No. 23-495

In the
Supreme Court of the United States

LUCINE TRIM,

Petitioner,

v.

REWARD ZONE USA LLC, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WIRELESS RESEARCH SERVICES, LLC AND RANDALL A. SNYDER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Wireless Research Services, LLC through Randall A.Snyder serves as a consultant and recognized expert in wireless telecommunications technologies, and is a published book and articles author on wireless networking technology, nominated for an Emmy Award for Outstanding Achievement in Advanced Media Technology. Having 47 patents related to wireless technology, Snyder has served as an expert witness in over 500 legal cases involving wireless technology, intellectual property, breach of contract, unfair business practices, and the Telephone Consumer Protection Act (TCPA).

SUMMARY OF THE ARGUMENT

This case involves the threshold question on the coverage of the Telephone Consumer Protection Act (TCPA). Either the Act covers RSNG auto-dialing of marketing list numbers, in campaigns of millions of calls, or does not. The Courts are seriously split, resulting in Circuits and District Courts totally stripping TCPA coverage from the exact calling that impelled Congress to enact the law.

This Amicus Brief succinctly addresses the position taken by the U.S. Solicitor General (in *Brickman v.*

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[1] Pursuant to Supreme Court Rule 37(2), all parties received notice of the intent to file this *amici curiae* brief 10 days prior to the due date for such brief. Pursuant to Supreme Court Rule 37(6), undersigned counsel certifies that no party's counsel authored this brief, in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person, other than the *amici curiae*, contributed money that was intended to fund preparing or submitting this brief.

Facebook, a case presenting this identical issue, and pending request for review by this Court). The Solicitor General insists that the agency (FCC) can untangle this split by administrative action. This Amicus Brief submits the agency has NO power to do so, and the suggestion by the Solicitor General that it can is another example, from the current administration, of gross overreaching by agencies and their supporters, beyond what the law and Constitution allow.

ARGUMENT

'Don't worry. The Agency will handle it.' U.S. Solicitor General, October, 2023.

This approach—expecting federal agencies to drive the boat on matters of Congressional action and intent—is currently facing possible complete rejection by this court (pending, *Loper Bright Enterprises v. Raimondo*, Doc. No. 22-451), and has met with disapproval by this Court. See *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) ("[a]gencies may play the sorcerer's apprentice but not the sorcerer himself.").

The Framers anticipated three branches of government would complement, not commandeer, each other.

Congress wrote the Telephone Consumer Protection Act. It granted rule-making power to the Federal Communications Commission. Rulemaking however does not mean statutory drafting, or interpretation that violates judicial decisions on the meaning of the statute. *Smith v. Berryhill*, 587 U.S. ---, 139 S.Ct. 1765, 204 L.Ed.2d 62 (2019) (Chevron

deference does not apply to the scope of judicial review).

The issue presented in this case, likewise in *Brickman v. United States, et al*., No. 23-6 (pending review in this court), *Borden v. eFinancial, LLC,* 53 F.4th 1230 (9th Cir. 2022), and *Panzarella v. Navient Solutions, Inc.*, 37 F.4th 867 (3d Cir. 2022), is whether the wording chosen by Congress at 47 U.S.C. § 227—"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"—requires that the numbers, themselves, be generated by the equipment.

In *Borden*, the Ninth Circuit answered that question, yes. (Followed by a heated opinion by Judge VanDyke that the ruling was "just wrong." *Brickman v. United States,* 56 F.4th 688, 692 (9th Cir. 2022) (Vandyke, J., concurring)). The Ninth Circuit holds that the telephone numbers, *themselves,* must be generated by the equipment. *Borden v. eFinancial, LLC*, 53 F.4th 1230, 1233 (2022). It claims to have relied on this court's unanimous decision in *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021). But the Third Circuit concluded the opposite: "*Duguid* does not stand for the proposition that a dialing system will constitute an [autodialer] only if it actually generates random or sequential numbers." *Panzarella v. Navient Solutions, Inc.*, 37 F.4th 867, 875 (2022).

This court appears to also have said the opposite in *Duguid* at n. 7: "For instance, an autodialer might use a random number generator to determine the order in which to pick phone numbers from a preproduced list.

It would then store those numbers to be dialed at a later time."

And across the nation, each day the divide grows: Compare *DeMesa v. Treasure Island, LLC*, No. 218CV02007JADNJK, 2022 WL 1813858, at *2 (D. Nev. June 1, 2022) (*Duguid* requires that equipment generates the telephone number itself; using RSNG to store and dial numbers from a list not allowed); *Franklin v. Hollis Cobb Assocs., Inc.*, No. 1:21-cv-02075-SDG, 2022 WL 4587849, at *3 (N.D. Ga. Sept. 29, 2022) (same); and *Cross v. State Farm Mut. Auto. Ins. Co.*, No. 1:20-cv-01047, 2022 WL 193016, at *8 (W.D. Ark. Jan. 20, 2022) (same); with *Daschbach v. Rocket Mortg., LLC*, No. 22-cv-346JL, 2023 WL 2599955, at *11 n.34 (D.N.H. Mar. 22, 2023) (*Duguid* does not require equipment to generate number itself; using RSNG to store and dial numbers from a pre-produced list is consistent with *Duguid*); *McEwen v. Nat'l Rifle Ass'n of Am.*, No. 2:20-cv-00153-LEW, 2021 WL 5999274, at *4 (D. Me. Dec. 20, 2021); and *Scherrer v. FPT Operating Co., LLC,* No. 19-CV-03703-SKC, 2023 WL 4660089, at *2–4 (D. Colo. July 20, 2023) (same, and noting direct split on issue throughout courts).

The instant amicus brief is a response to the notion that the administrative agency, the FCC, can untangle this mess by rulemaking.[2] That position is

[2] This position was taken recently by the Solicitor General in the matter of *Brickman v. United States*, Supreme Court No. 23-6. The Solicitor General argued that this "Court's intervention is not warranted" because "the FCC has open proceedings considering the question presented[.]" *Brickman v. United States*,

exactly the expansive and improper 'power creep' by agencies this court is now facing, especially with the current administration. See, e.g., *Security and Exchange Commission v. Jarkesy,* No. 22-859.

Agencies engage in rule-making to provide the contours of laws enacted by Congress, not to expand or restrict the provisions of the law. And they certainly do not exist, nor have any power, to overrule judicial decisions setting forth the specific meaning, limits or requirements of the words of an act of Congress. Article I vests the federal government's legislative powers in Congress, and Congress may not delegate those powers to an executive agency. See U.S. Const. Art. I, § 1; *Panama Refining Co. v. Ryan*, 293 U.S. 388, 420-433 (1935).

The Ninth Circuit's holding in *Borden* is that the TCPA does not cover any calls made by a random or sequential number generator ("RSNG") using marketing lists. That is clearly wrong. It strips the Act's coverage of the largest group of robo-calls sought to be banned by Congress—list dialing using an RSNG:

> "In that regard, it is notable that Congress, in its findings setting forth the basis for the statute, found that some '30,000 businesses actively telemarket goods and services to business and residential customers' and '[m]ore than 300,000 solicitors call more than 18,000,000 Americans every day.' 47 U.S.C. § 227 note, Pub. L. No. 102-243, § 2(2)-(3), 105

No. 23-6, Brief for the United States in Opposition, at p. 8 (Oct. 23, 2023).

> Stat. 2394, 2394. Those sorts of predicate congressional findings can shed substantial light on the intended reach of a statute. *See Sutton v. United Airlines, Inc.*, 527 U.S. 471, 484-87 (1999)."

ACA Int'l v. FCC, 885 F.3d 687, 698 (D.C. Cir. 2018)

> "The entire sales to service marketing function has been automated. Modern telemarketing software organizes information on current and prospective clients into databases designed to support businesses in every aspect of telephone sales." H.R. Rep. No. 102-317 at 7 (1991).
>
> "Businesses routinely purchase data from multiple sources in an effort to create unique product or service-specific databases." *Id*.
>
> "There are list brokers out there whose business it is to sell phone numbers, names, and so on and so forth, to the telemarketing industry."

Hearing on S. 1462 before Senate Subcommittee on Commerce, Science, and Transportation, 102d. Cong. 27 (Jul. 24, 1991) (Statement of Robert S. Bulmash).

CONCLUSION

The Solicitor General's claim that this 'mangling' (Judge Van Dyke's word) and stripping of the TCPA's most basic protection (marketing list targeted robo-calling) can be repaired by the FCC is wrong. The Agency cannot fix that problem. Nor even can another Circuit. Only this court has the power to do so, by reversing the lower court, and expressing that robo-calls of lists of numbers using an RSNG to produce or store those numbers is covered by the TCPA. And in

light of the millions of unwanted list-generated robo-calls every day in this fashion, it should do so.

Respectfully Submitted,

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