No. 19-631

In The Supreme Court of the United States

WILLIAM P. BARR, ATTORNEY GENERAL; FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RETAIL LITIGATION CENTER, INC. AND NATIONAL RETAIL FEDERATION AS AMICI CURIAE SUPPORTING NEITHER PARTY

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BRIEF FOR RETAIL LITIGATION CENTER, INC. AND NATIONAL RETAIL FEDERATION AS AMICI CURIAE SUPPORTING NEITHER PARTY

The Retail Litigation Center, Inc. and the National Retail Federation respectfully submit this brief as amici curiae in support of neither party.[1]

INTEREST OF AMICI CURIAE

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

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice before the due date of the intention of amici to file this brief. Petitioners have consented to the filing of this brief. Respondents have filed a blanket consent to the filing of amicus briefs.

The National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers from the United States and more than 45 countries. Retail is the largest private-sector employer in the United States, supporting one in four U.S. jobs—approximately 42 million American workers—and contributing $2.6 trillion to the annual GDP. NRF periodically submits amicus curiae briefs in cases raising significant legal issues for the retail community.

The RLC, the NRF, and their members have a significant interest in the subject matter of this case. The overwhelming majority of the RLC's and the NRF's members communicate with their customers by phone and by text messages. Many retailers seek to develop meaningful and sustained relationships with their customers through informational and promotional calls and text messages. Consumers value and affirmatively seek out these communications. Because of these calls and text messages, however, many of the RLC's and the NRF's members have become defendants in the thousands of lawsuits filed every year under the Telephone Consumer Protection Act ("TCPA"). Many of these lawsuits are filed by a small group of law firms and self-described professional plaintiffs. Retailers are subjected to contradictory judicial rulings and counterproductive regulations that leave retailers unclear about their compliance obligations.

They thus must choose between withholding communications valued by consumers or exposing themselves to rampant litigation under the TCPA. Accordingly, the RLC, the NRF, and their members will be directly and significantly affected by this Court's decision in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

When Congress enacted the TCPA in 1991, it made clear that "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices." Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(9), 105 Stat. 2394, 2394. Since then, however, the "balanced" approach directed by Congress to address certain telemarketing phone calls has been hijacked by the plaintiffs' bar to a ridiculous degree to extort monetary gains that the congressional sponsors never imagined. Thirty years after its enactment, the TCPA has been contorted by the plaintiffs' bar and interpreted by courts in ways that threaten legitimate businesses engaged in routine commercial activity with massive liability for communications far removed from the harassing, unwanted telemarketing calls that motivated the statute's enactment. And because of the potential for uncapped aggregate statutory damages, the TCPA has become a powerful engine for litigation driven by lawyers and professional plaintiffs, much of it on behalf of putative classes seeking millions or even billions in statutory damages.

This dangerous legal landscape puts conscientious retailers in an impossible position. Retailers expend substantial time and resources on TCPA compliance and support reasonable efforts to combat illegal telemarketing practices. But the significant uncertainty

that now exists about the statute's breadth chills common customer communications that are far removed from the harassing telemarketing practices that motivated the TCPA's enactment. That hurts customers, who may be deprived of communications they want and need. Order confirmations, shipping and delivery notifications, appointment reminders, and prescription refill reminders are all potentially subject to TCPA liability under judicial and agency interpretations of the statute's automated-call prohibition.

The RLC and the NRF take no position on the constitutionality of the TCPA's automated-call prohibition or the proper remedy for any constitutional violation. But they submit this brief so that the Court will understand some of the consequences—or lack thereof—of a decision invalidating the prohibition. On the one hand, such a decision would *not* result in an increase in unwanted calls or texts from retailers. Retailers (like other legitimate businesses) have no desire, and no incentive, to alienate their customers by engaging in the unwanted and intrusive practices that motivated the TCPA's enactment. Just the opposite. On the other hand, an invalidation decision would provide relief from an arbitrary and punitive regime that actually harms customers by chilling retailers' ability to provide communications customers want and need.

ARGUMENT

I. THE TCPA CREATES SIGNIFICANT UNCERTAINTY FOR RETAILERS AND OTHER COMPANIES

The TCPA is broken. Courts are intractably divided on issues central to the operation of the statutory scheme. Retailers can no longer consistently rely on the defenses Congress created to protect legitimate businesses communicating with their customers. And the FCC has done little to adequately address these issues. The result is a litigation minefield in which a legitimate business's inadvertent misstep can trigger massive liability. Whether in this case or another, the RLC and the NRF hope this Court will step in to address this dysfunction.

A. Businesses Lack Clarity On The Scope Of The ATDS Definition

The TCPA's prohibition on automated calls has been the subject of extensive litigation resulting in contradictory opinions. The TCPA generally makes it unlawful "to make any call * * * using any automatic telephone dialing system or an artificial or prerecorded voice" to any cellular telephone. 47 U.S.C. § 227(b)(1)(A).[2]

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[2] The Federal Communications Commission ("FCC") has interpreted "call[s]" to include text messages. *See Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 7964 n.3 (2015) ("*2015 FCC Order*"); *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 667 (2016) ("A text message to a cellular telephone, it is undisputed, qualifies as a 'call' within the compass of § 227(b)(1)(A)(iii).").

That prohibition excepts only calls "made for emergency purposes," calls "made with the prior express consent of the called party," and calls "made solely to collect a debt owed to or guaranteed by the United States." *Ibid.* The TCPA in turn defines an "automatic telephone dialing system" 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).

The automated-call restriction is badly outdated. It "was enacted in 1991—before the first text message was ever sent." *2015 FCC Order*, 30 FCC Rcd. at 8087 (O'Rielly, Comm'r, dissenting in part and approving in part). Modern communication technologies bear little resemblance to those that motivated the TCPA's enactment. TCPA plaintiffs have nonetheless attempted to "shoehorn a broken regime on a completely different technology." *Ibid.* That effort has led to grave uncertainty that presents significant challenges for retailers and other companies trying in good faith to comply with the law.

To start, courts have adopted divergent interpretations of what devices qualify as ATDSs under the automated-call prohibition. Consistent with the statutory text, the Third, Seventh, and Eleventh Circuits have held that systems must store or produce numbers using a random or sequential number generator to fall within the ATDS definition. *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018); *Gadelhak v. AT&T*

Servs., Inc., ___ F.3d ___, No. 19-1738, 2020 WL 808270, at *1 (7th Cir. Feb. 19, 2020); *Glasser v. Hilton Grand Vacations Co., LLC*, 948 F.3d 1301, 1304-05 (11th Cir. 2020). By contrast, the Ninth Circuit holds that even equipment that dials numbers stored in a customer database, without any random or sequential number generation, satisfies the ATDS definition. *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 (9th Cir. 2018). And district courts are in even greater disarray. Between March 2018 and October 2019, 38 district court decisions adopted the view of the Third, Seventh, and Eleventh Circuits, while 28 district court rulings went the Ninth Circuit's way. Alexis Kramer, *Facebook Robocall 4 Case Gives Justices Shot to Define Autodialer*, Bloomberg L. (Oct. 28, 2019).[3]

That leaves the TCPA liability of defendants to the happenstance of a recipient's physical location when a call or text sent using conventional technology is received. If the recipient is at her home in Philadelphia, Chicago, or Miami, there will be no violation under their respective circuits' interpretation of the statute. But if that text arrives after she gets off a plane to visit Los Angeles, TCPA liability and statutory damages could follow. Or if that same person takes a cross-country road trip, the TCPA's applicability to her texts will toggle on and off depending on which judicial district she is in upon receipt. This unpredictable legal

[3] A petition for a writ of certiorari presenting this question about the ATDS definition is currently pending before this Court. *Facebook, Inc. v. Duguid*, No. 19-511 (U.S. Oct. 17, 2019).

regime greatly complicates national retailers' compliance efforts.

B. The Consent Exception Does Not Reliably Protect Businesses

The automated-call prohibition contains an exception for calls "made with the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A). But the consent exception often fails to protect businesses that, reasonably and in good faith, believe their intended recipient has consented to receive communications. It is more common than this Court might expect for a consumer to provide her mobile phone number to a business with consent to be contacted, but for the consented-to calls or texts to be received by someone else. Occasionally this occurs because the consumer mistakenly provided the wrong number. More frequently, it happens because the original owner who consented to contact at that number recycles her physical phone, and the phone number is reassigned to another person. The latter scenario is increasingly common: "[M]illions of wireless numbers are reassigned each year." *ACA Int'l v. FCC*, 885 F.3d 687, 705 (D.C. Cir. 2018).

Critically, retailers have no way to know that the phone number in their database—once owned by a consumer who legitimately consented to receiving texts from the retailer—was reassigned by the cellular provider. *2015 FCC Order*, 30 FCC Rcd. at 8093 (O'Rielly, Comm'r, dissenting in part and approving in part) ("There is simply no realistic way for a company to

comprehensively determine whether a number has been reassigned."). Indeed, professional plaintiffs—and their lawyers—are intentionally exploiting that information gap regarding wrong or recycled numbers to bring suit. *Id*. at 8091; *see id.* at 8073 (Pai, Comm'r, dissenting). In one instructive example, a plaintiff boasted that she had purchased no fewer than 35 cell phones for the sole purpose of attracting calls that she could convert into lucrative TCPA claims. *Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782, 798-99, 801 (W.D. Pa. 2016). She made a point of choosing area codes in economically depressed areas, hoping she would thus receive more frequent debt collection calls attempting to reach customers who previously had those phone numbers. *Id.* at 799. According to her deposition testimony, she transported her shoebox full of cell phones and call logs with her at all times, even on vacations, as part of her TCPA business:

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

Id. at 788, 798-99; *see also* Jessica Karmasek, *Filing TCPA Lawsuits: 'It's What I Do,' Says Professional Plaintiff with 35 Cell Phones*, Forbes (Aug. 25, 2016), https://www.forbes.com/sites/legalnewsline/2016/08/25/

filing-tcpa-lawsuits-its-what-i-do-says-professionalplaintiff-with-35-cell-phones.

These difficulties around wrong and recycled numbers mean that securing consent can be insufficient to protect even the most conscientious retailer from massive liability—unless the retailer decides to forgo *all* texts, even those that are truly valued by the majority of consumers.

C. The FCC Has Failed To Provide Clear And Pragmatic Guidance For Businesses

Congress authorized the FCC to adopt regulations implementing the TCPA's automated-call restriction. 47 U.S.C. § 227(b)(2). But the agency has repeatedly failed to adopt clear, commonsense rules to provide companies guidance on these issues and curb misuse of the TCPA. As the D.C. Circuit has recognized, the FCC's orders interpreting the ATDS definition have "left significant uncertainty about the precise functions an autodialer must have the capacity to perform." *ACA Int'l*, 885 F.3d at 701. And the court invalidated the agency's most recent treatment of that issue, concluding that it "falls short of reasoned decisionmaking in 'offer[ing] no meaningful guidance' to affected parties in material respects on whether their equipment is subject to the statute's autodialer restrictions." *Ibid.* Indeed, as the D.C. Circuit observed, "all smartphones, under the [FCC's] approach, meet the statutory definition of an autodialer." *Id.* at 697. That "anomalous outcome[ ]," the court reasoned, indicated that the

agency's "interpretation of the statute's reach" was "unreasonable" and "impermissible." *Ibid.*

The FCC's treatment of reassigned numbers similarly has failed to protect good-faith callers from accidental liability. The agency previously adopted a "one-call safe harbor" in which a caller "unaware that a consenting party's wireless number has been reassigned" could "make one (and only one) post-reassignment call without incurring liability." *ACA Int'l*, 885 F.3d at 706. The D.C. Circuit held that this approach was arbitrary and capricious and set aside the agency's "treatment of reassigned numbers more generally." *Id.* at 708-09. In particular, the court noted that the agency "gave no explanation of why reasonable-reliance considerations would support limiting the safe harbor to just one call or message." *Id.* at 707. After all, "[t]he first call or text message * * * might give the caller no indication whatsoever of a possible reassignment (if, for instance, there is no response to a text message, as would often be the case with or without a reassignment)." *Ibid.* And the one-call safe harbor "provided a new way for consumers acting in bad faith to entrap legitimate companies." *2015 FCC Order*, 30 FCC Rcd. at 8091 (O'Rielly, Comm'r, dissenting in part and approving in part). A person seeking to manufacture liability "could take a call, never let on that it's the wrong person, and receive subsequent calls solely to trip the liability trap." *Ibid.*

In the nearly two years since the D.C. Circuit's decision in *ACA International*, the FCC has done little to address the flaws the court identified in the agency's

treatment of these issues. To be sure, it has published several public notices seeking comments on the ATDS definition, treatment of reassigned numbers, and revocation of consent. *See*, *e.g.*, *Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's* ACA International *Decision*, 33 FCC Rcd. 4864, 4864-67 (2018); *Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's* Marks v. Crunch San Diego, LLC *Decision*, CG Docket No. 02-278, 2018 WL 4801356, at *1 (FCC Oct. 3, 2018). But the agency has yet to take any meaningful action in response to the many comments it has received urging it to address these critical issues.[4] Accordingly, retailers and other businesses are left to grapple with contradictory judicial rulings that frustrate their ability to comply with the law.

II. THE TCPA GENERATES ABUSIVE AND COUNTERPRODUCTIVE LITIGATION

Thanks in part to the judicial and regulatory disarray discussed above, TCPA litigation has exploded

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[4] The Retail Industry Leaders Association (a sister organization to the RLC) and the NRF have submitted several sets of comments to the FCC on these issues. *See*, *e.g.*, Comments of the Retail Industry Leaders Association, CG Docket No. 02-278 (FCC June 13, 2018), https://ecfsapi.fcc.gov/file/10614232873363/RILA%20TCPA%20Comments.pdf; Comments of the National Retail Federation, CG Docket No. 17-59 (FCC June 7, 2018), https://ecfsapi.fcc.gov/file/10608633820337/NRF%20Comments%20to%20FCC%20NPRM%20on%20TCPA%20(Reassigned%20Numbers)%20-%20June%207%202018.pdf.

since the statute's enactment in 1991. Compliance-minded retailers are now vulnerable to abusive TCPA class actions and settlement demands, with little concomitant benefit to consumers.

When Congress enacted the TCPA in 1991, it intended to allow individual consumers to recover small sums in small claims courts without the assistance of lawyers. *See* 137 Cong. Rec. 30,821 (1991) (statement of Sen. Hollings) ("Small claims court or a similar court would allow the consumer to appear before the court without an attorney."). The TCPA thus provides statutory damages of $500 for each violation, and up to three times that amount for willful violations. 47 U.S.C. § 227(b)(3)(B). This damages amount was "set to be fair to both the consumer and the telemarketer." 137 Cong. Rec. 30,821.

But what was originally meant to be a shield for consumers has become a sword for lawyers. Indeed, "the TCPA has become the poster child for lawsuit abuse." *2015 FCC Order*, 30 FCC Rcd. at 8073 (Pai, Comm'r, dissenting). The number of new TCPA cases filed each year has skyrocketed from 14 in 2008 to nearly 5,000 in 2016 alone. U.S. Chamber Inst. for Legal Reform, *Analysis: TCPA Litigation Skyrockets Since 2007; Almost Doubles Since 2013* (Feb. 5, 2016), https://www.instituteforlegalreform.com/resource/analysis-tcpa-litigation-skyrockets-since-2007-almost-doubles-since-2013; WebRecon LLC, *2016 Year in Review: FDCPA Down, FCRA & TCPA Up* (Jan. 24, 2017), https://webrecon.com/2016-year-in-review-fdcpa-down-fcra-tcpa-up. The TCPA has "created a crippling litigation threat

for businesses in virtually all industries." O'Rielly, Comm'r, FCC, Remarks Before the ACA International Washington Insights Conference 2 (May 16, 2019), https://docs.fcc.gov/public/attachments/DOC-357496A1.pdf.

In particular, the promise of uncapped aggregate statutory damages, with no need to prove actual damages, has turned "[w]hat was once a 'cottage industry' " into "one of the most lucrative areas for the plaintiffs' bar." Stuart L. Pardau, *Good Intentions and the Road to Regulatory Hell: How the TCPA Went from Consumer Protection Statute to Litigation Nightmare*, 2018 U. Ill. J.L. Tech. & Pol'y, at 313, 321-22. More than a third of recent TCPA lawsuits were brought as nationwide class actions. U.S. Chamber Inst. for Legal Reform, *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits* 3 (Aug. 2017). And businesses receive an untold number of demand letters threatening classwide litigation in the absence of quick individual settlements. *See* Petition of SUMOTEXT Corp. for Expedited Clarification or, in the Alternative, Declaratory Ruling, CG Docket No. 02-278, at 4-6 (FCC Sept. 3, 2015). "Faced with even a small chance of a devastating loss," TCPA defendants are often "pressured into settling" even "questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011); *see also Brodsky v. HumanaDental Ins. Co.*, 910 F.3d 285, 291 (7th Cir. 2018) ("The consequences for a firm that violates the TCPA can be dire when it is facing not just a single aggrieved person, but a class.").

These class-action lawsuits have resulted in dramatic settlements. Among TCPA class actions filed in 2010 or later, 21 have settled for $10 million or more, 16 for $15 million or more, and nine for $30 million or more. Pardau, *supra*, at 322. Settlement figures in some cases have been much higher: cases filed in 2012 against Capital One Bank and Caribbean Cruise Line eventually settled for $75 million and $76 million, respectively. *Id.*; *see also TCPA Litigation Sprawl*, *supra*, at 10 (listing additional examples, *e.g.*, $49.9 million settlement by US Coachways, $45 million settlement by AT&T, and $40 million settlements by HSBC Bank Nevada and Interline Brands). These large class settlements "then incentivize even more litigation, in what has become a vicious circle of litigation abuse." U.S. Chamber Inst. for Legal Reform, *The Juggernaut of TCPA Litigation: The Problems with Uncapped Statutory Damages* 4 (Oct. 2013), https://www.instituteforlegalreform.com/uploads/sites/1/TheJuggernautofTCPALit_WEB.PDF. These settlements largely redound to the benefit of plaintiffs' attorneys rather than the consumers they purport to represent. As of late 2016, the average recovery for TCPA class members was $4.12, while the average take-home for TCPA plaintiffs' lawyers was $2.4 million. Pardau, *supra*, at 322.

Rather than seeking to redress the genuine consumer grievances the TCPA was enacted to address in the age of unwanted dinnertime phone calls, many of these lawsuits are built solely to extract money from businesses. Indeed, much litigation under the TCPA is brought by professional plaintiffs and counsel who

specialize in manufacturing and magnifying potential liability. *Bridgeview Health Care Ctr., Ltd. v. Clark*, 816 F.3d 935, 941 (7th Cir. 2016) (observing that TCPA litigation "has blossomed into a national cash cow for plaintiff's attorneys" (internal quotation marks omitted)). Just 44 law firms are responsible for filing about 60% of all TCPA lawsuits. *TCPA Litigation Sprawl*, *supra*, at 11. TCPA plaintiff firms use a variety of tactics to manufacture claims of non-compliance:

- Buying dozens of cell phones and requesting area codes for regions where debt collection calls are common. *See Stoops*, 197 F. Supp. 3d at 798-99, 801.
- Hiring staff to log calls in order to file hundreds of suits. *See Kinder v. Allied Interstate, Inc.*, No. E047086, 2010 WL 2993958, at *1 (Cal. Ct. App. Aug. 2, 2010).
- Porting a repeating digit phone number from a landline to a cell phone and making hundreds of thousands of dollars as a result. *See* Tr. of Hr'g on Pl.'s Standing at 12:3-5, *Konopca v. FDS Bank*, No. 15-cv-1547 (D.N.J. Feb. 16, 2016), ECF No. 56.
- Asking law firm employees to text "JOIN" to unknown company numbers. SUMOTEXT Petition, *supra*, at 4-6.
- Circumventing the opt-out mechanism of retail text message programs in order to revoke consent in a deliberately ineffective manner. *See Epps v. Earth Fare, Inc.*, No.

16-cv-8221, 2017 WL 1424637, at *5 (C.D. Cal. Feb. 27, 2017).

- Soliciting clients using questionable means. *See*, *e.g.*, *C-Mart, Inc. v. Metro. Life Ins. Co.*, No. 13-cv-80561, 2014 WL 12300313, at *1 (S.D. Fla. July 14, 2014).

- Teaching classes on how to sue telemarketers. *See Morris v. UnitedHealthcare Ins. Co.*, No. 15-cv-638, 2016 WL 7115973, at *6 (E.D. Tex. Nov. 9, 2016).

This state of affairs bears little resemblance to what Congress envisioned when it enacted the TCPA several decades ago. Congress set out to enable consumers to bring individual suits in small claims courts against unscrupulous telemarketers over unwanted dinnertime phone calls. Instead, the TCPA today sustains an entire industry of serial plaintiffs extracting multimillion-dollar settlements from legitimate companies under the threat of class-action suits with the potential for massive liability.

III. THE TCPA DISCOURAGES COMMUNICATIONS CONSUMERS WANT

These rampant and abusive TCPA lawsuits harm not only the compliance-oriented companies named as defendants but also the very consumers the statute was enacted to protect. These consumers experience increased costs and decreased convenience as companies are chilled from offering beneficial communications that their customers have come to want and expect.

The TCPA as now interpreted thus undermines fundamental First Amendment values. The "litigation risk" posed by the TCPA "chill[s] speech in direct contravention of the First Amendment's dictates." *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 615 (2003). By discouraging legitimate businesses from sending desired communications to their customers, the statute "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). This is no less problematic because retailers' speech is commercial in nature: "The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 579 (2011).

Congress did "not intend for th[e] restriction" on automated calls "to be a barrier to the normal, expected or desired communications between businesses and their customers." H.R. Rep. No. 102-317, at 17 (1991). Today, however, many TCPA lawsuits involve these desired communications between businesses and their customers. The TCPA was enacted to protect consumers against "the illegal telemarketers, the over-the-phone scam artists, and the foreign fraudsters." *2015 FCC Order*, 30 FCC Rcd. at 8072-73 (Pai, Comm'r, dissenting). "But trial lawyers have found legitimate, domestic businesses a much more profitable target." *Id.* at 8073. "Very frequently this litigation targets firms that are attempting to engage in legitimate business in compliance with the TCPA." Justin (Gus)

Hurwitz, *Telemarketing, Technology, and the Regulation of Private Speech: First Amendment Lessons from the FCC's TCPA Rules*, 84 Brook. L. Rev. 1, 57-58 (2018). Companies in diverse sectors of the economy—including the retail, healthcare, education, restaurant, entertainment, and hospitality industries—have been targeted by recent TCPA litigation. *TCPA Litigation Sprawl*, *supra*, at 7.

Many companies have been subjected to TCPA lawsuits based on these important and beneficial communications with their customers:

- To protect users against identity theft, Facebook provides optional login notifications that automatically alert a user when her account has been accessed from a new device and allow her to change her password and secure her account. *Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1150 (9th Cir. 2019), *petition for cert. pending*, No. 19-511 (U.S. Oct. 17, 2019). A plaintiff, who likely had a recycled number associated with another Facebook user, received several of these login-notification text messages. *Ibid.* He brought a class-action lawsuit against Facebook under the TCPA, alleging that these messages violated the automated-call prohibition. *Ibid.*

- Pharmacies are frequent targets of TCPA lawsuits for calling or texting their customers to remind them to pick up their prescriptions. *See*, *e.g.*, *Lindenbaum v. CVS Health Corp.*, No. 17-cv-1863, 2018 WL 501307, at *1 (N.D. Ohio Jan. 22, 2018); *Kolinek v. Walgreen Co.*,

311 F.R.D. 483, 487 (N.D. Ill. 2015); *Rooney v. Rite Aid Headquarters Corp.*, No. 14-cv-1249 (S.D. Cal. filed May 20, 2014).

- Akira, a Chicago-based apparel retailer, sent text messages to inform its customers of promotions, discounts, and in-store special events. *Blow v. Bijora, Inc.*, 855 F.3d 793, 796 (7th Cir. 2017). Customers could opt in to receiving messages by providing their phone number to in-store representatives, texting an opt-in number posted in stores, or filling out an opt-in card. *Ibid.* A customer filed a class-action lawsuit against the retailer, seeking over $1.8 billion in statutory damages. *Id.* at 797. After six years of costly litigation, the retailer prevailed on the ground that the customer had consented to receiving the text messages. *Id.* at 803-05.

- TaxiMagic, a precursor to Uber and Lyft, sent confirmation text messages to users who called a cab, indicating the cab's number and when the cab was dispatched to the user's location. *Gragg v. Orange Cab Co.*, 995 F. Supp. 2d 1189, 1191 (W.D. Wash. 2014). A user who requested a taxi received a confirmation message after his phone number was captured using caller ID. *Ibid.* The user sued the cab company as a putative class action, alleging violation of the TCPA's automated-call restriction. *Id.* at 1190.

- The Los Angeles Lakers asked fans to send texts with personalized messages to be displayed on the arena's jumbotron. *Emanuel v.*

> *Los Angeles Lakers, Inc.*, No. 12-cv-9936, 2013 WL 1719035, at *1 (C.D. Cal. Apr. 18, 2013). A fan attending a game sent a text message to the team and received a single text message confirming that his request had been received. *Ibid.* In response, he brought a class-action lawsuit against the team under the TCPA. *Ibid.*

The only way for businesses to avoid liability from those who would use the statute for their monetary gain is not to send communications that are truly valued by the vast majority of consumers. *See* Letter from Abercrombie & Fitch Co., CG Docket No. 02-278, at 4 (FCC May 13, 2015) (noting that "Abercrombie has eliminated the distribution of text messages to particular customers based solely on their carriers" because "the only way to avoid TCPA liability altogether for calls or texts related to reassigned numbers is to cease communicating"). That result does not benefit consumers—it harms them. They might not receive "critical and time-sensitive information," such as "data security breach notifications, prescription refill reminders, bill due date notices, school closure alerts, and notices of flight schedule changes." O'Rielly, *supra*, at 2-3.

* * *

The TCPA as now interpreted and litigated has strayed from the statute's original purpose. "Rather than focus on the illegal telemarketing calls that consumers really care about," professional TCPA plaintiffs and law firms manufacture liability and bring abusive lawsuits that "target useful communications between legitimate businesses and their customers." *2015 FCC*

Order, 30 FCC Rcd. at 8073 (Pai, Comm'r, dissenting). The "primary beneficiaries" of the TCPA's automated-call prohibition now are "trial lawyers, not the American public." *Ibid.* If this Court holds that the entire automated-call prohibition is unconstitutional, retailers have no intention of engaging in the intrusive and unwanted calls that motivated the TCPA's enactment decades ago. Instead, they will be able to send customers information they want and need without facing the risk of arbitrary and massive liability for doing so.

CONCLUSION

The RLC and the NRF take no position on the merits of the questions presented here. But they file this brief to provide the Court with a full understanding of the TCPA's real-world impact and the implications of a decision invalidating it.

Respectfully submitted,

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