No. _____

In the
Supreme Court of the United States

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY,

Petitioner,

v.

SUSAN ALLAN; JESSICA WILSON,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

GEORGE W. HICKS, JR.
Counsel of Record
MICHAEL D. LIEBERMAN
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
george.hicks@kirkland.com

Counsel for Petitioner

November 20, 2020

QUESTION PRESENTED

In *Facebook, Inc. v. Duguid*, No. 19-511 (U.S. granted July 9, 2020), this Court granted certiorari to determine whether the definition of an "automatic telephone dialing system" ("ATDS") in the Telephone Consumer Protection Act of 1991 ("TCPA") encompasses any device that can "store" and "automatically dial" telephone numbers, even if the device does not "us[e] a random or sequential number generator." 47 U.S.C. §227(a). This case presents the same question.

The question presented is:

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

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the U.S. District Court for the Western District of Michigan and the U.S. Court of Appeals for the Sixth Circuit:

- *Allan v. Penn. Higher Educ. Assistance Agency*, No. 14-cv-00054 (W.D. Mich. 2019), judgment entered Aug. 9, 2019;
- *Allan v. Penn. Higher Educ. Assistance Agency*, No. 19-2043 (6th Cir. 2020), judgment entered July 29, 2020.

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PETITION FOR WRIT OF CERTIORARI

This Term in *Facebook, Inc. v. Duguid*, No. 19-511 (U.S. granted July 9, 2020), the Court will consider whether the definition of an "automatic telephone dialing system" ("ATDS") in the Telephone Consumer Protection Act of 1991 ("TCPA") encompasses any device that can "store" and "automatically dial" telephone numbers, even if the device does not "us[e] a random or sequential number generator." 47 U.S.C. §227(a).

This case presents the identical question. Like *Facebook*, this case turns entirely on whether the device Petitioner used to contact Respondents—which stores and automatically dials telephone numbers but does not use a random or sequential number generator to do so—is an ATDS under the statute. Indeed, Respondents previously asked the Sixth Circuit to hold this case in abeyance because "the U.S. Supreme Court's decision in *Facebook, Inc. v. Duguid* will be dispositive in this matter." Dkt.43-1 at 2.

Because the two cases involve the same legal question, the same statute, and materially indistinguishable facts, Petitioner respectfully requests that the Court hold this petition pending resolution of *Facebook* and then grant, vacate, and remand or otherwise dispose of the petition consistent with the Court's decision in *Facebook*.

OPINIONS BELOW

The Sixth Circuit's opinion is reported at 968 F.3d 567 and reproduced at App.1-31. The district court's opinion is reported at 398 F.Supp.3d 240 and reproduced at App.32-41.

JURISDICTION

The Sixth Circuit issued its decision on July 29, 2020. On March 19, 2020, this Court extended the deadline to file any petition for a writ of certiorari due on or after that date to 150 days. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The TCPA defines an ATDS in 47 U.S.C. §227(a):

> (1) The term "automatic telephone dialing system" means equipment which has the capacity—
>
> (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and
>
> (B) to dial such numbers.

Other relevant provisions of the TCPA, 47 U.S.C. §277, are reproduced at App.42-70.

STATEMENT OF THE CASE

A. The Telephone Consumer Protection Act

In the early 1990s, Congress addressed two then-prevalent telemarketing abuses that were distinctly disruptive to residential privacy and critical communications infrastructure: (1) artificial- and prerecorded-voice calls ("robocalls"), and (2) automatic telephone dialing systems.

Robocalls, with their ever-increasing volume, were particularly vexing to individuals and families, who had their privacy disturbed, often in the middle of dinner, by unsolicited calls without a live human on the other end of the line. *See Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S.Ct. 2335, 2344 (2020)

(plurality op.) ("Consumers were 'outraged' and considered robocalls an invasion of privacy 'regardless of the content or the initiator of the message.'").

Automatic telephone dialing systems that generated telephone numbers randomly or sequentially for immediate or later dialing posed a distinct risk to certain nonresidential lines. Random dialing meant that callers could reach and "tie up" unlisted and specialized numbers, including the lines of public emergency services. *See* S. Rep. No. 102-178, at 2 (1991), as reprinted in 1991 U.S.C.C.A.N. 1968, 1969. Sequential dialing allowed callers to reach every number in a particular area, creating a "potentially dangerous" situation in which no outbound calls (including, for example, emergency calls) could be placed. H.R. Rep. No. 102-317, at 10 (1991), available at 1991 WL 245201. Sequential dialing posed a particular risk to cellular phone users, as cellular carriers would often "obtain large blocks of consecutive phone numbers for their subscribers." *Telemarketing/Privacy Issues: Hearing Before the Subcomm. on Telecomms. & Fin. of the H. Comm. on Energy & Commerce on H.R. 1304 & H.R. 1305*, 102d Cong. 113 (1991) (statement of Michael J. Frawley). These calls imposed much more significant costs on cellular phone users than they do today, as users then often paid on a per-minute basis, including for incoming calls. *See* Calvin Sims, *All About/Cellular Telephones; A Gadget That May Soon Become the Latest Necessity*, N.Y. Times (Jan. 28, 1990), https://nyti.ms/29wkETT.

Congress responded to these two problems with the Telephone Consumer Protection Act of 1991,

which was designed to curb these "telemarketing" abuses by "solicitors." 47 U.S.C. §227, note. The TCPA contains prohibitions on both types of calls that motivated Congress to act—*i.e.*, it contains prohibitions on both robocalls and calls made using an "automatic telephone dialing system." 47 U.S.C. §227(b)(1)(A). With respect to the latter, Congress defined an ATDS as follows:

> (1) The term "automatic telephone dialing system" means equipment which has the capacity—
>
> (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and
>
> (B) to dial such numbers.

Id. §227(a)(1). That definition targeted the kinds of automatic dialing systems with which Congress was most concerned—*i.e.*, those that indiscriminately reached specialized lines like emergency lines because of the random manner in which they generated numbers to call, and those that risked tying up entire businesses (or worse yet, entire hospitals or emergency service providers) because of the sequential manner in which they generated numbers to call.

Like its definition of an ATDS, the TCPA's prohibitions closely track the particular concerns that motivated Congress to act. First, as to calls to certain specialized, non-residential lines, such as emergency lines, patient rooms, and cellular or pager numbers, Congress prohibited both robocalls and calls made with an ATDS, unless the call is made "for emergency purposes" or with "prior express consent." 47 U.S.C.

§227(b)(1)(A). Then, as to "residential telephone line[s]," Congress prohibited robocalls (again, unless for emergency purposes or with express consent), but not calls made with an ATDS. *Id.* §227(b)(1)(B). Finally, Congress prohibited the use of an ATDS (but not robocalls) "in such a way that two or more telephone lines of a multi-line business are engaged simultaneously." *Id.* §227(b)(1)(D). Accordingly, whereas the TCPA prohibits unauthorized robocalls to virtually any number, it prohibits the use of an ATDS to make unauthorized calls only to the specific types of lines that were particularly vulnerable to random- or sequential-number-generation technology.

"The TCPA imposes tough penalties." *Am. Ass'n of Political Consultants*, 140 S.Ct. at 2345. Anyone who suffers a violation of the TCPA's restrictions can recover the greater of her actual damages or $500 per call in statutory damages, with treble damages available if the violation was committed "willfully or knowingly." 47 U.S.C. §227(b)(3)(B)-(C). The substantial statutory penalties available under this private right of action have made the TCPA one of the more frequently litigated federal statutes, and the availability of fixed statutory penalties that arguably obviate the need to prove individualized damages has made it a frequent basis for putative class actions. *See, e.g.*, *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 655-56 (4th Cir. 2019).

B. This Court's Grant of Certiorari in *Facebook*

On July 9, 2020, this Court granted certiorari in *Facebook, Inc. v. Duguid*, No. 19-511. The plaintiff in that case, Noah Duguid, alleged that Facebook

violated the TCPA's prohibitions on making calls with an ATDS by sending him text message notifications. Facebook offers a security feature that sends users a text message if someone attempts to access their account from an unknown device or browser. Duguid received such targeted messages, even though he claims that he has never been a Facebook user and never opted in to this security feature. Most likely, Duguid was assigned a recycled cell phone number that previously was associated with a Facebook user who opted into the login-notification feature. The primary dispute in the case is whether the system that Facebook uses to send such text messages meets the statutory definition of an ATDS—and, more generally, whether a device that does not use a random or sequential number generator can qualify as an ATDS.

The district court dismissed Duguid's claims, but while the case was on appeal to the Ninth Circuit, the latter court issued an opinion addressing the TCPA's definition of an ATDS. *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018). Expressly breaking with the only other circuit to have addressed the issue at the time, the Ninth Circuit concluded that "the statutory definition of ATDS is not limited to devices with the capacity to call numbers produced by a 'random or sequential number generator,' but also includes devices with the capacity to dial stored numbers automatically," even if those numbers are not generated in any automated fashion. *Id.* at 1052. Bound by *Marks*, the Ninth Circuit in *Facebook* reversed the district court's dismissal of Duguid's claims.

Facebook petitioned for certiorari, noting that the Ninth Circuit's interpretation was consistent with a decision from the Second Circuit but in conflict with decisions from the Third, Seventh, Eleventh, and D.C. Circuits. *See* Supplemental Brief For Petitioner at 3-8, *Facebook, Inc. v. Duguid*, No. 19-511 (U.S. filed July 7, 2020). This Court granted the petition. *See* Order, *Facebook, Inc. v. Duguid*, No. 19-511, 2020 WL 3865252 (U.S. July 9, 2020). The question presented in *Facebook* is "whether the definition of ATDS in the TCPA encompasses any device that can 'store' and 'automatically dial' telephone numbers, even if the device does not "us[e] a random or sequential number generator." *See* Brief for Petitioner at i, *Facebook, Inc. v. Duguid*, No. 19-511 (U.S. filed Sept. 4, 2020).

C. Factual and Procedural Background

Petitioner, the Pennsylvania Higher Education Assistance Agency (PHEAA), is a public corporation and government instrumentality created by the Pennsylvania General Assembly. PHEAA's purpose is "to improve the higher educational opportunities of persons who are residents of [Pennsylvania] and who are attending approved institutions of higher education, in [Pennsylvania] or elsewhere, by assisting them in meeting their expenses of higher education." 24 Pa. Stat. Ann. §5102. One way that PHEAA fulfills this purpose is by servicing student loans. *See* App.2.

In carrying out its loan-servicing activities, PHEAA regularly contacts borrowers who are delinquent on their loans. To do so, PHEAA uses the Avaya Proactive Contact system. This system does not dial numbers randomly or sequentially. App.3, 6.

Unlike the telemarketers at which the TCPA's ATDS prohibitions were aimed, a loan servicer like PHEAA has no reason to call random phone numbers; its interest is in contacting specific borrowers with delinquent loans. Accordingly, PHEAA uses the Avaya system to create a daily calling list of known accountholders "based on, among other things, amounts owed, delinquency status and prior contacts." App.3. After the day's list is created, a live person then "create[s] the calling campaigns for the day." App.3. Subsequently, the Avaya system places calls to the accountholders in the calling campaign, and when a human voice is detected on the other end, the Avaya system connects the call recipients to live human operators. App.3.

Respondent Wilson is a borrower on a student loan serviced by PHEAA; Respondent Allan acted as co-signer for both that loan and a loan issued to a non-party. App.2. At one point during the life of Wilson's loan, Wilson and Allan submitted a written request for forbearance, and in doing so, gave PHEAA permission to call their cell phones. App.2. In October 2013, however, Respondents revoked their prior express consent. App.2. But because the student loan was not being timely repaid, PHEAA continued to contact both Wilson and Allan using the above-described Avaya system. App.2-3.

Respondents filed suit against PHEAA, alleging that the calls they received after revoking their consent violated the TCPA. App.4. Respondents did not allege that the Avaya system "us[es] a random or sequential number generator," but rather argued that the Avaya system is an ATDS merely because it stores

telephone numbers and then dials those numbers automatically. After discovery, the district court granted summary judgment to Respondents. The district court expressly "agree[d] with the Ninth Circuit's analysis" in *Marks*, which had concluded that "the statutory definition of ATDS includes a device that stores telephone numbers to be called, whether or not those numbers have been generated by a random or sequential number generator." App.38-39 (quoting *Marks*, 904 F.3d at 1043). The district court awarded the two Respondents statutory damages in the amount of $176,500.

PHEAA appealed to the Sixth Circuit. While the appeal was pending, the Eleventh Circuit issued its decision in another TCPA case in which PHEAA was a defendant. *Glasser v. Hilton Grand Vacations Co., LLC*, 948 F.3d 1301 (11th Cir. 2020). In an opinion from Judge Sutton sitting by designation, the Eleventh Circuit held that PHEAA's Avaya system—the same system at issue in this case—is not an ATDS because it does not use "randomly or sequentially generated numbers." *Id.* at 1304-05. In so holding, the Eleventh Circuit expressly disagreed with the Ninth Circuit's analysis in *Marks*. *Id.* at 1311-12.

Subsequently, while this appeal was still pending at the Sixth Circuit, this Court granted certiorari in *Facebook*. Respondents then asked the Sixth Circuit to hold the case in abeyance pending *Facebook*, explaining that "the U.S. Supreme Court's decision in *Facebook, Inc. v. Duguid* will be dispositive in this matter." Dkt.43-1 at 2. PHEAA agreed that *Facebook* would be dispositive, but opposed the motion on the ground that courts within the Sixth Circuit could

"benefit from direction on the meaning of [ATDS]" in the period before this Court issues its decision in *Facebook*. Dkt.44 at 1.

The Sixth Circuit denied the motion and, the next day, affirmed the district court's judgment in a divided decision. The panel majority began by acknowledging that the Avaya system PHEAA uses "dials from a stored list of numbers" and "does not randomly or sequentially generate numbers to dial." App.6. Accordingly, the outcome of the case turned entirely on the answer to the question presented in *Facebook*—i.e., "[w]hether autodialer devices like the Avaya system are covered by the TCPA." App.6. The panel majority recognized that this question "is the source of [a] circuit split," explaining that the Second and Ninth Circuits have concluded "that stored-number systems are covered," while "[t]he Seventh and Eleventh Circuits have gone the other way." App.6; *see* App.5 ("That definition is at issue on this appeal. How to define ATDS has split the circuits.").

The panel majority acknowledged that the interpretation adopted by the Seventh and Eleventh Circuits—under which the Avaya system is not an ATDS—"follows proper grammar." App.8. And it acknowledged that the contrary interpretation adopted by the Second and Ninth Circuits "violates the last antecedent rule" and requires a "significant modification" to the statutory text—namely, "adding [a] phrase" to it. App.10-11. Nevertheless, the panel majority concluded that the TCPA's text is ambiguous, requiring it to "look to other provisions of the autodialer ban to guide us in our interpretation." App.13.

After looking to those other provisions, the panel majority "agree[d] with the Second and Ninth Circuits that the structure and context of the autodialer ban support an interpretation of ATDS that would cover stored-number systems like the Avaya system in this case." App.13. The panel majority found the TCPA's "exception for calls 'made with the prior express consent of the called party'" particularly persuasive evidence in favor of the sweeping interpretation it adopted. App.14. The panel majority opined that this exception "implies that the autodialer ban otherwise could be interpreted to prohibit consented-to calls … [which] by their nature are calls made to known persons, i.e., persons whose numbers are stored on a list and were not randomly generated." App.14. The panel majority acknowledged that this statutory exception is to a prohibition that covers both calls from an ATDS *and* robocalls, the latter of which can be targeted to those who have previously consented, so there is no legitimate concern with rendering the exception nugatory. App.15-16. But the panel majority remained convinced that "[t]he consent exception … commands the plain text reading that the autodialer ban applies to stored-number systems." App.24. The panel majority also reviewed the administrative history, legislative history, and practical effects of its interpretation, finding the Seventh and Eleventh Circuits' discussion of these topics unpersuasive. App.17-24.

The panel majority thus adopted the same definition of an ATDS as the Second and Ninth Circuits before it. In particular, it construed the ATDS definition as follows, with the bracketed text added by the court: "An ATDS is 'equipment which has

the capacity—(A) to store [telephone numbers to be called]; or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.'" App.24-25. It noted that by adopting this interpretation, "we join the Second and Ninth Circuits and hold that a stored-number device like the Avaya system here qualifies as an ATDS." App.25.

Judge Nalbandian dissented. He began by noting that "[s]everal courts of appeals and the majority here have discussed at length the meaning of the operative statutory language in this case," and that "the Supreme Court will likely address its meaning in the near future." App.26 (citing *Facebook, Inc. v. Duguid*, No. 19-511). While "[o]ther circuits have … split in primarily two camps on how to interpret" the ATDS definition, App.26, Judge Nalbandian proposed a third reading. In his view, the phrase "using a random or sequential number generator" modifies the entire phrase "telephone numbers to be called." App.27. Thus, in his view, the modifier "using a random or sequential number generator" describes "a quality of the numbers an ATDS must have the capacity to store or produce, specifically the process by which those numbers are generated in the first place." App.27. Under this reading, "a device like the Avaya system that dials only from a selected stored list of numbers [i.e., not a randomly-generated list of numbers] does not qualify as an ATDS." App.31.

REASONS FOR GRANTING THE PETITION

This case presents the same question as *Facebook, Inc. v. Duguid*, No. 19-511: Whether the definition of an ATDS in the TCPA encompasses any device that

can "store" and "automatically dial" telephone numbers, even if the device does not "us[e] a random or sequential number generator." 47 U.S.C. §227(a). The Sixth Circuit, like the Ninth Circuit in *Facebook*, answered that question in the affirmative, holding that "devices that dial from a stored list of numbers are subject to the autodialer ban," even if they do not use a random or sequential number generator. App.2. That decision conflicts with decisions from several other courts of appeals, including an Eleventh Circuit decision addressing PHEAA's use of the exact same system at issue in this case. *Glasser*, 948 F.3d 1301.

This Court's decision in *Facebook* will resolve the question presented in this case. Indeed, Respondents noted below that this Court's "decision in *Facebook, Inc. v. Duguid* will be dispositive in this matter." Dkt.43-1 at 2. Like Facebook, PHEAA uses an autodialing system that contacts specific individuals for specific account-based reasons, without using a random or sequential number generator. If this Court reverses or vacates in *Facebook* and holds that devices do not meet the statutory definition of an ATDS unless they "us[e] a random or sequential number generator," 47 U.S.C. §227(a)(1)(A), as the statutory definition requires, then the Sixth Circuit's decision in this case must be reversed or vacated as well. If this Court affirms in *Facebook* and holds that devices meet the statutory definition of an ATDS even if they do not "us[e] a random or sequential number generator," *id.*, then the Sixth Circuit's decision in this case should be affirmed. Accordingly, the Court should hold this petition pending its decision in *Facebook* and then dispose of this case in a manner consistent with that decision.

CONCLUSION

The petition should be held pending the Court's disposition of *Facebook*. Once *Facebook* has been decided, the Court should grant the petition, vacate the decision below, and remand for further proceedings, or otherwise dispose of the petition consistent with the Court's decision in *Facebook*.

Respectfully submitted,

GEORGE W. HICKS, JR.
Counsel of Record
MICHAEL D. LIEBERMAN
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
george.hicks@kirkland.com
Counsel for Petitioner

November 20, 2020