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 AMICI CURIAE JOHN MCCURLEY AND DAN DEFOREST IN SUPPORT OF RESPONDENT

KAZEROUNI
LAW GROUP, APC
Abbas Kazerounian, Esq.
Counsel of Record
Jason A. Ibey, Esq.
245 Fischer Avenue, D1
Costa Mesa,
California 92626
Phone: (800) 400-6808
ak@kazlg.com
jason@kazlg.com

LAW OFFICES OF TODD
M. FRIEDMAN, P.C.
Todd M. Friedman, Esq.
Adrian R. Bacon, Esq
Thomas E. Wheeler
21550 Oxnard St., Ste. 780
Woodland Hills, CA 91367
Phone: (877) 206-4741
tfriedman@toddflaw.com
abacon@toddflaw.com
twheeler@toddflaw.com

Attorneys for Amici Curiae John McCurley and Dan Deforest

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTEREST OF AMICUS

Amicus Curiae are two consumers John McCurley and Dan Deforest, who are frequent recipients of unwanted robocalls, and who have been appointed class representatives in the certified class action of *McCurley v. Royal Seas Cruises, Inc.*, Case No. 17-cv-00986-BAS-AGS (S.D. Cal.).[1] They are represented in the *Royal Seas Cruises* action by The Law Offices of Todd M. Friedman, P.C. ("LOTMF") and Kazerouni Law Group A.P.C. ("KLG"),[2] who are class action attorneys that are some of the most frequent practitioners under the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et. seq.* ("TCPA"), representing consumers across the United States. Undersigned Counsel present this Brief from a background of having collectively litigated numerous issues under the TCPA in hundreds of actions. Undersigned Counsel were also counsel for the plaintiff in the matter of *Marks v Crunch San Diego, LLC,* 904 F.3d 1041 (9th Cir. 2018), cert. dismissed, 139 S. Ct. 1289, 203 L. Ed. 2d 300 (2019). LOTMF and KLG have also advanced consumer privacy rights by regularly drafting comments to the FCC regarding interpretive rulemakings surrounding the TCPA.

The *McCurley* matter involves an overseas call vendor which placed over 630 million phone calls on

---

[1] Pursuant to Supreme Court Rule 37.3, amici certify that all parties have consented to the filing of this brief. Pursuant to Rule 37.6, amici certify that no counsel for a party authored this brief in whole or in part, and no persons other than amici or their counsel made a monetary contribution to its preparation or submission.

[2] While drafting this Amicus Brief, undersigned counsel received no less than a dozen robocalls.

behalf of Royal Seas Cruises and others as part of a widespread telemarketing campaign for which its services were contracted. These campaigns involved the use of a predictive dialer, which was calling stored lists of over 50 million Americans' telephone numbers, that the overseas vendor was purchasing from a variety of sources, some of which are alleged to be questionable. The record contains evidence that the over 630 million telemarketing calls were placed using a prerecorded voice and were automatically dialed in a manner which did not involve any human intervention, but for which Royal Seas Cruises contends were called with prior express written consent.

It is worth mentioning that the type of dialing system that was used here is exactly what the everyday American thinks of when they think of a robocall – mass numbers of calls placed with a computer, and not a live agent and where prerecorded voices are used. Mr. Deforest and Mr. McCurley, were the joint recipients of over twenty unwanted robocalls from just this one single company. However, because the systems function by automatically calling stored lists of 53 million Americans' phone numbers without any human intervention whatsoever, based on a strict reading of Facebook's position, that system would not meet the legal test for an Automatic Telephone Dialing System if this Court sides with Facebook. Such a position defies logic and the will of the American people, as expressed by Congress.

SUMMARY OF ARGUMENT

The Telephone Consumer Protection Act, 47 U.S.C. §§ 227, *et seq.*, is an important consumer privacy statute designed to protect consumers from an

alarmingly increasing trend of unwanted and voluminous automated telephone calls. The TCPA's prohibition at issue (for autodialed calls and text messages) requires the calls to be made through an automatic telephone dialing system ("ATDS"), which Congress defines as "equipment which has the *capacity* (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). The question of whether a dialing system qualifies as an ATDS focuses primarily on two issues, which should not be conflated:

1. Can an ATDS merely possess the capacity to automatically dial *stored lists* of numbers or must it also be able to randomly or sequentially *produce* those lists of numbers?[3]
2. What does "capacity" mean?

In the views of Amicus Curiae, this Court should and need only answer the former question on this Appeal, as the circuit court level law yet remains undeveloped on the question of capacity, and as the FCC is currently revisiting the "capacity" standard for purposes of rulemaking. Moreover, there is little in the way of a factual record regarding Facebook's texting platform in this case that would advise the Court

---

[3] As the D.C Circuit recently framed this issue "[a] basic question raised by the statutory definition is whether a device must itself have the ability to generate random or sequential telephone numbers to be dialed. Or is it enough if the device can call from a database of telephone numbers generated elsewhere?" *ACA International v. Federal Communications Commission*, 885 F.3d 687, 701 (D.C. Cir. 2018).

as to the actual capacity of Facebook's dialing platform. Rather, the focus of the briefing is geared towards a split in authority between circuit courts on the first question, with some courts following a similar line of reasoning as *Marks*, *supra*, while others hold that a system that cannot itself generate lists of numbers to be dialed is insufficient under the plain language of the statute to meet the definition of an ATDS. The D.C. Circuit lies in the middle, observing that "[it might be permissible for the Commission to adopt either interpretation." *ACA International v. Federal Communications Commission*, 885 F.3d 687, 703 (D.C. Cir. 2018) (going on to observe that "the choice between the interpretations is not without practical significance.")

Six Circuit Courts have now addressed the question of what constitutes an ATDS under the Telephone Consumer Protection Act. Each has a different answer. But in the views of Amicus Curiae, none of these decisions focus enough on the actual technologies that unquestionably were the target of Congressional concerns at the original time that the statute was enacted. No matter what approach to law is taken, the TCPA should be interpreted in a manner that is consistent with the plain language of the statute as a whole, and the clear and unambiguous intentions of Congress, as exemplified by the Legislative History.

These six decisions all ignore a straightforward and obvious problem with the reading advanced by Facebook in this matter – predictive dialers are autodialers and they always have been. Such technology existed well before the TCPA was enacted, and functions in the very way that most people colloquially think of an autodialer functioning. In-

deed, the very concept of an automated telephonic dialing system originated in the 1970s with the creation of and patent of predictive dialing technology. The technology has not changed significantly since that time. The law has likewise not changed since its enactment. But clever lawyers making clever arguments have somehow distorted the original intent of Congress, stretching the bounds of the law beyond its breaking point.

Equally troubling is the fact that by requiring a dialing platform to actually itself generate the lists of numbers, as opposed to being capable of automatically dialing them from a list inputted by a company, an entire codified defense for otherwise violative conduct (prior express consent) would be effectively excised from the statute rendering the provision totally meaningless surplusage.

This Brief attempts to fill in the gaps of the technology that gave rise to the enactment of the Telephone Consumer Protection Act, to give context to what an ATDS actually is and how it functions, and make clear that predictive dialing has existed since over a decade before the TCPA was drafted and passed. Ambiguous syntax should not prevail over crystal clear context.

ARGUMENT

History Of Autodialer Technology

At its root, an autodialer is simply a system that has the capacity to automatically dial phone numbers *en masse*, without human intervention. Autodialers calling from stored lists of numbers go back at least to 1968, with the patent of such

automated dialing technology. *See* U.S. Patent No. 3,899,645 (issued Aug. 12, 1975) ("processor for controlling the operation of a telephone"); U.S. Patent No. 3,407,269 (issued Oct. 22, 1968) ("system for automatically sequentially signaling plural different alarm messages to different telephone subscribers"); U.S. Patent No. 3,943,289 (issued Mar. 9, 1976) ("automatic telephone caller"). Some early autodialers were designed to call lists of phone numbers, but at that time computer storage was very expensive. As a result of the cost of computer storage, some early autodialers were designed to generate numbers, then call them. However, by the mid 1970's, computer storage became affordable to the point that desktop computers began finding their way into consumers' homes. The breakthrough in computer storage replaced the need to generate phone numbers. Thus, as a result of increased efficiency of storing data, the only software to have a need to generate telephone numbers in the early days of robodialing were "war dialers" used for finding modems and fax machines, not to place telephone calls. 2003 FCC Report and Order, ¶135 (released July 3, 2003).

The affordability of computer storage in the mid 1970's led to "predictive dialers." Predictive Dialers were invented in the mid-1970's with precisely the same functionality as they have today. Similarly to other autodialers, predictive dialers (colloquially referred to as "live-agent" dialers) also call from a stored list of phone numbers, but utilize algorithms to "predict" when an agent will receive a live

answer.[4] Such technology goes back to at least 1976, and carries the same functionality of predictive dialers today. *See* U.S. Patent No. 3,989,899 (issued Nov. 2, 1976) ("telephone scheduling system"); U.S. Patent No. 4,817,130 (issued Mar. 28, 1989) ("call management system with protocol converter and port controller").

By the early 1980's, Davox Corporation (now known as Aspect), marketed its predictive dialer installed on a standard desktop computer for $17,569. This predictive dialer called numbers stored in a database, predicting how many calls to make for each agent to get a live answer, and routing the call to a call agent. *See* U.S. Patent No. 4,881,261 at p. 4 (issued Nov. 14, 1989). During this time, Radio Shack offered a computer with autodialing software which called from a stored list of numbers for $799. *See* U.S. Patent No. 3,989,899 at p. 9 (issued Nov. 2, 1976). In 1981, police were using an autodialer that called from a stored list of numbers to aid in their investigations. *Id.* at p. 10.

---

[4] As a crude example, imagine an algorithm predicts that 10% of people will pick up a call placed to their phone. A predictive dialer can place ten calls for every one employee agent, and thereby accomplish the efficiency of ten people in a fraction of the time, and for a fraction of the labor cost. This type of automated dialing results in what are referred to as "abandoned" calls, i.e. instances where circumstances and happenstance result in the number of calls placed outpacing the number of live agents on standby. Imagine two of the ten people picking up the calls with only one available agent This leads to answered calls being met with dead air and no agent to pick up. Abandoned calls are exclusively an indicator of predictive dialer technology, and have long been a target of both Congress and the FCC, as described below.

After Davox dominated the market in the early 1980's, others began competing by developing a better predictive algorithm. *See* U.S. Patent No. 4,829,563 (issued May 9, 1989) ("method for predictive dialing"); U.S. Patent No. 4,881,261 (issued Nov. 14, 1989) ("method for predictive pacing of calls in a calling system"). With the development of affordable computer storage in the mid 1970's we saw the transition from autodialing from generated numbers to autodialing stored numbers. Many "agent-less" autodialers called stored lists of numbers at that time. *See* U.S. Patent No. 3,899,645 (issued Aug. 12, 1975); U.S. Patent No. 3,407,269 (issued Oct. 22, 1968); U.S. Patent No. 3,943,289 (issued Mar. 9, 1976).

By the 1980s, all Predictive dialers called from stored lists of numbers. Thus, it is a technological and historic fact that since at least 15 years before the TCPA, telemarketers relied on lists of phone numbers. It was the proliferation of predictive dialer technology (technology that automatically dials stored lists of numbers) that sparked consumer outrage and resulted in the passage of the TCPA.

The Passage Of The TCPA In 1991

It is against this technological backdrop that the TCPA was enacted in 1991. Congress was aware of this technology and enacted the law in direct response to such emerging intrusions. Such is clear from the Legislative History.[5]

---

[5] Briefing of Duguid, and other supporting briefs sufficiently address testimony before the House, but do not sufficiently address what happened before the Senate. This brief will thus focus primarily on Senate testimony.

The Senate testimony of Robert Bulmash, president and founder of Private Citizen, Inc., is particularly of interest and worth review:

> There is the incident where an autodialer that I am aware of called folks who were trying to call an ambulance for their father-in-law to get them to the hospital, tying the lines.
>
> But there is an even more insidious issue coming up in the area of automatic dialing announcing machines and that is called predictive dialers. Predictive dialers are machines that major telemarketing service agencies were using at the rate of perhaps 5 percent the last year. Now between 30 to 40 percent of the national telemarketing firms are using them this year. Predictive dialers dial in advance of the availability of a telemarketer to take the call of the person who answers their phone.
>
> What we are encountering is many people picking up the phone, hearing dead air and then being hung up on. The telenuisance industry, those folks who make predictive dialers, recommend to their customers that a 2 to 8-percent abandonment rate be set in using this type of equipment.
>
> Abandonment rate is the rate at which we are hung up on by these machines who call us to the phone, because the telemarketer does not want to have to wait for. us to come to the phone, does not want to have to wait for busy signals, for the phones to ring, for disconnect messages. They want live people on the phone to go through as many folks as they can in the shortest period of time to increase their effi-

> ciency. We are nothing more than sources of revenue to an industry that has lost its moral compass, or it points only to the bank.
>
> We talk about boiler rooms. Boiler rooms no longer refer to flyby-night organizations. They are rather the engines of business in this country. Major American corporations are calling consumers at a rate of 5 to 7 million times per month. We are not talking about boiler rooms. We are talking about respectable businesses.
>
> The top three or just three large telemarketing firms in this country have the phone fire power, live phone fire power, to call 65 people per second across the country. If that gives you a flavor of what this is about, I hope it does. We are up against big business and they are coming into our homes, and there is nothing that the average consumer can do to stop that, no regulation. We need help.

Hearing Before the Subcommittee on Communications of the Committee on Commerce, Science and Transportation, United States Senate One Hundred Second Congress First Session July 24, 1991, Testimony of Robert Bulmash (hereinafter "Senate Testimony") at pg 16. Mr. Bulmash went on to testify about the skyrocketing use of predictive dialers by telemarketers, and the intrusiveness of their trademark feature of resulting in abandonment rate.

> Increasingly, big telemarketing firms are using new machines called Predictive Dialer. These devices try to guess the rate at which their tele-yacking staff will be available to make their next pitch, then dials enough

> homes (taking into account no answers & busys), to have the next telemark on line, ready to be hustled as soon as the last one hangs up.
>
> When more folks answer than the machine expected, the device will either hang up on us or plays a tape asking that we hold for a yacker. Telemarketers term these hang-up calls "phantom calls" because we will not know we. were yanked from dinner and insulted just to enable a telemarketing outfit to save time.
>
> A predictive dialer's speed is controlled by setting its "abandonment rate", the rate at which the machine will "overdial", thus summoning more citizens to their phones than their are tele-yackers to pitch them. When this occurs, the machines generally hang-up on us. Manufacturers of predictive dialers feel that a 25 to 89 abandonment rate "is acceptable" for sales solicitations
>
> …
>
> A telemarketing trade publication recently reported that last year an estimated 5 percent. of American telemarketing service agencies were using predictive dialers. This year's (1991) estimate is around 35 percent."

Id. at pg 19.[6] He then went on to describe how such systems are designed to call stored lists of phone numbers.

---

[6] See also pgs. 24-25 where Mr. Bulmash and Senator Pressler have an exchange regarding the annoyance of abandoned calls.

> Of course the telemarketing industry is concerned about legislation that would protect citizens. As a result, the Direct Marketing Association encourages citizens to list themselves with what the DMA euphemistically calls The Telephone Preference Service. The DMA then sells this list to firms that want to purge call lists of folks who don't want to be solicited. Problem is, usage of this list is voluntary on the part of telemarketers and the vast majority ignore it.
>
> …
>
> There are list brokers out there whose business it is to sell phone numbers, names, and so on and so forth, to the telemarketing industry, if you will.[7]

Id. at pgs. 19 and 27. In other words, predictive dialers which called from lists of numbers is precisely the type of invidious and obnoxious technology that Robert Bulmash testified to in July 24, 1991, and which heavily influenced the enactment of the TCPA.

On a related note, Steve Hamm (administrator of the South Carolina Department of Consumer Affairs) testified about robodialers that delivered pre-recorded messages (what are referred to in the lexicon of the TCPA as agent-less dialers). *Id.* at pg. 11. Steve Hamm testified how the dialers that delivered pre-recorded messages would sometimes be used to call generated lists of numbers, either sequential or

---

[7] Lead brokers like this are a growing problem in the TCPA arena, as exemplified in the *McCurley v Royal Seas Cruises* action.

random. However, in contrast to this, Robert Bulmash testified of Predictive Dialers (referred to in the lexicon of the industry as agent-dialers) which were specifically designed to call from stored lists of numbers. Over the last couple decades, confusion appears to have developed, in part by fault of the FCC's contradictions of its definitions of ATDS, whereas in actuality, the technology was very straightforward and widely understood in 1991 when the statute was enacted.

The Congressional testimony shows that there are ***two*** types of dialers, "agent" dialers (Predictive Dialers) and "agent-less" dialers (pre-recorded messages and artificial voice).[8] The reality is that the only difference between the dialing systems about which Steve Hamm and Robert Bulmash testified and those used today, is computers are exponentially faster today than in 1991. Simply stated, the dialers operate exactly the same way only instead of thousands of calls per day, they can place millions of calls per hour.

Obviously, the concern of Congress was to ban such invasive technology from being used without consumer consent. However, Facebook's position would necessitate a fanciful inquiry to determine whether such calls were permissible – could that computer generate the list of numbers on its own, before autodialing them and annoying people, or must a list be loaded into the system? The absurdity of this argument can be demonstrated by the example of loading every number listed in the Chicago White

---

[8] Indeed, the 1992 FCC Order recognizes this dichotomy, as described below.

Pages into a predictive dialer and dialing every number 10 times an hour for three days straight. Because the phone numbers came from a list rather than a sequential or random number generator, Facebook's position would necessitate a finding that such an autodialer cannot be defined as an ATDS.

Again, this history, foundation and context are important because Facebook and many commenters supporting Facebook's reading of the statute would paint a picture of an evolving set of technologies (such as smartphones) which are far removed from the original technology targeted by Congress at the time of the statute. Not so. Predictive dialing technology was the same then as it is now, as demonstrated from the history of the patents on said technology, and the testimony before Congress, with the only change being the speed of computers and the amount of data that can be economically stored thereon. This technology always has had the capacity to automatically dial stored lists of numbers, as opposed to randomly generating its own lists of numbers, which is itself a form of technology (war dialing) that is hardly ever used at all, and clearly was not what the Congressional hearings addressed.

The 1992 and 2003 FCC Orders

Much ado is made about the 2003 FCC Order and whether it remains valid after the *ACA* opinion (it does). However, there is another equally important FCC Order issued almost immediately after the passage of the TCPA, which provides us with a historical snapshot of what technology was targeted as an ATDS at the time Congress passed the law, and what automated dialing technologies the industry was us-

ing to contact consumers for purposes of debt collection and telemarketing at that time. History tells us definitively that both the industry and the regulators believed, at the time the TCPA was passed, that Congress had clearly and unambiguously passed a law that outlawed predictive dialers that automatically called stored lists of numbers.

In 1992, the FCC's first ruling on the TCPA recognized the importance of restrictions on equipment such as predictive dialers, i.e. equipment which autodialed stored lists of numbers. Referring in part to "predictive dialers" to place live solicitation calls (7 FCC Rcd. 8752, 8756 (F.C.C. September 17, 1992)) ("1992 FCC Order"), the FCC then opined that "both live [referring again to live solicitation calls, such as with a predictive dialer] and artificial or prerecorded voice telephone solicitations should be subject to significant restrictions" *Id.* That is because the meaning of an "autodialer" and "predictive dialer" was understood very well by the FCC in 1992. 1992 FCC Order at ¶¶ 8-9.

In the events leading up to the 1992 FCC Order, the comments submitted by members of the industry suggest that they were aware that the definition of ATDS passed by Congress would relate to their predictive dialing systems, unless the FCC exempted those systems.

Commenter Telecheck Services, Inc. in its comment to the FCC stated "Debt collection is a non-commercial use. It is a non-telemarketing use of an autodialer or predictive dialer which is not intended to be protected under TCPA…In the collection business predictive dialer are often used to expedite the collection process. The dialer randomly dials num-

bers entered into its system and connects an available live operator to the call when it is answered." *See* Comment of TeleCheck Services, Inc. on CC Dkt No. 92-90 (received June 1, 1992), *available at https://ecfsapi.fcc.gov/file/1027570001.pdf*.

Commenter International Telesystems Communications petitioned the FCC to confirm that live operator calls made by a nonprofit organization using predictive dialers be held exempt under the TCPA since they can immediately deliver answered calls to a live operator. *See* Comment of Int'l Telesystems Corp. on TCPA of 1991 (received June 1, 1992), *available at https://ecfsapi.fcc.gov/file/1027580001.pdf.*

Commenter Metrocall describes a nightmarish situation where a predictive dialer operated by a newspaper subscription operator caused a serious service outage, and requested the FCC not provide any exemptions for use of such invidious technology. *See* Comment of Metrocall In The Matter Of The Telephone Consumer Protection Act of 1991 (received June 22, 1992), *available at https://ecfsapi.fcc.gov/file/1037040001.*pdf.

Commenter Mkt. Incorporated requested an exemption for predictive dialer technology used by survey companies. *See* Comment of Mktg. Inc. In Re: Telephone Consumer Protection Act Of 1991 (received June 23, 1992), *available at https://ecfsapi.fcc.gov/file/1037050001.pdf*.

Commenter Ameritech Operating Companies touted the business efficiencies advanced by use of predictive dialers as a justification for exempting use of this invasive technology. *See* Reply Comments of Ameritech Operating Companies In Re: Telephone

Consumer Protection Act Of 1991 (received June 24, 1992), *available at https://ecfsapi.fcc.gov/file/1037500001.pdf*.

Commenter Digital Systems created a series of tables summarizing the position of many other commenters regarding use of predictive dialer technology. *See* Second Comment of Digital Systems Int'l, Inc. In The Matter of The Telephone Consumer Protect Act of 1991, at pp. 4-14 (received June 24, 1992), *available at https://ecfsapi.fcc.gov/file/1037550001.pdf.*

This represents just some of the dozens of comments from businesses and interest groups surrounding the use of predictive dialers at the time immediately following the enactment of the TCPA. Much can be gleaned from this history, most importantly that it was well understood by those in the debt collection and telemarketing industries that a predictive dialer that calls from a defined list of numbers was an ATDS under the plain language of the TCPA. Why else would all of these businesses be asking in unison for the FCC to implement rules exempting certain types of calls and methods of calls from liability under the statute?

The FCC subsequently not only took no action relating to predictive dialers, but proceeded to take increased action against users of predictive dialers over the course of the next twenty-three years, starting with the 1992 FCC Order. In 2003, the FCC issued a more comprehensive order relating to predictive dialers with specificity. *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* Report and Order, 18 FCC Rcd. 14014,

14115 ¶¶ 131-134 (2003) ("2003 FCC Order"). There, the FCC describes a predictive dialer as follows:

> A predictive dialer is an automated dialing system that uses a complex set of algorithms to automatically dial consumers' telephone numbers in a manner that "predicts" the time when a consumer will answer the phone and a telemarketer will be available to take the call. Such software programs are set up in order to minimize the amount of downtime for a telemarketer. In some instances, a consumer answers the phone only to hear "dead air" because no telemarketer is free to take the call
> …
> a predictive dialer is equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when a sales agent will be available to take calls.
> …
> Predictive dialers initiate phone calls while telemarketers are talking to other consumers and frequently disconnect those calls when a telemarketer is unavailable to take the next call…Predictive dialers reduce the amount of down time for sales agents, as consumers are more likely to be on the line when the telemarketer completes a call.

See 2003 FCC Order at ¶¶ 8 fn 31, 131, and 146.

Such a description bears striking resemblance to

the technology described above that was present in the 1970s, 1980s, and which was described by Robert Bulmash during the Senate hearings, as well as that which is described in the comments to the FCC prior to the 1992 FCC Order. That is because the technology had not changed in pertinent part – it is still operating the same way as it always has. It is also worth noting that abandoned calls are exclusive to predictive dialers, and that the surrounding regulations target such conduct as invidious and unlawful in other aspects of the statute. *See* 47 C.F.R. §§ 64.1200(a)(5-7). Predictive dialers always have dialed stored lists of numbers, through preprogrammed automated campaigns, using algorithms that are based on a preprogrammed abandonment rate entered into the system by its operator. Predictive dialers are as much ancient technology, as they are obnoxious.

Simply stated, number self-generation is a red herring. It is completely historically inaccurate to say that when the TCPA was enacted, Congress was not targeting technology which could autodial stored lists of numbers. It is likewise completely historically inaccurate to say that the FCC's position on this issue has changed over the last thirty years. And it is inaccurate as well to suggest that the technology has changed seismically to the point where this particular prong of the ATDS analysis is and should be viewed in a different light. While there is yet much to debate about what the word capacity means,[9] in

---

[9] The Court should leave this debate about capacity for another day, given that Circuit Courts have yet to fully brew this issue, and given that the FCC is still in revised Rulemaking

(*Footnote continued*)

the context of the TCPA, there is no legitimate debate that with respect to the question of whether an autodialing system must have the ability to self-generate the lists of numbers that it robodials thereafter. The answer is no. The Ninth Circuit got it right in *Marks v Crunch San Diego, LLC*.

Interpreting The Definition Of ATDS To Preclude Dialing Systems That Dial From Stored Lists Would Render The Consent Requirement Irrelevant

It is an undisputed cornerstone of TCPA litigation that companies are permitted to autodial people if they have prior express consent to do so. See 47 U.S.C.A. §§ 227(b)(1)(A) ("It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States-- (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice"). Courts and the FCC have generally held that consent is an affirmative defense to any otherwise-violative conduct under the TCPA. *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037 (9th Cir. 2017); In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 23 F.C.C. Rcd. 559, 565 (Jan. 4, 2008). An autodialer that is required to self-generate its own lists of numbers to dial, as opposed to dialing from a stored list, could **never** be used in compliance

---

discussions after the *ACA* opinion rejected the 2015 FCC Order and sent the FCC back to the drawing board.

with the TCPA because there is by definition a lack of consent from an individual whose number is randomly generated. These two concepts are mutually exclusive.

Prior express consent can mean different things in different contexts. Generally speaking, consent must be express, i.e. "clearly and unmistakably stated." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir. 2009). In the context of debt collection, the mere provision of a phone number to a creditor, in writing or orally, is sufficient to satisfy the conditions of the defense. *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119–21 (11th Cir. 2014). As the FCC has held, consent may be provided through an intermediary. *In re GroupMe, Inc./Skype Commc'ns S.A.R.L. Petition*, 29 FCC Rcd. 3442, 3447 (2014). In the context of solicitation communications, express consent must adhere to more rigid requirements, including having to be in writing, as well as meet several additional stringent disclosure requirements. *In re Rules and Regs. Implementing Tel. Consumer Protection Act of 1991*, 27 FCC Rcd. 1830, at 1840 ¶ 25 (Feb. 15, 2012) ("2012 Order"); 47 C.F.R. §§ 64.1200(f)(1)(8-12); *Hill v. Homeward Residential, Inc.*, 799 F.3d 544, 552 (6th Cir. 2015) ("the FCC's regulations for telemarketers now require a more specific type of consent—namely, that the called party consents, *in writing*, to being called by an auto-dialer.")

Logistically, it is imperative to note that the reason companies use autodialers is because they can reach large numbers of people with very little expense in labor. For example, a major bank may wish to send its credit card customers reminders via automated call or text message letting them know

their monthly payment is late. Customers provide their phone numbers to these legitimate businesses for legitimate reasons, and those numbers make their way into the banks' predictive autodialing platforms, which are then programmed to send these reminders in advance of escalating collections activity. This is, in theory, legitimate robocalling, because consumers consented to it.

As the FCC has held, including in the 2015 FCC Order, companies are in the best position to take measures to ensure that their robodialing campaigns are reaching the consumers who consented to such (in many cases) mutually-beneficial communications. The most basic way this is done is by using autodialers, such as the predictive dialers described herein, which only call lists of phone numbers that were provided by the consumers for the purpose of receiving such automated communications. This dynamic is codified in the language of the TCPA, and also was discussed during the same aforementioned Senate Hearings. See Senate Testimony at pg. 13 ("The use of automatic dialing machines which play recorded messages should be reasonably restricted, except where a called party has given prior consent to receive the recorded message"). It is also a critical component of the 2013 telemarketing regulations regarding the written consent requirements for marketing calls, as described above.

It is not only fanciful to imagine, but axiomatically impossible, for there to exist automated dialing technology that self-generates lists of numbers, in the same universe where stored lists of numbers belonging to consumers that have consented to receive autodialer communications are being exclusively called. And yet, entire regulatory

schemes exist to create standards for what is and is not prior express consent. Dozens of circuit cases talk about what it means to consent to a robocall. The plain language of the statute codifies an affirmative defense for users of autodialer technology so long as they call only those people that consent to receive such calls. Regulations have been adopted. Responsible companies (including Facebook) spend billions of dollars annually attempting to comply with these consent requirements.

Facebook's own position in other aspects of the case at hand undermines its view of what constitutes an ATDS. Facebook's position is that its texting platform was designed to send messages only to users, for verification purposes. Facebook obviously is trying to reach people who consented to receive these text messages. Perhaps there are problems with its system, which led to privacy invasions of Duguid and others, but putting this aside, Facebook is trying to contact people who it believes consented to be contacted in this manner. Just like a responsible debt collector trying to contact a debtor. Just like a responsible telemarketer trying to contact a customer who actually expressed interest in their services. Just like a responsible banking institution notifying their customer of a fraud alert on their credit card. Just like an airline notifying a passenger of a flight delay. Just like a package service delivery company notifying us that our package has arrived. When done right, autodialing can be useful. That is why we can consent to it. But we cannot consent to autodialing if by axiom autodialing cannot be performed to a limited list of those who have so consented. And so it follows that by requiring self-generation as a component of the

statute, Facebook's definition of ATDS axiomatically excises an entire canon of codified doctrine right out of the plain language of the statute. These two concepts cannot be reconciled.

As this Court has held numerously, reading a statute in a manner which renders core portions of the statute mere surplusage should be avoided when interpreting a statute. *See Duncan v. Walker*, 533 U.S. 167, 174, (2001) ("We are especially unwilling" to treat a statutory term as surplusage "when the term occupies so pivotal a place in the statutory scheme"). The canon assists "where a competing interpretation gives effect to every clause and word of a statute." *Microsoft Corp. v. i4i Ltd. Partnership*, 131 S.Ct. 2238, 2240 (2011).

Consent is an inextricable component of the TCPA, as it is in any invasion of privacy statute, because it is not an invasion of privacy if it has been permitted. Guests are not intruders by virtue of their mere presence in one's homes. Yet the plain language of the TCPA can clearly be read two ways with respect to whether or not an ATDS must self-generate the numbers it autodials.

While it is true that the canon against superfluity is not absolute (*Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004)), it is likewise true that there exists a reading of the TCPA where autodialers do not self-generate lists, as the D.C. Circuit recognized in *ACA*, and multiple Circuit Courts have held as well. <u>But there is no TCPA without the affirmative defense of consent</u>, and consent cannot coexist with autodialers that cannot dial stored lists of numbers. Therefore, this case represents an ideal candidate for application of the canon against superfluity.

CONCLUSION

For the foregoing reasons, any interpretation of the TCPA's definition of ATDS which precludes a finding that a predictive dialer is an autodialer, or which results in rendering the consent requirements mere surplusage are wrong, plain and simple. This can be demonstrated by a review of the statute as a whole, by the Legislative History, and by public comments surrounding the 1992 FCC Rulemaking interpretation of the ATDS standard.

If our goal is to ensure that the policies underlying the TCPA are advanced by an expansive definition of the statute that protects consumer privacy, then even Facebook would agree with the positions advanced herein. But if our goals are more narrowly tailored towards a strict interpretation of the static law that was enacted in 1991, so as to parse what Congress originally meant when it defined an ATDS, the answer is no less clear when analyzed in the historical context of the technology and concerns of the time. Either way, Facebook's reading is wrong, as a matter of syntax, as a matter of context, as a matter of history, and as a matter of policy. It is right in no aspect, and the Ninth Circuit's holding in *Duguid* and by extension in *Marks* should be upheld in pertinent part.

Respectfully submitted,

KAZEROUNI
LAW GROUP, APC
Abbas Kazerounian, Esq.
Counsel of Record
Jason A. Ibey, Esq.
245 Fischer Avenue, D1
Costa Mesa,
California 92626
Phone: (800) 400-6808
ak@kazlg.com
jason@kazlg.com

LAW OFFICES OF TODD
M. FRIEDMAN, P.C.
Todd M. Friedman, Esq.
Adrian R. Bacon, Esq
Thomas E. Wheeler
21550 Oxnard St., Ste. 780
Woodland Hills, CA 91367
Phone: (877) 206-4741
tfriedman@toddflaw.com
abacon@toddflaw.com
twheeler@toddflaw.com

October 23, 2020