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 Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF "ON-DEMAND" TECHNOLOGY PLATFORMS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Since the enactment of the Telephone Consumer Protection Act ("TCPA") in 1991, smartphone technologies and cellular communications (including text messaging) have become ubiquitous. Entire new industries and business models have arisen in recent years to respond to consumer expectations for "on-demand" services—*e.g.*, when consumers need to request immediate transportation or want to order home or work delivery from their favorite businesses.

Amici are cutting-edge online platforms that facilitate these types of "on-demand" services. Along with other technology companies, *amici* have been some of the most innovative and vibrant drivers of the United States economy in recent years. While *amici* operate in different industries, they all interact with users and meet consumer demand through the sort of technologies—smartphones, cellular communications, and text messaging—that are the subject of this appeal. In fact, consumers rely on cellular technology to access *amici's* "on-demand" platforms significantly more than they would to access traditional brick-and-mortar businesses.

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[1] Pursuant to Supreme Court Rule 37.3, *amici* certify that all parties have consented to the filing of this *amicus curiae* brief. Pursuant to Supreme Court Rule 37.6, *amici* certify that no party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than *amici curiae* contributed money that was intended to fund preparing or submitting this brief.

Thus, *amici* have a direct interest in the Ninth Circuit's sweeping decision, which gave short shrift to the real-world consequences of making every smartphone a regulated "automatic telephone dialing system" (also, "ATDS"). By disconnecting the technical term ATDS from its historical origins, not to mention its statutory framework, the Ninth Circuit functionally broadened the reach of the TCPA to a host of cellular technologies that Congress did not envision when the statute was originally enacted:

- Lyft, Inc. ("Lyft") operates, among other things, a mobile-based ridesharing platform that provides a means to enable riders who seek transportation to certain destinations to be matched with persons driving to or through those destinations. Both riders and drivers use Lyft's mobile-phone application, called the "Lyft app," to connect with each other. For example, when in need of a ride, riders open the Lyft app on their smartphones, use the Lyft platform to search for and connect with a nearby driver, and request a ride through it. While Lyft itself does not provide transportation, it provides a technological platform that is accessed by and communicates with user cell phones (*e.g.*, sending text messages to riders about when their driver will arrive, or conveying text messages from riders to drivers about the precise location for pickup).

- Postmates Inc. ("Postmates") is a technology company that maintains an online marketplace and mobile application on which individual customers ("Buyers"), restaurants,

retail stores, and other brick-and-mortar businesses ("Merchants"), and couriers can connect to facilitate the purchase, fulfillment, and, when applicable, delivery of goods from Merchants to Buyers. Buyers access the marketplace through their cell phones and, if they request delivery, are connected with nearby couriers who receive a notification on their smartphones and may choose whether to accept an offer to pick up and complete the delivery.

- Eaze Technologies, Inc. ("Eaze") is the premier technology platform that connects authorized cannabis dispensaries with verified users, providing consumers with safe and secure access to the dispensaries' products. Using the Eaze platform, licensed dispensaries can deliver legal and compliant cannabis and cannabis products to customers in their service area quickly and safely. The Eaze platform includes, among other things, Eaze's website, technology platform, and mobile-phone applications, which depend on cellular and smartphone communications.

These convenient "on-demand" services facilitated by *amici*, and increasingly relied on by consumers every day, would not have been possible without technological innovation and could not have been imagined by the drafters of the TCPA. *Amici* are thus concerned about unreasonable interpretations of the phrase "automatic telephone dialing system" like the Ninth Circuit's that are broader than originally conceived by Congress, that would interfere with services that

consumers actually want and expect, and that could implicate basic business operations that neither pose harm to consumers nor violate the policies underlying the TCPA. An expansive definition of an ATDS, had Congress included one at the time of the TCPA's enactment, would have stymied innovations like those developed by *amici*. The ATDS definition created decades later by the Ninth Circuit now threatens both existing companies and emerging technologies that depend in any way on cellular technology and communications.

SUMMARY OF ARGUMENT

The Ninth Circuit's interpretation of the phrase "automatic telephone dialing system" in the TCPA is so broad as to make that limitation effectively meaningless in the smartphone era. As Petitioner describes in greater detail, that interpretation is based on an incorrect reading of the statutory text because it bypasses the express requirement of a "random or sequential number generator." But Congress expressly targeted random or sequential number generators because they were the original type of specialized equipment capable of carrying out the *en masse* "robocalling" that Congress sought to curb through the TCPA. By sidestepping that limitation, the Ninth Circuit's reimagining of an ATDS brings within the TCPA's scope any device that can "store" telephone numbers and then "dial" them—*i.e.*, every smartphone in existence.

But the Ninth Circuit's misreading of the TCPA is not just a grammatical nightmare—it is a practical disaster that threatens to wreak havoc on companies big and small. An expansive definition of an ATDS has enormous consequences for consumers and the business community, both of which rely on everyday technologies (smartphones, cellular communications, and text messaging) that did not exist at the time of the TCPA's enactment in 1991, but are now suddenly swept within the Ninth Circuit's definition of sanctionable technology.

In particular, *amici* have a direct interest in correcting the Ninth Circuit's overbroad interpretation of an ATDS. They are cutting-edge platforms that facilitate "on-demand" services in different industries, which arose in response to consumer demand for services provided with the speed and convenience made possible by the technologies implicated by the Ninth Circuit's decision. While *amici* agree with Petitioner's narrower reading of the statutory text, they write separately to explain how the Ninth Circuit failed to take into account the real-world context surrounding the original enactment and subsequent application of the TCPA:

- *First*, the Ninth Circuit's re-interpretation of the technical term "automatic telephone dialing system" improperly sweeps in new technologies that were unforeseeable when the TCPA was enacted in 1991. The first text message was not even sent until 1992, and

Congress could not have envisioned the technological revolution that followed.

- *Second*, the Ninth Circuit's definition of an ATDS would impede basic business operations and penalize good-faith conduct by technology companies—*e.g.*, dialing wrong or reassigned numbers, confirmation text messages, or individually targeted communications—in a way that Congress never could have intended.

- *Third*, the Ninth Circuit's expansive reading of an ATDS compounds existing problems with the TCPA, including the imposition of potential vicarious liability on upstream companies for routine communications from downstream technologies that they do not control or even know about.

In targeting "robocalling" and mass telemarketing in 1991, Congress could not have envisioned or intended anti-technological applications of the TCPA that would frustrate legitimate business innovations that, as a general matter, consumers want and expect. Accordingly, *amici* respectfully request that the Court (1) reject the Ninth Circuit's overbroad interpretation of an "automatic telephone dialing system," and (2) adopt a definition that is consistent with the actual statutory language of the TCPA, and that does not penalize ubiquitous cellular services and communications that have become a part of everyday life.

ARGUMENT

Technology has rapidly evolved since the original enactment of the TCPA in 1991. The widespread availability of cellular telephones (particularly smartphones) and text messaging has made it easier to conduct business and consummate transactions with a touch of a button in the palm of your hand. These developments were largely driven *by consumers*, who increasingly want and expect services provided with speed and convenience that is only possible when facilitated by technologies that did not exist in 1991. Indeed, technologies have developed in recent years to respond to the need for "on-demand" services in a range of industries—*e.g.*, banking, transportation, hospitality, food, and even healthcare—and new companies have emerged to meet those demands.

Amici are cutting-edge platforms that facilitate "on-demand" services in different industries. Consumers access their innovative technologies via the very smartphones and text message communications at issue in this appeal. *Amici* agree with Petitioner's commonsense arguments about the Ninth Circuit's sweeping decision: it is based on a grammatically incorrect reading of the TCPA's statutory language; it decouples the concept of an "automatic telephone dialing system" from the long-held requirement that such equipment involve "a random or sequential number generator"; and, in doing so, it treats *any* equipment with the mere capacity to store and dial numbers (including everyday cellular telephones) as a sanctionable ATDS.

Amici write separately to explain, as a matter of policy, why the definition of an ATDS should be interpreted narrowly—consistent with the statutory text and congressional intent—to avoid: (1) penalizing technologies that were never envisioned by the drafters of the TCPA; (2) interfering with basic operations of new industries that do not harm (and indeed support) consumers; and (3) chilling technological and business innovation that in no way implicates the original policy rationales behind the TCPA. This important real-world context makes clear why the Ninth Circuit's decision misreads the statutory text, and goes far afield from anything Congress could have envisioned, let alone intended.

I. THE TCPA SHOULD NOT BE INTERPRETED TO IMPEDE NEW TECHNOLOGIES UNFORESEEABLE AT THE TIME OF ITS ENACTMENT

In enacting the TCPA in 1991, Congress could not, and did not, envision the monumental advancements in communications technologies that would follow. This Court should resolve the circuit split over the meaning of the phrase "automatic telephone dialing system" to conform to the TCPA's drafters' original purpose and intent—to curb unwanted mass telemarketing through automatic dialers using randomly- or sequentially-generated numbers.

The TCPA's enactment was prompted by societal frustration with the proliferation of unwanted mass

telemarketing calls (so-called "robocalls") to telephone lines. *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, 105 Stat. 2394 ("Unrestricted telemarketing, however, can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety."); *see also Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2343 (2020) ("Americans . . . are largely united in their disdain for robocalls."). This proliferation of unwanted calls was facilitated by technology that generated, stored, and then automatically dialed randomly- or sequentially-generated numbers. *See* Pub. L. No. 102-243, § 2, 105 Stat. at 2394 ("The use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques."). One of the principal concerns of Congress in enacting the TCPA was to control these telemarketing practices of dialing randomly- or sequentially-generated numbers, which invaded the privacy of consumers, and tied up or blocked the services of businesses, governmental actors, and even emergency service providers. *Id.* In short, the TCPA was framed to deter *unwanted* and *en masse* contact generated by *random or sequential number generators*.

As explained by Petitioner, the TCPA largely succeeded in stopping the use of *en masse* contact generated by random or sequential number generators. *See* Pet. Br. at 10, 38–39. But the fact that the TCPA mostly succeeded in curing the problem it was intended to address is no reason to expand the definition of an

"automatic telephone dialing system" to sweep in other, unrelated conduct. Rather, continuing to enforce the TCPA consistent with the original congressional intent provides certainty, predictability, and fairness.[2] And that original intent could not have encompassed on-demand services facilitated by unanticipated cellular technologies, such as those facilitated by *amici*.

At the time of the TCPA's enactment in 1991, cellular telephones were uncommon (and primitive by today's standards), text messages did not exist, and the evolution of consumer behavior and expectations about connectivity was unimaginable. The first text message was sent on December 3, 1992.[3] The first cellular phone with a QWERTY keyboard was not produced until 1996.[4] It took another five years for wireless phone service providers to connect their networks for text messaging.[5] And in 2007, over fifteen years after enactment of the TCPA, the first iPhone was

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[2] *See United States v. Locke*, 471 U.S. 84, 95–96 (1985).

[3] *The First Text Message Celebrates 25 Years*, Nat'l Pub. Radio (Dec. 4, 2017), https://www.npr.org/2017/12/04/568393428/the-first-text-messages-celebrates-25-years (last accessed Sept. 2, 2020).

[4] Hugh Carnegy, *The Tale of Nokia's Amazing 1996 Smartphone*, Fin. Times (Sept. 3, 2013), https://www.ft.com/content/47156464-4cb2-3a19-9572-3a1766f42114 (last accessed Sept. 2, 2020).

[5] Tammy Erickson, *How Mobile Technologies Are Shaping a New Generation*, Harv. Bus. Rev. (Apr. 18, 2012), available at https://hbr.org/2012/04/the-mobile-re-generation (last accessed Sept. 2, 2020).

launched,[6] followed closely by the number of text messages per month surpassing the number of calls per month.[7] Since 2007, the explosion of smartphone ownership has been profound. In 2011, 35 percent of Americans owned a smartphone; by 2019, that percentage climbed to 81 percent.[8]

The ubiquitous adoption of smartphones has facilitated the development of an entirely new on-demand industry, offering consumers innovative technology platforms that make it possible for consumers to access the beneficial on-demand services and communications that they both expect and want (*e.g.*, operating online marketplaces that connect consumers, merchants, and/or service providers, and thus facilitate ridesharing, sales, or product delivery). *See* Deloitte, *The App Economy in the United States: A review of the mobile app market and its contribution to the United States Economy*, Aug. 20, 2018, *available at* https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0048-d-0121-155299.pdf (explaining how the app economy has "transformed the national economy and

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[6] Press Release, Apple, Inc., Press Release: Apple Reinvents the Phone with iPhone (Jan. 9, 2007), https://www.apple.com/newsroom/2007/01/09Apple-Reinvents-the-Phone-with-iPhone/ (last accessed Sept. 2, 2020).

[7] Chris Gayomali, *The Text Message Turns 20: A Brief History of SMS*, The Week (Dec. 3, 2012), https://theweek.com/articles/469869/text-message-turns-20-brief-history-sms (last accessed Sept. 2, 2020).

[8] *Mobile Fact Sheet*, Pew Research Center (June 12, 2019), https://www.pewresearch.org/internet/fact-sheet/mobile/ (last accessed Sept. 2, 2020).

people's li[ves]"). *Amici* are part of that industry, facilitating innovative, valuable services in response to consumer demand. Postmates was founded in 2011, Lyft in 2012, and Eaze in 2014. Undoubtedly, when the TCPA was enacted in 1991, Congress could not have envisioned *amici's* business models or even smartphone technology.

To the extent the Ninth Circuit adopted its sweeping interpretation of an ATDS to "support[ ] the TCPA's animating purpose" (*Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1152 (9th Cir. 2019), *pet'n for cert. granted*), it got both that goal and how to accomplish it wrong. That is because the phrase "automatic telephone dialing system" is a technical term. Such technical terms should not be expanded lightly, and certainly not in a way that defies the rules of grammar and implicates technologies that did not even exist at the time of the statute's enactment. *See Glasser v. Hilton Grand Vacations Co., LLC*, 948 F.3d 1301, 1309 (11th Cir. 2020) ("Congress in retrospect drafted the 1991 law for the moment but not for the duration. The focus on number generation eradicated one form of pernicious telemarketing but failed to account for how business needs and technology would evolve."); *cf. Nw. Airlines, Inc. v. Minnesota*, 322 U.S. 292, 300 (1944) (given "subtle and complicated technological facilities that are on the horizon," "certainly we ought not to embarrass the future by judicial answers which at best can deal only in a truncated way with problems sufficiently difficult even for legislative statesmanship"). And no generalized interest in addressing "robocalling" would justify an expansive

interpretation of a technical term that would impose real-world costs on consumers, current businesses, and future technologies.

II. AN OVERBROAD INTERPRETATION OF AN ATDS IMPEDES BASIC OPERATIONS OF INNOVATIVE TECHNOLOGY COMPANIES

Many businesses, including *amici's*, rely on cellular technologies to facilitate basic services—they use them to communicate with consumers, merchants, and couriers alike. And consumers want real-time communications from businesses: *e.g.*, text messages about when to expect drivers; alerts about new deals or promotions; or communications with shoppers who cannot find the originally ordered product. But the Ninth Circuit's expansion of the phrase "automatic telephone dialing system"—particularly when coupled with other aspects of the TCPA—would produce perverse results: the attempt to prohibit *unwanted* "robocalling" would interfere with operations, communications, and conveniences that consumers *want* and now *expect*.

Under the definition of an ATDS used by the Ninth Circuit and at issue here, text messages sent by *any* business, or even *any* individual, including text messages intended to be received by a single known person, could be subject to the TCPA's restrictions. *See* 47 U.S.C. § 227(b)(1) (making such conduct unlawful for "any person within the United States"). This is because *every* text message sent from a smartphone is a text

message sent from a device that has the capacity to "store" and "dial" a phone number, and thus there is potential liability for *every text message* sent in the United States, unless the sender of the text has the "prior express consent of the *called party*." 47 U.S.C. § 227(b)(1)(A) (emphasis added).

To make matters worse, both the FCC and circuit courts have held that "called party" means the actual recipient of a call, not the intended recipient. *See*, *e.g.*, *ACA Int'l v. FCC*, 885 F.3d 687, 705–06 (D.C. Cir. 2018) (upholding FCC's interpretation of "called party"). So if companies send a text message to a phone number provided by a customer—believing there was prior consent—but someone else receives it, companies could face TCPA liability. This can occur innocuously, such as (a) when a customer provides the wrong phone number, or (b) if a customer gets a new phone number and the customer's old number is reassigned. *See id.* at 705 ("The result of [the FCC's 'called party' interpretation] is that the reassignment of a wireless number extinguishes any consent given by the number's previous holder and exposes the caller to liability for reaching a party who has not given consent."). And even if companies engage in compliant marketing directed at specific individuals—*i.e.*, not the type of *en masse* "robocalling" originally targeted by Congress—they still risk potential liability under the Ninth Circuit's sweeping decision.

Thus, the Ninth Circuit's expansive interpretation of an ATDS threatens to penalize a range of *innocent* conduct—dialing wrong or reassigned numbers,

verification efforts, and even individually-targeted marketing. None of these good-faith acts involve "random or sequential number generator[s]." Congress included that important qualifier in the statutory language to address a particular problem with *en masse* marketing, and this Court should reject any definition of an ATDS that would ignore that limitation and sweep in everyday cellular technologies. Otherwise, the Ninth Circuit's virtually limitless definition of an ATDS would wreak havoc on businesses big and small that depend on cellular technologies to communicate. After all, the potential liability for these non-robocall situations can be massive, as plaintiffs in putative nationwide class actions seek at least $500 and up to $1,500 per text message in damages. *See* 47 U.S.C. § 227(b)(3); Pet. Br. at 13 (detailing explosion in TCPA litigation). And this appeal presents a straightforward opportunity to apply a commonsense limitation on the TCPA and to pull back the Ninth Circuit's overbroad and atextual definition of the technical phrase "automatic telephone dialing system."

A. Wrong Numbers, Verification Efforts, and Confirmation Texts

Amici's businesses all operate on technology platforms and they interact with millions of customers, as well as merchants and couriers, via their cellular telephones. Thus, the possibility of calling or texting a wrong number poses an acute risk for *amici* under the TCPA. But the problem of texting an incorrect cellular phone number is not unique to the technology industry,

or even to businesses in general. Dialing a wrong number is a human experience. It happened with calls made from rotary telephones, it happens with calls made from cellular telephones, and it happens when sending text messages. By adopting a definition of an ATDS that encompasses *all cellular telephones*, the Ninth Circuit created potential liability for any cellular call or text message.

Consider any person typing into their phone a friend's cellular phone number for the first time. That number is stored. Then that number is dialed when a text message is sent. And if the number was initially typed in incorrectly, the later text message was necessarily sent without the recipient's consent and there has been a potential TCPA violation. If multiple texts are sent before the recipient corrects the misunderstanding or the sender realizes the wrong number was used, *each one* is subject to a $500 statutory penalty. In *ACA International*, the D.C. Circuit recognized that these types of "anomalous outcomes are bottomed in an unreasonable, and impermissible, interpretation of the statute's reach." 885 F.3d at 697 (explaining the TCPA "cannot reasonably be read to render every smartphone an ATDS," subjecting "every smartphone user" to liability "whenever she makes a call or sends a text message without advance consent").

To be sure, the problem of dialing wrong numbers is magnified when applied to technology companies like *amici* whose customers interact with them primarily via cellular telephones. *See also id.* at 696 (noting that, for many consumers, a smartphone is "the sole

phone equipment they own"). As of 2020, *amicus* Lyft, for example, counted 21.2 million active users of its ride-sharing platform, almost all of whom utilize cellular telephones to interact with the Lyft platform. For its part, *amicus* Postmates' online marketplace was used to place an average of 5 million orders for goods per month in 2019, the majority of which were facilitated via cellular telephone.

As the vast majority of *amici's* customers utilize cellular telephones to interact with the companies, most of those relationships necessarily involve a customer signing up for a technology service and providing the company a cellular telephone number. In these situations, companies routinely send a confirmation or verification notice—often by text message—to the phone number provided. If the transaction is not completed, companies sometimes send reminder texts to encourage the completion of the sign-up process. But if the customer *initially* inputted the wrong number, every text message sent inadvertently to that wrong number faces potential TCPA liability. Yet this is the counterintuitive result of the Ninth Circuit's decision: good-faith efforts to *confirm* the interest of prospective customers, *verify* their identity and contact information, or *protect* their security, get penalized under an overbroad definition of an ATDS. Using new technology to *avoid* unwanted contacts and potential TCPA liability should not create additional exposure under the TCPA.

Before the Ninth Circuit espoused its expansive view of the meaning of an ATDS in *Marks v. Crunch*

San Diego, LLC, 904 F.3d 1041, 1053 (9th Cir. 2018), and then affirmed it in this case, courts in the Circuit routinely reached the commonsense proposition that consumer-friendly confirmation texts are not within the scope of the TCPA. *See*, *e.g.*, *Derby v. AOL, Inc.*, No. 15-CV-00452-RMW, 2015 WL 3477658, at *6 (N.D. Cal. June 1, 2015) ("Construing the TCPA to prohibit consumer-friendly confirmation texts like that at issue here would fly in the face of both common sense and the goals of TCPA. Ultimately, the court finds that the confirmation text at issue here is not actionable.").

Indeed, the complaint against Petitioner Facebook was initially dismissed because the allegations were *not* based on *en masse* marketing, but instead were grounded in "login notifications . . . designed to 'alert users when their account is accessed from a new device.'" *Duguid v. Facebook, Inc.*, No. 15-CV-00985-JST, 2016 WL 1169365, at *5 (N.D. Cal. 2016) (*Duguid I*). Following the Ninth Circuit's radical reading of an ATDS (which is the subject of this appeal), that commonsense reading was abandoned. *See Duguid*, 926 F.3d at 1152 (reaching a contrary result to *Duguid I* based on the "gloss on the statutory" definition of an ATDS announced in *Marks*). Nor is Facebook alone. In 2018, for example, *amicus* Eaze was sued in a nationwide TCPA class action after a prospective customer signed up for its platform using an incorrect cellular phone number, and subsequent text messages were inadvertently sent—clearly intended for the good-faith purpose of *verifying* the identity of the prospective customer—to the wrong phone number.

If even 1% of customers inadvertently type in a wrong number and thus initiate one or more confirmation texts to the wrong phone number, companies with hundreds of thousands of users would face potentially enormous statutory damages for someone else's basic errors. This can be a crippling amount for a startup company or any small business. *See*, *e.g.*, *Bridgeview Health Care Ctr., Ltd. v. Clark*, 816 F.3d 935, 941 (7th Cir. 2016) (affirming TCPA judgment against small business, but lamenting: "We doubt that Congress intended the TCPA, which it crafted as a consumer-protection law, to become the means of targeting small businesses. Yet in practice, the TCPA is nailing the little guy, while plaintiffs' attorneys take a big cut."). This type of staggering liability for non-robocalls—especially for calls where errors are not even attributable to the company, or the company was taking active steps to verify information and avoid risk—was never what Congress intended in enacting the TCPA. *See*, *e.g.*, *ACA Int'l*, 885 F.3d at 698 (striking down broad FCC autodialer rule because it would "constrain[] hundreds of millions of everyday callers" by encompassing all cellular telephones). Indeed, "[it] cannot be the case 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." *Id.*

B. Reassigned Numbers

Calling or texting wrong numbers does not always arise because of user error. The case of a mistaken call recipient arises most often when a phone number is

reassigned from its original owner to someone else. And there is virtually no effective way for companies to avoid this inevitability at present. *See ACA Int'l*, 885 F.3d at 705 (explaining the FCC "acknowledged that even the most careful caller, after employing all reasonably available tools to learn about reassignments, 'may nevertheless not learn of reassignment before placing a call to a new subscriber'" (quoting *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 8009 (2015))); *see also* Pet. Br. at 12 ("even when a business contacts only numbers that it has received authorization to call, it is virtually impossible to avoid inadvertently reaching some recycled numbers whose new owners have not given consent"). Potential liability arising out of calls to reassigned numbers thus presents one of the biggest challenges to TCPA compliance, especially for technology companies like *amici*.

On average, Americans change their cell phone numbers once every four years. *See In re Implementation of § 6002(B) of Omnibus Budget Reconciliation Act of 1993*, 32 FCC Rcd. 8968, 8984–85, ¶ 27 (Sept. 27, 2017) (annual churn rate of 26.3%). Those changes often occur without notice to companies that already have consent from their existing customers to send text messages to the cellular phone numbers on file.[9]

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[9] While the FCC's solution of a database of reassigned numbers has been in the works for some years, it remains plagued by technical problems and is behind schedule. *See* FCC Public Notice, DA 20-105, GC Dkt. No. 17-59, Wireline Competition Bureau and Consumer and Governmental Affairs Bureau Seek Comment on Technical Requirements for Reassigned Numbers Database

Thus, every change creates the likelihood of an inadvertent TCPA violation.

To be sure, in cases brought based on wrong or reassigned numbers, plaintiffs face a significant obstacle at class certification. *See*, *e.g.*, *Hunter v. Time Warner Cable Inc.*, 2019 WL 3812063, at *11–17 (S.D.N.Y. Aug. 14, 2019). But the risk of certification is real and this puts even the most careful of companies in a Catch-22: spend a significant amount of money attempting to oppose class certification, or settle TCPA claims for millions of dollars to avoid the expense of litigation and the possibility of billion-dollar judgments at trial. *See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001) (noting that class certification may place "inordinate or hydraulic pressure on defendants to settle, avoiding the risk, however small, of potentially ruinous liability"); *see also Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 962–63 (8th Cir. 2019) (concluding that a $1.6 billion TCPA verdict ($500 for each of 3,242,493 calls) violated the due process clause).

(Jan. 24, 2020). And even if a perfectly working database is implemented in the future, the TCPA has a four-year statute of limitations, and thus such a database would not resolve the reassigned number risk for several years, even for the most diligent companies. *See* 28 U.S.C. § 1658(a).

C. Marketing Involving Individual Targeting or Human Initiation

The above examples involve clearly unintentional communications with consumers, which are nonetheless vulnerable to an overbroad definition of an ATDS. But the Ninth Circuit's re-imagining of an ATDS also sweeps in intentional but compliant communications, which—just like those unintentional communications—are not the types of abusive mass telemarketing calls that the TCPA was originally intended to curb.

The historical interpretation of an ATDS was intended to target equipment that (a) automatically calls or sends messages (b) using a random or sequential number generator to (c) communicate *en masse* with nameless consumers. *See* Facebook, Inc.'s Petition for Writ of Certiorari, 4–5, 24–28, Case No. 19-511, Oct. 17, 2019. That is a "common sense" understanding of "robocalling." *Aderhold v. car2go N.A., LLC*, No. C13-489RAJ, 2014 WL 794802, at *5 (W.D. Wash. Feb. 27, 2014), *aff'd*, 668 F. App'x 795 (9th Cir. 2016) (noting the Ninth Circuit's prior endorsement, when analyzing the TCPA, of "approach[ing] the problem with a measure of common sense"). Yet none of those conventional features are necessary elements for meeting the low standard for an ATDS after the Ninth Circuit's far-reaching decision.

Indeed, prior to the Ninth Circuit's decisions in *Marks* and *Duguid*, many lower courts noted that the TCPA was not intended to cover communications that

were not automatic (*i.e.*, not "robo"), that were not dependent on a random or sequential number generator, or that involved direct targeting of a specific individual (especially by name). *See*, *e.g.*, *Ibey v. Taco Bell Corp.*, No. 12-CV-0583-H (WVG), 2012 WL 2401972, at *3 (S.D. Cal. June 18, 2012) (concluding that confirmatory text message was not actionable under TCPA because "[t]he TCPA's statutory and legislative history emphasize that the statute's purpose is to prevent unsolicited automated telemarketing and bulk communications"); *Flores v. Adir Int'l, LLC*, No. CV 15-00076-AB (PLAx), 2015 WL 4340020, at *4 (C.D. Cal. July 15, 2015) (dismissing TCPA claims because plaintiff's allegations suggested "direct targeting that is inconsistent with the sort of random or sequential number generation required for an ATDS").[10]

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[10] In part, lower courts that previously rejected TCPA claims based on individually targeted communications noted that such communications are often *responsive to* consumer demand or human initiation. In other words, they were not robocalls. *See*, *e.g.*, *Hulsey v. Peddle, LLC*, No. CV 17-3843 DSF (ASx), 2017 WL 8180583, at *1 (C.D. Cal. Oct. 23, 2017) (dismissing TCPA claim because "Peddle's texts were sent after Hulsey provided her phone number on the Junk Car Zone website, which suggests 'direct targeting that is inconsistent with the sort of random or sequential number generation required for an ATDS'"); *McKenna v. WhisperText* (*McKenna III*), No. 5:14-CV-00424-PSG, 2015 WL 5264750, at *3 (N.D. Cal. Sept. 9, 2015) (dismissing TCPA claims with prejudice because "it is undeniable from McKenna's previous allegations that the human intervention of a Whisper App user is necessary to set those processes in motion"); *Aderhold v. car2go N.A. LLC*, 668 F. App'x 795, 796 (9th Cir. 2016) (concluding that validation codes were not "telemarketing" under TCPA and following "the FCC's determination that such messages, whose purpose is to facilitate, complete, or confirm a commercial transaction

When measured against the original policies animating the TCPA, non-random and individually targeted communications should fall outside any reasonable definition of an ATDS. And this is particularly true for *amici* and other consumer-facing technologies, which sometimes require individually targeted communications to specific users.

III. THE UNINTENDED CONSEQUENCES FROM AN OVERBROAD DEFINITION OF AN ATDS ARE EXACERBATED BY ABUSIVE ATTEMPTS TO APPLY VICARIOUS LIABILITY TO THE TCPA

The aforementioned problems caused or further complicated by an overbroad definition of the phrase ATDS are compounded by principles of vicarious liability, which some plaintiffs have used to engage in extortionary litigation that the TCPA's drafters could never have intended. In these cases, defendants like *amici* are forced to defend against routine text messages sent by third parties, regardless of whether those texts were part of a marketing campaign at all.

While *amici* may be innovators in their respective industries, none of them are principally marketing or advertising companies. Indeed, the demands of specialization usually require companies to focus on their particular expertise (*e.g.*, operating online marketplaces to allow consumers to connect with drivers, merchants,

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that the recipient has previously agreed to enter into with the sender are not advertisements" (internal quotation marks omitted)).

and/or couriers, to arrange for ridesharing, purchases, or product delivery), while advertising is handled by external companies in a separate and specialized cottage industry focused on developing their own marketing technologies and communicating with consumers.

These specialized marketing companies often maintain autonomy in executing a marketing project for companies. *See Armstrong v. Investor's Bus. Daily, Inc.*, No. 2:18-cv-02134, 2020 WL 2041935, at *3, 7–12 (C.D. Cal. Mar. 6, 2020) (granting summary judgment to defendant on the issue of vicarious liability); *Thomas v. Taco Bell Corp.*, 879 F. Supp. 2d 1079, 1085–86 (C.D. Cal. 2012), *aff'd*, 582 F. App'x 678 (9th Cir. 2014) (granting Taco Bell's motion for summary judgment because Taco Bell's conduct did not amount to control over the manner and means by which the marketing campaign was executed, and noting that Taco Bell did not create or develop the message and had nothing to do with the decision to use text messages for the campaign). Such lawsuits can encompass not just run-of-the-mill text messages sent as part of an authorized marketing campaign, but also wrong number and reassigned number calls where the purported principal is at least several degrees removed from any control or responsibility for the marketing or making of those calls.

Plaintiffs, however, do not simply sue these downstream marketers for their own technology and marketing communications. For example, some plaintiffs file lawsuits that name only perceived "deep pocket" upstream companies, even if they are many steps

removed from downstream marketers who control the "manner and means" of consumer communications (including whether the technology used even fits within the definition of an ATDS). Some plaintiffs even actively avoid naming the downstream marketer as a defendant, to oversimplify their claims and distance themselves from the complexity and difficulties of multi-link, multi-defendant TCPA cases. *Compare* Complaint, *Armstrong v. Investor's Bus. Daily, Inc.*, Case No. 2:18-cv-02134, Dkt. No. 1, Mar. 14, 2018 (naming only upstream companies as defendants), *with* First Amended Complaint, *Armstrong v. Investor's Bus. Daily, Inc.*, Case No. 2:18-02134, Dkt. No. 34, July 2, 2018 (adding two downstream marketers as defendants following grant of dismissal without prejudice).

Other plaintiffs assert conclusory allegations for the ATDS element of a TCPA claim in the hopes of surviving a pleadings challenge and dragging defendants (even upstream defendants far removed from downstream marketers) through expensive discovery and litigation, and then leveraging the threat of statutory penalties to extract costly settlements. *See* Pet. Br. at 13–14 (explaining that "[s]ignificant settlements and verdicts continue to drive TCPA litigation" (quoting U.S. Chamber Institute for Legal Reform, *TCPA Litigation Sprawl: A Study of the Sources and targets of Recent TCPA Lawsuits* 1, 3 (Aug. 2017))). Nor is it easy for companies to extricate themselves from TCPA suits based on vicarious liability. *Amicus* Postmates, for example, recently prevailed on a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure,

but only after the plaintiff filed four different complaints attempting to allege Postmates was vicariously liable for a single text message sent by a downstream marketer several degrees removed from Postmates, with only *de minimis* allegations that basic cellular phone technology was somehow used or authorized. *Rogers v. Postmates Inc.*, No. 19-CV-05619-TSH, 2020 WL 3869191, at *8 (N.D. Cal. July 9, 2020).

While this Court cannot fix all of the problems with the TCPA in this case, by rejecting the Ninth Circuit's sweeping interpretation of an "automatic telephone dialing system," this Court would be enforcing the historical guardrails in that prong of the TCPA—as Congress wrote it—and preventing an unrecognizable expansion of the statute beyond what Congress could have intended. A correct statutory interpretation of an ATDS would also rein in the abusive conduct of some plaintiffs' attorneys and refocus the TCPA on what Congress was actually concerned with and what its language in fact encompasses—namely, harmful conduct by wrongdoers who use (and control) "robocallers" that randomly generate mass communications. And a commonsense, grammatically correct definition of an "automatic telephone dialing system" would make it easier for courts to dismiss meritless lawsuits that are based only on targeted, individual communications that do not violate the policies behind the TCPA or that name only upstream defendants who did not know or control downstream marketing technology.

CONCLUSION

Consumer demand for technologically-enabled and on-demand services, like those facilitated by *amici*, has generated innovation and driven new sectors of a thriving tech economy. That should not be impeded by judicially rewriting an archaic law to extend to emerging technologies, which neither the plain text of the statute nor the policies behind its enactment encompass. As this Court has recognized, laws and the courts interpreting those laws must accept that "unforeseen innovations" may arise, because "times change." *Bilski v. Kappos*, 561 U.S. 593, 605 (2010). At the same time, however, this Court has stated that courts must "proceed cautiously when we are asked to extend . . . rights into an area that the . . . Act likely was not enacted to protect, lest we create a legal regime that Congress never would have endorsed." *Id.* at 644. Thus, while the Court must "contend with the seismic shifts in digital technology," it has cautioned that "when considering new innovations . . . , the Court must tread carefully in such cases, to ensure that we do not 'embarrass the future.'" *Carpenter v. United States*, 558 U.S. ___, 138 S. Ct. 2206, 2219–20 (2018) (quoting *Nw. Airlines, Inc.*, 322 U.S. at 300).

Given the rapid pace of technological innovation, the Court should not give the language of the TCPA a broad, grammatically incorrect reading that will harm

legitimate business operations today and impede the innovations of tomorrow.

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