No. 19-511

IN THE
Supreme Court of the United States

FACEBOOK, INC.,
Petitioner,

v.

NOAH DUGUID, ET AL.,
Respondents.

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

BRIEF OF QUICKEN LOANS, LLC AS AMICUS CURIAE SUPPORTING REVERSAL

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September 11, 2020

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Quicken Loans is a Detroit-based mortgage company that helps its clients achieve the American dream of home ownership and financial freedom. It is the nation's largest mortgage lender and one of the nation's top ten mortgage servicers. Quicken Loans' "client-first" philosophy of customer service, driven largely by easy and efficient client engagement and communication, is the reason why Quicken Loans is the industry leader in client satisfaction. J.D. Power and Associates has named Quicken Loans the top mortgage originator for customer service for the last ten years, and the top mortgage servicer for the last seven.

Much of Quicken Loans' award-winning client engagement is done over the telephone—either with a call or a text. Quicken Loans does not blindly "cold call"; it communicates with prospective clients only when they have asked for information about Quicken Loans' products, and it proactively contacts current clients to offer services that might benefit them, such as forbearance, payment deferrals, and other options to help clients stay in their homes in the wake of the COVID-19 crisis.

That outreach has come at an unanticipated cost. In the last two years alone, Quicken Loans has been forced to defend against numerous putative class action lawsuits alleging that its telephone

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[1] All parties have consented to the filing of this brief. No counsel for a party authored any part of this brief, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to the brief's preparation or submission.

communications (both calls and text messages) violate the so-called "autodialer provision" of the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227. These lawsuits (and numerous other individual TCPA lawsuits) have been brought by plaintiffs looking to turn Quicken Loans' beneficial, client-focused outreach into a personal windfall in the form of statutory damages.

These lawsuits have been made possible by an overreaching and untenable interpretation of the TCPA's definition of the term "automatic telephone dialing system" ("ATDS"). Instead of limiting the term to equipment that randomly or sequentially dials phone numbers—as the statute plainly requires—several courts, including the Ninth Circuit, have concluded that the TCPA applies when calls are made using equipment that stores numbers and dials those stored numbers automatically—*i.e.*, that can automatically dial numbers from a list. This far-reaching interpretation, which would treat smartphones used by Americans everyday as an ATDS, *see* Br. for Pet'r 44, allows plaintiffs to weaponize the TCPA and sue companies like Quicken Loans over calls requested by consumers and legitimate calls to specific groups of individuals made for valid business purposes. This runs contrary to Congress's intent to have the TCPA serve as a shield against true, unsolicited nuisance calls—*i.e.*, automated robocalls and telemarketing calls that are blindly made and indiscriminately blanketed across the country.

As a frequent target of these abusive TCPA lawsuits, Quicken Loans has an interest in the question presented and in ensuring that the ATDS definition in the TCPA is given its original scope. Expanding the ATDS definition beyond what Congress

wrote has done little to stop the explosive growth of the calls that Congress intended to prohibit in enacting the TCPA in 1991. Indeed, other regulatory frameworks have proven to be far more effective in stopping unwanted calls. In Quicken Loans' experience, the contorted interpretation of the ATDS definition adopted by the court of appeals here has only harmed companies and the clients that they serve.

SUMMARY OF ARGUMENT

I. Everyone agrees that true robocalls are a nuisance. Most people with a phone are tired of receiving unsolicited marketing calls from a prerecorded or artificial voice, or randomly dialed calls, even if made by a live operator. But the fact that these calls are *still* a nuisance demonstrates that the TCPA is not particularly effective in stopping them, despite being designed for that very purpose. Even with an overly expansive ATDS definition, truly pernicious robocalls continue to bother owners of residential landlines and mobile phones alike. The people who make them are not afraid of the TCPA's penalties, because they are not afraid of being identified and sued in a U.S. court. The calls they make are "spoofed"—disguised to hide their origin and caller—so a weary recipient will not know whom to sue.

Instead of stopping unsolicited robocalls and uninvited telemarketing calls to random consumers, the widening of the TCPA's net has improperly snagged more and more legitimate calls and messages. Companies like Quicken Loans are being subjected to class actions, and the attendant pressure to settle or face uncertain liability for engaging in legitimate consumer outreach, even though the outreach is often done at the consumer's behest or to the consumer's

benefit. According to respondents and the court of appeals here, a caller cannot store numbers on a list and dial from the list "automatically" unless the caller has prior express consent for the call from each recipient. That interpretation punishes companies for using technology to efficiently place their legitimate, personalized calls, without random or sequential dialing—instead of dialing the phone manually. And while legitimate calls are being ensnared in the TCPA's widened web, the number of true robocalls is growing unabated—either because such calls are expressly allowed by the FCC, or because technology has made it possible for robocallers to evade detection.

II. Limiting the meaning of ATDS to the types of calls that Congress intended—calls that are randomly or sequentially made—will not open the proverbial floodgates and expose Americans to even more nuisance calls. To the contrary, there are a number of effective tools already in place to fight unwanted calls, including the Federal Do-Not-Call Registry, the Federal Trade Commission (FTC)'s Telemarketing Sales Rule, and SHAKEN/STIR, the FCC's new preferred framework for stopping robocalls at the carrier level, before they reach their intended recipients.

III.The court of appeals' sweeping ATDS interpretation will only discourage companies like Quicken Loans from maintaining contact with their clients and offering them assistance when appropriate. That discouragement is especially problematic when the contact and engagement is required *by federal law*. For example, as a mortgage servicer, Quicken Loans is required to establish "live contact" after learning that a client is unable to make his or her payments, and to "promptly" provide the client with information about

the client's options for avoiding foreclosure and saving his or her home. The court of appeals' ATDS interpretation would allow plaintiffs to use one consumer-protection statute (the TCPA) to hold Quicken Loans liable for complying with another consumer-protection statute, and for delivering relief to clients in financial distress.

ARGUMENT

I. An overly broad definition of "automatic telephone dialing system" will block legitimate outreach to consumers, while doing little to block truly pernicious robocalls.

A cordless landline and a cellphone both ring. The first is a randomly dialed call, using a prerecorded voice, with an unwanted political message. The second is a personal communication to let the recipient know that she has missed a mortgage payment. It should be obvious which of these two calls falls under a statute written to restrict *automatic telephone dialing—i.e.*, robocalls. But the first call is exempt. And the court below would find the *second* call in violation of the statute, and subject to civil penalties of $500 to $1,500, if the caller from the mortgage company automatically dials the number from a stored list of phone numbers without the borrower's consent—say, all clients who have missed a payment that month and need follow-up. In other words, under the Ninth Circuit's interpretation, many personal communications are punished as robocalls—whereas many actual robocalls are exempt. That topsy-turvy result helps illustrate why the Ninth Circuit's interpretation is simply wrong.

Under that interpretation, the TCPA no longer combats robocalls: it extends to calls and texts that are

not made through either "random" or "sequential" dialing (and that do not involve any artificial or prerecorded voice). That misreading of the statutory term "automatic telephone dialing system" ensnares calls made by live humans, to particular consumers, for legitimate business purposes. And all the while, true "robocalls" either evade detection or, in some cases, have even been *legitimized* by the FCC through the use of its exemption authority.

A. Congress enacted the TCPA to combat true robocalls.

Congress enacted the TCPA in 1991 to respond to "a torrent of vociferous consumer complaints about robocalls," *Barr v. Am. Ass'n of Pol. Consultants, Inc. (AAPC)*, 140 S. Ct. 2335, 2344 (2020) (plurality opinion). The problems with robocalls, as opposed to telephone solicitation more generally, fell mainly into two categories.

First, robocalls containing prerecorded messages were tying up phone lines of all kinds—phones used by emergency personnel, business lines, and residential lines. These messages were filling up answering machines and sometimes preventing callers from placing calls, as the calls delivering the prerecorded messages would not properly disconnect. *See* S. Rep. No. 102-178, at 2, 4-5 n.5 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 1969, 1971-72. The TCPA accordingly restricts the use of "an artificial or prerecorded voice" to call certain residential *or* cell phones, among other recipients. 47 U.S.C. § 227(b)(1)(A), (B).

Second, some indiscriminate calls cost the unwilling recipient money or tied up resources. Calls made to "cellular or paging telephone numbers" "impose[d] a

cost on the called party." S. Rep. No. 102-178, at 2, *as reprinted in* 1991 U.S.C.C.A.N. 1969. In the early 1990s, cell phone calls could cost up to 90 cents per minute (regardless of whether the cell phone user was the caller or the recipient)—up to 80 times the cost of a local call. *See* Anthony Ramirez, *Mapping the Wireless-Phone Future*, N.Y. Times (Nov. 12, 1992), https://www.nytimes.com/1992/11/12/us/mapping-out-the-wireless-phone-future.html. Auto-dialing randomly or sequentially, especially in large numbers, thus could result in calls—and charges—to many of these unsuspecting consumers, even if the caller used a live person rather than a recorded message. In addition, auto-dialing randomly or sequentially often resulted in calls to "emergency and public service organizations," which had to commit their limited resources to answering them. H.R. Rep. No. 102-317, at 10, 24 (1991). These autodialed calls are robocalls not because they use a robotic voice, but because they use robotic random or sequential number dialing to make indiscriminate "cold calls."

To combat that problem, Congress adopted the ATDS provision at issue in this case. The ATDS provision of the TCPA prohibits calls from being made "using any automatic telephone dialing system" to certain recipients. 47 U.S.C. § 227(b)(1)(A)(iii).[2] 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." *Id.* § 227(a)(1). The list of prohibited recipients in-

[2] There are exceptions for emergencies and calls made with prior express consent. 47 U.S.C. § 227(b)(1)(A).

cludes cell phones, as well as hospital rooms, police emergency numbers, and others that a telemarketer, for example, would be unlikely to call on purpose but might call through random or sequential dialing. *See id.* § 227(b)(1)(A)(i)-(iii).

Thus, "[i]n plain English, the TCPA prohibited almost all robocalls to cell phones." *AAPC*, 140 S. Ct. at 2344. At the time, that was a much smaller-scale prohibition than the restriction on calls using pre-recorded messages and artificial voices: unlike today, cell phones in the early 1990s were a rarity. As of June 1992, there were only 8,892,535 cell phone subscribers in the United States, roughly 3% of the American population. James F. DeRose, *The Wireless Data Handbook* 132 (4th ed. 1999). Now, 96% of Americans have a cell phone of some kind. Pew Research Ctr., *Mobile Fact Sheet,* (June 12, 2019), https://www.pewresearch.org/internet/fact-sheet/mobile/. And under most calling plans, an incoming call will rarely or never increase the recipient's bill, as these plans allow for unlimited calls and texts at a flat rate. *See* Adam Ismail, *Best Basic Phone Plans: From Low Data to Talk and Text Only*, Tom's Guide (Apr. 9, 2020), https://www.tomsguide.com/best-picks/best-basic-phone-plans-low-data-talk-text (identifying a number of low-cost cell phone plans with unlimited talk and text options).

B. Live calls, to a specific recipient who was not randomly chosen, are not robocalls.

There is a marked difference between a robocall and a live call directed at a consumer that is made from a list. Legitimate calls are *targeted*, whereas the robocalls addressed by the TCPA are often indiscriminately made. A telemarketer looking to blanket the

country with its product or service, or a fraudster trying to obtain iCloud passwords through a fake security message, are perfectly happy to make calls at random, or by sequentially dialing a series of numbers (*e.g.*, 202-555-1000, 202-555-1001, and so on). Indeed, as the Senate Report on the TCPA recognized, random or sequential dialing is attractive to telemarketers precisely because it allows the caller to reach even unlisted numbers. S. Rep. No. 102-178, at 2.

But TCPA plaintiffs, not content to pursue true robocallers, have attempted to portray the TCPA as if it penalized *any* call that the recipient might find unwelcome. That attempt to reinterpret the statute depends on reading the definition of ATDS as broadly as possible. They contend that any technology that makes phone calls from a stored list somehow automatically transforms the calls into robocalls prohibited by the TCPA.

But a list of phone numbers is not something only telemarketers use; it is an age-old technique used by everyone from neighborhood phone trees to charities that thank their donors—anyone, in short, who needs to contact two or more *specific* people (unlike an indiscriminate robocaller). Legitimate companies often use lists to reach out to a particular group of individuals for a specific purpose. *See* pp. 23-26, *infra*. These numbers are not generated at random or in sequential order and dialed; rather, they are gathered deliberately, often because the call recipients themselves have provided their numbers in order to receive communications from that caller. *See, e.g.*, *Blow v. Bijora, Inc.*, 855 F.3d 793, 803 (7th Cir. 2017) (TCPA plaintiff "gave her cell phone number to [the caller] on several differ-

ent occasions," which was then added to a text messaging list).

In short, dialing from a list is not robocalling—it is a common practice that virtually anyone can use for efficient outreach. There is nothing "robo" about it.

C. The TCPA is not effective in stopping unwanted calls and is instead being used to punish legitimate callers.

Even as plaintiffs have been pushing to expand the ATDS definition to treat more calls as robocalls and, supposedly, deter more robocalling, the end result has been exactly the opposite: there has only been a dramatic increase in unwanted calls. That, in turn, has caused most Americans to avoid answering the phone. *See* Yuki Noguchi, *'Do I Know You?' And Other Spam Phone Calls We Can't Get Rid Of*, NPR (June 6, 2019, 5:00 AM), https://www.npr.org/2019/06/06/727711432/do-i-know-you-and-other-spam-phone-calls-we-can-t-get-rid-of (noting that "70% of [Americans] no longer answer calls they don't recognize," and that, while "[r]egulators and industry are combating junk calls . . . . so far, they haven't succeeded").

There are two reasons for the explosive uptick in unwanted calls (despite the fact that in parts of the country the ATDS net has been cast more widely than the statute should allow). First, many types of calls that most Americans would consider "unwanted" are expressly *permitted* by the FCC. So even the broadest possible interpretation of ATDS would not stop those calls. Second, robocallers have become far cleverer and harder to detect than in 1991, when Congress enacted the TCPA.

1. Congress left it to the FCC to decide which unwanted calls subject to the TCPA should nevertheless be permitted even without prior express consent and even if made with an ATDS. 47 U.S.C. § 227(b)(2)(B), (C). And the FCC has used that power to carve out sweeping categories of "unwanted" calls.

The FCC expressly allows a number of "robocalls"—specifically, calls made "using an artificial or prerecorded voice to deliver a message"—to residential landlines. These are the robocalls that most Americans find to be a nuisance.[3] *Any* such robocall "not made for a commercial purpose," for example, is allowed. 47 C.F.R. § 64.1200(a)(3)(ii). So if a resident receives a prerecorded call on her home phone line asking her to participate in a market survey or a presidential poll, that is not considered a prohibited "robocall" under the TCPA, even if a sophisticated computer interface is asking questions on the other end of the line. *See In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd. 8752, 8774 (Oct. 16, 1992) ("1992 Order") (explaining that the exemption for non-commercial calls extends to "calls conducting research, market surveys, political polling or similar activities"). Robocalls "made by or on behalf of a tax-exempt nonprofit organization," as well as certain

[3] Of the 726,306 unwanted-call complaints that the FCC received since October 31, 2014, 265,238 (36.5%) were about prerecorded messages. By contrast, only 172,844 (23.8%) were about live calls. The remainder of the complaints were either about abandoned calls (135,504, or 18.7%), or text messages (31,031, or 4.3%), or did not identify a reason for the complaint (121,689, or 16.7%). *See* FCC, *CGB – Consumer Complaints Data* (accessed on Aug. 30, 2020), https://opendata.fcc.gov/Consumer/CGB-Consumer-Complaints-Data/3xyp-aqkj/data.

healthcare-related robocalls, are also exempt. 47 C.F.R. § 64.1200(a)(3)(iv), (v). Even commercial robocalls (such as a market survey on a homeowner's future interest in solar panels) are allowed, so long as they do not "include or introduce an advertisement or constitute telemarketing." *Id.* § 64.1200(a)(3)(iii).

Certain types of unsolicited calls to cell phones are also allowed. The 2015 Order, for example, exempts certain time-sensitive calls from financial institutions—*e.g.*, to notify a customer of a potentially fraudulent transaction, to alert a customer of identity theft or a data breach, or to confirm a money transfer. *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of* 1991, 30 FCC Rcd. 7961, 8024-26 (July 10, 2015) ("2015 Order"). Some healthcare calls are also exempted, so long as they are not made for marketing purposes—for example, calls about payment options, insurance coverage, and eligibility for government benefits. *Id.* at 8030.

Because of these exceptions, the TCPA is a sieve for unwanted calls, not a shield: even with the ATDS definition at its broadest and most untenable, there are still a host of potentially unwanted or unsolicited calls that the TCPA will not block. A person could start his day by getting a call on his home number asking if he'd like to participate in a poll on the local congressional race. Later in the day, he could get an automated call from his doctor's office on his cell phone, reminding him of dietary restrictions in advance of his upcoming elective procedure. And in the evening, the individual's bank may call him on his cell phone to let him know that, due to a recent data breach, he is eligible to sign up for a credit monitoring service. The TCPA would not stop any of these calls. *See* 2015 Order, 30

FCC Rcd. at 8025, 8030; 1992 Order, 7 FCC Rcd. at 8774. But if the person's mortgage servicer uses certain calling technology to place a live call to the person's cell phone so as to alert him about his eligibility for COVID-19 relief options, the Ninth Circuit's ATDS interpretation would make that call unlawful unless the servicer can show that it had prior express consent to place the call.

2. Expanding the definition of the type of equipment used to make phone calls will do little to address the reason why pernicious robocalls have become increasingly pervasive and increasingly difficult to stop: technology. The data proves this—the number of robocalls made in the United States has grown exponentially in the last five years, despite efforts by plaintiffs to persuade courts to broaden the ATDS definition. In 2016, approximately 29 billion robocalls were made in the United States; in 2018, that number skyrocketed to 47.8 billion. *See* FCC, *Report on Robocalls: A Report of the Consumer and Governmental Affairs Bureau*, CG Dkt. No. 17-59, 2019 WL 945132, at *4 (Feb. 1, 2019) ("*Report on Robocalls*").

The worst kinds of robocallers—such as those looking to scam individuals out of money or personal identifying information—manage to evade detection because their calls are "spoofed," *i.e.*, the name and number listed on the Caller ID display are falsified to make the recipient think that the call is coming from a legitimate source, and because they do not reveal their true identity during the call. The spoofing makes it difficult to track the original caller. FCC, *Caller ID Spoofing*, https://www.fcc.gov/consumers/guides/spoofing-and-caller-id. The same is true of Voice over Internet Protocol (VoIP) technology, which allows calls to be inex-

pensively made using the Internet. VoIP allows robocallers to hide the point of origin of a call by bouncing calls "around the telephony network a few times before connecting," which makes robocalls difficult to trace. *See* Lily Hay Newman, *The Robocall Crisis Will Never Be Totally Fixed*, Wired Magazine (Apr. 7, 2019, 7:00 AM), https://www.wired.com/story/robocalls-spam-fix-stir-shaken/.

Both Congress and the FCC have recently recognized that the only way to stop these robocalls is to use technology to thwart them before they make it to their recipients. *See* pp. 18-21, *infra*. And as the agency itself has acknowledged, the blunt, outdated instrument of the TCPA cannot be continually reimagined to thwart new, smarter approaches to old nuisances. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (P2P Alliance Petition for Clarification)*, DA No. 20-670, 2020 WL 3511100, at *4 (FCC June 25, 2020) ("The TCPA does not and was not intended to stop every type of call.").

3. Rather than stopping robocall-induced "telephone terrorism," as Congress intended, the TCPA has instead been used as a tool for class-action plaintiffs to "hold legitimate, well-intentioned businesses hostage with the ever-present threat of litigation." Stuart L. Pardau, *Good Intentions and the Road to Regulatory Hell: How the TCPA Went from Consumer Protection Statute to Litigation Nightmare*, 2018 U. Ill. J.L. Tech. & Pol'y 313, 323 (2018). As Quicken Loans has experienced firsthand, *see* pp. 27-29, *infra*, legitimate, targeted attempts at personal consumer outreach can become the subject of a multimillion-dollar class action. U.S. Chamber Institute for Legal Reform, *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent*

TCPA Lawsuits 10 (Aug. 2017) (listing TCPA class action settlements by companies between 2014 and 2017, and identifying 21 settlements of $10 million or more).

A company that does everything the right way—for example, by obtaining and documenting prior express consent before making a call—is still exposed to abusive TCPA lawsuits. Plaintiffs often are not deterred from suing even though the evidence will show that they consented to a call. Because consent is a fact-intensive affirmative defense, it is rarely resolved at the motion-to-dismiss stage. *See Reese v. Marketron Broad. Sols., Inc.*, No. 18-1982, 2018 WL 2117241, at *2 (E.D. La. May 8, 2018) ("In a TCPA case, consent is an affirmative defense."); *Connelly v. Hilton Grant Vacations Co., LLC*, No. 12-cv-599, 2012 WL 2129364, at *3 (S.D. Cal. June 11, 2012) ("Plaintiffs' complaint need not allege the absence of consent, and accordingly, a motion for summary judgment—rather than a motion to dismiss—is the proper place for the defendant to establish that the Plaintiff's claim fails due to the presence of prior express consent." (citation, internal quotation marks, and modifications omitted)). Plaintiffs can drag out a TCPA lawsuit through burdensome discovery, class certification, and summary judgment—and use the threat of lengthy litigation as leverage to extract an undeserved settlement.

As a result, not only has the TCPA been ineffective as a shield against abusive robocalls, it is being used as a weapon by class-action lawyers pursuing statutory damages. And an overly expansive interpretation of ATDS like the Ninth Circuit's only enables such abusive litigation.

II. Even if the meaning of ATDS is limited to its original scope, such an interpretation will not open the floodgates to robocalls, as other effective measures are in place to combat them.

Even if the ATDS provision were construed to cover only equipment that dials calls randomly and sequentially, that construction would not mean robocalls and unwanted solicitations would freely flow across the country. The TCPA is far from the only tool available to stop the scourge of unwanted calls. Regulators and members of the public alike can turn to other existing frameworks governing robocalls and telephone solicitations to stop unwanted calls. In many cases, these frameworks are more effective than the TCPA.

The Federal Do-Not-Call Registry. One of the most formidable defenses to unwanted calls is the Federal Do-Not-Call Registry maintained by the FTC. Before the Registry's creation in 2003, the FTC required companies to maintain their own do-not-call lists, and several states had their own lists as well. That patchwork proved to be ineffective, as it placed the burden on consumers to opt out of multiple companies' lists, and, as the calls were unsolicited, it was difficult to know which companies would be doing the calling. *See* Telemarketing Sales Rule, 68 Fed. Reg. 4,580, 4,638 (Jan. 29, 2003).

The Federal Do-Not-Call Registry supplemented company-specific do-not-call lists with a universal one. Consumers register their residential or personal cellular phone numbers onto the master federal list, and no uninvited solicitation calls may be made to the listed numbers unless there is an "established business rela-

tionship" between the caller and the recipient, or if the call recipient has given consent for the call. *See* 16 C.F.R. § 310.4(b)(1)(iii)(B); 47 C.F.R. § 64.1200(c)(2).

Those who make solicitation calls have a number of responsibilities under the Do-Not-Call Registry's regulatory scheme. First, solicitors must "scrub" their marketing lists every 31 days to ensure that all numbers on the Do-Not-Call Registry have been removed. 47 C.F.R. § 64.1200(c)(2)(i)(D). Second, in order to know *which* numbers to scrub, solicitors must pay for access to the list, at a cost of $65 per area code (and a maximum of $17,765). 16 C.F.R. § 310.8(c). Those fees pay for the upkeep of the Registry.

Calling a number properly registered on the Do-Not-Call Registry without express consent or an established business relationship results in steep penalties for a caller—up to $40,000 per call in a government enforcement action and $500 to $1,500 per call in a private lawsuit. *See* 47 U.S.C. §§ 227(c)(5), (e)(5)(A)(i). But the Do-Not-Call regulations also encourage companies to comply by providing a safe harbor for callers who take certain precautions to avoid calling numbers on the list. A caller "will not be liable" for a call made to a listed number if it:

> (A) implements procedures for carrying out the Do-Not-Call requirements;
>
> (B) trains its staff on how to comply with the Do-Not-Call regulations; and
>
> (C) keeps a list of customers who asked not to be contacted in the future.

47 C.F.R. § 64.1200(c)(2)(i)(A)-(C).

The Do-Not-Call Registry has been "highly effective in reducing unwanted calls." *Stopping Fraudulent Robocall Scams: Can More Be Done? Hrg. Before the Subcomm. on Consumer Protection, Product Safety, and Ins. of the Comm. on Commerce, Science, and Transportation*, 113th Cong. 5 (2013) (statement of Lois Greisman, Assoc. Dir., Bureau of Consumer Prot., FTC). If a cellphone user wants to avoid unwanted telemarketing solicitations, an overbroad ATDS definition is unlikely to provide her with the deterrence she seeks, but nor will a narrow interpretation leave her unprotected; rather, the TCPA (intentionally) offers her protection through the Do-Not-Call Registry. Many Americans have availed themselves of this protection: there are 239 million numbers on the list as of 2019. FTC, *Biennial Report to Congress Under the Do-Not-Call Registry Fee Extension Act of 2007*, at 1 (Dec. 2019). Millions of numbers are added to the list every year. *Id.* And the public has been vigilant about reporting violations of the Do-Not-Call Registry—in 2019, the FTC received 5,422,298 complaints about calls made to listed numbers, more than *25 times as many* as the 193,170 complaints that the FCC received in the same time period about unwanted calls. *Compare* FTC, *National Do Not Call Registry Data Book for Fiscal Year 2019* (Oct. 2019), https://www.ftc.gov/reports/national-do-not-call-registry-data-book-fiscal-year-2019, *with* FCC, *FCC – Open Data: CGB - Unwanted Calls 2019YTD*, https://opendata.fcc.gov/Consumer/CGB-Unwanted-Calls-2019YTD/vzkh-ddru (last visited Sept. 4, 2020).

SHAKEN/STIR. In recent years, Congress and the FCC have recognized that the best way to fight robocalls is not to continue adjusting the antiquated net

of the TCPA, but rather by new technological means adopted for 2020 (as opposed to 1991) technology. *See Report on Robocalls,* 2019 WL 945132, at *3 (noting that robocallers are "[u]nlike legitimate callers that wish to adhere to the TCPA" and "may not be deterred by the prospect of enforcement," and thus, "part of the [FCC's] recent work has focused on stopping robocalls before they reach consumers' phones").

SHAKEN/STIR is the ambitious acronym[4] for a technological solution licensed to kill spoofed calls, *i.e.*, those calls that display a false name or number to appear legitimate to the call recipient. SHAKEN/STIR is an authentication framework, relying on an exchange of encrypted information. *In re Call Authentication Trust Anchor Implementation of TRACED Act Section 6(a)*, No. 20-42, 2020 WL 1634553, at *3 (FCC Mar. 31, 2020). The originating carrier (the service provider for the caller) provides information about the identity of the caller, the phone number from which they are calling, or both. *Id.* at *4. The call and corresponding information pass through intermediate service providers, which authenticate the identity of the caller, and confirm the authentication to the service provider for the call recipient. *Id.* at *12. The originating carrier also provides a statement of attestation, *i.e.*, a statement about how confident the carrier is about the identity of the caller. Full attestation means that the call is coming from the person listed in the identifying headers, and the person is authorized to use that number. Partial attestation means that the network can confirm who is making the call, but not whether the caller is

[4] The full name is Signature-based Handling of Asserted information using toKENS/Secure Telephony Identity Revisited.

authorized to use the number. And gateway attestation, the lowest form of attestation, is merely confirmation that a call has been placed on the network, but the carrier cannot confirm anything else about the caller. *See Call Authentication Trust Anchor; Implementation of TRACED Act—Knowledge of Customers by Entities With Access to Numbering Resources*, 85 Fed. Reg. 22,029, 22,030-31 (Apr. 21, 2020) (describing the various levels of attestation). If the originating carrier does not provide the right level of attestation, the receiving carrier may drop the call.

Congress believed that SHAKEN/STIR would "help[] to reduce illegal and unwanted robocalls," S. Rep. No. 116-41, at 1 (2019), so it recently enacted the Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act, Pub. L. No. 116-105, 133 Stat. 3274 (2019). Under the TRACED Act, FCC is required to implement SHAKEN/STIR frameworks for all carriers capable of implementing it, *i.e.*, all VoIP networks, and create an analogous framework for older networks that do not use VoIP.

The FCC believes SHAKEN/STIR will be an effective tool for combatting robocalls. *In re Advanced Methods to Target and Eliminate Unlawful Robocalls*, No. 19-51, 2019 WL 2461905, at *19 (FCC June 7, 2019) ("Implementation of the SHAKEN/STIR framework across voice networks is important in the fight against unwanted, including illegal, robocalls."). The FCC estimates SHAKEN/STIR will play an important role in helping consumers achieve a cost savings of up to $3 billion per year. See FCC, *FCC Mandates That Phone Companies Implement Caller ID Authentication to Combat Spoofed Robocalls* (Mar. 31, 2020), https://docs.fcc.gov/public/attachments/DOC-363399A1

.pdf ("[T]he benefits of eliminating the wasted time and nuisance caused by illegal scam robocalls will exceed $3 billion annually, and STIR/SHAKEN is an important part of realizing those cost savings").

The FTC Telemarketing Sales Rule. In addition to the Do-Not-Call Registry, the FTC also has in its robocall-fighting arsenal the Telemarketing Sales Rule ("TSR"). Promulgated in 1995 to implement the Telemarketing Act of 1994, the TSR in its original form set forth certain ground rules for businesses to follow in making unsolicited marketing calls to consumers. In particular, the TSR originally required: (1) mandatory disclosures made at the outset of a call, including the identity of the caller and the purpose of the call; (2) company-specific opt-out lists; and (3) time-of-day restrictions for the placement of calls. *See* 16 C.F.R. §§ 310.4(b)(v)(B)(ii)(A), (c)-(e); *see also* Telemarketing Sales Rule, 60 Fed. Reg. 43,842, 43,855-56 (Aug. 23, 1995). While the TSR initially applied to only those entities regulated by the FTC, the FCC has adopted regulations in parallel that extend many of the TSR's provisions to callers outside the FTC's reach. *See* 47 C.F.R. § 64.1200(d); 77 Fed. Reg. 34,233, 34,242 (June 11, 2012) (harmonizing the FCC's rules with the FTC's TSR).

The FTC expanded the TSR in 2008 to cover certain robocalls containing prerecorded messages or using an automated-voice. Among other things, the call recipient must provide express *written* consent to receiving such calls. 16 C.F.R. § 310.4(b)(1)(v)(A). The caller must also provide recipients with the ability to use an automated function to be removed from the caller's list. *Id.* § 310.4(b)(1)(v)(B)(ii)(A). If the call reaches an answering machine or voicemail, the message must pro-

vide the call recipient with a telephone number to call to opt out of future calls. *Id.* § 310.4(b)(1)(v)(B)(ii)(B). These provisions mirror those in the TCPA's implementing regulations. 47 C.F.R. § 64.1200(a)(2) (exempting calls "made with the prior express written consent of the called party"); *id.* §§ 64.1200(a)(7)(i)(A)-(B), 64.1200(b)(3) (providing opt-out provisions similar to those found in the TSR).

State-Level Safeguards. State governments have taken additional measures to combat robocalls and unwanted solicitations. Some states, recognizing that spoofing is the "gateway for illegal robocalls," have enacted anti-spoofing laws, which either criminalize spoofing or treat it as an unfair trade practice. *See, e.g.*, S.B. 514, 92nd Assemb. (Ark. 2019) (making it unlawful to "display[] or caus[e] to be displayed a fictitious or misleading name or telephone number on an Arkansas resident's telephone caller identification service); LD 277, SP 89, 129th Leg. (Me. 2019) (making it an "unfair trade practice" to "to transmit misleading or inaccurate caller identification information with the intent to defraud or cause harm to another person or to wrongfully obtain anything of value"). Others, like California, have implemented their own SHAKEN/STIR requirements to combat spoofing. Consumer Call Protection Act of 2019, Cal. Pub. Util. Code § 2893.5.

New York recently took a different tack—instead of targeting spoofing, it made its telemarketing provisions more robust. The Nuisance Call Act of 2019 provides an array of added protections for New York residents. S.B. S4777, 2019-2020 Leg. Sess. (N.Y. 2019). A caller making a live telemarketing call must inform the call recipient that the recipient may ask to be add-

ed to the caller's do-not-call list.[5] If the recipient asks to be added to the list, the call must end immediately. New York also banned *any* telemarketing calls (live, prerecorded, manually dialed, or ATDS-initiated) made without consent or an existing business relationship during a state of emergency, such as the current COVID-19 crisis. N.Y. Gen. Bus. Law § 399-z(5-a). Violating these new restrictions comes at a heavy cost—state law allows for an administrative penalty of up to $11,000 per violation. *Id.* § 399-z(14)(a).

III. An overbroad construction of ATDS risks ensnaring calls that are not just legitimate but important, such as Quicken Loans' efforts to conduct legally required outreach to individuals in financial distress.

A. Quicken Loans uses calls and texts to communicate with both prospective and current clients—but only when they have asked Quicken Loans to do so.

Quicken Loans prides itself on being able to serve clients seamlessly, and to communicate with them quickly and efficiently when a need to do so arises. For example, every client that contacts Quicken Loans usually will receive a call back within 24 hours. While Quicken Loans interacts with many clients through its digital Rocket Mortgage platform, there are instances where a call or a text is the most effective way of communicating with a client.

Quicken Loans does not engage in cold-calling or random telephone solicitation to potential clients. Cli-

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[5] The FTC's TSR only requires an opt-out disclosure for robocalls. *See* 16 C.F.R. § 310.4(b)(1)(iii)(B)(ii).

ents are only contacted if they have expressed an interest in Quicken Loans' products or services. That, of course, makes sense because mortgages are simply unsuitable for cold telemarketing because individuals do not shop for them on a regular basis or obtain them on a whim. *See In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14,014, 14,155 (July 3, 2003) (statement from the Mortgage Bankers Association that "many small lenders use referrals from existing customers, not large lists, to attract new business").

A prospective client may receive a call or text from Quicken Loans after providing his or her information—for example, by signing up for daily rate updates or information about special promotions.[6] Once the prospective client begins the process of applying for a mortgage loan, Quicken Loans may call or text the client to obtain a missing document, additional financial information, or anything else that may be necessary to complete the mortgage loan (or refinance) application and close on a home. Telephone communication is the most speedy and effective means of communicating with a client to ensure that the application process does not stall.

After a client obtains a loan, Quicken Loans remains in consistent communication with the client for the life of the loan. Most communication may take place online or by mail. But sometimes a call or a text may be the most appropriate way to contact a client, so that a problem can be addressed immediately before it snowballs. If there is a snag in paying property taxes

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[6] *See* Quicken Loans, *Let's Stay In Touch*, https://www.quickenloans.com/subscribe.

or mortgage insurance, for example, it is in the interest of both Quicken Loans and the client to ensure that the problem is quickly addressed. A call or text is often the fastest way to achieve that.

B. Phone communication is often the most efficient way for Quicken Loans to engage in outreach required by federal law, and to provide clients in financial distress with immediate relief.

Quicken Loans also reaches out to clients if they fall behind on payments—and in many instances, that outreach is *required* by law. For example, the Consumer Financial Protection Bureau's (CFPB) mortgage servicing rules require a servicer to make "live contact" with a borrower no later than 36 days after the borrower becomes delinquent on his payments. 12 C.F.R. § 1024.39(a). Once a servicer makes "live contact," it must "*[p]romptly* . . . inform the borrower about the availability of loss mitigation options, if appropriate." *Id.* (emphasis added). In Quicken Loans' experience, one of the best ways to establish "live contact" to "promptly" provide information about relief options is to simply *call* a client.

Even if federal law does not require it, Quicken Loans will proactively reach out to clients to provide immediate relief should they need it. The COVID-19 crisis has left many homeowners unable to timely pay their mortgages, Quicken Loans' clients included. While the CARES Act requires servicers to provide forbearance relief to borrowers who ask for it, it does not require servicers to broadcast the availability of that relief to their borrowers. *See* 15 U.S.C. § 9056. But Quicken Loans has called and texted clients in tempo-

rary financial distress to alert them to the availability of forbearance options. And after a client enters an initial three-month forbearance period, Quicken Loans checks in with the client periodically to determine whether he needs additional time on forbearance, or whether he is ready to resume making payments. *See Quicken Loans Mortgage Assistance and Client Resources for COVID-19*, Rocket Mortgage (May 24, 2020), https://www.rocketmortgage.com/learn/mortgage-assistance-covid19. When the client's forbearance period is over, Quicken Loans works with the client to figure out whether additional relief—such as a structured repayment plan for forborne payments, a deferral, or a loan modification—is appropriate and necessary. *Id.* For many clients, the most effective way to communicate this information is with a call or a text.

D. An overbroad ATDS definition could allow plaintiffs to weaponize the TCPA to hold Quicken Loans liable for engaging in outreach that is beneficial to its clients.

The court of appeals' interpretation of ATDS would allow plaintiffs to use a warped interpretation of one consumer-protection statute, the TCPA, to punish businesses for complying with other consumer-protection obligations or otherwise delivering relief to consumers in the most timely and effective manner. Phone calls and text messages are the only effective ways of timely informing Quicken Loans' clients about loss mitigation that must be done "promptly" under mortgage-servicing regulations. And unlike the prohibition on robocalls to residential lines, the restrictions on calls to cell phones do not carve out non-solicitation calls. *See* 47 C.F.R. § 64.1200(a)(3)(ii). If Quicken

Loans made the exact same live call about forbearance options—one to a residential landline, and one to a cell phone—only the latter would subject Quicken Loans to potential TCPA liability. That arbitrary line-drawing is made possible only by stretching the definition of ATDS so broadly that it no longer reflects Congress's more narrow intent: to stop random and sequentially dialed calls from taking up precious time on cell phones. *See* S. Rep. No. 102-178, at 2.

An overly broad interpretation of ATDS leaves companies like Quicken Loans with a difficult choice: proactively reach out to consumers to fulfill disclosure obligations and face the threat of a TCPA class action and a statutory penalty of $500 or more for every call made without express, prior consent, or fail to follow a federal disclosure mandate and good customer-service principles by timely communicating with clients to offer much-needed relief. Even if Quicken Loans has consent from the individuals that it calls, that consent will not necessarily deter an ATDS lawsuit. Because consent is a fact-bound affirmative defense, it is typically resolved at the summary-judgment stage, *i.e.*, after burdensome discovery and other proceedings. *E.g.*, *Orsatti v. Quicken Loans, Inc.*, No. 15-cv-9380, 2016 WL 7650574, at *6 (C.D. Cal. Sept. 12, 2016) (holding that evidence of consent "is not properly before the Court" at the motion-to-dismiss stage, and that "Defendant's attempts to refute [Plaintiff's] claim [of lack of consent] are properly addressed in a motion for summary judgment").

This risk of litigation is not a hypothetical one—Quicken Loans has faced the consequences of its pro-disclosure, pro-client approach over the last few years, thanks to plaintiffs looking to push the ATDS defini-

tion to its extreme. In one such case, Fannie Mae engaged Quicken Loans to contact a select group of borrowers eligible for relief under the Home Affordable Refinance Program (HARP) to assist them with foreclosure avoidance and to help them save money on their mortgage payments. *Newhart v. Quicken Loans Inc.*, No. 15-cv-81250, 2016 WL 7118998, at *1 (S.D. Fla. Oct. 12, 2016). Quicken Loans first tried reaching out to these clients by mail, and only contacted clients by telephone several days after sending out its mailers. *Id.*

Quicken Loans had difficulty reaching one particular client—the plaintiff's mother. *Id.* at *5. After failing to connect several times and leaving several voicemails, a Quicken Loans representative finally connected with the plaintiff, who explained that his mother was not available at that time. When Quicken Loans tried the number again, the plaintiff attempted to obtain facts necessary for filing a TCPA suit, such as the type of dialer used to make the call, how Quicken Loans obtained the mother's phone number, and the questions that Quicken Loans was asking to determine HARP eligibility. *See* First Am. Compl. ¶ 43, *Newhart v. Quicken Loans Inc.*, No. 15-cv-81250 (S.D. Fla. filed Dec. 11, 2015) (ECF No. 30). The plaintiff filed a nationwide class action soon thereafter.

Even when outreach is not legally required, clients in financial distress still benefit from quick and efficient communication about options to avoid foreclosure and stay in their homes. But cases like *Newhart* demonstrate that opportunistic plaintiffs armed with an expansive ATDS definition are willing to use the TCPA to ensure that "no good deed goes unpunished." This has led to an explosive growth in litigation over

legitimate business practices that almost mirrors the explosive growth in robocalls. *See* U.S. Chamber Institute for Legal Reform, *TCPA Litigation Continues to Skyrocket* (Jan. 26, 2017), https://www.institutefor legalreform.com/resource/tcpa-litigation-continues-to-skyrocket-1272-percent-increase-since-2010 (noting a 1,272% increase in TCPA suits between 2010 and the end of 2016). While the threat of abusive litigation will not deter Quicken Loans from doing the right thing and connecting with its clients to ensure that they have the relief they need in times of financial difficulty, companies like Quicken Loans should not have to face the risk of a TCPA class action—and the substantial costs necessary to defeat such actions—every time they communicate with their clients over the phone or by text to offer beneficial services. This is exactly the anti-consumer result that current FCC Chairman Ajit Pai predicted in protesting an expansive reading of the TCPA—that such a reading would "leave the American consumer, not to mention American enterprise, worse off." 2015 Order, 30 FCC Rcd. at 8083 (dissenting statement of Commissioner Pai).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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September 11, 2020