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.,
Respondents.

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

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BRIEF OF MIDLAND CREDIT MANAGEMENT, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Midland Credit Management, Inc., along with its subsidiaries and affiliates (collectively, "MCM"), is the largest debt purchaser in the United States. One out of five American consumers has an account with MCM. For MCM and its consumers, First Amendment–protected speech is essential to their relationship—in particular, communication by telephone. Often, consumers are not even aware that they have outstanding debt until an account manager contacts them. Without these vital telephone calls, many consumers would have no opportunity to negotiate flexible and discounted repayment plans to resolve their debt and improve their credit.

In this day and age, when people use mobile phones as their primary or only telephone, MCM understandably contacts its consumers via their mobile devices. Recently, however, MCM's ability to speak with consumers about their debts has been hampered by the legal risk and substantial liability associated with this speech.

Specifically, over the past several years, thousands of lawsuits filed under the Telephone Consumer

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[1] Pursuant to this Court's Rule 37.2(a), counsel for all parties consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored, in whole or in part, by counsel to a party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than *amici* and their counsel.

Protection Act ("TCPA") have sought to capitalize on a provision that prohibits calls to cell phones that use "any automatic telephone dialing system or an artificial prerecorded voice." 47 U.S.C. § 227(b)(1)(A) (the "cellphone-call ban" or "ban"). The TCPA imposes a $500 to $1500 per-call penalty for violations, even as it exempts favored messages, including the collection of debts "owed to or guaranteed by the United States." *Id.* § 227(b)(1)(A)(iii) (the "government-debt exception"). MCM has a substantial interest in this case because its speech is constrained by the TCPA's content-based ban, and MCM, like many businesses, spends significant sums on TCPA-related activities, including compliance and litigation defense.

SUMMARY OF ARGUMENT

I.A. The TCPA's cellphone-call ban violates the First Amendment. It burdens protected speech—including any phone calls completed using "any automatic telephone dialing system"—while exempting speech that the government has chosen to favor. Plainly, the ban is content-based. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227-28 (2015). It treats calls differently "based on [their] communicative content." *Id.* For example, if a caller discusses "solely" debt owed to or guaranteed by the government, the caller is free to speak. 47 U.S.C. § 227(b)(1)(A)(iii). But if the caller discusses a different type of debt owed to someone else, he or she faces stiff penalties of up to $1,500 per call. The ban is therefore "presumptively unconstitutional and may be justified only if the government proves [it is] narrowly tailored to

serve compelling state interests." *Reed*, 135 S. Ct. at 2227.

This content-based ban cannot survive strict scrutiny. The Government says the ban furthers an interest in "individual privacy" from unwanted calls. Gov't Br. 14; *see United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813, (2000). But the government-debt exception shows that this interest is not one that the Government treats as compelling, and that the ban is not narrowly tailored to any such interest. The exception *permits* a substantial number of unconsented-to debt-collection calls, provided that the debt in question is owed to the government, and not a private entity. The Government says that these calls do "not do appreciable damage to the privacy interests underlying the TCPA." Gov't Br. 30. But if that is true, the Government's interest in banning calls about (for example) other types of debts can hardly be compelling. After all, a cellular phone call about a missed payment on a government-backed mortgage loan is no different as a practical matter to the called party than a call about a missed payment on a mortgage loan made by a private bank.

Meanwhile, the Government has ample content-neutral ways to advance any interest it has: treating phone calls evenhandedly without regard to what the caller says. The First Amendment does not tolerate the TCPA's selective ban. *Reed*, 135 S. Ct. at 2231. The Fourth and Ninth Circuits therefore correctly held that the cellphone-call ban violates the First Amendment. Pet. App. 12a-24a; *Duguid v. Facebook, Inc.*, 926 F.3d

1146, 1153-56 (9th Cir. 2019), *petition for cert. filed*, 88 U.S.L.W. 3136 (U.S. Oct. 21, 2019) (No. 19-511).

B. That leaves remedy. Congress has multiple ways it can avoid content-based bans on speech: It can burden less speech, or more—in either case legislating evenhandedly without regard to the content of the speech. But for courts that have invalidated a content-based ban on speech, there can be only one answer. The remedy is to strike the unconstitutional ban. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508-10 (2010). A court may not legislate a broader (yet content-neutral) ban on speech. Hence, upon finding that a speech restriction violates the First Amendment, this Court has consistently invalidated the challenged restriction. *See Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 233-34 (1987); *see also Reed*, 135 S. Ct. at 2231-32; *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 573-74 (2011). The Government's alternative—that this Court instead rewrite the cellphone-call ban by excising the government-debt exception—runs counter to the First Amendment's promise to protect against "abridge[ments of] the freedom of speech," U.S. Const., amend. I, and would perversely burden more speech than Congress authorized. If more speech is to be banned, the initiative must come from Congress, not this Court.

II.A. The Court need not have any hesitation about invalidating the entire cellphone-call ban. This ban burdens a remarkable amount of core protected speech, with remarkably little justification.

Because the statute provides for penalties of up to $1,500 *per call* for calls that do not fit within the statute's content-based exceptions, the TCPA's speech ban has become fodder for thousands of lawsuits every year.[2] Healthcare, technology, travel, dining, entertainment, sports, financial services, retail—no sector of the economy is immune. Businesses are sued for core speech: offering tools and applications that allow users to communicate with each other, calling their own customers, and responding to text messages. And with the prospect of large bounties, lawyers have developed mobile applications to quickly convert calls into lawsuits, while prospective plaintiffs have invented systems to *induce* wrong-number calls so that, when a business duly contacts them to engage in speech, they can sue. Multimillion-dollar class-action settlements are common, because even innocent defendants often cannot risk an adverse ruling due to the TCPA's sky-high penalties.

Making matters worse, the TCPA's burdens are especially heavy because some Circuits—though not others—have interpreted the TCPA's definition of "automatic telephone dialing system" to include not just equipment that has the capacity to use "a random or sequential number generator" but *any* equipment with the capacity to store and dial phone numbers. Under

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[2] *See* U.S. Chamber Institute for Legal Reform, *TCPA Litigation Sprawl: A Study of Sources and Targets of Recent TCPA Lawsuits* (Aug. 2017), https://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Paper_Final.pdf.

this sweeping definition, a business that uses any automated system to store and then dial telephone numbers—including, for example, the numbers of its own customers—falls within the purview of the TCPA's speech ban. This means that liability for speech turns not only on the content of the speech but also the jurisdiction in which the speaker is sued.

B. There is no sound reason for this Court to rewrite, rather than invalidate, the TCPA's cellphone-call ban in order to preserve the massive and unjustified burden on speech that the TCPA has become. Nor is doing so necessary to protect consumers' privacy: Other provisions of the TCPA protect consumers from harassing calls.

ARGUMENT

I. The TCPA's Content-Based Cellphone-Call Ban Violates The First Amendment And Must Be Invalidated.

A. The Cellphone-Call Ban Is Content-Based And Fails Strict Scrutiny.

Among the First Amendment's prime directives is neutrality. The First Amendment "prohibits the enactment of laws 'abridging the freedom of speech.'" *Reed*, 135 S. Ct. at 2226 (quoting U.S. Const., amend. I). And "[u]nder that clause, a government . . . 'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Id.* (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). Hence, "[c]ontent-based laws—those that target speech

based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.*

The TCPA's cellphone-call ban is just such a content-based restriction on speech. The ban begins by prohibiting calls to cell phones that use "any automatic telephone dialing system or an artificial prerecorded voice." 47 U.S.C. § 227(b)(1)(A). It then gerrymanders numerous exceptions. While some are content-neutral—such as the safe harbor for calls where the called party has given "prior express consent," *id.*—others depend wholly on the content of the calls. Hence, the TCPA includes exceptions for certain commercial speech, including delivery notifications, some healthcare-related messages, and calls regarding data breaches and money transfers.[3]

Especially relevant here, the TCPA draws a distinction between different types of debt-collection

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[3] *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd 7961, 8024-28, 8031-32 ¶¶ 129-138, 147 (2015), *decision set aside in part sub nom., ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). Congress permitted yet more messages under the TCPA's parallel provision regulating calls to residential phones *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752, 8782 ¶ 60 (1992) (exempting calls that "do not adversely affect the privacy interests of residential subscribers," including "commercial calls not transmitting an unsolicited advertisement"); *see also* Respondents' Br. 5-6 (chronicling broad exemptions for calls to residences).

calls. While restricting calls for the collection of commercial loans not secured by the government, the ban exempts calls "made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A)(iii)). Under this scheme, "a private debt collector could make two nearly identical automated calls to the same cell phone using prohibited technology, with the sole distinction being that the first call relates to a loan guaranteed by the federal government, while the second call concerns a commercial loan with no government guarantee." Pet. App. 13a. The first call is permissible, the second illegal.

On its face, the cellphone-call ban is content-based, as it "draws distinctions based on the message a speaker conveys." *Reed*, 135 S. Ct. at 2228. Callers may discuss the collection of government-owned or -guaranteed debt, but they may not talk about debts without a government guarantee. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 31 FCC Rcd 9074, 9104 Appendix A – Final Rules (2016) (defining the prohibited speech based on the "[c]ontent of the call"). As this Court has explained, this rule creates an "obvious" content-based restriction because it "defin[es] regulated speech by particular subject matter." *Reed*, 135 S. Ct. at 2227. And the TCPA's content-based ban is especially suspect because it favors messages related to outstanding debts in which *the government* has an interest over messages about the debts held by others. *See* Respondents' Br. 19.

Content-based restrictions are "presumptively unconstitutional and may be justified only if the government proves [the restriction is] narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226-27; *Playboy*, 529 U.S. at 813. The cellphone-call ban does not come close to surviving this stringent scrutiny.

The government-debt exception itself demonstrates that the asserted interest—consumer privacy—is not compelling. The exception allows a broad swath of calls to proceed without restriction. A huge amount of outstanding debt is guaranteed by the government, including the vast majority of student loans and private mortgages.[4] If, as the Government claims, excepting calls to collect these debts "do[es] not adversely affect privacy rights," Gov't Br. 31 (quotation marks omitted), there can be no claim that speech that the TCPA continues to ban—some of which is identical, except that it concerns debts that do not involve the Government—seriously threatens consumer privacy.

The ban therefore fails strict scrutiny. This Court's decision in *Reed* illustrates why. 135 S. Ct. 2218. There, the Court considered the constitutionality of a town's content-based "Sign Code." *Id.* at 2224. The Code had a structure parallel to the TCPA: It enacted a broad ban on "the display of outdoor signs" (rather than automated

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[4] *See, e.g.*, *Federal Student Loan Portfolio*, Federal Student Aid, U.S. Dep't of Educ. (2018), https://studentaid.gov/data-center/student/portfolio (92% of student debt held by the U.S. Department of Education); Respondents' Br. 8-9.

calls) and created a series of "exemptions" for signs conveying "particular message[s]." *Id.* at 2224, 2231. Applying strict scrutiny, the Court explained that the Sign Code's exceptions for various messages undermined its purported interest in "safety and aesthetics." *Id.* at 2231-32. That rendered the Code "hopelessly underinclusive," unsupported by a compelling interest, and therefore unconstitutional. *Id.* at 2231; *see Sorrell*, 564 U.S. at 574 ("Rules that burden protected expression may not be sustained when [they] are too narrow to advance legitimate interests . . . ."). The same is true for the cellphone-call ban. Because the ban exempts debt-collection calls with certain favored messages, but that have the same effect on consumer privacy, the Government's asserted interest cannot genuinely be compelling.[5]

Because the cellphone-call ban is not narrowly tailored, it violates the First Amendment, as both courts of appeal to consider the issue correctly concluded. *Reed*, 135 S. Ct. at 2231-32.; *see* Pet. App. 15a-22a (Fourth Circuit's decision below applying *Reed* to find

[5] As Respondents argue, the ban is also overinclusive. *See* Respondents' Br. 27-29. It prohibits debt-collection calls that, by the Government's own admission, do not infringe on consumer privacy. *See Duguid*, 926 F.3d at 1155-56 (finding the ban to be both "overinclusive" and "underinclusive").

TCPA cellphone-call ban underinclusive and therefore unconstitutional); *Duguid*, 926 F.3d at 1155-56 (same).[6]

B. The Cellphone-Call Ban Must Be Invalidated.

The only remedy consistent with the First Amendment, this Court's precedent, and the separation of powers is to invalidate the cellphone-call ban.

That remedy accords with this Court's general remedial principles: When a statutory provision is deemed unconstitutional, it must be invalidated. *See Free Enter. Fund*, 561 U.S. at 508-10. This approach leaves to the legislature the job of determining an appropriate—and appropriately tailored—alternative.

Those remedial principles apply with particular force where, as here, First Amendment–protected speech is at stake. The First Amendment instructs that speech receives the highest protection. It may be "abridg[ed]" only if the legislature adduces the most persuasive justification and uses the least restrictive means to advance that interest. U.S. Const. amend. I. Hence, when courts find a First Amendment violation, the remedy cannot be—as the Government proposes here—to judicially revise the law to ban even *more* speech, on the theory that this broader ban would at

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[6] As Respondents explain, the Government is wrong to contend that the TCPA's speech ban is subject to only intermediate scrutiny—and in any event, the ban also would fail intermediate scrutiny. *See* Gov't Br. 24-33 (defending the ban under intermediate scrutiny standard); Respondents' Br. 30-33 (refuting the Government's arguments).

least be content-neutral (even if more speech-restrictive).

This Court's First Amendment cases have uniformly adopted this speech-protective approach. For example, in *Arkansas Writers' Project, Inc. v. Ragland*, the Court found unconstitutional a magazine sales tax that exempted certain religious, professional, trade, or sports publications. 481 U.S. at 226. Though the *exception* rendered the tax infirm, the Court did not try to fix the constitutional problem by simply removing the exception. *Id.* at 233-34. Instead, the Court struck the tax. *Id.* If the Court had done otherwise, it would have levied a tax on speech that the legislature wanted to keep unburdened.

So, too, in *Reed*, after finding the Sign Code at issue unconstitutional, the Court outlined the "ample content-neutral options available" to the Town "to resolve problems with safety and aesthetics." 135 S. Ct. at 2232. The Court recognized that the Town *could* enact a very speech-restrictive code that went "a long way toward entirely *forbidding* the posting of signs," and that the Town might "reasonably view the general regulation of signs" in this manner "as necessary." *Id.* But the Court did not presume that the Town needed or wanted to place such onerous restrictions on its residents. The Court left to the local government the weighty decision if and how to limit speech.

The Court has never hinted that broadening speech burdens would be an appropriate remedy to cure a First

Amendment violation. *See*, *e.g.*, *Sorrell*, 564 U.S. at 573-74 (describing an alternative open to the state legislature that "might burden less speech"); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 190 (1999). That is because doing so would run counter to the very free speech interests the First Amendment safeguards.

II. Rewriting The TCPA's Cellphone-Call Ban Would Burden More Speech By Exacerbating The Flood Of TCPA Litigation And Is Unnecessary To Protect Consumer Privacy.

This is not a case for the Court to contemplate, for the first time, remedying a First Amendment violation by burdening more speech. The TCPA already burdens a huge amount of speech with little justification, especially because its cellphone-call ban has become an invitation to litigation abuse. Salvaging that ban is not necessary to preserve any legitimate interest in consumer privacy and would only serve to benefit the TCPA-plaintiffs' bar.

A. The Cellphone-Call Ban Encourages Abusive Litigation And Chills Core Speech.

The TCPA's cellphone-call ban is broadly drafted. Unless an exception applies, it prohibits "any call . . . using any automatic telephone dialing system." 47 U.S.C. § 227(b)(1)(A). In turn, the TCPA defines "automatic telephone dialing system" as "equipment which has the capacity—(A) to store or produce numbers to be called, using a random or sequential

number generator"; and "(B) to dial such numbers." *Id.* § 227(a)(1).

This coverage is broad—but lower-court decisions have threatened to make it broader still. To be sure, several Circuits have properly kept some restraints on this provision's coverage by holding, in accordance with the plain text, that an "automatic telephone dialing system" must "us[e] a random or sequential number generator; and [] to dial such numbers."[7] Other courts, however, have held that so long as a device can "store" and "dial" numbers, it is an "automatic telephone dialing system" subject to the TCPA's ban, whether or not it uses a random or sequential number generator. *See Marks v. Crunch San Diego, LLC* 904 F.3d 1041, 1052 (9th Cir. 2018), *cert. dismissed*, 139 S. Ct. 1289 (2019); *Duguid*, 926 F.3d at 1152.

A petition raising that circuit split is currently pending before this Court. *Facebook, Inc. v. Duguid*, No. 19-511 (U.S. Oct. 21, 2019).

While MCM maintains that many lower courts have interpreted the TCPA's cellphone-call ban more broadly

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[7] *See Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458, 460 (7th Cir. 2020); *Glasser v. Hilton Grand Vacations Co. LLC*, 948 F.3d 1301, 1304-05 (11th Cir. 2020); *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 117-19 (3d Cir. 2018); *see also ACA Int'l, Inc. v. FCC*, 885 F.3d 687, 697 (D.C. Cir. 2018) (rejecting reading of the TCPA that would "render every smartphone an ['automatic telephone dialing system'] 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").

than the statute can support, the reality is that the ban today is often invoked to burden a massive amount of speech. And its substantial monetary penalties—up to $1,500 per call—have made the statute a magnet for abusive and frivolous litigation. In practice, because of the substantial costs of litigation (even when the claims are meritless), the TCPA burdens even more speech than even the broadest reading of the statute could possibly cover. Below, MCM describes examples of litigation that has already curtailed core speech.

Social Networking. Companies offering consumers text-messaging and social networking services provide products that are core speech. They help users connect, communicate, and explore topics of interest. Yet repeatedly, they have been subject to opportunistic TCPA suits for their efforts to facilitate speech—threatening to chill speech at the heart of what the First Amendment protects.

- GroupMe is a mobile group-messaging application. In 2011, it was hit with a class-action lawsuit after a group of friends used the GroupMe platform to invite another acquaintance to a poker game. *Glauser v. GroupMe, Inc.*, No. C 11-2584, 2015 WL 475111, at *1 (N.D. Cal. Feb. 4, 2015). The acquaintance sued, claiming that GroupMe violated the TCPA by using an "automatic telephone dialing system" to help his friends exercise their rights to free association.
- Another social-networking service, Path, was sued in a class action based on a text message the plaintiff received from an acquaintance inviting

the plaintiff to view some photos. Class Action Compl., *Sterk v. Path, Inc.*, No. 1:13-CV-2330 (N.D. Ill. Mar. 28, 2013), ECF No. 1.

- Voxernet faced a class action based on a text message that the plaintiff received from a friend inviting him to connect with him using Voxernet's walkie-talkie application. *Hickey v. Voxernet LLC*, 887 F. Supp. 2d 1125 (W.D. Wash. 2012).
- Yahoo was sued in multiple class actions by plaintiffs alleging that its free online-messaging service that helps users connect with contacts and friends is an "automatic telephone dialing system." *E.g.*, *Dominguez v. Yahoo, Inc.*, 629 F. App'x 369 (3d Cir. 2015); *Sherman v. Yahoo! Inc.*, 997 F. Supp. 2d 1129 (S.D. Cal. 2014).
- Google also faced a class action claiming that Disco, its text-messaging service that facilitates group chats among friends, violated the cellphone-call ban. Class Action Compl., *Pimental v. Google Inc.*, No. 4:11-CV-2585 (N.D. Cal. May 27, 2011), ECF No. 1.
- Twitter found itself on the receiving end of a class action for allegedly using an "automatic telephone dialing system" to send "tweets" to people whose phone numbers used to belong to Twitter subscribers. Class Action Compl., *Nunes v. Twitter, Inc.*, No. 3:14-CV-2843 (N.D. Cal. June 19, 2014), ECF No. 1.

Internet-Based Services and Mobile Apps. Technology-based businesses have sued repeatedly for communicating with their own customers—providing

customers essential information about services they have purchased, and platforms for users to share information with their friends.

- Lyft faced a lawsuit alleging that its mobile application's "Invite Friends" feature, which enabled a user to choose to share the application with his or her contacts, violated the cellphone-call ban. *Wright v. Lyft, Inc.*, No. 2:14-CV-00421, 2016 WL 7971290 (W.D. Wash. Apr. 15, 2016).
- In 2013, Taxi Magic, a precursor to Uber and Lyft, was hit with a class-action lawsuit from a customer who alleged that Taxi Magic had violated the cellphone-call ban by sending him a text message announcing when the taxi he ordered would arrive. *Gragg v. Orange Cab Co.*, 995 F. Supp. 2d 1189 (W.D. Wash. 2014).
- An Uber customer who used the service over 300 times later sued the company, alleging that it violated the TCPA's cellphone-call ban by contacting riders. *Cubria v. Uber Techs., Inc.*, 242 F. Supp. 3d 541 (W.D. Tex. 2017).
- PayPal has been sued in multiple class actions by users for sending them text messages about their accounts. *E.g.*, *Roberts v. PayPal, Inc.*, 621 F. App'x 478 (9th Cir. 2015).
- Square, an electronic-payment service, was sued in a class action based on a single transaction receipt that was sent to the plaintiff via text message after a user made a purchase using Square and requested a receipt be sent to that number. Class Action Compl., *Ball v. Square*,

Inc., No. 3:12-CV-6552 (N.D. Cal. Dec. 28, 2012), ECF No. 1.

Banks and Financial Services. Banks and financial-services companies are regularly sued for calling borrowers who have stopped making payments. These calls are no different from those sheltered from liability, but for the fact that the debt to be collected is not owned or guaranteed by the government. Nevertheless, these cases regularly yield seven- and eight-figure class settlements. For example, in 2014, Capital One paid $75.5 million to settle TCPA class actions filed by cardholders. HSBC paid $40 million in 2015. Within the same timeframe, Chase Bank paid $34 million; Bank of America paid $32 million; and Sallie Mae paid $24.1 million. Between 2016 and 2019, Wells Fargo paid multiple settlements totaling over $45 million.

Labor Unions. The Service Employees International Union was sued for core speech involving freedom of protest and collective action. The union initiated a calling campaign to express dissent toward a hospital involved in a labor dispute. The hospital alleged that the union's technology, which facilitated local residents calling the hospital with messages of support for the union, was an "automatic telephone dialing system" whose use violated the cellphone-call ban. *See Ashland Hosp. Corp. v. Serv. Emps. Int'l Union Dist. 1199 WV/KY/OH*, 708 F.3d 737, 739 (6th Cir. 2013).

Sports Teams. Professional sports organizations have also become targets for speech helping fans participate in events and connect with each other. For example, a fan attending a Los Angeles Lakers basketball game sent a text message to the team that he

hoped would be displayed on the arena's jumbotron. *Emanuel v. L.A. Lakers, Inc.*, No. CV 12-9936, 2013 WL 1719035, at *1 (C.D. Cal. Apr. 18, 2013). The Lakers sent back a single text message confirming that his request had been received. *Id.* The fan responded by suing the team, alleging that its return message violated the cellphone-call ban. *See id.* The San Diego Chargers, Buffalo Bills, Los Angeles Clippers, Tampa Bay Rays, and Tampa Bay Lightning have also been hit with TCPA lawsuits.[8]

Pharmacies. Pharmacies have been sued for speech essential to their businesses and customers, including calling patients to remind them to pick up their prescriptions. *See, e.g.*, Class Action Compl., *Kolinek v. Walgreen Co.*, No. 1:13-CV-4806 (N.D. Ill. July 3, 2013), ECF No. 1; Class Action Compl., *Thompson v. CVS Pharmacy, Inc.*, No. 6:14-CV-2081 (M.D. Fla. Dec. 19, 2014), ECF No. 1.

Manufactured Violations. Because TCPA claims are so lucrative, there are many reported instances of

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[8] *See* Compl., *Friedman v. LAC Basketball Club, Inc.*, No. 2:13-CV-00818 (C.D. Cal. Feb. 6, 2013), ECF No. 1; Class Action Compl., *Wojcik v. Buffalo Bills, Inc.*, No. 8:12-CV-2414 (M.D. Fla. Oct. 25, 2012), ECF No. 1; Class Action Compl., *Story v. Chargers Football Co., LLC*, No. BC566896 (Cal. Super. Ct. Dec. 16, 2014), Dkt. No. 1; Class Action Compl., *Thomas v. Tampa Bay Rays Baseball LTD*, No. 8:18-cv-01187 (M.D. Fla. May 17, 2018), ECF No. 1; Class Action Compl., *Fernandez v. Tampa Bay Rays Baseball LTD*, No. 8:18-cv-02251 (M.D. Fla. Sept. 11, 2018), ECF No. 1; Class Action Compl., *Hanley v. Tampa Bay Sports & Entm't LLC*, No. 8:19-cv-00550 (M.D. Fla. Mar. 5, 2019), ECF No. 1.

plaintiffs going to extreme lengths to manufacture TCPA claims. These instances highlight a massive danger in further expanding TCPA liability. For would-be plaintiffs and their attorneys, anything that can generate potential TCPA violations is a valuable commodity—such as recycled cell phone numbers that receive large numbers of telemarketing calls, collection calls, or text communications from businesses. Indeed, one noted attorney bragged that he tells his clients, "You need to play the game . . . You need to string them along yourself."[9] And many litigants have done just that.

For example, a company called Telephone Science Corporation ("TSC") operates a for-profit service called "Nomorobo." Hiding behind the advertised purpose of helping consumers avoid robocalls, TSC maintains what it calls a "honeypot" of thousands of recycled telephone numbers and files TCPA lawsuits against the unsuspecting companies that call the numbers in its "honeypot"—even though many of these businesses were likely trying to reach prior owners of the numbers and had no way of knowing the numbers had been reassigned.[10]

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[9] TCPAWorld, *Firestarter: TCPAWorld's Most Adventurous Frequent Flyer – Todd Friedman – Joins Second Episode of Unprecedented Podcast* (Apr. 9, 2019), https://tcpaworld.com/2019/04/09/firestarter-tcpaworlds-most-adventurous-frequent-flyer-todd-friedman-joins-second-episode-of-unprecedented-podcast/.

[10] Compl., *Tel. Sci. Corp. v. Asset Recovery Sols., LLC*, No. 1:15-CV-05182 (N.D. Ill. June 12, 2015), ECF No. 1; Compl., *Tel. Sci. Corp. v.*

Such schemes abound, and they punish perfectly innocent speech that does not present even an arguable threat to consumer privacy. One case describes a plaintiff who "purchased at least thirty-five cell phones and cell numbers with prepaid minutes for the purpose of filing lawsuits under the Telephone Consumer Protection Act." *Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782, 788 (W.D. Pa. 2016). Despite living in Pennsylvania, the plaintiff selected numbers with Florida area codes because she believed that people in Florida would be more likely to default on credit cards and receive calls from debt collectors. *Id.*

Another case describes a plaintiff who "filed at least thirty-six . . . lawsuits under the TCPA," had "thought about franchising his TCPA lawsuits," "taught classes teaching others how to sue telemarketers," and listed himself as a "Pro Se Litigant of TCPA lawsuits on his LinkedIn profile."[11]

The Philadelphia Inquirer recently profiled a litigant who had eight different phone numbers and filed dozens

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Credit Mgmt., LP, No. 2:15-CV-04122 (E.D.N.Y. July 14, 2015), ECF No. 1; Compl., *Tel. Sci. Corp. v. Hilton Grand Vacations Co., LLC*, No. 6:15-CV-00969 (M.D. Fla. June 12, 2015), ECF No. 1; Compl., *Tel. Sci. Corp. v. Trading Advantage LLC*, No. 1:14-CV-04369 (N.D. Ill. June 12, 2014), ECF No. 1; Compl., *Tel. Sci. Corp. v. Pizzo*, No. 2:15-CV-01702 (E.D.N.Y. Mar. 30, 2015), ECF No. 1.

[11] *Morris v. Unitedhealthcare Ins. Co.*, No. 4:15-CV-00638, 2016 WL 7115973, at *6 (E.D. Tex. Nov. 9, 2016), *report and recommendation adopted*, 2016 WL 7104091 (E.D. Tex. Dec. 6, 2016).

of TCPA lawsuits. The article describes a case the plaintiff manufactured by placing an order, freezing the credit card payment so that the company would call him back, then suing the same day.[12] A Forbes article detailed a similar scheme, profiling a litigant who made over $800,000 filing TCPA lawsuits after having his landline number (which it would have been legal to autodial) ported to a cell phone.[13]

Another strategy involves consenting to receive automated text messages from a business and then withdrawing consent in a manner that the plaintiff knows will not cause the texts to stop. Automated text messages sent by legitimate (non-scam) businesses typically include a notification that the recipient can opt out by texting back "STOP." Savvy plaintiffs and lawyers, however, know that computerized texting systems are programmed to recognize "STOP"—but that these systems will not recognize text responses that do not include the word "STOP." As a result, there is now a line of cases—many involving the same lawyers—in which plaintiffs have consented to receive automated

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[12] Christian Hetrick, *Meet the Robocall Avenger: Andrew Perrong, 21, Sues Those Pesky Callers for Cash*, Phila. Inquirer (Nov. 2, 2018), https://www.inquirer.com/philly/business/robocall-lawsuits-verizon-citibank-andrew-perrong-20181102.html.

[13] Karen Kidd, *Phoney Lawsuits: Polish Immigrant Concludes Six-Figure Run By Settling 31st Lawsuit*, Forbes (Jan. 17, 2018), https://www.forbes.com/sites/legalnewsline/2018/01/17/phoney-lawsuits-polish-immigrant-concludes-six-figure-run-by-settling-31st-lawsuit/.

texts and then, instead of following the clear instruction to "Reply STOP to cancel," have sent back lengthy responses that did not include the word "stop" but used other language to request that the messages cease. When the messages continued, they filed TCPA lawsuits claiming that they had revoked their consent and demanding statutory penalties for every text sent after they supposedly requested that the messages cease.[14]

As an example of how the statute is used to generate meritless litigation, in one case, a litigant in California deliberately maintained a phone number (999-9999) that he knew would get thousands of wrong-number calls per year so that he could make money on TCPA lawsuits. *See Kinder v. Allied Interstate, Inc.*, No. E047086, 2010 WL 2993958, at *1 (Cal. Ct. App. Aug. 2, 2010). He converted what had been a pager number to a stand-alone voicemail account and hired staff to log every wrong-number call he received, issue demand letters to purported violators, and negotiate settlements. *Id.* He filed hundreds of TCPA lawsuits over the course of four years before a court branded him a vexatious litigant. *Id.*

Some lawyers have even launched mobile applications to easily convert texts and calls into cash-generating lawsuits. One firm, which has filed hundreds

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[14] *See, e.g., Rando v. Edible Arrangements Int'l, LLC*, No. 17-701, 2018 WL 1523858 (D.N.J. Mar. 28, 2018); *Viggiano v. Kohl's Dep't Stores, Inc.*, No. 17-0243, 2017 WL 5668000 (D.N.J. Nov. 27, 2017); Compl., *Epps v. Earth Fare, Inc.*, No. 2:16-CV-08221 (C.D. Cal. filed Nov. 3, 2016), ECF No. 1.

of TCPA lawsuits, launched a mobile application called "Block Calls Get Cash," which delivers information about cell-phone calls to the law firm so that it can file TCPA lawsuits against the callers.[15] "[L]augh all the way to the bank," the app's website reads.[16] Another firm created an app called "Stop Calls Get Cash."[17]

This abusive litigation chills speech and burdens speakers well beyond what Congress intended. The Court should not further expand the TCPA's scope and place yet more burdens on core speech.

B. Rewriting The TCPA Is Not Necessary To Prevent Harassing Calls.

The Court need not hesitate to strike the cellphone-call ban based on concerns that doing so will allow harassing calls to proceed. Other provisions of the TCPA prevent such calls. For example, the statute's Do-Not-Call Provisions and related regulations restrict telemarketing sales calls and text messages, provide a mechanism for consumers to opt out of unwanted telemarketing calls, and allow consumers to sue telemarketers who fail to comply for $500 per call. *See* 47 U.S.C. § 227(c)(1)-(5); 47 C.F.R. § 64.1200(c).

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[15] *See* U.S. Chamber Institute for Legal Reform, *Lawsuit Abuse? There's an App for That* (Oct. 29, 2014), https://www.instituteforlegalreform.com/resource/lawsuit-abuse-theres-an-app-for-that.

[16] *Id.*

[17] John O'Brien, *Click, Then Sue: Call-Blocking App Was Meet Market for Lawyers Seeking Clients*, Forbes (Jan. 30, 2019), https://www.forbes.com/sites/legalnewsline/2019/01/30/click-then-sue-call-blocking-app-hooked-users-up-with-lawyers/.

Congress drafted these provisions specifically to address the problem of intrusive telemarketing. A slew of TCPA regulations also limit unsolicited telephone and text advertisements, again on pain of imposing the TCPA's penalties for noncompliance.[18] The FCC vigorously enforces laws against illegal robocalls, such as those using caller-ID spoofing.[19]

Companies collecting unpaid debts are frequent targets of TCPA litigation, perhaps second only to telemarketers. But, again, other laws already guard against abusive practices by debt collectors, including federal and state laws that limit the time, place, and manner in which debt collectors can call consumers. These statutes allow consumers, either individually or as a class, to sue debt collectors and recover statutory penalties. *See* 15 U.S.C. §§ 1692c, 1692d(5), 1692k. And they provide for attorneys' fees, which the TCPA does not. These tailored provisions fully address any genuine abuse that might exist in the marketplace.

By contrast, courts threaten to put consumers at risk by repurposing the TCPA to punish companies for calling individuals who have defaulted on their loans. To do so eliminates an important communication channel that customers can use to *resolve* such disputes (as, indeed, the government-debt exception recognizes for

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[18] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act*, Report and Order, 27 FCC Rcd. 1830 (2012).

[19] *E.g.*, Press Release, FCC, *FCC Issues $120 Million Fine For Spoofed Robocalls* (May 10, 2018), https://docs.fcc.gov/public/attachments/DOC-350645A1.pdf.

its favored class of communications). If consumers cannot effectively communicate with their creditors over the phone, they are less likely to resolve their debts voluntarily and more likely to face debt-collection litigation. Rewriting and expanding the TCPA's cellphone-call ban to make in content-neutral, as the Government proposes here, is neither appropriate nor necessary to achieve any legitimate policy end.

CONCLUSION

For the foregoing reasons and those set forth by Respondents, MCM urges the Court to find that the TCPA's cellphone-call ban violates the First Amendment and to invalidate the cellphone-call ban.

Respectfully submitted,

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