No. _____

In the
Supreme Court of the United States

FACEBOOK, INC.,
Petitioner,

v.

NOAH DUGUID, individually and on behalf of himself and all others similarly situated,
Respondent,

and

UNITED STATES OF AMERICA,
Respondent-Intervenor

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Congress enacted the Telephone Consumer Protection Act of 1991 ("TCPA") to prohibit calls made to a cell phone without consent using an "automatic telephone dialing system" ("ATDS"). That prohibition exempts calls made "to collect a debt owed to or guaranteed by the United States" or "made for emergency purposes." 47 U.S.C. §227(b)(1)(A)(iii). Here, Petitioner was sued for violating this prohibition and defended on the grounds, *inter alia*, that the prohibition unconstitutionally discriminated on the basis of content and that the text messages at issue here did not involve an ATDS. The Ninth Circuit agreed that the TCPA was unconstitutional, but denied Petitioner any relief by taking the extraordinary step of rewriting the TCPA to prohibit more speech by eliminating the government-debt-collection exception. To make matters worse, the Ninth Circuit adopted a counter-textual and expansive definition of an ATDS that encompasses *any* device that can store and automatically dial telephone numbers—even if that device cannot store or produce them "using a random or sequential number generator," as the statutory definition requires, *id.* §227(b)(1)(A). That holding—which conflicts with the Third and D.C. Circuits—sweeps into the TCPA's prohibition almost any call or text made from any modern smartphone.

The questions presented are:

1. Whether the TCPA's prohibition on calls made using an ATDS is an unconstitutional restriction of speech, and if so whether the proper remedy is to broaden the prohibition to abridge more speech.

2. Whether the definition of ATDS in the TCPA encompasses any device that can "store" and "automatically dial" telephone numbers, even if the device does not "us[e] a random or sequential number generator."

PARTIES TO THE PROCEEDING

Facebook, Inc. is Petitioner here and was Defendant-Appellee below.

Noah Duguid, individually and on behalf of himself and all others similarly situated, is Respondent here and was Plaintiff-Appellant below.

The United States of America is Respondent-Intervenor here and was Intervenor-Appellee below.

CORPORATE DISCLOSURE STATEMENT

Facebook, Inc. is a publicly traded company and has no parent corporation. No publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

Duguid v. Facebook, Inc., No. 17-15320 (9th Cir.) (opinion issued and judgment entered June 13, 2019; petition for rehearing denied Aug. 22, 2019; mandate issued Sept. 12, 2019).

Duguid v. Facebook, Inc., No. 15-cv-00985-JST (N.D. Cal.) (order granting motion to dismiss with prejudice issued Feb. 16, 2017; order denying motion to set aside judgment issued July 24, 2017).

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

This case presents two questions of critical and far-reaching importance relating to the First Amendment and scope of the Telephone Consumer Protection Act of 1991 ("TCPA").

The first question concerns the constitutionality of this important and frequently litigated Act of Congress and strikes at the core of how courts should analyze and remedy speech restrictions under the First Amendment. Facebook was haled into court based on allegations that it violated the TCPA's prohibition on calls made without consent from an automatic telephone dialing system ("ATDS") by sending security-related text messages. Facebook raised two closely related constitutional defenses based on the First Amendment, arguing both that the TCPA's prohibition was impermissibly content-based because its reach turned on the content of the underlying calls and that it was hopelessly overbroad if the definition of an ATDS reached every smartphone. The Ninth Circuit accepted the first argument and found the TCPA unconstitutional based on Facebook's arguments. But the Ninth Circuit then took the extraordinary step of denying Facebook any relief from the prohibition it was alleged to have violated and which it successfully argued was unconstitutional. Rather than simply invalidating the TCPA's unconstitutional prohibition, the Ninth Circuit undertook to rewrite the prohibition to abridge even more speech under the guise of "severing" the statutory exception for calls made to collect government debt, 47 U.S.C. §227(b)(1)(A)(iii).

That holding turns principles of the First Amendment, severability, and standing on their heads. Courts have no license to rewrite laws to abridge more speech, and severability principles, properly understood, have no application here. Facebook's constitutional challenge was not to the TCPA's government-debt exception, which neither applied to Facebook nor abridged any speech. Instead, Facebook was sued for violating—and challenged—the TCPA's prohibition on making calls with an ATDS, which decidedly does abridge speech. Having succeeded in its challenge to that prohibition, the proper course was for the court to invalidate the prohibition and then see whether the rest of the statute could stand. Nothing in "severability" or First Amendment principles empowered the Ninth Circuit to rewrite the prohibition to abridge more speech by excising a government-debt exception. The Ninth Circuit's extraordinary decision finding an Act of Congress unconstitutional, but then denying the successful objecting party all relief by rewriting the statute to ban more speech, plainly merits this Court's review.

The second and closely related question concerns the scope of the TCPA's definition of an ATDS. If the TCPA's statutory prohibition on calls made using an ATDS really covers every smartphone in America, as the Ninth Circuit has held, then content-based discrimination is the least of the TCPA's First Amendment problems. The Ninth Circuit's statutory interpretation renders the statute wildly overbroad, extending the TCPA's up-to-$1,500-per-call penalty to calls and texts millions of Americans make with their smartphones every day. Fortunately, the Ninth

Circuit's nearly limitless view of what constitutes an ATDS is wrong as a matter of both basic statutory construction and constitutional avoidance principles. Moreover, the Ninth Circuit's view is in acknowledged conflict with the holding of the Third Circuit and reaches a result that the D.C. Circuit labeled "unreasonable," "impermissible," and "untenable." *ACA Int'l v. FCC*, 885 F.3d 687, 697-98 (D.C. Cir. 2018). This Court should grant certiorari to resolve that conflict and to determine the scope and constitutionality of the TCPA's much-litigated prohibition on ATDS calls.

The Ninth Circuit's decision is profoundly wrong and profoundly important. It invalidated an Act of Congress under the First Amendment, but then contravened principle and precedent by denying the challenging party any relief and rewriting the statute to prohibit *more* speech. And the court misread a federal statute that Congress passed to target now-largely-obsolete telemarketing equipment to prohibit a wide range of speech in today's economy. Each question presented independently warrants certiorari, and both together compel it. The Court should grant review to ensure correct application of First Amendment principles and restore the TCPA to its intended scope.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 926 F.3d 1146 and reproduced at App.1-20, and its order denying the government's petition for panel rehearing and rehearing en banc is unreported and reproduced at App.21-22. The district court's orders granting Facebook's motions to dismiss are unreported but

available at 2017 WL 635117 and 2016 WL 1169365 and reproduced at App.23-52.

JURISDICTION

The Ninth Circuit issued its opinion on June 13, 2019. That judgment became final on August 22, 2019, when the court denied the government's petition for panel rehearing and rehearing en banc. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides, in relevant part: "Congress shall make no law … abridging the freedom of speech, or of the press." U.S. Const. amend. I.

The relevant provisions of the TCPA, 47 U.S.C. §277, are reproduced at App.53-81.

STATEMENT OF THE CASE

A. The Telephone Consumer Protection Act

1. In 1991, "[a]lmost thirty years ago, in the age of fax machines and dial-up internet" and long before the first smartphones, Congress "took aim at unsolicited robocalls" by enacting the TCPA. App.1-2; *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 370-71 (2012) (noting that Congress passed the TCPA in response to "[v]oluminous consumer complaints about abuses of telephone technology"). The TCPA supplemented the Federal Communications Act of 1934, 47 U.S.C. §151 *et seq*., and among other things, makes it unlawful for a person to place calls without prior consent to cellular and certain specialized telephone lines using a device called an "automatic telephone dialing system." *Id.* §227(b)(1)(A).

The statute defines an ATDS as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." *Id.* §227(a)(1). Congress used the phrase "random or sequential number generator" to address particular problems posed by the autodialing technology prevalent when the TCPA was enacted in 1991. At that time, "telemarketers [were using] autodialing equipment that either called numbers in large sequential blocks or dialed random 10-digit strings." *Dominguez v. Yahoo, Inc.* (*Dominguez I*), 629 F. App'x 369, 372 (3d Cir. 2015). Random dialing meant that callers could reach and "tie up" unlisted and specialized numbers, crowding the phone lines and preventing those numbers from making or receiving any other calls. *See* S. Rep. No. 102-178, at 2 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 1968, 1969. Sequential dialing also allowed callers to reach every number in a particular area, creating a "potentially dangerous" situation in which no outbound calls (including, for example, emergency calls) could be placed. H.R. Rep. No. 102-317, at 10 (1991), *available at* 1991 WL 245201. Although Congress has not updated the TCPA to address technological changes, like the rise of texting, courts have generally interpreted the "call[s]" proscribed by the TCPA to include text messages. *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 667 (2016).

2. As relevant here, the TCPA contains three exceptions to its prohibition on calls made using an ATDS. First, the statute does not prohibit ATDS calls made with the recipient's "prior express consent." 47 U.S.C. §227(b)(1)(A). While this exception was

relatively straightforward to apply in 1991 when most telephones numbers were landline numbers that changed infrequently, it has become more challenging in recent years, as tens of millions of phone numbers are transferred (or "recycled") every year from one user to another when phone plans expire or users otherwise change their numbers. *See* Second Notice of Inquiry, *Advanced Methods to Target and Eliminate Unlawful Robocalls*, 32 FCC Rcd. 6,007, 6,009 ¶5 (2017). As a result, it is not unusual to dial the number of a person who had given consent but—because the number has been recycled—inadvertently reach a different person who has not given consent at the same number, especially because there is no reliable source for verifying the current ownership of a particular phone number. Second, the TCPA excepts calls "made for emergency purposes." 47 U.S.C. §227(b)(1)(A). The FCC has defined the term "emergency" to mean calls "made necessary in any situation affecting the health and safety of consumers." 47 C.F.R. §64.1200(f)(4). Third, the TCPA excepts calls "made solely to collect a debt owed to or guaranteed by the United States." Bipartisan Budget Act of 2015, Pub. L. No. 114-74, §301(a)(1)(A), 129 Stat. 584, 588; 47 U.S.C. §227(b)(1)(A)(iii).

3. The TCPA includes a private right of action that carries substantial potential penalties. 47 U.S.C. §227(b)(3). A caller who places a call to a cell phone without consent using an ATDS is subject to an automatic $500 statutory penalty per call, with treble damages available—increasing the potential statutory penalty to $1,500 per call—"[i]f the court finds that the defendant willfully or knowingly" committed the violation. *Id.* §227(b)(3)(B)-(C). The substantial

statutory penalties available under this private right of action have made the TCPA one of the more frequently litigated federal statutes, and the availability of fixed statutory penalties that arguably obviate the need to prove individualized damages has made it a frequent basis for putative class actions. *See, e.g.*, *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 655-56 (4th Cir. 2019); Marissa A. Potts, *"Hello, It's Me [Please Don't Sue Me!]": Examining the FCC's Overbroad Calling Regulations Under the TCPA*, 82 Brook. L. Rev. 281, 302-03 (2016) ("Recent trends in TCPA litigation show that TCPA lawsuits are clogging the judicial system. These lawsuits attract plaintiffs' attorneys because they frequently provide lucrative class-action settlement opportunities." (footnote omitted)).

B. Factual Background and Proceedings Below

1. Facebook operates a social-media service with more than 2.4 billion users across the globe, including more than 190 million users in the United States. Facebook's users create personal profiles and share messages, photographs, and other content with other users. Because Facebook's users often share personal information, Facebook—like many companies—allows its users to opt in to certain "extra security feature[s]" to protect that information. App.40. One of these opt-in security features allows a user to provide a mobile telephone number for Facebook to contact the user with a text-message "login notification" that alerts the user when the user's Facebook account is accessed from a potentially suspicious location—*i.e.*, a virtually real-time message alerting the user that, at a specific

time, someone attempted to access the user's account from an unknown device or browser. App.40. If the user does not recognize the log-in attempt, the notification enables the user to take immediate action and secure the account, thereby preventing improper access by an unknown actor.

2. In March 2015, respondent Noah Duguid filed a putative class action alleging that Facebook violated the TCPA's prohibition on making calls using an ATDS. App.42. Duguid asserted that, although he was and is not a Facebook user and had never provided Facebook with his phone number or consent (but likely had a recycled number associated with another Facebook user), Facebook sent him several, sporadic login-notification text messages in 2014 using an ATDS, in violation of 47 U.S.C. §227(b)(1)(A). App.4-5. The messages, each unique, alerted Duguid that an unrecognized browser at a specific time attempted to access a Facebook account associated with his phone number: "Your Facebook account was accessed [by/from] <browser> at <time>. Log in for more info." App.4. Duguid unsuccessfully attempted to unsubscribe to the Facebook alerts. App.4-5.

Duguid's putative class action against Facebook alleges that each of these security messages violates the TCPA's prohibition on calls made with an ATDS. App.5; App.42. Duguid alleged that the messages were sent via an ATDS and that Facebook had acted willfully or knowingly in sending the text messages, and that he and the putative class members were therefore entitled to $1,500 in treble damages for each message. CA9.R.Excerpts.62-63, ¶¶51-53.

3. Facebook moved to dismiss, raising both constitutional and statutory defenses to Duguid's amended complaint.[1] Facebook's argument that the TCPA's prohibition violated the First Amendment prompted the federal government to intervene for the limited purpose of defending the TCPA's constitutionality. *See* N.D.Cal.Dkt.41-44. The district court granted Facebook's motion to dismiss. App.51-52. The court held that Duguid's conclusory allegations that Facebook used an ATDS were insufficient because "plaintiff's own allegations suggest direct targeting that is inconsistent with the sort of random or sequential number generation required for an ATDS." App.47. In particular, "Duguid's allegations indicated that Facebook's login notification text messages are targeted to specific phone numbers and are triggered by attempts to log in to Facebook accounts associated with those phone numbers." App.48. Because the district court ruled for Facebook on the scope of the ATDS, the court did not reach Facebook's First Amendment objections. The district court also declined to reach Facebook's argument that the login notifications fell within the emergency exception because they convey information that protects users from a potential compromise of their accounts. App.51.

4. Duguid appealed. Facebook raised its First Amendment arguments as alternative bases to affirm, and the federal government again limited its participation to the constitutional issues. While

[1] The district court had previously granted an earlier motion to dismiss without prejudice and gave Duguid an opportunity to amend his initial complaint. *See* App.42.

Duguid's appeal was pending in the Ninth Circuit, the court issued an opinion on the scope of the TCPA's ATDS definition in *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018). Specifically, *Marks* addressed "whether, in order to be an ATDS, a device must dial numbers generated by a random or sequential number generator." *Id.* at 1050. The Ninth Circuit ultimately concluded "that the statutory definition of ATDS is not limited to devices with the capacity to call numbers produced by a 'random or sequential number generator,' but also includes devices with the capacity to dial stored numbers automatically." *Id.* at 1052. In reaching that conclusion, the Ninth Circuit expressly disagreed with the Third Circuit's conclusion "that a device must be able to generate random or sequential numbers in order to qualify as an ATDS." *Id.* at 1052 n.8.

The Ninth Circuit received supplemental briefing here on *Marks*, and then reversed the district court's decision. As to the statutory issue, the court acknowledged Facebook's argument that, if *Marks* "mean[s] what it says," it would sweep in "ubiquitous devices and commonplace consumer communications"—including any text message or call placed from any modern smartphone. App.7. The Ninth Circuit nevertheless reaffirmed *Marks* and held that Duguid's allegations were sufficient to satisfy the Ninth Circuit's "gloss on the statutory text." App.8-9.

Because the Ninth Circuit concluded that the TCPA's prohibition on calls from an ATDS would encompass Facebook's login-notification messages, the court had to reach the question of the prohibition's constitutionality. Although Facebook raised broader

First Amendment objections to the prohibition—namely, that the Ninth Circuit's broad conception of an ATDS in *Marks* renders the prohibition "wildly overbroad," CA9.Suppl.Br.28, the Ninth Circuit focused its First Amendment analysis exclusively on Facebook's argument that the government-debt-collection exception that Congress added in 2015 rendered the TCPA's prohibition content-based. App.11-12. The Ninth Circuit reasoned that because the government-debt-collection exception "targets speech based on its communicative content, the exception is content-based and subject to strict scrutiny." App.11-12. The court then held that the government-debt-collection exception is "insufficiently tailored to advance the government's interests in protecting privacy or the public fisc" and so fails strict scrutiny. App.18.

The Ninth Circuit accepted Facebook's argument that the government-debt exception rendered the TCPA's prohibition on calls from an ATDS unconstitutional, but then proceeded to deny Facebook any relief under the guise of severability analysis. The Ninth Circuit proceeded on the premise that the government-debt-collection exception, rather than the prohibition, was unconstitutional (even though the exception does not prohibit any speech, does not apply to Facebook, and is not what Facebook challenged). Based on the mistaken premise that the exception was what was unconstitutional, the Ninth Circuit found the "unconstitutional exception" severable from the rest of the statute, including the speech-abridging prohibition that Facebook actually challenged. App.19-20. Thus, although the Ninth Circuit agreed with Facebook that the government-

debt-collection exception caused "the TCPA [to] now favor[]" one type of "speech" over another based on its content, the court gave Facebook no relief. App.11. In fact, the Ninth Circuit's severability approach *broadened* the TCPA's speech restrictions to abridge more speech.

The government filed a petition for panel rehearing and rehearing en banc on the constitutional issue, arguing that "the panel misapprehended a question of exceptional importance when it erroneously invalidated part of an Act of Congress." U.S.Reh'g.Pet.1. The government acknowledged that Facebook's challenged the constitutionality of the TCPA's prohibition, not the government-debt-collection exception, *id.* at 14, and that in using severability analysis to deny relief to Facebook, the court had effectively rendered an advisory opinion. The government's extraordinary solution was to suggest that the panel "should have started with the severability analysis" before addressing the statute's constitutionality. *Id.* at 6. The court denied the government's petition on August 22, 2019. App.21-22.

REASONS FOR GRANTING THE PETITION

This petition raises two exceptionally important, interrelated questions involving the constitutionality and scope of the TCPA, one of the most frequently litigated federal statutes. To say that the decision below will carry extraordinary practical consequences is an understatement.

Both questions presented are independently certworthy, and together they compel review. First, the Ninth Circuit followed up the grave and delicate task of declaring an Act of Congress unconstitutional

with the even more extraordinary step of denying any relief to the party successfully challenging the statute's constitutionality. Both steps in that process justify this Court's review. The determination that an Act of Congress violates the Constitution almost always merits this Court's plenary review. But in reaching that conclusion and then denying Facebook any relief by rewriting the TCPA to abridge even more speech, the Ninth Circuit plainly inverted First Amendment principles. The Ninth Circuit lost sight of both what Facebook had challenged as unconstitutional (the TCPA's prohibition on calls from an ATDS, which is, not coincidentally, what plaintiffs alleged that Facebook violated) and the proper and properly limited role of a federal court in remedying a First Amendment violation. Having found the TCPA's prohibition to be an unconstitutional abridgement of speech, the Ninth Circuit should have invalidated the prohibition. It had no license to rewrite the statute to broaden the unconstitutional prohibition by eliminating an exception that Facebook never challenged and did not abridge anyone's speech. The Ninth Circuit's decision contravenes numerous precedents of this Court and other circuits analyzing First Amendment challenges in analogous contexts. This Court's intervention is necessary to correct this egregious error of constitutional dimension.

This Court's intervention is likewise needed to resolve the acknowledged circuit conflict regarding the ATDS definition. Indeed, the scope of the ATDS definition is inextricably intertwined with the constitutional issues. It is hard to meaningfully address the constitutionality of a prohibition on ATDS calls without first knowing whether an ATDS refers to

a small universe of rapidly obsolescing robocalling machines or virtually every modern smartphone. Moreover, as Facebook has consistently argued, if the latter view is correct, then the TCPA's content-based discrimination is the least of its First Amendment defects, as the statute would be wildly overbroad. The Ninth Circuit's atextual construction of the ATDS definition thus not only conflicts with the better reasoned views of the Third and D.C. Circuits, but it exacerbates the statute's constitutional difficulties. The statutory question has enormous practical consequences, as Americans deserve to know whether they have been inadvertently toting ATDSs around in their pockets and purses and risking $1,500-a-call fines. In short, both questions presented are independently certworthy and granting both questions will allow the Court to fully consider both issues and potentially avoid the constitutional questions altogether. This Court should grant review on both questions presented.

I. The Court Should Grant Certiorari To Bring The Ninth Circuit In Line With This Court's First Amendment Jurisprudence.

The Ninth Circuit decision below committed both statutory and constitutional errors, but it did get one important thing right: the TCPA prohibition on ATDS calls that Facebook is alleged to have violated is a content-based restriction on speech because it plainly "draws distinctions based on the message a speaker conveys." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). To determine whether the TCPA's prohibition applies, one must consider the content of the call, including whether it was "made for

emergency purposes" or "to collect a debt owed to or guaranteed by the United States," 47 U.S.C. §227(b). If the call seeks to alert the recipient of an emergency or to collect a government debt, the call is permissible. If the call addresses non-emergency matters, urges the resistence of government-debt collections, or addresses virtually any other subject, it is verboten.

That kind of content-based restriction of speech is plainly unconstitutional. *See McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (a statute "would be content based if it require[s] enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred"). This Court has made crystal clear that the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed*, 135 S. Ct. at 2226. Accordingly, laws that "target speech based on its communicative content," "appl[y] to particular speech because of the topic discussed or the idea or message expressed," or "draw[] distinctions based on the message a speaker conveys" are "presumptively unconstitutional" and may be justified "only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 2226-27. As the Ninth Circuit recognized, the extent to which the TCPA's prohibition on ATDS calls applies depends "exclusively on the purpose and content of the call." App.14. Moreover, having recognized that the TCPA's content-based speech restriction triggers heightened scrutiny, the Ninth Circuit squarely rejected the government's efforts to justify it as a narrowly tailored effort to further compelling interests. App.14-18.

While the Ninth Circuit was eminently correct to recognize that the TCPA's content-based prohibition on ATDS calls was unconstitutional, it then made a critical misstep. The Ninth Circuit proceeded as if all that was unconstitutional was the speech-permitting government-debt-collection exception, rather than the speech-abridging prohibition on ATDS calls. App.15 (condemning "the debt-collection exception—*not* … the TCPA overall"). Thus, based on the mistaken premise that the government-debt-collection exception was what was unconstitutional, the Ninth Circuit proceeded to analyze whether the *exception* could be "severed" from the statute, rather than whether the *prohibition* should be invalidated. App.19-20. The Ninth Circuit breezily concluded that the government-debt-collection exception could be severed without doing damage to "the fundamental purpose of the TCPA" since the exception was a relatively recent addition to the statute and because the TCPA includes a severability provision. App.19-20.

The Ninth Circuit's analysis is deeply flawed as a matter of severability doctrine and First Amendment principles. First, by starting from the mistaken premise that the speech-permitting government-debt-collection exception was unconstitutional, the Ninth Circuit reached an untenable conclusion. Facebook never challenged the constitutionality of the government-debt-collection exception as such. Facebook's security texts do not even implicate the exception, and Duguid never accused Facebook of violating it. Instead, what Duguid alleges that Facebook violated and what Facebook challenged as unconstitutional was the TCPA's basic prohibition on

ATDS calls. To be sure, Facebook argued that the government-debt-collection exception (along with the emergency exception and the FCC's authority to exempt calls deemed to advance the TCPA's purposes, 47 U.S.C. §227(b)(2)(B)) rendered the prohibition content-based and unconstitutional. But it was always the speech-restricting prohibition that Facebook assailed as unconstitutional, as even the government recognized in its rehearing petition. U.S.Reh'g.Pet.14. Having prevailed on that argument, Facebook was entitled to have the prohibition invalidated, with the only remaining severability question being whether anything else in the statute should fall along with the prohibition.

What the Ninth Circuit engaged in was not "severability" analysis at all, but a wholly improper exercise in rewriting a statute to excise the one thing in the statute that surely did not violate the First Amendment—a speech-permitting exception—and to broaden the prohibition to abridge more speech than the Act it declared unconstitutional. By broadening the speech prohibition, the Ninth Circuit not only went beyond any proper application of severability doctrine, but turned First Amendment principles on their head.

The First Amendment provides that "Congress shall make no law … abridging the freedom of speech." U.S. Const. amend. I. Needless to say, this Amendment prohibits laws that abridge or restrict speech on the basis of content or viewpoint. Exceptions that allow certain speech to avoid the censor's reach may render the censorship that actually

occurs unconstitutional, but the exceptions are not what run afoul of the First Amendment.

In recognition of this basic principle of First Amendment law, this Court has repeatedly remedied a First Amendment violation by invalidating the unconstitutional restriction—not the exception. In *Reed v. Town of Gilbert*, for example, the Court addressed the Town of Gilbert's "Sign Code." The Gilbert code mirrored the TCPA's structure: it contained a blanket "prohibit[ion]" on "the display of outdoor signs anywhere within the Town," but then included a series of "exemptions." *Reed*, 135 S. Ct. at 2224. These exemptions allowed the display of certain types of signs "on the basis of whether a sign conveys" a particular "message." *Id.* at 2227. As this Court explained, the "Town's *Sign Code* [was] content based on its face" because the existence of the various exemptions meant the prohibition on the display of outdoor signs "that apply to any given sign … depend[s] entirely on the communicative content of the sign." *Id.* (emphasis added). The Court subjected the Sign Code to strict scrutiny, concluding that the existence of the various exceptions from the Code's blanket ban rendered the Sign Code "hopelessly underinclusive." *Id.* at 2231. The Court then invalidated the Sign Code, not once suggesting that it might cure the First Amendment problem by "[e]xcising the … exception[s]" to "preserve[] the fundamental purpose" of the Sign Code and restore a "content-neutral" Sign Code. App.20.

This Court's other First Amendment decisions have charted a similar course, recognizing that when a government enacts a broad prohibition on speech,

but then exempts certain types of speech from that prohibition based on the content of the speech, that the statutory *prohibition*—not the *exception*—is subject to strict scrutiny and invalidation under the First Amendment. *See, e.g.*, *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 805 (2011); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563-64, 580 (2011); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 189-90 (1999); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488-91 (1995); *City of Ladue v. Gilleo*, 512 U.S. 43, 53 (1994); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430-31 (1993); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 233 (1987); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592-93 (1983); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794-95 (1978).

The vast majority of the Courts of Appeals have likewise been faithful to First Amendment values when analyzing First Amendment challenges to statutes, striking down the speech-restrictive prohibitions, rather than excising speech-permitting exceptions to broaden the abridgement. *See, e.g.*, *Willson v. City of Bel-Nor*, 924 F.3d 995, 1000, 1004 (8th Cir. 2019); *Rappa v. New Castle Cty.*, 18 F.3d 1043 (3rd Cir. 1994); *id.* at 1079-80 (Alito, J., concurring); *Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1572 (11th Cir. 1993); *Matthews v. Town of Needham*, 764 F.2d 58, 61 (1st Cir. 1985) (Rosenn, Breyer, and Torruella, JJ.); *Beckerman v. City of Tupelo*, 664 F.2d 502, 513 (5th Cir. Unit A 1981).

The Third Circuit's decision in *Rappa* applied the majority approach notwithstanding a broad severability clause. There, the Third Circuit

addressed the constitutionality of a Delaware ordinance similar to both the Town of Gilbert's Sign Code and the TCPA in that it generally prohibited a medium of speech (signs near state highways) but exempted signs advertising "local industries, meetings, buildings, historical markers and attractions." 18 F.3d at 1043. After holding that the statute was an unconstitutional content-based restriction of speech, the court addressed whether severability would be an appropriate remedy in light of an express severability clause. *See id.* at 1072. The Third Circuit recognized that "the rest of the statute could surely function independently" if the exemptions were severed, but nonetheless declined to adopt a remedy that would prohibit more speech because it would be inconsistent with the basic principle that the First Amendment prohibits the abridgement of speech. *Id.* at 1072-73.

Unfortunately, the Ninth Circuit's erroneous "severability" analysis does not stand alone. Weeks before the Ninth Circuit's ruling, the Fourth Circuit addressed the constitutionality of the TCPA's content-based speech restriction in *American Association of Political Consultants, Inc. v. FCC*, 923 F.3d 159 (4th Cir. 2019). The Fourth Circuit likewise concluded that the government-debt-collection exception rendered the TCPA's prohibition unconstitutional and likewise concluded that severing the exception—and extending the ban—was the appropriate remedy. *Id.* at 171. Recent decisions by the Seventh and Eighth Circuits addressing state anti-robocall statutes with content-based exceptions likewise appear to contemplate that severing the exception is the proper remedy for the First Amendment violation in comparable

circumstances. *See Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303, 305 (7th Cir. 2017); *Gresham v. Swanson*, 866 F.3d 853, 854-55 (8th Cir. 2017); *see also, e.g.*, *Perrong v. Liberty Power Corp.*, 2019 WL 4751936, at *6-7 (D. Del. Sept. 30, 2019).

All those decisions are wrong, and the fact that multiple courts are making the same error as the Ninth Circuit underscores the need for this Court's review. This novel and misguided approach to "severability" defies sound remedial doctrine and undermines basic First Amendment principles. This Court should review and correct this mistaken approach before it spreads to other contexts. This Court has developed its First Amendment jurisprudence based on challenges by parties like Pastor Reed and Facebook who object to being subjected to an unconstitutional restriction on speech. Their objection is not to speech-permitting exceptions that do not protect their speech, but to the abridgement of their own speech by laws that proscribe or authorize speech based on content. To tell them, as the Ninth Circuit did, that their First Amendment challenge prevailed but they are entitled to no relief because the Court will simply broaden the prohibition is wrong and will deter future challenges. The remedy for an unconstitutional abridgement of speech is not less speech and broader abridgement.

Even the government recognized that something was amiss with the Ninth Circuit's analysis when it suggested in its rehearing petition that its failure to grant Facebook any relief gave the Ninth Circuit's unconstitutionality ruling the feel of an advisory opinion. U.S.Reh'g.Pet.5-6. But rather than recognize that this error stemmed from a mistaken

"severability" analysis, the government made the extraordinary suggestion that the court "should have started with severability analysis" before addressing constitutionality. *Id.* at 6. There is no support for that cart-before-horse approach, which would have courts assume a federal statute is unconstitutional in order to avoid holding it unconstitutional. Instead, the solution is far more straightforward: courts should give meaningful relief to a party, like Facebook, who successfully challenges the constitutionality of a prohibition being applied to it and abridging its speech.

The Ninth Circuit's mistaken "severability" analysis created one last anomaly—it caused the Ninth Circuit to simply ignore Facebook's broader overbreadth challenge to the TCPA prohibition. Facebook challenged the TCPA prohibition not just as content-based but as overbroad, especially in light of the Ninth Circuit's unduly broad definition of an ATDS. CA9.Suppl.Br.32-35. However, because the Ninth Circuit accepted Facebook's content-based challenge only to deny it any relief, it never grappled with Facebook's overbreadth challenge. As a result, the Ninth Circuit never addressed the obvious First Amendment problems with interpreting the TCPA's prohibition on calls from an ATDS to presumptively reach every call or text from a modern smartphone to an out-of-date number in its contacts list. As the next section makes clear, the Ninth Circuit's atextual conception of an ATDS is both wrong as a statutory matter and exacerbates the TCPA's dire First Amendment problems.

II. The Court Should Grant Certiorari To Provide A Workable, Uniform Interpretation Of The TCPA.

In holding that any device that can "store numbers to be called" and "dial [those] numbers" counts as an ATDS, *Marks*, 904 F.3d at 1052, the Ninth Circuit misinterpreted the statute and greatly exacerbated the TCPA's constitutional difficulties by expanding the statute to reach nearly every telephone in use today. This is a stunning reimagination of a statute that Congress passed to curb the telemarketing abuses of the late 1980s and early 1990s. But the Ninth Circuit's statutory re-invention of the TCPA badly misconstrues its text, eschews sound principles of constitutional avoidance, and creates a circuit split. Given the volume of TCPA lawsuits flooding the lower courts, the scope of the TCPA is an issue of substantial national importance that informs the question of the TCPA's constitutionality and fully merits this Court's review.

A. The Statutory Text Forecloses the Ninth Circuit's Expansive Interpretation of an ATDS.

The Ninth Circuit's ruling in *Marks*, reaffirmed in the decision below, impermissibly rewrites the TCPA to have a breadth that Congress could not possibly have intended. Time and again, this Court has instructed that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004); *see also, e.g.*, *Hartford Underwriters Ins. Co. v. Union Planters*

Bank, N. A., 530 U.S. 1, 6 (2000). That principle holds true even if the statute as written "is awkward," *Lamie*, 540 U.S. at 534, because the "Court *cannot* construe a statute in a way that negates its plain text," *Honeycutt v. United States*, 137 S. Ct. 1626, 1635 n.2 (2017) (emphasis added).

The TCPA defines an ATDS as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. §227(a)(1). The definition thus describes the functionality an ATDS must have—*i.e.*, it must be able either "to store or produce numbers to be called"—and further defines *how* those functions must be discharged—*i.e.*, "using a random or sequential number generator." After all, "the most natural way to view [a] modifier" like "using a random or sequential number generator," which is set off by a comma, is to read the modifier "as applying to the entire preceding clause." *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1077 (2018); s*ee also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 161-62 (2012) (under the "punctuation canon," a qualifying phrase separated from its antecedents by a comma means that the qualifying phrase applies to all antecedents, and not only to the immediately preceding one). The phrase "using a random or sequential number generator" thus modifies *both* verbs in the preceding clause: "store" and "produce."[2]

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[2] The same result would follow even without the comma, pursuant to the so-called "series-qualifier canon." *See* Scalia & Garner at 147 ("When there is a straightforward, parallel

Read naturally and as a matter of ordinary English, equipment qualifies as an ATDS if it can either (1) "store … telephone numbers to be called, using a random or sequential number generator"; or (2) "produce telephone numbers to be called, using a random or sequential number generator." 47 U.S.C. §227(a)(1)(A). Either way, the critical mechanism Congress identified (and what distinguishes an ATDS from an ordinary smartphone) is the device's use of "a random or sequential number generator."

The Ninth Circuit blazed a different trail. Violating principles of punctuation, grammar, and statutory interpretation, the court held that the "phrase 'using a random or sequential number generator' modifies *only* the verb 'to produce,' and not the preceding verb, 'to store.'" App.6 (emphasis added). Under this reading, to qualify under the "store" prong, "an ATDS need not be able to use a random or sequential generator to store numbers—it suffices to merely have the capacity to 'store numbers to be called' and 'to dial such numbers automatically.'" App.6. That interpretation massively expands the reach of the statute, but the Ninth Circuit did not even try to reconcile that expansion with the statutory text. Nor could it have done so: the applicable rules of construction mandate that the phrase "using a random or sequential number generator" applies to the entire preceding clause—including its separate references to both "stor[ing]" and "produc[ing]" telephone numbers.

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construction that involves all nouns or verbs in a series, a … postpositive modifier normally applies to the entire series.").

The impact of the Ninth Circuit's interpretive maneuver is staggering. While the typical telephone is incapable of storing or producing numbers "using a random or sequential number generator" without further configurations, virtually any modern telephone has the capacity to store numbers and then dial those numbers automatically. The 265.9 million smartphones in the U.S. all have the basic capacity to store lists of numbers and call numbers automatically from those lists (*e.g.*, "Hey Siri, call …."; automatic do-not-disturb messages when cell phone owner is driving), to say nothing of the phones sitting on office desks and kitchen counters across the country. *See Number of smartphone users in the United States 2010 to 2023*, Statista, https://bit.ly/2gbXF5d (last visited Oct. 17, 2019). And because the TCPA imposes liability on any call made from an ATDS—regardless of whether it actually uses any autodialing functions to make the calls at it issue—the Ninth Circuit's interpretation renders unlawful virtually every wrong number called from the contacts list of any smartphone in the United States. As the D.C. Circuit recognized, it simply "cannot be the case" that under a law Congress passed in 1991 "every uninvited communication from a smartphone infringes federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact." *ACA Int'l*, 885 F.3d at 698.

Yet that is precisely the world the Ninth Circuit has created by construing "the statutory definition of an ATDS in a manner that brings within the definition's fold the most ubiquitous type of phone equipment known, used countless times each day for routine communications by the vast majority of people

in the country." *Id.* To its credit, the Ninth Circuit did not deny this consequence. It readily acknowledged that its "gloss on the statutory text" could "not avoid capturing smartphones." App.8-9.

None of the Ninth Circuit's justifications for this remarkable act of statutory revisionism holds water. First, the Ninth Circuit perceived a "linguistic problem" when applying normal grammar rules to the TCPA because "it is unclear how a number can be *stored* (as opposed to *produced*) using 'a random or sequential number generator.'" *Marks*, 904 F.3d at 1052 n.8; *see also id.* at 1051 ("After struggling with the statutory language ourselves, we conclude that it is not susceptible to a straightforward interpretation based on the plain language alone."). But nothing about the ordinary meaning of "random or sequential number generator" precludes the conclusion that a device with such functionality can also store the numbers it generates. To the contrary, random number generators at the time of the TCPA's enactment *could* "store" numbers and often needed to do so to avoid generating and calling the same number multiple times. *See, e.g.*, Noble Systems Corp., *Comments on FCC's Request for Comments on the Interpretation of The TCPA in Light of* Marks v. Crunch San Diego i-ii (Oct. 16, 2018), https://bit.ly/2n32vHd (describing technology at the time of the TCPA's enactment that "use[d]" a random number generator "to store" numbers, and explaining why this function was important). There is thus no "linguistic problem," and no reason to manipulate the text to prevent one.

Second, the Ninth Circuit relied heavily on Congress' inaction in response to certain FCC orders broadly interpreting the ATDS definition. *See* 904 F.3d at 1051-52. This reasoning was equally misguided. The FCC rulings the Ninth Circuit cited are the same rulings that the D.C. Circuit invalidated because they "f[e]ll[] short of reasoned decisionmaking" and "offer[ed] no meaningful guidance to affected parties in material respects on whether their equipment is subject to the statute's autodialer restriction." *ACA Int'l*, 885 F.3d at 701. Invoking congressional silence in the face of *invalid* agency rulemaking is a novelty even in the soft science of using congressional acquiescence to interpret statutes. It also ignores this Court's directive that even in more conventional circumstances, "[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186-87 (1994).

The Ninth Circuit's expansive ATDS interpretation profoundly exacerbates the First Amendment problems with the statute by prohibiting speech well beyond what the 102nd Congress could have possibly conceived. As even the Ninth Circuit recognized, Congress "focused on regulating the use of equipment that dialed blocks of sequential or randomly generated numbers," which could tie up emergency services and reach users with unlisted telephone numbers. *Marks*, 904 F.3d at 1051; *see also id.* at 1043-45. In that regard, the TCPA has been a resounding success—equipment that uses "random or sequential number generator[s]" has all but

disappeared from use. Fast-forward three decades, though, and a statute designed to regulate specialized equipment deployed by robocallers has been radicalized by the Ninth Circuit to threaten a broad range of speech that takes place in today's digital economy. Ordinary cell phone communications that have nothing to do with the disruptive telemarketing practices that drew Congress' ire now take place under threat of crippling statutory liability. This Court's review is imperative to correct the Ninth Circuit's flawed and dangerous ruling.

B. The Ninth Circuit's Interpretation Creates a Circuit Split.

The Ninth Circuit's holding that TCPA liability extends to equipment that "stores telephone numbers to be called, whether or not those numbers have been generated by a random or sequential number generator," *Marks*, 904 F.3d at 1043, is not only wrong, but also creates a divide among the lower courts about the proper interpretation of the ATDS prohibition.

1. The Ninth Circuit's holding in *Marks* created a direct and acknowledged conflict with the Third Circuit. In *Dominguez ex rel. Himself v. Yahoo, Inc.* (*Dominguez II*), the Third Circuit squarely held that an ATDS device *must* have the capacity to "generat[e] random or sequential telephone numbers and dial[] those numbers." 894 F.3d 116, 121 (3d Cir. 2018). Simply having the capacity to store and dial numbers was not enough. *Id.* The plaintiff in *Dominguez II* had received unwanted text messages from Yahoo "because the prior owner of [his] telephone number had affirmatively opted to receive them." *Id.* at 117,

121. On appeal, the Third Circuit identified the "key … question" as whether Yahoo's system "functioned as an autodialer by randomly or sequentially generating telephone numbers, and dialing those numbers." *Id.* at 121. It did not. Yahoo's system sent automatic "messages only to numbers that had been individually and manually inputted into its system by a user," and there was no evidence that Yahoo's system could "function as an [ATDS] by generating random or sequential telephone numbers and dialing those numbers." *Id.*

In *Marks*, the Ninth Circuit expressly "decline[d] to follow" the Third Circuit's precedential holding in *Dominguez II*. 904 F.3d at 1052 n.8. In the Ninth Circuit's view, the Third Circuit's opinion was "unpersuasive" and "unreasoned" because it failed to grapple with the "linguistic problem" of how a number could be "*stored* (as opposed to *produced*) using 'a random or sequential number generator.'" *Id.* The intractable conflict between the Third and Ninth Circuits is widely acknowledged and is the subject of considerable commentary. *E.g.*, *Snow v. Gen. Elec. Co.*, 2019 WL 2500407, at *6 (E.D.N.C. June 14, 2019), *appeal pending*, No. 19-1724 (4th Cir. docketed July 11, 2019); *Consumer Protection: Ninth Circuit Creates Circuit Split on Autodialer Rule Under the TCPA*, 31 Bus. Torts Rep. 37, 38 (Dec. 2018); 4 Ian Ballon, *E-Commerce & Internet Law* §29.16 (2019 update); Stephen P. Mandell et al., *Recent Developments in Media, Privacy, Defamation, and Advertising Law*, 54 Tort Trial & Ins. Prac. L.J. 651, 679-80 (Spring 2019).

2. The Ninth Circuit's interpretation also conflicts directly with the D.C. Circuit's decision in *ACA*

International, where the D.C. Circuit invalidated a line of FCC orders regarding the definition of an ATDS on the basis that the "TCPA cannot reasonably be read to render every smartphone an ATDS subject to the Act's restrictions, such that every smartphone user violates federal law whenever she makes a call or sends a text message without advance consent." 885 F.3d at 697; *see also, e.g.*, Declaratory Ruling and Order, *Rules and Regulations Implementing the TCPA Act of 1991*, 30 FCC Rcd. 7,961, 7,974-75 ¶¶16, 18 (2015). The D.C. Circuit explained that any such interpretation would be "an unreasonable, and impermissible, interpretation of the statute's reach," and fundamentally "untenable." *ACA Int'l*, 885 F.3d at 697-98.

The D.C. Circuit's holding cannot be reconciled with *Marks* or the decision below, in which the Ninth Circuit acknowledged that its construction of the statute *does* result in virtually every ordinary smartphone being deemed an ATDS. Despite recognizing that millions of smartphones are currently configured to "store numbers and, using built-in automated response technology, dial those numbers automatically," App.7, the Ninth Circuit reaffirmed that *any* device capable of performing those two basic functions qualifies as an ATDS, App.4. Indeed, the court not only recognized that smartphones can "store numbers … to be called" but described that as their "quintessential purpose." App.9.

The FCC itself has recognized that *Marks* and *ACA International* are fundamentally incompatible. In a notice seeking public comment on the *Marks* ruling, the FCC observed that *Marks* read the ATDS

definition "expansively" to include not only devices with the capacity to call numbers produced by a random or sequential number generator, but also devices with the capacity to store numbers and to dial those stored numbers automatically (as all ordinary smartphones can do). FCC, *Public Notice: Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the TCPA in light of the Ninth Circuit's* Marks v. Crunch San Diego, LLC *Decision* 2 (Oct. 3, 2018), https://bit.ly/2Qso4KG. The FCC contrasted *Marks* with the D.C. Circuit's interpretation in *ACA International*, which "held that the TCPA unambiguously foreclosed any interpretation that 'would appear to subject ordinary calls from any conventional smartphone to the Act's coverage.'" *Id.* (quoting *ACA Int'l*, 885 F.3d at 692). Courts and commenters alike agree that *Marks* is flatly inconsistent with *ACA International*. *See, e.g.*, *Roark v. Credit One Bank, N.A.*, 2018 WL 5921652, at *3 (D. Minn. Nov. 13, 2018); 4 E-Commerce & Internet Law §29.16; Blaine C. Kimrey & Bryan K. Clark, *What's That* Crunch-*ing sound? Reason Being Destroyed in the Ninth Circuit*, The Nat'l L. Rev. (Sept. 27, 2018), https://bit.ly/2lvHtAp.

3. This circuit split has confounded district courts across the country, including those outside the Third, Ninth, and D.C. Circuits. The majority of those courts favor the Third Circuit's view and reject the Ninth Circuit's approach,[3] while the minority agree with the

[3] *See, e.g.*, *Denova v. Ocwen Loan Servicing*, 2019 WL 4635552, at *3 (M.D. Fla. Sept. 24, 2019); *Smith v. Premier Dermatology*, 2019 WL 4261245, at *4-7 (N.D. Ill. Sept. 9, 2019); *Morgan v. On Deck Capital, Inc.*, 2019 WL 4093754, at *6 (W.D. Va. Aug. 29,

Ninth Circuit.[4] This deep and well-entrenched conflict at all levels of the federal courts is untenable. Billions of dollars are at stake in putative class actions seeking $1,500-per-call statutory penalties. The lower courts are hopelessly fractured, and certiorari is warranted

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2019); *Adams v. Safe Home Sec. Inc.*, 2019 WL 3428776, at *3 (N.D. Tex. July 30, 2019); *Snow*, 2019 WL 2500407, at *6; *Kloth-Zanard v. Bank of Am.*, 2019 WL 1922070, at *10 (D. Conn. Apr. 30, 2019); *Gadelhak v. AT&T Servs., Inc.*, 2019 WL 1429346, at *5-6 (N.D. Ill. Mar. 29, 2019), *appeal pending*, No. 19-1738 (7th Cir. argued Sept. 27, 2019); *Might v. Capital One Bank (USA), N.A.*, 2019 WL 544955, at *3 (W.D. Okla. Feb. 11, 2019); *Thompson-Harbach v. USAA Fed. Sav. Bank*, 359 F. Supp. 3d 606, 625-26 (N.D. Iowa 2019); *Asher v. Quicken Loans, Inc.*, 2019 WL 131854, at *3 (D. Utah Jan. 8, 2019); *Roark*, 2018 WL 5921652, at *3; *Glasser v. Hilton Grand Vacations Co., LLC.*, 341 F. Supp. 3d 1305, 1310 (M.D. Fla. 2018), *appeal pending*, No. 18-14499 (11th Cir. docketed Oct. 24, 2018); *Keyes v. Ocwen Loan Servicing, LLC*, 335 F. Supp. 3d 951, 963 (E.D. Mich. 2018); *Lord v. Kisling, Nestico & Redick, LLC*, 2018 WL 3391941, at *3 (N.D. Ohio July 12, 2018).

[4] *See, e.g.*, *Allan v. Pa. Higher Educ. Assistance Agency*, 2019 WL 3890214, at *2-3 (W.D. Mich. Aug. 19, 2019); *Gerrard v. Acara Sols. Inc.*, 2019 WL 2647758, at *10-11 (W.D.N.Y. June 27, 2019); *Espejo v. Santander Consumer USA, Inc.*, 2019 WL 2450492, at *6-7 (N.D. Ill. June 12, 2019); *Gonzalez v. HOSOPO Corp.*, 371 F. Supp. 3d 26, 34 (D. Mass. 2019); *Jiminez v. Credit One Bank, N.A.*, 377 F. Supp. 3d 324, 333-34 (S.D.N.Y. 2019); *Duran v. La Boom Disco, Inc.*, 369 F. Supp. 3d 476, 487-89 (E.D.N.Y. 2019), *appeal pending*, No. 19-600 (2d Cir. docketed July 11, 2019); *Adams v. Ocwen Loan Servicing, LLC*, 366 F. Supp. 3d 1350, 1355 (S.D. Fla. 2018); *Maes v. Charter Commc'n*, 345 F. Supp. 3d 1064, 1070 (W.D. Wis. 2018); *Heard v. Nationstar Mortg. LLC*, 2018 WL 4028116, at *6 (N.D. Ala. Aug. 23, 2018); *Ammons v. Ally Fin., Inc.*, 326 F. Supp. 3d 578, 587-88 (M.D. Tenn. 2018); *Evans v. Pa. Higher Educ. Assistance Agency*, 2018 WL 3954761, at *3 (N.D. Ga. June 12, 2018).

to provide much-needed clarity and restore uniformity to courts and potential litigants across the nation.

III. The Questions Presented Are Exceptionally Important And This Case Is An Ideal Vehicle.

Both questions presented are tremendously important and will have consequences far beyond this case. The Ninth Circuit recognized that the TCPA involved an unconstitutional restriction of free speech. Generally, the invalidation of an Act of Congress on constitutional grounds is a sufficient basis for this Court's review. But here First Amendment error infected not just the statute but the Ninth Circuit's remedial analysis. The Ninth Circuit accepted Facebook's First Amendment arguments and yet denied it any meaningful relief by broadening the statutory restriction of speech. That perverse result only underscores the need for this Court's review. The framers designed the First Amendment as a bulwark against "abridging the freedom of speech." U.S. Const. amend. I. Yet in the Ninth Circuit the prize for mounting a successful First Amendment challenge is not meaningful relief, but a greater abridgement of free speech. That approach cannot be right. The answer to impermissible government restrictions of free speech has to be more speech, not broader abridgement. The Ninth Circuit's speech-reducing approach to remedying First Amendment violations contradicts this Court's precedents and merits plenary consideration.

That this First Amendment question arises in the context of the hotly-debated TCPA is even further reason for this Court's review. The TCPA is one of the

most frequently litigated statutes in the federal courts, with more than 12,000 new cases (including thousands of class action cases) filed in the last three years alone. *See WebRecon Stats for Dec 2018*, WebRecon LLC, https://bit.ly/2mellej (last visited Oct. 17, 2019) (indicating that 4,639 TCPA cases were filed in 2016, 4,380 in 2017, and 3,803 in 2018). With thousands of additional TCPA suits filed each year, the confusion resulting from the deep divide across these fundamental constitutional and statutory issues will only grow.

And yet as a result of the circuit split over the ATDS definition, entities operating nationwide and individuals communicating across the country now face divergent—and potentially enormous—liability based on the geographic happenstance of where recipients receive a call (or where they bring suit). That creates unsustainable uncertainty and the risk of arbitrary liability for those wishing to communicate their message via any device with autodialing capacity—which in the view of the Ninth Circuit includes the vast majority of telephones in use today.

This Court's timely review is imperative to ensure that courts across the country impose TCPA liability only as permitted by the Constitution and intended by Congress. And this case is an ideal vehicle to review both issues. Because of the statute's draconian penalty scheme, which imposes substantial monetary damages of up to $1,500 per call or text message, TCPA cases can threaten jury awards in the billions of dollars. There is thus typically substantial settlement pressure, and many TCPA cases do not make it past the early stages of litigation. But this case arises in

an ideal, concrete, real-world context. The parties—including the government as intervenor-appellee in both the district court and the Ninth Circuit—have actively litigated both the constitutional and statutory issues.

The combination of both constitutional and statutory issues here makes this case in particular an excellent vehicle. The issues are closely related and this Court would benefit from considering them together. Indeed, it would be virtually impossible to consider whether the TCPA's basic prohibition on ATDS calls is constitutional without knowing precisely what counts as an ATDS. It makes far more sense to tackle that question in a case where the statutory definition has been actively litigated than in a case where that issue has been addressed only by assumption or in passing. Moreover, if the Ninth Circuit were correct that the definition of an ATDS includes virtually every modern smartphone then the statutory overbreadth of a statute that undeniably restricts speech would be unmistakable. Finally, the inclusion of the statutory issue in this case provides an opportunity for the Court to consider (and potentially apply) constitutional-avoidance principles that may be unavailable in a standalone constitutional case.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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October 17, 2019

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-15320

NOAH DUGUID, individually and on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

FACEBOOK, INC.,

Defendant-Appellee,

and

UNITED STATES OF AMERICA,

Intervenor-Appellee.

Argued and Submitted: Mar. 11, 2019
Filed: June 13, 2019

Before: J. Clifford Wallace, Eugene E. Siler,* and M. Margaret McKeown, Circuit Judges.

McKEOWN, Circuit Judge:

Almost thirty years ago, in the age of fax machines and dial-up internet, Congress took aim at

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* The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

unsolicited robocalls by enacting the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227. In the decades since, the TCPA has weathered the digital revolution with few amendments. With important exceptions, the TCPA forbids calls placed using an automated telephone dialing system ("ATDS"), commonly referred to as an autodialer.

Noah Duguid claims that Facebook used an ATDS to alert users, as a security precaution, when their account was accessed from an unrecognized device or browser. For unknown reasons, Duguid received the messages despite not being a Facebook customer or user and never consenting to such alerts. His repeated attempts to terminate the alerts were unsuccessful.

Facebook challenges the adequacy of Duguid's TCPA allegations and, alternatively, claims that the statute violates the First Amendment. We conclude that Duguid's allegations are sufficient to withstand Facebook's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).

As to the constitutional question, we join the Fourth Circuit and hold that a 2015 amendment to the TCPA, which excepts calls "made solely to collect a debt owed to or guaranteed by the United States," is content-based and incompatible with the First Amendment. *Am. Ass'n of Political Consultants, Inc. v. FCC*, 923 F.3d 159 (4th Cir. 2019) (hereinafter, *AAPC*). But rather than toss out the entire TCPA—a longstanding and otherwise constitutional guardian of consumer privacy—we sever the newly appended "debt-collection exception" as an unconstitutional restriction on speech.

BACKGROUND

I. The Telephone Consumer Protection Act

In what was thought to be telemarketing's heyday, Congress enacted the TCPA to "protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls." S. Rep. No. 102-178, at 1 (1991). With certain exceptions, the TCPA bans calls (including text messages) placed using an ATDS. 47 U.S.C. § 227(b)(1); *see Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) ("[A] text message is a 'call' within the TCPA.").

Since its enactment, the definition of an ATDS has remained the same: "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). In contrast, the scope of the prohibition section has evolved. In 2014, when Duguid received messages from Facebook, the statute excepted two types of calls: those "made for emergency purposes" and those "made with the prior express consent of the called party." *Id.* § 227(b)(1)(A) (2010). Effective November 2, 2015, Congress added a third exception for calls "made solely to collect a debt owed to or guaranteed by the United States." Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301(a)(1)(A), 129 Stat. 584, 588; 47 U.S.C. § 227(b)(1)(A)(iii). It is this "debt-collection exception" that Facebook contends is unconstitutional.

Two court rulings during this appeal have shifted the TCPA playing field. First, in *ACA International v. Federal Communications Commission*, the D.C.

Circuit overturned aspects of several Federal Communications Commission ("FCC") rulings construing the ATDS definition. 885 F.3d 687 (D.C. Cir. 2018). Shortly thereafter, in *Marks v. Crunch San Diego, LLC*, we construed *ACA International* to wipe the definitional slate clean, so we "beg[an] anew to consider the definition of ATDS under the TCPA." 904 F.3d 1041, 1049-50 (9th Cir. 2018). To clarify any ambiguity, we rearticulated the definition of an ATDS: "equipment which has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers automatically." *Id.* at 1053. That definition governs this appeal.

II. Duguid's Allegations[1]

Duguid is not a Facebook customer and has never consented to Facebook contacting his cell phone. Nonetheless, beginning in approximately January 2014, Facebook began sending Duguid sporadic text messages. The messages alerted Duguid that an unrecognized browser was attempting to access his (nonexistent) Facebook account. Each message followed a common template: "Your Facebook account was accessed [by/from] <browser> at <time>. Log in for more info."

Flummoxed, and unable to "log in for more info," Duguid responded to the messages by typing "Off" and "All off." Facebook immediately assured Duguid that

[1] At this stage, we treat Duguid's factual allegations as true and construe them in the light most favorable to Duguid. *See Northstar Fin. Advisors Inc. v. Schwab Invs.*, 779 F.3d 1036, 1042 (9th Cir. 2015), *as amended* (Apr. 28, 2015).

"Facebook texts are now off," but the messages kept coming. Duguid also requested via email that Facebook stop sending him messages, but he received similar, automated email responses that failed to resolve the issue. The text messages continued until at least October 2014.

Duguid sued Facebook for violating the TCPA, alleging that Facebook sent the text messages using an ATDS. Specifically, he alleges that Facebook established the automated login notification process as an extra security feature whenever a Facebook account is accessed from a new device. According to Duguid, Facebook maintained a database of phone numbers and—using a template and coding that automatically supplied the browser information and time of access—programmed its equipment to send automated messages to those numbers each time a new device accessed the associated account. Somehow, Facebook acquired Duguid's number and (as it did with the numbers provided by its users) stored and sent automated messages to that number.

Duguid sued on behalf of two putative classes: people who received a message from Facebook without providing Facebook their cell phone number; and people who notified Facebook that they did not wish to receive messages but later received at least one message. Each putative class reaches back four years from April 22, 2016, when Duguid filed the amended complaint. Duguid seeks statutory damages for each message, plus declaratory relief and an injunction prohibiting similar TCPA violations in the future.

The district court concluded that Duguid inadequately alleged that Facebook sent its messages

using an ATDS—a prerequisite for TCPA liability. After providing leave to amend, the district court dismissed the amended complaint with prejudice.

ANALYSIS

Faithful to our unflagging duty to assess constitutional standing, we hold that Duguid adequately alleges a concrete injury in fact. *See Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1042-43 (9th Cir. 2017) (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016)).

I. Sufficiency of the Allegations

Facebook invites us to avoid the First Amendment challenge by affirming on the ground that Duguid inadequately alleges a TCPA violation. According to Facebook, the equipment Duguid characterizes in the amended complaint is not an ATDS. We conclude that *Marks* forecloses that position.

By definition, an ATDS must have 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). In *Marks*, we clarified that the adverbial phrase "using a random or sequential number generator" modifies only the verb "to produce," and not the preceding verb, "to store." 904 F.3d at 1052. In other words, an ATDS need not be able to use a random or sequential generator to store numbers—it suffices to merely have the capacity to "store numbers to be called" and "to dial such numbers automatically."[2] *Id.* at 1053.

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[2] An alternative to the capacity to store numbers is the capacity "to produce numbers to be called, using a random or sequential number generator." *Marks*, 904 F.3d at 1053; *see* 47 U.S.C.

Duguid's nonconclusory allegations plausibly suggest that Facebook's equipment falls within this definition. He alleges that Facebook maintains a database of phone numbers and explains how Facebook programs its equipment to automatically generate messages to those stored numbers. The amended complaint explains in detail how Facebook automates even the aspects of the messages that appear personalized. Those factual allegations, accepted as true and construed in the light most favorable to Duguid, sufficiently plead that Facebook sent Duguid messages using "equipment which has the capacity . . . to store numbers to be called . . . and to dial such numbers."[3] *Id.*

Facebook responds that *Marks* cannot possibly mean what it says, lest the TCPA be understood to cover ubiquitous devices and commonplace consumer communications. In particular, Facebook cautions, such an expansive reading of *Marks* would capture smartphones because they can store numbers and, using built-in automated response technology, dial those numbers automatically. And if smartphones are ATDSs, then using them to place a call—even without using the automated dialing functionality—violates the TCPA. *See In re Rules & Regulations*

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§ 227(a)(1)(A). Because Duguid adequately alleges the capacity to store numbers, we do not address whether he adequately alleges the capacity to produce.

[3] Our conclusion that Duguid's detailed factual allegations are *sufficient* says nothing about whether that level of detail is *necessary* to plead ATDS use. We also note that Facebook does not raise, so we do not consider, the requirement that an ATDS have the capacity to "dial . . . numbers *automatically*." *Marks*, 904 F.3d at 1053 (emphasis added).

Implementing the Telephone Consumer Protection Act of 1991, 30 FCC Rcd. 7961, 7975 ¶ 19 n.70 (July 10, 2015); *ACA Int'l*, 885 F.3d at 704. "It cannot be the case," the D.C. Circuit has remarked, "that every uninvited communication from a smartphone infringes federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact." *ACA Int'l*, 885 F.3d at 698.

As a textual anchor for narrowing *Marks*, Facebook points to the statutory requirement (repeated in *Marks*) that an ATDS store numbers "to be called." 47 U.S.C. § 227(a)(1)(A). The ATDS at issue in *Marks* was designed to send promotional text messages to a list of stored numbers—a proactive advertising campaign. *See* 904 F.3d at 1048. Facebook differentiates its equipment because it stores numbers "to be called" only reflexively—as a preprogrammed response to external stimuli outside of Facebook's control. It urges us to cabin *Marks* as inapplicable to such purely "*responsive* messages," because numbers stored to send such messages were not stored "to be called." So construed, Facebook argues, *Marks* avoids the outcome of deeming smartphones a type of ATDS.

We cannot square this construction with *Marks* or the TCPA. *Marks*'s gloss on the statutory text provides no basis to exclude equipment that stores numbers "to be called" only reflexively. 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. 47 U.S.C. § 227(a)(1). The amended complaint does not so much as suggest that Facebook's equipment could (or did) store numbers for any other reason.

Importantly, rejecting the active-reflexive distinction does not render "to be called" superfluous. Phone numbers are frequently stored for purposes other than "to be called": shops and restaurants store numbers to identify customers in their loyalty programs; electronic phonebooks store numbers for public access; data mining companies store and sell numbers; and software for customer relations management stores numbers to help businesses manage their clientele. So "to be called" has meaning without inferring a silent distinction between active and reflexive calls.

Finally, Facebook's argument that any ATDS definition should avoid implicating smartphones provides no reason to adopt the proposed active-reflexive distinction. Even if Facebook's premise has merit, the quintessential purpose for which smartphone users store numbers is "to be called" proactively. In other words, excluding equipment that stores numbers "to be called" only reflexively would not avoid capturing smartphones.

Our reading supports the TCPA's animating purpose—protecting privacy by restricting unsolicited, automated telephone calls. *See* S. Rep. 102-178, at 1. The messages Duguid received were automated, unsolicited, and unwanted. We are unpersuaded by Facebook's strained reading of *Marks* and the TCPA.

Facebook advances a separate argument that it was entitled to dismissal on the pleadings because the TCPA excepts "call[s] made for emergency purposes." 47 U.S.C. § 227(b)(1)(A). The FCC has construed this exception broadly, to include "calls made necessary in

any situation affecting the health and safety of consumers." 47 C.F.R. § 64.1200(f)(4). But Duguid alleges that he is not a Facebook customer and has advised Facebook of that fact repeatedly and through various means of communication. Accepting these allegations as true, Duguid did not have a Facebook account, so his account could not have faced a security issue, and Facebook's messages fall outside even the broad construction the FCC has afforded the emergency exception. *See In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 31 F.C.C. Rcd. 9054, 9063 ¶ 21 n.76 (Aug. 4, 2016) ("[P]urported emergency calls cannot be targeted to just any person. These calls must be about a bona fide emergency that is relevant to the called party.").

Finally, it bears reiterating that we are considering the amended complaint at the Rule 12(b)(6) dismissal stage. Thus, we review the sufficiency of the allegations, not their accuracy or the intricate workings of Facebook's equipment, algorithms, or notification system. Developing those factual details remains for the parties and the district court on remand.

II. First Amendment

As a threshold matter, we confirm that Facebook has standing to challenge the constitutionality of the post-amendment TCPA. Although the TCPA violations Duguid alleges predate the debt-collection exception, which took effect in 2015, he also seeks damages on behalf of a putative class for violations that occurred in part in 2016, as well as forward-looking injunctive relief based on the post-amendment

TCPA. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994) ("[A]pplication of new statutes passed after the events in suit is unquestionably proper in many situations," such as "[w]hen the intervening statute authorizes or affects the propriety of prospective relief."). The class allegations and request for injunctive relief vest Facebook with a sufficient personal stake in the post-amendment TCPA to challenge its constitutionality.

A. The Post-Amendment TCPA Is Content-Based

Turning to the merits, we first evaluate whether the TCPA is content-neutral and subject to intermediate scrutiny or content-based and subject to strict scrutiny. We have repeatedly affirmed that the pre-amendment TCPA was content-neutral and consistent with the First Amendment. *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 876 (9th Cir. 2014), *aff'd*, 136 S. Ct. 663 (2016); *Moser v. Fed. Commc'ns Comm'n*, 46 F.3d 970, 975 (9th Cir. 1995). The statute satisfied intermediate scrutiny because it was narrowly tailored to advance the "government's significant interest in residential privacy" and left open "ample alternative channels of communication." *Moser*, 46 F.3d at 974; *see also Gomez*, 768 F.3d at 876-77 (recognizing that the government's interest in privacy extends beyond the household, and rejecting the argument that the statute is inadequately tailored insofar as it applies to text messages).

The debt-collection exception, which adds a purposive element, changes the framework. The TCPA now favors speech "solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C.

§ 227(b)(1)(A)(iii). Because this section "target[s] speech based on its communicative content," the exception is content-based and subject to strict scrutiny. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015); *see AAPC*, 923 F.3d at 165-67.

The government's argument that the debt-collection exception is relationship-based as opposed to content-based is foreclosed by *Reed*. The "crucial first step in the content-neutrality analysis" is "determining whether the law is content neutral on its face." *Reed*, 135 S. Ct. at 2228. If it is not, the law "is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)). For that reason, we "consider[] whether a law is content neutral on its face *before* turning to the law's justification or purpose." *Id.*

It is obvious from the text that the debt-collection exception's applicability turns entirely on the content of the communication—i.e., whether it is "solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A)(iii). The identity and relationship of the caller are irrelevant. And the government's "innocuous justification"—permitting third-party debt collectors to place calls on the government's behalf using the same means as the government itself can use—"cannot transform a facially content-based law into one that is content neutral." *Reed*, 135 S. Ct. at 2228. We therefore conclude that the exception is content-based, without

resorting to *Reed*'s second, intent-focused inquiry. *See id.* at 2227-28.

Our sister circuits' post-*Reed* decisions are consistent with our reading. There is, of course, the Fourth Circuit's decision in *AAPC*, decided shortly after argument in our case, in which the court reached the same conclusion regarding the debt-collection provision. 923 F.3d at 161 ("[W]e agree with the Plaintiffs that the debt-collection exemption contravenes the Free Speech Clause. In agreement with the Government, however, we are satisfied to sever the flawed exemption from the automated call ban."). Earlier, the Fourth Circuit also deemed content-based South Carolina's TCPA analogue because the statute applies only to robocalls "of a political nature" or made "for the purpose of making an unsolicited consumer telephone call." *Cahaly v. Larosa*, 796 F.3d 399, 402 (4th Cir. 2015) (quoting S.C. Code § 16-17-446(A)). "Applying *Reed*'s first step," the Fourth Circuit reasoned, "South Carolina's anti-robocall statute is content based because it makes content distinctions on its face." *Id.* at 405. The Eighth Circuit likewise deemed content-based an exception to Minnesota's TCPA analogue for messages sent to solicit voluntary donations. *Gresham v. Swanson*, 866 F.3d 853, 854-55 (8th Cir. 2017) (citing Minn. Stat. § 325E.27(a)), *cert. denied*, 138 S. Ct. 682 (2018).

By contrast, the Seventh Circuit upheld Indiana's TCPA analogue, which exempted calls for "(1) Messages from school districts to students, parents, or employees[;] (2) Messages to subscribers with whom the caller has a current business or personal relationship[; and] (3) Messages advising employees of

work schedules." *Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303, 304 (7th Cir.) (quoting Ind. Code § 24-5-14-5(a)), *cert. denied sub nom. Patriotic Veterans, Inc. v. Hill*, 137 S. Ct. 2321 (2017). The first and second exceptions to the Indiana statute are based on the relationship between caller and recipient, and the plaintiff did not invoke the third exception. *See id.* at 305 (suggesting in dicta that the third exception, were it invoked, is content-based). Accordingly, the Seventh Circuit upheld the Indiana statute as content-neutral and consistent with the First Amendment. *Id.* at 306 ("Indiana does not discriminate by content—the statute determines who may be called, not what message may be conveyed . . . .").

The text of the TCPA makes clear that the availability of the exception depends exclusively on the purpose and content of the call. The relationship between caller and recipient, though not coincidental, does not bear on the exception's applicability. *Reed* forbids us from imputing motives or sensibilities to Congress where, as here, its plain language is clear, and clearly content-based. 135 S. Ct. at 2228.

B. The Post-Amendment TCPA Fails Strict Scrutiny

Because it is content-based, the TCPA's debt-collection provision is "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests."[4] *Reed*, 135 S. Ct. at 2226. More specifically,

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[4] We reject the government's unsupported assertion that Facebook's security messages are subject to intermediate scrutiny because they constitute commercial speech. *See Hunt v. City of Los Angeles*, 638 F.3d 703, 715 (9th Cir. 2011)

the government (and Duguid, who adopts the government's constitutional arguments) must demonstrate that the TCPA's "differentiation between [robocalls to collect a debt owed to or guaranteed by the United States] and other types of [robocalls] . . . furthers a compelling government interest and is narrowly tailored to that end." *Id.* at 2231. Importantly, we focus our analysis on the content-based differentiation—the debt-collection exception—*not* on the TCPA overall. *See id.* at 2231-32; *AAPC*, 923 F.3d at 167 ("[I]n order to survive strict scrutiny, the Government must show that *the debt-collection exemption* has been narrowly tailored to further a compelling governmental interest." (emphasis added)).

The government seriously advocates only one interest: "the protection of personal and residential privacy." This articulation is a head-scratcher, because robocalls to collect government debt are just as invasive of privacy rights as robocalls placed for other purposes. On that point, congressional findings corroborate common sense (not to mention practical experience): "Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, *regardless of the content* or the initiator of the message, to be a nuisance and an invasion of privacy."

("Commercial speech is 'defined as speech that does no more than propose a commercial transaction.' . . . Where the facts present a close question, 'strong support' that the speech should be characterized as commercial speech is found where the speech is an advertisement, the speech refers to a particular product, and the speaker has an economic motivation." (internal citations omitted)).

Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(10), 105 Stat. 2394, 2394 (emphasis added). Permitting callers to collect government debt thus hinders—not furthers—the government's asserted interest. Because it "subverts the privacy protections underlying the" TCPA and "deviates from the purpose of the automated call ban," the debt-collection exception is fatally underinclusive. *AAPC*, 923 F.3d at 168.

Contrasting the privacy implications of the TCPA's longstanding consent and emergency exceptions highlights this tailoring defect. Robocalls placed pursuant to consent "are less intrusive than other automated calls" because "consent generally diminishes any expectation of privacy." *Id.* at 169. So too are emergency robocalls, because they are infrequent, "protect[] the safety and welfare of Americans," and serve the public interest. *Id.* at 170. By contrast, an unconsented, non-emergency robocall thoroughly invades personal and residential privacy, whether it is placed to collect government debt or for some other purpose. The universe of otherwise illegal calls that the debt-collection exception permits—which one senator estimated to be in the tens of millions—has an outsized, detrimental impact on residential and personal privacy. *See In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 31 F.C.C. Rcd. 9074, 9078 ¶ 9 & n.36 (Aug. 11, 2016). This incongruency underscores that the exception impedes, rather than furthers, the statute's purpose.

To evade this largely self-evident conclusion, the government would have us focus our analysis on the

TCPA writ large rather than the debt-collection exception. It argues that the post-amendment statute, viewed holistically, remains narrowly tailored to protect personal and household privacy. This gloss-over approach is at odds with *Reed*, which directs that the tailoring inquiry focus on the content-based differentiation—here, the debt-collection exception. *See* 135 S. Ct. at 2231-32; *see also AAPC*, 923 F.3d at 167.

The government's expanded lens also fails in its objective. The post-amendment TCPA is underinclusive, in that it excepts automated calls placed pursuant to the debt-collection exception, which are—all else being equal—every bit as invasive of residential and personal privacy as any other automated call. *See* Pub. L. No. 102-243, § 2(10), 105 Stat. at 2394. It is also overinclusive because the government—in its own words—could have accomplished the same goal in a content-neutral manner by basing the exception "on the called party's preexisting relationship with the federal government." *See Reed*, 135 S. Ct. at 2232. And the TCPA's potentially expansive application to everyday consumer communications—a small fraction of which implicate residential and personal privacy—further emphasizes its over-inclusiveness. *See ACA Int'l*, 885 F.3d at 697-99.

The government halfheartedly suggests an alternative interest: protecting the public fisc.[5] We

[5] The President's annual budget proposal for fiscal year 2015—the wellspring of the debt-collection exception—projected that the amendment would yield $12 million per year over the ensuing decade. *See* Fiscal Year 2015 President's Budget, at 185,

credit this argument for candor: debt collection is unescapably the exception's main purpose—hence its inefficacy in protecting privacy. *See Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015) ("[U]nderinclusiveness can raise doubts about whether the government is in fact pursuing the interest it invokes . . . ." (internal quotation marks and citation omitted)). But even assuming that protecting the public fisc is a compelling interest, the debt-collection exception is not the least restrictive means to achieve it. For one, Congress could protect the public fisc in a content-neutral way by phrasing the exception in terms of the relationship rather than content. *See Reed*, 135 S. Ct. at 2232 (noting the "ample content-neutral options" available to serve the same government interest). The government could also obtain consent from its debtors or place the calls itself. *See AAPC*, 923 F.3d at 169 n.10 (noting these possibilities); *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016), *as revised* (Feb. 9, 2016) ("The United States and its agencies, it is undisputed, are not subject to the TCPA's prohibitions because no statute lifts their immunity."). We hold that the debt-collection exception is content-based and insufficiently tailored to advance the government's interests in protecting privacy or the public fisc.

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available at https://www.govinfo.gov/content/pkg/BUDGET-2015-BUD/pdf/BUDGET-2015-BUD.pdf; Fiscal Year 2015 President's Budget: Analytical Perspectives, at 123, *available at* https://www.govinfo.gov/content/pkg/BUDGET-2015-PER/pdf/BUDGET-2015-PER.pdf.

C. The Debt-Collection Exception Is Severable

Though incompatible with the First Amendment, the debt-collection exception is severable from the TCPA. *See AAPC*, 923 F.3d at 171. Congressional intent is the touchstone of severability analysis. *See Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984). Congress simplifies our inquiry when, as here, it speaks directly to severability: "If any provision of this chapter [containing the TCPA] . . . is held invalid, the remainder . . . shall not be affected thereby." 47 U.S.C. § 608. While not dispositive, this unambiguous language endorsing severability relieves us of a counterfactual inquiry as to congressional intent and creates a presumption of severability absent "strong evidence that Congress intended otherwise." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987).

History reaffirms what Congress said. The TCPA has been "fully operative" for more than two decades. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010). Then, with little fanfare, Congress appended the comparatively modest debt-collection exception as a small portion of the 2015 budget bill. The newly enacted exception did not suddenly and silently become so integral to the TCPA that the statute could not function without it. *See Gresham*, 866 F.3d at 855 (severing a newly enacted, content-based exception to Minnesota's robocalling statute because "[t]he balance of the statute pre-existed the amendment, and we presume that the Minnesota legislature would have retained the pre-existing statute"); *cf. Rappa v. New Castle County*, 18 F.3d 1043, 1073 (3d Cir. 1994) ("[T]he proper remedy

for content discrimination *generally* cannot be to sever the statute so that it restricts more speech than it did before—at least *absent quite specific evidence of a legislative preference* for elimination of the exception." (emphases added)).

Excising the debt-collection exception preserves the fundamental purpose of the TCPA and leaves us with the same content-neutral TCPA that we upheld—in a manner consistent with *Reed*—in *Moser* and *Gomez*.

CONCLUSION

Duguid adequately alleges Facebook utilized an ATDS, and the additional elements of a TCPA claim are not at issue in this appeal. We reject Facebook's challenge that the TCPA as a whole is facially unconstitutional, but we sever the debt-collection exception as violative of the First Amendment. We reverse the dismissal of Duguid's amended complaint and remand for further proceedings.

REVERSED AND REMANDED.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-15320

NOAH DUGUID, individually and on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

FACEBOOK, INC.,

Defendant-Appellee,

and

UNITED STATES OF AMERICA,

Intervenor-Appellee.

Filed: Aug. 22, 2019

Before: J. Clifford Wallace, Eugene E. Siler,[*] and M. Margaret McKeown, Circuit Judges.

ORDER

The panel unanimously votes to deny the petition for panel rehearing.

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[*] The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

Judge McKeown votes to deny the petition for rehearing en banc, and Judges Wallace and Siler so recommend. The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

Appendix C

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 15-cv-00985-JST

NOAH DUGUID,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

Filed: Mar. 24, 2016

ORDER GRANTING MOTION TO DISMISS

Before the Court is Defendant Facebook, Inc.'s Motion to Dismiss Plaintiff's Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6). ECF No. 24. Plaintiff Noah Duguid opposes the motion. ECF No. 30. For the reasons set forth below, the Court will grant the motion to dismiss.

I. Background

For the purpose of deciding this motion, the Court accepts as true the following allegations from Plaintiff's Complaint, ECF No. 1. *See Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

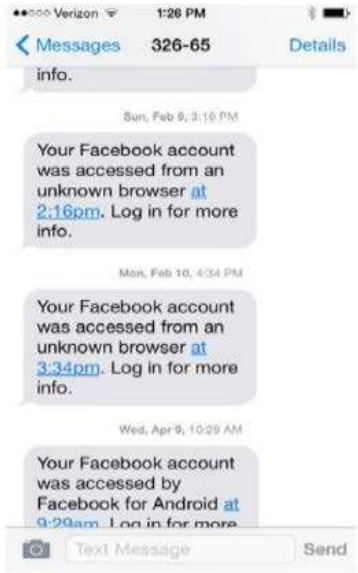
Defendant Facebook, Inc. ("Facebook") operates an online social network. Compl. ¶ 3. As of September

2014, Facebook had 864 million daily active users and 1.35 billion monthly active users. *Id.* Users often share private information on Facebook. *Id.* ¶ 4. As an "extra security feature," a user may activate "login notifications" to alert her via text message when her account is accessed from a new device. *Id.* ¶¶ 4-5. The notifications state: "Your Facebook account was accessed from [internet browser] at [time]. Log in for more info." *Id.* ¶ 5.

Login notification text messages are often sent to the cellphones of persons who have not authorized Facebook to contact them on their cellphones, who have requested that the notifications stop, or who do not use Facebook. *Id.* Such messages may be sent several times a day. *Id.* Facebook's online instructions direct users to change their account settings in order to deactivate login notifications, but provide no solution for persons who receive messages even though they have no Facebook account. *Id.* at 6, Ex. B. When someone replies "off" to Facebook's text messages, Facebook responds with a message stating, "Facebook texts are now off. Reply on to turn back on." *Id.* ¶ 7. Notwithstanding this response, Facebook often continues to send unauthorized text messages. *Id.*

Plaintiff Noah Duguid began receiving Facebook login notifications via text message on or around January 25, 2014. *Id.* ¶ 20. The messages were sent from an SMS short code, 326-65 ("FBOOK"), which is licensed and operated by Defendant or one of its agents. *Id.* ¶ 21. Although Duguid never provided his cellphone number to Facebook or authorized Facebook to send him text messages, he received repeated login

notification messages. *Id.* ¶¶ 22-26. Several example messages are reproduced below:



Id. ¶ 22, Ex. D. On or around April 20, 2014, Duguid sent Facebook an email message requesting that the text messages cease. *Id.* ¶ 27. In response, Facebook sent an automated message directing Duguid to log on to the Facebook website in order to report problematic content. *Id.* Duguid's efforts to deactivate the messages by responding "off" and "all off" were also unsuccessful. *Id.* ¶ 28.

On March 3, 2015, Plaintiff filed his complaint against Facebook, alleging violations of the Telephone Consumer Protection Act ("TCPA"). He seeks to represent the following two classes:

> Class 1: All persons within the United States who did not provide their cellular telephone number to Defendant and who received one or more text messages, from or on behalf of

> Defendant to said person's cellular telephone, made through the use of any automatic telephone dialing system within the four years prior to the filing of the Complaint.
>
> Class 2: All persons within the United States who, after notifying Defendant that [they] no longer wished to receive text messages and receiving a confirmation from Defendant to that effect, received one or more text messages, from or on behalf of Defendant to said person's cellular telephone, made through the use of any automatic telephone dialing system within the four years prior to the filing of the Complaint.

Id. ¶ 34.

Defendant moves to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), and requests that the Court take judicial notice of certain publicly available webpages. ECF Nos. 24, 24-3. Plaintiff opposes the motion to dismiss. ECF No. 30.

The Court has jurisdiction over this action pursuant to 28 U.S.C. section 1331.

II. Request for Judicial Notice

A. Legal Standard

Pursuant to Federal Rule of Evidence 201(b), "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." The Court may also "consider materials incorporated into the complaint,"

where "the complaint necessarily relies upon a document or the contents of the document are alleged in a complaint, the document's authenticity is not in question and there are no disputed issues as to the document's relevance." *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010). The Court "must take judicial notice if a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(c)(2).

B. Facebook Webpages

First, Defendant requests that the Court take judicial notice of screen shots of three Facebook webpages: Facebook's "Statement of Rights and Responsibilities" and two Help Center webpages titled, "How do I verify my account?" and "How do I add or remove credit card info from my account?". ECF No. 24-3 at 2; Exs. 1-3. Defendant argues that the Court may take judicial notice of these exhibits because they are "currently publicly available on Facebook's website—the same website upon which Plaintiff repeatedly relies in his complaint," and "there is no reasonable dispute regarding the information." ECF No. 24-3 at 3. Furthermore, Defendant argues, the Court may consider these documents pursuant to the incorporation by reference doctrine because Plaintiff's Complaint relies on and attaches Facebook webpages, and alleges facts relating to the login notification process and the private information that Facebook users may use login notifications to protect. ECF No. 24-3 at 4-5. Plaintiff has not filed an opposition to Defendant's request for judicial notice, although he does argue that "Facebook's suppositions are matters outside the

pleadings and should not be considered in deciding the motion to dismiss." ECF No. 30 at 4 n.1.

"'[F]ederal courts considering the issue have expressed skepticism as to whether it is appropriate to take judicial notice of information or documents' from websites when the sole justification for judicial notice is that the information or documents 'appear[] on websites that are created and maintained by a party to the litigation.'" *Punian v. Gillette Co.*, No. 14-cv-05028-LHK, 2015 WL 4967535, at *5 (N.D. Cal. Aug. 20, 2015) (quoting *Gerritsen v. Warner Bros. Entm't Inc.*, No. 14-cv-03305 MMM (CWx), 2015 WL 4069617, at * 10 (C.D. Cal. Jan. 30, 2015)); *see also Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 795 (N.D. Cal. 2011) (taking judicial notice of document from defendant's website that was cited in the complaint, but denying request for judicial notice as to other webpages created by the defendant). The Court finds that the inclusion of Exhibits 1, 2, and 3 on Facebook's website "is not, standing alone, a sufficient basis for the Court to grant the request" for judicial notice. *Punian*, 2015 WL 4967535, at *5.

Moreover, these documents are not incorporated by reference in Plaintiff's complaint because it neither necessarily relies on them nor alleges their contents. *See Coto Settlement*, 593 F.3d at 1038. Defendants correctly state that Plaintiff's Complaint discusses the login notification process, includes some Facebook Help Center webpages as attachments, and states that users share private information on Facebook. ECF No. 24-3 at 4-5. But the Complaint does not reference or incorporate the account verification process, Facebook's Statement of Rights and

Responsibilities, or the process by which users share credit card details with Facebook. *See Fraley*, 830 F. Supp. 2d at 795. The Court therefore denies Facebook's request for judicial notice as to Exhibits 1, 2, and 3.

C. Media Reports

Second, Facebook requests that the Court take judicial notice of the following media reports: (1) Sharon Profis, *Find out if someone's logging in to your Facebook account*, CNET (Dec. 10, 2011, 4:36 AM), http://www.cnet.com/au/how-to/find-out-if-someones-logging-in-to-your-facebook-account/; (2) Alyssa Abkowitz, *Wrong Number? Blame Companies' Recycling*, THE WALL STREET JOURNAL (Dec. 1, 2011), http://www.wsj.com/articles/SB10001424052970204012004577070122687462582; (3) Alison Griswold, *Venmo Money, Venmo Problems*, SLATE (Feb. 25, 2015, 8:10 PM), http://www.slate.com/articles/technology/safety_net/2015/02/venmo_security_it_s_not_as_strong_as_the_company_wants_you_to_think.html. ECF No. 24-3 at 2, Ex. 4-6. Plaintiff has not filed an opposition to this request.

The Court "may take judicial notice of publications introduced to indicate what was in the public realm at the time, not whether the contents of those articles were in fact true." *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2009) (internal quotation marks omitted); *accord Heliotrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 n. 18 (9th Cir. 1999) (taking judicial notice "that the market was aware of the information contained in news articles submitted by the

defendants"). The Court therefore takes judicial notice of these publications "solely as an indication of what information was in the public realm at the time." *Von Saher*, 592 F.3d at 960.

III. Motion to Dismiss

A. Legal Standard

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). The Court must "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

B. Discussion

Defendant argues that Plaintiff's Complaint should be dismissed for failure to state a claim for three independent reasons. ECF No. 24 at 1. First,

Defendant argues that Plaintiff does not adequately allege that the login notifications were sent by an automatic telephone dialing system as required under the TCPA. *Id.* at 7-12; *see* 47 U.S.C. § 227(a)(1). Second, Defendant argues that the login notifications fall within the TCPA's exception for calls "made for emergency purposes." ECF No. 24 at 12-15; *see* 47 U.S.C. 227(b)(1)(A). Third, Defendant argues that because the login notifications are non-commercial security messages sent to protect individual consumers' privacy, they cannot be restricted under the First Amendment. ECF No. 24 at 15-18.[1]

To state a claim for a violation of the TCPA, a plaintiff must allege that "(1) the defendant called a cellular telephone number; (2) using an automatic telephone dialing system; (3) without the recipient's prior express consent." *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012); 47 U.S.C. § 227(b)(1). A text message is a "call" within the meaning of the TCPA. *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009). An "automatic telephone dialing system" ("ATDS") is "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). "[T]he clear language of the TCPA 'mandates that the focus must

[1] In a footnote, Defendant also states that "[i]t is questionable whether Plaintiff has Article III standing for his TCPA claim" because he "does not allege that he pays incrementally for each text he receives or that he in fact paid for the alleged login notifications." ECF No. 24 at 2 n.1. Defendant indicates that it may seek to bring this standing argument "at a later time." *Id.* The Court does not address the argument in this order.

be on whether the equipment has the *capacity* to store or produce telephone numbers to be called, using a random or sequential number generator.'" *Meyer*, 707 F.3d at 1043 (quoting *Satterfield*, 569 F.3d at 951) (emphasis in original). "[A] system need not actually store, produce, or call randomly or sequentially generated telephone numbers, it need only have the capacity to do it." *Satterfield*, 569 F.3d at 951.

Plaintiff alleges that "[t]he text messages sent to Plaintiff's cellular phone were made with an ATDS as defined by 47 U.S.C. § 227(a)(1)," and that "[t]he ATDS has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator." Compl. ¶¶ 29-30. This conclusory allegation that Facebook used an ATDS is not, without more, sufficient to support a claim for relief under the TCPA. *Kramer v. Autobytel, Inc.*, 759 F. Supp. 2d 1165, 1171 (N.D. Cal. 2010) (the "naked assertion" that messages were sent "using equipment that, upon information and belief, had the capacity to store or produce telephone numbers to be called, using a random or sequential number generator . . . need not be taken as true"); *Flores v. Adir Int'l, LLC*, No. 15-cv-00076-AB, 2015 WL 4340020, at *3 (C.D. Cal. July 15, 2015) ("Without more, Plaintiff's conclusory allegation that Defendant used an ATDS is little more than speculation, and cannot support a claim for relief under the TCPA"); *see also Twombly*, 550 U.S. at 555 ("a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do" (internal quotation marks and alterations omitted)).

Because it may be difficult for a plaintiff to identify the specific type of dialing system used without the benefit of discovery, courts have allowed TCPA claims to proceed beyond the pleading stage where a plaintiff's allegations support the inference that an ATDS was used. For example, in *Kramer v. Autobytel*, the court found that the complaint, read as a whole, contained "sufficient facts to show that it is plausible" that the defendants used an ATDS where the plaintiff alleged that he received messages from a short code registered to one of the defendants, the messages were advertisements written in an impersonal manner, and the plaintiff had no other reason to be in contact with the defendants. 759 F. Supp. 2d at 1171. Similarly, in *Kazemi v. Payless Shoesource, Inc.*, the court concluded that "plaintiff's description of the received messages as being formatted in SMS short code licensed to defendants, scripted in an impersonal manner and sent en masse supports a reasonable inference that the text messages were sent using an ATDS," and the complaint therefore met federal pleading requirements. No. 09-cv-05142-MHP, 2010 WL 963225, at *2 (N.D. Cal. Mar. 16, 2010); *see also Gragg v. Orange Cab Co., Inc.*, No. 12-cv-0576-RSL, 2013 WL 195466, at *3 n.3 (W.D. Wash. Jan. 17, 2013) ("Plaintiffs alleging the use of a particular type of equipment under the TCPA are generally required to rely on indirect allegations such as the content of the message, the context in which it was received, and the existence of similar messages, to raise an inference that an automated dialer was utilized. Prior to the initiation of discovery, courts cannot expect more."); *see also* Scott Dodson, *New Pleading, New Discovery*,

109 Mich. L. Rev. 53 (2010) (arguing in favor of "limited presuit or predismissal discovery to counteract the information asymmetry and overscreening caused by *Twombly* and *Iqbal*").

Where, however, a "[p]laintiff's own allegations suggest direct targeting that is inconsistent with the sort of random or sequential number generation required for an ATDS," courts conclude that the allegations are insufficient to state a claim for relief under the TCPA. *Flores*, 2015 WL 4340020, at *4. In *Flores v. Adir International*, for example, the plaintiff alleged that the defendant was a debt collector that sent him a number of text messages for the purpose of collecting on a specific debt, each of which included the same reference number. *Id.* The text messages did not include the plaintiff's name and appeared to follow a generic template, and the plaintiff alleged that he received immediate responses to his "Stop" texts. *Id.* at *3-4. The court found that while these allegations might support the reasonable inference that the defendant's equipment was capable of some form of automation, they did not suggest the use of an ATDS as defined in the TCPA. *Id.* at *4-5. To the contrary, "the content of the message, the context in which it was received, and the existence of similar messages all weigh[ed] *against* an inference that Defendant used an ATDS," suggesting instead "that Defendant expressly targeted Plaintiff." *Id.* at *5 (emphasis in original) (internal quotation marks omitted). *See also Daniels v. Cmty. Lending, Inc.*, No. 13-cv-488-WQH-JMA, 2014 WL 51275, at *5 (S.D. Cal. Jan. 6, 2014) (plaintiffs did not adequately allege the use of an ATDS where the "alleged calls to Plaintiffs do not appear to have been 'random,' 47 U.S.C. § 227(a)(1);

instead the calls are alleged to be directed specifically toward Plaintiffs").

Here, as in *Flores*, Plaintiff's allegations do not support the inference that the text messages he received were sent using an ATDS. Plaintiff alleges that the login notifications are designed "to alert users when their account is accessed from a new device." Compl. ¶ 4. The text messages follow the following template: "Your Facebook account was accessed from [internet browser] at [time]. Log in for more info." *Id.* ¶¶ 5, 22. Plaintiff has attached to his Complaint a webpage from Facebook's online Help Center, which explains that users must add their mobile numbers to their accounts in order to receive login notifications by text message. *Id.* Ex. A. These allegations suggest that Facebook's login notification text messages are targeted to specific phone numbers and are triggered by attempts to log in to Facebook accounts associated with those phone numbers.[2] Although Plaintiff alleges that the operation of this system is "sloppy" because messages are sent to individuals who have never had a Facebook account, have never shared their phone number with Facebook, and/or who have requested deactivation of the login notifications, he does not suggest that Facebook sends text messages en masse to randomly or sequentially generated numbers. *Id.* ¶¶ 5, 8. As in *Flores*, "it is at least *possible* that Defendant utilized a system that is capable of storing or generating a random or sequential list of telephone

[2] In his opposition to the motion to dismiss, Plaintiff acknowledges that "the messages are automatically sent when the subject Facebook account is accused from an unknown device." ECF No. 30 at 5.

numbers and then dialing them," 2015 WL 4340020, at *4 (emphasis in original), but nothing in Plaintiff's Complaint "nudge[s] [his] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 547.[3]

In his opposition, Plaintiff suggests that the capacity to produce or store random or sequential numbers is not a necessary feature of an ATDS, citing a 2003 order in which the Federal Communications Commission ("FCC") concluded that a predictive dialer constitutes an ATDS. ECF No. 30 at 7-13. The FCC described a predictive dialer as "equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when a sales agent will be available to take calls. The hardware, when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers." *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14091-93 (2003). Courts in this district have concluded that the reasoning of the FCC's order is not restricted to predictive dialers. *See Nunes v. Twitter, Inc.*, No. 14-cv-02843-VC, 2014

[3] Plaintiff also alleges that Facebook sends automatic responses to opt-out texts. These responses are not actionable under the TCPA. *See Derby v. AOL, Inc.*, No. 15-cv-00452-RMW, 2015 WL 3477658, at *6 (N.D. Cal. June 1, 2015) ("a single message sent in response to plaintiff's text (or texts) is not the kind of intrusive, nuisance call that the TCPA prohibits"); *In Re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961 ¶ 57 at *21 (2015) (describing a ruling in which the FCC "concluded that a one-time text confirming a consumer's request to opt out of future calls did not violate the TCPA").

WL 6708465, at *1 (N.D. Cal. Nov. 26, 2014) ("Although this language is not crystal clear, it appears to encompass any equipment that stores telephone numbers in a database and dials them without human intervention."); *Fields v. Mobile Messengers Am., Inc.*, No. 12-cv-05160-WHA, 2013 WL 6774076, at *3 (N.D. Cal. Dec. 23, 2013) (concluding that there were genuine disputes of material fact regarding whether messages were sent using an ATDS where plaintiffs alleged that the equipment used functioned similarly to a predictive dialer in that it received numbers from a computer database and dialed those numbers without human intervention).

But Duguid has not alleged that Facebook uses a predictive dialer, or equipment that functions like a predictive dialer. The Complaint plainly alleges that the text messages were sent using an ATDS that "has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator." Compl. ¶¶ 29-30. As discussed above, the Court concludes that this claim is not plausible, and it will therefore dismiss the TCPA claims for failure to adequately allege that the login notifications were sent using an ATDS.

Because the Court dismisses the complaint on this basis, it need not address Facebook's arguments that the motion should be granted because Plaintiff's allegations establish that human intervention triggered the login notifications, and because the notifications are sent for emergency purposes. The Court also does not reach the argument that imposing liability on Facebook for sending the login notifications would violate the First Amendment. *See*

San Francisco Tech., Inc. v. GlaxoSmithKline LLC, No. 10-cv-03248-JF NJV, 2011 WL 941096, at *2 (N.D. Cal. Mar. 16, 2011) ("Because it concludes that SF Tech's claims are subject to dismissal on other bases, the Court need not decide the constitutional issues presented here, at least at the present time.").

CONCLUSION

For the foregoing reasons, the motion to dismiss is granted without prejudice. Plaintiff may file an amended complaint within 30 days of the date of this order.

An Initial Case Management Conference is scheduled for June 1, 2016. A Joint Case Management Conference Statement is due by May 18, 2016. *See* ECF No. 29.

IT IS SO ORDERED.

Dated: March 24, 2016

[handwritten: signature]
JON S. TIGAR
United States District Judge

Appendix D

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 15-cv-00985-JST

NOAH DUGUID,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

Filed: Feb. 16, 2017

ORDER GRANTING MOTION TO DISMISS WITH PREJUDICE

Before the Court is Defendant Facebook, Inc.'s Motion to Dismiss Plaintiff's First Amended Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6). ECF No. 65. Plaintiff Noah Duguid opposes the motion. ECF No. 73. For the reasons below, the Court will grant the motion to dismiss with prejudice.

I. Background

A. Factual History

For the purpose of deciding this motion, the Court accepts as true the following allegations from Plaintiff's First Amended Complaint ("FAC"), ECF No.

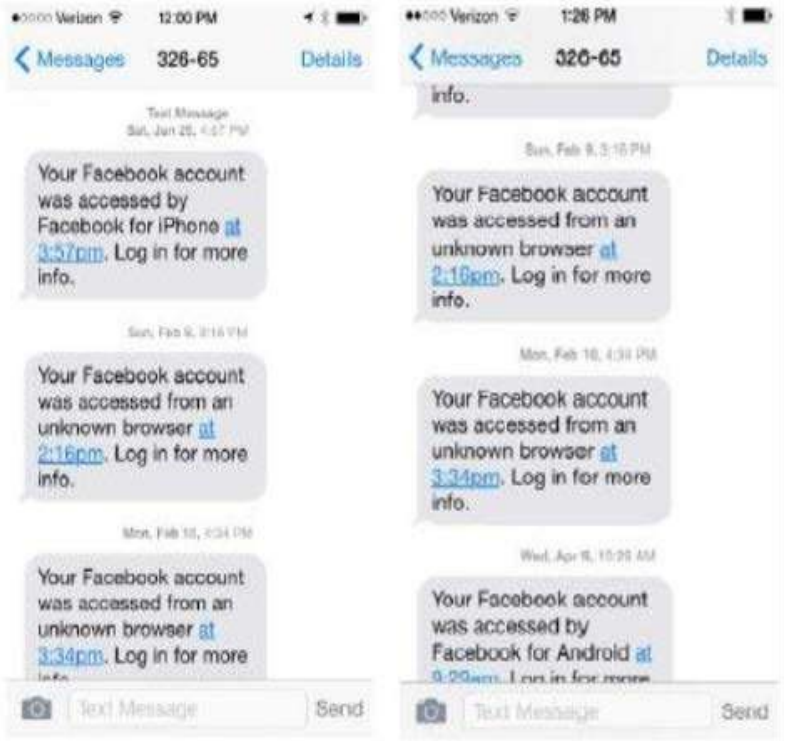
53. *See Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

Defendant Facebook, Inc. ("Facebook") offers an "extra security feature" for its consumers through an automated "login notification" process, in which Facebook sends computer-generated text messages when a Facebook account is accessed from a new device. FAC ¶ 14. When an account is disabled due to suspected fraud, Facebook's "Login Approval" process sends a code to a user's mobile phone via text message and requires the user to enter the security code to log into Facebook. *Id.* ¶ 18. Facebook maintains a database of phone numbers on its computers to transmit these alert text messages to selected numbers. *Id.* ¶ 19.

Plaintiff alleges that many consumers receive text messages from Facebook even though they did not authorize Facebook to contact them on their cellphones. *Id.* ¶ 51. Facebook's online instructions to deactivate the login notification feature provide no solution for those who receive the messages despite having no Facebook account. *Id.* ¶ 52. When someone replies "off" to Facebook's text messages, Facebook responds with a message stating, "Facebook texts are now off. Reply on to turn back on." *Id.* ¶ 53. Even though it sends this response, Facebook often continues to send unauthorized text messages. *Id.* ¶¶ 26, 53.

Plaintiff Noah Duguid began receiving automated, templated text messages from Facebook on his cellular phone. *Id.* ¶ 21. These messages were sent from an SMS short code, 326-65 ("FBOOK"), which is licensed and operated by Facebook or one of

its agents. *Id.* ¶ 22. Several example messages received by Duguid are reproduced below:



Id. ¶ 23. Duguid could not "Log in" to turn off the messages because he does not have a Facebook account. *Id.* ¶ 24. He became "frustrated" with the text message bombardment. *Id.* ¶ 25. On or around April 20, 2014, Duguid sent Facebook an email message requesting that the text messages cease. *Id.* ¶ 34. In response, Facebook sent Duguid an automated message directing Duguid to log on to the Facebook website to report problematic content. *Id.* ¶ 35. Duguid's efforts to deactivate the messages by responding "off" and "all off" were also unsuccessful. *Id.* ¶¶ 25-26.

Plaintiff alleges that Defendant sent text messages with an automatic telephone dialing system ("ATDS") as defined by 47 U.S.C. § 227(a)(1) and the Federal Communications Commission ("FCC"). *Id.* ¶ 38. Specifically, Plaintiff alleges that Defendant's system either has the capacity to generate random or sequential numbers or can add that capacity with code. *Id.* ¶¶ 40-50.

B. Procedural History

Plaintiff Noah Duguid filed his original complaint on March 3, 2015, alleging violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (the "TCPA"). ECF No. 1 ¶ 1. On March 24, 2016, this Court dismissed Plaintiff's complaint against Facebook without prejudice. ECF No. 48 at 11. The Court found that Plaintiff failed to adequately allege that text messages from Facebook were sent using an ATDS as required under the TCPA. *Id.* Plaintiff then filed his FAC, which re-asserted the TCPA violation claim after adding additional factual allegations. ECF No. 53. Plaintiff seeks to represent the following two classes:

> Class 1: All persons within the United States who did not provide their cellular telephone number to Defendant and who received one or more text messages, from or on behalf of Defendant to said person's cellular telephone, made through the use of any automatic telephone dialing system within the four years prior to the filing of the Complaint.
>
> Class 2: All persons within the United States who, after notifying Defendant that it no longer wished to receive text messages and

> receiving a confirmation from Defendant to that effect, received one or more text messages, from or on behalf of Defendant to said person's cellular telephone, made through the use of any automatic telephone dialing system within the four years prior to the filing of the Complaint.

Id. ¶ 58.

Defendant moves to dismiss Plaintiff's FAC for lack of standing and failure to state a claim under the TCPA. ECF No. 65. Plaintiff opposes the motion to dismiss. ECF No. 73.

The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

II. Legal Standards

A. Motion to Dismiss Under Rule 12(b)(1)

"If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3). A defendant may raise the defense of lack of subject matter jurisdiction by motion pursuant to Federal Rule of Civil Procedure 12(b)(1). The plaintiff always bears the burden of establishing subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "A Rule 12(b)(1) jurisdictional attack may be facial or factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Id.* "By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise

invoke federal jurisdiction." *Id.* In considering a facial attack, the court "determine[s] whether the complaint alleges 'sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1131 (9th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

B. Motion to Dismiss Under Rule 12(b)(6)

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft*, 556 U.S. at 678 (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). The Court must "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

III. Discussion

Defendant moves to dismiss Plaintiff's FAC for lack of Article III standing pursuant to Rule 12(b)(1)

and for failure to state a claim pursuant to Rule 12(b)(6). ECF No. 65 at 1. The Court concludes that Plaintiff has standing but again fails to state a plausible claim under the TCPA.

A. Standing

Defendant first asserts that under the recent decision of *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), *as revised* (May 24, 2016), Plaintiff lacks Article III standing. The Ninth Circuit squarely rejected that argument in *Patten v. Vertical Fitness Group, LLC, et al.*, No. 14-55980, 2017 WL 460663 (9th Cir. Jan. 30, 2017). The court found that, in passing the TCPA, Congress had purposefully "establishe[d] the substantive right to be free from certain types of phone calls and texts absent consumer consent." *Id.* at *4. Deferring to Congress's judgment, the court held that a "plaintiff alleging a violation under the TCPA 'need not allege any additional harm beyond the one Congress has identified'" to establish Article III standing. *Id.* Here, Duguid's allegations that he received unwanted text messages suffice to confer standing.

B. TCPA Claim

Defendant offers three reasons why Plaintiff's FAC should be dismissed for failure to state a claim. ECF No. 65 at 1-3. First, Defendant argues that Plaintiff did not adequately allege that the login notifications were sent by an ATDS as defined by the TCPA. *Id.* at 1-2; *see* 47 U.S.C. § 227(a)(1). Second, Defendant argues that the login messages fall within the TCPA's exception for calls "made for emergency purposes." ECF No. 65 at 2; *see* 47 U.S.C. § 227(b)(1)(A). Third, Defendant argues that even if

the TCPA reaches the login messages, the TCPA violates the First Amendment as a content-based restriction of speech that cannot survive strict scrutiny. ECF No. 65 at 20. Because the Court again concludes that Plaintiff has failed to plausibly allege the use of an ATDS, it does not reach the latter two of Defendant's arguments.

To state a claim for a violation of the TCPA, a plaintiff must allege that "(1) the defendant called a cellular telephone number; (2) using an automatic telephone dialing system; (3) without the recipient's prior express consent." *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012); *see* 47 U.S.C. § 227(b)(1). A text message is a "call" within the meaning of the TCPA. *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009). An "automatic telephone dialing system means equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). In evaluating whether equipment constitutes an ATDS, "the clear language of the TCPA 'mandates that the focus must be on whether the equipment has the *capacity* to store or produce telephone numbers to be called, using a random or sequential number generator.'" *Meyer*, 707 F.3d at 1043 (quoting *Satterfield*, 569 F.3d at 951). Thus, "a system need not actually store, produce, or call randomly or sequentially generated telephone numbers, it need only have the capacity to do it." *Satterfield*, 569 F.3d at 951.

Because it may be difficult for a plaintiff to identify the specific type of dialing system used without the benefit of discovery, courts have allowed TCPA claims to proceed beyond the pleading stage where a plaintiff's allegations support the inference that an ATDS was used. *See, e.g.*, *Kramer v. Autobytel, Inc.*, 759 F. Supp. 2d 1165, 1171 (N.D. Cal. 2010) (finding that the complaint, read as a whole, contained "sufficient facts to show that it is plausible" that the defendants used an ATDS where the plaintiff alleged that he received messages from a short code registered to one of the defendants, the messages were advertisements written in an impersonal manner, and the plaintiff had no other reason to be in contact with the defendants); *Kazemi v. Payless Shoesource Inc.*, No. 09-cv-05142-MHP, 2010 WL 963225, at *2 (N.D. Cal. Mar. 16, 2010) (concluding that the complaint met federal pleading requirements because the "plaintiff's description of the received messages as being formatted in SMS short code licensed to defendants, scripted in an impersonal manner and sent en masse supports a reasonable inference that the text messages were sent using an ATDS").

But where a "[p]laintiff's own allegations suggest direct targeting that is inconsistent with the sort of random or sequential number generation required for an ATDS," courts conclude that the allegations are insufficient to state a claim for relief under the TCPA. *See Flores v. Adir Int'l*, LLC, No. 15-cv-00076-AB, 2015 WL 4340020, at *4 (C.D. Cal. July 15, 2015). Courts generally rely on the message content, the context in which the message was received, and the existence of similar messages to assess whether an automated dialer was utilized. *See id.* at *5. In *Flores*,

for example, the plaintiff alleged that the defendant debt collector used an ATDS to send text messages about a debt because the messages were on a generic template that did not refer to the plaintiff by name, though they all included a reference number to identify the plaintiff. *Id.* at *3. The court acknowledged that it was "at least *possible*" that the defendant utilized a system "capable of storing or generating a random or sequential list of telephone numbers and then dialing them," but that the plaintiff offered no allegations to take his claim "'across the line from conceivable to plausible.'" *Id.* (quoting *Twombly*, 556 U.S. at 680). It noted that the messages included a unique reference number, that the messages sought to collect on a "specific" debt, and that other messages contained similar reference numbers and content, all of which "supports the inference" that the defendant "expressly targeted" the plaintiff. *Id.*

This Court dismissed Duguid's prior complaint because his allegations that Facebook's "login notifications are designed 'to alert users when their account is accessed from a new device'" after "users . . . add their mobile numbers to their accounts" did not plausibly support the inference that Facebook was using an ATDS. ECF No. 48 at 9. It noted that Duguid "d[id] not suggest that Facebook sends text messages en masse to randomly or sequentially generated numbers." *Id.* at 9-10. Instead, Duguid's allegations indicated that "Facebook's login notification text messages are targeted to specific phone numbers and are triggered by attempts to log in to Facebook accounts associated with those phone numbers." *Id.* at 9. In line with *Flores*, this suggested direct targeting that was inconsistent with the

existence of an ATDS. The Court also dismissed Duguid's suggestion that since predictive dialers constitute an ATDS, the capacity to produce or store random or sequential numbers is not a necessary feature of an ATDS, given that Duguid "has not alleged that Facebook uses a predictive dialer, or equipment that functions like a predictive dialer." *Id.* at 11.

Duguid has added a number of new facts to his FAC, but once again fails to plausibly allege that Facebook used an ATDS. Duguid newly alleges that Facebook uses a "computerized protocol for creating automated text messages programmed to appear customized to the user" through a template-based process. FAC ¶¶ 25-30. Additionally, Duguid alleges that in addition to the login notification process described in the original complaint, Facebook also employs a "Login Approval" process, a two factor authentication system requiring users to "enter a code" sent to mobile phones via text message whenever users log into Facebook from a new or unrecognized device. *Id.* ¶¶ 15, 18. It is unclear why Duguid believes these facts would strengthen the inference that Facebook sent text messages en masse using an ATDS. To the contrary, allegations of customizable protocols and unique codes only further suggest, in line with Duguid's other allegations, that the messages were sent through direct targeting that is akin to *Flores*.

Duguid further suggests that Facebook's system "is still an ATDS . . . because it has the capacity to sequentially and randomly dial," given that it is a "computer based system" with "capacity to generate

random numbers" and "capacity to generate sequential numbers." ECF No. 73 at 18; FAC ¶¶ 40-41. And even if Facebook's system does not currently have those abilities, Plaintiff argues, the capacity "can be trivially added with minimal computer coding." ECF No. 73 at 18; see FAC ¶¶ 44-50 (providing code that could be added to Facebook's system to generate random or sequential numbers). Duguid's allegations are conclusory. He merely repeats the central elements of an ATDS and asserts that Facebook's system possesses all of them. Nor does the possibility that these elements "can be trivially added" plausibly suggest that they are in fact present here.

In his opposition, Duguid argues that he has plausibly alleged that Facebook uses a "predictive dialer-like system." ECF No. 73 at 11. A predictive dialer, often used by telemarketers, is "equipment that dials numbers" and, when paired with certain software, "has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers." *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14091 (2003). Both the FCC and courts in this district have concluded that predictive dialers may fall within the scope of the TCPA. *Id.* at 14092-93; *see, e.g.*, *Nunes v. Twitter, Inc.*, No. 14-cv-02843-VC, 2014 WL 6708465, at *1 (N.D. Cal. Nov. 26, 2014) (finding that an ATDS "appears to encompass any equipment that stores telephone numbers in a database and dials them without human intervention").

Here, however, Plaintiff has again failed to allege the existence of such a system. At best, his allegations

are conclusory, given that he merely asserts that Facebook "maintains a database of phone numbers on its computer" and "transmits alert text messages to selected numbers from its database using its automated protocol," without offering any factual support for this claim. FAC ¶ 19. At worst, this claim contradicts the variety of other allegations offered by Plaintiff, which suggest that Facebook does not dial numbers randomly but rather directly targets selected numbers based on the input of users and when certain logins were attempted.

Duguid's reliance on *Nunes* is also misplaced. *See* ECF No. 73 at 11. In *Nunes*, the court noted that "dismissal of the complaint would not be warranted" because the plaintiff plausibly alleged that the defendant's "equipment ha[s] the "capacity to 'generate' numbers at random or sequentially" in addition to its ability to store and dial numbers without human intervention. 2014 WL 6708465, at *1-2. Here, no plausible inference can be made that Facebook's equipment has the capacity to generate random or sequential numbers.

As such, this Court dismisses Plaintiff's TCPA claims for failure to adequately allege that the text messages were sent using an ATDS. Because the Court dismisses the FAC on this basis, it need not address Facebook's arguments that the allegations show human intervention triggered the messages and that the messages were sent for emergency purposes. Likewise, the Court does not reach the argument that the TCPA violates the First Amendment. *See San Francisco Tech., Inc. v. GlaxoSmithKline LLC*, No. 10-cv-03248-JF NJV, 2011 WL 941096, at *2 (N.D. Cal.

Mar. 16, 2011) ("Because it concludes that SF Tech's claims are subject to dismissal on other bases, the Court need not decide the constitutional issues presented here, at least at the present time.").

This is Plaintiff's second attempt to plausibly allege the existence of an ATDS, and he has been unable to do so. Plaintiff does not offer any additional allegations that he could provide if given further leave to amend, and the Court is unable to identify any, given that his current allegations strongly suggest direct targeting rather than random or sequential dialing. Accordingly, the Court concludes that further amendment would be futile, and dismisses Plaintiff's complaint with prejudice.

CONCLUSION

For the foregoing reasons, the Motion to Dismiss Plaintiff's First Amended Complaint is granted with prejudice.

IT IS SO ORDERED.

Dated: February 16, 2017

[handwritten: signature]
JON S. TIGAR
United States District Court

Appendix E

RELEVANT STATUTORY PROVISION
47 U.S.C. § 227

(a) Definitions

As used in this section—

(1) The term "automatic telephone dialing system" means equipment which has the capacity—

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

(2) The term "established business relationship", for purposes only of subsection (b)(1)(C)(i),, shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that—

(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G)).[1]

(3) The term "telephone facsimile machine" means equipment which has the capacity (A) to transcribe text or images, or both, from paper into

[1] So in original. Second closing parenthesis should not appear.

an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(4) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call unless such call is made solely to collect a debt owed to or guaranteed by the United States;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes, is made solely pursuant to the collection of a debt owed to or guaranteed by the United States, or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless—

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through—

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if the sender possessed the facsimile machine number of the recipient before July 9, 2005; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission—

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe—

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines—

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement;

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this

subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect;

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if—

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes—

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (d);

(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—

(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and

(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine;

(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only—

(i) by regulation issued after public notice and opportunity for public comment; and

(ii) if the Commission determines that such notice required by paragraph (1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements; and

(G)(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall—

(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and

(IV) determine whether with respect to small businesses, the costs would not be unduly burdensome; and

(ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-month period that begins on July 9, 2005.

(3) Private right of action

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(c) Protection of subscriber privacy rights

(1) Rulemaking proceeding required

Within 120 days after December 20, 1991, the Commission shall initiate a rulemaking proceeding

concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall—

(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific "do not call" systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

(C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;

(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most

effective and efficient to accomplish the purposes of this section.

(2) Regulations

Not later than 9 months after December 20, 1991, the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

(3) Use of database permitted

The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase. If the Commission determines to require such a database, such regulations shall—

(A) specify a method by which the Commission will select an entity to administer such database;

(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations;

(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection under subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;

(D) specify the methods by which such objections shall be collected and added to the database;

(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the

database that are incurred by the entities carrying out those activities;

(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with the regulations prescribed under this subsection;

(J) be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify methods for protection of the privacy rights of persons whose numbers are included in such database; and

(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

(4) Considerations required for use of database method

If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall—

(A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;

(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and—

(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;

(ii) reflect the relative costs of providing such lists on paper or electronic media; and

(iii) not place an unreasonable financial burden on small businesses; and

(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

(5) Private right of action

A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State—

(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive up to

$500 in damages for each such violation, whichever is greater, or

(C) both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(6) Relation to subsection (b)

The provisions of this subsection shall not be construed to permit a communication prohibited by subsection (b) of this section.

(d) Technical and procedural standards

(1) Prohibition

It shall be unlawful for any person within the United States—

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a

manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

(2) Telephone facsimile machines

The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after December 20, 1991, clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

(3) Artificial or prerecorded voice systems

The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that—

(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the

message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and

(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(e) Prohibition on provision of inaccurate caller identification information

(1) In general

It shall be unlawful for any person within the United States, in connection with any telecommunications service or IP-enabled voice service, to cause any caller identification service to knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value, unless such transmission is exempted pursuant to paragraph (3)(B).

(2) Protection for blocking caller identification information

Nothing in this subsection may be construed to prevent or restrict any person from blocking the capability of any caller identification service to transmit caller identification information.

(3) Regulations

(A) In general

Not later than 6 months after December 22, 2010, the Commission shall prescribe regulations to implement this subsection.

(B) Content of regulations

(i) In general

The regulations required under subparagraph (A) shall include such exemptions from the prohibition under paragraph (1) as the Commission determines is appropriate.

(ii) Specific exemption for law enforcement agencies or court orders

The regulations required under subparagraph (A) shall exempt from the prohibition under paragraph (1) transmissions in connection with—

(I) any authorized activity of a law enforcement agency; or

(II) a court order that specifically authorizes the use of caller identification manipulation.

(4) Repealed

Pub.L. 115-141, Div. P, Title IV, § 402(i)(3), Mar. 23, 2018, 132 Stat. 1089 **(5) Penalties**

(A) Civil forfeiture

(i) In general

Any person that is determined by the Commission, in accordance with paragraphs (3) and (4) of section 503(b) of this title, to have violated this

subsection shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this paragraph shall be in addition to any other penalty provided for by this chapter. The amount of the forfeiture penalty determined under this paragraph shall not exceed $10,000 for each violation, or 3 times that amount for each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $1,000,000 for any single act or failure to act.

(ii) Recovery

Any forfeiture penalty determined under clause (i) shall be recoverable pursuant to section 504(a) of this title.

(iii) Procedure

No forfeiture liability shall be determined under clause (i) against any person unless such person receives the notice required by section 503(b)(3) of this title or section 503(b)(4) of this title.

(iv) 2-year statute of limitations

No forfeiture penalty shall be determined or imposed against any person under clause (i) if the violation charged occurred more than 2 years prior to the date of issuance of the required notice or notice or apparent liability.

(B) Criminal fine

Any person who willfully and knowingly violates this subsection shall upon conviction thereof be fined not more than $10,000 for each violation, or 3 times that amount for each day of a continuing violation, in lieu of the fine provided by section 501 of this title for such a violation. This subparagraph does not

supersede the provisions of section 501 of this title relating to imprisonment or the imposition of a penalty of both fine and imprisonment.

(6) Enforcement by States

(A) In general

The chief legal officer of a State, or any other State officer authorized by law to bring actions on behalf of the residents of a State, may bring a civil action, as parens patriae, on behalf of the residents of that State in an appropriate district court of the United States to enforce this subsection or to impose the civil penalties for violation of this subsection, whenever the chief legal officer or other State officer has reason to believe that the interests of the residents of the State have been or are being threatened or adversely affected by a violation of this subsection or a regulation under this subsection.

(B) Notice

The chief legal officer or other State officer shall serve written notice on the Commission of any civil action under subparagraph (A) prior to initiating such civil action. The notice shall include a copy of the complaint to be filed to initiate such civil action, except that if it is not feasible for the State to provide such prior notice, the State shall provide such notice immediately upon instituting such civil action.

(C) Authority to intervene

Upon receiving the notice required by subparagraph (B), the Commission shall have the right—

(i) to intervene in the action;

(ii) upon so intervening, to be heard on all matters arising therein; and

(iii) to file petitions for appeal.

(D) Construction

For purposes of bringing any civil action under subparagraph (A), nothing in this paragraph shall prevent the chief legal officer or other State officer from exercising the powers conferred on that officer by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(E) Venue; service or process

(i) Venue

An action brought under subparagraph (A) shall be brought in a district court of the United States that meets applicable requirements relating to venue under section 1391 of title 28.

(ii) Service of process

In an action brought under subparagraph (A)—

(I) process may be served without regard to the territorial limits of the district or of the State in which the action is instituted; and

(II) a person who participated in an alleged violation that is being litigated in the civil action may be joined in the civil action without regard to the residence of the person.

(7) Effect on other laws

This subsection does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States.

(8) Definitions

For purposes of this subsection:

(A) Caller identification information

The term "caller identification information" means information provided by a caller identification service regarding the telephone number of, or other information regarding the origination of, a call made using a telecommunications service or IP-enabled voice service.

(B) Caller identification service

The term "caller identification service" means any service or device designed to provide the user of the service or device with the telephone number of, or other information regarding the origination of, a call made using a telecommunications service or IP-enabled voice service. Such term includes automatic number identification services.

(C) IP-enabled voice service

The term "IP-enabled voice service" has the meaning given that term by section 9.3 of the Commission's regulations (47 C.F.R. 9.3), as those regulations may be amended by the Commission from time to time.

(9) Limitation

Notwithstanding any other provision of this section, subsection (f) shall not apply to this subsection or to the regulations under this subsection.

(f) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits—

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

(2) State use of databases

If, pursuant to subsection (c)(3) of this section, the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

(g) Actions by States

(1) Authority of States

Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive $500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the preceding sentence.

(2) Exclusive jurisdiction of Federal courts

The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Rights of Commission

The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(4) Venue; service of process

Any civil action brought under this subsection in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the violation occurred or is occurring, and process in such cases may be served in any district in which the defendant is an inhabitant or where the defendant may be found.

(5) Investigatory powers

For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) Effect on State court proceedings

Nothing contained in this subsection shall be construed to prohibit an authorized State official from

proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

(7) Limitation

Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

(8) "Attorney general" defined

As used in this subsection, the term "attorney general" means the chief legal officer of a State.

(h) Junk fax enforcement report

The Commission shall submit an annual report to Congress regarding the enforcement during the past year of the provisions of this section relating to sending of unsolicited advertisements to telephone facsimile machines, which report shall include—

(1) the number of complaints received by the Commission during such year alleging that a consumer received an unsolicited advertisement via telephone facsimile machine in violation of the Commission's rules;

(2) the number of citations issued by the Commission pursuant to section 503 of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(3) the number of notices of apparent liability issued by the Commission pursuant to section 503 of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(4) for each notice referred to in paragraph (3)—

(A) the amount of the proposed forfeiture penalty involved;

(B) the person to whom the notice was issued;

(C) the length of time between the date on which the complaint was filed and the date on which the notice was issued; and

(D) the status of the proceeding;

(5) the number of final orders imposing forfeiture penalties issued pursuant to section 503 of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(6) for each forfeiture order referred to in paragraph (5)—

(A) the amount of the penalty imposed by the order;

(B) the person to whom the order was issued;

(C) whether the forfeiture penalty has been paid; and

(D) the amount paid;

(7) for each case in which a person has failed to pay a forfeiture penalty imposed by such a final

order, whether the Commission referred such matter for recovery of the penalty; and

(8) for each case in which the Commission referred such an order for recovery—

(A) the number of days from the date the Commission issued such order to the date of such referral;

(B) whether an action has been commenced to recover the penalty, and if so, the number of days from the date the Commission referred such order for recovery to the date of such commencement; and

(C) whether the recovery action resulted in collection of any amount, and if so, the amount collected.