APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-15320

NOAH DUGUID, individually and on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

FACEBOOK, INC.,

Defendant-Appellee,

and

UNITED STATES OF AMERICA,

Intervenor-Appellee.

Argued and Submitted: Mar. 11, 2019
Filed: June 13, 2019

Before: J. Clifford Wallace, Eugene E. Siler,* and M. Margaret McKeown, Circuit Judges.

McKEOWN, Circuit Judge:

Almost thirty years ago, in the age of fax machines and dial-up internet, Congress took aim at

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* The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

unsolicited robocalls by enacting the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227. In the decades since, the TCPA has weathered the digital revolution with few amendments. With important exceptions, the TCPA forbids calls placed using an automated telephone dialing system ("ATDS"), commonly referred to as an autodialer.

Noah Duguid claims that Facebook used an ATDS to alert users, as a security precaution, when their account was accessed from an unrecognized device or browser. For unknown reasons, Duguid received the messages despite not being a Facebook customer or user and never consenting to such alerts. His repeated attempts to terminate the alerts were unsuccessful.

Facebook challenges the adequacy of Duguid's TCPA allegations and, alternatively, claims that the statute violates the First Amendment. We conclude that Duguid's allegations are sufficient to withstand Facebook's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).

As to the constitutional question, we join the Fourth Circuit and hold that a 2015 amendment to the TCPA, which excepts calls "made solely to collect a debt owed to or guaranteed by the United States," is content-based and incompatible with the First Amendment. *Am. Ass'n of Political Consultants, Inc. v. FCC*, 923 F.3d 159 (4th Cir. 2019) (hereinafter, *AAPC*). But rather than toss out the entire TCPA—a longstanding and otherwise constitutional guardian of consumer privacy—we sever the newly appended "debt-collection exception" as an unconstitutional restriction on speech.

BACKGROUND

I. The Telephone Consumer Protection Act

In what was thought to be telemarketing's heyday, Congress enacted the TCPA to "protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls." S. Rep. No. 102-178, at 1 (1991). With certain exceptions, the TCPA bans calls (including text messages) placed using an ATDS. 47 U.S.C. § 227(b)(1); *see Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) ("[A] text message is a 'call' within the TCPA.").

Since its enactment, the definition of an ATDS has remained the same: "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). In contrast, the scope of the prohibition section has evolved. In 2014, when Duguid received messages from Facebook, the statute excepted two types of calls: those "made for emergency purposes" and those "made with the prior express consent of the called party." *Id.* § 227(b)(1)(A) (2010). Effective November 2, 2015, Congress added a third exception for calls "made solely to collect a debt owed to or guaranteed by the United States." Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301(a)(1)(A), 129 Stat. 584, 588; 47 U.S.C. § 227(b)(1)(A)(iii). It is this "debt-collection exception" that Facebook contends is unconstitutional.

Two court rulings during this appeal have shifted the TCPA playing field. First, in *ACA International v. Federal Communications Commission*, the D.C.

Circuit overturned aspects of several Federal Communications Commission ("FCC") rulings construing the ATDS definition. 885 F.3d 687 (D.C. Cir. 2018). Shortly thereafter, in *Marks v. Crunch San Diego, LLC*, we construed *ACA International* to wipe the definitional slate clean, so we "beg[an] anew to consider the definition of ATDS under the TCPA." 904 F.3d 1041, 1049-50 (9th Cir. 2018). To clarify any ambiguity, we rearticulated the definition of an ATDS: "equipment which has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers automatically." *Id.* at 1053. That definition governs this appeal.

II. Duguid's Allegations[1]

Duguid is not a Facebook customer and has never consented to Facebook contacting his cell phone. Nonetheless, beginning in approximately January 2014, Facebook began sending Duguid sporadic text messages. The messages alerted Duguid that an unrecognized browser was attempting to access his (nonexistent) Facebook account. Each message followed a common template: "Your Facebook account was accessed [by/from] <browser> at <time>. Log in for more info."

Flummoxed, and unable to "log in for more info," Duguid responded to the messages by typing "Off" and "All off." Facebook immediately assured Duguid that

[1] At this stage, we treat Duguid's factual allegations as true and construe them in the light most favorable to Duguid. *See Northstar Fin. Advisors Inc. v. Schwab Invs.*, 779 F.3d 1036, 1042 (9th Cir. 2015), *as amended* (Apr. 28, 2015).

"Facebook texts are now off," but the messages kept coming. Duguid also requested via email that Facebook stop sending him messages, but he received similar, automated email responses that failed to resolve the issue. The text messages continued until at least October 2014.

Duguid sued Facebook for violating the TCPA, alleging that Facebook sent the text messages using an ATDS. Specifically, he alleges that Facebook established the automated login notification process as an extra security feature whenever a Facebook account is accessed from a new device. According to Duguid, Facebook maintained a database of phone numbers and—using a template and coding that automatically supplied the browser information and time of access—programmed its equipment to send automated messages to those numbers each time a new device accessed the associated account. Somehow, Facebook acquired Duguid's number and (as it did with the numbers provided by its users) stored and sent automated messages to that number.

Duguid sued on behalf of two putative classes: people who received a message from Facebook without providing Facebook their cell phone number; and people who notified Facebook that they did not wish to receive messages but later received at least one message. Each putative class reaches back four years from April 22, 2016, when Duguid filed the amended complaint. Duguid seeks statutory damages for each message, plus declaratory relief and an injunction prohibiting similar TCPA violations in the future.

The district court concluded that Duguid inadequately alleged that Facebook sent its messages

using an ATDS—a prerequisite for TCPA liability. After providing leave to amend, the district court dismissed the amended complaint with prejudice.

ANALYSIS

Faithful to our unflagging duty to assess constitutional standing, we hold that Duguid adequately alleges a concrete injury in fact. *See Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1042-43 (9th Cir. 2017) (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016)).

I. Sufficiency of the Allegations

Facebook invites us to avoid the First Amendment challenge by affirming on the ground that Duguid inadequately alleges a TCPA violation. According to Facebook, the equipment Duguid characterizes in the amended complaint is not an ATDS. We conclude that *Marks* forecloses that position.

By definition, an ATDS must have the capacity "to store or produce telephone numbers to be called, using a random or sequential number generator." 47 U.S.C. § 227(a)(1)(A). In *Marks*, we clarified that the adverbial phrase "using a random or sequential number generator" modifies only the verb "to produce," and not the preceding verb, "to store." 904 F.3d at 1052. In other words, an ATDS need not be able to use a random or sequential generator to store numbers—it suffices to merely have the capacity to "store numbers to be called" and "to dial such numbers automatically."[2] *Id.* at 1053.

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[2] An alternative to the capacity to store numbers is the capacity "to produce numbers to be called, using a random or sequential number generator." *Marks*, 904 F.3d at 1053; *see* 47 U.S.C.

Duguid's nonconclusory allegations plausibly suggest that Facebook's equipment falls within this definition. He alleges that Facebook maintains a database of phone numbers and explains how Facebook programs its equipment to automatically generate messages to those stored numbers. The amended complaint explains in detail how Facebook automates even the aspects of the messages that appear personalized. Those factual allegations, accepted as true and construed in the light most favorable to Duguid, sufficiently plead that Facebook sent Duguid messages using "equipment which has the capacity . . . to store numbers to be called . . . and to dial such numbers."[3] *Id.*

Facebook responds that *Marks* cannot possibly mean what it says, lest the TCPA be understood to cover ubiquitous devices and commonplace consumer communications. In particular, Facebook cautions, such an expansive reading of *Marks* would capture smartphones because they can store numbers and, using built-in automated response technology, dial those numbers automatically. And if smartphones are ATDSs, then using them to place a call—even without using the automated dialing functionality—violates the TCPA. *See In re Rules & Regulations*

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§ 227(a)(1)(A). Because Duguid adequately alleges the capacity to store numbers, we do not address whether he adequately alleges the capacity to produce.

[3] Our conclusion that Duguid's detailed factual allegations are *sufficient* says nothing about whether that level of detail is *necessary* to plead ATDS use. We also note that Facebook does not raise, so we do not consider, the requirement that an ATDS have the capacity to "dial . . . numbers *automatically*." *Marks*, 904 F.3d at 1053 (emphasis added).

Implementing the Telephone Consumer Protection Act of 1991, 30 FCC Rcd. 7961, 7975 ¶ 19 n.70 (July 10, 2015); *ACA Int'l*, 885 F.3d at 704. "It cannot be the case," the D.C. Circuit has remarked, "that every uninvited communication from a smartphone infringes federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact." *ACA Int'l*, 885 F.3d at 698.

As a textual anchor for narrowing *Marks*, Facebook points to the statutory requirement (repeated in *Marks*) that an ATDS store numbers "to be called." 47 U.S.C. § 227(a)(1)(A). The ATDS at issue in *Marks* was designed to send promotional text messages to a list of stored numbers—a proactive advertising campaign. *See* 904 F.3d at 1048. Facebook differentiates its equipment because it stores numbers "to be called" only reflexively—as a preprogrammed response to external stimuli outside of Facebook's control. It urges us to cabin *Marks* as inapplicable to such purely "*responsive* messages," because numbers stored to send such messages were not stored "to be called." So construed, Facebook argues, *Marks* avoids the outcome of deeming smartphones a type of ATDS.

We cannot square this construction with *Marks* or the TCPA. *Marks*'s gloss on the statutory text provides no basis to exclude equipment that stores numbers "to be called" only reflexively. Indeed, the statute suggests otherwise: "to be called" need not be the only purpose for storing numbers—the equipment need only have the "capacity" to store numbers to be called. 47 U.S.C. § 227(a)(1). The amended complaint does not so much as suggest that Facebook's equipment could (or did) store numbers for any other reason.

Importantly, rejecting the active-reflexive distinction does not render "to be called" superfluous. Phone numbers are frequently stored for purposes other than "to be called": shops and restaurants store numbers to identify customers in their loyalty programs; electronic phonebooks store numbers for public access; data mining companies store and sell numbers; and software for customer relations management stores numbers to help businesses manage their clientele. So "to be called" has meaning without inferring a silent distinction between active and reflexive calls.

Finally, Facebook's argument that any ATDS definition should avoid implicating smartphones provides no reason to adopt the proposed active-reflexive distinction. Even if Facebook's premise has merit, the quintessential purpose for which smartphone users store numbers is "to be called" proactively. In other words, excluding equipment that stores numbers "to be called" only reflexively would not avoid capturing smartphones.

Our reading supports the TCPA's animating purpose—protecting privacy by restricting unsolicited, automated telephone calls. *See* S. Rep. 102-178, at 1. The messages Duguid received were automated, unsolicited, and unwanted. We are unpersuaded by Facebook's strained reading of *Marks* and the TCPA.

Facebook advances a separate argument that it was entitled to dismissal on the pleadings because the TCPA excepts "call[s] made for emergency purposes." 47 U.S.C. § 227(b)(1)(A). The FCC has construed this exception broadly, to include "calls made necessary in

any situation affecting the health and safety of consumers." 47 C.F.R. § 64.1200(f)(4). But Duguid alleges that he is not a Facebook customer and has advised Facebook of that fact repeatedly and through various means of communication. Accepting these allegations as true, Duguid did not have a Facebook account, so his account could not have faced a security issue, and Facebook's messages fall outside even the broad construction the FCC has afforded the emergency exception. *See In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 31 F.C.C. Rcd. 9054, 9063 ¶ 21 n.76 (Aug. 4, 2016) ("[P]urported emergency calls cannot be targeted to just any person. These calls must be about a bona fide emergency that is relevant to the called party.").

Finally, it bears reiterating that we are considering the amended complaint at the Rule 12(b)(6) dismissal stage. Thus, we review the sufficiency of the allegations, not their accuracy or the intricate workings of Facebook's equipment, algorithms, or notification system. Developing those factual details remains for the parties and the district court on remand.

II. First Amendment

As a threshold matter, we confirm that Facebook has standing to challenge the constitutionality of the post-amendment TCPA. Although the TCPA violations Duguid alleges predate the debt-collection exception, which took effect in 2015, he also seeks damages on behalf of a putative class for violations that occurred in part in 2016, as well as forward-looking injunctive relief based on the post-amendment

TCPA. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994) ("[A]pplication of new statutes passed after the events in suit is unquestionably proper in many situations," such as "[w]hen the intervening statute authorizes or affects the propriety of prospective relief."). The class allegations and request for injunctive relief vest Facebook with a sufficient personal stake in the post-amendment TCPA to challenge its constitutionality.

A. The Post-Amendment TCPA Is Content-Based

Turning to the merits, we first evaluate whether the TCPA is content-neutral and subject to intermediate scrutiny or content-based and subject to strict scrutiny. We have repeatedly affirmed that the pre-amendment TCPA was content-neutral and consistent with the First Amendment. *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 876 (9th Cir. 2014), *aff'd*, 136 S. Ct. 663 (2016); *Moser v. Fed. Commc'ns Comm'n*, 46 F.3d 970, 975 (9th Cir. 1995). The statute satisfied intermediate scrutiny because it was narrowly tailored to advance the "government's significant interest in residential privacy" and left open "ample alternative channels of communication." *Moser*, 46 F.3d at 974; *see also Gomez*, 768 F.3d at 876-77 (recognizing that the government's interest in privacy extends beyond the household, and rejecting the argument that the statute is inadequately tailored insofar as it applies to text messages).

The debt-collection exception, which adds a purposive element, changes the framework. The TCPA now favors speech "solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C.

§ 227(b)(1)(A)(iii). Because this section "target[s] speech based on its communicative content," the exception is content-based and subject to strict scrutiny. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015); *see AAPC*, 923 F.3d at 165-67.

The government's argument that the debt-collection exception is relationship-based as opposed to content-based is foreclosed by *Reed*. The "crucial first step in the content-neutrality analysis" is "determining whether the law is content neutral on its face." *Reed*, 135 S. Ct. at 2228. If it is not, the law "is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)). For that reason, we "consider[] whether a law is content neutral on its face *before* turning to the law's justification or purpose." *Id.*

It is obvious from the text that the debt-collection exception's applicability turns entirely on the content of the communication—i.e., whether it is "solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A)(iii). The identity and relationship of the caller are irrelevant. And the government's "innocuous justification"—permitting third-party debt collectors to place calls on the government's behalf using the same means as the government itself can use—"cannot transform a facially content-based law into one that is content neutral." *Reed*, 135 S. Ct. at 2228. We therefore conclude that the exception is content-based, without

resorting to *Reed*'s second, intent-focused inquiry. *See id.* at 2227-28.

Our sister circuits' post-*Reed* decisions are consistent with our reading. There is, of course, the Fourth Circuit's decision in *AAPC*, decided shortly after argument in our case, in which the court reached the same conclusion regarding the debt-collection provision. 923 F.3d at 161 ("[W]e agree with the Plaintiffs that the debt-collection exemption contravenes the Free Speech Clause. In agreement with the Government, however, we are satisfied to sever the flawed exemption from the automated call ban."). Earlier, the Fourth Circuit also deemed content-based South Carolina's TCPA analogue because the statute applies only to robocalls "of a political nature" or made "for the purpose of making an unsolicited consumer telephone call." *Cahaly v. Larosa*, 796 F.3d 399, 402 (4th Cir. 2015) (quoting S.C. Code § 16-17-446(A)). "Applying *Reed*'s first step," the Fourth Circuit reasoned, "South Carolina's anti-robocall statute is content based because it makes content distinctions on its face." *Id.* at 405. The Eighth Circuit likewise deemed content-based an exception to Minnesota's TCPA analogue for messages sent to solicit voluntary donations. *Gresham v. Swanson*, 866 F.3d 853, 854-55 (8th Cir. 2017) (citing Minn. Stat. § 325E.27(a)), *cert. denied*, 138 S. Ct. 682 (2018).

By contrast, the Seventh Circuit upheld Indiana's TCPA analogue, which exempted calls for "(1) Messages from school districts to students, parents, or employees[;] (2) Messages to subscribers with whom the caller has a current business or personal relationship[; and] (3) Messages advising employees of

work schedules." *Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303, 304 (7th Cir.) (quoting Ind. Code § 24-5-14-5(a)), *cert. denied sub nom. Patriotic Veterans, Inc. v. Hill*, 137 S. Ct. 2321 (2017). The first and second exceptions to the Indiana statute are based on the relationship between caller and recipient, and the plaintiff did not invoke the third exception. *See id.* at 305 (suggesting in dicta that the third exception, were it invoked, is content-based). Accordingly, the Seventh Circuit upheld the Indiana statute as content-neutral and consistent with the First Amendment. *Id.* at 306 ("Indiana does not discriminate by content—the statute determines who may be called, not what message may be conveyed . . . .").

The text of the TCPA makes clear that the availability of the exception depends exclusively on the purpose and content of the call. The relationship between caller and recipient, though not coincidental, does not bear on the exception's applicability. *Reed* forbids us from imputing motives or sensibilities to Congress where, as here, its plain language is clear, and clearly content-based. 135 S. Ct. at 2228.

B. The Post-Amendment TCPA Fails Strict Scrutiny

Because it is content-based, the TCPA's debt-collection provision is "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests."[4] *Reed*, 135 S. Ct. at 2226. More specifically,

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[4] We reject the government's unsupported assertion that Facebook's security messages are subject to intermediate scrutiny because they constitute commercial speech. *See Hunt v. City of Los Angeles*, 638 F.3d 703, 715 (9th Cir. 2011)

the government (and Duguid, who adopts the government's constitutional arguments) must demonstrate that the TCPA's "differentiation between [robocalls to collect a debt owed to or guaranteed by the United States] and other types of [robocalls] . . . furthers a compelling government interest and is narrowly tailored to that end." *Id.* at 2231. Importantly, we focus our analysis on the content-based differentiation—the debt-collection exception—*not* on the TCPA overall. *See id.* at 2231-32; *AAPC*, 923 F.3d at 167 ("[I]n order to survive strict scrutiny, the Government must show that *the debt-collection exemption* has been narrowly tailored to further a compelling governmental interest." (emphasis added)).

The government seriously advocates only one interest: "the protection of personal and residential privacy." This articulation is a head-scratcher, because robocalls to collect government debt are just as invasive of privacy rights as robocalls placed for other purposes. On that point, congressional findings corroborate common sense (not to mention practical experience): "Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, *regardless of the content* or the initiator of the message, to be a nuisance and an invasion of privacy."

("Commercial speech is 'defined as speech that does no more than propose a commercial transaction.' . . . Where the facts present a close question, 'strong support' that the speech should be characterized as commercial speech is found where the speech is an advertisement, the speech refers to a particular product, and the speaker has an economic motivation." (internal citations omitted)).

Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(10), 105 Stat. 2394, 2394 (emphasis added). Permitting callers to collect government debt thus hinders—not furthers—the government's asserted interest. Because it "subverts the privacy protections underlying the" TCPA and "deviates from the purpose of the automated call ban," the debt-collection exception is fatally underinclusive. *AAPC*, 923 F.3d at 168.

Contrasting the privacy implications of the TCPA's longstanding consent and emergency exceptions highlights this tailoring defect. Robocalls placed pursuant to consent "are less intrusive than other automated calls" because "consent generally diminishes any expectation of privacy." *Id.* at 169. So too are emergency robocalls, because they are infrequent, "protect[] the safety and welfare of Americans," and serve the public interest. *Id.* at 170. By contrast, an unconsented, non-emergency robocall thoroughly invades personal and residential privacy, whether it is placed to collect government debt or for some other purpose. The universe of otherwise illegal calls that the debt-collection exception permits—which one senator estimated to be in the tens of millions—has an outsized, detrimental impact on residential and personal privacy. *See In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 31 F.C.C. Rcd. 9074, 9078 ¶ 9 & n.36 (Aug. 11, 2016). This incongruency underscores that the exception impedes, rather than furthers, the statute's purpose.

To evade this largely self-evident conclusion, the government would have us focus our analysis on the

TCPA writ large rather than the debt-collection exception. It argues that the post-amendment statute, viewed holistically, remains narrowly tailored to protect personal and household privacy. This gloss-over approach is at odds with *Reed*, which directs that the tailoring inquiry focus on the content-based differentiation—here, the debt-collection exception. *See* 135 S. Ct. at 2231-32; *see also AAPC*, 923 F.3d at 167.

The government's expanded lens also fails in its objective. The post-amendment TCPA is underinclusive, in that it excepts automated calls placed pursuant to the debt-collection exception, which are—all else being equal—every bit as invasive of residential and personal privacy as any other automated call. *See* Pub. L. No. 102-243, § 2(10), 105 Stat. at 2394. It is also overinclusive because the government—in its own words—could have accomplished the same goal in a content-neutral manner by basing the exception "on the called party's preexisting relationship with the federal government." *See Reed*, 135 S. Ct. at 2232. And the TCPA's potentially expansive application to everyday consumer communications—a small fraction of which implicate residential and personal privacy—further emphasizes its over-inclusiveness. *See ACA Int'l*, 885 F.3d at 697-99.

The government halfheartedly suggests an alternative interest: protecting the public fisc.[5] We

[5] The President's annual budget proposal for fiscal year 2015—the wellspring of the debt-collection exception—projected that the amendment would yield $12 million per year over the ensuing decade. *See* Fiscal Year 2015 President's Budget, at 185,

credit this argument for candor: debt collection is unescapably the exception's main purpose—hence its inefficacy in protecting privacy. *See Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015) ("[U]nderinclusiveness can raise doubts about whether the government is in fact pursuing the interest it invokes . . . ." (internal quotation marks and citation omitted)). But even assuming that protecting the public fisc is a compelling interest, the debt-collection exception is not the least restrictive means to achieve it. For one, Congress could protect the public fisc in a content-neutral way by phrasing the exception in terms of the relationship rather than content. *See Reed*, 135 S. Ct. at 2232 (noting the "ample content-neutral options" available to serve the same government interest). The government could also obtain consent from its debtors or place the calls itself. *See AAPC*, 923 F.3d at 169 n.10 (noting these possibilities); *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016), *as revised* (Feb. 9, 2016) ("The United States and its agencies, it is undisputed, are not subject to the TCPA's prohibitions because no statute lifts their immunity."). We hold that the debt-collection exception is content-based and insufficiently tailored to advance the government's interests in protecting privacy or the public fisc.

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available at https://www.govinfo.gov/content/pkg/BUDGET-2015-BUD/pdf/BUDGET-2015-BUD.pdf; Fiscal Year 2015 President's Budget: Analytical Perspectives, at 123, *available at* https://www.govinfo.gov/content/pkg/BUDGET-2015-PER/pdf/BUDGET-2015-PER.pdf.

C. The Debt-Collection Exception Is Severable

Though incompatible with the First Amendment, the debt-collection exception is severable from the TCPA. *See AAPC*, 923 F.3d at 171. Congressional intent is the touchstone of severability analysis. *See Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984). Congress simplifies our inquiry when, as here, it speaks directly to severability: "If any provision of this chapter [containing the TCPA] . . . is held invalid, the remainder . . . shall not be affected thereby." 47 U.S.C. § 608. While not dispositive, this unambiguous language endorsing severability relieves us of a counterfactual inquiry as to congressional intent and creates a presumption of severability absent "strong evidence that Congress intended otherwise." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987).

History reaffirms what Congress said. The TCPA has been "fully operative" for more than two decades. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010). Then, with little fanfare, Congress appended the comparatively modest debt-collection exception as a small portion of the 2015 budget bill. The newly enacted exception did not suddenly and silently become so integral to the TCPA that the statute could not function without it. *See Gresham*, 866 F.3d at 855 (severing a newly enacted, content-based exception to Minnesota's robocalling statute because "[t]he balance of the statute pre-existed the amendment, and we presume that the Minnesota legislature would have retained the pre-existing statute"); *cf. Rappa v. New Castle County*, 18 F.3d 1043, 1073 (3d Cir. 1994) ("[T]he proper remedy

for content discrimination *generally* cannot be to sever the statute so that it restricts more speech than it did before—at least *absent quite specific evidence of a legislative preference* for elimination of the exception." (emphases added)).

Excising the debt-collection exception preserves the fundamental purpose of the TCPA and leaves us with the same content-neutral TCPA that we upheld—in a manner consistent with *Reed*—in *Moser* and *Gomez*.

CONCLUSION

Duguid adequately alleges Facebook utilized an ATDS, and the additional elements of a TCPA claim are not at issue in this appeal. We reject Facebook's challenge that the TCPA as a whole is facially unconstitutional, but we sever the debt-collection exception as violative of the First Amendment. We reverse the dismissal of Duguid's amended complaint and remand for further proceedings.

REVERSED AND REMANDED.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-15320

NOAH DUGUID, individually and on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

FACEBOOK, INC.,

Defendant-Appellee,

and

UNITED STATES OF AMERICA,

Intervenor-Appellee.

Filed: Aug. 22, 2019

Before: J. Clifford Wallace, Eugene E. Siler,* and M. Margaret McKeown, Circuit Judges.

ORDER

The panel unanimously votes to deny the petition for panel rehearing.

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* The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

Judge McKeown votes to deny the petition for rehearing en banc, and Judges Wallace and Siler so recommend. The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

Appendix C

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 15-cv-00985-JST

NOAH DUGUID,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

Filed: Mar. 24, 2016

ORDER GRANTING MOTION TO DISMISS

Before the Court is Defendant Facebook, Inc.'s Motion to Dismiss Plaintiff's Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6). ECF No. 24. Plaintiff Noah Duguid opposes the motion. ECF No. 30. For the reasons set forth below, the Court will grant the motion to dismiss.

I. Background

For the purpose of deciding this motion, the Court accepts as true the following allegations from Plaintiff's Complaint, ECF No. 1. *See Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

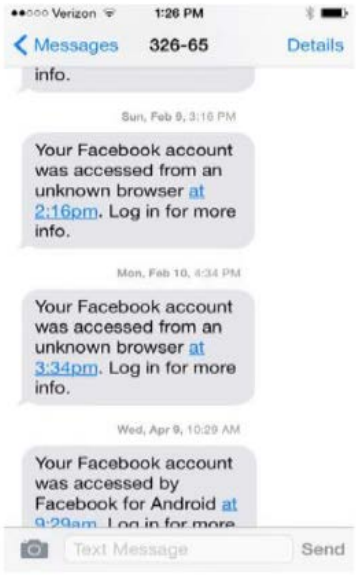
Defendant Facebook, Inc. ("Facebook") operates an online social network. Compl. ¶ 3. As of September

2014, Facebook had 864 million daily active users and 1.35 billion monthly active users. *Id.* Users often share private information on Facebook. *Id.* ¶ 4. As an "extra security feature," a user may activate "login notifications" to alert her via text message when her account is accessed from a new device. *Id.* ¶¶ 4-5. The notifications state: "Your Facebook account was accessed from [internet browser] at [time]. Log in for more info." *Id.* ¶ 5.

Login notification text messages are often sent to the cellphones of persons who have not authorized Facebook to contact them on their cellphones, who have requested that the notifications stop, or who do not use Facebook. *Id.* Such messages may be sent several times a day. *Id.* Facebook's online instructions direct users to change their account settings in order to deactivate login notifications, but provide no solution for persons who receive messages even though they have no Facebook account. *Id.* at 6, Ex. B. When someone replies "off" to Facebook's text messages, Facebook responds with a message stating, "Facebook texts are now off. Reply on to turn back on." *Id.* ¶ 7. Notwithstanding this response, Facebook often continues to send unauthorized text messages. *Id.*

Plaintiff Noah Duguid began receiving Facebook login notifications via text message on or around January 25, 2014. *Id.* ¶ 20. The messages were sent from an SMS short code, 326-65 ("FBOOK"), which is licensed and operated by Defendant or one of its agents. *Id.* ¶ 21. Although Duguid never provided his cellphone number to Facebook or authorized Facebook to send him text messages, he received repeated login

notification messages. *Id.* ¶¶ 22-26. Several example messages are reproduced below:



Id. ¶ 22, Ex. D. On or around April 20, 2014, Duguid sent Facebook an email message requesting that the text messages cease. *Id.* ¶ 27. In response, Facebook sent an automated message directing Duguid to log on to the Facebook website in order to report problematic content. *Id.* Duguid's efforts to deactivate the messages by responding "off" and "all off" were also unsuccessful. *Id.* ¶ 28.

On March 3, 2015, Plaintiff filed his complaint against Facebook, alleging violations of the Telephone Consumer Protection Act ("TCPA"). He seeks to represent the following two classes:

> Class 1: All persons within the United States who did not provide their cellular telephone number to Defendant and who received one or more text messages, from or on behalf of

> Defendant to said person's cellular telephone, made through the use of any automatic telephone dialing system within the four years prior to the filing of the Complaint.
>
> Class 2: All persons within the United States who, after notifying Defendant that [they] no longer wished to receive text messages and receiving a confirmation from Defendant to that effect, received one or more text messages, from or on behalf of Defendant to said person's cellular telephone, made through the use of any automatic telephone dialing system within the four years prior to the filing of the Complaint.

Id. ¶ 34.

Defendant moves to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), and requests that the Court take judicial notice of certain publicly available webpages. ECF Nos. 24, 24-3. Plaintiff opposes the motion to dismiss. ECF No. 30.

The Court has jurisdiction over this action pursuant to 28 U.S.C. section 1331.

II. Request for Judicial Notice

A. Legal Standard

Pursuant to Federal Rule of Evidence 201(b), "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." The Court may also "consider materials incorporated into the complaint,"

where "the complaint necessarily relies upon a document or the contents of the document are alleged in a complaint, the document's authenticity is not in question and there are no disputed issues as to the document's relevance." *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010). The Court "must take judicial notice if a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(c)(2).

B. Facebook Webpages

First, Defendant requests that the Court take judicial notice of screen shots of three Facebook webpages: Facebook's "Statement of Rights and Responsibilities" and two Help Center webpages titled, "How do I verify my account?" and "How do I add or remove credit card info from my account?". ECF No. 24-3 at 2; Exs. 1-3. Defendant argues that the Court may take judicial notice of these exhibits because they are "currently publicly available on Facebook's website—the same website upon which Plaintiff repeatedly relies in his complaint," and "there is no reasonable dispute regarding the information." ECF No. 24-3 at 3. Furthermore, Defendant argues, the Court may consider these documents pursuant to the incorporation by reference doctrine because Plaintiff's Complaint relies on and attaches Facebook webpages, and alleges facts relating to the login notification process and the private information that Facebook users may use login notifications to protect. ECF No. 24-3 at 4-5. Plaintiff has not filed an opposition to Defendant's request for judicial notice, although he does argue that "Facebook's suppositions are matters outside the

pleadings and should not be considered in deciding the motion to dismiss." ECF No. 30 at 4 n.1.

"'[F]ederal courts considering the issue have expressed skepticism as to whether it is appropriate to take judicial notice of information or documents' from websites when the sole justification for judicial notice is that the information or documents 'appear[] on websites that are created and maintained by a party to the litigation.'" *Punian v. Gillette Co.*, No. 14-cv-05028-LHK, 2015 WL 4967535, at *5 (N.D. Cal. Aug. 20, 2015) (quoting *Gerritsen v. Warner Bros. Entm't Inc.*, No. 14-cv-03305 MMM (CWx), 2015 WL 4069617, at * 10 (C.D. Cal. Jan. 30, 2015)); *see also Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 795 (N.D. Cal. 2011) (taking judicial notice of document from defendant's website that was cited in the complaint, but denying request for judicial notice as to other webpages created by the defendant). The Court finds that the inclusion of Exhibits 1, 2, and 3 on Facebook's website "is not, standing alone, a sufficient basis for the Court to grant the request" for judicial notice. *Punian*, 2015 WL 4967535, at *5.

Moreover, these documents are not incorporated by reference in Plaintiff's complaint because it neither necessarily relies on them nor alleges their contents. *See Coto Settlement*, 593 F.3d at 1038. Defendants correctly state that Plaintiff's Complaint discusses the login notification process, includes some Facebook Help Center webpages as attachments, and states that users share private information on Facebook. ECF No. 24-3 at 4-5. But the Complaint does not reference or incorporate the account verification process, Facebook's Statement of Rights and

Responsibilities, or the process by which users share credit card details with Facebook. *See Fraley*, 830 F. Supp. 2d at 795. The Court therefore denies Facebook's request for judicial notice as to Exhibits 1, 2, and 3.

C. Media Reports

Second, Facebook requests that the Court take judicial notice of the following media reports: (1) Sharon Profis, *Find out if someone's logging in to your Facebook account*, CNET (Dec. 10, 2011, 4:36 AM), http://www.cnet.com/au/how-to/find-out-if-someones-logging-in-to-your-facebook-account/; (2) Alyssa Abkowitz, *Wrong Number? Blame Companies' Recycling*, THE WALL STREET JOURNAL (Dec. 1, 2011), http://www.wsj.com/articles/SB10001424052970204012004577070122687462582; (3) Alison Griswold, *Venmo Money, Venmo Problems*, SLATE (Feb. 25, 2015, 8:10 PM), http://www.slate.com/articles/technology/safety_net/2015/02/venmo_security_it_s_not_as_strong_as_the_company_wants_you_to_think.html. ECF No. 24-3 at 2, Ex. 4-6. Plaintiff has not filed an opposition to this request.

The Court "may take judicial notice of publications introduced to indicate what was in the public realm at the time, not whether the contents of those articles were in fact true." *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2009) (internal quotation marks omitted); *accord Heliotrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 n. 18 (9th Cir. 1999) (taking judicial notice "that the market was aware of the information contained in news articles submitted by the

defendants"). The Court therefore takes judicial notice of these publications "solely as an indication of what information was in the public realm at the time." *Von Saher*, 592 F.3d at 960.

III. Motion to Dismiss

A. Legal Standard

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). The Court must "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

B. Discussion

Defendant argues that Plaintiff's Complaint should be dismissed for failure to state a claim for three independent reasons. ECF No. 24 at 1. First,

Defendant argues that Plaintiff does not adequately allege that the login notifications were sent by an automatic telephone dialing system as required under the TCPA. *Id.* at 7-12; *see* 47 U.S.C. § 227(a)(1). Second, Defendant argues that the login notifications fall within the TCPA's exception for calls "made for emergency purposes." ECF No. 24 at 12-15; *see* 47 U.S.C. 227(b)(1)(A). Third, Defendant argues that because the login notifications are non-commercial security messages sent to protect individual consumers' privacy, they cannot be restricted under the First Amendment. ECF No. 24 at 15-18.[1]

To state a claim for a violation of the TCPA, a plaintiff must allege that "(1) the defendant called a cellular telephone number; (2) using an automatic telephone dialing system; (3) without the recipient's prior express consent." *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012); 47 U.S.C. § 227(b)(1). A text message is a "call" within the meaning of the TCPA. *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009). An "automatic telephone dialing system" ("ATDS") is "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). "[T]he clear language of the TCPA 'mandates that the focus must

[1] In a footnote, Defendant also states that "[i]t is questionable whether Plaintiff has Article III standing for his TCPA claim" because he "does not allege that he pays incrementally for each text he receives or that he in fact paid for the alleged login notifications." ECF No. 24 at 2 n.1. Defendant indicates that it may seek to bring this standing argument "at a later time." *Id.* The Court does not address the argument in this order.

be on whether the equipment has the *capacity* to store or produce telephone numbers to be called, using a random or sequential number generator.'" *Meyer*, 707 F.3d at 1043 (quoting *Satterfield*, 569 F.3d at 951) (emphasis in original). "[A] system need not actually store, produce, or call randomly or sequentially generated telephone numbers, it need only have the capacity to do it." *Satterfield*, 569 F.3d at 951.

Plaintiff alleges that "[t]he text messages sent to Plaintiff's cellular phone were made with an ATDS as defined by 47 U.S.C. § 227(a)(1)," and that "[t]he ATDS has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator." Compl. ¶¶ 29-30. This conclusory allegation that Facebook used an ATDS is not, without more, sufficient to support a claim for relief under the TCPA. *Kramer v. Autobytel, Inc.*, 759 F. Supp. 2d 1165, 1171 (N.D. Cal. 2010) (the "naked assertion" that messages were sent "using equipment that, upon information and belief, had the capacity to store or produce telephone numbers to be called, using a random or sequential number generator . . . need not be taken as true"); *Flores v. Adir Int'l, LLC*, No. 15-cv-00076-AB, 2015 WL 4340020, at *3 (C.D. Cal. July 15, 2015) ("Without more, Plaintiff's conclusory allegation that Defendant used an ATDS is little more than speculation, and cannot support a claim for relief under the TCPA"); *see also Twombly*, 550 U.S. at 555 ("a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do" (internal quotation marks and alterations omitted)).

Because it may be difficult for a plaintiff to identify the specific type of dialing system used without the benefit of discovery, courts have allowed TCPA claims to proceed beyond the pleading stage where a plaintiff's allegations support the inference that an ATDS was used. For example, in *Kramer v. Autobytel*, the court found that the complaint, read as a whole, contained "sufficient facts to show that it is plausible" that the defendants used an ATDS where the plaintiff alleged that he received messages from a short code registered to one of the defendants, the messages were advertisements written in an impersonal manner, and the plaintiff had no other reason to be in contact with the defendants. 759 F. Supp. 2d at 1171. Similarly, in *Kazemi v. Payless Shoesource, Inc.*, the court concluded that "plaintiff's description of the received messages as being formatted in SMS short code licensed to defendants, scripted in an impersonal manner and sent en masse supports a reasonable inference that the text messages were sent using an ATDS," and the complaint therefore met federal pleading requirements. No. 09-cv-05142-MHP, 2010 WL 963225, at *2 (N.D. Cal. Mar. 16, 2010); *see also Gragg v. Orange Cab Co., Inc.*, No. 12-cv-0576-RSL, 2013 WL 195466, at *3 n.3 (W.D. Wash. Jan. 17, 2013) ("Plaintiffs alleging the use of a particular type of equipment under the TCPA are generally required to rely on indirect allegations such as the content of the message, the context in which it was received, and the existence of similar messages, to raise an inference that an automated dialer was utilized. Prior to the initiation of discovery, courts cannot expect more."); *see also* Scott Dodson, *New Pleading, New Discovery*,

109 Mich. L. Rev. 53 (2010) (arguing in favor of "limited presuit or predismissal discovery to counteract the information asymmetry and overscreening caused by *Twombly* and *Iqbal*").

Where, however, a "[p]laintiff's own allegations suggest direct targeting that is inconsistent with the sort of random or sequential number generation required for an ATDS," courts conclude that the allegations are insufficient to state a claim for relief under the TCPA. *Flores*, 2015 WL 4340020, at *4. In *Flores v. Adir International*, for example, the plaintiff alleged that the defendant was a debt collector that sent him a number of text messages for the purpose of collecting on a specific debt, each of which included the same reference number. *Id.* The text messages did not include the plaintiff's name and appeared to follow a generic template, and the plaintiff alleged that he received immediate responses to his "Stop" texts. *Id.* at *3-4. The court found that while these allegations might support the reasonable inference that the defendant's equipment was capable of some form of automation, they did not suggest the use of an ATDS as defined in the TCPA. *Id.* at *4-5. To the contrary, "the content of the message, the context in which it was received, and the existence of similar messages all weigh[ed] *against* an inference that Defendant used an ATDS," suggesting instead "that Defendant expressly targeted Plaintiff." *Id.* at *5 (emphasis in original) (internal quotation marks omitted). *See also Daniels v. Cmty. Lending, Inc.*, No. 13-cv-488-WQH-JMA, 2014 WL 51275, at *5 (S.D. Cal. Jan. 6, 2014) (plaintiffs did not adequately allege the use of an ATDS where the "alleged calls to Plaintiffs do not appear to have been 'random,' 47 U.S.C. § 227(a)(1);

instead the calls are alleged to be directed specifically toward Plaintiffs").

Here, as in *Flores*, Plaintiff's allegations do not support the inference that the text messages he received were sent using an ATDS. Plaintiff alleges that the login notifications are designed "to alert users when their account is accessed from a new device." Compl. ¶ 4. The text messages follow the following template: "Your Facebook account was accessed from [internet browser] at [time]. Log in for more info." *Id.* ¶¶ 5, 22. Plaintiff has attached to his Complaint a webpage from Facebook's online Help Center, which explains that users must add their mobile numbers to their accounts in order to receive login notifications by text message. *Id.* Ex. A. These allegations suggest that Facebook's login notification text messages are targeted to specific phone numbers and are triggered by attempts to log in to Facebook accounts associated with those phone numbers.[2] Although Plaintiff alleges that the operation of this system is "sloppy" because messages are sent to individuals who have never had a Facebook account, have never shared their phone number with Facebook, and/or who have requested deactivation of the login notifications, he does not suggest that Facebook sends text messages en masse to randomly or sequentially generated numbers. *Id.* ¶¶ 5, 8. As in *Flores*, "it is at least *possible* that Defendant utilized a system that is capable of storing or generating a random or sequential list of telephone

[2] In his opposition to the motion to dismiss, Plaintiff acknowledges that "the messages are automatically sent when the subject Facebook account is accused from an unknown device." ECF No. 30 at 5.

numbers and then dialing them," 2015 WL 4340020, at *4 (emphasis in original), but nothing in Plaintiff's Complaint "nudge[s] [his] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 547.[3]

In his opposition, Plaintiff suggests that the capacity to produce or store random or sequential numbers is not a necessary feature of an ATDS, citing a 2003 order in which the Federal Communications Commission ("FCC") concluded that a predictive dialer constitutes an ATDS. ECF No. 30 at 7-13. The FCC described a predictive dialer as "equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when a sales agent will be available to take calls. The hardware, when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers." *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14091-93 (2003). Courts in this district have concluded that the reasoning of the FCC's order is not restricted to predictive dialers. *See Nunes v. Twitter, Inc.*, No. 14-cv-02843-VC, 2014

[3] Plaintiff also alleges that Facebook sends automatic responses to opt-out texts. These responses are not actionable under the TCPA. *See Derby v. AOL, Inc.*, No. 15-cv-00452-RMW, 2015 WL 3477658, at *6 (N.D. Cal. June 1, 2015) ("a single message sent in response to plaintiff's text (or texts) is not the kind of intrusive, nuisance call that the TCPA prohibits"); *In Re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961 ¶ 57 at *21 (2015) (describing a ruling in which the FCC "concluded that a one-time text confirming a consumer's request to opt out of future calls did not violate the TCPA").

WL 6708465, at *1 (N.D. Cal. Nov. 26, 2014) ("Although this language is not crystal clear, it appears to encompass any equipment that stores telephone numbers in a database and dials them without human intervention."); *Fields v. Mobile Messengers Am., Inc.*, No. 12-cv-05160-WHA, 2013 WL 6774076, at *3 (N.D. Cal. Dec. 23, 2013) (concluding that there were genuine disputes of material fact regarding whether messages were sent using an ATDS where plaintiffs alleged that the equipment used functioned similarly to a predictive dialer in that it received numbers from a computer database and dialed those numbers without human intervention).

But Duguid has not alleged that Facebook uses a predictive dialer, or equipment that functions like a predictive dialer. The Complaint plainly alleges that the text messages were sent using an ATDS that "has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator." Compl. ¶¶ 29-30. As discussed above, the Court concludes that this claim is not plausible, and it will therefore dismiss the TCPA claims for failure to adequately allege that the login notifications were sent using an ATDS.

Because the Court dismisses the complaint on this basis, it need not address Facebook's arguments that the motion should be granted because Plaintiff's allegations establish that human intervention triggered the login notifications, and because the notifications are sent for emergency purposes. The Court also does not reach the argument that imposing liability on Facebook for sending the login notifications would violate the First Amendment. *See*

San Francisco Tech., Inc. v. GlaxoSmithKline LLC, No. 10-cv-03248-JF NJV, 2011 WL 941096, at *2 (N.D. Cal. Mar. 16, 2011) ("Because it concludes that SF Tech's claims are subject to dismissal on other bases, the Court need not decide the constitutional issues presented here, at least at the present time.").

CONCLUSION

For the foregoing reasons, the motion to dismiss is granted without prejudice. Plaintiff may file an amended complaint within 30 days of the date of this order.

An Initial Case Management Conference is scheduled for June 1, 2016. A Joint Case Management Conference Statement is due by May 18, 2016. *See* ECF No. 29.

IT IS SO ORDERED.

Dated: March 24, 2016

[handwritten: signature]
JON S. TIGAR
United States District Judge

Appendix D

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 15-cv-00985-JST

NOAH DUGUID,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

Filed: Feb. 16, 2017

ORDER GRANTING MOTION TO DISMISS WITH PREJUDICE

Before the Court is Defendant Facebook, Inc.'s Motion to Dismiss Plaintiff's First Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6). ECF No. 65. Plaintiff Noah Duguid opposes the motion. ECF No. 73. For the reasons below, the Court will grant the motion to dismiss with prejudice.

I. Background

A. Factual History

For the purpose of deciding this motion, the Court accepts as true the following allegations from Plaintiff's First Amended Complaint ("FAC"), ECF No.

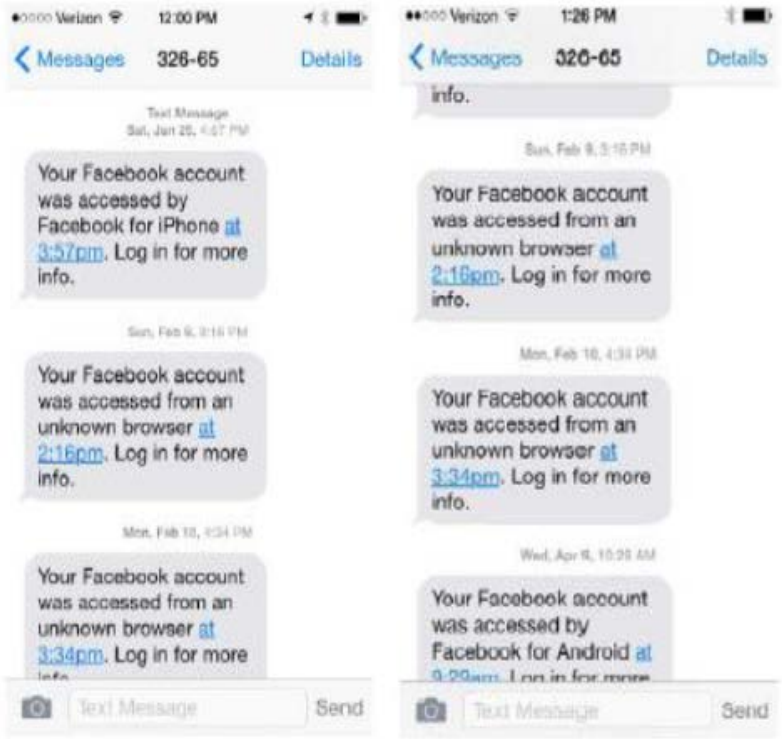
53. *See Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

Defendant Facebook, Inc. ("Facebook") offers an "extra security feature" for its consumers through an automated "login notification" process, in which Facebook sends computer-generated text messages when a Facebook account is accessed from a new device. FAC ¶ 14. When an account is disabled due to suspected fraud, Facebook's "Login Approval" process sends a code to a user's mobile phone via text message and requires the user to enter the security code to log into Facebook. *Id.* ¶ 18. Facebook maintains a database of phone numbers on its computers to transmit these alert text messages to selected numbers. *Id.* ¶ 19.

Plaintiff alleges that many consumers receive text messages from Facebook even though they did not authorize Facebook to contact them on their cellphones. *Id.* ¶ 51. Facebook's online instructions to deactivate the login notification feature provide no solution for those who receive the messages despite having no Facebook account. *Id.* ¶ 52. When someone replies "off" to Facebook's text messages, Facebook responds with a message stating, "Facebook texts are now off. Reply on to turn back on." *Id.* ¶ 53. Even though it sends this response, Facebook often continues to send unauthorized text messages. *Id.* ¶¶ 26, 53.

Plaintiff Noah Duguid began receiving automated, templated text messages from Facebook on his cellular phone. *Id.* ¶ 21. These messages were sent from an SMS short code, 326-65 ("FBOOK"), which is licensed and operated by Facebook or one of

its agents. *Id.* ¶ 22. Several example messages received by Duguid are reproduced below:



Id. ¶ 23. Duguid could not "Log in" to turn off the messages because he does not have a Facebook account. *Id.* ¶ 24. He became "frustrated" with the text message bombardment. *Id.* ¶ 25. On or around April 20, 2014, Duguid sent Facebook an email message requesting that the text messages cease. *Id.* ¶ 34. In response, Facebook sent Duguid an automated message directing Duguid to log on to the Facebook website to report problematic content. *Id.* ¶ 35. Duguid's efforts to deactivate the messages by responding "off" and "all off" were also unsuccessful. *Id.* ¶¶ 25-26.

Plaintiff alleges that Defendant sent text messages with an automatic telephone dialing system ("ATDS") as defined by 47 U.S.C. § 227(a)(1) and the Federal Communications Commission ("FCC"). *Id.* ¶ 38. Specifically, Plaintiff alleges that Defendant's system either has the capacity to generate random or sequential numbers or can add that capacity with code. *Id.* ¶¶ 40-50.

B. Procedural History

Plaintiff Noah Duguid filed his original complaint on March 3, 2015, alleging violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (the "TCPA"). ECF No. 1 ¶ 1. On March 24, 2016, this Court dismissed Plaintiff's complaint against Facebook without prejudice. ECF No. 48 at 11. The Court found that Plaintiff failed to adequately allege that text messages from Facebook were sent using an ATDS as required under the TCPA. *Id.* Plaintiff then filed his FAC, which re-asserted the TCPA violation claim after adding additional factual allegations. ECF No. 53. Plaintiff seeks to represent the following two classes:

> Class 1: All persons within the United States who did not provide their cellular telephone number to Defendant and who received one or more text messages, from or on behalf of Defendant to said person's cellular telephone, made through the use of any automatic telephone dialing system within the four years prior to the filing of the Complaint.
>
> Class 2: All persons within the United States who, after notifying Defendant that it no longer wished to receive text messages and

> receiving a confirmation from Defendant to that effect, received one or more text messages, from or on behalf of Defendant to said person's cellular telephone, made through the use of any automatic telephone dialing system within the four years prior to the filing of the Complaint.

Id. ¶ 58.

Defendant moves to dismiss Plaintiff's FAC for lack of standing and failure to state a claim under the TCPA. ECF No. 65. Plaintiff opposes the motion to dismiss. ECF No. 73.

The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

II. Legal Standards

A. Motion to Dismiss Under Rule 12(b)(1)

"If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3). A defendant may raise the defense of lack of subject matter jurisdiction by motion pursuant to Federal Rule of Civil Procedure 12(b)(1). The plaintiff always bears the burden of establishing subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "A Rule 12(b)(1) jurisdictional attack may be facial or factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Id.* "By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise

invoke federal jurisdiction." *Id.* In considering a facial attack, the court "determine[s] whether the complaint alleges 'sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1131 (9th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

B. Motion to Dismiss Under Rule 12(b)(6)

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft*, 556 U.S. at 678 (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). The Court must "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

III. Discussion

Defendant moves to dismiss Plaintiff's FAC for lack of Article III standing pursuant to Rule 12(b)(1)

and for failure to state a claim pursuant to Rule 12(b)(6). ECF No. 65 at 1. The Court concludes that Plaintiff has standing but again fails to state a plausible claim under the TCPA.

A. Standing

Defendant first asserts that under the recent decision of *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), *as revised* (May 24, 2016), Plaintiff lacks Article III standing. The Ninth Circuit squarely rejected that argument in *Patten v. Vertical Fitness Group, LLC, et al.*, No. 14-55980, 2017 WL 460663 (9th Cir. Jan. 30, 2017). The court found that, in passing the TCPA, Congress had purposefully "establishe[d] the substantive right to be free from certain types of phone calls and texts absent consumer consent." *Id.* at *4. Deferring to Congress's judgment, the court held that a "plaintiff alleging a violation under the TCPA 'need not allege any additional harm beyond the one Congress has identified'" to establish Article III standing. *Id.* Here, Duguid's allegations that he received unwanted text messages suffice to confer standing.

B. TCPA Claim

Defendant offers three reasons why Plaintiff's FAC should be dismissed for failure to state a claim. ECF No. 65 at 1-3. First, Defendant argues that Plaintiff did not adequately allege that the login notifications were sent by an ATDS as defined by the TCPA. *Id.* at 1-2; *see* 47 U.S.C. § 227(a)(1). Second, Defendant argues that the login messages fall within the TCPA's exception for calls "made for emergency purposes." ECF No. 65 at 2; *see* 47 U.S.C. § 227(b)(1)(A). Third, Defendant argues that even if

the TCPA reaches the login messages, the TCPA violates the First Amendment as a content-based restriction of speech that cannot survive strict scrutiny. ECF No. 65 at 20. Because the Court again concludes that Plaintiff has failed to plausibly allege the use of an ATDS, it does not reach the latter two of Defendant's arguments.

To state a claim for a violation of the TCPA, a plaintiff must allege that "(1) the defendant called a cellular telephone number; (2) using an automatic telephone dialing system; (3) without the recipient's prior express consent." *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012); *see* 47 U.S.C. § 227(b)(1). A text message is a "call" within the meaning of the TCPA. *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009). An "automatic telephone dialing system means 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). In evaluating whether equipment constitutes an ATDS, "the clear language of the TCPA 'mandates that the focus must be on whether the equipment has the *capacity* to store or produce telephone numbers to be called, using a random or sequential number generator.'" *Meyer*, 707 F.3d at 1043 (quoting *Satterfield*, 569 F.3d at 951). Thus, "a system need not actually store, produce, or call randomly or sequentially generated telephone numbers, it need only have the capacity to do it." *Satterfield*, 569 F.3d at 951.

Because it may be difficult for a plaintiff to identify the specific type of dialing system used without the benefit of discovery, courts have allowed TCPA claims to proceed beyond the pleading stage where a plaintiff's allegations support the inference that an ATDS was used. *See, e.g.*, *Kramer v. Autobytel, Inc.*, 759 F. Supp. 2d 1165, 1171 (N.D. Cal. 2010) (finding that the complaint, read as a whole, contained "sufficient facts to show that it is plausible" that the defendants used an ATDS where the plaintiff alleged that he received messages from a short code registered to one of the defendants, the messages were advertisements written in an impersonal manner, and the plaintiff had no other reason to be in contact with the defendants); *Kazemi v. Payless Shoesource Inc.*, No. 09-cv-05142-MHP, 2010 WL 963225, at *2 (N.D. Cal. Mar. 16, 2010) (concluding that the complaint met federal pleading requirements because the "plaintiff's description of the received messages as being formatted in SMS short code licensed to defendants, scripted in an impersonal manner and sent en masse supports a reasonable inference that the text messages were sent using an ATDS").

But where a "[p]laintiff's own allegations suggest direct targeting that is inconsistent with the sort of random or sequential number generation required for an ATDS," courts conclude that the allegations are insufficient to state a claim for relief under the TCPA. *See Flores v. Adir Int'l*, LLC, No. 15-cv-00076-AB, 2015 WL 4340020, at *4 (C.D. Cal. July 15, 2015). Courts generally rely on the message content, the context in which the message was received, and the existence of similar messages to assess whether an automated dialer was utilized. *See id.* at *5. In *Flores*,

for example, the plaintiff alleged that the defendant debt collector used an ATDS to send text messages about a debt because the messages were on a generic template that did not refer to the plaintiff by name, though they all included a reference number to identify the plaintiff. *Id.* at *3. The court acknowledged that it was "at least *possible*" that the defendant utilized a system "capable of storing or generating a random or sequential list of telephone numbers and then dialing them," but that the plaintiff offered no allegations to take his claim "'across the line from conceivable to plausible.'" *Id.* (quoting *Twombly*, 556 U.S. at 680). It noted that the messages included a unique reference number, that the messages sought to collect on a "specific" debt, and that other messages contained similar reference numbers and content, all of which "supports the inference" that the defendant "expressly targeted" the plaintiff. *Id.*

This Court dismissed Duguid's prior complaint because his allegations that Facebook's "login notifications are designed 'to alert users when their account is accessed from a new device'" after "users . . . add their mobile numbers to their accounts" did not plausibly support the inference that Facebook was using an ATDS. ECF No. 48 at 9. It noted that Duguid "d[id] not suggest that Facebook sends text messages en masse to randomly or sequentially generated numbers." *Id.* at 9-10. Instead, Duguid's allegations indicated that "Facebook's login notification text messages are targeted to specific phone numbers and are triggered by attempts to log in to Facebook accounts associated with those phone numbers." *Id.* at 9. In line with *Flores*, this suggested direct targeting that was inconsistent with the

existence of an ATDS. The Court also dismissed Duguid's suggestion that since predictive dialers constitute an ATDS, the capacity to produce or store random or sequential numbers is not a necessary feature of an ATDS, given that Duguid "has not alleged that Facebook uses a predictive dialer, or equipment that functions like a predictive dialer." *Id.* at 11.

Duguid has added a number of new facts to his FAC, but once again fails to plausibly allege that Facebook used an ATDS. Duguid newly alleges that Facebook uses a "computerized protocol for creating automated text messages programmed to appear customized to the user" through a template-based process. FAC ¶¶ 25-30. Additionally, Duguid alleges that in addition to the login notification process described in the original complaint, Facebook also employs a "Login Approval" process, a two factor authentication system requiring users to "enter a code" sent to mobile phones via text message whenever users log into Facebook from a new or unrecognized device. *Id.* ¶¶ 15, 18. It is unclear why Duguid believes these facts would strengthen the inference that Facebook sent text messages en masse using an ATDS. To the contrary, allegations of customizable protocols and unique codes only further suggest, in line with Duguid's other allegations, that the messages were sent through direct targeting that is akin to *Flores*.

Duguid further suggests that Facebook's system "is still an ATDS . . . because it has the capacity to sequentially and randomly dial," given that it is a "computer based system" with "capacity to generate

random numbers" and "capacity to generate sequential numbers." ECF No. 73 at 18; FAC ¶¶ 40-41. And even if Facebook's system does not currently have those abilities, Plaintiff argues, the capacity "can be trivially added with minimal computer coding." ECF No. 73 at 18; see FAC ¶¶ 44-50 (providing code that could be added to Facebook's system to generate random or sequential numbers). Duguid's allegations are conclusory. He merely repeats the central elements of an ATDS and asserts that Facebook's system possesses all of them. Nor does the possibility that these elements "can be trivially added" plausibly suggest that they are in fact present here.

In his opposition, Duguid argues that he has plausibly alleged that Facebook uses a "predictive dialer-like system." ECF No. 73 at 11. A predictive dialer, often used by telemarketers, is "equipment that dials numbers" and, when paired with certain software, "has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers." *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14091 (2003). Both the FCC and courts in this district have concluded that predictive dialers may fall within the scope of the TCPA. *Id.* at 14092-93; *see, e.g.*, *Nunes v. Twitter, Inc.*, No. 14-cv-02843-VC, 2014 WL 6708465, at *1 (N.D. Cal. Nov. 26, 2014) (finding that an ATDS "appears to encompass any equipment that stores telephone numbers in a database and dials them without human intervention").

Here, however, Plaintiff has again failed to allege the existence of such a system. At best, his allegations

are conclusory, given that he merely asserts that Facebook "maintains a database of phone numbers on its computer" and "transmits alert text messages to selected numbers from its database using its automated protocol," without offering any factual support for this claim. FAC ¶ 19. At worst, this claim contradicts the variety of other allegations offered by Plaintiff, which suggest that Facebook does not dial numbers randomly but rather directly targets selected numbers based on the input of users and when certain logins were attempted.

Duguid's reliance on *Nunes* is also misplaced. *See* ECF No. 73 at 11. In *Nunes*, the court noted that "dismissal of the complaint would not be warranted" because the plaintiff plausibly alleged that the defendant's "equipment ha[s] the "capacity to 'generate' numbers at random or sequentially" in addition to its ability to store and dial numbers without human intervention. 2014 WL 6708465, at *1-2. Here, no plausible inference can be made that Facebook's equipment has the capacity to generate random or sequential numbers.

As such, this Court dismisses Plaintiff's TCPA claims for failure to adequately allege that the text messages were sent using an ATDS. Because the Court dismisses the FAC on this basis, it need not address Facebook's arguments that the allegations show human intervention triggered the messages and that the messages were sent for emergency purposes. Likewise, the Court does not reach the argument that the TCPA violates the First Amendment. *See San Francisco Tech., Inc. v. GlaxoSmithKline LLC*, No. 10-cv-03248-JF NJV, 2011 WL 941096, at *2 (N.D. Cal.

Mar. 16, 2011) ("Because it concludes that SF Tech's claims are subject to dismissal on other bases, the Court need not decide the constitutional issues presented here, at least at the present time.").

This is Plaintiff's second attempt to plausibly allege the existence of an ATDS, and he has been unable to do so. Plaintiff does not offer any additional allegations that he could provide if given further leave to amend, and the Court is unable to identify any, given that his current allegations strongly suggest direct targeting rather than random or sequential dialing. Accordingly, the Court concludes that further amendment would be futile, and dismisses Plaintiff's complaint with prejudice.

CONCLUSION

For the foregoing reasons, the Motion to Dismiss Plaintiff's First Amended Complaint is granted with prejudice.

IT IS SO ORDERED.

Dated: February 16, 2017

[handwritten: signature]
JON S. TIGAR
United States District Court

Appendix E

RELEVANT STATUTORY PROVISION
47 U.S.C. § 227

(a) Definitions

As used in this section—

(1) The term "automatic telephone dialing system" means 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.

(2) The term "established business relationship", for purposes only of subsection (b)(1)(C)(i),, shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that—

(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G)).[1]

(3) The term "telephone facsimile machine" means equipment which has the capacity (A) to transcribe text or images, or both, from paper into

[1] So in original. Second closing parenthesis should not appear.

an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(4) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call unless such call is made solely to collect a debt owed to or guaranteed by the United States;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes, is made solely pursuant to the collection of a debt owed to or guaranteed by the United States, or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless—

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through—

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if the sender possessed the facsimile machine number of the recipient before July 9, 2005; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission—

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe—

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines—

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement;

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this

subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect;

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if—

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes—

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (d);

(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—

(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and

(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine;

(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only—

(i) by regulation issued after public notice and opportunity for public comment; and

(ii) if the Commission determines that such notice required by paragraph (1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements; and

(G)(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall—

(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and

(IV) determine whether with respect to small businesses, the costs would not be unduly burdensome; and

(ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-month period that begins on July 9, 2005.

(3) Private right of action

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(c) Protection of subscriber privacy rights

(1) Rulemaking proceeding required

Within 120 days after December 20, 1991, the Commission shall initiate a rulemaking proceeding

concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall—

> (A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific "do not call" systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;
>
> (B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;
>
> (C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;
>
> (D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such a finding is made and supported by the record, propose specific restrictions to the Congress; and
>
> (E) develop proposed regulations to implement the methods and procedures that the Commission determines are most

effective and efficient to accomplish the purposes of this section.

(2) Regulations

Not later than 9 months after December 20, 1991, the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

(3) Use of database permitted

The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase. If the Commission determines to require such a database, such regulations shall—

(A) specify a method by which the Commission will select an entity to administer such database;

(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations;

(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection under subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;

(D) specify the methods by which such objections shall be collected and added to the database;

(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the

database that are incurred by the entities carrying out those activities;

(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with the regulations prescribed under this subsection;

(J) be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify methods for protection of the privacy rights of persons whose numbers are included in such database; and

(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

(4) Considerations required for use of database method

If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall—

(A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;

(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and—

(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;

(ii) reflect the relative costs of providing such lists on paper or electronic media; and

(iii) not place an unreasonable financial burden on small businesses; and

(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

(5) Private right of action

A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State—

(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive up to

$500 in damages for each such violation, whichever is greater, or

(C) both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(6) Relation to subsection (b)

The provisions of this subsection shall not be construed to permit a communication prohibited by subsection (b) of this section.

(d) Technical and procedural standards

(1) Prohibition

It shall be unlawful for any person within the United States—

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a

manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

(2) Telephone facsimile machines

The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after December 20, 1991, clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

(3) Artificial or prerecorded voice systems

The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that—

(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the

message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and

(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(e) Prohibition on provision of inaccurate caller identification information

(1) In general

It shall be unlawful for any person within the United States, in connection with any telecommunications service or IP-enabled voice service, to cause any caller identification service to knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value, unless such transmission is exempted pursuant to paragraph (3)(B).

(2) Protection for blocking caller identification information

Nothing in this subsection may be construed to prevent or restrict any person from blocking the capability of any caller identification service to transmit caller identification information.

(3) Regulations

(A) In general

Not later than 6 months after December 22, 2010, the Commission shall prescribe regulations to implement this subsection.

(B) Content of regulations

(i) In general

The regulations required under subparagraph (A) shall include such exemptions from the prohibition under paragraph (1) as the Commission determines is appropriate.

(ii) Specific exemption for law enforcement agencies or court orders

The regulations required under subparagraph (A) shall exempt from the prohibition under paragraph (1) transmissions in connection with—

(I) any authorized activity of a law enforcement agency; or

(II) a court order that specifically authorizes the use of caller identification manipulation.

(4) Repealed

Pub.L. 115-141, Div. P, Title IV, § 402(i)(3), Mar. 23, 2018, 132 Stat. 1089 **(5) Penalties**

(A) Civil forfeiture

(i) In general

Any person that is determined by the Commission, in accordance with paragraphs (3) and (4) of section 503(b) of this title, to have violated this

subsection shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this paragraph shall be in addition to any other penalty provided for by this chapter. The amount of the forfeiture penalty determined under this paragraph shall not exceed $10,000 for each violation, or 3 times that amount for each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $1,000,000 for any single act or failure to act.

(ii) Recovery

Any forfeiture penalty determined under clause (i) shall be recoverable pursuant to section 504(a) of this title.

(iii) Procedure

No forfeiture liability shall be determined under clause (i) against any person unless such person receives the notice required by section 503(b)(3) of this title or section 503(b)(4) of this title.

(iv) 2-year statute of limitations

No forfeiture penalty shall be determined or imposed against any person under clause (i) if the violation charged occurred more than 2 years prior to the date of issuance of the required notice or notice or apparent liability.

(B) Criminal fine

Any person who willfully and knowingly violates this subsection shall upon conviction thereof be fined not more than $10,000 for each violation, or 3 times that amount for each day of a continuing violation, in lieu of the fine provided by section 501 of this title for such a violation. This subparagraph does not

supersede the provisions of section 501 of this title relating to imprisonment or the imposition of a penalty of both fine and imprisonment.

(6) Enforcement by States

(A) In general

The chief legal officer of a State, or any other State officer authorized by law to bring actions on behalf of the residents of a State, may bring a civil action, as parens patriae, on behalf of the residents of that State in an appropriate district court of the United States to enforce this subsection or to impose the civil penalties for violation of this subsection, whenever the chief legal officer or other State officer has reason to believe that the interests of the residents of the State have been or are being threatened or adversely affected by a violation of this subsection or a regulation under this subsection.

(B) Notice

The chief legal officer or other State officer shall serve written notice on the Commission of any civil action under subparagraph (A) prior to initiating such civil action. The notice shall include a copy of the complaint to be filed to initiate such civil action, except that if it is not feasible for the State to provide such prior notice, the State shall provide such notice immediately upon instituting such civil action.

(C) Authority to intervene

Upon receiving the notice required by subparagraph (B), the Commission shall have the right—

(i) to intervene in the action;

(ii) upon so intervening, to be heard on all matters arising therein; and

(iii) to file petitions for appeal.

(D) Construction

For purposes of bringing any civil action under subparagraph (A), nothing in this paragraph shall prevent the chief legal officer or other State officer from exercising the powers conferred on that officer by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(E) Venue; service or process

(i) Venue

An action brought under subparagraph (A) shall be brought in a district court of the United States that meets applicable requirements relating to venue under section 1391 of title 28.

(ii) Service of process

In an action brought under subparagraph (A)—

(I) process may be served without regard to the territorial limits of the district or of the State in which the action is instituted; and

(II) a person who participated in an alleged violation that is being litigated in the civil action may be joined in the civil action without regard to the residence of the person.

(7) Effect on other laws

This subsection does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States.

(8) Definitions

For purposes of this subsection:

(A) Caller identification information

The term "caller identification information" means information provided by a caller identification service regarding the telephone number of, or other information regarding the origination of, a call made using a telecommunications service or IP-enabled voice service.

(B) Caller identification service

The term "caller identification service" means any service or device designed to provide the user of the service or device with the telephone number of, or other information regarding the origination of, a call made using a telecommunications service or IP-enabled voice service. Such term includes automatic number identification services.

(C) IP-enabled voice service

The term "IP-enabled voice service" has the meaning given that term by section 9.3 of the Commission's regulations (47 C.F.R. 9.3), as those regulations may be amended by the Commission from time to time.

(9) Limitation

Notwithstanding any other provision of this section, subsection (f) shall not apply to this subsection or to the regulations under this subsection.

(f) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits—

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

(2) State use of databases

If, pursuant to subsection (c)(3) of this section, the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

(g) Actions by States

(1) Authority of States

Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive $500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the preceding sentence.

(2) Exclusive jurisdiction of Federal courts

The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Rights of Commission

The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(4) Venue; service of process

Any civil action brought under this subsection in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the violation occurred or is occurring, and process in such cases may be served in any district in which the defendant is an inhabitant or where the defendant may be found.

(5) Investigatory powers

For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) Effect on State court proceedings

Nothing contained in this subsection shall be construed to prohibit an authorized State official from

proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

(7) Limitation

Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

(8) "Attorney general" defined

As used in this subsection, the term "attorney general" means the chief legal officer of a State.

(h) Junk fax enforcement report

The Commission shall submit an annual report to Congress regarding the enforcement during the past year of the provisions of this section relating to sending of unsolicited advertisements to telephone facsimile machines, which report shall include—

(1) the number of complaints received by the Commission during such year alleging that a consumer received an unsolicited advertisement via telephone facsimile machine in violation of the Commission's rules;

(2) the number of citations issued by the Commission pursuant to section 503 of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(3) the number of notices of apparent liability issued by the Commission pursuant to section 503 of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(4) for each notice referred to in paragraph (3)—

(A) the amount of the proposed forfeiture penalty involved;

(B) the person to whom the notice was issued;

(C) the length of time between the date on which the complaint was filed and the date on which the notice was issued; and

(D) the status of the proceeding;

(5) the number of final orders imposing forfeiture penalties issued pursuant to section 503 of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(6) for each forfeiture order referred to in paragraph (5)—

(A) the amount of the penalty imposed by the order;

(B) the person to whom the order was issued;

(C) whether the forfeiture penalty has been paid; and

(D) the amount paid;

(7) for each case in which a person has failed to pay a forfeiture penalty imposed by such a final

order, whether the Commission referred such matter for recovery of the penalty; and

(8) for each case in which the Commission referred such an order for recovery—

(A) the number of days from the date the Commission issued such order to the date of such referral;

(B) whether an action has been commenced to recover the penalty, and if so, the number of days from the date the Commission referred such order for recovery to the date of such commencement; and

(C) whether the recovery action resulted in collection of any amount, and if so, the amount collected.