No. 19-511

In the Supreme Court of the United States

FACEBOOK, INC., PETITIONER,
v.
NOAH DUGUID, ET AL.

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

BRIEF OF PORTFOLIO RECOVERY ASSOCIATES, LLC, AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the definition of "automatic telephone dialing system" ("ATDS") in the Telephone Consumer Protection Act of 1991 ("TCPA") encompasses any device that can "store" and "automatically dial" telephone numbers, even if the device does not "us[e] a random or sequential number generator."

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INTEREST OF *AMICUS CURIAE*[1]

Portfolio Recovery Associates, LLC ("PRA") is one of the nation's largest buyers of private debt on the secondary debt market. PRA, *Frequently Asked Questions*.[2] PRA purchases delinquent private loans extended by banks or credit-card companies and then attempts to collect on those debts from the defaulted debtors. *See id.* PRA follows all "applicable federal, state and local laws and regulations that govern debt collection," including the Fair Debt Collection Practices Act. PRA, *Compliance*.[3] PRA does not use telemarketing or other invasive practices that Congress designed the TCPA to stop. Nevertheless, PRA has had to defend against meritless TCPA lawsuits for its use of ordinary debt-collection technologies, which tools merely facilitate PRA's communications with its own defaulted debtors. *See, e.g.*, Order, Dkt. 45, *Lamkin v. Portfolio Recovery*

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[1] Under Rule 37.6, Portfolio Recovery Associates, LLC affirms that no counsel for a party authored this brief, in whole or in part, and that no person other than Portfolio Recovery Associates, LLC or its counsel made a monetary contribution to fund the preparation or submission of this brief. All parties have consented to the filing of this brief. Rule 37.3.

[2] Available at https://www.portfoliorecovery.com/prapay/help/faqs (all websites last accessed Sept. 9, 2020).

[3] Available at https://www.portfoliorecovery.com/prapay/help/pra-promise/compliance.

Assocs., LLC, No. 19-16947 (9th Cir. Aug. 3, 2020) (staying proceedings pending decision in this case).

INTRODUCTION AND SUMMARY OF ARGUMENT

In enacting the TCPA's prohibition on the use of automatic telephone dialing systems to contact certain phone lines without express consent ("ATDS ban"), Congress sought to curb a particular problem arising from then-current operations of telemarketers and scammers. That is, Congress sought to resolve the issue of telemarketers and scammers using technologies "to store or produce" "random[ly] or sequential[ly]" generated telephone numbers, and then "dial such numbers," 47 U.S.C. § 227(a)(1), thereby tying up emergency numbers, hospital phones, pagers, and cellular phones.

The Ninth Circuit, apparently unsatisfied with the TCPA's successful defeat of the ATDS systems that Congress sought to curb, has atextually expanded the ATDS ban to cover any communications technology that merely stores phone numbers in a list and can automatically dial those numbers. While PRA agrees with Petitioner and the United States that the Ninth Circuit's interpretation is foreclosed by the plain statutory text, to the extent that this Court has any doubt, PRA respectfully submits that this doubt should be resolved in Petitioner's favor under the doctrine of constitutional avoidance. That is, the Ninth Circuit's expansion of the ATDS ban to cover a

wide swath of common communications methods would render that ban unconstitutionally overbroad, in violation of the First Amendment, for two reasons.

The Ninth Circuit's interpretation would make the ATDS ban unconstitutional first because it would transform modern smartphones into prohibited ATDSs, thereby turning "nearly every American [into] a TCPA-violator-in-waiting, if not a violator-in-fact." *ACA Int'l v. FCC*, 885 F.3d 687, 698 (D.C. Cir. 2018). Imposing harsh penalties for the mere use of the most common form of modern communications technology is plainly not "narrowly tailored to serve a significant government interest." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

The Ninth Circuit's interpretation would also render the ATDS ban unconstitutionally overbroad because it would prohibit numerous legitimate, socially beneficial companies—including both Petitioner and debt collectors like PRA in the secondary debt market—from using standard technologies to communicate effectively with their consumers. Most relevant to PRA's brief here, the secondary debt market relies on communications technology to quickly and efficiently make live contact with delinquent debtors, thereby placing them on the road to resolving their debts. That industry is vitally important to our Nation's economy, including because it helps lenders keep their costs of credit low. Yet, the Ninth Circuit would subject the standard communications technology that this industry relies

upon to stifling TCPA liability, undermining communication between secondary market creditors and debtors, while doing nothing to forward the interests that Congress sought to advance.

ARGUMENT

I. The ATDS Ban's Text Prohibits The Tools That Telemarketers And Scammers Use To "Automatic[ally]" "Dial[ ]" "Random" Or "Sequential" Phone Numbers

As relevant here, the TCPA prohibits "using any automatic telephone dialing system" to call hospitals, emergency numbers, pagers, and cellular phones absent "prior express consent." 47 U.S.C. § 227(b)(1); *see generally Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2343 (2020) ("*AAPC*"). The TCPA then defines an "automatic telephone dialing system" as "equipment which has the capacity[ ] (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). Under this statutory text, the ATDS ban covers only equipment that has "the capacity either to 'store a telephone number to be called, using a random or sequential generator; and to dial such a number' or to 'produce a telephone number to be called, using a random or sequential number generator; and to dial such a number.'" Pet. Br. 22. That is, as Petitioner correctly explains, the "critical

mechanism" of an ATDS is the capacity to use "a random or sequential number generator." Pet. Br. 30.

That plain-text interpretation of the ATDS ban comports with Congress' goal of stopping "intrusive, nuisance calls" from "telemarketers," Pub. L. No. 102-243, § 2(6), 105 Stat. 2394, 2394 (1991); *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 371–73 (2012), and "over-the-phone scam artists" and "foreign fraudsters," *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 8072–73 (July 10, 2015) ("*2015 TCPA Order*") (Pai, Comm'r, dissenting). Those "telemarketing methods" are the "nuisance[s]" and "unacceptably intrusive" practices that disturb the privacy of the home. H.R. Rep. No. 101-633 (1990); *see* S. Rep. No. 102-178, at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1969. That is why the majority of the TCPA's statutory findings refer specifically to telemarketers. *See* Pub. L. No. 102-243, § 2; *see generally AAPC*, 140 S. Ct. at 2344 (relying on these findings).

To achieve the TCPA's statutory purposes, "Congress expressly targeted equipment that enables telemarketers to dial random or sequential numbers." *2015 TCPA Order* at 8076 (Pai, Comm'r, dissenting). At the time of the TCPA's enactment, telemarketers and scammers employed communications technology that could dial "randomly or sequentially generated telephone numbers," *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1308 (11th Cir. 2020), including "numbers in large sequential blocks,"

Dominguez v. Yahoo, Inc., 629 F. App'x 369, 372 (3d Cir. 2015) (*Dominquez I*). The then-prevailing telemarketing technology would "seize" a phone line, meaning that the owner could only use the line again after "the prerecorded message is played, even when the called party hangs up." H.R. Rep. No. 102-317, at 10 (1991), 1991 WL 245201. This could "tie up" all lines in a particular geographic area—including emergency, specialized, and unlisted lines, 137 Cong. Rec. S16204-01, S16205 (1991); H.R. Rep. No. 102-317, at 10—and thereby pose "a risk to public safety," Pub. L. No. 102-243, § 2(5); *see also AAPC*, 140 S. Ct. at 2344; S. Rep. No. 102-178, at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1969.

II. The Doctrine Of Constitutional Avoidance Forecloses Adopting The Ninth Circuit's Expansion Of The ATDS Ban To Cover Common Tools Of Communication

The Ninth Circuit expanded the ATDS ban, holding that any communications technology that "merely ha[s] the capacity to store numbers to be called and to dial such numbers automatically" qualifies as a prohibited ATDS. App. 6 (citation omitted). That reading untethers the ATDS ban from its textual and historical moorings, broadening it far beyond its focus on telemarketing technology that dials "randomly or sequentially generated telephone numbers." *Glasser*, 948 F.3d at 1308; *see* Pet. Br. 30. As Petitioner and the United States explain, the Ninth Circuit's expansive interpretation is contrary

to the text and to basic rules of grammar, which are reasons enough to reject it. *See* Pet. Br. 21–42; U.S. Br. 14–25.

If this Court believes that there is some uncertainty as between Petitioner's and the Ninth Circuit's reading of the TCPA's text, PRA respectfully submits that this ambiguity should be settled in Petitioner's favor under the doctrine of constitutional avoidance. When this Court is presented with "two plausible statutory constructions to adopt," and one of those interpretations raises "constitutional problems," the constitutional-avoidance canon counsels the Court to choose the interpretation that will "avoid the decision of constitutional questions." *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005) (emphasis omitted); *see also Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (collecting cases). Here, the Ninth Circuit's interpretation turns the focused ATDS ban into an overbroad prohibition on commonly used technology, ranging from modern smartphones to banal tools that numerous businesses like Petitioner and PRA use to communicate with their own customers and debtors. Such a ban would violate the First Amendment, and this Court should thus avoid that reading.

A. The First Amendment Bars Overbroadly Prohibiting The Use Of Common Communications Tools

"Ratified in 1791, the First Amendment provides that Congress shall make no law 'abridging the freedom of speech.'" *AAPC*, 140 S. Ct. at 2346 (quoting U.S. Const. amend. I). This Court has long held that a law that limits or prohibits a particular method or medium of communication is subject to substantial constitutional scrutiny under the First Amendment by "examin[ing] the effect of the challenged legislation" to ensure that the law does not unduly burden the "free enjoyment of the right[ ]" to free speech. *Schneider v. Town of Irvington*, 308 U.S. 147, 161 (1939). This Court has also recognized that "[e]ach method of communicating ideas is a law unto itself and that law must reflect the differing natures, values, abuses and dangers of each method." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) (citation omitted).

To help guide this sensitive, context-dependent analysis, this Court has held that a content-neutral regulation on the use of a particular method or medium of speech can survive only if the regulation is "narrowly tailored to serve a significant government interest." *Ward*, 491 U.S. at 791; *accord Schneider*, 308 U.S. at 162–63. While such a law "'need not be the least restrictive . . . means of' serving the government's interests," it must not place "a substantial portion of the [regulation's] burden on

speech [that] does not serve to advance its goals." *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (quoting *Ward*, 491 U.S. at 798–99). In other words, a regulation that limits or bans a medium of communication may not "burden substantially more speech than is necessary." *Ward*, 491 U.S. at 799. Furthermore, such a law must "leave open ample alternative channels for communication of the information." *Id.* at 791, 802.

This Court has also broadly recognized the core First Amendment interests in communications through various methods and mediums. Today, speakers communicate through the Internet, *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017); "movies, television comedies, or skits on YouTube.com," *Citizens United v. FEC*, 558 U.S. 310, 371 (2010); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 639 (1994); radio broadcasting, *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389–90 (1969); sound trucks, *Saia v. New York*, 334 U.S. 558, 561–62 (1948); mail, *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 69 n.18 (1983); or books, pamphlets, and papers, *see, e.g.*, *Schneider*, 308 U.S. at 162.

This Court has also held that the First Amendment's protections apply to commercial speech, such as the speech that is often at issue in TCPA cases. "The mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them." *44 Liquormart, Inc. v.*

Rhode Island, 517 U.S. 484, 501 (1996). Rather, when a statute neither seeks "to protect consumers from misleading, deceptive, or aggressive sales practices," nor "requires the disclosure of beneficial consumer information," such a ban on commercial speech is "unrelated to the preservation of a fair bargaining process," and First Amendment protections apply. *Id.*

B. The Ninth Circuit's Approach Unconstitutionally Makes Modern Smartphones Prohibited ATDSs

The Ninth Circuit's interpretation of the ATDS ban would render that ban unconstitutional by turning modern smartphones into prohibited ATDSs, thereby transforming "nearly every American [into] a TCPA-violator-in-waiting, if not a violator-in-fact," *ACA Int'l*, 885 F.3d at 698.

1. The Ninth Circuit's approach turns virtually every smartphone into a prohibited ATDS.

Under the Ninth Circuit's view, a communications technology qualifies as a prohibited ATDS if it "merely ha[s] the capacity to 'store numbers to be called' and 'to dial such numbers automatically.'" App. 6 (quoting *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1053 (9th Cir. 2018)). This would sweep in virtually any smartphone, regardless of whether this Court adopts Petitioner's argument about the Ninth Circuit's automaticity gloss on its reading of the statutory text.

Petitioner argues that a smartphone would be an ATDS under the Ninth Circuit's interpretation because "virtually any modern phone has the capacity to store numbers and then dial them." Pet. Br. 43. Petitioner takes the position that the Ninth Circuit's additional prerequisite that the technology must have the capacity to dial the phone number *automatically* is a nonstarter, because automatically dialing a number is not actually within the statutory ATDS definition. *See* Pet. Br. 26. If Petitioner is correct that automaticity can play no part in the ATDS definition, then there would obviously be no dispute that the Ninth Circuit's interpretation would render any smartphone a prohibited ATDS, given the many basic features that smartphones have. Pet. Br. 43.

But even if this Court believes that automatic dialing capacity is a requirement of a prohibited ATDS because of the statutory provision's title—"*automatic* telephone dialing system"—smartphones would *still* clearly be within the scope of the Ninth Circuit's interpretation, as even the Ninth Circuit itself seemed to recognize. App. 9. That is because smartphones generally have "Do Not Disturb" auto-response features, *see, e.g.*, *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 467 (7th Cir. 2020), "Siri, Cortana, [or] Alexa," *Glasser*, 948 F.3d at 1309, and group-texting tools. These common features can all send texts to other smartphones *automatically*—that is, without the user needing to input each individual phone number and then hitting "send." For just this reason, the United States is wrong to suggest that,

perhaps, the disputed automaticity requirement could possibly lessen the "ultimate practical effect" of adopting the Ninth Circuit's view. U.S. Br. 33–34.

2. By subjecting "ordinary [communications] from any conventional smartphone" to the ATDS ban, *ACA Int'l*, 885 F.3d at 692, the Ninth Circuit has construed this ban to have a "far-reaching," *Gadelhak*, 950 F.3d at 467, and "'eye-popping' sweep," *Glasser*, 948 F.3d at 1309 (quoting *ACA Int'l*, 885 F.3d at 697), which is not "narrowly tailored to serv[ing] a significant government interest," *Ward*, 491 U.S. at 791.

Smartphones are "a uniquely valuable [and] important mode of communication," *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984), given that they are both the most essential and the most commonly used piece of communications technology for millions of Americans, *see Carpenter v. United States*, 138 S. Ct. 2206, 2211 (2018); *Riley v. California*, 573 U.S. 373, 395 (2014). Indeed, "for many people," smartphones are "the sole phone equipment they own." *ACA Int'l*, 885 F.3d at 696. Now, "the person who is not carrying a cell phone . . . is the exception," *Riley*, 573 U.S. at 395, since the "vast majority of Americans—96%—now own a cellphone of some kind," with "81%" of Americans owning "smartphones," Pew Research Ctr., *Mobile Fact Sheet* (June 12, 2019);[4] *see* Statista,

[4] Available at https://www.pewresearch.org/internet/fact-sheet/mobile/.

Number of Smartphone Users in the U.S. from 2018 to 2024 (in Millions) (June 2019) (estimating 275.66 million smartphone users in 2020 and 280.54 million users in 2021).[5] The ubiquity of smartphones in modern life means that prohibiting their use for calls or texts to another cellular line, without the recipient's prior express consent, greatly reduces a speaker's ability to deliver the desired message.

The Ninth Circuit's interpretation would chill even consensual calls or texts from a smartphone. It is the rare individual who could remember who among their many smartphone contacts have provided the prior express consent needed to receive calls or texts without incurring TCPA liability. Therefore, many prudent smartphone users would forgo making calls or sending texts to many otherwise-consenting recipients, rather than risking significant TCPA liability for each innocuous communication. *Accord Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965).

Or consider the following hypothetical, which PRA noted in its amicus brief submitted in *AAPC*. Br. of *Amicus Curiae* PRA at 15–16, *AAPC*, 140 S. Ct. 2335 (No. 19-631). An ordinary American named Tom sends a group text to friends and acquaintances with whom he shared a weekend getaway, asking them to pay their share of the vacation home that they rented.

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[5] Available at https://www.statista.com/statistics/201182/forecast-of-smartphone-users-in-the-us/.

Under the Ninth Circuit's construction, Tom would be liable for $500 to $1,500 per text, *see* 47 U.S.C. § 227(b)(3), unless he obtained prior express consent from each member of the group-text chain, *id.* § 227(b)(1)(A). Tom would face the same liability if he set a "Do Not Disturb" auto-reply on his smartphone for the duration of his weekend vacation, thereby *automatically* sending a preset message to anyone who happened to text him that weekend. Each "Do Not Disturb" response from Tom could subject him to between $500 and $1,500 in TCPA penalties. *See id.* § 227(b)(3).

Subjecting everyday communications like Tom's to TCPA liability, as the Ninth Circuit's interpretation would do, is plainly not "narrowly tailored to further," *Ward*, 491 U.S. at 797, Congress' purpose of protecting consumers from telemarketers and scammers, *see* Pub. L. No. 102-243, § 2(12). The government may, of course, "protect the . . . tranquility of a community" by banning those kinds of privacy-invading calls, *Kovacs v. Cooper*, 336 U.S. 77, 83 (1949), but the vast majority of smartphone calls that the Ninth Circuit would bring within the TCPA's scope are "far less intrusive," *Bolger*, 463 U.S. at 74. An uninterested recipient of one of those communications—someone who did not end up taking the weekend trip with Tom, perhaps—can delete or ignore the message. *Compare id.* at 78–79 (Rehnquist, J., concurring) ("transferring [unwanted mail] from envelope to wastebasket" (citations omitted)); *McCullen*, 573 U.S. at 476 ("turn the page,

change the channel, or leave the Web site"); *Cohen v. California*, 403 U.S. 15, 21 (1971) ("averting their eyes"). In any event, the core value of communications with smartphones—perhaps the dominant modern method of communication, and growing—outweighs any interest Congress could have sought to advance through the ATDS ban.

C. The Ninth Circuit's Approach Also Unconstitutionally Bans Common Tools That Companies Use To Talk With Their Customers, Including Firms Like PRA In The Secondary Debt Collection Market

The Ninth Circuit's interpretation of the ATDS ban renders the ban unconstitutionally overbroad for the additional reason that it prohibits common technologies that many law-abiding companies use to talk with their *own* customers. Petitioner's technology at issue in this case is just one example of such a beneficial use, as Petitioner uses the communications tool at issue here to "alert[ ] [one of Petitioner's] user[s] when his or her Facebook account is being accessed from a potentially suspicious location, thereby enabling the user to take immediate action to secure the account." Pet. Br. 50. Other companies use similarly unproblematic tools to communicate with their own customers. *See Dominguez ex rel. Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018) (*Dominguez II*) ("[Yahoo!'s] Email SMS Service sent messages only to numbers

that had been individually and manually inputted into its system by a user" of Yahoo!).

PRA is another business that uses common technologies to communicate with those with whom it has a preexisting commercial relationship. PRA explains below that: (1) secondary market debt collectors like PRA serve a critically important role in the economy and are already closely regulated under federal and state law; and (2) banning the common tools that these secondary market debt collectors use to communicate with their own debtors is not "narrowly tailored to serv[ing] a significant government interest." *Ward*, 491 U.S. at 791.

1.a. The "secondary debt market" refers to the selling of debt to another financial institution, like a debt-collection company, for purposes of collecting the debt. *See* David E. Reid, *The Value Of Resale On The Receivables Secondary Market* at 4–5, Receivables Mgmt. Ass'n Int'l White Paper (April 2016);[6] Office of the Comptroller of the Currency ("OCC") Bulletin 2014-37 (Aug. 4, 2014), 2014 WL 3866679, at *1. Secondary debt transactions generally occur once a consumer debtor has defaulted on the debt, prompting the original lender of credit to sell the debt at a discount to a debt-collection company, who then attempts to contact the private debtor and collect at least a portion of the original loan amount. *See* Reid,

[6] Available at https://rmaintl.org/wp-content/uploads/2019/01/RMAI-Secondary-Market-White-Paper-2016-FINAL.pdf.

supra, at 4–5.; *see also* Kaulkin Ginsberg, *2020 State Of The Industry Report*;[7] Ernst & Young, *The Impact of Third-Party Debt Collection on the US National and State Economies in 2016* (Nov. 2017).[8]

Our Nation's secondary debt market is exceedingly large. In 2018, original lenders sold $923.1 billion of debt to debt-collection companies on the secondary debt market, and those firms collected nearly $102.6 billion of this debt—a rate of 11.1% of the debt's face value. Kaulkin Ginsberg, *supra*. Of that amount, nearly $90.1 billion was returned to the original lenders of credit. *Id.* The secondary debt industry, in turn, employed about 124,400 individuals in 2018, with an aggregate payroll of about $5 billion. *Id.* These companies and their employees paid about $1.1 billion in federal taxes and $105.9 million in state and local taxes for that year. *Id.*

A robust secondary debt market lowers the cost of lending credit for original credit lenders, which, in turn, provides a benefit throughout the economy. Reid, *supra* at 2. Availability of credit "plays a critical role" in our markets, Fed. Reserve Gov. Elizabeth A. Duke, *Fostering A Healthy Credit Environment* (June

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[7] Available at www.acainternational.org/Kaulkin-Ginsberg.

[8] Available at https://www.acainternational.org/news/ernst-young-survey-once-again-demonstrates-substantial-value-of-third-party-debt-collection-industry.

30, 2010),[9] "support[ing] investment in productive enterprises and . . . smooth[ing] household spending from fluctuations in income," James McAndrews, *Credit Growth and Economic Activity After the Great Recession* (Apr. 16, 2015).[10]

The secondary debt market helps drive this lower-credit-cost effect. *See* Todd J. Zywicki, *The Law and Economics of Consumer Debt Collection and Its Regulation*, 28 Loy. Consumer L. Rev. 167, 183–84 (2016). By selling defaulted debt on the secondary debt market, the original lender limits the losses that it otherwise would have had to absorb from delinquent debts. Reid, *supra* at 5–6; OCC Bulletin 2014-37, 2014 WL 3866679, at *1; Fed. Trade Comm'n ("FTC"), *The Structure and Practice of the Debt Buying Industry* at 11 (Jan. 2013).[11] This frees up capital for these original credit lenders, which capital they may then extend to consumer borrowers at lower interest rates than would have otherwise been available. Reid, *supra* at 5–6; FTC, *supra*, at 11. Or, as this Court has explained with respect to savings-and-loans institutions in particular, "[t]he marketability of a mortgage in the secondary market

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[9] Available at https://www.federalreserve.gov/newsevents/speech/duke20100630a.htm.

[10] Available at https://www.newyorkfed.org/newsevents/speeches/2015/mca150416.html.

[11] Available at https://www.ftc.gov/sites/default/files/documents/reports/structure-and-practices-debt-buying-industry/debtbuyingreport.pdf.

is critical" since it allows savings-and-loans institutions to "sell mortgages to obtain funds to make additional home loans." *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 155 n.10 (1982).

The ability to sell defaulted loans on the secondary debt market also provides long-term stability to original credit lenders by enabling them to manage their liquidity. Zywicki, 28 Loy. Consumer L. Rev. at 212–14; *see also* Rustom M. Irani et al., *Loan Sales and Bank Liquidity Risk Management: Evidence from the Shared National Credit Program* 2–4 (Oct. 28, 2014).[12] Thus, the Office of the Comptroller of the Currency provides that a "bank's overall liquidity strategy"—which is necessary to minimize the "risk to a bank's safety and soundness"—"should include the identification of those loans . . . that may be easily converted to cash" on a secondary market, OCC Comptroller's Handbook, Loan Portfolio Management 1, 7 (Apr. 1998);[13] *see also* OCC, *Concentrations of Credit* at 12–13 (Dec. 2011).[14] This Court identified the importance of this strategy long ago: banks must be able to "discount[ ] notes" and "assign or sell those

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[12] Available at https://www.federalreserve.gov/econresdata/feds/2015/files/2015001pap.pdf.

[13] Available at https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-handbook/files/loan-portfolio-management/index-loan-portfolio-management.html.

[14] Available at https://www.occ.gov/publications-and-resources/publications/comptrollers-handbook/files/concentrations-of-credit/index-concentrations-of-credit.html.

notes when necessary and proper as, for instance, to procure more specie in an emergency." *Planters' Bank of Miss. v. Sharp*, 47 U.S. (6 How.) 301, 323 (1848).

The successful operation of the secondary debt market allows merchants who extend credit to consumers to keep their prices low, benefiting most Americans. Reid, *supra* at 5–6; Kaulkin Ginsberg, *supra*. These merchants must price the "recuperation value" of consumer debt into the cost of their goods and services, thus their ability to recuperate even a percentage of bad debt on the secondary market lowers the "recuperation value" that is "factored into the price." Reid, *supra* at 5–6; Kaulkin Ginsberg, *supra*. This yields substantial benefits to *all* consumers. *See* Reid, *supra* at 6. In 2018, the value of the debt recovered by debt-collection agencies on the secondary market averaged to $706 in savings *for each American household* "due to lower costs of goods and services." Kaulkin Ginsberg, *supra*.

The efficient operation of the secondary debt market is particularly beneficial to low and middle-income consumers and small businesses, given their more limited access to credit markets. *See* Reid, *supra* at 5–6; Zywicki, 28 Loy. Consumer L. Rev. at 188–89. High-income consumers may avoid the higher credit costs of an inefficient secondary debt market by satisfying their borrowing needs with home-equity loans, whereas lower-income borrowers "might be forced to shift" to "payday loans and pawn shops." Zywicki, 28 Loy. Consumer L. Rev. at 188–89.

For larger businesses, they "have broader access to capital markets," while "small businesses are highly dependent on bank financing." Burcu Duygan-Bump et al., *Financing Constraints & Unemployment: Evidence From the Great Recession* at 1, Fed. Reserve Bank of Boston Working Paper No. QAU10-6 (Dec. 14, 2011);[15] Karen Gordon Mills & Brayden McCarthy, *The State of Small Business Lending: Credit Access During the Recovery and How Technology May Change the Game* at 17, Harvard Bus. Sch. Working Paper No. 15-004 (July 22, 2014).[16] So, because of this outsized effect on small businesses, "any kind of disruption in the flow of bank credit may have significant real effects on the labor market." Duygan-Bump, *supra* at 1. "[R]estrictions in credit markets hurt highest-risk borrowers the most," like "lower-income families and families headed by younger persons." William F. Baxter, *Section 85 of the National Bank Act and Consumer Welfare*, 1995 Utah L. Rev. 1009, 1023 (citations omitted).

The specialization and efficient operation of debt-collection companies like PRA are critical to this entire system's functioning. "Specialists in debt collection are likely to be better at it than specialists in creating credit card debt in the first place." *Olvera v. Blitt & Gaines, P.C.*, 431 F.3d 285, 288 (7th Cir.

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[15] Available at https://www.bostonfed.org/-/media/Documents/Workingpapers/PDF/qau1006.pdf.

[16] Available at https://www.hbs.edu/faculty/Pages/download.aspx?name=15-004.pdf.

2005) (Posner, J.). Debt-collection companies have "comparative expertise and flexibility in structuring realistic payment arrangements that meet the constraints of the consumer's budget." *See* Zywicki, 28 Loy. Consumer L. Rev. at 213. PRA, for example, offers customers "personalized" and "affordable payment plans" and "helpful, realistic options," PRA, *About Us*,[17] including by frequently giving "savings offer[s] to resolve [the] debt for less than what [is] owe[d]," PRA, *How It Works*.[18]

b. Debt-collection agencies like PRA are closely regulated by both federal and state laws.

Most prominently, the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, "deter[s] wayward [debt] collection practices" like "[d]isruptive dinnertime calls, downright deceit, and more besides," *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1720 (2017). The FDCPA prohibits debt collectors from "[c]ausing a telephone to ring . . . repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number," 15 U.S.C. § 1692d(5); communicating with a consumer "at any unusual time or place," *id.* § 1692c(a)(1); communicating directly with a consumer who the debt collector knows is represented

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[17] Available at https://www.portfoliorecovery.com/prapay/help/about-us.

[18] Available at https://www.portfoliorecovery.com/prapay/help/how-it-works.

by counsel, *id.* § 1692c(a)(2); communicating with a consumer at the consumer's place of employment if the debt collector "knows or has reason to know that the consumer's employer prohibits" the practice, *id.* § 1692c(a)(3); or communicating with the consumer via postcard, *id.* § 1692f(7). The FDCPA also allows consumers to opt-out of receiving collections communications from a debt collector altogether. *Id.* § 1692c(c); *see also* OCC Bulletin 2014-37, 2014 WL 3866679, at *8; *accord Glasser*, 948 F.3d at 1309–10 (explaining that the Ninth Circuit's ATDS definition "moot[s] much of the Fair Debt Collection Act's application to telephone debt collection efforts").

And that is not all at the federal level. Title X of the Dodd-Frank Act makes it unlawful for "any covered person or service provider . . . to engage in any unfair, deceptive, or abusive act or practice," *see* 12 U.S.C. § 5536(a)(1)(B), including abusive practices "related to the collection of consumer debt," Consumer Financial Protection Bureau ("CFPB") Bulletin 2013-07, *Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts* at 5–6 (July 10, 2013).[19] The Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, prohibits debt buyers from reporting information to consumer reporting agencies that they know or have reason to believe is inaccurate, *id.* § 1681s-2(a)(1)(A); *see generally* PRA, *Contact & FAQs* (discussing PRA's policy of requesting that

[19] Available at https://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf.

credit-reporting agencies delete any PRA reports after debt is paid).[20] The Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.*, prohibits "unfair or deceptive acts or practices" in the debt-collection industry, similar to the FDCPA, *id.* § 45(a)(1); OCC Bulletin 2014-37, 2014 WL 3866679, at *9. The Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.*, limits "banks' sharing of nonpublic personal information with debt buyers," OCC Bulletin 2014-37, 2014 WL 3866679, at *9. And the Electronic Fund Transfer Act, 15 U.S.C. § 1693 *et seq.*, also applies to ensure debt-collection companies quickly resolve errors related to a debtor's electronic payment of funds, *id.* § 1693f.

Finally, "[m]ost States have laws about debt collection practices, many of which are similar to the FDCPA." CFPB, *Are There Laws That Limit What Debt Collectors Can Say Or Do?* (Jan. 30, 2017).[21] California, where Petitioner is located, has enacted the Rosenthal Fair Debt Collection Practices Act, Cal. Civ. Code § 1788 *et seq.*, which prohibits "debt collectors from engaging in unfair or deceptive acts or practices in the collection of consumer debts," *id.* § 1788.1(b). That Act's restrictions include prohibiting debt collectors from "[c]ommunicating, by

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[20] Available at https://www.portfoliorecovery.com/prapay/help/contact-us.

[21] Available at https://www.consumerfinance.gov/ask-cfpb/are-there-laws-that-limit-what-debt-collectors-can-say-or-do-en-329/.

telephone or in person, with the debtor with such frequency as to be unreasonable or to constitute [ ] harassment," and from "[c]ausing expense . . . for long distance telephone calls" by misrepresenting the purpose of the call. *Id.* § 1788.11(c), (e); *see also* FTC, *supra* at 5–6 (collecting state statutes and sources).

2. The Ninth Circuit's interpretation of the ATDS ban would unconstitutionally sweep in the common communications tools that debt collectors in the secondary market use to contact their own debtors.

Most problematically on this score, courts that have adopted the Ninth Circuit's approach to interpreting the ATDS ban have held that the ban applies to the commonly used Avaya Proactive Contact technology ("Avaya"), because this tool has the capacity to call a debt collector's debtors from a stored, company-maintained list of its own debtors' phone numbers. *Compare Allan v. Pa. Higher Educ. Assistance Agency*, 968 F.3d 567, 580 (6th Cir. 2020) (concluding that Avaya is an ATDS under the Ninth Circuit's approach), *and Lamkin v. PRA*, No. 2:18-CV-03071-WBS-KJN, 2019 WL 4670829, at *3 (E.D. Cal. Sept. 25, 2019) (same), *appeal pending* No. 19-16947 (9th Cir.), *with Hagood v. PRA*, No. 3:18-CV-1510-NJR, 2020 WL 1308388, at *5 (S.D. Ill. Mar. 19, 2020) (concluding that Avaya is not an ATDS, using Petitioner's approach), *and Allan*, 968 F.3d at 572 (acknowledging same). Avaya works by calling the phone number of a consumer debtor who owes money to the secondary lender. *See* Opening Br. of PRA at

7–8, *Lamkin*, No. 19-16947, Dkt. 17 (9th Cir. Feb. 10, 2020). Once the debtor answers the call, Avaya transfers the call to a lender's live agent, who then speaks with the debtor about the defaulted debt. *Id.* Avaya thus ensures that the secondary lender and the debtor can more effectively discuss the defaulted debt. *Id.*

Banning communications tools like Avaya would not be "narrowly tailored to serv[ing] a significant government interest." *Ward*, 491 U.S. at 791. Secondary market debt collectors have a legitimate right to contact those who owe them money, so long as those calls comply with all federal and state laws like the FDCPA. *The only end that banning tools like Avaya will achieve is making these legitimate communications slower, clunkier, and more expensive*. That serves no "significant government interest," and certainly does not do so in any "narrowly tailored" manner. *Id.* Put another way, as the Federal Communications Commission ("FCC") has explained in its first regulations under the TCPA, "debt collection calls" of the type that PRA has made have not been placed with a prohibited ATDS because they are not "dialed using a random or sequential number generator." *See In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC Rcd. 8752, 8773 (Oct. 16, 1992). Following the Ninth Circuit's lead and holding that Congress nevertheless inadvertently swept these common, unproblematic communications tools into the ATDS ban would render the ban unconstitutional.

Banning communications tools like Avaya would also impose significant First Amendment costs by undermining the efficiency and flow of communication between creditors and debtors. As the FCC has explained, it is plainly "beneficial" to debtors for lenders to be able to contact them effectively by phone, in order to "mak[e] them aware of the [debt collector's] inquiry" and thereby enable them to avoid further delinquency and default. *In the Matter of the Tel. Consumer Prot. Act of 1991*, 7 FCC Rcd. 2736, 2738 ¶ 15 (Apr. 17, 1992). Through live conversations, secondary debt-collection companies like PRA inform their debtors of their oftentimes flexible repayment options, thus reducing their costs to resolving debtors' delinquent debt. PRA, for example, offers "personalized" and "affordable payment plans" to its debtors, which offer them "helpful" and "realistic options" to resolve their debts. PRA, *About Us*, *supra*. These plans include the frequent provision of "savings offer[s] to resolve [the] debt for less than what [is] owe[d]," PRA, *How It Works*, *supra*. But, in order to determine whether it can exercise its "flexibility in structuring realistic payment arrangements that meet the constraints of the consumer's budget," Zywicki, 28 Loy. Consumer L. Rev. at 213, PRA must make live contact.

The Federal Government has recognized the communicative benefits of live conversations between creditors and debtors. In explicating the since-invalidated government-debt exception, *AAPC*, 140 S. Ct. at 2343–44, the FCC has stated that "consumers

may benefit from calls" related to the collection of government debt because the calls "can prevent them from falling into potentially devastating debt" by missing out on their various repayment options. *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 31 FCC Rcd. 9074, 9075 (Aug. 11, 2016); *id.* at 9136 (O'Reilly, Comm'r, dissenting) ("More than 90 percent of the time that we have a live conversation with a federal loan borrower, we are able to resolve a loan delinquency." (citations omitted)). The Treasury Department, in turn, has explained that "speaking with a call center agent is critical to identifying and enrolling in a repayment option," since the only way that borrowers can "resolve their loans on their own" is through "full repayment of outstanding principal and interest." U.S. Dep't of Treasury, *Report on Initial Observations from the Fiscal-Federal Student Aid Pilot for Servicing Defaulted Student Loan Debt* at 3, 5 (July 2016).[22] Other federal agencies specifically require government entities with an interest in collecting on government loans to initiate live conversations with federal debtors. *See, e.g.*, 34 C.F.R. § 682.411(d)(1) (Department of Education regulation requiring at least "four diligent efforts" to contact certain delinquent borrowers by phone); 38 C.F.R. § 36.4278(g)(1)(ii) (Department of Veterans Affairs

[22] Available at https://www.treasury.gov/connect/blog/Documents/student-loan-pilot-report-july-2016.pdf.

regulation requiring an attempt to establish live contact by the twentieth day of delinquency).

Finally, banning tools like Avaya will harm the Nation's economy, in general, and low-income debtors, in particular. Prohibiting communications tools like Avaya would needlessly disrupt the secondary debt industry, and thus the Nation's economy, since these tools are helpful in "ensur[ing] that all debt owed . . . is collected as quickly and efficiently as possible." Office of Mgmt. & Budget, Exec. Office of the President, *Fiscal Year 2016: Analytical Perspectives of the U.S. Government* at 128 (2015).[23] Much of the "higher costs of collection" that would follow such a disruption would flow downstream to the original credit lenders in the form of lower sales prices for their defaulted debt on the secondary market. *See Olvera*, 431 F.3d at 288 (Posner, J.). That is, if debt-collection companies must spend more money collecting on defaulted debt, they will only purchase defaulted debt from original credit lenders at lower prices. Those original credit lenders will, in turn, pass on those losses to consumer debtors "in the form of even higher interest rates" on credit. *Id.* Thus, the benefits of lower-cost credit on borrowers—especially low-income borrowers and small businesses—discussed above would decrease.

[23] Available at https://go.usa.gov/xUtw2.

CONCLUSION

This Court should reverse the judgment below.

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