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*,

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

## BRIEF FOR *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, ACA INTERNATIONAL, AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION, EDISON ELECTRIC INSTITUTE, INSIGHTS ASSOCIATION, INTERNET ASSOCIATION, MORTGAGE BANKERS ASSOCIATION, AND NATIONAL ASSOCIATION OF FEDERALLY-INSURED CREDIT UNIONS, IN SUPPORT OF PETITIONER


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## INTEREST OF AMICI CURIAE[1]

*Amici curiae* are various trade associations that represent businesses and organizations in every sector of the economy. *Amici*'s members strive to provide excellent service and support to their customers, which often includes telephone communications. The Ninth Circuit's broad reading of the Telephone Consumer Protection Act threatens to impose liability on *amici*'s members for communications that are helpful to, and desired by, consumers, thereby depriving consumers of these valuable communications.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents an underlying membership of three million businesses and professional organizations of every size, in every economic sector, and from every region of the country.

Business Roundtable is an association of chief executive officers who collectively have trillions in annual revenues and employ more than 15 million people. The association was founded on the belief that businesses should play an active and effective role in the formation of public policy.

American Bankers Association ("ABA") is the principal trade association of the banking industry. It represents banks and holding companies of all sizes,

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[1] Pursuant to Rule 37.3(a), counsel for all parties consented in writing to the filing of this brief. No counsel for any party authored this brief in any part, and no person or entity other than *amici*, *amici*'s members, or *amici*'s counsel made a monetary contribution to fund the preparation or submission of this brief.

as well as savings associations, trust companies, and savings banks.

ACA International is the leading trade association for credit and collection professionals. ACA represents approximately 2,500 members, including credit grantors, third-party collection agencies, asset buyers, attorneys, and vendor affiliates. ACA members contact consumers exclusively for non-telemarketing reasons to facilitate the recovery of payment for services that have already been rendered, goods that have already been received, or loans that have already been provided.

The American Financial Services Association ("AFSA") is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with closed-end and open-end credit products, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

The Consumer Bankers Association is the only national trade association focused exclusively on retail banking. Established in 1919, the association is now a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly $3 trillion in consumer loans, and provide $270 billion in small business loans.

Edison Electric Institute ("EEI") is the trade association representing all U.S. investor-owned electric companies. Its members provide electricity for 220 million Americans and operate in all 50 states and the District of Columbia.

The Insights Association is the leading nonprofit association for the insights industry. Insights Association members are the world's leading producers of intelligence, analytics, and insights defining the needs, attitudes, and behaviors of consumers, organizations and their employees, students, and citizens.

The Internet Association is the only trade association that exclusively represents leading global internet companies on matters of public policy. Its mission is to foster innovation, promote economic growth, and empower people through the free and open internet.

The Mortgage Bankers Association ("MBA") is the national association representing the real estate finance industry that works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans.

The National Association of Federally-Insured Credit Unions ("NAFCU") advocates for all federally-insured not-for-profit credit unions that, in turn, serve over 121 million consumers with personal and small business financial service products. NAFCU members are from across the country of all asset sizes.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Modern businesses must communicate with their customers in a rapid, efficient manner. This isn't only because businesses want to provide excellent customer service. Customers expect, and even demand, routine communications like health care appointment reminders, delivery notifications, low-balance alerts, and fraud warnings. Consumers rely on these communications to carry out their responsibilities, organize their financial affairs, and protect their health and safety.

As it stands, businesses face impossible choices when making these communications, and so customers are deprived of them. In 1991, Congress passed the Telephone Consumer Protection Act and its so-called "ATDS" provision, which made it unlawful to call hospital rooms, 911 operators, and wireless numbers—but not landlines—using an "automatic telephone dialing system," defined as "equipment which has the capacity … to store or produce telephone numbers to be called, using a random or sequential number generator." 47 U.S.C. § 227(a)(1)(A). That provision targeted a specific, now-eradicated practice: telemarketers whose equipment randomly or sequentially dialed numbers and thereby shut down hospital switchboards, knocked out nascent cellular networks, and aggravated consumers with pricey per-minute charges.

Some federal courts, perhaps unhappy with the limited scope of Congress's efforts, have rewritten the ATDS prohibition. Under *Marks v. Crunch San Diego*, the ATDS provision covers equipment that merely has

the "capacity" to "store[] numbers and dial[] them automatically." 904 F.3d 1041, 1053 (9th Cir. 2018). That overly broad reading arguably captures nearly every modern calling device, from the equipment that organizations use to make these communications to the smartphone in your pocket. As a result, callers risk litigation—and *at least* $500 in damages per call, with $1500 for willful violations—every time they try to deliver essential, desired, and often time-sensitive communications.

*Marks* is wrong. As Facebook and the United States explain, it badly misconstrues the TCPA's text, context, and history. But even if *Marks*'s reading of the statute were plausible, it still would have to be rejected. By treating every smartphone as an ATDS and by threatening liability for billions of legitimate calls and texts from organizations of all stripes, *Marks* violates the First Amendment.

**I.** 1. *Marks* overlooked the TCPA's history and context. In 1991, the vast majority of Americans used residential telephone lines as their primary means of communication, so businesses called these lines to provide information to their customers. Had Congress been concerned about such calls, it would have restricted ATDS calls to landlines, not merely hospital rooms, emergency lines, and wireless numbers. *Marks* ignored this distinction, threatening the business communications that Congress sought to protect.

2. *Marks* also reasoned that the TCPA must target calls from a list (not just randomly directed calls) because it exempts calls made with consent and calls to collect government-backed debt. There is no inconsistency. The TCPA has been construed to cover

calls from equipment with the *capacity* to generate random numbers, not just calls actually placed at random. Recipients can of course consent to such calls.

*Marks* also reasoned that Congress ratified its view in the debt-collection exemption. But this Court has since severed that exemption. It therefore cannot represent a "valid expression of the legislative intent." *Frost v. Corp. Comm'n*, 278 U.S. 515, 527 (1929).

**II.** *Marks* must also be rejected because it violates the First Amendment.

**A.** The Government may not "regulate … in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). This principle applies with particular force where the Government trenches upon a common, effective means of communication in the belief that recipients will not want to hear others' speech.

**B.** 1. *Marks* violates these First Amendment principles because it extends the ATDS provision to smartphones. Under *Marks*, an ATDS need only have the "capacity … to store numbers to be called" and "to dial such numbers automatically." 904 F.3d at 1053. Smartphones exhibit that capacity through voice-activated assistants, autoreply features, and group texting.

2. Some have tried to keep smartphones out of *Marks*'s grasp through statutory interpretation, but their efforts have failed. Others have accepted that *Marks* covers smartphones, but have asked the FCC to exempt them or have promised not to sue "ordinary" smartphone users. That only highlights the First Amendment problem.

**C.** 1. *Marks* also violates the First Amendment by suppressing desired business communications. Businesses need to send—and customers want to receive—the myriad informational communications described above. To do so, they *must* use equipment that stores and dials numbers, often automatically. Manual dialing will not suffice. Under *Marks*, every informational call and text thus comes with a hefty potential price tag.

2. That price tag is all too real. Plaintiffs' lawyers have filed thousands of TCPA cases a year, and defendants have often been forced to settle rather than face litigation and massive liability. *Marks* thus puts businesses to an impossible choice: forego important communications or face tremendous risk.

3. Businesses can't escape by securing consent. For example, even after an organization obtains consent, it cannot necessarily rely on it. Each year, 35 million wireless numbers are reassigned. If a business unwittingly calls one of these numbers, the prevailing law subjects it to liability anyway. While the FCC has begun to address this problem, those efforts will not be operational for some time and, even then, will not cover every accidental call. The choice thus remains: ignore your customers, or get sued for trying to call.

4. The First Amendment prohibits the Government from threatening speech in this fashion. As explained, many of the calls suppressed by *Marks* are calls that customers have *consented* to receive but that businesses cannot send for fear of liability. The Government has no interest in penalizing them.

Similarly, many people want to receive important informational messages, even though they have yet

not formally consented. These peoples' rights—as well as businesses'—are threatened by *Marks*. And if consumers do *not* want such messages, they can do what recipients do with unwanted mailers or unwelcome proselytizers: ignore the speech and ask that it cease. By sweeping far beyond any effort to restrict unwanted telemarketing or impermissible cost-shifting, *Marks* violates the First Amendment.

## ARGUMENT

### I. *MARKS* MISREADS THE TCPA AND ITS HISTORY

Facebook and the United States have persuasively explained why *Marks* misreads the statute. *See* Facebook Br. 21–42; U.S. Br. 14–34. A few key points regarding history, context, and structure merit additional emphasis.

1. In enacting the TCPA, Congress sought to *preserve* "normal, expected or desired communications between businesses and their customers"—not to prohibit targeted communications like the informational updates and alerts that businesses have long given to those customers.[2] *Marks* overlooked that context and history in concluding that the statute addresses every "automatic call[] from lists of recipients." 904 F.3d at 1051.

When Congress prohibited ATDS calls in 1991, it declined to extend that prohibition to residential landline numbers—by far the most dominant form of communication at the time. Instead, Congress restricted ATDS calls only when placed to certain specialized lines, including "emergency telephone line[s]," "the telephone line of any guest room … of a

[2] H.R. Rep. No. 102-317, at 17 (1991).

hospital," and "any telephone number assigned to … cellular telephone service[]." 47 U.S.C. § 227(b)(1)(A). To this day, callers remain free to use ATDSs to contact landline subscribers with informational messages.

When a business in 1991 wanted to contact a customer about a catalog order, an in-home visit, or a late payment, it tried her landline. At the time, wireless service was relatively rare; in a country of 253 million people, there were about 7 million cellular subscribers.[3] Even then, those subscribers rarely used wireless devices as their chief means of communication, because a 60-minutes-a-*month* plan cost *$63* a month.[4] As recently as 2003, fewer than *5%* of Americans lived in households with solely wireless service.[5] Despite these well-known demographic facts, Congress allowed businesses to continue using computer-assisted equipment—even ATDSs—to contact their customers on residential landlines, provided that they did not "us[e] an artificial or prerecorded voice." *Id.* § 227(b)(1)(B).

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[3] *See In re Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, Annual Report & Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, 10 FCC Rcd. 8844, 8874 tbl.1 (1995).

[4] *See id.* at 8880, tbls. 3–4.

[5] *See* Stephen J. Blumberg & Julian V. Luke, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January–June 2008*, NATIONAL CENTER FOR HEALTH STATISTICS (Dec. 2018), https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201812.pdf.

The ATDS provision's targeted focus on specialized numbers rather than residential lines was not a mistake. Instead, it was Congress's response to "horror stor[ies]" about the unique harms that automated, *random* or *sequential* dialing machines posed to these numbers, not residential numbers generally.[6] In one particularly poignant example, legislators heard about random callers who reached the unlisted pager numbers of would-be organ transplant recipients, tricking them into thinking they were about to receive lifesaving help.[7] Sequential dialing posed even more systemic threats. When sequential autodialers chanced upon then-nascent wireless exchanges, they would "saturate mobile facilities, thereby blocking the provision of service to the public" for hours.[8]

This background underscores Congress's aim in legislating as it did. Congress attacked the random or sequential number generators that indiscriminately savaged particularly vulnerable recipients—not the routine, targeted, computer-assisted communications made by businesses and other organizations since time out of mind. Under *Marks*, however, all of these communications are at risk. *See infra* 21–30.

2. Without discussing this history at all, *Marks* cited two exemptions—one for calls made with consent,

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[6] *Computerized Telephone Sales Calls and 900 Service: Hearings Before the Senate Committee on Commerce, Science, and Transportation*, 102d Cong. 28 (1991) (statement of Rep. Unsoeld)

[7] *See Telemarketing/Privacy Issues: Hearing Before the House Subcommittee on Telecommunications and Finance*, 102d Cong. 111 (1991) (statement of Michael J. Frawley).

[8] *Id.* at 113.

one (now-severed) for calls made to collect government debt—as proof that the TCPA in fact covers "equipment that ma[kes] automatic calls from lists of recipients." 904 F.3d at 1051. Those exceptions prove no such thing. The ATDS provision has been construed to cover calls from equipment that has the "*capacity*" to randomly or sequentially generate numbers, not just calls *actually* made that way. *See, e.g.*, *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009). But you *can* consent to calls—say, to collect government debt—placed with equipment that also happens to generate random numbers, so the supposed contradiction disappears.

*Marks* similarly claimed that Congress ratified its store-and-dial-numbers interpretation in enacting the government-debt exemption. This argument is now meritless. Since *Marks*, this Court held that the exemption violated the First Amendment and severed it from the TCPA. *See Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020) (plurality op.); *id.* at 2363 (Breyer, J., concurring in the judgment with respect to severability and dissenting in part). The original, unamended version of the TCPA is therefore the only "valid expression of the legislative intent"; the amendment is a "nullity," "powerless to work any change in the existing statute." *Frost*, 278 U.S. at 526–27; *see Barr*, 140 S. Ct. at 2353 (plurality op.) (relying on *Frost*).

Text, context, and history thus point to the same conclusion: the ATDS provision targeted uniquely harmful random and sequential dialing to specialized numbers, not ordinary computer-assisted calls between businesses and their customers. *Marks*, however, puts all of those calls in jeopardy.

## II. *MARKS* VIOLATES THE FIRST AMENDMENT

Even if *Marks* could be plausibly defended as a textual matter, it still must be rejected. Its reading violates the First Amendment by subjecting every call from one smartphone to another to potential liability, and by suppressing a tremendous amount of desired, protected communications between businesses and their customers.

### A. The First Amendment Prohibits Overbroad Restrictions on Vital Means of Communication

Even content-neutral legislation that affects speech must still face heightened scrutiny. For instance, content-neutral time, place, or manner restrictions must be "narrowly tailored to serve a significant governmental interest." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Although this standard does not require the Government to use the "least restrictive" means, it does prevent the Government from "regulat[ing] … in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *McCullen*, 573 U.S. at 486. In addition, such restrictions must "leave open ample alternative channels for communication." *Ward*, 491 U.S. at 791. Those alternatives must be "realistic[]"; if they are substantially "more cost[ly]" or provide substantially "less autonomy" to speakers, then the legislation must fall. *Linmark Assocs., Inc. v. Willingboro Twp.*, 431 U.S. 85, 93 (1977).

These standards are not paper tigers in any circumstance. *See, e.g.*, *McCullen*, 573 U.S. at 487–90 (invalidating 35-foot buffer zone around abortion clinics because it "made it substantially more

difficult … to distribute literature to arriving patients" and to "initiate the close, personal conversations … essential to 'sidewalk counseling'"); *Linmark*, 431 U.S. at 93 (invalidating ban on "For Sale" signs because it "relegated" speakers to less effective, more costly "newspaper advertising and listing with real estate agents"). They become particularly stringent where the legislature tries to restrict the use of widespread methods of communication because it believes recipients do not want to hear certain speech.

For example, in *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, the village banned canvassers from knocking on doors without first obtaining a "solicitation permit." 536 U.S. 150, 154 (2002). The Court invalidated the ordinance, reasoning in part that residents' ability to post a "No Solicitation" sign or to "refuse to engage in conversation with unwelcome visitors" "provide[d] ample protection for the unwilling listener." *Id.* at 168; *see also, e.g.*, *Martin v. City of Struthers*, 319 U.S. 141, 141 (1943) (door-to-door pamphleteering). And in *Bolger v. Youngs Drug Products Corp.*, the Court invalidated a ban on unsolicited birth control mailers. 463 U.S. 60 (1983). "[It] ha[s] never held that the government itself can shut off the flow of mailings to protect those recipients who might potentially be offended." *Id.* at 72. Rather, the "short, though regular, journey from mail box to trash can … is an acceptable burden, at least so far as the Constitution is concerned." *Id.*; *see Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001) (the commercial-speech "framework" is "substantially similar to the test for time, place, and manner restrictions").

### B. *Marks* Treats Smartphones as ATDSs

1. If *Marks* covers smartphones, it violates these First Amendment principles. No matter what governmental interest one considers—either the concerns about harmful telemarketing that *actually* motivated the ATDS provision, or the generalized privacy concerns highlighted by its modern rewriters—proscribing every smartphone is not a sufficiently tailored means of achieving those interests. Simply put, the Government may not subject hundreds of millions of calls and texts a day to the threat of damages on the off chance that some of them might be unwanted.

That is exactly what *Marks* does. In its view, an ATDS need only have the "capacity … to store numbers to be called" and "to dial such numbers automatically." 904 F.3d at 1053. And under *Marks*, equipment can dial "automatically" "even if the system must be … triggered by a person"; it need not "operate without any human intervention whatsoever," so long as it "engage[s] in automatic *dialing*." *Id.* at 1052–53 (emphasis in original).

These days, "it's hard to think of a phone that does not have th[at] capacity." *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1309 (11th Cir. 2020) (Sutton, J., sitting by designation). And smartphones have it "right out of the box." *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 467 (7th Cir. 2020).

Imagine you're hiking around New Hampshire and want to call an old friend. No problem—just say, "Siri, call Justice Souter," and Siri will dial his number from your contacts list. In that scenario, your phone has the capacity to "store" numbers; it stored Justice Souter's.

It also has the capacity to "dial" stored numbers; it called his. Indeed, at least in the Ninth Circuit, it may even have the capacity to do so "automatically." Even though you asked her to do so, some might say *Siri* "dialed" because you didn't have to push a button. *See Glasser*, 948 F.3d at 1309 ("Suddenly an unsolicited call using voice activated software … could be a violation."). Under *Marks*, the only reason that you can't get sued is that Justice Souter almost certainly uses a landline.

Other common features make even clearer that smartphones fall within *Marks*'s rule. Do Not Disturb is a feature found on hundreds of millions of iPhones. When activated, this functionality sends automated responses, either to all incoming calls and messages or to a select group, to "let[] [the caller] know" the recipient is unavailable.[9]

Do Not Disturb is indistinguishable from the functions that Facebook's equipment performs here. Facebook's servers "maintained a database of phone numbers," Pet. App. 5, just as smartphones "maintain[]" their owner's contacts (and the number behind every incoming call). Facebook's equipment was "programmed … to send automated messages to those numbers each time a new device accessed the associated account," *id.*, just as smartphones with Do Not Disturb turned on are "programmed" to text incoming callers. Facebook's equipment sent those

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[9] Apple, *How To Use Do Not Disturb While Driving*, https://support.apple.com/en-us/HT208090 (Sept. 19, 2019); *see also* Apple, *App Store*, https://developer.apple.com/support/app-store/ (noting that, as of June 2020, at least 99% of iPhones run a version of iOS with Do Not Disturb).

texts "automat[ically]" after unusual logon attempts, Pet. App. 5, just as smartphones set in this fashion text without further direction. If Facebook's security-alert system qualifies as an ATDS under *Marks*, so does every iPhone.

If you still aren't convinced, consider group texting. *Marks* itself held that the "Textmunication system"—a "marketing platform" that allowed clients to "select[] the recipient phone numbers," "generate[] the content of the message," and "select[] the date and time for the message to be sent"—qualified as an ATDS. 904 F. 3d at 1048. That is exactly what happens when someone sends a group text. She "selects" her intended recipients, "generates" the message's content by typing it into her phone, and "selects" the date and time for the message to be sent by pressing "send." Under *Marks*, any phone that can be used to schedule a group lunch, recruit neighborhood volunteers, or find a babysitter is an ATDS. Indeed, prominent players in the plaintiffs' bar have already admitted as much.[10]

Whether you ever send a group text, activate Do Not Disturb, or ask Siri to help dial, your smartphone is thus an ATDS under *Marks* because it has the "*capacity*" "to store numbers to be called … and to dial such numbers automatically." *Id.* at 1053 (emphasis added). Every call or text you ever place to another

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[10] *E.g.*, Comment of Law Offices of Todd M. Friedman, P.C., Kazerouni Law Group, APC, and Hyde & Swigart, APC at 20, FCC Dkt. Nos. 02-278 & 18-152 (Oct. 17, 2018) ("Friedman Comment"), *available at* https://tinyurl.com/y48eyvf7; Comments of National Consumer Law Center at 12, FCC Dkts. No. 02-278 & 18-152 (Oct. 17, 2018) ("NCLC Comment"), *available at* https://tinyurl.com/y472koov.

wireless user thus risks $1500 in damages unless you have the recipient's prior express consent.

2. Most of *Marks*'s defenders recognize that no one should be fined up to $1500 for the grave offense of texting an acquaintance without permission. Although they have tried to explain away its breadth, they have failed.

Some have sought hope in other parts of the statute. One reasoned that an ATDS must have the capacity to "dial[] … numbers" (plural), so a smartphone—which supposedly calls only one number at a time—does not qualify. *See Glasser*, 948 F.3d at 1317 (Martin, J., concurring in part and dissenting in part).

These premises are mistaken. As noted above, modern smartphones send group texts indistinguishable from mass texts sent by text messaging platforms, so it isn't true that smartphones dial numbers only one at a time. Moreover, a separate TCPA provision makes it unlawful to "use an [ATDS] in such a way that two or more telephone lines of a multi-line business are engaged simultaneously." 47 U.S.C. § 227(b)(1)(D). This provision *presumes* that ATDSs may dial one number at a time. Moreover, the sequential dialer that ties up an exchange call-by-call over three hours, *see supra* 10, surely counts as an ATDS. *Cf.* 1 U.S.C. § 1 ("words importing the plural [generally] include the singular"). *Marks* cannot survive by playing games with "numbers."

Others have suggested that the escape lies in the word "dial"—when you "[c]lick[] on a name in a digital phonebook," you undertake "a form of speed-dialing or constructive dialing that is the functional equivalent of dialing by inputting numbers." *Duran v. La Boom*

*Disco, Inc.*, 955 F.3d 279, 289 n.39 (2d Cir. 2020). By contrast, when someone clicks "send" on a texting platform, it "tell[s] the ATDS to go ahead and dial a separate list of contacts." *Id.* To the extent that we understand this point, it is mistaken. When you hit "send" on a group text, it "tell[s]" your iPhone "to go ahead and dial a separate list of contacts," namely, the ones that you entered into the recipient field. If one "constructively dial[s]" by hitting a button to send a group text, *id.*, then one "constructively dial[s]" by hitting send on a text-messaging platform. There must be liability for both or neither.

Still others have taken refuge in the "automatic" dialing inherent in qualifying as an "*automatic* telephone dialing system." One court thus reasoned that smartphones do not qualify because "[v]oice activation software simply allows a person to dictate the recipient, message, and command to send"; it is not an "automatic" process. *Allan v. Pa. Higher Educ. Assistance Agency*, 968 F.3d 567, 579 (6th Cir. 2020). The court also claimed that autoreply features do not count as automatic dialing because such messages are "only sent *in reply*." *Id.* (emphasis in original).

To be sure, there is some question whether voice activation alone counts as "automatic" dialing. But smartphones also send group texts, and doing so is just as "automatic" as sending the same texts through a marketing platform. Moreover, the responsive nature of autoreply texts—identical to Facebook's security alerts here—has proven incapable of solving the problem. "*Marks*'s gloss on the statutory text provides no basis to exclude equipment that stores numbers 'to be called' only reflexively." Pet. App. 8. "Indeed, the statute suggests otherwise: 'to be called' need not be

the only purpose for storing numbers—the equipment need only have the 'capacity' to store numbers to be called." *Id.*

Plaintiffs' lawyers—those who will gain the most from *Marks*'s breadth—often *concede* that smartphones qualify under its definition.[11] So they have suggested more lawless means of avoiding the *reductio* to *Marks'*s absurdity. In this vein, one prominent group has argued that there should be a carve-out from *Marks*'s reasoning for smartphones because they "do not appear to be capable of texting *a large number* of recipients."[12] But the ATDS provision does not require simultaneous dialing *at all* to qualify, *see supra* 17; it certainly lacks a numerical cutoff.

Others assert that, while smartphones are covered, the FCC should exempt them so long as they are not "actually used to make multiple calls or send mass texts"—in other words, if you send one group text you're okay, but if you send "multiple, identical or near-identical, group text[s]," you should be held liable.[13] It is unreasonable to think that Congress would have left it to the FCC to decide whether hundreds of millions of calls and texts a day should be prohibited. And had Congress done so, the First Amendment would stand in the way. It "protects against the Government; it does not leave us at the

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[11] *See, e.g.*, Friedman Comment, *supra*, at 27; NCLC Comment, *supra*, at 7.

[12] Friedman Comment, *supra*, at 27 (emphasis added).

[13] NCLC Comment, *supra*, at 7, 12–13.

mercy of *noblesse oblige*." *United States v. Stevens*, 559 U.S. 460, 480 (2010).

Finally, plaintiffs' lawyers have argued that it is no big deal that *Marks* covers smartphones, because no one has been sued yet for using one.[14] The TCPA plaintiffs' bar, though, has not been known for its restraint—it is the "poster child for lawsuit abuse"[15]—so this makeshift line is unlikely to hold. Once again, the Government is not allowed to pass unconstitutionally overbroad speech restrictions because it—let alone *private plaintiffs*—"promise[s] to use [them] responsibly." *Stevens*, 559 U.S. at 480.

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The obvious First Amendment consequences of treating every smartphone as an ATDS should end this case. "[W]here an otherwise acceptable construction … would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). There is no

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[14] *See, e.g.*, Friedman Comment, *supra*, at 21.

[15] *In re Rules & Regulations Implementing the TCPA*, 30 FCC Rcd. 7961, 8073 (2015) (dissenting statement of Commissioner Pai); *see also, e.g.*, Chamber Amicus Br. at 8–16, *Charter Commc'ns, Inc. v. Gallion*, No. 19-575, 2020 WL 3865257 (U.S. July 9, 2020) (documenting the breathtaking rise in ATDS litigation).

serious argument that the statute *compels Marks*'s reading over Facebook's,[16] so *Marks* cannot be the law.

### C. *Marks* Unlawfully Suppresses Protected, Desired Business Communications

*Marks*'s constitutional flaws do not end with smartphones. By restricting every piece of equipment that has the capacity to dial from a list, *Marks* makes it nearly impossible for businesses and other organizations to provide vital, time-sensitive, desired communications to their customers and other consumers. The breadth of that restriction raises another serious constitutional problem that compels *Marks*'s rejection.

1. *Marks*'s interpretation sweeps far beyond the random or sequential telemarketing calls that tied up 911 operators, halted doctors' work, and took down wireless networks. Instead, by covering every piece of equipment with the capacity to call or text automatically from a list of numbers, it imposes liability on a tremendous amount of essential speech.

Consider first the kinds of messages that the FCC has already had to exempt from the TCPA rather than lose to *Marks*'s grasp. As we are all now very well aware, package delivery companies like to send—and customers like to receive—automated notifications informing recipients that a package has been delivered. These companies "generally do not have any contact

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[16] *See Marks*, 904 F.3d at 1051 ("[T]he statutory text is ambiguous on its face."); *Duran*, 955 F.3d at 283 (The ATDS provision's "language leaves much to interpretation."); *Allan*, 968 F.3d at 574 (agreeing with *Marks*'s "assessment" of the ATDS provision).

with a recipient until a package is shipped," and it "would be impossible, given the volume of daily package deliveries, to manually dial each delivery notification call to wireless phone numbers or to obtain prior express consent."[17] Absent *Marks*, these delivery notifications pose no problem—no one uses random-dialing equipment to tell someone a package has arrived, and if someone is somehow upset by such texts, she can ask them to stop. With *Marks*, these communications cannot be made (absent an administrative exemption) for fear of crushing liability.

So too for "appointment and exam confirmations and reminders, wellness checkups, hospital pre-registration instructions, pre-operative instructions, lab results, post-discharge follow-up intended to prevent readmission, prescription notifications, and home healthcare instructions."[18] These messages are "time-sensitive," "welcome[d]," "expect[ed]," and often important for "mak[ing] informed decisions." [19] Without the FCC's exemption, they cannot be placed efficiently and effectively through automated equipment. And of course, the continuing viability of this and other exemptions is in doubt. *See Political Consultants*, 140 S. Ct. at 2355 (severing the government-debt exemption as content-based).

There is a welter of speech that is just as valuable and desired that has not received an exemption from

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[17] *In re Cargo Airline Ass'n Petition for Expedited Declaratory Ruling*, 29 FCC Rcd. 3432, 3433 (2014).

[18] *In re Rules & Regulations Implementing the TCPA*, 30 FCC Rcd. at 8031.

[19] *Id.* at 8030.

the FCC. For example, federal and state law often *require* mortgage companies to communicate with customers who miss a payment.[20] Consumers benefit from informational calls like these because they often make a difference—as one happy recipient recounted, "the customer service representatives were very kind and understanding of my human mistake, helped me make the payment, and waived the late fees because they knew my customer history."[21] Mortgage servicers have no problem placing these calls to landlines. In fact, the Commission has exempted *all* non-commercial calls from the ban on prerecorded or automatic voice messages, *see* 47 C.F.R. § 64.1200(a)(3)(ii), and the ATDS provision does not cover residential landlines. With the rise of wireless-only households, the specter of TCPA liability makes it impossible to place them—which is why the Federal Housing Finance Agency *itself* has asked the FCC to craft yet another exemption for certain mortgage-related calls.[22]

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[20] *See, e.g.*, 12 C.F.R. § 1024.39(a) (CFPB Mortgage Servicing Rule requiring telephonic or in-person contact by the 36th day of delinquency); Cal. Civil Code § 2923.5(e)(2)(A) (requiring mortgage servicers to "attempt to contact the borrower by telephone at least three times at different hours and on different days" before recording a default)

[21] *See* Letter from Jonathan Thessin to Marlene Dortch, Secretary, FCC, *Ex Parte* Presentation, CG Dkt. Nos. 02-278, 18-152 (Dec. 18, 2019), *available at* https://www.aba.com/advocacy/policy-analysis/statements-of-customer-appreciation.

[22] *See* Comments of the FHFA to the Commission's Notice of Proposed Rulemaking on the TCPA's Budget Act Amendment,

Mortgage servicers aren't alone in this dilemma. Three large banks refrained from sending analogous time-sensitive automated calls and texts to *tens of millions* of customers because of possible liability.[23] Insurance companies also want to reach out to clients *before* a policy lapses, not after; to make sure clients have the coverage they need before an impending storm; or to ask whether clients need any help after the storm has passed.

Across the economy, customers desire—indeed, demand—these timely communications. Modern consumers rely on calls and text messages providing information such as updates regarding an order status, low-balance alerts, power outage updates, product recall notifications, and security alerts like the ones that Facebook sent in this case.

The present global pandemic has underscored the need for businesses to make timely communications with their customers. In the midst of financial uncertainty, lenders need to contact borrowers about opportunities for payment deferrals, fee waivers, loan modifications, and other payment relief options. Adapting to new protocols, grocery stores may wish to advise customers about special shopping hours for healthcare professionals and seniors. Financial

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CG Dkt. No. 02-278 (June 6, 2016), *available at* https://ecfsapi.fcc.gov/file/60002096538.pdf.

[23] Letter from Jonathan Thessin to Marlene Dortch, Secretary, FCC, *Ex Parte* Presentation, CG Dkt. Nos. 02-278, 18-152 (Nov. 4, 2019), *available at* https://ecfsapi.fcc.gov/file/1104045326296/Letter_to_FCC_Bank_Data_Calls_Not_Placed_2019_11_04_final.pdf.

institutions seek to remind account holders about the availability of online and mobile banking, which is particularly important for customers who have not used these platforms in the past. Once again, however, the threat of massive TCPA liability stands in the way.

2. That threat is all too real. Between 2014 and 2017, roughly 5,000 TCPA cases were filed in state and federal court.[24] By the end of October 2018, nearly 3,000 TCPA lawsuits had been filed just in that year.[25] *Marks* then made things even worse. For example, after it came down, one plaintiff's firm planned a "massive uptick in TCPA filings (80–100 in the next month) in light of renewed confidence in the TCPA."[26] That firm wasn't kidding about additional litigation; in the first half of 2020 *alone*, more than 2,000 new TCPA cases have hit the dockets.[27]

Faced with massive uncapped per-call statutory damages, uncertainty about the true scope of the law, and the prospect of burdensome discovery, many defendants have had to settle rather than fight—and at eye-watering numbers.[28] Indeed, the TCPA has become such a lucrative cash cow that plaintiffs have

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[24] *See* U.S. Chamber Inst. for Legal Reform, *TCPA Litigation Sprawl* 2 (2017), *available at* https://bit.ly/2WpfFMa.

[25] *See* TCPALand, *Happy Halloween TCPALand! More Ghoulish TCPA Statistics To Freak You Out*, https://bit.ly/322ex2o (Nov. 1, 2018).

[26] *Id.*

[27] *See* WebRecon LLC, *WebRecon Stats for June 2020: An Interesting Dichotomy*, https://bit.ly/3gqOtWA (July 20, 2020)

[28] *See TCPA Litigation Sprawl*, *supra*, at 9–10 (detailing settlements in excess of $10 million).

turned pro in shaking down callers. *See, e.g.*, *Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782, 788 (W.D. Pa. 2016) (plaintiff purchased "at least thirty-five cell phones … for the purpose of filing lawsuits" under the TCPA); *Nghiem v. Dick's Sporting Goods, Inc.*, 318 F.R.D. 375, 382 (C.D. Cal. 2016) (plaintiff signed up for promotional texts "for the specific purpose of finding a TCPA violation").

*Marks*'s reading of the TCPA thus presents business with a series of unsavory options. They can refrain from calling or texting, thereby frustrating customers and missing opportunities. They can limit their contacts to landline numbers, but risk alienating their wireless-only customers and aggravating those who prefer to be contacted by cell phone. Using antiquated equipment such as rotary phones is not a realistic option because staffing them carries a hefty price tag and diverts resources from other areas that benefit consumers. Or they could try to develop new equipment that avoids storing and automatically dialing numbers—but they would struggle mightily to do so in an era in which smartphones trigger liability and technology constantly evolves. In other words, *Marks* forces businesses to forego meaningful communications with consumers or face devastating liability.

3. It is no answer to say that all of these communications can still occur under *Marks*'s regime, so long as the caller acquires prior express consent. As the package delivery companies explained, it may be difficult or impossible for some organizations to secure consent in advance because they lack preexisting contractual relationships with those with whom they wish to communicate.

Then there are the questions about how consent works in practice, both for small organizations and for nationwide businesses with millions of customers. Say, for instance, that a financial institution obtains a customer's number from his spouse during a customer service call. The financial institution rightly believes that it has consent to contact the spouse, but it may not be able to *document* that consent, and therefore relies upon it at its peril. The same problem occurs when a bank acquires a customer's account from a prior institution or when it learns a customer's number from an incoming call. Moreover, in addition to the difficulties of proving consent, there are thorny questions surrounding its revocation. Are the power company's repair personnel supposed to pass along opt-out requests? If someone tells a credit union teller that she no longer wishes to receive calls or texts, does that request apply just to her checking account? What about her mortgage? Or credit card? The possibilities for disagreement—that is, litigation—abound, especially in light of the unprecedented financial consequences stemming from a global pandemic.

Even for those organizations able to solicit and appropriately document consent and its revocation, those processes themselves are rife with difficulties. To make these often time-sensitive communications efficiently, organizations must process large volumes of recipient information over multiple channels. A single error anywhere in the line—for example, a customer who provides an incorrect phone number—could lead to a class action seeking tens of millions in statutory damages. Even the most careful caller risks litigation every time it makes a call or sends a text.

Finally, even when everything goes right—a recipient consents to receive calls from an organization, she correctly provides her number for the organization's records, and a few months later, the organization sends a security alert to that number—there is still a catch. "Approximately 35 million numbers are disconnected and made available for reassignment [for] each year."[29] The circuits agree that calls or texts placed to these numbers trigger TCPA liability because the *actual* recipient has not consented. *See N.L. ex rel. Lemos v. Credit One Bank, N.A.*, 960 F.3d 1164, 1167 (9th Cir. 2020) (collecting cases). So if the consumer has dropped her number without telling the organization, its effort to contact her could very well end up hitting someone else's phone. As a result, even with full diligence, those trying to contact their *willing* customers cannot do so without fear of litigation.

Efforts to mitigate this last problem are laudable, but they do not eliminate the risk of massive liability. The FCC has ordered the creation of a Reassigned Numbers Database,[30] and it will exempt from TCPA liability anyone who has consent and who "quer[ies] the database … and receiv[es] a response of 'no'" before calling, *see* 47 C.F.R. § 64.1200(m)(1). But that Database will not be up and running for many months, if not years. The FCC has not yet announced the date

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[29] Second Report and Order, *In re Advanced Methods To Target & Eliminate Unlawful Robocalls*, 33 FCC Rcd. 12024, 12027 (2018) ("Reassigned Numbers Database Order").

[30] *See* Reassigned Numbers Database Order, 33 FCC Rcd. at 12029.

by which voice service providers must begin providing information to the Database. In fact, until January 2021, some voice service providers aren't even required to maintain *records* regarding the permanent disconnection date for reassigned numbers.[31]

Even once the Database is up and running, it will not catch every reassignment. To use the database, the would-be caller enters the number and the "last date the caller is reasonably certain the consumer had the number."[32] But "if the queried number and a permanent disconnect date are not contained in the database and the date provided in the query is before the [as-yet-undetermined] date all providers are required to report disconnected numbers," then the Database will return an answer of "no data" and the caller will be on the hook for calls to reassigned numbers.[33] As a result, the Database will prove useless for those whose last contact with the consumer occurred before mid-to-late 2021 (at the earliest). Even then, the administrator of the Database will charge for its use and is allowed to make a "reasonable profit."[34] On the whole, then, the game may not be worth the candle for smaller organizations, and it does nothing at all to help anyone here and now.

4. The First Amendment blocks the Government from jeopardizing such a vast amount of speech in this

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[31] *See id.* at 12039.

[32] Public Notice, *Consumer and Governmental Affairs Bureau Establishes Guidelines for Operation of the Reassigned Numbers Database*, 2020 WL 1907792, at *1 (Apr. 16, 2020).

[33] *Id.* at *2.

[34] *Id.*

fashion. Congress enacted the TCPA to end the "'scourge'" of telemarketing, particularly from equipment that "could automatically dial a telephone number and deliver an artificial or prerecorded voice message." *Political Consultants*, 140 S. Ct. at 2344 (plurality op.) (quoting 137 Cong. Rec. 30821 (1991) (statement of Senator Hollings)). With respect to the ATDS ban in particular, Congress sought to end a particularly aggravating form of telemarketing and to prevent telemarketers from "inappropriately shift[ing] marketing costs … to consumers" through "costly" calls to wireless numbers.[35] Congress made clear, however, that *non*-telemarketing calls, as well as calls that are free to the recipient, do not pose the same threats. *See* 47 U.S.C. § 227(b)(2)(B) (empowering the FCC to exempt non-commercial calls from the ban on prerecorded or artificial calls to residential lines); *In re Rules & Regulations Implementing the TCPA*, 7 FCC Rcd. 8752, 8782 (1992) (exempting such calls); 47 U.S.C. § 227(b)(2)(C) (authorizing the FCC to exempt ATDS calls that are "not charged to the called party"). In these ways, Congress proved that it did not *want* the TCPA "to be a barrier to the normal, expected, or desired communications between businesses and their customers."[36]

The amount of speech threatened by *Marks*'s reading of the ATDS provision sweeps far beyond these interests. This is most easily seen with respect to those communications that organizations have consent to send but cannot make because of the

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[35] *In re Rules & Regulations Implementing the TCPA*, 18 FCC Rcd. 14014, 14115 (2003).

[36] H.R. Rep. No. 102-317, at 17.

unavoidable risk of liability. Even if these *are* telemarketing calls (they generally are not), and even if they generally *did* cost the recipients money (they rarely do), the recipient's consent defeats any possible interest that the Government might have. Yet the threat of crippling liability still deters businesses from making these calls. "The right of freedom of speech and press … embraces the right to distribute [communications], and necessarily protects the right to receive [them]." *Martin*, 319 U.S. at 143. By treating as burglars' tools the only equipment capable of sending high-volume, consented-to communications, *Marks* puts a price tag on speech that the Government has no business regulating.

*Marks*'s interpretation also steps over the line with respect to millions or billions of calls or texts for which the recipient might not have given prior express consent. A great many consumers *want* these time-sensitive, informational messages, even if they have not affirmatively asked for them. These recipients have rights too, just like those who might want to hear the gospel preached on their doorstep or to contribute to a new charitable cause. The Government may not "submit[] the distributor to … punishment for annoying the person on whom he calls, even though the recipient of the literature distributed is in fact glad to receive it." *Martin*, 319 U.S. at 144.

Even if some people do not wish to receive informational updates, these are *not* telemarketing messages and thereby escape that central purpose of the TCPA. Indeed, under the FCC's exemption for non-solicitation calls, the exact same calls could be placed using automated technology to someone's landline. Moreover, unlike in 1991, the vast majority of wireless

users now have unlimited calling and texting plans and therefore pay nothing to receive unwanted informational communications.[37] These people stand in the same position as those who would rather not receive unsolicited birth control advertisements in the mail or would rather be left alone by proselytizers and do-gooders seeking adherents to their cause. Like them, those who receive "objectionable" texts can simply "avert[] their eyes." *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 542 (1980). Indeed, they have more powerful and user-friendly options. If they don't want the texts, they can just type "STOP."

That leaves automated telemarketing calls and texts, as well as automated calls and texts for which the non-consenting recipient is nonetheless forced to pay a fee. It may well be that the Government could restrict such calls in advance. But that does not matter here. In our world, these calls and texts are dwarfed by non-telemarketing ones and by ones for which no recipient pays anything. Far from targeting the "exact source of the 'evil' it seeks to remedy," *Frisby v. Schultz*, 487 U.S. 474, 485 (1988), *Marks* thus sweeps in a much broader set of other, constitutionally protected communications.

Just as importantly, that is not how the constitutional avoidance canon works. "[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice." *Clark v.*

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[37] *See* Josh Zagorksy, *Almost 90% of Americans Have Unlimited Texting*, INSTANT CENSUS BLOG (Dec. 8, 2015), https://tinyurl.com/y2pn2h38.

*Martinez*, 543 U.S. 371, 380 (2005). "If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Id.* at 380–81. Thus, even if the ATDS provision as construed in *Marks* could be constitutionally applied to telemarketers or those who force costs upon unwilling recipients, *Marks* must still be rejected because of the host of constitutional problems it raises with respect to other communications—including Facebook's informational, likely-free-to-the-recipient texts here.

## CONCLUSION

For the foregoing reasons and those given in Facebook's brief, the judgment of the Ninth Circuit should be reversed.

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Respectfully submitted,

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