No. 19-511

IN THE

Supreme Court of the United States

FACEBOOK, INC.,
Petitioner,
v.

NOAH DUGUID, individually and on behalf of himself and all others similarly situated,
Respondent,
and
UNITED STATES OF AMERICA,
Respondent-Intervenor.

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

BRIEF OF MIDLAND CREDIT MANAGEMENT, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Midland Credit Management, Inc., along with its affiliates and subsidiaries (collectively "MCM"), is the largest debt purchaser in the United States. For example, MCM purchases charged-off credit-card accounts from creditors and then collects on the accounts. One out of five American consumers has an account with MCM. MCM's ability to work with consumers to resolve their debts depends on being able to reach them by telephone. Often, consumers are not even aware that they have outstanding debt until an account manager contacts them by telephone. Without these vital telephone calls, many consumers would have no opportunity to negotiate flexible and discounted repayment plans to resolve their debt and improve their credit.

Increasingly, the calls MCM makes are to consumers' mobile phones, since today, most people use a mobile phone as their primary or only phone. In recent years, however, the ability of MCM to communicate with consumers about their debts has been hampered by the legal risk associated with calling mobile phones.

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[1] Pursuant to this Court's Rule 37.3(a), counsel for all parties have consented to the filing of this brief. Pursuant to this Court's Rule 37.6, MCM states that this brief was not authored, in whole or in part, by counsel to a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than MCM and its counsel.

Specifically, over the past several years, an aggressive and well-organized plaintiffs' bar has clogged the federal courts with thousands of lawsuits under the Telephone Consumer Protection Act ("TCPA"), trying to capitalize on a TCPA provision that imposes a $500 to $1500 per-call penalty on anyone who uses an "automatic telephone dialing system"—which the TCPA provides must have a "random or sequential number generator"—to call a mobile phone without the recipient's consent. Like many companies, MCM spends substantial time and resources on TCPA compliance and does not (because it has no reason to) use "automatic telephone dialing systems" to contact its consumers. Hence, MCM has a significant interest in ensuring that courts interpret the TCPA in accordance with the statute's text and Congress's intent.

SUMMARY OF ARGUMENT

I. This case is about the TCPA's definition of "automatic telephone dialing system," or "ATDS." The TCPA bans some (but far from all) calls made using an ATDS. It defines an "ATDS" as equipment that has the capacity "to store or produce telephone numbers to be called, *using a random or sequential number generator*," and "to dial such numbers." 47 U.S.C. § 227(a)(1) (emphasis added). The question is whether the italicized phrase applies to both "store" and "produce," or just "produce." If the former, a device may be an "ATDS" only if it dials using a random or sequential number generator. If the latter, any phone with the capacity to store and then dial phone

numbers—such as a standard-issue mobile phone or office desk phone—is an ATDS whose use without the caller's express consent could result in statutory damages of $500 to $1500 per call.

The question in this case has a clear answer. That is so as a matter of straightforward text because—as Facebook and the United States explain—"the most natural way to view [a] modifier" set off by a comma is to read the modifier "as applying to the entire preceding clause." *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1077 (2018). Hence, only devices that can produce random or sequential numbers to dial can qualify as an ATDS—and standard mobile phones and desk phones cannot.

This case, however, does not turn only on punctuation. Courts interpret statutes according to their ordinary meaning because Congress *expects* them to do so. And here, the narrow text that Congress drafted reflects the narrow problems it was trying to solve. Most people do not like receiving calls from numbers they do not recognize—and some courts have breezily viewed the TCPA's ATDS ban as a general prohibition on all such calls. But when Congress enacted the TCPA in 1991, it did not intend to create such a blanket ban. The dispositive evidence is, again, right there in the statutory text. The TCPA does not prohibit all calls using an ATDS, but only specified categories of calls—to "any emergency telephone line," "any … room of a hospital … or similar establishment," or "any telephone number assigned to a paging service, cellular

telephone service, specialized mobile radio service, or other radio common carrier service." 47 U.S.C. § 227(b)(1)(A). Notably absent are *residential* phones lines—and in 1991, virtually all consumers relied on residential land lands (and virtually none had mobile phones).

The TCPA selected these categories because the record before Congress showed that random and sequential dialers—which were then favored by telemarketers (who were universally disliked)—created distinctive problems for these categories of phone lines. By dialing *randomly*, ATDS devices tied up lines that needed to be left open for emergency communications. And by dialing *sequentially*, these devices simultaneously blocked all of the incoming lines assigned to businesses, hospitals, nursing homes, and other facilities with multiple lines. Likewise, early mobile carriers typically obtained large blocks of consecutive phone numbers for their subscribers—and thus sequential autodialers could occupy all of a carrier's facilities and effectively block service to its customers. The legislative history thus makes plain that the TCPA's limited definition of "automatic telephone dialing system" fits hand-in-glove with the specific problems Congress was trying to solve—focusing on telemarketers' use of random and sequential dialers.

II. The plaintiffs' bar has been working for years to expand the ATDS definition to capture a broader range of technology, and thereby enlarge the universe of calls that will draw the statute's $500 to $1500 per-call

penalties. By detaching the definition of "automatic telephone dialing system" from the narrow problems Congress sought to solve, the Ninth Circuit and like-minded courts have contributed to the flood of TCPA litigation jamming the courts. In their view, the ATDS definitions covers any phone that can both "store" and "dial" numbers. That definition covers … well, more or less any phone. And with nearly every American today relying on a mobile phone, these courts have made the TCPA's ATDS ban into exactly what Congress declined to enact—a blanket prohibition on undesired or unknown calls. Thousands of TCPA lawsuits are filed every year against companies that never have used and never would think to use a random or sequential dialer (because they already have the numbers they intend to dial and often have had previous contact with the individuals associated with the numbers). Healthcare, technology, travel, dining, entertainment, sports, financial services, retail—no sector of the economy is immune. Multimillion dollar class-action settlements are commonplace, because even innocent defendants often cannot run the risk of an adverse ruling. And the Ninth's Circuit's ruling will exacerbate the problem.

As they hunt for new targets, plaintiffs' lawyers are growing more and more creative. Businesses are being sued for calling their own customers, for responding to text messages, and for offering software tools and applications that allow users to communicate with each other. Plaintiffs' lawyers have also enlisted the creativity of Silicon Valley, developing mobile

applications to easily convert unwanted or unknown calls into lawsuits. Indeed, plaintiffs are even coming up with elaborate schemes to *induce* wrong-number calls so that they can sue the callers. The list goes on.

The solution to this litigation flood is straightforward. This Court should return the definition of "automatic telephone dialing system" to match the narrow text Congress enacted and the narrow problems Congress sought to solve.

ARGUMENT

I. As The TCPA's History Underscores, An "Automatic Telephone Dialing System" Must Use A Random Or Sequential Number Generator.

The TCPA bans virtually all calls using an "artificial or prerecorded voice," as well as certain calls made using an "automatic telephone dialing system," or "ATDS." The TCPA bans ATDS-based calls to "any emergency telephone line," to "any … room of a hospital … or similar establishment," or to "any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service." 47 U.S.C. § 227(b)(1)(A). The statute defines an "automatic telephone dialing system" as equipment that has the capacity "to store or produce telephone numbers to be called, using a random or sequential number generator" and "to dial such numbers." 47 U.S.C. § 227(a)(1).

MCM agrees with Facebook and the United States that the statutory text resolves the question presented

in this case and dictates the conclusion that, to be an ATDS, a system must use a random or sequential number generator. The ATDS definition straightforwardly describes what functions an ATDS must have (ability to either "store or produce numbers to be called") and how an ATDS must employ those functions ("using a random or sequential number generator"). Reading the latter requirement to apply to both the "store" and "produce" functions accords with ordinary usage—because "the most natural way to view [a] modifier" set off by a comma is to read the modifier "as applying to the entire preceding clause." *Cyan, Inc.*, 138 S. Ct. at 1077 (quoting 137 Cong. Rec. 30,821 (1991)); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 161-62 (2012) (similar). And this ordinary-usage reading sensibly avoids turning every mobile or landline phone that can store numbers into a liability-generating "automatic telephone dialing system." Pet. Br. 22-29; U.S. Br. 15-17.

MCM writes to emphasize that the narrow text that Congress enacted reflects the narrow problems Congress was trying to solve. Today, virtually *everyone* has a mobile phone (and many, if not most, people *only* have a mobile phone). Unwanted and unknown mobile phone calls are ubiquitous, and most people find them annoying. That makes it all too tempting—at least for those who are not over-concerned with the TCPA's text—to look at statements in the legislative history denouncing unwanted calls and assume that Congress restricted ATDS usage to prevent such calls, especially

to mobile phones. *E.g.*, *Duran v. La Boom Disco, Inc.*, 955 F.3d 279, 280 & n.1 (2d Cir. 2020).

That view, however, does not accord with the TCPA's text or its history. When the TCPA was enacted, unsolicited mobile phone calls were not a significant consumer problem. In 1990, only about 2.5% of Americans had mobile phones.[2] Virtually all consumer calls went through residential land lines. The "robocalls" that Congress enacted the TCPA to stop were prerecorded calls to landlines, which were endemic in the 1990s. These were the calls that Senator Hollings called the "scourge of modern civilization"—in fact, his very next sentence made clear that his target was landline calls, as he railed against calls that "hound us until we want to *rip the telephone right out of the wall*." 137 Cong. Rec. 30,821 (1991) (emphasis added).

If Congress's purpose in restricting auto-dialed calls had been to limit unwanted phone calls, it would have prohibited such calls to residential lines. Yet Congress did not do so. Instead, the TCPA bans only calls to "residential telephone line[s]" "using an artificial or prerecorded voice." 47 U.S.C. § 227(b)(1)(B). Congress narrowly restricted the autodialer ban's coverage because its purpose was not to prevent such calls. Instead, it sought to address specific problems

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[2] *See* Susan Lorde Martin, *How Much Is "Substantial Evidence" and How Big Is A "Significant Gap"? The Telecommunications Attorney Full Employment Act*, 9 Wm. & Mary Bus. L. Rev. 29, 34 (2017).

distinctively associated with *automatic* or *sequential* number generators. In two related respects, the TCPA's history makes that point clear.

A. Congress Was Concerned About Harm To Emergency Services And Mobile Phones From Random And Sequential Dialing.

First, Congress was concerned about the impact of random or sequential dialing on emergency services and pager or mobile phone lines. Congress understood that because systems dialing random or "sequential blocks of telephone numbers" were calling strings of random or sequential digits and not specific people, those numbers would often "include[] those of emergency and public service organizations." H.R. Rep. No. 102-317, at 10 (1991). Such calls were "in any emergency … potentially dangerous" because the calls often "'seize[d]' a recipient's telephone line and [refused to] release it until [a] prerecorded message is played, even when the called party hangs up." *Id.* Congress stressed that the committee record included specific "examples of systems calling and seizing the telephone lines of public emergency services, dangerously preventing those lines from being utilized to receive calls from those needing emergency services." *Id.* at 24; *accord* S. Rep. No. 102-178, at 2 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 1968, 1969 (stressing that "automated calls are placed to lines reserved for emergency purposes, such as hospitals and fire and police stations" and that such "calls do not respond to human voice commands to disconnect the phone, especially in times of emergency").

The committee testimony indeed was filled with concerns about harm from automatic or sequential dialing to emergency services. At the hearing before the House Committee on Energy and Commerce, Chairman Edward J. Markey emphasized that the concern with "[a]utodialers" was not just that they were "a nuisance" but that they were a "potential danger if an autodialer does not disconnect, as some apparently do not, while calling a hospital or other emergency health and safety related service." *Telemarketing/Privacy Issues: Hearing on H.R. 1304 & H.R. 1305 Before the Subcomm. on Telecomms. and Fin. of the H. Comm. on Energy & Commerce*, 102d Cong. 3 (1991) ("House Hearing").

Likewise, Senator Pressler opened the Senate hearing by stressing that, by calling "thousands of *sequential* phone numbers," autodialers yielded "calls to hospitals, emergency care providers …, and paging and cellular equipment." *S. 1462, The Automated Telephone Consumer Protection Act of 1991, S. 1410 The Telephone Advertising Consumer Protection Act, and S. 857, Equally Billing for Long Distance Charges: Hearing before the Subcomm. on Commc'ns of the S. Comm. on Commerce, Sci., and Transp.*, 102d Cong. 7 (1992) ("Senate Hearing") (emphasis added). He described "examples of autodial [messages] hitting hospital switchboards and *sequentially* delivering a recorded message to all phone lines." *Id.* (emphasis added).

For example, testimony before the Senate described how an "auto-dialer called telephones *sequentially* throughout the House of Good Samaritan, a hospital in

Watertown, N.Y."—"call[ing] exam rooms, patient rooms, offices, labs, emergency rooms, and x-ray facilities." *Id.* at 43 (statement of Michael F. Jacobson). Indeed, these sequential calls "not only tied up the incoming lines, but since the recorded pitch was for a 900 number contest, staff and patients within the hospital tied up outgoing lines trying to win the vacation." *Id.* Likewise, the Chairman of the Florida Public Service Commission, on behalf of the National Association of Regulatory Utility Commissioners, travelled to Washington to tell Congress that autodialed calls "have jeopardized public safety by tying up emergency telephone lines and by not disconnecting after the called party has hung up the telephone." House Hearing at 31. Given these problems, even the Direct Marketing Association—the telemarketing trade group—"strongly agree[d] with the provisions that essentially ban *sequential and random* dialing because of the great difficulties that they cause in hospital emergency rooms and cellular phones, and things of that nature." Senate Hearing at 33 (statement of Richard Barton).

Concerns with random and sequential dialing to emergency services overlapped substantially with concerns about pagers and mobile phones—which, in those early days, were used disproportionately by doctors and those with urgent medical issues. Testimony recounted how the "vast majority of paging customers … use their paging units to be alerted to important or emergency calls," citing as an example the "Life Page Program." House Hearing at 113 (statement

of Michael J. Frawley). This program allowed "organ transplant candidates" to receive pages when donor organs might be available—and there is little "more distressing than to be waiting for an organ transplant and to be falsely notified that it is waiting for you at the hospital" based on "false pages generated by automatic dialers" dialing randomly or sequentially. Senate Hearing at 45 (statement of Thomas Stroup).

Random and sequential dialing was also a particular problem for the budding mobile phone industry—hence why Congress banned auto-dialed calls to mobile phones but not to residential lines. The testimony before Congress explained that the "most important[]" problem was that "sequential calling by automatic dialing systems can effectively saturate mobile facilities, thereby blocking provision of service to the public." Senate Hearing at 46 (statement of Thomas Stroup). That was so "[b]ecause mobile carriers obtain large blocks of consecutive phone numbers for their subscribers," and thus autodialed calls that "run through whole groups of paging and cellular numbers at one time" could "result in seizure of a … carrier's facilities that effectively block service to its customers." *Id.*

All of these concerns arose because of random or sequential dialing, specifically. Telemarketers—the only ones who used random or sequential number generators—did not *intend* to call hospitals, doctors, or organ recipients. Nor did the problem calls, aside from a handful, occur because the caller intended to call a specific person based on records already in its possession

but by accident called a hospital, doctor, or organ recipient. These calls occurred because telemarketers used random and sequential dialers that called indiscriminately, sweeping in emergency numbers and mobile phone blocks with all other numbers. *See* House Hearing at 110-11 (statement of Michael J. Frawley) (complaining that "autodialers … tie up [an entire mobile] exchange and impede the service to all of my customers … [t]he Coast Guard, national defense organizations, police, fire department, hospitals, doctors, you name it; they're all affected"). Congress thus targeted the autodialer ban to redress the random and sequential dialing that yielded these problems.

B. Congress Was Also Concerned About Telemarketers, Who Distinctively Relied On Random And Sequential Dialing.

Congress's second, overlapping concern related to telemarketing. It may be true that not *every* telemarketing call comes from a random or sequential dialer. But the vast majority of randomly or sequentially dialed calls are *telemarketing* calls. A business that has a legitimate reason to call a particular person will not use a random or sequential dialer. They have the number they are trying to call. Telemarketers, on the other hand, will use random or sequential dialers. Congress thus emphasized that "[*t*]*elemarketers* often program their systems to dial sequential blocks of telephone numbers," or random numbers. H.R. Rep. No. 102-317, at 10 (emphasis added); *accord* 47 U.S.C. § 227, note (finding that "[u]nrestricted telemarketing … can

be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety").

Those advocating a sweeping definition of "automatic telephone dialing system" often trot out the legislative history describing telemarketing as the "scourge of modern civilization." *Duran*, 955 F.3d at 280 & n.1 (quoting 137 Cong. Rec. 30,821 (1991) (statement of Sen. Hollings)). But those advocates ignore that "[a]t the time that the [TCPA] was passed, telemarketers *primarily* used systems that randomly generated numbers and dialed them." *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 461 (7th Cir. 2020) (emphasis added); *Dominguez v. Yahoo, Inc.*, 629 F. App'x 369, 372 (3d Cir. 2015) (at the time, "telemarketers typically used autodialing equipment that either called numbers in large sequential blocks or dialed random 10-digit strings"). Hence, by addressing random and sequential dialing and prerecorded messages, Congress addressed the telemarketing problem to the extent Congress concluded that the problem needed addressing.

More important, these advocates again ignore that Congress chose to limit calls using an ATDS *only* when made to emergency, hospital, pager, and mobile numbers. The lesson, again, is that Congress intended the ATDS restriction to address specific issues relating to random and sequential dialing of emergency, hospital, pager, and mobile numbers—not to prohibit all technology-assisted calls. Had Congress aimed at the latter purpose, it would have banned ATDS calls to

landlines as well. In fact, the legislative history recounts a survey finding that "one-half of" respondents "favored prohibiting *all* unsolicited calls." S. Rep. No. 102-178, at 3, 1991 U.S.C.C.A.N. at 1970. But Congress declined to enact that broader ban. Instead, the TCPA's text and history both confirm that Congress focused narrowly on the distinctive problems that arise from random and sequential dialing devices.

II. Attempts To Expand The Definition Of "Automatic Telephone Dialing System" Have Caused A Flood Of TCPA Litigation That Will Only Grow Unless This Court Rejects The Ninth Circuit's Interpretation.

In today's world, the sweeping ATDS definition embraced by some courts would turn the TCPA into exactly the blanket ban on "all unsolicited calls" that Congress deliberately rejected. Today, "it is the person who is not carrying a cell phone … who is the exception," *Riley v. California*, 573 U.S. 373, 395 (2014)—and as the Ninth Circuit conceded, even mobile phones satisfy the unmoored definition of "automatic telephone dialing system" that it embraced. App-9; *accord* Pew Research Center, *Mobile Fact Sheet* (June 12, 2019) (96% of Americans own mobile phones). By departing from the text Congress enacted, lower courts—with some encouragement from the FCC, which belatedly broke from its original, limited, and correct interpretation of the ATDS definition—have made the TCPA into a magnet for abusive suits that have nothing to do with random or sequential dialing or even the telemarketing

concerns on which Congress focused in the TCPA. TCPA lawsuits increased from just 14 in 2007 to 3,297 in 2019.[3] The TCPA is routinely used to gin up baseless suits, including against businesses dialing their own customers and even when the businesses have perfectly legitimate reasons for making the calls. Nothing in the TCPA's text or history supports this sweeping expansion. If this Court embraces an unlimited ATDS definition, the problems are certain to grow.

A. The FCC Indefensibly Departed From Its Original And Correct Interpretation Of "Automatic Telephone Dialing System."

In the years immediately following the TCPA's enactment, the FCC repeatedly recognized that the definition of "automatic telephone dialing system" swept no farther than equipment that uses a random or sequential number generator. When the FCC issued its first TCPA regulations in October 1992, it explained that an exemption from certain requirements for debt collectors was unnecessary because debt collection calls "are not autodialer calls (*i.e.*, dialed using a random or

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[3] ACA Int'l, *Consumer Litigation Year in Review* (Jan. 30, 2020), https://www.acainternational.org/news/consumer-litigation-year-in-review; Adonis Hoffman, *Does TCPA Stand for 'Total Cash for Plaintiffs' Attorneys'?*, Hill (Feb. 17, 2016), https://thehill.com/blogs/pundits-blog/technology/269656-does-tcpa-stand-for-total-cash-for-plaintiffs-attorneys.

sequential number generator)."[4] The FCC also determined that "speed dialing," "call forwarding," and "delayed message" equipment were not covered "because the numbers called are not generated in a random or sequential fashion."[5] In 1995, the FCC again confirmed that the ATDS provision does not apply to calls "directed to [a] specifically programmed contact number[]"—just to calls to "randomly or sequentially generated telephone numbers."[6]

Hence, for more than a decade after the TCPA's enactment, and thanks in no small part to the limited ATDS definition embraced by the FCC during the Clinton Administration, the definition of "automatic telephone dialing system" generated no controversy. The statute quietly did its work of stamping out random and sequential dialers.

The FCC, however, then wandered from the statute Congress had passed and unleased a flood of litigation that continues today. In 2003, the FCC issued a declaratory ruling that, though muddled, seemed to say that equipment could qualify as an "automatic telephone

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[4] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd. 8752, 8773 ¶ 39 (1992).

[5] *Id.* at 8776 ¶ 47.

[6] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Memorandum Opinion and Order, 10 FCC Rcd. 12,391, 12,400 ¶ 19 (1995).

dialing system" even if it did not use a random or sequential number generator.[7] The FCC did not base this ruling on any analysis of the statutory text. Rather, it determined that it had the authority to *expand* the statutory definition to capture new technologies.[8] The FCC stated that "[i]t is clear from the statutory language and the legislative history that Congress anticipated that the FCC, under its TCPA rulemaking authority, might need to consider changes in technologies."[9] The FCC, however, did not point to anywhere that Congress had given it the authority to rewrite the definition of "automatic telephone dialing system."

B. Departures From The TCPA's Text Have Unleashed A Cascade Of Litigation Over Calls That Have Nothing To Do With The Concerns That Led Congress To Enact The Autodialer Ban.

The plaintiffs' bar quickly poured into the opening created by the FCC. They recognized that, by detaching the ATDS ban from the statutory language and the limited purposes that Congress enacted it to serve, the FCC's approach arguably meant that most of the technologies used by businesses to contact consumers

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[7] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14,014, 14,091-92 ¶ 132 (2003).

[8] *Id.*

[9] *Id.*

could become an "automatic telephone dialing system." The rest was history—and for nearly two decades, TCPA litigation exploded based on calls that have nothing to do with the limited problems that Congress sought to solve via the ATDS ban. In 2018, 30 years after the TCPA's enactment, the plaintiffs' bar prevailed upon a circuit court—the Ninth Circuit, in *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018)—to embrace the view that the TCPA sweeps in devices that do not have the ability to dial random or sequential numbers. Below, MCM describes some of the cases that have resulted from jettisoning the narrow focus on calls made using a random or sequential number generator.

Social Networking. The lawsuit against Facebook described in Petitioner's brief, based on Facebook's security messages, is not an anomaly. For years, companies offering consumers text-messaging and social networking services have been targets of TCPA litigation.

- In 2011, GroupMe, a mobile group-messaging application, was hit with a class-action lawsuit by a person whose friends used the GroupMe platform to invite him to a poker game. *Glauser v. GroupMe, Inc.*, No. 11-2584, 2015 WL 475111, at *1 (N.D. Cal. Feb. 4, 2015).
- Another social-networking service, Path, was sued in a class action based on a text message the plaintiff received inviting him to view an acquaintance's photos. Class Action Compl., *Sterk v. Path, Inc.*, No. 13-2330 (N.D. Ill. Mar. 28, 2013), ECF No. 1. This invitation, the plaintiff

claimed, came from an "automatic telephone dialing system."

- Voxernet faced a class action based on a text message that the plaintiff received from a friend inviting him to use Voxernet's walkie-talkie application. *Hickey v. Voxernet LLC*, 887 F. Supp. 2d 1125 (W.D. Wash. 2012). Again, the plaintiff claimed this invitation came from an "automatic telephone dialing system."

- Yahoo was sued in multiple class actions by plaintiffs alleging that its free online-messaging service is an "automatic telephone dialing system." *E.g.*, *Dominguez v. Yahoo, Inc.*, 629 F. App'x 369 (3d Cir. 2015); *Sherman v. Yahoo! Inc.*, 997 F. Supp. 2d 1129 (S.D. Cal. 2014).

- Google faced a class action filed by plaintiffs claiming that its Disco text-messaging service was an "automatic telephone dialing system." Class Action Compl., *Pimental v. Google Inc.*, No. 11-2585 (N.D. Cal. May 27, 2011), ECF No. 1.

- Twitter found itself on the receiving end of a class action for allegedly using an "automatic telephone dialing system" to send "tweets" to people whose phone numbers used to belong to Twitter subscribers. Class Action Compl., *Nunes v. Twitter, Inc.*, No. 14-2843 (N.D. Cal. June 19, 2014), ECF No. 1.

Internet-Based Services and Mobile Apps. Technology-based business models have also come under fire.

- In 2013, Taxi Magic, a precursor to Uber and Lyft, was hit with a class-action lawsuit from a customer who alleged that Taxi Magic had used an "automatic telephone dialing system" to send him a text message announcing when the taxi he ordered would arrive. *Gragg v. Orange Cab Co.*, 995 F. Supp. 2d 1189 (W.D. Wash. 2014).
- Shortly thereafter, Lyft faced a lawsuit alleging that its mobile application's "Invite Friends" feature constituted an "automatic telephone dialing system." *Wright v. Lyft, Inc.*, No. 2:14-CV-00421, 2016 WL 7971290 (W.D. Wash. Apr. 15, 2016).
- An Uber customer who used the service over 300 times turned around and sued the company, alleging that it used an "automatic telephone dialing system" to contact riders. *Cubria v. Uber Techs., Inc.*, 242 F. Supp. 3d 541 (W.D. Tex. 2017).
- PayPal has been sued in multiple class actions by users contending that it used an "automatic telephone dialing system" to send them text messages. *E.g.*, *Roberts v. PayPal, Inc.*, 621 F. App'x 478 (9th Cir. 2015).
- Square, an electronic-payment service, was sued in a class action based on a single transaction receipt that was sent to the plaintiff via text message after a user made a purchase using Square and requested a receipt be sent to that number. Class Action Compl., *Ball v. Square, Inc.*, No. 12-6552 (N.D. Cal. Dec. 28, 2012), ECF No. 1.

Sports Teams. Professional sports organizations have also become targets. For example, a fan attending a Los Angeles Lakers basketball game sent a text message to the team that he hoped would be displayed on the arena's jumbotron. *Emanuel v. L.A. Lakers, Inc.*, No. 12-9936, 2013 WL 1719035, at *1 (C.D. Cal. Apr. 18, 2013). The Lakers sent back a single text message confirming that his request had been received. *Id.* The fan responded by suing the team, alleging that its return message was sent by an "automatic telephone dialing system." *See id.* The San Diego Chargers, Buffalo Bills, Los Angeles Clippers, Tampa Bay Rays, and Tampa Bay Lightning have also been hit with TCPA lawsuits.[10]

Restaurants. Rubio's, a restaurant chain with locations throughout the Western United States, was sued for accidentally sending food-safety text-message alerts meant for Rubio's staff to a person whose new mobile phone came with a number that had been previously assigned to a Rubio's employee. Instead of notifying Rubio's or blocking the number, the new user waited until he had received 876 texts and then sued Rubio's for $500,000. In response, Rubio's cancelled its

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[10] *See* Compl. *Friedman v. LAC Basketball Club, Inc.*, No. 13-818 (C.D. Cal. Feb. 6, 2013), ECF No. 1; Class Action Compl., *Wojcik v. Buffalo Bills, Inc.*, No. 12-2414 (M.D. Fla. Oct. 25, 2012), ECF No. 1; Class Action Compl., *Story v. Chargers Football Co., LLC*, No. BC566896 (Cal. Super. Ct. Dec. 16, 2014), Dkt. No. 1; Class Action Compl., *Thomas v. Tampa Bay Rays Baseball LTD*, No. 8:18-cv-01187 (M.D. Fla. May 17, 2018), ECF No. 1; Class Action Compl., *Fernandez v. Tampa Bay Rays Baseball LTD*, No. 8:18-cv-02251 (M.D. Fla. Sept. 11, 2018), ECF No. 1; Class Action Compl., *Hanley v. Tampa Bay Sports & Entm't LLC*, No. 8:19-cv-00550 (M.D. Fla. Mar. 5, 2019), ECF No. 1.

food-safety alert system. *See* Petition for Expedited Declaratory Ruling at 1-2, *In re Rubio's Restaurant, Inc.*, CG Docket No. 02-278 (FCC Aug. 11, 2014), http://apps.fcc.gov/ecfs/document/view?id=7521768526.

Pharmacies. Pharmacies have been sued for calling consumers to remind them to pick up their prescriptions. *See, e.g.*, Class Action Compl., *Kolinek v. Walgreen Co.*, No. 13-4806 (N.D. Ill. July 3, 2013), ECF No. 1; Class Action Compl., *Thompson v. CVS Pharmacy, Inc.*, No. 14-2081 (M.D. Fla. Dec. 19, 2014), ECF No. 1.

Labor Unions. The Service Employees International Union was sued in connection with a calling campaign aimed at a hospital involved in a labor dispute. The hospital alleged that the union's technology, which facilitated local residents calling the hospital with messages of support for the union, was an "automatic telephone dialing system." *See Ashland Hosp. Corp. v. Serv. Emps. Int'l Union Dist. 1199 WV/KY/OH*, 708 F.3d 737, 739 (6th Cir. 2013).

Banks and Financial Services. Banks and financial-services companies are regularly sued for calling borrowers who have stopped making payments. Such cases regularly yield seven- and eight-figure class settlements. For example, in 2014, Capital One paid $75.5 million to settle TCPA class actions filed by cardholders. HSBC paid $40 million in 2015. Within the same time frame, Chase Bank paid $34 million; Bank of America paid $32 million; and Sallie Mae paid $24.1 million. Between 2016 and 2019, Wells Fargo paid multiple settlements totaling over $45 million.

Standard-issue Phones. As the Ninth Circuit correctly conceded, eliminating the requirement of a random or sequential number generator makes *every* smartphone an "automatic telephone dialing system." That is because they *all* have the capacity to store and dial numbers. Perhaps lawsuits based on that theory seem extreme. But the TCPA's hefty financial penalties ensure that such suits will be brought. Indeed, even before the Ninth Circuit's decision in *Marks*, there were already multiple reported cases in which TCPA plaintiffs argued that a standard office desk phone is an "automatic telephone dialing system." *See, e.g.*, *Robinson v. Green Tree Servicing, LLC*, No. 13 CV 6717, 2015 WL 4038485, at *4 (N.D. Ill. June 26, 2015); *Mudgett v. Navy Fed. Credit Union*, 998 F. Supp. 2d 722, 724-25 (E.D. Wis. 2012); *Dobbin v. Wells Fargo Auto Fin., Inc.*, No. 10 C 268, 2011 WL 2446566, at *4 (N.D. Ill. June 14, 2011).

Manufactured Violations. Because TCPA claims are so lucrative, plaintiffs have gone to extreme lengths to manufacture TCPA claims. For would-be plaintiffs and their attorneys, anything that can generate potential TCPA violations is a valuable commodity—such as recycled mobile phone numbers that receive large numbers of telemarketing calls, collection calls, or text communications from businesses. Indeed, one noted plaintiffs' attorney bragged that he tells his clients "You need to play the game … You need to string them

along yourself."[11] And many litigants have done just that.

For example, a company called Telephone Science Corporation ("TSC") operates a for-profit service called "Nomorobo." Based on the pretext of helping consumers avoid robocalls, TSC maintains what it calls a "honeypot" of thousands of recycled telephone numbers and files TCPA lawsuits against the unsuspecting companies that call the numbers in its "honeypot"—even though many of these businesses are likely just trying to reach prior owners of the numbers and have no way of knowing that the numbers were reassigned.[12]

Such schemes abound. One case describes a plaintiff who "purchased at least thirty-five cell phones and cell numbers with prepaid minutes for the purpose of filing lawsuits under the" TCPA. *Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782, 788 (W.D. Pa. 2016). Despite living in Pennsylvania, the plaintiff selected numbers

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[11] TCPAWorld, *Firestarter: TCPAWorld's Most Adventurous Frequent Flyer – Todd Friedman – Joins Second Episode of Unprecedented Podcast* (Apr. 9, 2019), https://tcpaworldcom/2019/04/09/firestarter-tcpaworlds-most-adventurous-frequent-flyer-todd-friedman-joins-second-episode-of-unprecedented-podcast/.

[12] *Tel. Sci. Corp. v. Asset Recovery Sols., LLC*, No. 1:15-CV-05182 (N.D. Ill. filed June 12, 2015); *Tel. Sci. Corp. v. Credit Mgmt., LP*, No. 2:15-CV-04122 (E.D.N.Y. filed July 14, 2015); *Tel. Sci. Corp. v. Hilton Grand Vacations Co., LLC*, No. 6:15-CV-00969 (M.D. Fla. filed June 12, 2015); *Tel. Sci. Corp. v. Trading Advantage LLC*, No. 1:14-CV-04369 (N.D. Ill. filed June 12, 2014); *Tel. Sci. Corp. v. Pizzo*, No. 2:15-CV-01702 (E.D.N.Y. filed Mar. 30, 2015).

with Florida area codes because she believed that people in Florida would be more likely to default on credit cards and receive calls from debt collectors. *Id.*

Another case describes a plaintiff who "filed at least thirty-six … lawsuits under the TCPA," had "thought about franchising his TCPA lawsuits," "taught classes teaching others how to sue telemarketers," and listed himself as a "Pro Se Litigant of TCPA lawsuits on his LinkedIn profile."[13]

In 2018, the Philadelphia Inquirer profiled a litigant who had eight different phone numbers and filed dozens of TCPA lawsuits. The article describes a lawsuit the plaintiff manufactured by placing an order, freezing the credit card payment so that the company would call him back, then suing the same day.[14] A Forbes article detailed a similar scheme, profiling a litigant who made over $800,000 by filing TCPA lawsuits after having his landline number (which it would have been legal to autodial) ported to a mobile phone.[15]

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[13] *Morris v. Unitedhealthcare Ins. Co.*, No. 4:15-CV-00638, 2016 WL 7115973, at *6 (E.D. Tex. Nov. 9, 2016), *report and recommendation adopted*, 2016 WL 7104091 (E.D. Tex. Dec. 6, 2016).

[14] Christian Hetrick, *Meet the Robocall Avenger: Andrew Perrong, 21, Sues Those Pesky Callers for Cash*, Phila. Inquirer (Nov. 2, 2018), https://www.inquirer.com/philly/business/robocall-lawsuits-verizon-citibank-andrew-perrong-20181102.html.

[15] Karen Kidd, *Phoney Lawsuits: Polish Immigrant Concludes Six-Figure Run By Settling 31st Lawsuit*, Forbes (Jan. 17, 2018), https://www.forbes.com/sites/legalnewsline/2018/01/17/phoney-law

Another strategy involves consenting to receive automated text messages from a business and then withdrawing consent in a manner that the plaintiff knows will not cause the texts to stop. Automated text messages sent by legitimate (non-scam) businesses typically include a notification that the recipient can opt out by texting back "STOP." Savvy plaintiffs and their lawyers, however, know that computerized texting systems are programmed to recognize "STOP"—but that these systems will not recognize other text responses. As a result, there is now a line of cases—many involving the same plaintiffs' lawyers—in which plaintiffs have consented to receive automated texts and then, instead of following the clear instruction to "Reply STOP to cancel," have sent back lengthy responses that did not include the word "stop" but used other language to request that the messages cease. When the messages continued, they filed TCPA lawsuits claiming that they had revoked their consent and demanding statutory penalties for every text sent after they supposedly requested that the messages cease.[16]

In one early case, a litigant in California deliberately maintained a phone number (999-9999) that he knew

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suits-polish-immigrant-concludes-six-figure-run-by-settling-31st-lawsuit/.

[16] *See, e.g.*, *Rando v. Edible Arrangements Int'l, LLC*, No. 17-701, 2018 WL 1523858 (D.N.J. Mar. 28, 2018); *Viggiano v. Kohl's Dep't Stores, Inc.*, No. 17-0243, 2017 WL 5668000 (D.N.J. Nov. 27, 2017); *Epps v. Earth Fare, Inc.*, No. CV 16-08221 (C.D. Cal. filed Nov. 3, 2016).

would get thousands of wrong-number calls per year so that he could make money on TCPA lawsuits. *See Kinder v. Allied Interstate, Inc.*, No. E047086, 2010 WL 2993958, at *1 (Cal. Ct. App. Aug. 2, 2010). He converted what had been a pager number to a stand-alone voicemail account and hired staff to log every wrong-number call he received, issue demand letters to purported violators, and negotiate settlements. *Id.* He filed hundreds of TCPA lawsuits over the course of four years before a court branded him a vexatious litigant. *Id.*

Some lawyers have even launched mobile applications to easily convert texts and calls into cash-generating lawsuits. One plaintiffs' firm, which has filed hundreds of TCPA lawsuits, launched a mobile application called "Block Calls Get Cash," which delivers information about cell-phone calls to the law firm so that it can file TCPA lawsuits against the callers.[17] "[L]augh all the way to the bank," the app's website boasts.[18] Not to be outdone, another firm was right on its heels with its own app, dubbed "Stop Calls Get Cash."[19]

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[17] *See* U.S. Chamber Institute for Legal Reform, *Lawsuit Abuse? There's an App for That* (Oct. 29, 2014), https://www.institutefor legalreform.com/resource/lawsuit-abuse-theres-an-app-for-that.

[18] *Id.*

[19] John O'Brien, *Click, Then Sue: Call-Blocking App Was Meet Market for Lawyers Seeking Clients*, Forbes (Jan. 30, 2019), https:// www.forbes.com/sites/legalnewsline/2019/01/30/click-then-sue-call-blocking-app-hooked-users-up-with-lawyers/.

If cases like those described above are going to flood the federal courts—and impose crushing financial penalties on businesses simply for calling their own customers—it should only be because Congress has mandated as much. Here, Congress has said the very opposite. This Court should repair the breach and return the ATDS ban to the limited purposes Congress enacted it to serve.

III. Expanding The "Automatic Telephone Dialing System" Definition Is Not Necessary To Prevent Harassing Calls.

As MCM has shown, a sweeping ATDS definition is not necessary to serve the purposes that *actually* motivated Congress to enact the ATDS ban. Nor is such a sweeping definition necessary to serve any genuine policy purpose. Other provisions of the TCPA already serve the functions that plaintiffs and sympathetic courts hope to rewrite the ATDS definition to achieve. For example, the statute's Do-Not-Call provisions and related regulations restrict telemarketing sales calls and text messages, provide a mechanism for consumers to opt out of unwanted telemarketing calls, and allow consumers to sue telemarketers who fail to comply for $500 per call. *See* 47 U.S.C. § 227(c)(1)-(5); 47 C.F.R. § 64.1200(c). Unlike the ATDS definition, Congress drafted these provisions specifically to address the problem of intrusive telemarketing. A slew of TCPA regulations also limit unsolicited telephone and text advertisements, again on pain of imposing the TCPA's

statutory penalties for noncompliance.[20] The FCC also vigorously enforces laws against illegal robocalls, such as those using caller-ID spoofing.[21] And the FCC is currently strengthening protections against illegal robocalls via its implementation of the Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (TRACED Act). *See In re Amendment of Section 1.80 of the Commission's Rules*, Order, 35 FCC Rcd. 4476 (E.B. 2020).

Companies collecting unpaid debts are a frequent target of TCPA litigation. But again, other laws already guard against abusive practices by debt collectors, including federal and state laws that limit the time, place, and manner in which debt collectors can call consumers. These statutes allow consumers, either individually or as a class, to sue debt collectors and recover substantial statutory penalties. *See* 15 U.S.C. §§ 1692c, 1692d(5), 1692k. These laws even provide for attorneys' fees, which the TCPA does not. These tailored laws fully address genuine abuse. By contrast, there is no evidence in the TCPA's lengthy legislative history that Congress intended its auto-dialer ban to target debt-collection calls. Nowhere, for example, did any advocate for the auto-dialer ban claim that the ban was necessary to address debt-collection calls. Instead, as explained above, those advocates focused on the

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[20] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd. 1830 (2012).

[21] *E.g.*, Press Release, FCC, *FCC Issues $120 Million Fine For Spoofed Robocalls* (May 10, 2018), https://docs.fcc.gov/public/attachments/DOC-350645A1.pdf.

problems that arose from random and sequential dialing—problems that have nothing to do with debt collection, where callers know exactly who they are trying to reach and have no reason to dial randomly or sequentially.

CONCLUSION

MCM urges the Court to reverse the decision below.

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