

No. 24A _____

IN THE
Supreme Court of the United States

DAY PACER LLC, EDUTREK L.L.C.,
RAYMOND FITZGERALD, AND IAN FITZGERALD,

Applicants,

v.

FEDERAL TRADE COMMISSION, ET AL.,

Respondents.

**APPLICATION FOR AN EXTENSION OF TIME TO FILE A
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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APPLICATION

To the Honorable Amy Coney Barrett, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Seventh Circuit:

Pursuant to this Court's Rule 13.5 and 28 U.S.C. § 2101(c), applicants Day Pacer LLC, EduTrek L.L.C., Raymond Fitzgerald, and Ian Fitzgerald respectfully request a 60-day extension of time, to and including August 4, 2025, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

1. The United States Court of Appeals for the Seventh Circuit issued its decision on January 3, 2025. *See FTC v. Day Pacer LLC*, 125 F.4th 791 (App. 1a-32a). Applicants timely filed a petition for panel rehearing and for rehearing en banc, which the court of appeals denied on March 6, 2025. *See FTC v. Day Pacer LLC*, Nos. 23-3310 etc., 2025 WL 723020 (mem.) (App. 94a). The court of appeals issued its mandate on March 14, 2025. Unless extended, the time to file a petition for a writ of certiorari will expire on June 4, 2025. Pursuant to this Court's Rule 13.5, this application is being filed more than ten days before the petition is currently due. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

2. In March 2019, applicants (two entities and two individuals) were sued by respondent Federal Trade Commission (FTC) for violating rules promulgated by the FTC pursuant to the Telemarketing and Consumer Fraud and Abuse Prevention Act. App. 5a. The FTC alleged that applicants violated the FTC's Telemarketing Sales Rule, or "TSR,"

by making outbound telephone calls to numbers on the National Do Not Call Registry. *Id.*; *see* App. 2a-4a. The FTC sought both injunctive and monetary relief. App. 5a.

3. The district court granted summary judgment in favor of the FTC with respect to calls made by applicants. App. 33a-93a; *see* App. 64a-78a. As relevant here, the court rejected applicants' arguments that they had not engaged in telemarketing within the plain meaning of the TSR because the allegedly unlawful calls were informational only and did not include any attempt to sell any goods or services. App. 65a-68a. The district court ultimately entered a civil penalty of approximately \$28.7 million against applicants and entered a permanent injunction prohibiting applicants from engaging in any and all telemarketing activity, lawful or not. App. 7a-8a; *see* App. 92a.

4. The court of appeals affirmed in relevant part. App. 1a-32a; *see* App. 8a-9a. Applicants renewed their argument (among others) that they had not violated the TSR under the regulation's plain language because they had not attempted to sell any goods or services. App. 8a-9a. Applicants emphasized that they were alleged to have unlawfully initiated "outbound telephone calls," which the TSR defines to mean calls "initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution." 16 C.F.R. § 310.2(x); *see* App. 13a-14a. Applicants again emphasized that it was undisputed in the summary-judgment record that the allegedly unlawful calls neither induced the purchase of any goods or services nor solicited any contributions; rather, applicants were alleged to have merely obtained contact information from individuals on the Do Not Call Registry and then passed that information onto others. The court of appeals rejected this argument, concluding that because applicants met the TSR's definition of a

“telemarketer,” any telephone call they placed must constitute an “outbound telephone call,” regardless how that latter phrase is defined in the regulation. App. 14a-15a.

5. This Court’s review is warranted because this case raises important questions about the proper interpretation of the oft-enforced TSR and the “essentially equivalent” Telephone Consumer Protection Act of 1991. App. 11a.

Applicants were sued for violating 16 C.F.R. § 310.4(b)(1)(iii), which makes it an “abusive telemarketing act or practice and a violation of [the TSR] for a telemarketer” to “[i]nitiat[e] any outbound telephone call” to individuals on the Do Not Call Registry. App. 5a; *see* App. 3a. Under the TSR, an “[o]utbound telephone call means a telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution.” 16 C.F.R. § 310.2(x). That means to violate the provision of the TSR that applicants are charged with violating, a party must be shown *both* (a) to be a telemarketer; and (b) to have made a phone call to induce a purchase of goods or services or solicit a contribution. It is undisputed that (b) has not been demonstrated in this case.

By nonetheless affirming the grant of summary judgment in favor of the FTC, the Seventh Circuit endorsed a troubling, atextual expansion of the TSR. The court grafted the phrase “plan, program, or campaign which is conducted to induce the purchase of goods or services,” 16 C.F.R. § 310.2(hh), a broader notion that appears in the definition of “telemarketing,” and used it to expand the definition of “outbound telephone call” (which conspicuously does not reference a “plan, program, or campaign”). App. 13a-15a. That was not only incorrect, but it is particularly worrisome given that it threatens to pull within the TSR’s ambit purely informational calls in which individuals or entities seek to purvey

protected political speech the agency finds to have some tenuous connection to a “plan, program, or campaign” meant to “induce” purchases. 16 C.F.R. § 310.2(hh). This Court’s review is warranted to realign the TSR’s scope with its text and prevent arbitrary enforcement by an unaccountable federal agency.

6. Ian Heath Gershengorn of Jenner & Block LLP, Washington, D.C., was only recently retained—within the last ten days—on behalf of applicants to file a petition for a writ of certiorari in this Court. During the short period between his retention and the current due date for the petition for certiorari, counsel is occupied with several other matters, including oral argument in *Nolen v. PeopleConnect, Inc.*, No. 24-3894 (9th Cir. to be argued May 23, 2025). A briefer extension than 60 days would create a conflict with other matters (including a principal summary-judgment brief in *Davidson v. Atkins*, No. 24-cv-197 (W.D. Tex.), due July 17, 2025) as well as with long-scheduled plans surrounding the July 4 holiday. Applicants therefore request this extension of time to permit counsel to research the relevant legal and factual issues and to prepare a petition that fully addresses the important questions raised by the proceedings below.

7. For these reasons, applicants respectfully request that an order be entered extending the time to file a petition for a writ of certiorari to and including August 4, 2025.

Respectfully submitted.

/s/ Ian Heath Gershengorn

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