No. 20-209

In the Supreme Court of the United States

ALI GADELHAK,

Petitioner,

v.

AT&T SERVICES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENT

ANDREW J. PINCUS
Counsel of Record
ARCHIS A. PARASHARAMI
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Respondent

QUESTION PRESENTED

The Telephone Consumer Protection Act of 1991 ("TCPA") prohibits calls made to a cellular phone without consent using an "automatic telephone dialing system") ("ATDS"). 47 U.S.C. § 227(b)(1)(A). The TCPA defines an ATDS to mean "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 question presented is:

Whether the definition of an ATDS in the TCPA encompasses any device that can "store" and "automatically dial" telephone numbers, even if the device does not store those numbers "using a random or sequential number generator."

RULE 29.6 STATEMENT

Respondent AT&T Services, Inc. ("AT&T") is a wholly-owned subsidiary of AT&T Inc., which is a publicly held company. No parent corporation or publicly held company owns 10 percent or more of the stock in AT&T Inc.

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This petition presents the issue now before the Court in *Facebook Inc.* v. *Duguid*, cert. granted., No. 19-511 (July 9, 2020): the meaning of the term "automatic telephone dialing system" (ATDS) in the Telephone Consumer Protection Act of 1991 (TCPA). The court below rejected the Ninth Circuit's construction of the statute (Pet. App. A 14-20), which was applied by the court of appeals in *Duguid*.

This Court granted review in *Duguid* to resolve the lower courts' conflicting interpretations of the ATDS definition. The petition here should therefore be held pending the Court's decision in *Duguid* and then disposed of as appropriate in light of that decision.

STATEMENT

AT&T uses a software tool to send to customers, via text message, surveys to assess customers' recent interactions with AT&T's customer service department. Pet. App. A 3-4; Pet. App. B 2-3 & 15-16. Petitioner, who is not an AT&T customer, nonetheless received five text messages asking survey questions. Pet App. A 2. (AT&T believes that Gadelhak's number must have been erroneously listed on a customer account in AT&T's records. Pet App. B 3).

Petitioner filed a putative class action lawsuit against AT&T under the TCPA, alleging that AT&T sent him the text messages using an ATDS without his prior consent, in violation of the relevant provision of the TCPA, 47 U.S.C. § 227(b)(1).

The district court granted AT&T's motion for summary judgment. The court concluded that "[t]he most sensible reading" of the TCPA's definition of an

ATDS "is that the phrase 'using a random or sequential number generator' describes a required characteristic of the *numbers* to be dialed by an ATDS—that is, *what* generates the numbers." Pet. App. B 12 (emphasis in original). The court concluded that, "[b]ased on the record evidence, there is no genuine dispute that AT&T's system cannot *generate* telephone numbers randomly or sequentially—as those terms are used in the TCPA—and thus it is not an ATDS and is not prohibited." Pet. App. B 16.

The court of appeals affirmed. In a unanimous panel opinion authored by Judge Barrett and joined by Chief Judge Wood and Judge Kanne, the Seventh Circuit held "that 'using a random or sequential number generator' modifies both [the verbs] 'store' and 'produce'" in the TCPA's definition of an ATDS. Pet. App. A 2. And because AT&T's system "neither stores nor produces numbers using a random or sequential number generator," but "instead * * * exclusively dials numbers stored in a customer database," "it is not an [ATDS] as defined by the Act—which means that AT&T did not violate the Act[.]" *Ibid.*

The court of appeals identified the "far-reaching consequences" that would result if it were to adopt respondent's contrary interpretation: "it would create liability for every text message sent from an iPhone"—"a sweeping restriction on private consumer conduct that is inconsistent with the statute's narrower focus" on "conduct much more likely to be performed by telemarketers than by private citizens." Pet. App. A 16. Yet because "right out of the box," "[a]n iPhone of course can store telephone numbers," and "can also send text messages automatically," it would qualify as an ATDS under respondent's reading. *Ibid.* "[T]hat result makes little sense." *Ibid.*

The court of appeals denied rehearing en banc with no judge requesting a vote. See Pet. App. C 1.

DISCUSSION

Facebook, Inc. v. *Duguid*, in which this Court granted review, presents the same issue as the petition in this case. Oral argument in *Duguid* is scheduled for December 8, 2020. The Court should therefore hold this petition pending the disposition of *Duguid*.

As relevant here, the TCPA prohibits calls and texts placed to cell phones without consent using an ATDS. 47 U.S.C. § 227(b)(1). The potential for liability under the TCPA frequently turns on whether an ATDS was used to place the call or text at issue. And that question has given rise to a conflict among the lower courts.

The TCPA defines an ATDS to mean "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) (emphasis added). At least three courts of appeals have held that the phrase "using a random or sequential number generator" modifies both "store" and "produce"—and that a device does not qualify as an ATDS unless it is capable of either storing calls using random or sequential number generation or producing calls using random or sequential number generation. See Pet. App. A (decision below); *Glasser* v. *Hilton Grand Vacations Company,* 948 F.3d 1301 (11th Cir. 2020) (Sutton, J., sitting by designation); *Dominguez* v. *Yahoo! Inc.,* 894 F.3d 116 (3rd Cir. 2018).

Three other courts have taken a different approach, under which (in those courts' views) it is

enough that a device be capable of "stor[ing]" a list of numbers to be dialed. *Marks* v. *Crunch San Diego,* 904 F.3d 1041 (9th Cir. 2018); *Duran* v. *La Boom Disco, Inc.,* 955 F.3d 279 (2nd Cir. 2020); *Allan* v. *Pennsylvania Higher Education Assistance Agency,* 968 F.3d 567 (6th Cir. 2020).

In respondent's view, the decision below is correct. But, given the grant of review in *Duguid*, the Court should hold this case pending its decision in *Duguid*, and then dispose of the petition in this case as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *Facebook Inc.* v. *Duguid*, cert. granted., No. 19-511 (July 9, 2020), and then disposed of as appropriate in light of that decision.

Respectfully submitted.

ANDREW J. PINCUS
Counsel of Record
ARCHIS A. PARASHARAMI
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Respondent

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