No. 19-511

In the
Supreme Court of the United States

FACEBOOK, INC.,

Petitioner,

v.

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

Respondent.

and

UNITED STATES OF AMERICA,

Respondent-Intervenor.

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

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QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING

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

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

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

CORPORATE DISCLOSURE STATEMENT

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

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INTRODUCTION

In the Telephone Consumer Protection Act of 1991 (TCPA), Congress addressed two related but distinct telemarketing abuses prevalent at that time. First, Congress broadly prohibited virtually all unsolicited calls made using "an artificial or prerecorded voice" (*i.e.*, robocalls), finding them to be a nuisance that invaded residential privacy and tranquility. Second, Congress imposed more limited restrictions on a specific type of telephone equipment that had tied up up emergency, business, and cellular lines: an "automatic telephone dialing system," or ATDS.

The defining feature of an "automatic telephone dialing system," *i.e.*, what makes it "automatic," is its capacity to use random- or sequential-number-generation technology to store or produce telephone numbers to be called. While artificial- and prerecorded-voice robocalls were always a nuisance, especially when targeting residential lines, random- or sequential-number-generation technology created distinct concerns for non-residential lines. Through randomly generated numbers, an ATDS could reach emergency lines, patient rooms at hospitals, and unlisted lines like then-nascent cellular phones or pagers. Through sequentially generated numbers, an ATDS could simultaneously tie up all the lines in a single hospital, police station, business, or cellular network. Thus, in addition to prohibiting robocalls (*i.e.*, those using artificial or prerecorded voices) to virtually *all* telephone lines, including residential lines, Congress more narrowly restricted the use of an ATDS, which it defined as equipment that has "the

capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. §227(a)(1). Instead of broadly banning *all* calls made via an ATDS, Congress targeted the use of an ATDS to make calls to specific types of lines endangered by random- and sequential-number dialing, such as emergency, patient-room, cellular, and pager lines, or multiple lines at a single business.

For more than a decade, everyone understood the definition of ATDS to encompass only equipment that uses random- or sequential-number-generation technology to store or produce numbers. And by all accounts, the TCPA's ATDS restrictions were a resounding success; ATDSs faded as the new millennium dawned. But some have taken this success story as a license to revise and repurpose the ATDS definition to cover different technologies and practices, many of which arose long after 1991. In particular, some courts, including the Ninth Circuit here, have read the phrase "using a random or sequential number generator" in the ATDS definition to modify only the verb "produce," not the verb "store." So read, the statutory prohibitions expand exponentially, not just banning calls made by specialized devices employing technology posing distinct risks, but also capturing ubiquitous devices with innocuous features. Indeed, the ruling below converts any telephone that can store and dial numbers—which is to say virtually any modern phone—into an ATDS, and every call to a cell phone without the recipient's prior express consent into a TCPA violation punishable by up to $1,500.

The Ninth Circuit's expansive construction of the ATDS definition is incompatible with text, context, common sense, and principles of constitutional avoidance. By decoupling the term "store" from the defining feature that makes an "automatic telephone dialing system" automatic (and distinctly problematic)—namely, the use of a random- or sequential-number generator—the Ninth Circuit eschewed basic rules of statutory construction and grammar in favor of novel doctrines of acquiescence and its own perception of the statute's "animating purpose." That reading converts a statute designed to protect ordinary consumers and businesses from abusive telemarketers into one that threatens ordinary consumers and businesses with potentially massive TCPA liability and raises unprecedented overbreadth problems. This Court should reverse and restore the ATDS prohibitions to the important but narrow (and constitutional) scope envisioned by Congress and enshrined in the statutory text.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 926 F.3d 1146 and reproduced at Pet.App.1-20. Its order denying rehearing en banc is unreported and reproduced at Pet.App.21-22. The district court's orders granting Facebook's motions to dismiss are unreported but available at 2017 WL 635117 and 2016 WL 1169365 and reproduced at Pet.App.23-52.

JURISDICTION

The Ninth Circuit issued its opinion on June 13, 2019, and denied rehearing en banc on August 22, 2019. Facebook thereafter timely filed a petition for

certiorari. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The TCPA defines an ATDS in 47 U.S.C. §227(a)(1):

> (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.

The TCPA, 47 U.S.C. §227, is reproduced in full at Add.1-29.

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

STATEMENT OF THE CASE

A. The Telephone Consumer Protection Act

1. In the early 1990s, Congress addressed two then-prevalent telemarketing abuses. At the time, two different technologies were distinctly disruptive to residential privacy and critical communications infrastructure: artificial- and prerecorded-voice calls (*i.e.*, robocalls) and automatic telephone dialing systems. The ever-increasing volume of telemarketing robocalls was particularly vexing, as individuals had their privacy disturbed, often in the middle of dinner, by unsolicited calls without a live human on the other end of the line. At the same time,

the advent of equipment that generated telephone numbers randomly or sequentially for immediate or later dialing posed a distinct risk to certain non-residential lines, like emergency and business numbers.

Using these new machines, "[t]elemarketers often program[med] their systems to dial sequential blocks of telephone numbers, … includ[ing] those of emergency and public service organizations." H.R. Rep. No. 102-317, at 10 (1991), *available at* 1991 WL 245201; *see also* S. Rep. No. 102-178, at 2 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 1968, 1969. These automated calls could tie up lines for significant periods, as they sometimes would "not disconnect the line for a long time after the called party hangs up the phone" or would not "respond to human voice commands." *Id.*; *see also* H.R. Rep. No. 102-317, at 10. Indeed, the legislative record was replete with "examples of systems calling and seizing the telephone lines of public emergency services, dangerously preventing those lines from being utilized to receive calls from those needing emergency services." *Id.* at 24. Moreover, calls made sequentially could "t[ie] up all the lines of a business" simultaneously, thereby "preventing any outgoing calls." S. Rep. No. 102-178, at 2.

Telemarketers using random- or sequential-number-generation technology also posed distinct problems for users of then-nascent cellular and pager technology. H.R. Rep. No. 102-317, at 24. Cellular numbers were particularly susceptible to sequential dialing, as cell carriers in those days 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). And automated calls to cellular phones imposed much more significant costs on the recipients than they do today. At the time, in contrast to today's "unlimited" packages, users typically paid substantial per-minute charges, even on incoming calls. In 1990, the New York Times reported that a "typical cellular customer now pays about $100 a month" (equivalent to nearly $200 today); discount plans allowed "heavy users to pay a high monthly charge of $35 to $50 and low usage rates of about 30 cents to 40 cents per minute," while "[l]ow-volume users can pay a low monthly charge, about $10 to $15, and high rates of about 60 cents to 90 cents." 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; *see also In re Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993*, 10 FCC Rcd. 8,844, 8,881 (1995) ("First Report") (60 minute plan costs $60 per month). Consumers thus were understandably vexed by the prospect of paying dearly and wasting precious cellular minutes on robocalls or calls placed with an ATDS.

2. Congress responded with the Telephone Consumer Protection Act of 1991, which was designed to curb these "telemarketing" abuses by "solicitors." 47 U.S.C. §227, note. Finding that "[u]nrestricted telemarketing … can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety," *id.*, the

TCPA imposed "[r]estrictions on [the] use of" certain types of "automated telephone equipment," including the use of "an artificial or prerecorded voice," and the use of an "automatic telephone dialing system," *id.* §227(b).

Congress defined an ATDS as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." *Id.* §227(a)(1). That definition targeted the kinds of systems with which Congress was most concerned—*i.e.*, those that indiscriminately reached all kinds of lines, including specialized lines like emergency lines and pagers, due to the random manner in which they generated numbers to call; and those that risked tying up an entire business (or worse yet, an entire hospital or emergency service provider) due to the sequential manner in which they generated numbers to call. The definition was crafted to reach both systems that "produce" numbers using such technology for immediate calling and systems that "store" numbers using the same technology for later calling or to avoid calling the same number multiple times. *See* Noble Systems Corp., *Comments on FCC's Request for Comments on the Interpretation of The TCPA in Light of* Marks v. Crunch San Diego i-ii (Oct. 16, 2018), https://bit.ly/2n32vHd ("Noble Systems Comments").

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 artificial- or prerecorded-voice robocalls (again, unless for emergency purposes or with express consent), but *not* calls made with an ATDS. *Id.* §227(b)(1)(B). Finally, in the TCPA's only ATDS-specific restriction, Congress prohibited the use of an ATDS (but not artificial- or prerecorded-voice 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, including residential lines, it prohibits the use of an ATDS to make unauthorized calls only to certain types of lines that were particularly vulnerable to random- or sequential-number-generation technology.

Congress charged the Federal Communications Commission (FCC) with developing regulations to implement the TCPA and authorized the Commission to impose civil forfeiture penalties on TCPA violators. *Id.* §227(b)(2), (4). In addition, the TCPA provides a private right of action that "imposes tough penalties for violating [its] restriction[s]." *Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2345 (2020) (plurality op.). Anyone who suffers a violation of the TCPA's restrictions can recover the greater of his 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 statutory damages provisions lend themselves to class-action treatment by avoiding individualized damages assessments. With private

parties authorized "to recover up to $1,500 per violation," damages "can add up quickly in a class action." *Barr*, 140 S. Ct. at 2345 (plurality op.).

The TCPA is by no means Congress' only effort to combat telemarketing abuses. Three years later, Congress passed the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994, which empowered the Federal Trade Commission (FTC) to regulate telemarketing. *See* 15 U.S.C. §6102. The FTC has exercised that authority to "implement and enforce a national do-not-call registry," among other protections against intrusive telemarketing practices. *Id.* §6151(a); *see also* 16 C.F.R. §310.4. The FTC is empowered to pursue enforcement actions against telemarketers who violate do-not-call or other restrictions. *E.g.*, *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611 (6th Cir. 2014).

3. The FCC issued its first implementing regulations in 1992, a year after the TCPA became law. *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC Rcd. 8,752 (1992) ("1992 FCC Order"). Consistent with the statutory text and the still-extant practices that animated it, the Commission's early pronouncements confirmed that the statute's definition of an ATDS encompasses only devices that use random- or sequential-number-generation technology to store or produce numbers to be called.

For example, the FCC's very first order concluded that calls targeted to individuals with outstanding debts are not prohibited by the TCPA because "such calls are not autodialer calls (i.e., dialed using a random or sequential number generator)." *Id.* at

8,773. The FCC likewise confirmed that the ATDS prohibitions "clearly do not apply" to then-standard phone "function[ality] like 'speed dialing,' 'call forwarding,' or public telephone delayed message services …, because the numbers called are not generated in a random or sequential fashion." *Id.* at 8,776. A few years later, the FCC reiterated that the statute does not reach calls "directed to … specifically programmed contact numbers," as such calls are not "directed to randomly or sequentially generated telephone numbers." *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 10 FCC Rcd. 12,391, 12,400 (1995).

By all accounts, the TCPA proved extremely successful in curtailing the use of random- or sequential-number-generation technology. Indeed, by 2003, the FCC was able to declare victory: The use by "telemarketers" of "dialing equipment to create and dial 10-digit telephone numbers arbitrarily" was "[i]n the past." *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14,014, 14,092 (2003).

Not content to declare victory over the particular form of telemarketing technology that the TCPA targeted, the FCC soon began issuing orders expanding the statute and attempting to repurpose and redefine the ATDS prohibitions to address "marketplace changes." *Id.* at 14,021-22. First, the FCC interpreted the TCPA reference to "call" to include text messages. *See id.* at 14,115. Then, the FCC suggested that the TCPA might reach equipment that merely *stores* numbers and then later dials those numbers, even if the numbers were neither randomly

nor sequentially generated. *Id.* at 14,091-93; *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 23 FCC Rcd. 559, 566-67 (2008). So read, the statute would reach virtually any modern telephone, as the ability to store numbers to call later has long been commonplace on telephones (as evidenced by the fact that the FCC received questions about speed dialing in 1992, *supra* pp.9-10).

After vacillating on the issue for years, the FCC issued an order in 2015 that managed to adopt two competing views simultaneously. *See In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7,961 (2015) ("2015 FCC Order"). In one formulation, the rule tracked the statutory definition, positing that equipment "meets the TCPA's definition of 'autodialer'" only if it has "the capacity" to "dial random or sequential numbers." *Id.* at 7,971-72. At the same time, the FCC claimed that equipment that lacks that capacity could still qualify as an ATDS merely because it "dials numbers from customer telephone lists." *Id.* at 7,972-73. The 2015 FCC Order was promptly challenged, and the D.C. Circuit ultimately invalidated it, concluding, *inter alia*, that the "Commission's ruling appears to be of two minds on the issue." *ACA Int'l v. FCC*, 885 F.3d 687, 701 (D.C. Cir. 2018).

4. Even the suggestion by the FCC that every unsolicited call made from a phone capable of storing numbers to be dialed later might be punishable by between $500 and $1,500 in statutory damages prompted a wave of TCPA class-action litigation. Changes in cellular technology have fueled such litigation efforts. Cellular phones have become

ubiquitous and are no longer confined to a subset of consumers paying high per-minute subscriptions. Today, in contrast to 1991, "it is the person who is not carrying a cell phone … who is the exception." *Riley v. California*, 573 U.S. 373, 395 (2014). Yet the TCPA continues to prohibit the use of an ATDS to make any unsolicited call to a cellular phone. Thus, if an ATDS encompasses not just random- or sequential-number-generation technology, but reaches any device that can store and dial numbers, the scope for TCPA litigation is nearly limitless, as every unwanted call or text received on a cell phone constitutes a putative TCPA violation.

The manner in which cellular phone numbers are assigned further complicates matters. Tens of millions of phone numbers are transferred (or "recycle[d]") every year from one user to another when phone plans expire or users change their numbers. *See In re Advanced Methods to Target & Eliminate Unlawful Robocalls*, 32 FCC Rcd. 6,007, 6,009 (2017). And there is no reliable source for verifying the current ownership of a particular phone number. Thus, even when a business contacts only numbers that it has received authorization to call, it is virtually impossible to avoid inadvertently reaching some recycled numbers whose new owners have not given consent. Such unavoidable wrong numbers are only a minor inconvenience, and not a TCPA violation, if an ATDS encompasses only technology that uses a random- or sequential-number generator. But TCPA compliance would become a virtual impossibility if an ATDS really included any phone that stores numbers to be called later (which is to say virtually any phone).

The uncertainty over the scope of an ATDS has caused an explosion in TCPA litigation. While there were only 14 TCPA cases filed in 2007 and 16 in 2008, the numbers skyrocketed in just a few years, with 1,137 TCPA cases filed in 2012; 2,208 in 2013; 3,015 in 2014; 3,710 in 2015; 4,638 in 2016; 4,380 in 2017; 3,806 in 2018; 3,267 in 2019; and 2,106 in the first half of 2020.[1] Today, "TCPA cases—many of which are brought as nationwide class actions—sprawl across the country, targeting companies in virtually every industry." U.S. Chamber Institute for Legal Reform, *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits* 1 (Aug. 2017), https://bit.ly/2XqLsxQ (finding that more than one-third of TCPA lawsuits brought between August 2015 and December 2016 were brought as nationwide class actions); 2015 FCC Order, 30 FCC Rcd. at 8,073 (dissenting statement of Comm'r Pai). Many of these lawsuits "involve technologies" (such as text messaging) "that were not and could not have been part of Congress' discussions when it crafted the TCPA," and "[s]ignificant settlements and verdicts

[1] *See WebRecon Stats for June 2020: An Interesting Dichotomy*, WebRecon LLC (July 20, 2020), https://bit.ly/3gqOtWA; *WebRecon Stats for Dec 2019 and Year in Review: How Did Your Favorite Statutes Fare?*, WebRecon LLC (Jan. 28, 2020), https://bit.ly/2DZrBit; *Out Like a Lion… Debt Collection Litigation & CFPB Complaint Statistics, Dec 2015 & Year in Review*, WebRecon LLC (Jan. 18, 2016), https://bit.ly/2Dft30d; U.S. Chamber Institute for Legal Reform, *Analysis: TCPA Litigation Skyrockets Since 2007; Almost Doubles Since 2013* (Feb. 5, 2016), https://bit.ly/3k5gLYR; U.S. Chamber Institute for Legal Reform, *The Juggernaut of TCPA Litigation: The Problems with Uncapped Statutory Damages* (Oct. 2013), https://bit.ly/2EMUnDv.

continue to drive TCPA litigation." *TCPA Litigation Sprawl* at 1, 3; *see also id.* at 9-10 (surveying 39 recent TCPA settlements, including 20 cases that settled for more than $10 million).

In short, "[w]hat was once a 'cottage industry' is now 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 313, 322 (2018), and "the poster child for lawsuit abuse," 2015 FCC Order, 30 FCC Rcd. at 8,073 (dissenting statement of Comm'r Pai). All of that would be unrecognizable to a Congress that "d[id] not intend for this restriction to be a barrier to the normal, expected or desired communications between businesses and their customers." H.R. Rep. No. 102-317, at 17.

B. Proceedings Below

1. Facebook operates a social-media service with more than 2.7 billion users across the globe, including more than 220 million users in the United States. Facebook's users create personal profiles and share messages, photographs, and other content with other users. Because users often share personal information, Facebook—like many companies—allows its users to opt in to certain "extra security feature[s]" to protect that information. Pet.App.40. One of those opt-in security features allows a user to provide a cellular telephone number for Facebook to contact the user with a "login notification" text message, which is a virtually real-time message alerting the user that, at a specific time, someone attempted to access the user's Facebook account from an unknown device or

browser. Pet.App.40. If the user does not recognize the log-in attempt, the notification allows the user to take immediate action to secure the account, thereby preventing improper access. Pet.App.35 & n.2, 40. Facebook users must go through a multi-step process before they can receive login notifications, including verifying the provided phone number. N.D.Cal.Dkt.65 at 4; Pet.App.47-49.

2. In March 2015, Respondent Noah Duguid filed a putative class action alleging that Facebook violated the TCPA's prohibitions on making calls using an ATDS. Pet.App.42. According to Duguid, he is not and has never been a Facebook user, and he has never opted into Facebook's login-notification feature. Pet.App.4-5. Duguid alleges that he nevertheless received several login-notification text messages from Facebook in 2014. Pet.App.4-5. The messages were sent from an SMS (short message service) short code licensed and operated by Facebook, 326-65 ("FBOOK"). Pet.App.24. The messages, each unique, alerted Duguid that an unrecognized browser at a specific time attempted to access the Facebook account associated with his phone number: "Your Facebook account was accessed [by/from] <browser> at <time>. Log in for more info." Pet.App.4. Duguid unsuccessfully attempted to unsubscribe to the Facebook alerts. Pet.App.4-5.

As the individualized content and context of the message demonstrates, it was not sent to a number generated at random or in sequence. To the contrary, the alert was the product of a Facebook user's personal customization of his or her account and security settings, and someone's login or login attempt from a

particular unrecognized device. Most likely, Duguid was assigned a recycled phone number that previously was associated with a Facebook user who opted into the login-notification feature. But according to Duguid, each of these text messages constituted a TCPA violation. Pet.App.4-5, 42. Duguid further alleged that Facebook acted willfully or knowingly in sending the text messages, and thus that every member of his putative class is entitled to $1,500 in treble damages for each and every message received. JA.49-50.

3. Facebook moved to dismiss Duguid's complaint, raising both statutory and constitutional defenses. On the statutory front, Facebook argued that Duguid failed to plausibly allege that the texts were sent by an ATDS. As Facebook explained, far from alleging that they were sent to numbers generated randomly or sequentially, Duguid alleged that Facebook sent him targeted, informational security alerts on an individual basis, and in response to specific instances of potentially unauthorized account access. Facebook also argued that the TCPA violated the First Amendment, prompting the United States to intervene to defend the statute's constitutionality. JA.20-21.

The district court dismissed the complaint, concluding that Duguid failed to plausibly allege "that the text messages he received were sent using an ATDS." Pet.App.35. As the court explained, by Duguid's own telling, "Facebook's login notification text messages are targeted to specific phone numbers and are triggered by attempts to log in to Facebook accounts associated with those phone numbers," not

sent "en masse to randomly or sequentially generated numbers." Pet.App.35. The court therefore found Duguid's allegations "inconsistent with the sort of random or sequential number generation required for an ATDS." Pet.App.47-48.

4. Duguid appealed, and while his appeal was pending, the Ninth Circuit issued an opinion addressing the scope of the TCPA's definition of an ATDS. *See 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, *see Dominguez ex rel. Himself v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018), the court 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. 904 F.3d at 1052. The Ninth Circuit found its exceptionally broad reading more consistent with various exceptions in the statute that appear to contemplate the non-automatic *dialing* of numbers, such as the (now-invalidated) exception for calls to collect a debt owed to the federal government. *Id.* at 1051. The court also suggested that Congress acquiesced in the FCC's expansive construction of the definition when it amended the TCPA in 2015, the same year the FCC issued its order addressing the definition of an ATDS. *Id.* In doing so, however, the court failed to mention that the D.C. Circuit invalidated that order because it was not clear what definition the FCC was embracing. *See ACA Int'l*, 885 F.3d at 701.

5. Bound by *Marks*, the Ninth Circuit here reversed the district court's dismissal of Duguid's claims and reaffirmed its view that "an ATDS need not be able to use a random or sequential generator"; instead, "it suffices to merely have the capacity to 'store numbers to be called' and 'to dial such numbers automatically.'" Pet.App.6. The court acknowledged that if *Marks* "mean[s] what it says," then it would sweep in "ubiquitous devices and commonplace consumer communications"—including any text message or call placed from any modern smartphone. Pet.App.7. But it nevertheless reaffirmed *Marks*' "gloss on the statutory text." Pet.App.8-9.[2]

SUMMARY OF ARGUMENT

The plain text and basic rules of construction and grammar resolve this case. Congress defined 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." 47 U.S.C. §227(a)(1). Under ordinary rules of grammar and canons of construction, the phrase "using a random or sequential number generator" cannot be decoupled from the verb "store," but instead modifies both "store" and "produce."

That conclusion follows from a straightforward application of the series-modifier rule and is

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[2] The court accepted Facebook's argument that the government-debt-collection exception rendered the statute incompatible with the First Amendment, but found that exception severable. Pet.App.11-12, 19-20. The government sought rehearing en banc on the First Amendment issue, which was denied. Pet.App.21-22; CA9.Dkt.82-83.

particularly clear given that the verbs "store" and "produce" are the only two verbs in the section and share a common direct object ("telephone numbers to be called") that *follows* "produce" and *precedes* the modifier "using a random or sequential number generator." Thus, at least *some* of what follows "produce" modifies both "store" and "produce." Otherwise, the statute would nonsensically prohibit calls made using a device with "the capacity—(A) to store … and (B) to dial such numbers," without ever explaining what is "store[d]" or what "*such* numbers" refers to. And the notion that only the direct object ("telephone numbers to be called"), but not the adverbial clause ("using a random or sequential number generator"), modifies "store" strains credulity and defies basic rules of grammar. If a college makes it "a violation of dorm rules to wash or dry your clothes using your roommates' access card," no one would think that college students were prohibited from washing their clothes, wholly apart from whether they did so using someone else's access card. But that is the nonsense that results from allowing only the direct object and not the adverbial phrase to modify both verbs.

The surrounding statutory text only reinforces the conclusion that "using a random or sequential number generator" modifies both "store" and "produce." First, only the plain-text reading gives effect to the critical feature that makes an "automatic telephone dialing system" automatic under the statute and distinguishes it from an ordinary phone—namely, the use of "a random or sequential number generator." What makes an ATDS automatic (and a distinct threat to emergency and other non-residential lines) is not

the rudimentary capacity to store a number for later dialing—a capacity possessed in 1991 by ordinary telephones with a "speed-dial" feature—but the capacity to "us[e] a random or sequential number generator" to store or produce numbers. This reading aligns the definition of an ATDS with the specific concerns Congress identified and the specific conduct Congress prohibited, such as the use of an ATDS to tie up two business lines simultaneously. Finally, it aligns with Congress' stated intent to protect ordinary telephone users and businesses, not from each other, but from the abusive practices of telemarketers.

The Ninth Circuit's approach, by contrast, violates rules of punctuation, grammar, and statutory construction and raises serious First Amendment problems to boot. There is no basis in grammar or canons of construction for applying the adverbial "phrase 'using a random or sequential number generator'" to "modif[y] only the verb 'to produce,' and not the preceding verb, 'to store.'" Pet.App.6. Indeed, one of the few courts to follow the Ninth Circuit's lead admitted it is not one that "follows proper grammar." *Allan v. Pa. Higher Educ. Assistance Agency*, 968 F.3d 567, 572-73 (6th Cir. 2020). Decoupling the use of random- or sequential-number-generation technology from the verb "store" also carries the untenable consequence of extending the ATDS prohibitions to devices that pose none of the risks unique to random and sequential dialing that were Congress' target. Indeed, taken at face value, the prohibitions would cover calls from not just every modern smartphone, but from ordinary telephones with call-forwarding or speed-dial features that were already common in 1991.

Making matters worse, the practical and constitutional consequences of the Ninth Circuit's (mis)reading of the statute are untenable. The Ninth Circuit's opinion converts a statute designed to target the specialized technologies of telemarketers that posed distinct risks of tying up emergency numbers or business lines into one that penalizes wrong numbers. The Ninth Circuit's ATDS definition casts the net so widely that nearly everyone in the country risks $1,500-per-call statutory liability practically every time they attempt a phone call. That result is impossible to square with any fair reading of statutory text or legislative intent, and would convert a targeted statute into an unconstitutional dragnet. A statute that directly implicates the First Amendment cannot be interpreted to embrace the very antithesis of narrow tailoring. In short, there is no reason to accept the Ninth Circuit's strained interpretation and every reason to reject it.

ARGUMENT

I. The Phrase "Random Or Sequential Number Generator" In The Definition Of "Automatic Telephone Dialing System" Modifies Both "Store" And "Produce."

The TCPA targets, *inter alia*, calls made using certain specialized equipment: an "automatic telephone dialing system," or "ATDS." The statute defines an ATDS as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. §227(a)(1). Basic rules of grammar and every applicable canon of statutory interpretation indicate

that the phrase "using a random or sequential number generator" in that definition modifies both "store" and "produce." Accordingly, to qualify as an ATDS, equipment must have the capacity either to "store a telephone number to be called, using a random or sequential generator; and to dial such a number" or to "produce a telephone number to be called, using a random or sequential number generator; and to dial such a number." It is not enough merely to have the capacity to store a telephone number to be called and to dial it. If it were, then the TCPA would sweep in all manner of devices that were common in 1991 and are ubiquitous today. That is manifestly not what Congress intended when it enacted a statute carefully crafted to address specific concerns with the random- or sequential-number-generation technology used by telemarketers.

A. The Plain Text Confirms That "Random or Sequential Number Generator" Modifies Both "Store" and "Produce."

This Court has instructed time and again that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004); *see also, e.g.*, *Artis v. District of Columbia*, 138 S. Ct. 594, 603 (2018). The language Congress used to define an ATDS in the TCPA is plain. It describes the functionality an ATDS must have—*i.e.*, the capacity "to store or produce telephone numbers to be called"—and further describes *how* each of those two functions must be discharged—*i.e.*, "using a random or sequential number generator." The adverbial phrase

"using a random or sequential number generator" modifies both verbs; it does not modify only "produce."

1. That conclusion follows directly from basic rules of grammar. Under the series-modifier rule, the "most natural way to view [a] modifier" is "as applying to the entire preceding clause." *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1077 (2018). Accordingly, "[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series, a … postpositive modifier normally applies to the entire series." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012). That is particularly true when the modifier "directly follows a concise and integrated clause," *Cyan*, 138 S. Ct. at 1077, like, as here, an adverbial phrase with just two preceding verbs separated by a disjunctive "or." And the conclusion is inescapable when the two verbs share a common direct object—*i.e.*, "telephone numbers to be called"—that follows the second verb and precedes the adverbial phrase.

There can be no serious dispute that "telephone numbers to be called"—a phrase that appears *after* the verb "produce" but *before* the modifier "using a random or sequential number generator"—is the object of both "store" and "produce." Because subsection (B) of the statute requires the equipment to have the capacity "to dial *such* numbers," it must refer back to some numbers described earlier (presumably in subsection (A)). And the only available referent for "such numbers" in subsection (A) (or anywhere else) is the "telephone numbers to be called." That phrase thus *must* apply to both "store" and "produce," for otherwise

the "store" prong would be incomplete. It would define an ATDS as "equipment which has the capacity—(A) to store … and (B) to dial such numbers," without ever explaining what is "store[d]" or what "such numbers" are. Thus, it clear beyond doubt, and Duguid appears to concede, *see* BIO.28, that at least some of what follows "produce" refers back to "store" and is not part of a phrase that modifies only "produce."

Once it is clear that the intervening phrase "telephone numbers to be called" is the direct object of both "store" and "produce," it would make no sense at all to read the subsequent phrase "using a random or sequential number generator" as modifying only "produce." That would require statutory surgery rather than the application of ordinary rules of construction. To borrow an example from Judge Sutton sitting by designation on the Eleventh Circuit, "[i]n the sentence, 'Appellate courts reverse or affirm district court decisions using the precedents at hand,' no one would think that the appellate judges rely on precedents only when affirming trial judges." *Glasser v. Hilton Grand Vacations Co., LLC*, 948 F.3d 1301, 1306 (11th Cir. 2020); *see also Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 464-65 (7th Cir. 2020). Likewise, in the sentence, "It is a violation of dorm rules to wash or dry your clothes using your roommates' access card," no one would think that college students were prohibited from washing their clothes. As these examples illustrate, the only logical way to read the definition is that *everything* that follows "store or produce"—*i.e.*, *both* "telephone numbers to be called" *and* "using a random or

sequential number generator"—carries over to both verbs and not just the latter verb.

Indeed, this is a particularly straightforward case because the punctuation canon reinforces what the series-modifier canon requires. The "punctuation canon" provides that where a qualifying phrase is separated from its antecedents by a comma, the qualifying phrase applies to all antecedents, not just to the immediately preceding one. *See* Scalia & Garner 161-62; *The Chicago Manual of Style* §6.24 (17th ed. 2017) ("When a dependent clause precedes the main, independent clause, it should be followed by a comma."); *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993) ("A statute's plain meaning must be enforced, of course, and the meaning of a statute will typically heed the commands of its punctuation."). Here, the phrase "using a random or sequential number generator" follows a comma placed after the phrase "store or produce telephone numbers to be called." The punctuation canon thus underscores that the later phrase modifies all of its antecedents. Indeed, even courts that have rejected the plain-text reading have conceded that reading the adverbial phrase to modify both verbs "follows proper grammar" because "[w]hen a clause is set off by a comma at the end of a sentence, it should modify all that precedes it." *Allan*, 968 F.3d at 572.

2. Statutory context reinforces the plain meaning of the text. First, it bears repeating that the statutory provision at issue is a *definition*, and the meaning and scope of a definition cannot lose sight of the term it seeks to define. *See*, *e.g.*, *United States v. Castleman*,

572 U.S. 157, 163 (2014); *United States v. Stevens*, 559 U.S. 460, 474 (2010). Here, Congress sought to define an "*automatic* telephone dialing system." 47 U.S.C. §227(a)(1) (emphasis added). Just as one would not readily construe a definition of an "interactive computer system" to reach computer systems involving no interaction, the definition of an "automatic telephone dialing system" cannot be read to cover telephone dialing systems that are not "automatic" in any meaningful respect. And in the TCPA it is precisely the use of random- or sequential-number-generation technology that makes an ATDS automatic. If "using a random or sequential number generator" modifies only "produce," then the TCPA's definition would capture any device that can store numbers and dial them. Such a definition would cover almost any "telephone dialing system," without regard to whether it was automatic. Indeed, it would capture every telephone with call-back, call-forwarding, or speed-dial functions, which were not at all uncommon for standard office and home telephones in 1991. *See* 1992 FCC Order, 7 FCC Rcd. at 8,776 (assuring that speed-dial functionality does not make a telephone an ATDS).

Perhaps recognizing this problem, some courts have attempted (either implicitly or explicitly) to smuggle some notion of automation back into the statute by adding an adverb to subsection (B) and requiring the capacity to *dial* numbers "automatically" or "without human intervention." *See, e.g.*, *Marks*, 904 F.3d at 1052 ("the statutory definition of ATDS … includes devices with the capacity to dial stored numbers automatically"); *Duran v. La Boom Disco, Inc.*, 955 F.3d 279, 287-90 (2d Cir. 2020) (ATDS

must have the capacity to dial numbers "without human intervention"). But subsection (B) does not include an adverb. That subsection does not say that the system must have the capacity to dial numbers "automatically" (let alone "without human intervention"); it says only that equipment must have the capacity "to dial such numbers." 47 U.S.C. §227(a)(1)(B). The adverbial phrase that confines an ATDS to systems that operate automatically comes not from subsection (B), but from subsection (A) and its requirement that equipment have the capacity "to store or produce telephone numbers to be called, *using a random or sequential number generator*." *Id.* §227(a)(1)(A) (emphasis added). The felt need of these courts to engraft an adverb imposing some requirement of "automatic-ness" onto the verb "dial" in subsection (B) (though it is plainly absent) just underscores their error in decoupling the key adverbial phrase that Congress actually included in the statute from "store" in subsection (A).

That decoupling also runs head-on into the canon against superfluity, under which a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009). Reading the phrase "using a random or sequential number generator" to modify both "store" and "produce" is the only way to ensure that this key statutory phrase has practical force. After all, it is hard to conceive of a device that has the relatively rare and sophisticated capacity to "produce" telephone numbers using a random- or sequential-number generator and to "dial" telephone numbers, but lacks the ubiquitous and mundane capacity to "store"

telephone numbers at least ephemerally. Accordingly, if "using a random or sequential number generator" applied only to "produce," then both "produce" and the entire phrase "using a random or sequential number generator" would fall into desuetude. It would be passing strange if the statute's key modifier—a phrase that "account[s] for" nearly "half of [subsection (A)'s] text"—were to "lie dormant in all but the most unlikely situations." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

Reading "using a random or sequential number generator" to modify both "store" and "produce" is also more consistent with the "whole-text canon," which teaches that a statute's meaning is informed by "the entire text, in view of its structure and of the physical and logical relation of its many parts." Scalia & Garner at 167; *see also, e.g.*, *Mont v. United States*, 139 S. Ct. 1826, 1833-34 (2019). Unlike with artificial- and prerecorded-voice robocalls, Congress did not prohibit using an ATDS to make unwanted calls to all lines, including residential lines. Instead, it prohibited using an ATDS only to make unsolicited calls to particular types of non-residential lines that were vulnerable to random- and sequential-number-generation technology. Thus, the statute prohibits calls to certain "emergency telephone line[s]" and lines "for which the called party is charged for the call," such as pagers or cell phones, as to which random-number generation posed a distinct problem. 47 U.S.C. §227(b)(1)(A). Similarly, the only prohibition in the TCPA that applies *exclusively* to the use of an ATDS (and not robocalls) addresses the distinct problem of sequential-number generation by prohibiting the use an ATDS "in such a way that two

or more telephone lines of a multi-line business are engaged simultaneously." *Id.* §227(b)(1)(D).

As is clear from the narrower scope of those prohibitions, Congress' ATDS prohibitions were plainly targeting technology with a specific type of functionality—namely, the ability to generate numbers in a random or sequential manner that risked reaching unlisted numbers or clogging up multiple lines operated by a single entity. A definition of ATDS that isolates the technology that poses the risks Congress sought to eliminate—*i.e.*, technology that uses a random- or sequential-number generator to store or produce numbers to be called—makes the entire statutory section work as a harmonious and coherent whole. By contrast, a definition that sweeps in every phone that has the bare capacity to store numbers and dial them would render Congress' careful focus on the particular problems posed by random- or sequential-number-generation technology for naught, and impose liability for conduct having nothing to do with preventing "[u]nrestricted telemarketing" from posing "a risk to public safety" when "an emergency or medical assistance telephone line is seized." 47 U.S.C. §227, note.

And not just any liability: Each violation of the TCPA is subject to a statutory damages award of $500, which can be trebled for "willful[]" or "knowing[]" conduct. *Id.* §227(b)(3)(B)-(C). The availability of those statutory damages eliminates the need for the individualized assessment of actual injury or damages (which will often be minimal) and thus facilitates class certification. Decoupling the definition's key adverbial phrase from one of the two verbs it modifies

would thus create enormous potential liability even for the speed-dialing and call-forwarding technology of 1991. Such a result would convert a statute designed to protect ordinary telephone users, including businesses, *id.* §227(b)(1)(D), from the specialized technologies of telemarketers into a statute that exposes ordinary telephone users and non-telemarketing businesses to massive liability. The statute should not be read to countenance such draconian and counterintuitive results absent at least *some* textual indication that Congress actually intended them. No such indication can be found in the TCPA.

In short, read naturally and as a matter of ordinary English, equipment qualifies as an ATDS if it can either (1) "store … telephone numbers to be called, using a random or sequential number generator"; or (2) "produce telephone numbers to be called, using a random or sequential number generator." *Id.* §227(a)(1)(A). Either way, the critical mechanism that makes an ATDS *automatic*, and distinct from an ordinary phone, is the use of "a random or sequential number generator." There is simply no reason to decouple that critical qualifying phrase from one of the two antecedent verbs that it modifies.

B. Historical Context Reinforces That the Statutory Text Means What It Says.

There is no need to consider legislative history here, for this Court "should prefer the plain meaning since that approach respects the words of Congress" that complied with bicameralism and presentment and became law. *Lamie*, 540 U.S. at 536. But

unsurprisingly, the words Congress chose here comport with its manifest intent, as reflected in both the statutorily enumerated purposes of the TCPA and the legislative record. It is no accident that Congress' prohibitions on the use of an ATDS were more circumscribed than its prohibitions on artificial- and prerecorded-voice robocalls. As the statute's enumerated purposes reflect, the two forms of technology posed different concerns. When it came to robocalls, Congress' findings focused on how consumers considered "automated or prerecorded telephone calls" to the home a "nuisance" and an "invasion of privacy." *E.g.*, 47 U.S.C. §227, note. Consistent with those nuisance and privacy concerns, Congress prohibited robocalls not just to emergency or specialized pay-per-minute lines, but "to any residential telephone line." *Id.* §227(b)(1)(B).

The record before Congress with respect to ATDS technology was quite different. At the time, "telemarketers typically used autodialing equipment that either called numbers in large sequential blocks or dialed random 10-digit strings." *Dominguez v. Yahoo, Inc.*, 629 F. App'x 369, 372 (3d Cir. 2015). The record before Congress with respect to that particular technology was less focused on the nuisance of receiving calls from such devices or their intrusion on domestic tranquility (likely because, unlike a call that imposes the immediately obvious indignity of a prerecorded or non-human voice, consumers may not even know whether a *non*-robocall from a telemarketer originated from an ATDS), and Congress ultimately did not prohibit the use of an ATDS to reach an ordinary residential line. Thus, the most colorful statements in the legislative history, such as

Senator Hollings' complaint about interrupted dinners and his corresponding desire "to rip the telephone right out of the wall," 137 Cong. Rec. 30,821 (1991), were not addressed to ATDS calls.

Instead, the concern with ATDS technology focused on how the specific practice of randomly or sequentially generating numbers to be called can tie up emergency lines or disable a business with multiple lines, especially when telemarketers combined prerecorded messages and the use of an ATDS. As the House Report explained, "[o]nce a phone connection is made, automatic dialing systems can 'seize' a recipient's telephone line and not release it until the prerecorded message is played, even when the called party hangs up." H.R. Rep. No. 102-317, at 10. Since a business is often issued several numbers sequentially, equipment that "dial[ed] numbers in sequence" and then played a prerecorded message could "t[ie] up all the lines of a business and prevent[] any outgoing calls." S. Rep. No. 102-178, at 2. That specific technological "capability makes these systems not only intrusive, but, in an emergency, potentially dangerous as well." H.R. Rep. No. 102-317, at 10.

For example, Congress received testimony about how a sequential dialer tied up "exam rooms, patient rooms, and x-ray facilities" with a prerecorded voice offering a free vacation. S. 1462, *The Automated Tel. Consumer Prot. Act of 1991: Hearing Before the Subcomm. on Commc'ns of the S. Comm. on Commerce, Sci., & Transp.*, 102d Cong. 43 (1991) (statement of Michael F. Jacobson). Another witness described how these automated systems could "dial 911," or even all of a localities' "emergency numbers,"

and in so doing "delay[] the response of emergency services." *Computerized Tel. Sales Calls & 900 Serv.: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 102d Cong. 34-35 (1991) (statement of Chuck Whitehead).

Congress also heard testimony about how these random- or sequential-number generators were able to reach specialized and unlisted numbers like pagers or cellular lines. That was particularly problematic because incoming calls to such lines in the early 1990s imposed substantial costs on the *recipients*. *See* Sims, *supra* p.6; First Report, 10 FCC Rcd. at 8,881 tbls.3-4. An ATDS that happened to dial a cellular line would use up precious and costly minutes of these limited plans—especially if the recipient was subjected to a prerecorded message that prevented her from hanging up. Pager and cellular networks were particularly susceptible to intrusive calls made via sequential dialing. Because cellular carriers "obtain[ed] large blocks of consecutive phone numbers for their subscribers," a sequential dialer chancing upon that block of numbers could knock out the entire network; one carrier "had its system seized by autodialers three separate times for approximately 3 hours each time, during which … the service was totally disrupted to almost 1,000 customers." *Telemarketing/Privacy Issues*, 102d Cong. at 113 (statement of Michael J. Frawley).

The line between these problems and the statutory text is direct: Congress made it unlawful to "make any call … using any automatic telephone dialing system or an artificial or prerecorded voice" without the "prior express consent of the called party"

not to *any* line, but *only* to "emergency telephone line[s]," to "guest room[s] or patient room[s] of a hospital," or "to any telephone number assigned to a paging service[or] cellular telephone service." 47 U.S.C. §227(b)(1)(A). The statute separately prohibited calls using "an artificial or prerecorded voice," but *not* ATDS calls, to "any residential telephone line." *Id.* §227(b)(1)(B). Finally, in the only provision targeted exclusively at calls made using an ATDS, Congress prohibited tying up multiple lines of a business, a distinct problem with sequential-number-generation technology. *Id.* §227(b)(1)(D); *see* S. Rep. No. 102-178, at 2; H.R. Rep. No. 102-317, at 10.

A definition of ATDS that is confined to devices that actually *use* random- or sequential-number generators leaves Congress' ATDS prohibitions precisely tailored to those particularized concerns. A definition that sweeps in every single device capable of storing numbers to dial later would be massively overbroad. Indeed, decoupling the phrase "using a random or sequential number generator" from the verb "store," particularly when combined with a definition of "calls" that includes "texts," would produce a prohibition that bears no resemblance to the concerns that led Congress to act. Giving the definition of ATDS its plain meaning thus comports not just with the statutory text, but with the objectives Congress sought to accomplish.

II. The Ninth Circuit's Interpretation Is Deeply Flawed And Divorced From Statutory Text.

The Ninth Circuit's contrary view is more "'surgery' … than interpretation," *Glasser*, 948 F.3d at 1311, and massively expands the scope of Congress'

prohibitions, thereby threatening to convert every smartphone user into a "TCPA-violator-in-waiting, if not … violator-in-fact," *ACA Int'l*, 885 F.3d at 698. That capacious conception of the ATDS defies text, context, and common sense.

1. According to the Ninth Circuit, the "phrase 'using a random or sequential number generator' modifies *only* the verb 'to produce,' and not the preceding verb, 'to store.'" Pet.App.6 (emphasis added). In its view, "an ATDS need not be able to use a random or sequential generator to store numbers—it suffices to merely have the capacity to 'store numbers to be called' and 'to dial such numbers automatically.'" Pet.App.6. Thus, the Ninth Circuit construed (or, more aptly, reconstructed) the ATDS definition as follows: "equipment which has the capacity—[A](1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—[B] and to dial such numbers automatically." *Marks*, 904 F.3d at 1053.

That interpretation defies bedrock rules of construction and then adds words to compensate for deviating from those rules. To adopt this construction, as Judge Sutton observed, one must first "separate the statute's two verbs ('to store or produce'), place the verbs' shared object ('telephone numbers to be called') in between those verbs, then insert a copy of that shared object into the statute, this time after the now separate verb 'to produce' to make clear that 'using a random or sequential number generator' modifies only 'to produce.'" *Glasser*, 948 F.3d at 1311. But all that maneuvering leaves a definition that captures any telephone that can store and dial numbers—which is

to say virtually any telephone. Thus, in an effort to cabin the definition (however modestly) and reintroduce some element of "automatic-ness" to the definition of an "automatic telephone dialing system," the Ninth Circuit added the modifier "automatically" onto the verb "dial" in subsection (B), even though it does not appear there.

To be sure, having left the verb "store" in subsection (A) unmodified by the adverbial phrase "using a random or sequential number generator" or any other modifier, the Ninth Circuit's impulse to reintroduce an adverb into subsection (B) to modify "dial" is understandable. *Accord Duran*, 955 F.3d at 287-90 (adding adverbial phrase "without human intervention" to subsection (B)). But courts do not have license to try to rebalance statutory equations by adding words to one subsection to compensate for ignoring rules of grammar in another part of the statute. That is statutory reconstruction, not construction.

2. The court nominally justified its efforts by perceiving a "linguistic problem" with applying normal rules of grammar because "it is unclear how a number can be *stored* (as opposed to *produced*) using 'a random or sequential number generator.'" *Marks*, 904 F.3d at 1052 n.8. In fact, random- or sequential-number generators at the time of the TCPA's enactment could indeed "store" "numbers to be called" later, and often needed to do so to avoid calling the same number multiple times. *See, e.g.*, Noble Systems Comments i-ii. Not only did such equipment exist, but it made perfect sense for Congress to want to ensure that its definition of ATDS captured it. If that

definition reached only equipment that has the capacity to *produce* numbers to be called using a random- or sequential-number generator and to dial such numbers, then arguments could have been made that it did not cover equipment that separated out the production of random or sequential numbers and their storage for later dialing. Simply put, Congress reasonably wanted to ensure that it captured the use of random- or sequential-number-generation technology for immediate *or later* calling.

To the extent the Ninth Circuit was concerned that devices that "store" numbers likely "produce" those numbers first, that potential overlap is no excuse for statutory reconstruction. Given that equipment with and without the function to store randomly or sequentially generated numbers existed at the time, *see* Noble Systems Comments i-ii, the clearest way for Congress to ensure that both would be covered, and to avoid efforts at circumvention via arguments that the storage function was sufficiently separate in time or space, was to include both "store" and "produce" in its definition. This Court has "long acknowledged that a 'sufficient' explanation for the inclusion of [language] can be 'found in the desire to remove all doubts' about the meaning of the rest of the text." *Young v. UPS, Inc.*, 135 S. Ct. 1338, 1363-64 (2015) (Scalia, J., dissenting) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420 (1819)). "It is no superfluity for Congress to clarify what" would otherwise be "at best unclear" or to avoid the possibility of circumvention. *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 543 n.7 (1994).

In all events, the Ninth Circuit's statutory surgery cannot be justified by the canon against superfluity when it in fact creates a far greater superfluity problem. "[T]he canon against superfluity assists only where a competing interpretation gives effect to every clause and word of a statute." *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011). Far from doing so, the Ninth Circuit's reading "would in practical effect render" nearly half of the statutory text—including the sole statutory phrase that ensures that an "automatic telephone dialing system" actually does something automatic—"entirely superfluous in all but the most unusual circumstances." *TRW*, 534 U.S. at 29. However rare a device that stores numbers to be called "using a random or sequential number generator" without producing them using that technology, a device with the capacity to produce numbers using such technology and dial them without the bare ability to store a single telephone number to be called at least ephemerally would seem rarer still. As between a reading that eliminates potential doubt about whether the statute covers the principal technology targeted by the statute (random- or sequential-number generation) when employed in two related but distinct functions (storing or producing), and a reading that jettisons the principal technology targeted by the statute and covers every telephone that stores and dials numbers, the choice is not close.

To the extent the Ninth Circuit's real concern was that equipment using a random- or sequential-number generator to store numbers for later use is no longer in common use by telemarketers, its statutory reconstruction was even more problematic. The court essentially mistook a success story for a license to

rewrite the statute's plain text. The 102nd Congress targeted specific problems that were extent in 1991: the proliferation of calls to numbers generated randomly (which might reach emergency rooms or hotlines) or sequentially (which might tie up entire businesses). If the prohibitions have largely eliminated those practices, that is a cause for celebration, not for repurposing the statute to address later-developing technologies that Congress has not yet addressed. As then-Commissioner Pai put it, "Congress expressly targeted equipment that enables telemarketers to dial random or sequential numbers in the TCPA. If callers have abandoned that equipment, then the TCPA has accomplished the precise goal Congress set out for it." 2015 FCC Order, 30 FCC Rcd. at 8,076 (dissenting statement of Comm'r Pai). That new problems may have arisen in the intervening decades is no excuse to "pour new wine into this old skin." *Glasser*, 948 F.3d at 1308.

3. The Ninth Circuit also justified its reading of the statute as "supported by" some of the TCPA's exceptions "allowing an ATDS to call selected numbers … rather than merely dialing a block of random or sequential numbers"—for instance, the exception to the ATDS prohibitions on calls made to "persons who had consented" to them. 904 F.3d at 1051. The Ninth Circuit appears to believe that since a telemarketer could not use random- or sequential-dialing technology to call specific individuals who had consented or had outstanding government debts, the prohibitions on the use of an ATDS must extend beyond random or sequential calling. But that reflects a misunderstanding of the statutory text in multiple respects.

First, the Ninth Circuit ignores that even if random- or sequential-number-generation technology cannot target specific numbers, it would still make sense to prevent those who had consented to the calls from suing. Even more important, the Ninth Circuit overlooked the fact that the exceptions it invoked are exceptions to prohibitions that cover both calls from an ATDS *and artificial- or prerecorded-voice robocalls*. The prohibitions on the latter robocalls are unaffected by the issue here, and such robocalls can be targeted to those with outstanding government debts or who have previously consented, so there is no legitimate concern with rendering the exceptions nugatory. In short, the broader prohibitions on the artificial- and prerecorded-voice robocalls that were the target of much of Congress' ire fully explain and ensure a continuing role for the exceptions.

Indeed, the link between the exceptions and the prohibitions on artificial- or prerecorded-voice robocalls is particularly clear, as the residential-line prohibition in §227(b)(1)(B), which applies only to robocalls, and not ATDS calls, includes exceptions that largely track the exceptions in §227(b)(1)(A), while the multiple-business-line prohibition in §227(b)(1)(D), which applies only to ATDS calls, and not robocalls, contains no exceptions. Thus, the exceptions in §227(b)(1)(A) are fully explained by that subsection's application to robocalls. And the fact that those exceptions will rarely apply to ATDS calls is hardly anomalous, because where Congress targeted ATDS calls alone in §227(b)(1)(D), it created no exceptions.

4. As a final testament to how far the Ninth Circuit strayed from the statutory text, it embraced a novel extension of the dubious doctrine of congressional-acquiescence-by-silence, suggesting that Congress silently acquiesced in an agency construction that was subject to court challenge when Congress acted and was ultimately rejected as internally inconsistent. Specifically, the Ninth Circuit emphasized that Congress left "the definition of ATDS untouched" when it amended other parts of the TCPA in 2015, "even though the FCC's prior orders interpreted this definition to include devices that could dial numbers from a stored list." *Marks*, 904 F.3d at 1051-52. This Court has long cautioned that even in the best of circumstances such arguments "deserve little weight in the interpretive process" since "Congressional inaction cannot amend a duly enacted statute." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186-87 (1994). But whatever could be said about acquiescence to a uniform judicial construction of a statute or a longstanding and judicially affirmed agency construction, employing the acquiescence doctrine here pushes that largely discredited doctrine past the breaking point and well illustrates the "limitations" "on the acquiescence doctrine … as an expression of congressional intent." *Id.* at 186.

First, the Ninth Circuit ignored that the FCC *rejected* a reading of the statute comparable to what the Ninth Circuit later embraced when the FCC considered the TCPA nearly contemporaneously with its enactment and for the first decade-plus of its existence. *See supra* pp.9-10. "Everyone seemed to accept" the plain-text reading "for the first dozen years

of the statute's existence." *Glasser*, 948 F.3d at 1308. This Court has been skeptical of administrative efforts to revise positions that were adopted when agency understandings of congressional intent were still fresh. *See, e.g.*, *Wyeth v. Levine*, 555 U.S. 555 (2009). Thus, even if Congress were aware of the FCC's late-breaking position, it is highly improbable that Congress would have acquiesced in that position, rather than the one the FCC adopted in the immediate wake of the TCPA's enactment.

Making matters worse, the Ninth Circuit ignored the fact that the principal FCC order purporting to reverse course and disturb the earlier consensus was *invalidated*. *See ACA Int'l*, 885 F.3d at 701. Invoking congressional silence in the face of *invalid* agency rulemaking is a novelty even in the soft science of employing congressional silence to interpret statutes. Worse still, the court ignored the reasons *why* the rule was invalidated: because it was internally inconsistent about the definition of an ATDS and "'offer[ed] no meaningful guidance' to affected parties in material respects on whether their equipment is subject to the statute's autodialer restriction." *Id.* at 696-701. If neither the D.C. Circuit nor the regulated community could clearly discern which of two inconsistent definitions the FCC order embraced, it is hard to see how Congress could have acquiesced in just one of them, or in anything the FCC had to say on the matter. Ultimately, the Ninth Circuit's need to grasp a reed as thin as the FCC's prior discredited rulemaking just underscores how far it deviated from statutory text and conventional rules of construction.

III. The Ninth Circuit's Reading Has Untenable Practical And Constitutional Consequences.

While its incompatibility with text and context is reason enough to reject it, the Ninth Circuit's interpretation of the statute is also doomed by the untenable practical and constitutional problems it would produce. By decoupling "store" from "using a random or sequential number generator"—the centerpiece of the ATDS definition—the Ninth Circuit radically reinvented the statute to impose liability and prohibit speech far beyond what the 102nd Congress could possibly have intended, and far beyond what the First Amendment could possibly tolerate.

1. If the phrase "using a random or sequential number generator" really does not modify "store," then nearly every American is a "TCPA-violator-in-waiting, if not … violator-in-fact." *ACA Int'l*, 885 F.3d at 698. While the typical phone is incapable of storing or producing numbers "using a random or sequential number generator" without modification, virtually any modern phone has the capacity to store numbers and then dial them. Indeed, even in 1991, functions like speed-dial and call-forwarding were common on both business and residential phones. *See* 1992 FCC Order, 7 FCC Rcd. at 8,776. Today, phones with the capacity to store and dial numbers are a way of life.

"The vast majority of Americans—96%—now own a cellphone of some kind," and 81% of Americans own "smartphones." Pew Research Center, *Mobile Fact Sheet* (June 12, 2019), https://pewrsr.ch/31csbS5. Thus, these days, "it is the person who is not carrying a cell phone … who is the exception," *Riley*, 573 U.S. at 395, and for many people, a smartphone is "the sole

phone equipment they own," *ACA Int'l*, 885 F.3d at 696. Even the least sophisticated mobile telephone, and certainly every one of the 269 million smartphones in the United States, has the capacity to store numbers and then dial them. *See Number of Smartphone Users in the United States 2010 to 2024 (in millions)*, Statista, https://bit.ly/2gbXF5d (last visited Sept. 4, 2020). Indeed, if that were all it took to make something an ATDS, then "each and every smartphone, tablet, VoIP phone, calling app, texting app—pretty much any calling device or software-enabled feature that's not a 'rotary-dial phone'—[would be] an automatic telephone dialing system." 2015 FCC Order, 30 FCC Rcd. at 8,075-76 (dissenting statement of Comm'r Pai) (footnote omitted). And, given the statutory focus on the device's capacity, that problem cannot be solved by engrafting a requirement that dialing occur "automatically" or "by human intervention" onto the ATDS definition, as smartphones all have the capacity to call numbers automatically (*e.g.*, auto-reply functionality, automatic do-not-disturb messages when cell phone owner is driving). *See, e.g.*, Apple, *How To Use Do Not Disturb While Driving*, https://apple.co/2w8nurH (last visited Sept. 4, 2020); Ben Stegner, *How to Send Automatic Replies to Text Messages on Android*, Make Use Of (Mar. 25, 2020), https://bit.ly/2IRgGWA; Verizon, *Turn On Auto Reply*, https://vz.to/2A5tqpH (last visited Sept. 4, 2020) (discussing the autoreply functionality in Verizon's often pre-installed messaging app). The Ninth Circuit's reading thus would "bring[] within the definition's fold the most ubiquitous type of phone equipment known, used countless times each day for routine communications

by the vast majority of people in the country." *ACA Int'l*, 885 F.3d at 698.

The consequences would be catastrophic. After all, if every cell phone really is an ATDS, then the TCPA would "subject[] not just businesses and telemarketers but almost all our citizens to liability for everyday communications." 2015 FCC Order, 30 FCC Rcd. at 8,075-76 (dissenting statement of Comm'r Pai). A new college student who gets a list of ten students in her virtual orientation section and texts them with an unsolicited invitation to a Zoom get-together would violate the TCPA ten times over, as her smartphone is an ATDS in the Ninth Circuit, and she lacked "prior express consent." 47 U.S.C. §227(a)(1), (b)(1)(A). While the class-action bar may leave college students alone, the sensible, but inherently fallible, business practices they have targeted are equally far removed from the text or Congress' concerns, as this case well illustrates. Given the rate at which cellular telephone numbers are recycled, it is impossible for a business to avoid inadvertently reaching numbers whose previous owners consented, even when the business is simply trying to send useful messages, like the Facebook security alerts at issue here. Imposing liability for those targeted calls via a statute designed to regulate specialized equipment deployed by telemarketers to contact numbers randomly or sequentially makes no sense. And casting the liability net as wide as the Ninth Circuit did converts the ordinary telephone users and businesses the statute was designed to protect into violators.

To its credit, the Ninth Circuit did not deny those untenable consequences. It readily acknowledged

that its "gloss on the statutory text" could "not avoid capturing smartphones." Pet.App.8-9. But it cavalierly dismissed that startling result as consistent with "the TCPA's animating purpose—protecting privacy by restricting unsolicited, automated telephone calls." Pet.App.9. Although identifying a statute's "animating purpose" can be an elusive enterprise and often lies in the eye of the beholder, the Ninth Circuit's reasoning fails on its own terms.

First, it mistakes the statute's *general* purposes, as reflected in, *inter alia*, the broader prohibitions on artificial- and prerecorded-voice robocalls, with its *specific* purpose for the narrower prohibitions on the use of an ATDS. As discussed, the ATDS prohibitions were motivated by concerns other than individual privacy, which is why they, unlike the robocall ban, never extended to ordinary residential lines. The statutory text thus confirms that Congress' "animating purpose" with respect to the use of an ATDS was not "protecting privacy" or domestic tranquility, but rather protecting against the use of a random- or sequential-number generator to tie up critical and/or costly communications infrastructure.

The Ninth Circuit's reasoning also ignores the related problem that the text of the ATDS definition focuses on the device's capacity and prohibits calls from an ATDS *without regard to whether they are automated*. When it comes to an ATDS (as opposed to a robocall), the text makes liability turn on the functionality of *the equipment*, not the type of call or the particular manner in which a call was placed. That reinforces why the definition should be given the narrow compass its text indicates. It is not a problem

to entirely prohibit *any use* of a specialized device with pernicious capabilities. But extending that definition to any use of ubiquitous devices with the innocuous capabilities of storing and dialing numbers is a recipe for disaster. Even in the context of statutes enforced only by government prosecutors, the approach of prohibit-everything-and-trust-the-government-to-pursue-the-worst-abuses is not in favor with this Court. *See, e.g., McDonnell v. United States*, 136 S. Ct. 2355 (2016). But employing a comparable approach in a statute that gives every recipient of an unwanted call a right to statutory damages is wholly untenable.

2. The canon of constitutional avoidance provides one more reason to respect the text of the statute as Congress actually wrote it. "[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice." *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005). If one construction "would raise a multitude of constitutional problems, the other should prevail." *Id.* That principle compels rejection of the Ninth Circuit's capacious interpretation, for if the TCPA really did cast a dragnet as wide as the Ninth Circuit envisions, then it would plainly violate the First Amendment.

As this Court just reaffirmed, the TCPA and its prohibitions implicate the First Amendment. *Barr*, 140 S. Ct. at 2343, 2346-47 (plurality op.). In the modern world, where vast quantities of political and commercial speech occur via telephone and text messages, a statute like the TCPA must comply with First Amendment doctrines that prohibit overbreadth as well as content-based discrimination. "When the Government restricts speech, the Government bears

the burden of proving the constitutionality of its actions." *McCutcheon v. FEC*, 572 U.S. 185, 210 (2014) (plurality op.). Even a time, place, and manner restriction must be "narrowly tailored to serve a significant governmental interest" and must "leave open ample alternative channels for communication." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *see also McCullen v. Coakley*, 573 U.S. 464, 477 (2014). In other words, "the government … 'may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.'" *McCullen*, 573 U.S. at 486 (quoting *Ward*, 491 U.S. at 799). Accordingly, even if a restriction on speech advances an important government interest, it cannot survive First Amendment scrutiny "if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 473; *see also, e.g.*, *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019). Simply put, "[i]n the First Amendment context, fit matters." *McCutcheon*, 572 U.S. at 218.

If the text did not already answer the question whether the definition of an ATDS sweeps in ubiquitous devices and not just specialized technology, the First Amendment would. A prohibition on specialized devices with pernicious capabilities could be readily justified as a valid "manner" restriction on calls and texts. But if the TCPA really did prohibit virtually all calls and texts made from any smartphone without "prior express consent," then it would be a wildly overbroad means of advancing the government's objectives in promoting privacy and public safety. As this Court has recognized,

smartphones are "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Riley*, 573 U.S. at 385. Hundreds of millions of Americans use them to place billions of calls and text messages every day. *See supra* pp.43-44. Subjecting "the speech of every American that owns a phone" to a $500 penalty any time a call is made to another mobile telephone without prior express consent cannot possibly be a narrowly tailored means of achieving any legitimate interest the government might have. 2015 FCC Order, 30 FCC Rcd. at 8,076 (dissenting statement of Comm'r Pai).

It is certainly not a legitimate means of advancing any interest Congress actually articulated in the TCPA. To the contrary, Congress went out of its way to *avoid* unduly restricting *live* calls, whether solicited or not. That was no accident. When questions were raised "about whether [the bill] is consistent with the First Amendment protections of freedom of speech," the Senate Committee responded by emphasizing that the statute was principally focused on "automated telephone calls that deliver an artificial or prerecorded voice message," which "are more of a nuisance and a greater invasion of privacy than calls placed by 'live' persons." S. Rep. No. 102-178, at 4. To be sure, the TCPA does prohibit even live calls made by ATDS to certain types of telephone lines. But there, Congress was careful (or at least thought it was careful) to ensure that it was restricting only calls made with a particularly pernicious type of technology that posed distinct threats to critical infrastructure and interstate commerce. If an ATDS must have the capacity to use a random- or sequential-number

generator, then Congress' prohibitions are carefully tailored to its objective of ensuring that ATDSs would not clog up emergency and specialized lines. If an ATDS encompasses virtually any type of telephone under the sun, then Congress' prohibitions are a radically overbroad incursion on free speech.

This is a case in point. Facebook's login-notification text messages are designed to *enhance* consumer privacy and security by alerting the user when his or her Facebook account is being accessed from a potentially suspicious location, thereby enabling the user to take immediate action to secure the account. Far from sending messages en masse to randomly or sequentially generated numbers, Facebook sends targeted, informational security alerts on an individual basis, in response to specific instances of potentially unauthorized account access. *See* Pet.App.47-49. These kinds of targeted privacy- and security-enhancing messages are nothing like the disruptive practices Congress sought to curtail when it restricted the use of an ATDS. Indeed, the very fact that Facebook users routinely *opt in* to receive such security messages confirms their utility. *See also, e.g.*, John Koetsier, *Consumers 35x More Likely To See Brands' Texts vs Emails*, Forbes (Nov. 14, 2019), https://bit.ly/3i0v3Z0 (70% of consumers find mobile alerts about possible fraudulent bank account activity "very useful"); *cf.* Mike Kappel, *Texting—One Small Step For Friends, One Giant Leap For Business*, Forbes (Sept. 18, 2019), https://bit.ly/2Xsj52w ("According to a recent study …, most customers actually prefer to communicate with businesses via texting.").

No one doubts the government's interest in preventing abusive telemarketing practices, but those interests will be furthered by the prohibitions on artificial- and prerecorded-voice robocalls no matter how broadly or narrowly the ATDS definition is construed. And however important the government's interest in avoiding the distinctive risks from random- and sequential-number-generation technology, it is hard to imagine how subjecting Facebook to a class action seeking hundreds of millions of dollars in liability simply because security alerts sometimes go to recycled numbers could be "necessary or legitimate to serve that purpose." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). And it is inconceivable that any interest the government may have could justify prohibiting virtually every telephone call in the country made to a cell phone without "prior express consent," particularly given the obvious class-action abuses that the statutory damages provision invites. Yet that is the inevitable result of untethering the definition of ATDS from its core requirement of "using a random or sequential number generator." Far from compelling such untenable results, statutory text, context, constitutional avoidance, and basic common sense all compel the conclusion that the TCPA does not reach every telephone with the capacity to store numbers and dial them.

CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully submitted,

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