TCPA. *Duguid v. Facebook, Inc.*, 926 F.3d 1146 (9th Cir. 2019); *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 370-71 (2012) (noting that Congress passed the TCPA in response to "[v]oluminous consumer complaints about abuses of telephone technology"). The TCPA supplemented the Federal Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, and among other things, makes it unlawful for a person to place calls without prior consent to cellular and certain specialized telephone lines using a device called an "automatic telephone dialing system." *Id.* § 227(b)(1)(A).

The statute defines an 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." *Id.* § 227(a)(1).

2 Congress used the phrase "random or sequential number generator" to address particular problems

posed by the autodialing technology prevalent when the TCPA was enacted in 1991. *Id.* "[A]t the time of enactment, devices existed that could randomly or sequentially create telephone numbers and (1) make them available for immediate dialing or (2) make them available for later dialing." *Glasser v. Hilton Grand Vacations Company, LLC*, 948 F.3d 1301, 1307 (11th Cir. 2020). Random dialing meant that callers could reach and "tie up" unlisted and specialized numbers, crowding the phone lines and preventing those numbers from making or receiving any other calls. *See* S. Rep. No. 102-178, at 2 (1991), as reprinted in 1991 U.S.C.C.A.N. 1968, 1969 (1991).

Sequential dialing also allowed callers to reach every number in a particular area, creating a "potentially dangerous" situation in which no outbound calls (including, for example, emergency calls) could be placed. *See* H.R. Rep. No. 102-317, at 10 (1991). Although Congress has not updated the TCPA to address technological changes, like the rise of texting, courts have generally interpreted the "call[s]" proscribed by the TCPA to include text messages. *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 667 (2016).

3. The TCPA includes a private right of action that carries substantial potential penalties. 47 U.S.C. § 227(b)(3). A caller who places a call or sends a text message to a cell phone without consent using an ATDS is subject to an automatic $500 statutory penalty per call, with treble damages available—increasing the potential statutory penalty to $1,500 per call or text—"[i]f the court finds that the defendant

willfully or knowingly" committed the violation. *Id.* § 227(b)(3)(B)-(C).

The substantial statutory penalties available under this private right of action have made the TCPA one of the more frequently litigated federal statutes, and the availability of fixed statutory penalties that arguably obviate the need to prove individualized damages has made it a frequent basis for putative class actions. As Commissioner Michael O'Rielly of the FCC stated: "it's not consumers who ultimately reap the proceeds of judgments and settlements, but attorneys; the average recovery for TCPA class members is a few measly dollars, whereas the average recovery for a plaintiff's lawyer is well over $2 million." Alison Grande, *Industry Must Push FCC to Fix TCPA Litigation Mess: O'Rielly*, LAW360 (May 16, 2019, 9:46 PM), https://www.law360.com/articles/1160568/industry-must-push-fcc-to-fix-tcpa-litigation-mess-o-rielly.

B. FCC Orders

1. The FCC is charged with enacting regulations to implement the requirements of the TCPA. 28 U.S.C. § 227(b)(2). Between 2003 and 2015, the FCC issued several declaratory rulings seeking to clarify what equipment qualifies as an ATDS.

2. In 2003, the FCC ruled that "predictive dialers" qualify as an ATDS, notwithstanding that the "principal feature of predictive dialing software is a timing function, not number storage or generation." *Rules and Regulations Implementing the Telephone*

Consumer Protection Act of 1991, 18 FCC Rcd. 14014, 14091-92 ¶¶ 131-32 (2003) ("2003 Order"). According to the FCC, because predictive dialers have the "capacity to dial numbers without human intervention," they qualified as an ATDS under the TCPA, because "to exclude . . . equipment that use[s] predictive dialing software from the definition of 'automated telephone dialing equipment' simply because it relies on a given set of numbers would lead to an unintended result." *Id.* ¶¶ 131-32. Thus, to determine whether a device qualifies as an ATDS, the FCC found that the relevant inquiry was whether a device had the "capacity to dial numbers without human intervention." *Id*.

3. Subsequent orders from the FCC also focused on the absence of human intervention as the defining characteristic of an autodialer (a term commonly used by the FCC to refer to an ATDS, as defined by the statute). *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd. 559, 566 ¶¶ 12-13 (2008) ("2008 Order"); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd. 15391, 15392 ¶ 2 n.5 (2012) ("2012 Order").

4. In 2015, the FCC was asked to clarify which devices qualify as an ATDS—*i.e.*, equipment that "has the capacity" to "store or produce telephone numbers to be called, using a random or sequential number generator," and "to dial such numbers." 47 U.S.C. § 227(a)(1). With regard to whether equipment has the "capacity" to perform the enumerated functions, the FCC declined to define a device's "capacity" in a

manner confined to its "present capacity." Instead, the agency construed a device's "capacity" to encompass its "potential functionalities" with modifications such as software changes. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 7974 ¶ 16 (2015) ("2015 Order").

In reaching its conclusion, the FCC explicitly reaffirmed its 2003 and 2008 Orders and stated that "the Commission has already twice addressed the issue in 2003 and 2008, stating that autodialers need only have the 'capacity' to dial random and sequential numbers, rather than the 'present ability' to do so." *Id.* ¶¶ 10, 15. The FCC further held that "[b]ecause our decision is based on the TCPA's terms and past Commission interpretation, we need not reach the policy arguments . . . such as claims related to class-action lawsuits, that could be viewed as being offered to support reversing the Commission's prior decisions; in a declaratory ruling we only clarify existing law or resolve controversy regarding the interpretation or application of existing law, rules, and precedents." *Id.* ¶ 22.

5. The FCC recently issued a declaratory ruling in response to a long-pending petition for clarification in *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 P2P Alliance Petition for Clarification*, Declaratory Ruling No. 02-278 (June 25, 2020) ("*In re P2P Alliance*"), holding that "the fact that a calling platform or other equipment is used to make calls or send texts to a large volume of telephone numbers is not probative of whether that equipment constitutes an autodialer

under the TCPA." *Id.* ¶ 3. Instead, "whether a certain piece of equipment or platform is an autodialer turns on whether it is capable of performing those functions without human intervention, not whether it can make a large number of calls in a short time." *Id.* ¶ 9.

C. ACA International

1. In *ACA International v. Federal Communications Commission*, 885 F.3d 687 (D.C. Cir. 2018), the D.C. Circuit addressed the FCC's interpretation of the term ATDS and concluded that the FCC's interpretation of an equipment's "capacity" was overbroad because it would "hav[e] the apparent effect of embracing any and all smartphones." *Id.* at 695-703 (holding that the 2015 Order's interpretation of a device's capacity was "an unreasonably, and impermissibly, expansive one"). Indeed, the D.C. Circuit explained that:

> If every smartphone qualifies as an ATDS, the statute's restrictions on autodialer calls assume an eye-popping sweep. . . . The TCPA cannot reasonably be read to render every smartphone an ATDS subject to the Act's restrictions, such that every smartphone user violates federal law whenever she makes a call or sends a text message without advance consent. . . .

Id. at 697.

2. The D.C. Circuit held that any definition of an ATDS that would encompass smart phones would violate the Administrative Procedures Act and also found

the FCC's rule-making regarding whether an ATDS must *generate* random or sequential numbers, rather than dial from a list, failed to constitute reasoned decision-making and set aside those orders. *Id.* at 695-703. Specifically, the D.C. Circuit found that "[b]y reaffirming that conclusion [from the 2003 Order] in its 2015 ruling, the Commission supported the notion that a device can be considered an autodialer even if it has no capacity itself to generate random or sequential numbers." *Id.* Because the FCC offered competing interpretations on the issue, the D.C. Circuit "set aside the Commission's treatment of those matters" including the FCC's prior orders on the issue. *Id.*

The D.C. Circuit also specifically rejected the argument that it was precluded from reviewing the FCC's 2003 and 2008 Orders because "[p]etitioners covered their bases by filing petitions for both a declaratory ruling and a rulemaking concerning that issue and related ones." 885 F.3d at 701. In response to those requests, the FCC issued the 2015 Order and denied petitions for rulemaking. *Id.* Accordingly, the FCC's prior orders were subject to review by the D.C. Circuit. *Id.*

D. The Hobbs Act

1. The Hobbs Act confers on the federal courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity" certain FCC final orders. 28 U.S.C. § 2342. When agency regulations are challenged in more than one

court of appeals, the panel on multidistrict litigation consolidates those petitions and assigns them to a single circuit. *See* 28 U.S.C. § 2112(a)(3). In *ACA*, the various challenges to the FCC's 2003, 2008 and 2015 Orders were consolidated before the D.C. Circuit.[1]

Factual Background and Proceedings Below

1. LBD is a nightclub located in Queens County, New York, which offers musical entertainment to its customers. LBD offers promotions on Facebook that allow customers to gain free entry to the club when they respond to the promotion by texting a keyword identified by LBD. After a customer responds to LBD's Facebook promotion, LBD stores the responding telephone number in its customer database. LBD sends text messages to these customers to inform them of future events at the club.

2. LBD used two texting systems, EZ Texting and ExpressText to send text messages. Neither system created or generated the telephone numbers that were texted; instead, the only source of those telephone numbers was LBD's customer database. An LBD employee determined the date and time those texts would be sent and determined and created the content of the

[1] *ACA*, 885 F.3d at 687 ("No. 15-1211, consolidated with 15-1218, 15-1244, 15-1290, 15-1304, 15-1306, 15-1311, 15-1313, 15-1314, 15-1440, 15-1441."). The Second Circuit previously recognized this fact. *King v. Time Warner Cable Inc.*, 894 F.3d 473, 476 n.3 (2d Cir. 2018) ("Challenges to the 2015 Order were assigned to the D.C. Circuit, which thereby became the sole forum for addressing . . . the validity of the FCC's order.").

texts that would be sent. Significantly, the employee then pressed the "send" button—just as a human user must do to send a text message using his or her smartphone—to transmit texts to the intended recipients.

3. Plaintiff Radames Duran visited LBD's Facebook page and texted the keyword "TROPICAL" in response to the Facebook advertisement. Following that text message, Duran began to receive text messages concerning events at LBD. If Duran had texted "stop" in response to any of the text messages he received, he would not have received further text messages from LBD. Duran, however, never made such a request. Instead, he filed a putative class action on October 31, 2017, asserting that LBD violated the TCPA by sending him text messages, using an ATDS, without prior express consent.

The District Court Decision

1. Following the completion of discovery, the District Court denied Plaintiff's motion for summary judgment and awarded summary judgment for LBD *sua sponte*. The District Court held that the EZ Texting and ExpressText systems used by LBD to send text messages were not ATDS because they required too much human intervention to send a text message.

2. In analyzing the text platforms, the District Court relied upon the FCC's 2003 Order, along with the 2008 and 2012 Orders. App. 42-44. The District Court held that these Orders survived the D.C. Circuit's

decision in *ACA* to invalidate the FCC's 2015 Order. *Id.* at 54-55.

3. The District Court thus analyzed whether ExpressText and EZ Texting could dial numbers without human intervention to determine whether they qualified as an ATDS. *Id.* The District Court held that because "a user determines the time at which the ExpressText and EZ Texting programs send messages to recipients" there was too much human intervention to qualify as an ATDS. *Id.* at 61. The District Court further relied upon the fact that "[t]here is no dispute that for the programs to function, a human agent must determine [the time to send the message], the content of the messages, and upload the numbers to be texted into the system." *Id.* at 57. The District Court therefore granted summary judgment in LBD's favor, notwithstanding its view that a system can qualify as an ATDS even though the numbers contacted were generated from the user's stored list. *Id.* at 42, 61.

The Second Circuit's Decision

1. Plaintiff appealed to the Second Circuit. The Second Circuit reversed the District Court's award of summary judgment in LBD's favor and concluded that the ExpressText and EZ Texting platforms qualify as an ATDS. App 25-26. The Second Circuit acknowledged that a split among the circuits existed with respect to the interpretation of the ATDS definition and elected to follow the Ninth Circuit's interpretation in *Marks v. Crunch San Diego, LLC*. *Id.* at 280 n.5.

2. In reaching its conclusion, the Second Circuit held that, in order to qualify as an ATDS, a device only needed to "store" numbers and that the term "using a random or sequential number generator" modified only the word "produce" in the statute. *Id.* at 284-85. The Second Circuit concluded that this construction avoided rendering "store" a "surplusage" under the statute. *Id.*

3. It also determined that the purpose and structure reinforced this interpretation, given that there were certain exceptions to liability for the use of (i) an ATDS, or (ii) pre-recorded messages or artificial voice. The Second Circuit rejected the argument that the exceptions applied in the context of pre-recorded messages and artificial voice technology, which is a construction that other courts relied upon. *See*, *e.g.*, *Glasser v. Hilton Grand Vacations Company, LLC*, 948 F.3d 1301, 1311-12 (11th Cir. 2020). The Second Circuit did not address, in any respect, the prevalence of dialing technology at the time of enactment, which "generated" telephone numbers randomly or sequentially, or the capacity of such systems to "store" numbers after they were generated. App. 13-15.

4. The Second Circuit also relied upon the FCC's interpretation of an ATDS in its 2003, 2008 and 2012 Orders to confirm its interpretation of the term ATDS. 955 F.3d at 285-86. This reliance is in conflict with every other circuit court to consider this issue, including the Ninth and Sixth Circuits, with which the Second Circuit otherwise aligned. *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1049-50 (9th Cir. 2018)

("Because the D.C. Circuit vacated the FCC's interpretation of what sort of device qualified as an ATDS, only the statutory definition of ATDS as set forth by Congress in 1991 remains."); *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 463 (7th Cir. 2020) ("*ACA International* did not leave prior FCC Orders intact."); *Glasser*, 948 F.3d at 1310 ("[T]he D.C. Circuit, in a Hobbs Act proceeding of its own, wiped the slate clean."); *Allan v. Penn. Higher Ed. Assistance Agency*, 968 F.3d 567, 570 (6th Cir. 2020) ("[W]e cannot look to [FCC] orders for guidance on this interpretive question because the D.C. Circuit invalidated the FCC's interpretation of ATDS").

5. Regarding the level of human intervention that is permitted for a system to qualify as "automatic" under the TCPA, the Second Circuit reversed the District Court's conclusion that where, as here, a human determined the time at which a text message was sent, that the system was not an ATDS. App. 21-22. The Second Circuit disagreed that this "timing" function was dispositive of the inquiry. *Id.*

6. Instead, the Second Circuit looked to the definition of "dialing" and concluded that pressing "send" was not analogous to "dialing," ignoring the functions of modern technology. The Second Circuit thus concluded that "[c]licking 'send' does not require enough human intervention to turn an automatic dialing system into a non-automatic one" and that EZ Texting and ExpressText did not require sufficient human intervention to fall outside the scope of the ATDS definition. *Id.* at 289-90. In this regard, it also split with the

Eleventh Circuit. *Glasser*, 948 F.3d at 1312 ("Far from automatically dialing phone numbers, this system requires a human's involvement to do everything except press the numbers on a phone."). It also adopted an interpretation that could render every smartphone in America an ATDS. *Id.* at 1309-10.

REASONS FOR GRANTING THE PETITION

This petition raises important questions regarding the scope of the TCPA, one of the most frequently litigated federal statutes. To say that the decision below will carry extraordinary practical consequences is an understatement.

These questions are independently worthy of review and taken together present an even stronger case for review. First, while this Court has already granted certiorari in a case concerning the ATDS definition (*see Duguid*, 2020 WL 3865252 (U.S. July 9, 2020) (No. 19-511)), intervention is also required to resolve an acknowledged split concerning the level of human intervention required to remove a device from the statute's purview with respect to "automatic" technology. If the Second Circuit's construction of the ATDS definition is correct, the statute would be overbroad and capture every smartphone in America, and also impact countless businesses. This question has enormous practical consequences. First, businesses that attempt to contact their own customers using customer lists require guidance as to the circumstances, if any, such

contacts could implicate the TCPA. And, Americans deserve to know whether they have been inadvertently toting ATDSs around in their pockets and purses and risking $1,500-a-call fines.

The Second Circuit's atextual construction of the ATDS definition not only conflicts with the better reasoned views of the Third, Seventh, Eleventh and D.C. Circuits, but it exposes countless citizens to liability under the TCPA. If the Second, Sixth and Ninth Circuits' interpretations of an ATDS are upheld by the Supreme Court, businesses across the country would face liability for billions of dollars of damages and would create an existential threat to numerous businesses.

Second, certiorari is also warranted to address whether the Second Circuit violated the Hobbs Act when it relied upon the FCC's 2003, 2008 and 2012 Orders concerning the ATDS definition. App. 15-19, n. 28. The 2015 Order itself stated that it had already twice addressed the issue before and stated it was reaffirming its 2003 and 2008 Orders. And, the D.C. Circuit specifically rejected the FCC's efforts to "shield the agency's pertinent pronouncements from review" because "[t]he agency's prior rulings left significant uncertainty about the precise functions an autodialer must have the capacity to perform." *ACA*, 885 F.3d at 701. Thus, there is no question that the D.C. Circuit invalidated the very orders upon which the Second Circuit relied, in violation of the Hobbs Act.

I. The Court Should Grant Certiorari To Resolve the Circuit Split on the ATDS Definition

The TCPA defines an 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).

As the Second Circuit notes in *Duran*, the definitional question that pervades TCPA litigation is: what exactly is an ATDS? In concluding that an ATDS "may call numbers from stored lists," and that hitting "send" is insufficient human intervention to remove a device from the TCPA's scope, App. 19-20, the Second Circuit misinterpreted the statute and expanded the TCPA's scope to reach nearly every telephone in use today. This is a significant judicial rewrite of a statute that Congress passed to curb the telemarketing abuses of the late 1980s and early 1990s. Given the volume of TCPA lawsuits flooding the lower courts, the scope of the TCPA is an issue of substantial national importance that fully merits this Court's review.

A. The Second Circuit Is In Conflict With Other Circuits on the Application of "Random or Sequential Number Generator"

This Court has already granted certiorari to resolve the conflict among the circuits concerning the appropriate application of the phrase "using a random or

sequential number generator" within the ATDS definition. *Duguid*, 2020 WL 3865252 (U.S. July 9, 2020) (No. 19-511). This appeal, which presents the same—but also additional issues—should be consolidated with that appeal. Sup. Ct. R. 27.3.

This Court has repeatedly held that a statute must be interpreted in accordance with its terms and courts "cannot construe a statute in a way that negates its plain text." *Honeycutt v. United States*, 137 S. Ct. 1626, 1635 n.2 (2017). As this Court recognized, review is appropriate because multiple circuit courts have now held that, based upon a plain reading of the requirement that a device must be able "to store or produce telephone numbers to be called, using a random or sequential number generator," a device must ***generate*** telephone numbers to be called in order to qualify as an ATDS. Dialing numbers from a stored list will not suffice.

In *Dominguez v. Yahoo, Inc.*, the Third Circuit[2] affirmed summary judgment for the defendant where there was no evidence the text platform "had the present capacity to function as an autodialer by *generating random or sequential telephone numbers and dialing those numbers*." 894 F.3d 116, 121 (3d Cir. 2018) (emphasis added). Earlier this year, the Eleventh Circuit followed *Dominguez* and also concluded that equipment does not qualify as an ATDS where it does not "use[] randomly or sequentially generated

[2] The Third Circuit is poised to again address this question in *Smith v. Navient Sols., LLC*, No. 19-3025 (3d Cir. 2019).

numbers." *Glasser*, 949 F.3d at 1305. Just weeks later, the Seventh Circuit followed suit with the same interpretation, affirming that the text platform at issue "it is not an [ATDS] as defined by the [TCPA]" because it "neither stores nor produces numbers using a random or sequential number generator; instead, it exclusively dials numbers stored in a customer database." *Gadelhak*, 950 F.3d at 460.[3]

The Second Circuit ignored this weight of authority and instead explicitly followed the Ninth Circuit's decision in *Marks*, concluding that "an ATDS may call numbers from stored lists, such as those generated,

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[3] This reasoning has also been followed by numerous district courts outside of these circuits. *Adams v. Safe Home Sec., Inc*., No. 3:18-vs-03098-M, 2019 WL 3428776 (N.D. Tex. July 30, 2019); *Asher v. Quicken Loans, Inc.*, No. 2:17-cv-1203, 2019 WL 131854 (D. Utah Jan. 8, 2019); *Beal v. Outfield Brew House, LLC*, No. 2:18-CV-4028-MDH, 2020 WL 618839 (W.D. Mo. Feb. 10, 2020) (appeal filed May 8, 2020); *DeCapua v. Metro. Prop. & Cas. Ins. Co.*, No. CV 18-590 WES, 2020 WL 1303248 (D.R.I. Mar. 19, 2020) (appeal filed April 21, 2020); *Hatuey v. IC Sys.*, No. 1:16-cv-12542, 2018 WL 5982020 (D. Mass. Nov. 14, 2018); *Hill v. USAA Sav. Bank*, No. CIV-18-803, 2019 WL 3082471 (W.D. Okla. July 15, 2019); *Might v. Capital One Bank (USA), N.A.*, No. CIV-18-716-R, 2019 WL 544955 (W.D. Okla. Feb. 11, 2019); *Morgan v. On Deck Capital, Inc.*, No. 3:17-CV-00045, 2019 WL 4093754 (W.D. Va. Aug. 29, 2019); *Roark v. Credit One Bank, N.A.*, No. 16-173 (PAM/ECW), 2018 WL 5921652 (D. Minn. Nov. 13, 2018); *Smith v. Truman Rd. Dev., LLC*, No. 4:18-cv-00670-NKL 2020 WL 2044730 (W.D. Mo. Apr. 28, 2020); *Snow v. Gen. Elec. Co.*, No. 5:18-CV-511-FL, 2019 WL 2500407 (E.D.N.C. June 14, 2019); *Thompson-Harbach v. USAA Fed. Sav. Bank*, 359 F. Supp. 3d 606 (N.D. Iowa 2019); *Suttles v. Facebook, Inc.*, No. 1:18-CV-1004-LY, 2020 WL 2763383, at *5-6 (W.D. Tex. May 20, 2020).

initially, by humans."[4] App. 19. The Sixth Circuit also recently followed this interpretation in *Allan v. Penn. Higher Educ. Assistance Agency*, 968 F.3d at 574. The impact of this decision is that, under the Second, Sixth and Ninth Circuit's interpretation of the ATDS definition, nearly every phone in use in America may qualify as an ATDS, while cases litigated in the Third, Seventh, and Eleventh Circuits apply a more appropriately narrow definition of ATDS. This case should be consolidated with that one.

B. The Second Circuit Is In Conflict with the Eleventh Circuit on the Interpretation of the Term "Automatic"

Certiorari is also warranted here on the separate and independent ground that this Court's guidance is necessary to determine what level of operation qualifies as "automatic" under the TCPA. The Second Circuit took an expansive view of the level of human intervention that was "tolerable" in order for a system to qualify as "automatic."

Specifically, the Second Circuit recognized that it was undisputed that the following steps ***by a human*** were required to operate the EZ Texting and ExpressText platforms: (i) upload numbers to the platforms, (ii)

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[4] Fewer district courts outside the Second, Sixth and Ninth Circuits have followed this interpretation. *Gonzalez v. HOSOPO Corp.*, 371 F. Supp. 3d 26, 34 (D. Mass. 2019); *Pederson v. Donald J. Trump for President, Inc.*, No. 19-2735 (JRT/HB), 2020 WL 3047779, at *5 (D. Minn. June 8, 2020) (appeal filed June 22, 2020).

identify a population of recipients, (iii) craft an outgoing message, (iv) determine the time at which to send a text message and (v) ultimately hit a button to send a text message. Notwithstanding these human-directed actions, however, the Second Circuit concluded that the platforms operated "automatically." App. 22-25.

To reach this conclusion, the Second Circuit rejected the notion that pressing "send" was equivalent to dialing a number. Pressing send, however, is the mechanism through which nearly all modern telephones operate. *Id.* at 24-25. In fact, the Second Circuit itself acknowledged that it adopted an interpretation of the term that could be considered "antiquated."

Instead, the Second Circuit relied upon the ability of the text platforms to send large numbers of text messages in a short period of time. *Id.* at 23, n. 39. This consideration, however, was recently rejected by the FCC. *In re P2P Alliance*, ¶ 3 ("[T]he fact that a calling platform or other equipment is used to make calls or send texts to a large volume of telephone numbers is not probative of whether that equipment constitutes an autodialer under the TCPA."). Thus, the Second Circuit erred when it concluded that hitting "send" was not equivalent to dialing.

In this regard, the Second Circuit is also in conflict with the Eleventh Circuit. In *Glasser*, the Eleventh Circuit held that where the "technology before us requires meaningful human interaction to dial telephone numbers: An employee's choice initiates every call."

948 F.3d at 1312. While other circuits have addressed the appropriate interpretation of the phrase "random or sequential number generator," only the Second and Eleventh Circuits have considered what level of human intervention is permissible for a system to operate "automatically." *See*, *e.g.*, *Allan*, 968 F.3d 567, 581, n. 2 (declining to address issue where appellant "claims the . . . system requires some human intervention, but does not make any legal arguments on that point"); *Marks*, 904 F.3d at 1053 (observing that appellee conceded the text platform operated "automatically"). This case, resolved on summary judgment, provides a factual record on which this Court can provide guidance concerning the level of human intervention required for a device to operate "automatically."

This guidance is of critical importance because the Second Circuit's expansive interpretation of what constitutes "automatic" dialing again confirms that every smartphone in America is subject to the TCPA's prohibitions. "[N]o one would think that telling a smartphone to dial the phone number of a stored contact (or several contacts) means the smartphone has automatically dialed the number." *Glasser*, 948 F.3d at 1312. Moreover, other district courts have ruled that the EZ Texting platform at issue in this case does not qualify as an ATDS because it requires too much human intervention. *DeCapua v. Metro. Prop. and Cas. Co.*, No. CV 18-590 WES, 2020 WL 1303248, at *1 (D.R.I. Mar. 19, 2020) (appeal filed Apr. 21, 2020) (granting summary judgment because "EZ Texting 'demands far more from its human operators than just

"turning on the machine or initiating its functions"'"). If the Court does not resolve the question of what constitutes "automatic" dialing, there could be an anomalous result wherein this very platform is considered an ATDS within the Second Circuit, but not in another.

This Court recently addressed the constitutionality of the TCPA in *Barr v. American Association of Political Consultants*. Although the Court concluded that the provisions of the TCPA that are relevant here survived the constitutional challenge, it recognized that the TCPA restricts speech protected under the First Amendment. 140 S. Ct. at 2348. Where, as here, the prohibition on speech is subject to a narrower interpretation, constitutional avoidance principles favor such an interpretation. As the Eleventh Circuit recognized, "[w]ould the First Amendment really allow Congress to punish every unsolicited call to a cell phone? That is a G too far." *Glasser*, 948 F.3d at 1310 (citing *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996)). The Second Circuit did not even attempt to limit the expansive definition it adopted and therefore review on this ground is also warranted.

II. The Court Should Grant Certiorari to Resolve the Circuit Split Concerning the Continued Validity of the FCC Orders

A. The D.C. Circuit Invalidated Prior FCC Orders

With the exception of the Second Circuit, every circuit court to address the viability of the FCC Orders

following *ACA* has held that the D.C. Circuit not only invalidated the 2015 Order, but also the 2003, 2008 and 2012 Orders as well.[5] *Marks*, 904 F.3d at 1049-50 ("Because the D.C. Circuit vacated the FCC's interpretation of what sort of device qualified as an ATDS, only the statutory definition of ATDS as set forth by Congress in 1991 remains."); *Gadelhak*, 950 F.3d at 462 ("*ACA International* did not leave prior FCC Orders intact."); *Glasser*, 948 F.3d at 1310 ("[T]he D.C. Circuit, in a Hobbs Act proceeding of its own, wiped the slate clean."); *Allan*, 968 F.3d at 571-72 (same).

The D.C. Circuit's ruling in *ACA* further supports this conclusion, which rejected the FCC's attempt to "shield the agency's pertinent pronouncements from review" and which "left significant uncertainty about the precise functions an autodialer must have the capacity to perform."[6] 885 F.3d at 701. Accordingly, the

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[5] The continuing viability of the FCC Orders has also been the subject of disagreement among the district courts. *Compare Thompson-Harbach v. USAA Federal Savings Bank*, 359 F. Supp. 3d 606, 620-21 (N.D. Iowa Jan. 9, 2019); *Richardson v. Verde Energy USA, Inc.*, 354 F. Supp. 3d 639, 643-45 (E.D. Pa. 2018) *with Wilson v. Quest Diagnostics, Inc.*, No. 2:18-11960, 2018 WL 6600096, at *3 (D.N.J. Dec. 17, 2018).

[6] The D.C. Circuit exercised its authority to set aside the FCC's interpretations of the definition of an ATDS in the 2015 Order, 28 U.S.C. § 2342, and in doing so further set aside any prior FCC rules that were reinstated by the 2015 Order. *See Biggerstaff v. FCC*, 511 F.3d 178, 185 (D.C. Cir. 2007) (quoting *Pub. Citizen v. Nuclear Regulatory Comm'n*, 901 F.2d 147, 152 (D.C. Cir. 1990)). In *Biggerstaff*, the D.C. Circuit held that "an official reinterpretation of an old rule that creates a new opportunity to challenge the continuation of that rule triggers reopening [of the old rule]." 511 F.3d at 185.

D.C. Circuit "set aside the Commission's treatment of those matters." *Id.* This result is confirmed by the fact that the FCC, in the 2015 Order, specifically stated not only that it was reaffirming its prior orders, but that it had already "twice addressed" the ATDS issue before it.[7] 2015 Order, ¶ 15. Indeed, even the FCC recently recognized that only the statutory definition remains following *ACA*. *In re P2P Alliance*, ¶ 1, n. 2 ("The details of the Commission's interpretation of the autodialer definition remain pending in the wake of a 2018 decision of the U.S. Court of Appeals for the D.C. Circuit in *ACA*. . . . Until that issue is decided by the Commission, we rely on the statutory definition of autodialer.").

B. The Second Circuit Violated the Hobbs Act

The Hobbs Act provides that the courts of appeals have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of all final orders of the [FCC] made reviewable by section 402(a) of title 27." 28 U.S.C. § 2342(1). In the case of the action concerning the challenge to the 2015 Order, the D.C. Circuit had exclusive jurisdiction because

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[7] These statements eliminate any argument that the 2015 Order only expanded the definition of capacity, without offering other guidance concerning the definition of an ATDS. Courts that have taken a narrow interpretation of the D.C. Circuit's opinion in *ACA* (*see*, *e.g.*, *Wilson*, 2018 WL 6600096, at *2), have incorrectly disregarded these statements in the 2015 Order, as well as the D.C. Circuit's holding that the FCC's guidance "falls short of reasoned decision making." 885 F.3d at 701.

the Multidistrict Litigation Panel assigned these petitions to the D.C. Circuit. *See supra* n. 1.

Multiple circuits have held that, following consolidation before the D.C. Circuit, that court became "the sole forum for addressing . . . the validity of the FCC's rule." *Peck v. Cingular Wireless, LLC*, 535 F.3d 1053, 1057 (9th Cir. 2008) (quoting *MCI Telecomms. Corp. v. U.S. West Comms.*, 204 F.3d 1262, 1267 (9th Cir. 2000)). Consequently, the D.C. Circuit's decision in *ACA* became "binding outside of the [D.C. Circuit]." *Id.*

This result makes sense in light of the procedural mechanism Congress has provided for challenging agency rules. *See* 28 U.S.C. §§ 2112, 2342-43. By requiring petitioners to first bring a direct challenge before the FCC, the statute allows this expert agency to weigh in on its own rules, and by consolidating petitions into a single circuit court, the statute promotes judicial efficiency and ensures uniformity nationwide. *See CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 450 (7th Cir. 2010); *cf. Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 467 (6th Cir. 2017).

The Second Circuit, however, ignored this procedure and continued to rely upon the FCC Orders to interpret the ATDS definition.[8] 955 F.3d at 285-86. It is

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[8] While the Second Circuit held that it was "merely treat[ing] the FCC Orders as persuasive authority," in light of this Court's ruling in *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.* 139 S. Ct. 2051 (2019), this statement does not absolve it from

the only appellate court to date to reach this conclusion. Thus, the petition should be granted to confirm that such continued reliance violates the Hobbs Act.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

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its violation of the Hobbs Act, given that it continued to rely on invalidated FCC Orders.