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, AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RETAIL LITIGATION CENTER, INC. AS AMICUS CURIAE SUPPORTING PETITIONER

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BRIEF FOR RETAIL LITIGATION CENTER, INC. AS AMICUS CURIAE SUPPORTING PETITIONER

The Retail Litigation Center, Inc. respectfully submits this brief as amicus curiae in support of petitioner.[1]

INTEREST OF AMICUS CURIAE

The Retail Litigation Center, Inc. ("RLC") is the only trade organization dedicated to representing the retail industry in the judiciary. The RLC's members include many of the country's largest and most innovative retailers. Collectively, they employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the RLC has participated as an amicus in more than 150 judicial proceedings of importance to retailers.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days before the due date of the intention of amicus to file this brief. All parties have consented to the filing of this brief.

The RLC and its members have a significant interest in the outcome of this case. The Ninth Circuit, in conflict with several other courts of appeals, adopted an impermissibly expansive interpretation of the "automatic telephone dialing system" ("ATDS") provision of the Telephone Consumer Protection Act ("TCPA"). The overwhelming majority of the RLC's members communicate with their customers by phone and by text messages. Many are defendants in the more than 5,000 lawsuits filed under the TCPA in just the past few years, many of them by a limited number of law firms and self-described professional plaintiffs. The Ninth Circuit's decision thus subjects national retailers to contradictory judicial rulings and frustrates their ability to comply with the law. Retailers must choose between holding back on communications valued by consumers or exposing themselves to rampant litigation under the TCPA. Accordingly, the RLC and its members have a strong interest in the Court's intervention in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

When Congress enacted the TCPA in 1991, it made clear that "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices." Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(9), 105 Stat. 2394, 2394. The Ninth Circuit has dramatically upended that balance by adopting an overly broad interpretation of the statute that makes every smartphone-carrying American a potential TCPA violator. For this reason alone, the Court should grant review.

But this Court's intervention is also necessary because the Ninth Circuit has departed from the view of sister circuits. That leaves the TCPA liability of defendants to the happenstance of a recipient's physical location when a call or text sent using conventional technology is received. If the recipient is at her home in Philadelphia, there will be no violation under the Third Circuit's interpretation of the statute. But if that text arrives after she gets off a plane to visit Los Angeles, TCPA liability and statutory damages could follow. Or if that same person takes a cross-country road trip, the TCPA's applicability to her texts will toggle on and off depending on which judicial district she is in upon receipt. Since March 2018, 38 district court decisions have adopted the Third Circuit's view of ATDSs, while 28 district court rulings have gone the Ninth Circuit's way. Alexis Kramer, *Facebook Robocall*

Case Gives Justices Shot to Define Autodialer, Bloomberg L. (Oct. 28, 2019); *see* Pet. 32-33.

All of this puts conscientious retailers trying to follow the law in an impossible position. Both the Ninth Circuit's approach, and the significant uncertainty that now exists on the breadth of the statute, will chill common customer communications that are far removed from the harassing telemarketing practices that motivated the TCPA's enactment. That hurts *customers*, who may be deprived of communications they want and need. Order confirmations, appointment reminders, shipping and delivery notifications, and prescription refill reminders are all potentially subject to TCPA liability under the Ninth Circuit's overbroad definition of an ATDS.

This Court should grant certiorari on both questions presented in the petition. The RLC agrees with petitioner that the TCPA's prohibition on calls made using an ATDS violates the First Amendment and that the Ninth Circuit's approach to severability was wrong. But this brief focuses on the statutory-interpretation question posed by the petition's second question presented and the practical adverse impact on consumers and retailers of leaving the Ninth Circuit's decision uncorrected.

ARGUMENT

I. THE NINTH CIRCUIT'S ERRONEOUS DEFINITION OF AN ATDS WILL HAVE SIGNIFICANT ADVERSE CONSEQUENCES

The Ninth Circuit's erroneous and overbroad interpretation of the statutory ATDS definition will sweep valuable consumer communications into the TCPA's liability net. Defendants will face significant liability for trying to provide their customers with information that has no relation to the kind of indiscriminate marketing messages that motivated the TCPA's passage. As a result, transmission of information that consumers want and need will inevitably be chilled.

These adverse consequences flow from the central role that the definition of an ATDS plays in the TCPA's liability scheme. The TCPA generally makes it unlawful "to make any call * * * using any automatic telephone dialing system" to any cellular telephone. 47 U.S.C. § 227(b)(1)(A).[2] That prohibition excepts only "call[s] made for emergency purposes," calls "made with the prior express consent of the called party," and calls "made solely to collect a debt owed to or guaranteed by the United States." *Ibid.* The TCPA in turn defines an ATDS 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." *Id.* § 227(a)(1).

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[2] Under Ninth Circuit precedent, "a text message is a 'call' within the meaning of the TCPA." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009); *see* Pet. App. 3.

The Ninth Circuit here read that ATDS definition to include any device that "merely ha[s] the capacity to 'store numbers to be called' and 'to dial such numbers automatically.'" Pet. App. 6 (quoting *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1053 (9th Cir. 2018)). As described below, that conclusion misreads the statute, and the TCPA's consent defense does not mitigate the error.

But we start by discussing the tremendous practical harm triggered by the Ninth Circuit's reading of the statute. Countless communications on which Americans rely begin with "stor[ing] numbers to be called" and "dial[ing] such numbers automatically." The Ninth Circuit has transformed all of them into potential TCPA violations. That makes this Court's intervention critical.

A. Mobile Communications With Consumers Are Ubiquitous In Daily Life

Calls and texts to consumers from businesses and other organizations are an integral part of our daily routines. Those communications necessarily involve storing and automatically dialing mobile numbers. Consider a week in the life of a hypothetical consumer named Claire:

- On Monday, Claire wakes up to an automated text from her son's school, informing her of a delayed opening due to snow. *E.g.*, Sidwell Friends School, *Snow, Inclement Weather, and Emergency Policy* (Aug. 2, 2019), https://www.

sidwell.edu/posts-tags/~board/community-handbook.

- On her way to work Tuesday, Claire orders a coffee to pick up. The coffee shop's mobile app automatically texts her as part of its two-factor authentication process, which requires her to enter a code sent to her mobile phone to access her account. *E.g.*, Starbucks, *How Do I Enroll in 2-Factor Authentication?*, https://customerservice.starbucks.com/app/answers/detail/a_id/6180/kw/2%20factor%20authentication (last updated Sept. 15, 2019); *see* Pet. App. 49 (describing Facebook's two-factor authentication system).

- Later that morning, Claire receives automated texts from a store, her salon, and her son's doctor, all reminding her of upcoming appointments. *See, e.g.*, Apple, *Genius Bar*, https://www.apple.com/retail/geniusbar (last visited Nov. 19, 2019).

- While on her lunch break Wednesday, Claire receives an automated text confirming her order of a gift for her friend, providing tracking information for the shipment, telling her how many loyalty points she earned, and notifying her of an upcoming sale. *E.g.*, Macy's, *How Can I Sign Up for Delivery Text Notifications?*, https://www.customerservice-macys.com/app/answers/list/c/3 (last visited Nov. 19, 2019); Jo-Ann Fabric and Craft Stores, *JoAnn2Go Messages*, https://www.joann.com/sms-terms.html (last visited Nov. 19, 2019).

- That afternoon, Facebook automatically texts Claire that a new device is attempting to access her account. She does not recognize the device, so she changes her password and secures her account using the instructions in the notification. *See* Pet. App. 5.

- Thursday evening, just before she leaves work, Claire receives an automatic text from her pharmacy, reminding her to refill a prescription and notifying her that another prescription is ready for pickup. *E.g.*, CVS Pharmacy, *Pharmacy Text Alerts*, https://www.cvs.com/mobile-cvs/text (last visited Nov. 19, 2019).

- As she arrives at a restaurant for dinner Friday night, Claire receives an automated text informing her that her table is ready. *E.g.*, OpenTable, *Texting Diners on the Waitlist*, https://support.opentable.com/s/article/Waitlist-Texting-1505261476830?language=en_US (last visited Nov. 19, 2019).

- Late that evening, Claire receives an automated text from her bank about suspected unauthorized use of her account. *E.g.*, Bank of America, *Set Up Custom Alerts*, https://www.bankofamerica.com/online-banking/mobile-and-online-banking-features/manage-alerts (last visited Nov. 19, 2019).

B. The Ninth Circuit's Interpretation Will Discourage Communications Consumers Want

Congress did "not intend for th[e] restriction" on calls using an ATDS "to be a barrier to the normal,

expected or desired communications between businesses and their customers." H.R. Rep. No. 102-317, at 17 (1991). Yet the Ninth Circuit's decision will do exactly that—it will discourage beneficial communications that consumers want and expect. As Claire's week makes clear, many retailers (and other businesses and organizations) interact with consumers in ways that involve "stor[ing] numbers to be called" and "dial[ing] such numbers." *Marks*, 904 F.3d at 1052. The Ninth Circuit's decision means that each of these communications violates the TCPA unless the recipient has provided prior express consent. *See* 47 U.S.C. § 227(b)(1)(A). Critically, however, the consent defense often fails to protect businesses that, reasonably and in good faith, believe their intended recipient has consented to receive communications.

It is more common than this Court might expect for a consumer to provide her mobile phone number to a business with consent to be contacted, but for the consented-to calls or texts to be received by someone else. Occasionally this occurs because the consumer mistakenly provided the wrong number. More frequently, it happens because the original owner who consented to contact at that number recycles her physical phone, and the phone number is reassigned to another person. The latter scenario is increasingly common: "[M]illions of wireless numbers are reassigned each year." *ACA Int'l v. FCC*, 885 F.3d 687, 705 (D.C. Cir. 2018).

Critically, retailers have no way to know that the phone number in their database—once owned by a

consumer who legitimately consented to receiving texts from the retailer—was reassigned by the cellular provider. Indeed, professional plaintiffs—and their lawyers—are intentionally exploiting that information gap regarding wrong or recycled numbers to bring suit. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 8091 (2015) ("*2015 FCC Order*") (O'Rielly, Comm'r, dissenting in part and approving in part); *see id.* at 8073 (Pai, Comm'r, dissenting). The Ninth Circuit's sweeping definition of an ATDS exacerbates this problem. It means that securing consent can be insufficient to protect even the most conscientious retailer from massive liability unless the retailer decides to forgo all texts, even those that are truly valued by the majority of consumers like Claire.

C. The Ninth Circuit's Decision Will Spur Even More Abusive TCPA Litigation

It is no idle assertion that the Ninth Circuit's overbroad interpretation of the ATDS definition will also generate even more abusive TCPA class actions and settlement demands, with little concomitant benefit to consumers.

When Congress enacted the TCPA in 1991, it intended to allow individual consumers to recover small sums in small claims courts without the assistance of lawyers. *See* 137 Cong. Rec. 30,821 (1991) (statement of Sen. Hollings) ("Small claims court or a similar court would allow the consumer to appear before the court without an attorney."). Accordingly,

the TCPA provides statutory damages of $500 for each violation, and up to three times that amount for willful violations. 47 U.S.C. § 227(b)(3)(B); *see* 137 Cong. Rec. 30,821 ("The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer.").

But what was originally meant to be a shield for consumers has now become a sword for lawyers. Indeed, "the TCPA has become the poster child for lawsuit abuse, with the number of TCPA cases filed each year skyrocketing from 14 in 2008 to 1,908 in the first nine months of 2014." *2015 FCC Order*, 30 FCC Rcd. at 8073 (Pai, Comm'r, dissenting). Nearly 5,000 new TCPA actions were filed in 2016 alone, a significant increase from the 14 actions filed in 2008. WebRecon LLC, *2016 Year in Review: FDCPA Down, FCRA & TCPA Up* (Jan. 24, 2017), https://webrecon.com/2016-year-in-review-fdcpa-down-fcra-tcpa-up; *see* U.S. Chamber Inst. for Legal Reform, *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits* 3 (Aug. 2017). And businesses receive an untold number of demand letters threatening classwide litigation in the absence of quick individual settlements. *See* Petition of SUMOTEXT Corp. for Expedited Clarification or, in the Alternative, Declaratory Ruling, CG Docket No. 02-278, at 4-6 (FCC Sept. 3, 2015); *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *Brodsky v. HumanaDental Ins. Co.*, 910 F.3d 285, 291 (7th Cir. 2018) ("The consequences for a firm that violates the TCPA can be dire

when it is facing not just a single aggrieved person, but a class.").

Much litigation under the TCPA is brought by professional plaintiffs and counsel who specialize in manufacturing and magnifying potential liability. *Bridgeview Health Care Ctr., Ltd. v. Clark*, 816 F.3d 935, 941 (7th Cir. 2016) (observing that TCPA litigation "has blossomed into a national cash cow for plaintiff's attorneys" (internal quotation marks omitted)). The tactics used by these firms run the gamut:

- Buying dozens of cell phones and requesting area codes for regions where debt collection calls are common. *See Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782, 798-99, 801 (W.D. Pa. 2016).

- Hiring staff to log calls in order to file hundreds of suits. *See Kinder v. Allied Interstate, Inc.*, No. E047086, 2010 WL 2993958, at *1 (Cal. Ct. App. Aug. 2, 2010).

- Porting a repeating digit phone number from a landline to a cell phone and making hundreds of thousands of dollars as a result. *See* Tr. of Hr'g on Pl.'s Standing at 12:3-5, *Konopca v. FDS Bank*, No. 15-cv-1547 (D.N.J. Feb. 16, 2016), ECF No. 56.

- Asking law firm employees to text "JOIN" to unknown company numbers. SUMOTEXT Petition, *supra*, at 4-6.

- Circumventing the opt-out mechanism of retail text message programs in order to revoke consent in a deliberately ineffective manner.

- Lawyers questionably soliciting clients. *See, e.g.*, *C-Mart, Inc. v. Metro. Life Ins. Co.*, No. 13-cv-80561, 2014 WL 12300313, at *1 (S.D. Fla. July 14, 2014).
- Teaching classes on how to sue telemarketers. *See Morris v. UnitedHealthcare Ins. Co.*, No. 15-cv-638, 2016 WL 7115973, at *6 (E.D. Tex. Nov. 9, 2016).

In one instructive example, a plaintiff boasted that she had purchased no fewer than 35 cell phones for the sole purpose of attracting calls that she could convert into lucrative TCPA claims. *Stoops*, 197 F. Supp. 3d at 798-99, 801. She made a point of choosing area codes in economically depressed areas with the hope that this would result in more frequent debt collection calls. *Id.* at 799. According to her deposition testimony, she transported her shoebox full of cell phones and call logs with her at all times, even on vacations, as part of her TCPA business:

> Q. Why do you have so many cell phone numbers?
>
> A. I have a business suing offenders of the TCPA * * * . It's what I do.
>
> Q. So you're specifically buying these cell phones in order to manufacture a TCPA? In order to bring a TCPA lawsuit.
>
> A. Yeah.

Id. at 788, 798-99; *see also* Jessica Karmasek, *Filing TCPA Lawsuits: 'It's What I Do,' Says Professional Plaintiff with 35 Cell Phones*, Forbes (Aug. 25, 2016),

https://www.forbes.com/sites/legalnewsline/2016/08/25/filing-tcpa-lawsuits-its-what-i-do-says-professional-plaintiff-with-35-cell-phones.

Rather than seeking to redress the genuine consumer grievances the TCPA was enacted to address in the age of unwanted dinnertime phone calls, these lawsuits are built solely to extract money from businesses. Not only do aggressive professional plaintiffs extract significant sums, but the plaintiffs' attorneys fare well too. "Among TCPA classes filed in 2010 or later, 21 have settled for $10 million or more, 16 for $15 million or more, and nine for $30 million or more." 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, 322. But "[a]s of late 2016, the average recovery for members of TCPA classes was $4.12, while the average take-home for TCPA plaintiffs' lawyer, by contrast, was $2.4 million." *Ibid.*

In combination, the Ninth Circuit's sweeping definition of an ATDS and the information gap exploited by plaintiffs around wrong and recycled numbers means that securing consent can be insufficient to protect even the most conscientious retailer from TCPA liability. Where the Ninth Circuit's definition of an ATDS controls, the only way for businesses to avoid liability from those who would use the statute for their monetary gain is not to send communications that are truly valued by the vast majority of consumers like Claire. That result does not benefit consumers. Patients could run out of medicine or miss doctor's

appointments; retail customers might not receive delivery notifications, earned discounts, or loyalty points; and credit card holders may not be notified of potential fraud. The Ninth Circuit's decision thus will harm the very consumers Congress enacted the TCPA to protect.

II. THE NINTH CIRCUIT'S INTERPRETATION OF AN ATDS IS WRONG

The Ninth Circuit's decision is as wrong as it is harmful.

Again, the TCPA generally makes it unlawful "to make any call * * * using any automatic telephone dialing system" to any cellular telephone. 47 U.S.C. § 227(b)(1)(A); *see id.* (exceptions only for "call[s] made for emergency purposes," calls "made with the prior express consent of the called party," and calls "made solely to collect a debt owed to or guaranteed by the United States"). The TCPA defines an ATDS 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." *Id.* § 227(a)(1).

As the Third Circuit has correctly held, this text unambiguously requires that both "stor[ing] * * * telephone numbers to be called" *and* "produc[ing] telephone numbers to be called" must be performed "using a random or sequential number generator" to fall within the statutory definition. *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018). Thus, an ATDS must be capable of "generating random or sequential

telephone numbers and dialing those numbers." *Ibid.* Equipment that merely makes calls to a predetermined list of stored telephone numbers—rather than a list of numbers generated randomly or sequentially—is not an ATDS. That means a retailer or other responsible business texting a curated list of customer telephone numbers will not run afoul of the statute.

The Third Circuit's interpretation—reading "using a random or sequential number generator" to modify "produce" *and* "store"—is supported by longstanding rules of statutory construction. Under the punctuation canon, a qualifying phrase separated from its antecedents by a comma generally applies to all antecedents, not just the immediately preceding one. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 161-62 (2012); *see also Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1077 (2018) (noting that "the most natural way to view [a] modifier" set off by a comma "is as applying to the entire preceding clause"). The same result would follow under the series-qualifier canon even if there were no comma. A "postpositive modifier normally applies to the entire series" when, as here, "there is a straightforward, parallel construction that involves all nouns or verbs in a series." Scalia & Garner, *supra*, at 147; *see Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 344 n.4 (2005). The phrase "using a random or sequential number generator" thus applies to *both* storing and producing.

A. The Ninth Circuit Had No Basis For Disregarding Basic Rules Of Statutory Construction

The Ninth Circuit has left those longstanding statutory-construction principles behind. In an earlier case that laid the path followed by the court here, the Ninth Circuit read the statute to define an ATDS as "equipment which has the capacity—(1) to store numbers to be called *or* (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers." *Marks*, 904 F.3d at 1052 (emphasis added). The decision here reaffirmed that erroneous interpretation, concluding that "the adverbial phrase 'using a random or sequential number generator' modifies only the verb 'to produce,' and not the preceding verb, 'to store.'" Pet. App. 6. According to the Ninth Circuit, any equipment with the capacity both to "store" telephone numbers and to "dial" them is an ATDS. It need not include any "random or sequential number generator" at all.

That interpretation "wrench[es] the rules of grammar." *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 205 (1993). There is no basis to read "using a random or sequential number generator" as modifying "produce" but not "store." If Congress intended the result that "the postpositive modifier does not apply to each item," it would have "position[ed] it earlier." Scalia & Garner, *supra*, at 149. That is, Congress would have defined an ATDS as equipment with the capacity "to store, or produce using a random or sequential number generator, telephone numbers to be called." But "[t]hat, of course,

is not what Congress wrote." *Doe v. Chao*, 540 U.S. 614, 621 n.2 (2004).

None of the Ninth Circuit's justifications for departing from the statutory text's plain meaning is persuasive.

1. The Ninth Circuit perceived a "linguistic problem" with the Third Circuit's contrary interpretation: "[I]t is unclear how a number can be *stored* (as opposed to *produced*) using a random or sequential number generator." *Marks*, 904 F.3d at 1052 n.8 (internal quotation marks omitted). The Third Circuit's reading, the Ninth Circuit believed, "fail[ed] to make sense of the statutory language without reading additional words into the statute." *Id.* at 1050.

Contrary to the Ninth Circuit's belief, the Third Circuit's construction presents no such problem. "[T]o store * * * telephone numbers to be called, using a random or sequential number generator" contemplates the storing of telephone numbers that were randomly or sequentially generated. And Congress had good reason to define an ATDS to include equipment that can store—not just produce—randomly generated telephone numbers. The inclusion of "to store" ensures that callers cannot circumvent the statute by generating random numbers and then storing them to be automatically dialed later. Similarly, that phrase captures systems that generate random numbers on one device and then store them on a separate device capable of automatic dialing.

2. The Ninth Circuit wrongly believed that its conclusion was "supported by provisions in the TCPA allowing an ATDS to call selected numbers." *Marks*, 904 F.3d at 1051. As noted before, the TCPA permits calls from an ATDS "with the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A). And Congress's 2015 amendment to the TCPA exempts calls from an ATDS "made solely to collect a debt owed to or guaranteed by the United States." *Id.* § 227(b)(1)(A)(iii). The Ninth Circuit thought those defenses presuppose that an ATDS is "not limited to dialing wholly random or sequential blocks of numbers, but could be configured to dial a curated list." *Marks*, 904 F.3d at 1051 n.7. In other words, the court reasoned that the Third Circuit's interpretation—that an ATDS must be capable of generating random or sequential telephone numbers—would render superfluous the TCPA's consent and government-debt defenses, both of which assume the caller is trying to reach a known individual.

Contrary to the Ninth Circuit's view, the consent and government-debt defenses have meaning even if, as the Third Circuit held, both "stor[ing]" and "produc[ing]" must be performed "using a random or sequential number generator." For one thing, under Ninth Circuit precedent, an ATDS "need *not* actually store, produce, or call randomly or sequentially generated telephone numbers, it need only have the *capacity* to do it." *Satterfield*, 569 F.3d at 951 (emphases added). According to that pre-existing Ninth Circuit precedent, *all* calls using an ATDS violate the TCPA, even calls made to a curated list created without use of random

or sequential number generation. *Ibid.*; *see Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012).[3] That means the defenses would not be rendered superfluous if equipment must be able to generate random or sequential numbers to qualify as an ATDS—the defenses would apply to calls made by that equipment but not using those particular features.

The Ninth Circuit also disregarded the fact that the TCPA provision prohibiting calls to cell phones using an ATDS separately prohibits calls to cell phones using "an artificial or prerecorded voice." 47 U.S.C. § 227(b)(1)(A). Whether or not these defenses applied to ATDS calls, they thus would remain relevant to calls with artificial or prerecorded voice messages. This again shows that the Ninth Circuit's concern about superfluity was misplaced.

3. The Ninth Circuit believed that its conclusion was supported by Congress's supposed acquiescence in the FCC's interpretation of an ATDS. According to the Ninth Circuit, "the FCC's prior orders interpreted this definition to include devices that could dial numbers from a stored list." *Marks*, 904 F.3d at 1052. Because

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[3] That conclusion is incorrect. The TCPA prohibits "mak[ing] any call * * * using any [ATDS]." 47 U.S.C. § 227(b)(1)(A). A call made without using the equipment's autodialing functionality is not "ma[de] * * * using" an ATDS. *2015 FCC Order*, 30 FCC Rcd. at 8088 (O'Rielly, Comm'r, dissenting in part and approving in part) ("[T]he TCPA bars companies from using autodialers to 'make any call' subject to certain exceptions. This indicates that the equipment must, in fact, be used *as an autodialer* to make the calls."); *see ACA Int'l*, 885 F.3d at 703-04.

Congress amended the TCPA but "left the definition of [an] ATDS untouched," the court inferred, "its decision not to amend the statutory definition of ATDS to overrule the FCC's interpretation suggests Congress gave the interpretation its tacit approval." *Ibid.*

The Ninth Circuit's analysis is flawed on multiple counts. To start, "[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (internal quotation marks omitted). In any event, this case is a strikingly poor candidate for finding congressional acquiescence. Contrary to the Ninth Circuit's suggestion, it was far from clear that the FCC actually interpreted the ATDS definition to include devices that could dial numbers from a stored list. Rather, as the D.C. Circuit has recognized, the FCC's prior orders "left significant uncertainty about the precise functions an autodialer must have the capacity to perform." *ACA Int'l*, 885 F.3d at 701. And the FCC's 2015 ruling similarly "'offer[ed] no meaningful guidance' to affected parties in material respects on whether their equipment is subject to the statute's autodialer restrictions." *Ibid*. Indeed, the D.C. Circuit *invalidated* the FCC's prior interpretation because of the "uncertainty" over which interpretation the agency was adopting. *Id.* at 702-03. It would be remarkable to conclude that Congress had acquiesced in an agency construction so unclear as to be unlawful.

4. The stunning sweep of the Ninth Circuit's interpretation confirms its error. That interpretation

would treat every smartphone as an ATDS—all such devices can "store numbers to be called" and "dial such numbers." *Marks*, 904 F.3d at 1052. Indeed, the Ninth Circuit candidly acknowledged that what it characterized as its "gloss on the statutory text" could "not avoid capturing smartphones." Pet. App. 8-9.

But as the D.C. Circuit has explained, it simply cannot be that "every uninvited communication from a smartphone infringes federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact." *ACA Int'l*, 885 F.3d at 698. The D.C. Circuit rejected the FCC's interpretation of the ATDS definition for that precise reason, observing that "all smartphones, under the [FCC's] approach, meet the statutory definition of an autodialer." *Id.* at 697. That "anomalous outcome[ ]," the court reasoned, indicated that the agency's "interpretation of the statute's reach" was "unreasonable" and "impermissible." *Ibid.* "The TCPA cannot reasonably be read to 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." *Ibid*. But the Ninth Circuit's reading here embraces the very same "anomalous outcome." For that reason as well, this Court's intervention is necessary.

B. The Ninth Circuit's Interpretation Is Inconsistent With The Legislative History Of The TCPA

Because the statutory text unambiguously forecloses the Ninth Circuit's interpretation, the Court's inquiry should end there. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). To the extent it is relevant, though, the legislative history of the TCPA confirms that the Ninth Circuit's reading of the ATDS definition is significantly broader than Congress intended. That history underscores that Congress was specifically concerned with random and sequential dialing of telephone numbers, not with the innocuous practice of merely storing numbers to be dialed.

Tellingly, the only part of the legislative history specifically discussing the ATDS definition refers just to random or sequential dialing. The section of the House Report under the heading "automatic dialing systems" observed that "[i]n recent years a growing number of telemarketers have begun using automatic dialing systems to increase their number of customer contacts." H.R. Rep. No. 102-317, at 10. After describing the number of calls made using automatic dialing systems, the report continued: "Telemarketers often program their systems to dial *sequential blocks of telephone numbers*, which have included those of emergency and public service organizations, as well as unlisted telephone numbers." *Ibid.* (emphasis added). That section does not even mention calls to stored lists of numbers or calls targeted to specific individuals.

The legislative history's discussion of the harms the TCPA was meant to combat likewise focused on random and sequential dialing. For instance, the Senate Report cited complaints that "some automatic dialers will dial numbers *in sequence*, thereby tying up all the lines of a business and preventing any outgoing calls." S. Rep. No. 102-178, at 2 (1991) (emphasis added). Similarly, the House Report explained that "dial[ing] sequential blocks of telephone numbers" can "include[] those of emergency and public service organizations." H.R. Rep. No. 102-317, at 10. This can be "potentially dangerous" in an emergency, the House Report emphasized, because "automatic dialing systems can 'seize' a recipient's telephone line and not release it until the prerecorded message is played, even when the called party hangs up." *Ibid.*

C. The Ninth Circuit's Interpretation Raises Serious First Amendment Concerns

Given the statutory text and legislative history, there is only one reasonable interpretation of the ATDS definition: an ATDS must be capable of generating random or sequential numbers. But even if the Ninth Circuit's construction were not foreclosed, it would render the TCPA's prohibition of calls using an ATDS unconstitutionally overbroad. Settled principles of constitutional avoidance thus provide yet another reason to reject the Ninth Circuit's impermissibly expansive interpretation.

It is this Court's "settled policy to avoid an interpretation of a federal statute that engenders constitutional

issues if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989); *see, e.g.*, *Nielsen v. Preap*, 139 S. Ct. 954, 971 (2019). This principle applies with full force when the constitutional issues raised by one interpretation involve First Amendment overbreadth. *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982).

That is the case here. The Ninth Circuit's interpretation of an ATDS would render the TCPA hopelessly overbroad, "burden[ing] substantially more speech than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). Under the Ninth Circuit's reading, every smartphone is an ATDS, and every call or message from a smartphone violates the TCPA unless the recipient has given prior express consent. *See supra* pp. 19-22. As the D.C. Circuit recognized, "[i]f every smartphone qualifies as an ATDS, the statute's restrictions on autodialer calls assume an eye-popping sweep." *ACA Int'l*, 885 F.3d at 697. Such an interpretation would transform a law originally intended to address only specific kinds of telemarketing practices, *see* H.R. Rep. No. 102-317, at 6, "into one constraining hundreds of millions of everyday callers," *ACA Int'l*, 885 F.3d at 698. Indeed, the Third Circuit recognized that the position adopted by the Ninth Circuit would "raise[] the same concerns about the TCPA's breadth that the D.C. Circuit addressed in *ACA International*." *Dominguez*, 894 F.3d at 120-21. Even the Ninth Circuit in the decision below did not resist the conclusion that its interpretation "would not avoid capturing

smartphones." Pet. App. 9. The TCPA as interpreted by the Ninth Circuit plainly "prohibits a substantial amount of protected speech * * * relative to the statute's plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292 (2008).

The Ninth Circuit's interpretation thus presents serious First Amendment problems. To avoid these constitutional concerns, this Court should adopt the narrower (and correct) interpretation advanced by the Third Circuit: an ATDS must have the capacity to generate random or sequential telephone numbers. That interpretation avoids sweeping in communications from "the most ubiquitous type of phone equipment known." *ACA Int'l*, 885 F.3d at 698. And it still furthers Congress's legitimate interest in protecting consumers from particularly intrusive and potentially harmful calls.

* * *

The Court should grant certiorari to correct the Ninth Circuit's impermissibly expansive interpretation of an ATDS, prevent potential harm to consumers, and put a stop to counterproductive TCPA litigation unmoored from the statutory text and purpose.

CONCLUSION

For these reasons and those in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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