No. 19-511

IN THE

Supreme Court of the United States

FACEBOOK, INC.,
Petitioner,
v.

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

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

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BRIEF OF MIDLAND CREDIT MANAGEMENT, INC., AND ENCORE CAPITAL GROUP, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Midland Credit Management, Inc., a subsidiary of Encore Capital Group, Inc., along with its own affiliates and subsidiaries (collectively "MCM"), is the largest debt purchaser in the United States. One out of five American consumers has an account with MCM. For MCM and its consumers, communication by telephone is essential. Often, consumers are not even aware that they have outstanding debt until an account manager contacts them by telephone. Without these vital telephone calls, many consumers would have no opportunity to negotiate flexible and discounted repayment plans to resolve their debt and improve their credit.

MCM's ability to work with consumers to resolve their debts depends on being able to reach them by telephone. Increasingly, this means calling them on their mobile phones, since in this day and age, most people use a mobile phone as their primary or only telephone. In recent years, however, the ability of MCM to communicate with consumers about their debts has been

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[1] Pursuant to this Court's Rule 37.2(a), *amici* gave parties timely notice of the intention to file this brief. Counsel for all parties have consented to the filing of this brief. Petitioner Facebook consented to the filing of this brief through the filing of a blanket consent letter; Respondents Noah Duguid and the United States of America granted written consent to the filing of this brief. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored, in whole or in part, by counsel to a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than *amici* and their counsel.

hampered by the legal risk associated with calling mobile phones.

Over the past several years, an aggressive and well-organized plaintiffs' bar has clogged the federal courts with thousands of lawsuits under the Telephone Consumer Protection Act ("TCPA"), trying to capitalize on a TCPA provision that imposes a $500 to $1500 per-call penalty on anyone who uses an automatic telephone dialing system ("ATDS") to call a cellular phone without the recipient's consent. Like many companies, MCM spends substantial time and resources on TCPA compliance. Hence, MCM has a significant interest in ensuring that courts interpret the TCPA in a uniform fashion—and that they do so in accordance with the statute's text and Congress's intent.

SUMMARY OF ARGUMENT

I. The definition of "automatic telephone dialing system" adopted by the Ninth Circuit in the decision below, and in *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018), is wrong. It conflicts with the statute's plain language and with the Third Circuit's decision in *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3d Cir. 2018), and the D.C. Circuit's decision in *ACA International, Inc. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). The Court should grant certiorari to correct the Ninth Circuit's error and resolve the circuit split.

The question in this case is whether, to qualify as an "automatic telephone dialing system," a system must have the capacity to use a random or sequential number

generator to make calls. The TCPA's plain text resolves that question. It defines an "automatic telephone dialing system" as "equipment which has the capacity—(A) to store or produce 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). Hence, as subsection (A) provides, only equipment that has the capacity to use "a random or sequential number generator" can be an ATDS. *Id.*; *see Dominguez*, 894 F.3d at 117-19 (holding that an ATDS must have the capacity to use a random or sequential number generator); *ACA Int'l*, 885 F.3d at 697 (rejecting reading of TCPA that would "render every smartphone an ATDS subject to the Act's restrictions, such that every smartphone user violates federal law whenever she makes a call or sends a text message without advance consent").

But disregarding this clear text, the Ninth Circuit held that *any* equipment with the capacity to store and dial numbers is an ATDS, whether or not that equipment uses a random or sequential number generator. Pet. App. 6 (citing *Marks*, 904 F.3d at 1052). This reading does violence to the statutory language.

It is vitally important to correct the Ninth Circuit's error. The TCPA imposes a $500 to $1500 per-call penalty on anyone who uses an ATDS to place a call to a mobile phone without the recipient's prior express consent. The Ninth Circuit's definition potentially imposes crushing financial liability on any business that communicates with consumers by telephone or text.

II. By broadening the definition of "automatic telephone dialing system" beyond what the statute explicitly provides, the Ninth Circuit's ruling will only exacerbate the nation's TCPA litigation epidemic. The past several years have witnessed inconsistent district court rulings and befuddling FCC pronouncements about what is and is not an ATDS. The result is a litigation environment that offers extraordinary financial bounties to plaintiffs' lawyers, and chills—via the prospect of ruinous liability—the conduct of potential defendants who strive to follow the law. With the courts divided, a perception has arisen among the plaintiffs' bar that every unwanted cell-phone call is a TCPA violation regardless of whether the call falls within what the TCPA prohibits. As a result, thousands of TCPA lawsuits are filed every year against companies that never have used and never would think to use a random or sequential dialer.[2] Healthcare, technology, travel, dining, entertainment, sports, financial services, retail—no sector of the economy is immune. Multimillion dollar class-action settlements are commonplace, because (as the plaintiffs' bar knows) even innocent defendants often cannot run the risk of an adverse ruling.

As they hunt for new targets, plaintiffs' lawyers are growing more and more creative. Businesses are being

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[2] *See* U.S. Chamber Institute for Legal Reform, *TCPA Litigation Sprawl: A Study of Sources and Targets of Recent TCPA Lawsuits* (Aug. 2017), https://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Paper_Final.pdf.

sued for calling their own customers, for responding to text messages, and for offering software tools and applications that allow users to communicate with each other. Plaintiffs even pursue companies for using standard-issue desk phones, arguing that such phones fall within the ATDS definition because they could—in theory—be connected to a computer and, after transformative modifications, be used to dial lists. Plaintiffs' lawyers have also enlisted the creativity of Silicon Valley, developing mobile applications to easily convert unwanted calls into lawsuits. Indeed, plaintiffs are even coming up with elaborate schemes to *induce* wrong-number calls so that they can sue the callers. The list goes on.

This Court should intervene, and it should intervene now. The situation is untenable today and will not improve so long as the circuits remain divided on the definition of "automatic telephone dialing system." A grant of certiorari is badly needed to bring lower courts back in line with the statute Congress enacted.

ARGUMENT

I. The TCPA's Definition of "Automatic Telephone Dialing System" Is Limited to Equipment That Uses a Random or Sequential Number Generator.

The TCPA defines an "automatic telephone dialing system" as equipment that has the capacity "to store or produce telephone numbers to be called, using a random or sequential number generator" and to dial such

numbers. 47 U.S.C. § 227(a)(1). Thus, on this definition's face, only equipment that uses a random or sequential number generator can be an ATDS. *Id.*; *see Dominguez*, 894 F.3d at 117-19; *accord ACA Int'l*, 885 F.3d at 697.[3]

The statute's history reinforces what its plain text provides. Congress had good reason for requiring that equipment use a random or sequential number generator. In the early 1990s, when the TCPA was enacted, Congress saw that significant problems were arising from devices that generated and dialed random or sequential numbers (*e.g.*, 555-1000, 555-1001, 555-1002). By dialing *randomly*, these devices tied up lines that needed to be left open for emergency communications.[4] And by dialing *sequentially*, these devices simultaneously blocked all of the incoming lines assigned to businesses, hospitals, nursing homes, and other facilities with multiple lines.[5]

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[3] Tellingly, the Ninth Circuit found it needed to insert words into the statute in order to reach its preferred result. *See Marks*, 904 F.3d at 1050 (adopting as its reading of the ATDS definition "equipment which has the capacity (A) to [i] store [telephone numbers to be called] or [ii] produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers" (quoting 47 U.S.C. § 227(a)) (alterations in original)).

[4] *S. 1462, The Automated Telephone Consumer Protection Act of 1991*; *S. 1410, The Telephone Advertising Consumer Protection Act; and S. 857, Equal Billing for Long Distance Charges: Hearing before the Subcomm. on Commc'ns of the S. Comm. on Commerce, Sci., and Transp.*, 102d Cong. 46 (1991) (statement of Thomas Stroup).

[5] *Id.* at 43 (statement of Michael F. Jacobson).

When Congress enacted the TCPA, sequential dialing was also a particular problem for mobile carriers. Because mobile carriers obtain large blocks of consecutive phone numbers for their subscribers, automatic dialers programmed to call sequential numbers can run through whole groups of numbers at one time, occupying all of a carrier's facilities and effectively blocking service to its customers.[6]

In the years immediately following the TCPA's enactment, the FCC repeatedly recognized that the definition of "automatic telephone dialing service" swept no farther than equipment using a random or sequential number generator. When the FCC issued its first TCPA regulations in October 1992, it explained that an exemption from certain requirements for debt collectors was unnecessary because debt collection calls "are not autodialer calls (*i.e.*, dialed using a random or sequential number generator)."[7] The FCC also determined that "speed dialing," "call forwarding," and "delayed message" equipment were not covered "because the numbers called are not generated in a random or sequential fashion."[8] In 1995, the FCC again confirmed

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[6] *Id.* at 46 (statement of Thomas Stroup); *Telemarketing/Privacy Issues: Hearing on H.R. 1304 & H.R. 1305 Before the Subcomm. on Telecomms. and Fin. of the H. Comm. on Energy & Commerce*, 102d Cong. 113 (1991) (statement of Michael J. Frawley).

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

[8] *Id.* at 8776 ¶ 47.

that the ATDS provision does not apply to calls "directed to [a] specifically programmed contact number[]"—just to calls to "randomly or sequentially generated telephone numbers."[9]

II. Attempts to Expand the Definition of "Automatic Telephone Dialing System" Have Caused a Flood of TCPA Litigation That Will Only Grow Unless this Court Grants Certiorari.

For over a decade after the TCPA's enactment, the definition of "automatic telephone dialing system" generated no controversy. The statute quietly did its work of stamping out random and sequential dialers.

The problems began in 2003. That year, the FCC issued a declaratory ruling that, though muddled, seemed to say that equipment could qualify as an "automatic telephone dialing system" even if it did not use a random or sequential number generator.[10] The FCC did not base this ruling on any analysis of the statutory text. Rather, it determined that it had the authority to *expand* the statutory definition to capture new technologies.[11] The FCC stated that "[i]t is clear from the statutory language and the legislative history

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

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

[11] *Id.*

that Congress anticipated that the FCC, under its TCPA rulemaking authority, might need to consider changes in technologies."[12] But the FCC did not actually *cite* anything from the "statutory language" providing such roving authority to update the statute's text. Instead, the FCC relied solely on an out-of-context statement by the bill's sponsor plucked from the legislative record.[13]

But the damage was done. The plaintiffs' bar quickly realized that the FCC's reworking of the statutory text arguably meant that most of the technologies used by businesses to contact consumers were now potentially an "automatic telephone dialing system." TCPA litigation exploded. Below, *amici* describe some examples of the results that followed from the elimination of the TCPA's requirement that a device use "a random or sequential number generator."

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

- In 2011, GroupMe, a mobile group-messaging application, was hit with a class-action lawsuit by a person whose friends used the GroupMe platform to invite him to a poker game. *Glauser*

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[12] *Id.*

[13] *Id.* at 14,092 ¶ 132 n.436 (citing 37 Cong. Rec. S18784 (1991) (statement of Sen. Hollings)).

v. GroupMe, Inc., No. 11-2584, 2015 WL 475111, at *1 (N.D. Cal. Feb. 4, 2015).

- Another social-networking service, Path, was sued in a class action based on a text message the plaintiff received inviting him to view an acquaintance's photos. Class Action Compl., *Sterk v. Path, Inc.*, No. 13-2330 (N.D. Ill. Mar. 28, 2013), ECF No. 1. This invitation, the plaintiff claimed, came from an "automatic telephone dialing system."

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

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

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

- Twitter found itself on the receiving end of a class action for allegedly using an "automatic telephone dialing system" to send "tweets" to people whose

phone numbers used to belong to Twitter subscribers. Class Action Compl., *Nunes v. Twitter, Inc.*, No. 14-2843 (N.D. Cal. June 19, 2014), ECF No. 1.

Internet-Based Services and Mobile Apps. Technology-based business models have also come under fire from the TCPA plaintiffs' bar.

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

> receipt that was sent to the plaintiff via text message after a user made a purchase using Square and requested a receipt be sent to that number. Class Action Compl., *Ball v. Square, Inc.*, No. 12-6552 (N.D. Cal. Dec. 28, 2012), ECF No. 1.

Sports Teams. Professional sports organizations have also become targets. For example, a fan attending a Los Angeles Lakers basketball game sent a text message to the team that he hoped would be displayed on the arena's jumbotron. *Emanuel v. L.A. Lakers, Inc.*, No. 12-9936, 2013 WL 1719035, at *1 (C.D. Cal. Apr. 18, 2013). The Lakers sent back a single text message confirming that his request had been received. *Id.* The fan responded by suing the team, alleging that its return message was sent by an "automatic telephone dialing system." *See id.* The San Diego Chargers, Buffalo Bills, Los Angeles Clippers, Tampa Bay Rays, and Tampa Bay Lightning have also been hit with TCPA lawsuits.[14]

Restaurants. Rubio's, a restaurant chain with locations throughout the Western United States, was sued for accidentally sending food-safety text-message

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

alerts meant for Rubio's staff to a person whose new cell phone came with a number that had been previously assigned to a Rubio's employee. Instead of notifying Rubio's or blocking the number, the new user waited until he had received 876 texts and then sued Rubio's for $500,000. In response, Rubio's cancelled its food-safety alert system. *See* Petition for Expedited Declaratory Ruling at 1-2, *In re Rubio's Restaurant, Inc.*, CG Docket No. 02-278 (FCC Aug. 11, 2014), http://apps.fcc.gov/ecfs/document/view?id=7521768526.

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

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

Banks and Financial Services. Banks and financial-services companies are regularly sued for calling borrowers who have stopped making payments. Such cases regularly yield seven- and eight-figure class settlements. For example, in 2014, Capital One paid $75.5 million to settle TCPA class actions filed by cardholders. HSBC paid $40 million in 2015. Within the

same time frame, Chase Bank paid $34 million; Bank of America paid $32 million; and Sallie Mae paid $24.1 million. Between 2016 and 2019, Wells Fargo paid multiple settlements totaling over $45 million.

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

Manufactured Violations. Because TCPA claims are so lucrative, there are many reported instances of plaintiffs going to extreme lengths to manufacture TCPA claims. For would-be plaintiffs and their attorneys, anything that can generate potential TCPA violations is a valuable commodity—such as recycled cell phone numbers that receive large numbers of telemarketing calls, collection calls, or text communications from businesses. Indeed, one noted

plaintiffs' attorney bragged that he tells his clients "'You need to play the game … You need to string them along yourself."[15] And many litigants have done just that.

For example, a company called Telephone Science Corporation ("TSC") operates a for-profit service called "Nomorobo." Hiding behind the advertised purpose of helping consumers avoid robocalls, TSC maintains what it calls a "honeypot" of thousands of recycled telephone numbers and files TCPA lawsuits against the unsuspecting companies that call the numbers in its "honeypot"—even though many of these businesses were likely just trying to reach prior owners of the numbers and had no way of knowing the numbers had been reassigned.[16]

Such schemes abound. One case describes a plaintiff who "purchased at least thirty-five cell phones and cell numbers with prepaid minutes for the purpose of filing lawsuits under the Telephone Consumer Protection Act." *Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d

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

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

782, 788 (W.D. Pa. 2016). Despite living in Pennsylvania, the plaintiff selected numbers with Florida area codes because she believed that people in Florida would be more likely to default on credit cards and receive calls from debt collectors. *Id.*

Another case describes a plaintiff who "filed at least thirty-six … lawsuits under the TCPA," had "thought about franchising his TCPA lawsuits," "taught classes teaching others how to sue telemarketers," and listed himself as a "Pro Se Litigant of TCPA lawsuits on his LinkedIn profile."[17]

Last year, the Philadelphia Inquirer profiled a litigant who had eight different phone numbers and filed dozens of TCPA lawsuits. The article describes a lawsuit the plaintiff manufactured by placing an order, freezing the credit card payment so that the company would call him back, then suing the same day.[18] A Forbes article detailed a similar scheme, profiling a litigant who made over $800,000 filing TCPA lawsuits after having his landline number (which it would have been legal to autodial) ported to a cell phone.[19]

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

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

[19] Karen Kidd, *Phoney Lawsuits: Polish Immigrant Concludes Six-Figure Run By Settling 31st Lawsuit*, Forbes (Jan. 17, 2018),

Another strategy involves consenting to receive automated text messages from a business and then withdrawing consent in a manner that the plaintiff knows will not cause the texts to stop. Automated text messages sent by legitimate (non-scam) businesses typically include a notification that the recipient can opt out by texting back "STOP." Savvy plaintiffs (and their lawyers), however, know that computerized texting systems are programmed to recognize "STOP"—but that these systems will not recognize text responses that do not include the word "STOP." As a result, there is now a line of cases—many involving the same plaintiffs' lawyers—in which plaintiffs have consented to receive automated texts and then, instead of following the clear instruction to "Reply STOP to cancel," have sent back lengthy responses that did not include the word "stop" but used other language to request that the messages cease. When the messages continued, they filed TCPA lawsuits claiming that they had revoked their consent and demanding statutory penalties for every text sent after they supposedly requested that the messages cease.[20]

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https://www.forbes.com/sites/legalnewsline/2018/01/17/phoney-lawsuits-polish-immigrant-concludes-six-figure-run-by-settling-31st-lawsuit/.

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

In one early case, a litigant in California deliberately maintained a phone number (999-9999) that he knew would get thousands of wrong-number calls per year so that he could make money on TCPA lawsuits. *See Kinder v. Allied Interstate, Inc.*, No. E047086, 2010 WL 2993958, at *1 (Cal. Ct. App. Aug. 2, 2010). He converted what had been a pager number to a stand-alone voicemail account and hired staff to log every wrong-number call he received, issue demand letters to purported violators, and negotiate settlements. *Id.* He filed hundreds of TCPA lawsuits over the course of four years before a court branded him a vexatious litigant. *Id.*

Some lawyers have even launched mobile applications to easily convert texts and calls into cash-generating lawsuits. One plaintiffs' firm, which has filed hundreds of TCPA lawsuits, launched a mobile application called "Block Calls Get Cash," which delivers information about cell-phone calls to the law firm so that it can file TCPA lawsuits against the callers.[21] "[L]augh all the way to the bank," the app's website boasts.[22] Not to be outdone, another firm was right on its heels with its own app, dubbed "Stop Calls Get Cash."[23]

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

[22] *Id.*

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

The FCC's 2003 ruling no longer has any legal force, since it was part of a series of rulings that were invalidated in *ACA International, Inc. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). But the 2003 ruling lives on in the private class-action lawsuits that urge courts to adopt even more sweeping interpretations of "automatic telephone dialing service." Nor has *ACA International* diminished the number or creativity of TCPA filings. To this day, plaintiffs are still arguing that the 2003 ruling should be followed and are perpetually searching for new arguments to lure courts into expanding the TCPA's definition of "automatic telephone dialing service" beyond what the statute provides. Some courts, like the Ninth Circuit below, accept those arguments. This Court should step in to resolve the division of authority and bring the TCPA's interpretation back in line with the statutory text.

III. Expanding the "Automatic Telephone Dialing Service" Definition Is Not Necessary to Prevent Harassing Calls.

Plaintiffs often urge, and courts like the Ninth Circuit sometimes accept, that expanding the TCPA's definition of "automatic telephone dialing service" is necessary, as a policy matter, to avoid abuse. A common, and hyperbolic, refrain is that unwanted telephone calls are "the scourge of civilization." *Marks*, 904 F.3d at 1044. Such rhetoric serves as a trumpet for courts to broaden the TCPA's statutory definition on the theory that doing so is a necessary tool to hold telemarketers, advertisers, and others accountable for annoying Americans with spam texts and robocalls.

But even as a policy argument, such claims are baseless. Other provisions of the TCPA *already* serve the functions that plaintiffs and sympathetic courts hope to rewrite the ATDS definition to achieve. For example, the statute's Do-Not-Call Provisions and related regulations restrict telemarketing sales calls and text messages, provide a mechanism for consumers to opt out of unwanted telemarketing calls, and allow consumers to sue telemarketers who fail to comply for $500 per call. *See* 47 U.S.C. § 227(c)(1)-(5); 47 C.F.R. § 64.1200(c). Unlike the ATDS definition, Congress drafted these provisions specifically to address the problem of intrusive telemarketing. A slew of TCPA regulations also limit unsolicited telephone and text advertisements, again on pain of imposing the TCPA's statutory penalties for noncompliance.[24] The FCC also vigorously enforces laws against illegal robocalls, such as those using caller-ID spoofing.[25]

Companies collecting unpaid debts are a frequent target of TCPA litigation, perhaps second only to telemarketers. But again, other laws already guard against abusive practices by debt collectors, including federal and state laws that limit the time, place, and manner in which debt collectors can call consumers. These statutes allow consumers, either individually or as a class, to sue debt collectors and recover substantial statutory penalties. *See* 15 U.S.C. §§ 1692c, 1692d(5),

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

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

1692k. These laws even provide for attorneys' fees, which the TCPA does not. These tailored laws fully address genuine abuse. By contrast, courts only hurt consumers by repurposing the TCPA to punish companies for calling consumers who have defaulted on their loans. This eliminates an important communication channel that customers can use to *resolve* such disputes. If consumers cannot effectively communicate with their creditors over the phone, they are less likely to resolve their debts voluntarily and more likely to face debt-collection litigation.

The TCPA was never intended to be a ban on all unwanted calls to mobile numbers. And even if one accepted the doubtful proposition that such a ban would be good policy, enlarging the TCPA's text is neither appropriate nor necessary to achieve any legitimate policy end.

CONCLUSION

For the foregoing reasons and those set forth by Petitioner, *amici* urge the Court to grant certiorari to review the decision below.

Respectfully submitted,

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