No. 14-1751

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BILL H. DOMINGUEZ,

Plaintiff-Appellant,

v.

YAHOO! INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania, Case No. 13-cv-1887
The Honorable Michael M. Baylson, U.S. District Judge

BRIEF OF TWITTER, INC., PATH, INC., AND THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(c)(1) of the Federal Rules of Appellate Procedure, Amici make the following disclosures. Twitter, Inc. states that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock. Path, Inc. states that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock. The Computer & Communications Industry Association states that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

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INTEREST OF *AMICI*[1]

Amici are innovative technology companies (and a trade organization for such companies) concerned about abuses of the Telephone Consumer Protection Act ("TCPA"), a well-intentioned federal statute that is increasingly being misused by plaintiffs' lawyers to seek windfall damages and coercive settlements from any company that sends or facilitates the sending of text messages.

Amicus Twitter, Inc. ("Twitter") enables users to connect with people, express ideas, and discover what is happening. As part of this free service, users may post short messages—known as "Tweets"—on Twitter's website, where they can be read by other Twitter users. Users have the option of receiving these Tweets as text messages on their cell phones. Because Twitter offers this text message-based service, it has repeatedly been the target of TCPA litigation. In one such case, a user sent a "stop" message to Twitter and received a text message confirming

[1] No counsel for any party authored this brief in whole or part; no party or counsel made a monetary contribution intended to fund its preparation or submission; and no person other than Amici and their counsel made such a contribution. Appellee Yahoo is a member of CCIA but took no role in the preparation of this brief. Because Appellant opposed the filing of this brief, Amici have filed a motion for leave pursuant to Fed. R. App. P. 29(b).

that texts would cease. On the basis of this single confirmatory message, the plaintiff sued on behalf of a putative class, seeking tens of millions of dollars in damages. In another case, a person who had, unbeknownst to Twitter, acquired a reassigned cell phone number filed a TCPA class action after she received Tweets via text message that had been requested by the prior user of the number.

Amicus Path, Inc. ("Path") is a free social networking service that allows users to share private messages, photos, videos, stickers, experiences, and thoughts with a circle of their friends and family members. Users may invite contacts to join this circle by sending them a text message. Because Path facilitates users sending such text message invitations, it has been dragged into *three* putative class action lawsuits under the TCPA.

Amicus Computer & Communications Industry Association ("CCIA") represents more than twenty large, medium-sized, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services— companies that collectively generate more than $465 billion in annual revenues. A

list of CCIA members, including Appellee Yahoo, is available at http://www.ccianet.org/members. Several CCIA members have been subjected to frivolous TCPA litigation; CCIA is concerned that the availability of statutory damages, divorced from any actual harm, encourages frivolous suits and stifles innovation in the technology industry.

Based on these experiences, Amici have a powerful interest in ensuring that the TCPA is properly applied. Amici submit this brief to explain how the TCPA is being abused in a variety of cases (including this one) and how those abuses threaten to chill a range of legitimate and desired communications. Amici seek to ensure that companies who do not own or employ the type of equipment that Congress regulated with the TCPA can avoid the threat of potentially catastrophic liability.

SUMMARY OF ARGUMENT

In this case and others, plaintiffs' attorneys have sought to transform a statute intended to target abusive telemarketing practices into an extortionist club used to coerce windfall settlements. Under their interpretation, *any* company that sends text messages for *any* purpose is presumptively in violation of the Telephone Consumer

Protection Act ("TCPA"). The TCPA incentivizes lawsuits through the promise of substantial statutory damages without requiring any showing of actual harm or ill-intent. As a result, it has become a favorite tool of class action attorneys. And the threat of gargantuan liability for statutory damages invariably prompts companies to settle putative class actions despite their lack of merit.

As Amici know all too well, technology companies that offer consumers free text message-based services are often the target of these strike suits. The lawsuits force companies to choose between denying consumers innovative text-based services that they request and desire, or the burden and expense of almost-certain litigation. This case illustrates the problem—and offers this Court an important opportunity to help bring it under control.

Yahoo is not a telemarketer. It is an Internet company that provides consumers a variety of free services. One such service allowed users to receive their emails via text message. Yahoo did not send users these texts unless they affirmatively requested them. Yet, Appellant (Bill Dominguez) asserts that this service violates the TCPA, entitling him to at least $500 in statutory damages for each text message he

received, and entitling him to represent a class of countless other "victims" who are supposedly entitled to the same windfall—all because they received text messages requested by the prior users of recycled cell phone numbers; text messages that they could have easily blocked. While it seems hard to believe that Mr. Dominguez would even file a lawsuit based on what was effectively a call to a wrong number, his case (and the class action demand it carries) exemplifies the temptation that the TCPA, with its promise of statutory damages unconnected to any showing of actual harm, offers to opportunistic plaintiffs' lawyers.

This is not what Congress had in mind when it enacted the TCPA. The statute was never meant to regulate all phone calls or text messages to cell phones. Instead, Congress intended to regulate a specific type of telephone equipment—automated dialers that could randomly or sequentially generate and dial phone numbers—that was used by telemarketers to make unsolicited phone calls to unwilling recipients at the time the statute was passed. That is why, to show a violation of the TCPA, a plaintiff must prove that the unsolicited call they received on their cell phone was sent via an "automatic telephone dialing system" ("ATDS"), a term expressly and narrowly defined by the

statute. By its terms, the TCPA applies only to such calls made using equipment that 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." *See* 47 U.S.C. § 227(a) (emphasis added).

At issue in this appeal is the proper interpretation of this ATDS definition. Consistent with this statutory language and congressional intent, the lower court properly held that the equipment must have the capacity to generate random or sequential numbers to qualify as an ATDS. In contrast, Appellant argues that an ATDS is *any* system that can automatically dial telephone numbers from a list—regardless of its ability to generate random or sequential numbers. This interpretation simply reads the words "using a random or sequential number generator" out of the statute.

Beyond doing violence to the TCPA's text, Appellant's approach would create profound practical problems. As Appellant's own expert admits, its interpretation of ATDS would sweep in virtually all cell phones and computers in use today, as they have the unremarkable ability to automatically dial numbers from lists. Because the relevant

provision of the TCPA does not distinguish between telemarketers and everyone else (*see* 47 U.S.C. § 227(b)(1)), that means that "*any person*" who uses a cell phone would face potential liability for statutory damages of at least $500 for every call or message they send, unless they can prove prior express consent (*id.* § 227(b)(3)(B)). That is so regardless of the content of the message and even regardless of whether the call was placed on purpose. If Appellant's interpretation is adopted, therefore, the TCPA will chill vast amounts of speech, far beyond the randomly or sequentially autodialed telemarketing calls that Congress sought to curtail.

This concern of unconstitutional overbreadth recently led the United States to endorse a significantly narrower interpretation of the TCPA. In *De Los Santos v. Millward Brown, Inc.*,[2] the United States intervened as a party, and in defending the constitutionality of the TCPA, sided with those courts that have adopted the more narrow

[2] No. 13-80670, 2014 U.S. Dist. LEXIS 88711 (S.D. Fla. June 29, 2014).

interpretation of "automatic telephone dialing system."[3] The United States has taken the same position in at least one prior case.[4] The Court should adopt that same position here. To protect innovative businesses and the consumers they serve and stem the tide of lawyer-driven TCPA class action litigation, the Court should confirm that, as stated in the statute itself, only equipment that has the capacity to generate and dial random or sequential phone numbers constitutes an ATDS.

ARGUMENT

I. Nuisance TCPA Litigation Is A Burgeoning Problem That Leads To Coercive Settlements And Threatens To Chill Legitimate Business Communications

The TCPA was enacted in 1991 "in response to an increasing number of consumer complaints arising from the increased number of telemarketing calls" that were "a 'nuisance and an invasion of privacy.'" *Satterfield v. Simon & Shuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) (quoting S. Rep. No. 102-178, at 1 (1991)). But here and elsewhere, the

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[3] United States Mem. In Supp. Of The Constitutionality Of The TCPA at 8-11 & n.7, *De Los Santos* (S.D. Fla. Jan. 31, 2014) (ECF No. 54) ("*De Los Santos* DOJ Br."); *see also infra* Part II.

[4] *See* United States Mem. In Supp. Of The Constitutionality Of The TCPA, *In re Jiffy Lube Int'l, Inc.*, No. 3:11-md-2261 (S.D. Cal. Jan. 30, 2012) (ECF No. 46) ("*Jiffy Lube* DOJ Br.")

lawsuits brought under the statute are a far greater nuisance than the conduct at which those lawsuits are aimed. The volume of TCPA lawsuits has dramatically increased in recent years. In 2013 alone, approximately 1,200 new putative class actions were filed.[5] As the U.S. Chamber of Commerce recently observed, "[i]t is rare these days to see TCPA litigation brought against its original intended target—abusive telemarketers."[6] Instead, companies in every sector of the economy—footwear retailers, apparel manufacturers, fast-food restaurants, banks, sports franchises, electronic payment services, and online social networks—have been swept up into a litigation maelstrom.[7]

The reasons for the sprawling growth of TCPA litigation are not hard to see. The TCPA creates a private right of action along with statutory damages of $500 to $1,500 for each call, text, or fax sent in

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[5] *See* Arent Fox, Alert, *FCC Seeks Comment on Two Petitions Related to Recent TCPA Rule Changes* (Nov. 5, 2013), http://www.arentfox.com/newsroom/alerts/fcc-seeks-comment-two-petitions-related-recent-tcpa-rule-changes.

[6] *See* U.S. Chamber, Institute for Legal Reform, The Juggernaut of TCPA Litigation at 1 (Oct. 2013) ("*TCPA Juggernaut*"), http://www.instituteforlegalreform.com/uploads/sites/1/TheJuggernautofTCPALit_WEB.PDF.

[7] *Id.*

violation of the statute. 47 U.S.C. § 227(b)(3). Plaintiffs claiming violations and seeking statutory damages have not been required to prove that they suffered any actual harm or that that the defendant acted with any culpable intent. Given this scheme, especially when harnessed to a class action procedure where the plaintiff purports to represent all other people who received similar calls or texts over a four-year period, potential damages in TCPA cases can soar beyond any reason.

In this case, for example, Yahoo's simple act of sending emails via text messages to the phone numbers of users who had requested them could expose the company to hundreds of millions of dollars in statutory damages. Similarly, two putative class actions have been brought against Twitter based on its free service that allows users to receive Tweets via text message. *See* Compl. ¶¶ 10-14, *Moss v. Twitter*, No. 3:11-cv-00906 (S.D. Cal. Apr. 28, 2011) (ECF No. 1) (dismissed); *Nunes v. Twitter*, 3:2014-cv-02843 (N.D. Cal. June 19, 2014) (pending). And three have been filed against Path based on invitation text messages Path users sent to friends using the Path application. Am. Compl. ¶¶ 10, 12, *Smeets v. Path, Inc.*, No. CV 13-03057 (N.D. Cal. Aug. 1,

2013) (ECF No. 21) (dismissed); Am. Compl. ¶ 18, *Montes v. Path, Inc.*, No. 3:13-cv-02218 (S.D. Cal. Nov. 25, 2013) (ECF No. 9) (dismissed); Compl. ¶ 13, *Sterk v. Path*, No. 1:13-cv-02330 (N.D. Ill. Mar. 28, 2013) (ECF No. 1) (pending).

The lawyers in each of these cases have demanded hundreds of millions of dollars in statutory damages. Similar examples of abusive TCPA lawsuits in contexts having nothing to do with invasive telemarketing practices abound:

- A plaintiff sued Square (an electronic payment service) in a class action based on a single transaction receipt that was sent to his putative number via text message after a user made a purchase using Square and requested a receipt be sent to that number. Compl. ¶¶ 16-17, *Ball v. Square, Inc.*, No. 3:12-cv-06552-SC (N.D. Cal. Dec. 28, 2012) (ECF No. 1) (dismissed).

- A plaintiff brought a class action against Voxernet after receiving a text message from an acquaintance inviting plaintiff to use defendant's walkie-talking application. *Hickey v. Voxernet LLC*, 887 F. Supp. 2d 1125 (W.D. Wash 2012) (settled Jan. 4, 2012).

- A plaintiff sued PayPal in a class action after receiving a "welcome" text message from the defendant when he added his cell phone number to his PayPal account. *Roberts v. PayPal, Inc.*, No. C 12-0622, 2013 U.S. Dist. LEXIS 76319 (N.D. Cal. May 30, 2013) (summary judgment granted).

- A plaintiff sued GroupMe and Twilio in a class action after Plaintiff received an invitation from a user of the GroupMe group texting application to join a group text message conversation. Am.

Compl. ¶ 33, *Glauser v. Twilio Inc.*, No. 11-cv-02584 (N.D. Cal. Sept. 15, 2011) (ECF No. 34) (pending).

- A plaintiff brought a class action against MySpace after receiving a text message from the social networking site confirming his request to opt out of receiving notification text messages that he had previously authorized. Compl. ¶¶ 10-14, *Noorpavar v. MySpace, Inc.*, No. 11-cv-0903 (S.D. Cal. Apr. 28, 2011) (ECF No. 1) (voluntarily dismissed June 20, 2011).

- A plaintiff sued Facebook in a class action after receiving a text message from Facebook confirming his request to opt out of notification text messages that he had previously authorized. Compl. ¶¶ 10-14, *Lo v. Facebook, Inc.*, No. 11-0901 (S.D. Cal. Apr. 28, 2011) (ECF No. 1) (voluntarily dismissed July 7, 2011).

- A plaintiff sued the Los Angeles Lakers after he sent a text message to the team while attending a game, which he hoped would be displayed on the arena scoreboard, and received a text message from the Lakers confirming that his request had been received. *Emanuel v. L.A. Lakers, Inc.*, No. 12-9936-GW, 2013 U.S. Dist. LEXIS 58842, at *2 (C.D. Cal. Apr. 18, 2013) (settled).

As these examples demonstrate, the prospect of windfall statutory damages awards has proven all too enticing for the plaintiffs' bar. A cottage industry of lawyers has sprung up to pursue TCPA cases, often recruiting friends, colleagues, or family members to act as "victims." *TCPA Juggernaut* at 4. For example, the wife of serial TCPA plaintiffs' expert Randall Snyder (also Appellant's expert in this case) is the named plaintiff in a similar putative TCPA class action currently pending in federal court. *See* First Am. Compl. ¶¶ 19, 21, *Snyder v.*

IvisionMobile, Inc., No. 5:13-cv-05946 (N.D. Cal. Apr. 15, 2014) (alleging her son received a text message that the prior user of the cell phone number had consented to receiving); *Dominguez v. Yahoo!, Inc.*, No. 13-1887, 2014 Dist. LEXIS 36542, at *7-8 (E.D. Pa. Mar. 20, 2014) (describing Ms. Snyder's lawsuit). Some individuals are even making a living as TCPA plaintiffs, with websites instructing consumers about how to "set up" a TCPA lawsuit to maximize potential damages before negotiating a quick settlement. *See TCPA Juggernaut* at 4.[8] All of this confirms the truth of one court's observation that "remedial laws can themselves be abused and perverted into money-making vehicles for individuals and lawyers." *Saunders v. NCO Fin. Sys.*, 910 F. Supp. 2d 464, 465 (E.D.N.Y. 2012).

The massive statutory damages that plaintiffs typically seek in TCPA class actions exert an *in terrorem* effect. The risk of ruinous liability—which may even exceed the defendant's annual revenue or net worth—puts immense pressure on defendants to settle cases, even if

[8] *E.g.*, *How to Sue A Telemarketer*, Impact Dialing (May 20, 2013), http://www.impactdialing.com/2012/05/how-to-sue-a-telemarketer/; *Suing Telemarketers—Simple and Cheap*, KilltheCalls.com, http://www.killthecalls.com/suing-telemarketers.php (last visited Aug. 6, 2014).

they are entirely without merit. Courts have recognized this pattern in similar situations. *See, e.g.*, *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("[C]lass certification creates insurmountable pressure on defendants to settle, whereas individual trials would not."); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.) ("[Defendants] may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.").

As a result, eye-popping settlements are becoming a reality in TCPA litigation. Between 2011-2013, there have been at least a dozen TCPA settlements of greater than $5 million. *TCPA Juggernaut* at 2. Capital One recently settled a TCPA class action for a staggering $75 million, with plaintiffs' counsel asking for 30% of the settlement fund.[9]

[9] *See* Am. Settlement Agreement and Release at ¶ 5.01, Ex. 1 to Decl. of Jonathan D. Selbin in Support of Pl.'s Unopposed Mot. for Preliminary Approval of Class Action Settlement, *In re Capital One TCPA Litig.*, No. 1:12-cv-10064 (N.D. Ill. July 14, 2014) (ECF No. 131-1); *see also* Mot. and Mem. Of Points and Authorities in Support of Unopposed Mot. for Preliminary Approval of Class Action Settlement, *Rose v. Bank of Am. Corp.*, No. 11-cv-02390 (N.D. Cal. Sept. 27, 2013) (ECF 59-1) (25% of $32 million settlement fund); Agreement and Release at ¶ 6.01, Ex. A to Mot. for Preliminary Approval of Class Action Settlement and Certification of Settlement Class, *Barani v. Wells Fargo Bank, N.A.*, No. 12-cv-02999 (S.D. Cal. Jan. 17, 2014) (ECF 21-3) (25% of $950,000 fund).

The success of plaintiffs' lawyers in such cases only encourages more lawsuits. And those suits are increasingly targeting communications far afield from the kinds of telemarketing calls that animated the TCPA—from the e-mail alert messages at issue here, to invitations that Path users can initiate to their friends and family, to Tweets Twitter users ask to receive by text. Unless courts limit the scope of the TCPA as intended by Congress, strike suits like these will continue to proliferate, defendants will be compelled into coercive settlements, and legitimate uses of text messaging by innovating companies and their users will be squelched.

II. The TCPA's Definition Of An ATDS Only Encompasses Equipment That Has The Capacity To Generate Random Or Sequential Telephone Numbers

In this case, the district court correctly held that an ATDS is limited to equipment with the capacity to generate random or sequential telephone numbers. This interpretation avoids absurd results, helping to ensure that legitimate companies (including Amici Twitter and Path, and those represented by Amicus CCIA) can continue offering innovative text message-based services that consumers request and desire, without facing the risk of extortionist TCPA strike suits.

Appellant, however, seeks a very different result: he argues that any equipment that can automatically dial a list of numbers is an ATDS, regardless of its capacity to generate random or sequential phone numbers. This view defies the plain language of the statute, is contrary to the weight of authority, and is not consistent with the FCC's interpretation. It also would transform the TCPA into a law that regulates nearly every call or text from a smartphone, chilling a broad range of legitimate speech in violation of the First Amendment.

A. The TCPA Was Never Intended To Cover And On Its Face Does Not Regulate All Equipment Capable Of Automatic Dialing

The provision of the TCPA at issue here—and in most of the text-messaging suits brought under the statute—applies only to "calls"[10] made using an "automatic telephone dialing system or an artificial or prerecorded voice." 47 U.S.C. § 227(b)(1)(A). This provision narrowly regulates the use of particular kinds of automatic calling technology that were used by telemarketers to make unsolicited phone calls to

[10] The Ninth Circuit has concluded that SMS messages fall within the scope of "calls" subject to the TCPA. *See, e.g.*, *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009). While Amici do not agree that all text messages constitute "calls," that issue is not before the Court.

unwilling recipients at the time the statute was passed. *See, e.g.*, S. Rep. 102-178, at 2 ("[h]aving an unlisted number does not prevent those telemarketers that call numbers randomly or sequentially"); *id.* ("some automatic dialers will dial numbers in sequence, thereby tying up all the lines of a business and preventing any outgoing calls").

Congress could have drafted the statute to encompass all automated calls to wireless numbers, but it did not. Instead, Congress carefully limited the definition of "automatic telephone dialing system" to "equipment which has the capacity" *both* (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). This narrow and highly specific definition serves important purposes.

Congress was concerned that by using such equipment to generate numbers at random or sequentially, telemarketers might reach unlisted phone numbers, hospitals, or emergency organizations. *See*, *e.g.*, 137 Cong. Rec. 35,302 (Nov. 26, 1991); H.R. Rep. No. 101-633, at 3 (1990); H.R. Rep. No. 102-317, at 10 (1991); S. Rep. No. 102-178, at 2. Likewise, it was concerned that telemarketers might "dial numbers in sequence, thereby tying up all the lines of a business and preventing outgoing

calls." S. Rep. No. 102-178, at 2. At the same time, Congress explicitly did not want to inhibit "expected or desired communications between businesses and their customers." H.R. Rep. No. 102-317, at 17 (1991). Congress thus confined potential TCPA claims to calls involving specialized equipment that is capable of randomly or sequentially generating and dialing telephone numbers, thereby ensuring that not every phone call to a cell phone becomes a potential federal case.

Most courts—including the lower court here—remain faithful to the text and purpose of the TCPA and interpret the statute as regulating calls to cell phones only if they are made with equipment that has the requisite capacity to generate random or sequential telephone numbers. *See, e.g., Dominguez*, 2014 U.S. Dist. LEXIS 36542, at *16-19 & n.6 (granting summary judgment to Appellee on ATDS issue because system did not have capacity to generate random or sequential numbers); *Satterfield*, 569 F.3d at 951 (holding that an ATDS must have the "capacity" to "store, produce, or call randomly or sequentially generated telephone numbers"); *Gragg v. Orange Cab Co.*, No. C12-0576RSL, 2014 U.S. Dist. LEXIS 16648, at *7-10 (W.D. Wash. Feb. 7, 2014) (granting summary judgment to defendant on ATDS issue

because system did not have capacity to generate random or sequential numbers); *Stockwell v. Credit Mgmt.*, No. 30-2012-00596110, slip op. at 2 (Cal. Super. Ct. Oct. 3, 2013) (same).[11]

Appellant nonetheless urges this Court to adopt a strained interpretation of the TCPA that would eliminate the random or sequential number generation requirement. *See* Appellee Br. 19-26. As discussed in greater detail below, this Court should reject Appellant's invitation to rewrite the statute and instead follow the interpretation adopted by a majority of courts.

B. The FCC Did Not Broaden The Scope Of The TCPA's ATDS Definition

To support his position, Appellant relies primarily on statements made by the FCC in its ruling on predictive dialers. But Appellant

[11] *See also Lozano v. Twentieth Century Fox Film Corp.*, 702 F. Supp. 2d 999, 1010-11 (N.D. Ill. 2010) (explaining that violation of TCPA requires use of equipment with capacity to store or produce telephone numbers using a random or sequential number generator); *In re Jiffy Lube Int'l, Inc. Text Spam Litig.*, 847 F. Supp. 2d 1253, 1261 (S.D. Cal. 2012) (ATDS must have the "'capacity'" to "'store, produce, or call randomly or sequentially generated telephone numbers'") (quoting *Satterfield*, 569 F.3d at 951); *Ibey v. Taco Bell Corp.*, No. 12-cv-0583-H, 2012 U.S. Dist. LEXIS 91030, at *9 (S.D. Cal. June 18, 2012) (dismissing TCPA claim because complaint failed to allege "that the system uses a random or sequential number genera[tor]").

misunderstands the FCC's ruling, which did not (and could not) eliminate Congress' specific limitations in the ATDS definition.[12] The FCC ruled only that a "predictive dialer" *falls within the statutory definition of an ATDS* because it had the requisite random or sequential number generation capacity, even though in practice that capacity was not used. The Commission did not purport to eliminate the number generator requirement or otherwise alter the definition of ATDS.

The portion of the *2003 FCC Order* that Appellant relies on resolved an issue that courts had not yet decided—whether "predictive dialers," which have the capacity to generate and dial random or sequential telephone numbers, but operate by simply dialing numbers

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[12] The few courts that have adopted Appellant's interpretation have similarly taken statements made by the FCC about predictive dialers out of context to conclude that a capacity to generate random or sequential numbers is no longer required. *See Sterk v. Path, Inc.*, No. 13-cv-2330, 2014 U.S. Dist. LEXIS 73507, at *10-19 (N.D. Ill. May 30, 2014) (citing *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* ("*2003 FCC Order*"), 18 FCC Rcd. 14,014, 14,091-93 (2003); *In re Rules & Regulations Implementing the TCPA of 1991* ("*2012 FCC Order*"), 27 FCC Rcd. 15,391, 15,392 n.5 (2012)); *Legg v. Voice Media Grp., Inc.*, No. 13-cv-62044, 2014 U.S. Dist. LEXIS 67623, at *9-11 (S.D. Fla. May 16, 2014) (citing *2003 FCC Order* at 14,091-93); *Sherman v. Yahoo! Inc.*, 13-cv-0041, 2014 U.S. Dist. LEXIS 13286, at *15-20 (S.D. Cal. Feb. 3, 2014) (citing *2003 FCC Order* at 14,091-93; *In re Rules & Regulations Implementing the TCPA* ("*2008 FCC Order*"), 23 FCC Rcd. 559, 566 (2008)).

from a prescribed list, fall within Congress' definition of ATDS. *See 2003 FCC Order* at 14,090-93.[13] The FCC reasoned that because predictive dialers met the ATDS definition, it was irrelevant that in practice they dialed numbers from lists, rather than using their capacity to generate numbers randomly or sequentially:

> [T]o exclude from these restrictions equipment that use predictive dialing software from the definition of "automated telephone dialing equipment" simply because it relies on a given set of numbers would lead to an unintended result. Calls to emergency numbers, health care facilities, and wireless numbers would be permissible when the dialing equipment is paired with predictive dialing software and a database of numbers, but prohibited when the equipment operates independently of such lists and software packages.

Id. at 14,092. Accordingly, the FCC found that predictive dialers fell within the statutory definition of an ATDS. *Id.* at 14,093 ("Therefore the FCC finds that a predictive dialer *falls within* the meaning and statutory definition of 'automatic telephone dialing equipment' and the intent of Congress.") (emphasis added).

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[13] As the FCC explained, a predictive dialer is a specific type of telemarketing equipment that "uses a complex set of algorithms to automatically dial consumers' telephone numbers in a manner that 'predicts' the time when a consumer will answer the phone and a telemarketer will be available to take the call. Such software programs are set up in order to minimize the amount of downtime for a telemarketer." *2003 FCC Order* at 14,022 n.31.

In 2008—while discussing a different issue—the FCC referred back to the *2003 FCC Order* on predictive dialers, but again said nothing about changing the ATDS definition. *2008 FCC Order* at 566-67. Instead, it invoked the statutory ATDS definition. *Id.* at 566. And more recently, the FCC reaffirmed the number generation capacity requirement, "emphasiz[ing] that [the ATDS] definition covers any equipment ***that has the specified capacity to generate numbers*** and dial them without human intervention regardless of whether the numbers are randomly or sequentially generated or come from calling lists." *2012 FCC Order* at 15,392 n.5 (emphasis added).

If, as Appellant claims, the FCC eliminated the need to demonstrate a capacity to generate numbers, the FCC would not keep referring to that requirement. In any event, the FCC's own official ATDS definition, which it adopted after public notice in the Federal Register, eliminates any alleged ambiguity in the proper interpretation of the ATDS requirement. That definition retains the random or sequential number generator requirement: "The terms automatic telephone dialing system and autodialer mean equipment which has the capacity to store or produce telephone numbers to be called ***using a***

random or sequential number generator and to dial such numbers." 47 C.F.R. § 64.1200(f)(2) (emphasis added). Although the FCC has amended other of its TCPA-related definitions—after giving notice and a time period prior to the effective date—the FCC has never amended its official ATDS definition to eliminate the random or sequential number generation capacity requirement.

Regardless, because that requirement is part of the statutory text, the FCC has no authority to change it. *See La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 376 (1986) ("As we so often admonish, only Congress can rewrite [a] statute."). It should therefore come as no surprise that in the FCC's most recent Consumer Guide addressing telemarketing calls, it explained that "[a]utodialers can produce, store and dial telephone numbers using a random or sequential number generator." FCC, *Consumer Guide: Unwanted Telephone Calls* (June 14, 2013), http://www.fcc.gov/cgb/consumerfacts/tcpa.pdf. If the FCC had eliminated the random or sequential number generator requirement, why would it be telling consumers otherwise?

C. Adopting Appellant's Interpretation Of The ATDS Definition Would Lead To Absurd Results And Render The TCPA Unconstitutionally Overbroad

Interpreting the ATDS definition to cover any equipment that is capable of automatically dialing lists of numbers—as Appellant proposes—would have serious consequences. Under that approach, the TCPA would regulate nearly every call or text from a smartphone. Most smartphones have speed dial, group texting, and text auto-response capabilities—functions that give them the capacity to automatically dial numbers from pre-existing lists, without a human manually typing in each number. Accordingly, most smartphones would qualify as ATDSs under Appellant's interpretation, and every call they make or text they send would be subject to the TCPA's requirements, regardless of whether it was actually made using the phone's automatic dialing capabilities. *See* 47 U.S.C. § 227(b)(1)(A)(iii) ("It shall be unlawful for any person . . . to make any call (other than for emergency purposes or with the prior express consent of the called party) using any automatic telephone dialing system . . . to any telephone number assigned to a . . . cellular telephone service . . . .").

This is not hyperbole: indeed, the most recent court to adopt the interpretation that Appellant proposes acknowledged that it subjects cell phones to the TCPA. *See Sterk*, 2014 U.S. Dist. LEXIS 73507, at *17. Likewise, Appellant's purported expert, Mr. Snyder, has conceded as much in testimony given in this case and elsewhere. *See* A572-75 (Snyder Tr. at 15:19-18:6) (testifying that he is not aware of any technology capable of sending a text message that would *not* be an ATDS under Appellant's definition); A835-36 (Snyder Tr. in *Gragg v. Orange Cab Co., Inc.* at 80:25-81:10) (stating that an iPhone "certainly . . . has the ability to automatically dial telephone numbers en masse from a list of numbers," and thus "fulfills the definition of an ATDS within the TCPA").

Because most courts have put the burden on the caller to prove "prior express consent," under Appellant's definition, every non-emergency call or text message from a cell phone would be a prima facie violation of the TCPA. This approach would have profound real-world consequences. Ordinary consumers would violate the TCPA every day, millions of times, by dialing wrong numbers, by accidentally dialing a number, and by calling businesses or people from whom they could not

prove they had obtained prior express consent to call using their cell phone. That is an absurd result, one far removed from the specific abusive telemarketing practices Congress intended the TCPA to combat.

It also would render the TCPA unconstitutionally overbroad. Courts addressing constitutional overbreadth challenges to the TCPA have rejected them by relying on the limiting language in the statutory ATDS definition.[14] That is no accident: the United States recently filed a brief defending the constitutionality of the TCPA. In doing so, it sided with those courts that have adopted the more narrow interpretation of "automatic telephone dialing system." *De Los Santos* DOJ Br. at 8-11 & n.7. The Government cited with approval *Hunt v. 21st Mortgage Co.*, which held that to satisfy the statutory definition the equipment at issue must "have present capacity, at the time the calls were being

[14] *See, e.g., Lozano*, 702 F. Supp. 2d at 1012 ("Here, the limitations on the prohibition of the use of equipment with certain capacities reflect that the restriction is not excessive in proportion to the interest it serves." (citation omitted)); *Jiffy Lube*, 847 F. Supp. 2d at 1261 (holding that TCPA was not constitutionally overbroad after finding that an ATDS must have the "'capacity'" to "'store, produce, or call randomly or sequentially generated telephone numbers'" (quoting *Satterfield*, 569 F.3d at 951)).

made, to store or produce and call numbers from a number generator." *De Los Santos* DOJ Br. at 11 n.7 (quoting *Hunt v. 21st Mortgage Corp.*, No. 2:12-cv-02697, 2:12-cv-2697, 2013 WL 53200061, at *4 (N.D. Ala. Sept. 17, 2013)). It also relied on the analysis of *In re Jiffy Lube,* which found "'no support for [the proposition] that . . . an iPhone or Black[]Berry'" is an ATDS, *id.* at 8 (quoting *Jiffy Lube*, 847 F. Supp. 2d at 1261-62), after concluding that number generation capacity is required to qualify, *Jiffy Lube*, 847 F. Supp. 2d at 1261 (citing *Satterfield*, 569 F.3d at 951).[15]

The *De Los Santos* court agreed with the United States and refused to broadly interpret the TCPA, citing *Gragg*, *Jiffy Lube*, the lower court's decision here, and other cases that have interpreted the ATDS definition as requiring a capacity to randomly or sequentially

[15] The United States' brief is particularly significant because it undermines Appellant's claim that the FCC somehow eliminated the number generator requirement. While the United States surely was aware of the FCC's statements regarding predictive dialers, notably absent from its brief was any support for the notion that the FCC had somehow modified the TCPA's ATDS definition to eliminate the requirement that the equipment must have the capacity to generate random or sequential numbers. To the contrary, it recognized that the TCPA "regulat[es] the 'capacity' to store or produce randomly or sequentially generated numbers." *De Los Santos* DOJ Br. at 9 n.5.

generate numbers. *De Los Santos*, 2014 U.S. Dist. LEXIS 88711, at *18-21. Moreover, the court stressed that "[i]f autodialers included smartphones, or if autodialers included computers, then Defendant could argue overbreadth." *Id.* at *21. Only because the court construed the ATDS definition to require a capacity to generate random or sequential numbers, there was no constitutional problem.

De Los Santos is not the only case in which the United States has taken this position. In *Jiffy Lube*, the government also intervened and defended the TCPA against the defendant's argument that the law violated the First Amendment. *See Jiffy Lube* DOJ Br. In so doing, the United States similarly rejected the argument that smartphones and personal computers are ATDSs, stressing that these devices lack the capacity "'to randomly or sequentially generate telephone numbers.'" *Id.* at 8 n.6. The United States also cited with approval a host of cases that held that an ATDS must have this capacity. *See id.* at 4 & n.3 (citing *Satterfield*, *Lozano*, and *Abbas v. Selling Source*, No. 09-cv-3413, 2009 WL 4885571, at *4 (N.D. Ill. Dec. 14, 2009) ("The plain text of the statute requires only 'the capacity' for such random or sequential

[number] generation, and the implementing regulations impose no higher burden." (citation omitted))).

Appellant here advances an ATDS interpretation that indisputably would encompass smartphones and personal computers. In doing so, Appellant implicates the serious First Amendment problem that the courts in *De Los Santos*, *Jiffy Lube*, and other courts have avoided by properly limiting the scope of an ATDS in accordance with Congress' intent. The Court should reject the Appellant's interpretation and avoid rendering the TCPA constitutionally overbroad.

CONCLUSION

For these reasons, Amici submit that the Court should affirm the decision below, and hold that to qualify as an ATDS, the equipment at issue must have the capacity to generate random or sequential telephone numbers.

DATED: August 6, 2014

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Appellate Rule 28.3(d), the undersigned hereby certifies that David H. Kramer, Tonia Ouellette Klausner, and David J. Strandness are members of good standing of the bar of the United States Court of Appeals for the Third Circuit.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6,055 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

Pursuant to Local Appellate Rule 31.1, the undersigned certifies that on August 6, 2014, I caused the foregoing brief to be filed with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system and will cause seven (7) copies of the brief to be mailed to the Clerk.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. I further certify that I will cause the foregoing document to be mailed by First-Class Mail, postage prepaid, or to be dispatched to a third party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants:

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