

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

FACEBOOK, INC.,)
) Petitioner,)
) v.) No. 19-511
NOAH DUGUID, ET AL.,)
) Respondents.)

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10 Washington, D.C.

11 Tuesday, December 8, 2020

12

13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:00 a.m.

16

17 APPEARANCES:

18 PAUL D. CLEMENT, ESQUIRE, Washington, D.C.;

19 on behalf of the Petitioner.

20 JONATHAN Y. ELLIS, Assistant to the Solicitor

21 General, Department of Justice, Washington, D.C.;

22 for Respondent United States, supporting the

23 Petitioner.

24 BRYAN A. GARNER, ESQUIRE, Dallas, Texas;

25 on behalf of the Respondents.

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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 19-511, Facebook versus Duguid.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONER

MR. CLEMENT: Mr. Chief Justice, and may it please the Court:

The TCPA defines an Automatic Telephone Dialing System as equipment with the capacity to store or produce telephone numbers to be called, using a random or sequential number generator, and to dial such number. The statute prohibits calls using an ATDS to emergency and cellular lines but not to residential lines.

Under well-established rules of grammar and statutory construction, the entire phrase "telephone numbers to be called, using a random or sequential number generator" applies to both disjunctive verbs, "store" or "produce." The contrary reading covers any device that can store and dial numbers even without the use of a

1 random or sequential number generator. That
2 reading creates a statute of impossible breadth
3 and a fundamental mismatch between the ATDS
4 definition and the targeted ATDS prohibitions.

5 Under ordinary rules of grammar, a
6 restrictive modifier that follows two
7 disjunctive verbs modifies both, not just the
8 second one. Three features of the statutory
9 text here reinforce that conclusion.

10 First, the punctuation. The modified
11 phrase here is set off by a comma, which
12 indicates that the phrase modifies both verbs.

13 Second, the shared direct object. The
14 direct object that follows "produce," "telephone
15 numbers to be called," concededly applies
16 equally to "store" as well as "produce." Having
17 some but not all of the text that follows
18 "produce" refer back to "store" requires a
19 significant judicial rewrite.

20 Third, the scope of the ATDS
21 prohibitions. They do not prevent ATDS calls to
22 the residential landlines used by most Americans
23 in 1991. Instead, they target only the
24 specialized lines -- emergency, cellular, and
25 multiple business lines -- that were distinctly

1 vulnerable to random and sequential dialing.
2 That limited scope makes sense as a targeted
3 response to the problems of random or sequential
4 dialing. But, if Congress were really aiming at
5 annoying calls from devices that could store and
6 dial numbers, its failure to protect the home
7 front would be inexplicable.

8 CHIEF JUSTICE ROBERTS: Mr. Clement,
9 your friend on the other side says that we ought
10 to look to the sense of the passage and not to
11 rules of -- of syntax. I know you have a
12 dispute about what the sense of the passage is.

13 But, as a general matter, he's right,
14 isn't he? I mean, the drafters here weren't
15 following the rule of reddendo singula singulis
16 or diagramming these sentences, so why -- why
17 should we focus on -- on syntax to the extent
18 that I think both parties do?

19 MR. CLEMENT: Well, Your Honor, I
20 think because the other way lies madness, with
21 all due respect. I mean, I think, if one
22 deviates from the rules of sort of ordinary
23 grammar and statutory construction, then there
24 becomes so much play in the joints that you
25 essentially empower the judiciary to rewrite

1 statutes.

2 And with all respect to my friends on
3 the other side, I think that's really what they
4 invite you to do here. I think Congress
5 targeted a very specific problem in this
6 provision, a problem that was prevalent in 1991.

7 I think it was successful in
8 eradicating that specific technology, and my
9 friend would like to use the synesis or the
10 sense of the statute to repurpose the statutory
11 prohibition to address more modern ills.

12 CHIEF JUSTICE ROBERTS: Well, it's
13 clear that they didn't have in mind the modern
14 ills, as -- as you say, and the modern ills, at
15 least according to your friend, would lead to a
16 disaster if his interpretation weren't --
17 weren't adopted. Is that something we should
18 consider at all?

19 MR. CLEMENT: I -- I don't think it's
20 something you should really consider, and I
21 think it gives too little credence to Congress's
22 own ability to address these problems in an
23 ongoing way.

24 As recently as 2019, Congress passed
25 another statute addressed to the problem of

1 accepted telemarketing calls. One of the things
2 that that Act did is to try to create a process
3 where the technology we use in our home phones
4 and our cellular phones would itself block these
5 kind of unwanted calls.

6 CHIEF JUSTICE ROBERTS: Thank you.
7 Thank you, counsel.

8 Justice Thomas.

9 JUSTICE THOMAS: Thank you, Mr. Chief
10 Justice.

11 Mr. Clement, I know this isn't central
12 to your case, but it's -- it's -- but I am
13 interested in why a text message is considered a
14 call under the TCPA.

15 MR. CLEMENT: Well, Justice Thomas, I
16 actually think that's an excellent question, and
17 I think it is another way in which the courts
18 have essentially updated the statute to keep up
19 with the times.

20 And it's not at all clear that a
21 statute that was directed not just at calls but
22 also, in particular, at artificial or
23 prerecorded voice calls is really sensibly
24 applied to texts at all.

25 And if one were to hold that the

1 statute were limited to actual voice calls and
2 not to texts, that would be an alternative route
3 for ruling in our favor in this case.

4 The one other thing I would -- I would
5 point to, Justice Thomas, is there is an amicus
6 brief by the Washington Legal Foundation that
7 addresses this issue specifically, and what they
8 point out is that in more recent statutes, when
9 Congress is -- when Congress addresses calls and
10 texts, they do so either conjunctively or
11 disjunctively. But I think that gives real
12 evidence to the fact that one doesn't naturally
13 talk about a text as a call, but, rather, one
14 talks about either calls I received on my phone
15 or texts I received.

16 JUSTICE THOMAS: The -- the -- when
17 you -- when we talk about a number generator
18 under the TCPA, are we talking about a device as
19 a number generator or a process? It would seem
20 that perhaps it would -- makes more sense it
21 would be a device, but what's your thought on
22 that?

23 MR. CLEMENT: Justice Thomas, I think
24 the statute's most likely read as talking about
25 a process that is part of overall equipment. So

1 I think they may have had in mind a computer
2 program that would be part of the overall
3 equipment that's used to store or produce a
4 number using the random or sequential number
5 generator and then to dial that number.

6 JUSTICE THOMAS: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Justice Breyer.

10 JUSTICE BREYER: Well, my only
11 question from your answer to -- was in light of
12 your answer to the Chief Justice. I think you
13 say in your brief, and it seems right to me,
14 that if we take your friend's -- your opponent's
15 definition, then it would be unlawful for a
16 person to use a cell phone, yes, that stores
17 numbers, like an emergency hospital number, to
18 make a call for -- to the emergency line of the
19 hospital.

20 Now that's -- that -- I think you say
21 something like that. Is that right?

22 MR. CLEMENT: That's right, Justice
23 Breyer.

24 JUSTICE BREYER: And are you really
25 telling the Chief Justice that's irrelevant?

1 MR. CLEMENT: No, I -- I didn't mean
2 to tell the Chief Justice that that was
3 irrelevant. I think that the -- the scope --

4 JUSTICE BREYER: Wouldn't you say it's
5 fairly important?

6 MR. CLEMENT: -- of the statute --

7 JUSTICE BREYER: Wouldn't you say it's
8 fairly important? I mean, if it produces a very
9 peculiar or weird result, it does have something
10 to do with interpretation, doesn't it?

11 MR. CLEMENT: Oh -- oh, absolutely.
12 I -- what I -- all I was responding to is the
13 idea that rather than looking at the results
14 produced by the actual words in their syntax,
15 whether we start sort of creeping into this
16 concept of synesis, which, I mean, maybe, you
17 know, it's sort of in vogue in certain
18 grammarian circles, but -- but I really don't
19 think that's something that's featured in this
20 Court's cases.

21 And I think the --

22 JUSTICE BREYER: I'm making a --

23 MR. CLEMENT: -- ordinary tool --

24 JUSTICE BREYER: -- I'm making a
25 general point that both consequences and

1 purposes and text are all relevant, and in this
2 case, you have a pretty strong claim in my
3 opinion -- and I'll ask your -- your colleague,
4 your friend -- you have a pretty strong case on
5 the consequences and purposes.

6 MR. CLEMENT: Well, obviously, Justice
7 Breyer, there's -- there's a range of views on
8 this Court as to how much one looks beyond the
9 text to sort of context and consequences. I
10 think -- happily, here, I think text, context,
11 and consequences all point in favor of our
12 proposed construction of the text.

13 JUSTICE BREYER: I -- I --

14 CHIEF JUSTICE ROBERTS: Thank --

15 JUSTICE BREYER: -- realize you think
16 that. I -- I realize it. Thank you.

17 CHIEF JUSTICE ROBERTS: Justice Alito.
18 Justice Alito.

19 JUSTICE ALITO: Sorry.

20 Mr. Clement, the statutory phrase that
21 we have to interpret in this case has a
22 structure that is fairly common. It lists two
23 activities, "storing or producing telephone
24 numbers," followed by a modifying phrase, "using
25 a random or sequential number generator."

1 People make statements like that all
2 the time, and, you know what, those who hear
3 them or read them understand what they mean
4 without looking at treatises on grammar syntax,
5 usage, or interpretation. And the way they do
6 that is to ask, what makes sense?

7 I can give you lots of examples, but I
8 have very little time for questioning, so they
9 -- they ask about the sense of it before they
10 get to all this arcane stuff.

11 So the question that jumps out here is
12 this: Does it make any sense to speak about
13 storing a list of telephone numbers using a
14 random or sequential number generator?

15 And the best answer I can find in the
16 briefs on your side is that there were systems
17 that produced lists of numbers using such a
18 generator and then stored them. But, unless you
19 can explain how a generator was used in the very
20 process of storing the numbers, I think you have
21 a problem.

22 MR. CLEMENT: So, Justice Alito, two
23 quick things on that. One is I do think readers
24 of language have an advantage over listeners,
25 which is they can look to the punctuation, and I

1 do think the punctuation here is important.

2 But, to get to the heart of your
3 question, I don't think there's anything
4 nonsensical or redundant about talking about
5 using a random generator, number generator, to
6 store numbers.

7 I think it's not any different in
8 principle with the phrase that a lot of people
9 have used to describe the sense of the ATDS
10 prohibition, which prohibits dialing of numbers
11 using a random or sequential number generator.

12 In both contexts, I think the senses
13 are very sensible -- the sentences are very
14 sensible. They just mean that you're using the
15 number generator not to do the actual dialing or
16 the actual storing but as part of the process of
17 storing telephone numbers to be called or part
18 of the process of dialing telephone numbers to
19 be called.

20 And I think, if you understand the
21 terms in that way, they make perfect sense in --
22 in normal English. And I think what they really
23 get at is the idea that Congress was trying to
24 prohibit the use of a random or sequential
25 number generator, either for immediate dialing,

1 which would be produced, or for later dialing,
2 which would be captured even more aptly by the
3 verb "to store."

4 JUSTICE ALITO: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Sotomayor.

7 JUSTICE SOTOMAYOR: Mr. Clement, with
8 your parade of horribles that, if read the way
9 the other side wants, it would cover devices,
10 too many devices, I'm wondering if the issue is
11 less with Respondents' interpretation and more
12 so with the TCPA being outdated. When the Act
13 was passed nearly 30 years ago, smartphones
14 didn't even exist. Even today, it still
15 references pagers, the TCPA.

16 But you are right to note that today
17 almost all phones have the ability to store and
18 dial telephone numbers. If what Congress wanted
19 to do was stop a call that was automatic and
20 that's what it accomplished, wouldn't it be its
21 job, not ours, to update the TCPA to bring it in
22 line with the times?

23 MR. CLEMENT: So, Justice Sotomayor, I
24 definitely think that it's Congress's job to
25 update the statute, but I don't think the

1 problem with the other side's construction is
2 something that only materializes with the modern
3 smartphone.

4 I think the basic problem also inhered
5 in technology that was prevalent in 1991, like
6 speed dialing or call forwarding, which involves
7 the rudimentary capacities to store numbers and
8 to dial them.

9 And the FCC confronted that issue in
10 the immediate wake of the statute's passage in a
11 1992 rulemaking, and it said, don't worry about
12 speed dialing, don't worry about call
13 forwarding, that's not covered because it
14 doesn't use a random or sequential number
15 generator.

16 So I think there's a -- you know, for
17 the entire history of the TCPA, there's been the
18 potential for it to be read way too broadly, and
19 I think, since the very beginning, the sensible
20 way to avoid that outcome is to read "using a
21 random or sequential number generator" to modify
22 both "to store" and "to produce."

23 JUSTICE SOTOMAYOR: Thank you,
24 counsel.

25 CHIEF JUSTICE ROBERTS: Justice Kagan.

1 JUSTICE KAGAN: Mr. Clement, I'd like
2 to give you a hypothetical along the lines that
3 Justice Alito was talking about. So here is the
4 sentence: It is illegal to stab or shoot
5 another person using a firearm.

6 And what I want to know is, would I be
7 covered if I stabbed somebody with a knife?

8 MR. CLEMENT: I -- I think you would,
9 Justice Kagan. You would obviously be covered
10 if you stabbed somebody using a bayonet, I
11 suppose, but I -- I think that really gets to
12 some of the -- the -- the sense that you
13 provided in the Supreme Court's decision in the
14 Advocate Health case, which there are certain
15 combinations of words where the mind just sort
16 of rebels at the combination of the two words.

17 And I think, there, it's very clear
18 that you really don't in the ordinary parlance,
19 except for possibly with a bayonet, stab
20 somebody using a firearm. But I don't think
21 there's any comparable logical inconsistency or
22 linguistic impossibility with using equipment to
23 store telephone numbers to be called using a
24 random or sequential number generator.

25 And, indeed, if you look at some of

1 the state statutes that were passed before the
2 TCPA, they all used a bunch of different
3 formulations, but a number of them did address
4 the combination of storage technology and random
5 or sequential number generator.

6 And I think that is a real problem,
7 not a feigned problem or an odd combination,
8 particularly if you think about sequential
9 number generation, where you generate thousands
10 of numbers, you have to store them someplace,
11 and it's really the fact that you're using the
12 equipment to store the numbers and then dial
13 them seriatim that creates the distinct risks to
14 emergency lines and cellular phones and pager
15 lines and the rest.

16 JUSTICE KAGAN: And, quickly,
17 Mr. Clement, could you comment on the surplusage
18 problem that your reading creates?

19 MR. CLEMENT: So I don't think it
20 creates a -- a surplusage problem, Justice
21 Kagan. And I do think the other side's reading
22 creates a bigger surplusage problem.

23 So, on our side, I don't think there's
24 a surplusage problem because, if I talked about
25 using a power generator to store or -- or

1 produce electricity, I don't think you would
2 read that as having the "store to" being
3 completely redundant because, by using "store or
4 produce," I'd be making clear I don't really
5 care whether you're using the electricity now or
6 later. So I don't think it's purely redundant.

7 On the other hand --

8 JUSTICE KAGAN: Thank you,
9 Mr. Clement. Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Gorsuch.

12 JUSTICE GORSUCH: Good morning,
13 Mr. Clement. You -- you pressed what Judge
14 Barrett in her opinion on -- for the Seventh
15 Circuit called the first potential reading. But
16 the problem that it generates, as everybody's
17 recognized, so to speak, is that it's awkward to
18 speak of -- of equipment storing anything using
19 a random number generator. That's what Justice
20 Alito and Justice Kagan have pointed out.

21 One potential response to that might
22 be that what -- what Judge Barrett called the
23 fourth potential reading, which is to say that
24 the phrase "using a random or sequential number
25 generator" modifies the object rather than the

1 verbs.

2 And it would be sensible to talk about
3 storing telephone numbers to be called -- that
4 are to be called using a random number
5 generator. The problem there, of course, is the
6 comma. I -- I -- I see all that. All right?

7 My question for you is -- is you
8 didn't raise the fourth argument as a potential.
9 I'm not sure we need to rule it out. Would it
10 -- would it make any difference to you and your
11 clients and -- and in any sensible way make a
12 difference in the real world whether we were
13 adopting the first alternative or -- or saying
14 that the fourth might be a possibility too?

15 MR. CLEMENT: So, Justice Gorsuch, I
16 -- I think we would prevail equally under the
17 fourth alternative, and I don't -- I -- as I'm
18 -- as I'm standing here today, I can't think of
19 a practical difference between the two.

20 Obviously, when we're formulating our
21 argument, it's hard for us to ignore the comma,
22 which is part of the reason we didn't press the
23 fourth construction.

24 The other reason we didn't press it,
25 to -- to -- to be candid, is if you don't think

1 there's anything terribly anomalous about
2 talking about calling using a random or
3 sequential number generator, then I don't know
4 why you think there's something so anomalous
5 about storing numbers using a random or
6 sequential number generator.

7 I think, in both contexts, it's not
8 the generator itself that does the calling or
9 the storing, but in both cases, the number
10 generator is used as part of the storage process
11 or part of the calling process.

12 JUSTICE GORSUCH: Very helpful. Thank
13 you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Kavanaugh.

16 JUSTICE KAVANAUGH: Thank you, Chief
17 Justice.

18 Good morning, Mr. Clement. I want to
19 touch on what you talked about what Congress was
20 getting at in 1991 and just make sure I
21 understand the structure of the statute.

22 Your point about calls to the home,
23 only artificial or prerecorded calls to the home
24 were prohibited, why didn't Congress also
25 prohibit live calls, live telemarketing calls,

1 to the home do you think?

2 MR. CLEMENT: Well, I think it's
3 pretty clear from both the legislative history
4 and the legislative findings that were enacted
5 in the statute itself that the reason they
6 didn't go after live voice calls to the home was
7 out of respect for the First Amendment.

8 JUSTICE KAVANAUGH: Okay. And then,
9 when you get to the other category of calls
10 we're talking about, to the specialized numbers,
11 Congress again prohibits the artificial or
12 prerecorded voice calls but then also prohibits
13 calls which would, presumably, be live caller
14 calls using an ATS -- an ATS -- ATDS.

15 What was, in your view, Congress
16 getting at with those calls? Am I right in
17 thinking those are live caller calls that would
18 necessarily be covered by the ATDS prohibition?

19 MR. CLEMENT: Well, they could be.
20 They could, I think, be live caller calls.
21 There's actually some debate about that. And I
22 think, if you look at the whole legislative
23 history, there's a little bit of ambivalence
24 about that.

25 But let's say they call voice calls.

1 I think the reason that they targeted those
2 specialized lines and, as to those specialized
3 lines, prohibited the ATDS in addition to the
4 artificial or prerecorded voice calls when they
5 didn't do the same to the residential landlines
6 is precisely because those were the lines that
7 were particularly vulnerable to random or
8 sequential number generation technology --

9 JUSTICE KAVANAUGH: Right. The
10 artificial or pre- --

11 MR. CLEMENT: -- and the harm that
12 that would --

13 JUSTICE KAVANAUGH: -- the artificial
14 or prerecorded calls to those lines would have
15 been already prohibited, though, so the ATDS
16 must be getting -- and I don't know which way
17 this cuts; I'm just trying to understand it --
18 would have been -- using that, an ATDS, for a
19 live caller call would have been the only thing
20 separately covered?

21 MR. CLEMENT: Yeah, I'm -- I'm -- I'm
22 not positive that's the way the statute is
23 structured, Your Honor, because I think the
24 prohibition to the residential lines only covers
25 artificial or prerecorded voice calls. And

1 then, as to the cellular and business lines and
2 emergency lines, both are prohibited.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 MR. CLEMENT: So they -- they --

6 CHIEF JUSTICE ROBERTS: Justice --

7 MR. CLEMENT: -- specifically singled
8 --

9 CHIEF JUSTICE ROBERTS: Justice --

10 MR. CLEMENT: -- out the -- the -- the
11 cellular and mobile lines --

12 CHIEF JUSTICE ROBERTS: Justice
13 Barrett.

14 MR. CLEMENT: -- and the emergency
15 lines, and they said, as to those, we don't want
16 either artificial or prerecorded voice calls or
17 an indication --

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 MR. CLEMENT: -- we don't want these
21 ATDS calls.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett.

24 JUSTICE BARRETT: Mr. Clement, some of
25 the lower courts that have adopted your

1 opponent's interpretation have been moved by the
2 exception in (B), which says that liability
3 doesn't attach if the call is made for emergency
4 purposes or with the prior express consent of
5 the called party. And, you know, they've
6 pointed out that, under your interpretation,
7 they say: Listen, the prior express consent
8 would do no work for an ATDS.

9 I'm looking at the emergency purposes
10 exception to liability, and I'm wondering how
11 either an ATDS or an automated or artificial
12 prerecorded voice device would make a call for
13 emergency purposes.

14 MR. CLEMENT: So, Justice Barrett, I
15 think you could imagine either one of them
16 making a call if -- you know, if there were a
17 medical emergency. If there were an individual
18 at large in the community, you could imagine a
19 police department using this kind of technology
20 to provide a warning message, and it could be a
21 prerecorded warning message, to everybody in the
22 jurisdiction.

23 JUSTICE BARRETT: So you think it
24 would have some utility -- I mean, I -- I guess
25 what I'm getting at here is I'm wondering

1 whether, in an abundance of caution, you can
2 imagine why Congress wouldn't want any call that
3 was placed for emergency purposes or a call that
4 was placed with express consent to give rise to
5 liability.

6 However, I mean, it -- it may not be
7 that there's very wide applicability for either
8 one of those exceptions, including the one for
9 emergency services, which I think would deprive
10 the objection of some of its force, that your
11 interpretation renders the prior consent of not
12 great utility.

13 MR. CLEMENT: I think it's going to be
14 a narrow band of calls, but I do think they're
15 calls that conceivably could make -- be made
16 with an ATDS, so I think the exception has some
17 force.

18 I do think, though, if you read the
19 statute as a whole, it's pretty clear that the
20 exceptions are mostly in there for the
21 prerecorded or artificial voice calls, because
22 there's no exception in (b)(1)(D), which is the
23 one provision that applies only to ATDS calls.

24 JUSTICE BARRETT: Thank you, counsel.

25 CHIEF JUSTICE ROBERTS: A minute to

1 wrap up, Mr. Clement.

2 MR. CLEMENT: Thank you.

3 There are two final defects with
4 Respondents' view I'd like to emphasize. Under
5 our reading, both disjunctive verbs are
6 modified, and so both capture specialized
7 conduct of comparable scope.

8 Under Respondents' reading, by
9 contrast, "to store" is unmodified and captures
10 a wide swath of conduct, while "to produce using
11 a random or sequential number generator"
12 captures only a narrow band of specialized
13 conduct.

14 That is not how Congress generally
15 writes statutes. It does not put an elephant
16 hole next to a mouse hole, prohibiting both
17 everything under the sun and a highly
18 specialized practice.

19 And that points to the second problem.
20 If Congress really wanted to prohibit every
21 annoying call made with a device that can store
22 and dial numbers, it would not have left the
23 home front unprotected. In 1991, there were
24 only about 7 million cell phones. The default
25 telephone for almost every constituent

1 represented in Congress was a residential
2 landline.

3 If the ATDS provisions were addressed
4 to something broader than random or sequential
5 dialing, Congress's decision to leave the
6 residential landlines unprotected would be
7 inexplicable.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Mr. Ellis.

11 ORAL ARGUMENT OF JONATHAN Y. ELLIS
12 FOR RESPONDENT UNITED STATES,
13 SUPPORTING THE PETITIONER

14 MR. ELLIS: Mr. Chief Justice, and may
15 it please the Court:

16 In the government's view, this case
17 can and should begin and end with the statutory
18 text. Under ordinary rules of grammar and
19 canons of construction, the phrase "using a
20 random or sequential number generator" in
21 Section 227(a)(1)(A) is best read to modify both
22 "store" and "produce."

23 Now Respondent asks this Court to
24 discard those rules and rely instead on the
25 anti-grammatical sense of the passage, but it

1 cannot show the sort of contextual plausibility
2 of a grammatical reading that might warrant that
3 approach. He also places significant weight on
4 the purported consequences of the government's
5 reading on the modern telemarketing industry.

6 But that argument misconceives the
7 limited role that the ATDS definition plays in
8 the statutory scheme both today and, more
9 importantly, from the perspective of the 1991
10 Congress.

11 Regardless of how the Court resolves
12 this case, the TCPA will continue to broadly
13 prohibit robocalls to cell phones and
14 residential lines. The fact that the 1991 ATDS
15 definition describes a universe of devices that
16 are no longer in widespread use provides no
17 basis for this Court to adopt anything other
18 than the most natural reading of the statutory
19 text.

20 I welcome the Court's questions.

21 CHIEF JUSTICE ROBERTS: Mr. Ellis, you
22 began by saying this case can begin and end with
23 the statutory text. Are you saying it's a plain
24 meaning case?

25 MR. ELLIS: We think, Your Honor, that

1 the -- the interpretation we've offered here is
2 by far the most natural reading of the text.
3 Just like a case in the other case where there's
4 not an agency action at issue, we haven't gone
5 so far as to weigh in on whether we -- we think
6 that a contrary approach by the FCC would be
7 permissible.

8 But I -- I just -- I don't want to
9 suggest that lacks -- that suggests any lack of
10 confidence in our reading. We do think it's by
11 far the more natural one.

12 CHIEF JUSTICE ROBERTS: Well, I guess,
13 if you're saying it begins and ends with the
14 text, that doesn't leave much room for the FCC
15 to adopt a different interpretation from the one
16 you're advancing.

17 MR. ELLIS: I think that's right, Your
18 Honor. I don't think there's much room for a
19 contrary interpretation.

20 Again, the -- this is a question on
21 which the FCC has requested comment twice since
22 the D.C. Circuit's decision in ACA
23 International. It's a question that's open on
24 its docket.

25 You know, we were -- are -- are

1 reticent to foreclose that -- any contrary
2 interpretation from the FCC without seeing what
3 they had to say, but -- but I -- I agree with
4 you completely that there's not a lot of room
5 for a contrary interpretation here.

6 CHIEF JUSTICE ROBERTS: Well, that was
7 a question, not a statement. The -- what --
8 what do you take -- how do you react to the
9 notion that this is going to have disastrous
10 consequences given -- given technology that has
11 developed since Congress passed this and -- and
12 whether or not those consequences should enter
13 into our consideration?

14 MR. ELLIS: Well, I think a couple
15 things about that, Your Honor. I -- I -- I
16 agree with my -- my friend from Facebook that
17 that shouldn't be -- shouldn't drive the Court's
18 analysis here. I think the question is what the
19 statute meant in 1991.

20 I -- I also, though, think that it
21 sort of misconceives, as I suggested, the -- the
22 narrow role that the ATDS definition plays in
23 this statutory scheme. The ATDS definition only
24 implicates the automated call restriction to --
25 to these sensitive lines, emergency lines, guest

1 and patient rooms at healthcare facilities, and
2 cell phones.

3 CHIEF JUSTICE ROBERTS: Thank you, Mr.
4 Ellis.

5 Justice Thomas.

6 JUSTICE THOMAS: Thank you, Mr. Chief
7 Justice.

8 Mr. Ellis, the -- Justice Sotomayor
9 brought up the point of the ill fit between this
10 statute from 1991 and current technology, which
11 is advanced. In '91, cell phones, or quite a
12 few of them, were the size of a loaf of bread,
13 and they're not in widespread use. Lots of
14 people had car phones instead -- installed in
15 their cars. The -- we've had, in legislation,
16 quite a change. The industry's changed. The
17 technology is far beyond anything we could have
18 conceived of in '91.

19 At what point do we simply say -- and
20 I understand the statutory construction and the
21 -- the -- what we're attempting to do with this
22 statute, but at what point do we say this
23 statute is an ill fit for current technology?

24 MR. ELLIS: So I -- I think, in -- in
25 one respect, that -- that may be true. I think

1 the -- the best reading of the ATDS definition,
2 as you suggested, doesn't apply to a great deal
3 of technology that's still in use today. I -- I
4 think that's actually evidence of the TCPA's
5 success and -- and not a reason to update the
6 statute.

7 I -- and on the flip side, as -- as
8 you suggest, the Respondents' reading of the
9 text does at least present a potential that --
10 that ordinary smartphones could be -- calls from
11 ordinary smartphones could be made unlawful.

12 I -- I think, happily, the best
13 reading of the text doesn't lead to that result,
14 and that's what we're urging for the -- the
15 Court to adopt here.

16 JUSTICE THOMAS: But I think the point
17 -- what I'm asking is sometimes we use -- I
18 think it's a little odd when we use these -- we
19 make great effort to interpret a statute that
20 really wasn't intended for the universe in which
21 we are operating now. And at what point do we
22 just simply say that?

23 MR. ELLIS: I think you can say that
24 in an opinion. I think that the -- the -- the
25 Court's approach shouldn't change based on that.

1 I think the -- the Court -- the right approach
2 for the Court is to still engage with the
3 statutory text as it's written and, if it needs
4 to be updated, to leave that updating to
5 Congress.

6 JUSTICE THOMAS: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Breyer.

9 JUSTICE BREYER: No, I won't. Thank
10 you very much.

11 CHIEF JUSTICE ROBERTS: Justice Alito.

12 JUSTICE ALITO: I -- I have two
13 questions. The first is the one that I asked
14 Mr. Clement: does it make any sense to talk
15 about a system that uses a -- a random or
16 sequential number generator in the very process
17 of storing telephone numbers?

18 The second is this: in order for your
19 interpretation to be right, don't you have to
20 show that there are or were systems that stored
21 numbers using such a generator but didn't use
22 the generator to produce the numbers? If --
23 otherwise, there wouldn't be any point in
24 separately covering storage.

25 So, if you could cover those two in --

1 perhaps in reverse order, I would appreciate it.

2 MR. ELLIS: Sure. I'll -- so I'll
3 start with the latter first. I -- I -- I do
4 think that this statute can be read to cover for
5 both verbs that do independent work. But let me
6 start by saying that I don't think that's a
7 requirement for the Court to adopt our reading.

8 I think that the -- the Court has
9 recognized in cases like Rimini Street and
10 Atlantic Richfield that sometimes Congress does
11 adopt a belt-and-suspenders approach. And so,
12 at most, I think Respondent has shown that
13 that's what they've done here. And I think
14 that's the kind of superfluity that this Court
15 would or -- would lead the Court to --
16 ordinarily to disregard the other ordinary rules
17 of grammar or the other canons of construction.

18 That said, I think, as -- as my friend
19 acknowledged, I think there are two types of
20 ways that the autodialers use random and
21 sequential number generators, and I think it's
22 natural for Congress to have described them
23 both.

24 And, in fact, I think, if you -- if --
25 if you think about "produce" in the statute and

1 what it likely means, I think it's kind of -- it
2 -- it probably doesn't mean create, as
3 Respondents suggest, because autodialers, or
4 ATDSs, won't be any use if what they do is
5 create brand-new 10-digit numbers that never
6 existed before. They have to identify numbers
7 that existed in the real world and have been
8 defined -- assigned to telephone numbers. And
9 so they --

10 JUSTICE ALITO: Well, they produce a
11 list of numbers. What's -- what's strange about
12 that idea?

13 MR. ELLIS: I -- I -- I'm not saying
14 that it's strange to think of a random or
15 sequential -- sequential number generator as
16 creating 10-digit numbers. I think it's -- it's
17 an awkward fit to say "producing telephone
18 numbers to be called" if what you mean is
19 "create."

20 I think, rather, what it probably
21 means is bring forth or offer up. And so, if
22 that's the meaning that -- that you ascribe to
23 "produce," then it's not inevitable that every
24 use of a random or sequential number generator
25 will -- will produce numbers.

1 JUSTICE ALITO: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Sotomayor.

4 JUSTICE SOTOMAYOR: Counsel, could TC
5 -- I -- I from the beginning have wondered,
6 could a TCPA lawsuit against individual
7 smartphone users actually prevail, given that
8 smartphones don't automatically dial phone
9 numbers in the ways of this -- in the way that a
10 sequential numbering system does?

11 It doesn't seem like a smartphone can
12 be an Automatic Telephone Dialing System. Am I
13 missing something? Why wasn't that the -- the
14 -- the main reason for reading things against
15 the Respondent -- reading this -- reading this
16 law as not applying to the Respondent?

17 MR. ELLIS: So, as to whether the TCPA
18 or the ATDS definition could include
19 smartphones, as you suggest, if you read the
20 second prong of this statute to include an
21 automatic requirement, then I think that at
22 least limits the con- -- the circumstances in
23 which an ordinary smartphone could be considered
24 to be an ATDS.

25 The Court -- the second prong of the

1 statute doesn't include the word "automatic."
2 And I think it's an open question as to whether
3 that's the right way to read this statute.

4 Courts of appeals on both sides of the
5 split have assumed that, and ACA has previously
6 done it, but, again, I think it's -- it's not
7 actually there in the text.

8 And that's -- I think, if you don't
9 adopt that reading, then it is when it begins to
10 present serious problems for ordinary
11 smartphones.

12 JUSTICE SOTOMAYOR: All right. Thank
13 you, counsel.

14 CHIEF JUSTICE ROBERTS: Justice Kagan.

15 JUSTICE KAGAN: Mr. Ellis, at the time
16 the TCPA was enacted, there were a fair number
17 of state statutes that dealt with the same
18 general subject matter area, and every single
19 one of those statutes defined an autodialer to
20 encompass at least some machines that didn't use
21 a random or sequential number generator.

22 So doesn't that suggest that your
23 definition is wrong? I mean, would Congress
24 really have wanted to depart from all of those
25 state statutes in this particular way?

1 MR. ELLIS: So I don't think it
2 suggests our reading is wrong. I think what it
3 suggests is that Congress approached the similar
4 -- the same problem in a different way.

5 And so it's true that all or almost
6 all the state statutes included devices beyond
7 those that use random or sequential number
8 generators, but it's also true that almost every
9 state, I think all but two, limited -- only
10 addressed devices that delivered a prerecorded
11 voice and then regulated those devices.

12 Congress came at that same problem in
13 a different way by first prohibiting all
14 prerecorded voice calls to residential lines and
15 to the sensitive lines, regardless of the
16 technology -- dialing technology, and then
17 separately prohibiting a -- a subset of the --
18 of -- of calls made with an ATDS using a random
19 or sequential number generator.

20 At the end of the day, it's a similar
21 approach. Indeed, Congress's approach is
22 somewhat broader. It's just a different
23 approach.

24 JUSTICE KAGAN: And --

25 MR. ELLIS: I --

1 JUSTICE KAGAN: -- and why is it that
2 Congress would have adopted that approach? I
3 mean, if I understand what you're saying, you're
4 saying that Congress decided to cover these
5 predictive dialers when there was an automated
6 or prerecorded voice but not when there was a
7 live person on the line.

8 What -- what sense would that have
9 made? What difference does it make from the
10 recipient of the call's perspective?

11 MR. ELLIS: So perhaps I was unclear.
12 Congress regulates prerecorded voices with --
13 not -- without regard to whether they were
14 made -- delivered with an automated system at --
15 at all. And they do that because I think that
16 --

17 JUSTICE KAGAN: Well, I understand
18 that, but within that, they were definitely --
19 they -- they definitely covered these predictive
20 dialers, isn't that right?

21 MR. ELLIS: No. Actually, predictive
22 dialers, at least in 1991, as I understand them,
23 typically didn't deliver a prerecorded voice.
24 They delivered -- they connected to a live
25 operator.

1 So I don't think the prerecorded voice
2 part of the statute covers predictive dialers
3 and that --

4 JUSTICE KAGAN: There weren't any of
5 these that existed that -- that were predictive
6 dialers with a prerecorded voice?

7 MR. ELLIS: There -- there may have
8 been. My -- my -- my point is, in the whole,
9 predictive dialers, the point -- the way they
10 worked, the whole point of them is to sort of
11 time up the call so that there was a live
12 operator available when the call was connected.
13 They were principally --

14 JUSTICE KAGAN: Thank you.

15 MR. ELLIS: -- ways to connect live
16 operators. And, actually --

17 JUSTICE KAGAN: Thank you.

18 MR. ELLIS: I'm sorry.

19 CHIEF JUSTICE ROBERTS: Justice
20 Gorsuch.

21 JUSTICE GORSUCH: Good morning,
22 Mr. Ellis. Two questions. Take them in
23 whatever order you care.

24 First, I think your argument depends
25 upon the possibility that, in the world at the

1 time Congress adopted the statute, there were
2 devices that used random number generators to
3 store telephone numbers. So what evidence do
4 you have that that exists -- existed in the
5 world, number one?

6 Number two, the same question I posed
7 to Mr. Clement with respect to what Judge
8 Barrett in her excellent opinion called the
9 fourth possible interpretation. I understand
10 the problems with it, but it does overcome this
11 difficulty. And it -- it wasn't addressed in
12 the briefs, and I'm just curious why it wasn't
13 addressed and whether we need to rule it out,
14 whether it would make any difference going with
15 the first versus the fourth?

16 MR. ELLIS: So, as to your first
17 question, whether there were devices in the
18 world that stored using a random or sequential
19 number generator, I -- I would point you to the
20 -- page 19 and 20 of our brief and then the PACE
21 and Noble Systems amicus brief that goes through
22 this in some detail that describes that
23 automatic dialing systems in 1991 either used a
24 random or sequential number generator to
25 generate numbers and then immediately dial them

1 or used them to generate numbers to store them
2 for subsequent dialing.

3 And I don't think it's unnatural to
4 describe the latter system as using the random
5 or sequential number generator to store the
6 numbers in the same way that you might say that
7 I have a backup power generator at my home that
8 both generates and stores power for subsequent
9 access or in the way you might say I -- you
10 might describe using a web browser to download
11 and store a file, that is to say, doing
12 something more than just browsing the web.

13 As to the latter -- second question
14 about why we haven't addressed -- I actually do
15 think we did address that. That possible
16 interpretation, we think it is not available
17 because of the comma.

18 JUSTICE GORSUCH: No, I understand --
19 I understand that. I -- I -- I -- I'm -- that's
20 not my question.

21 MR. ELLIS: Okay. As to the practical
22 consequences of that, I think you should not
23 leave it open. I think it's not the best
24 reading.

25 JUSTICE GORSUCH: I understand that

1 too. That wasn't my question either.

2 MR. ELLIS: Okay. I'm sorry, then --

3 JUSTICE GORSUCH: My -- my question
4 is, does it make any difference in the real
5 world?

6 MR. ELLIS: I -- yes, it does. And
7 the reason -- the difference it would make in
8 the real world, at least if you -- I think you
9 would understand that calling using a random or
10 sequential number generator, you could -- that
11 could describe taking a set list, a sort of
12 preselected list, and then calling them in
13 random order.

14 But that's not the problem that
15 Congress was trying to get at with the ATDS
16 definition. The problem it was getting at with
17 that definition and the restriction was calling
18 indiscriminately, calling unintentional numbers
19 that -- that would result in you -- in
20 telemarketers accidentally calling emergency
21 lines and cell phones and guest and patient
22 rooms. That was what Congress was --

23 JUSTICE GORSUCH: Thank you, counsel.

24 MR. ELLIS: -- trying to get at with
25 that prohibition.

1 CHIEF JUSTICE ROBERTS: Justice
2 Kavanaugh.

3 JUSTICE KAVANAUGH: Thank you.

4 And good morning, Mr. Ellis. Justice
5 Thomas and Justice Sotomayor, I think, and
6 others have talked about the ill fit of the
7 statutory language to current technology, and I
8 want to break that down with you a bit because
9 there are two -- as you've indicated, two
10 prohibitions here.

11 One is the prohibition on artificial
12 or prerecorded voice calls, and that covers
13 artificial or prerecorded voice calls to the
14 house or to these specialized lines.

15 MR. ELLIS: Correct.

16 JUSTICE KAVANAUGH: And that part of
17 the statute still makes sense and applies today,
18 correct?

19 MR. ELLIS: Correct.

20 JUSTICE KAVANAUGH: Okay. So then you
21 have the ATDS prohibition, which only applies to
22 the calls to specialized lines, does not apply
23 to calls to the house, and because artificial
24 and prerecorded calls are already prohibited,
25 must be getting at something different than

1 artificial and prerecorded calls.

2 And I'm trying to figure out, one,
3 what -- what -- what's that getting at at the
4 time, what was the real-world problem; and, two,
5 does that have any relevance at all today, as
6 Justice Thomas and Justice Sotomayor were
7 indicating, with the ATDS prohibition?

8 MR. ELLIS: So I think what it was
9 getting at, Your Honor, was, one, it may have
10 also been sort of a belt-and-suspenders in
11 addressing those prerecorded calls. But I think
12 it may be --

13 JUSTICE KAVANAUGH: Well, can I stop
14 you right there? Do you think -- and this gets
15 to Justice Kagan's question, what Congress was
16 drawing on -- do you think they meant "and"
17 instead of "or" and made a mistake?

18 MR. ELLIS: No, I guess I -- I don't
19 think that. I think I -- I was going to -- what
20 I was going to say is I think live calls, live
21 operator calls, to those sensitive lines could
22 equally cause problems. You know, I don't think
23 we want telemarketers calling emergency -- 911
24 lines or bothering people at their -- in their
25 patient rooms at a healthcare facility or, in

1 1991, making calls to cell phones which were
2 unintentional at the time and were -- would then
3 cost the -- the -- the called party by the
4 minute.

5 I -- I think those sorts of problems,
6 they're exacerbated by prerecorded voice calls,
7 but they're caused also in -- by indiscriminate
8 calls that connect to live operators.

9 CHIEF JUSTICE ROBERTS: Justice
10 Barrett.

11 JUSTICE BARRETT: So, Mr. Ellis, some
12 of the lower courts have characterized this
13 provision as ambiguous and, you know, said that
14 that leaves the FCC some room to choose whether
15 this applies, you know, to this kind of
16 pre-stored situation or not.

17 And you, in your colloquy with the
18 Chief Justice, suggested that although the FCC,
19 you know, may have a narrow band of authority,
20 you weren't ruling that out either.

21 And I guess I'm wondering if you could
22 explain why you think any kind of Chevron
23 deference would apply here, where we have two
24 conflicting choices and we have to decide which
25 is the best one, because I would have thought

1 that Chevron -- that the premise of it is that
2 when Congress deliberately chooses open-ended
3 language or vague language, it's implicitly
4 delegated to the agency a range of discretion to
5 make the choice.

6 But this kind of thorny statutory
7 provision doesn't strike me as reflecting an
8 implicit congressional choice to delegate to the
9 FCC how to regulate this.

10 MR. ELLIS: So I think that's a fair
11 question, Your Honor. And I -- I would just say
12 that I think the Court has often in the Chevron
13 analysis asked just is it -- is the statute
14 ambiguous and then took that ambiguity as an
15 indication of Congress's delegation.

16 We haven't addressed those issues here
17 for the obvious reason that there isn't an
18 outstanding agency interpretation for the Court
19 to -- to gauge whether it should be -- it should
20 give Chevron deference or -- or not, but I think
21 it's a fair question.

22 JUSTICE BARRETT: Thank you, counsel.

23 CHIEF JUSTICE ROBERTS: A minute to
24 wrap up, Mr. Ellis.

25 MR. ELLIS: Thank you, Mr. Chief

1 Justice.

2 I think I'll close with just one more
3 word about the surplusage problem. For the --
4 that Respondents, of course, have identified.

5 For the reasons I explained, I don't
6 think the government's reading presents any
7 meaningful surplusage, but even if you disagree,
8 I think, at most, what Respondent has shown is
9 that Congress took a sort of belt-and-suspenders
10 approach here. He certainly hasn't shown the
11 sort of superfluity that would warrant
12 discarding the ordinary rules of grammar and
13 other canons of construction.

14 And I think that's particularly so in
15 -- in light of the superfluity that Respondents'
16 own reading would introduce. He makes clear on
17 page 37 of his brief that, in his view, Congress
18 drafted the ATDS definition to encompass "all
19 technologies used to deluge cell phones with
20 automated calls." But, if that were so, it's
21 not clear why Congress would have included the
22 first prong of the definition at all.

23 Under Respondents' reading of the
24 statute, you could strike not just one word but
25 the entire modifying phrase, "using a random or

1 sequential number generator," if not all of
2 Section 227(a)(1)(A), and the ATDS definition
3 would reach the exact same universe of devices.
4 That's the sort of superfluity that the Court
5 ordinarily would not countenance, and we urge
6 the Court not to do so here. Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Mr. Garner.

10 ORAL ARGUMENT OF BRYAN A. GARNER
11 ON BEHALF OF THE RESPONDENTS

12 MR. GARNER: Mr. Chief Justice, and
13 may it please the Court:

14 Any method of interpretation --
15 textualism, purpose of-ism, consequentialism --
16 favors affirmance here. Congressional purpose
17 is overwhelmingly clear. It's privacy.

18 Let me focus, though, on text. The
19 issue here involves ordinary lexical meaning,
20 grammar, and cognition. An example: To
21 maintain or acquire lands to be developed using
22 eminent domain.

23 No linguistic rule should lead us to
24 conclude that we must maintain lands using
25 eminent domain. The adverbial modifier links up

1 with the verb acquire; that's ordinary meaning.

2 Other canons are crucial. First, the
3 conjunctive/disjunctive canon. The word "or"
4 denotes two distinct categories, storing and
5 producing, and the word order is significant.

6 Second, the surplusage canon. The
7 words "store" and "or" are given real work to do
8 only on our reading.

9 Third, the harmonious reading canon.
10 The consent provision in the statute makes
11 little sense with random number generation. You
12 obtain consent from known people.

13 Fourth, the presumption against
14 ineffectiveness. Facebook would read the
15 statute into oblivion because robocallers today
16 use stored phone numbers to annoy people just as
17 they often did in 1991.

18 In Barr, just five months and two days
19 ago, this Court repeatedly said that the Act
20 prohibits almost all unsolicited robocalls. The
21 borrower's numbers in that case would have been
22 stored. The Court having invalidated the
23 exception in that case, Facebook now argues for
24 an across-the-board exemption: effectively all
25 autodialers call -- all autodialer calls and

1 messages are exempt, they say.

2 In reading law, this is called a
3 viperine interpretation. Like a viper, it kills
4 the statute and privacy.

5 CHIEF JUSTICE ROBERTS: Thank you, Mr.
6 Garner. You -- you agree, don't you, that our
7 objective is to settle upon the most natural
8 meaning of the statutory language to an ordinary
9 speaker of English, right?

10 MR. GARNER: Yes, Your Honor.

11 CHIEF JUSTICE ROBERTS: So, if these
12 various rules of construction, viperine or -- or
13 something else, those are only pertinent -- we
14 don't assume that the ordinary speaker is
15 applying those canons or rules of syntax at all,
16 right?

17 MR. GARNER: Your Honor, that's
18 correct. Most native speakers of English,
19 competent users of the language, understand.
20 For example, cookbooks are full of statements
21 that say using a spatula, lift -- using a
22 spatula, lift the omelet and tilt the pan.
23 Nobody -- no -- nobody stops to parse it and
24 say, oh, do I have to use the spatula to lift
25 the pan?

1 CHIEF JUSTICE ROBERTS: So the most
2 probably useful way of settling all these
3 questions would be to take a poll of 100
4 ordinary -- ordinary speakers of English and ask
5 them what it means, right? That's -- that would
6 be the most useful rule of construction?

7 MR. GARNER: I'm not sure that we
8 would just take a poll of everybody and say -- I
9 mean, I think it would be a useful datum, yes.

10 CHIEF JUSTICE ROBERTS: Okay. Sort of
11 shifting a little bit here, you're -- you say
12 that if Facebook wins, we'll all be flooded with
13 robocalls. But doesn't --

14 MR. GARNER: Well, that --

15 CHIEF JUSTICE ROBERTS: -- doesn't the
16 statute independently bar calls with artificial
17 or prerecorded voices, which I think is what
18 most ordinary speakers of English would regard
19 as a robocall?

20 MR. GARNER: Well, Your Honor, the
21 difficulty with having ordinary speakers or
22 readers try to read a -- a legislative
23 definition like this is immediately people would
24 be a little bit befuddled by the legal language.
25 They just would.

1 CHIEF JUSTICE ROBERTS: Well, lawyers
2 too, I guess, but the -- the -- the point is
3 that Congress didn't write the legislation with
4 the technical rules in mind, and I think
5 ordinary speakers wouldn't read them that way.

6 And so you just -- the most useful
7 tool is kind of your -- your first -- first
8 blush reading it in terms of how it makes sense.
9 And I think most people's first blush would
10 suggest that the -- your friend on the other
11 side's reading makes the most sense.

12 MR. GARNER: Your Honor, I
13 respectfully disagree if you take into account
14 the -- the actual meaning of the words. But, if
15 you -- if you just looked at it sort of
16 mechanically and hastily, yes, it's possible
17 that that is the way it would strike people.

18 As Justice Holmes once said, a
19 well-drafted statute -- this is paraphrase --
20 phrasing slightly. A well-drafted statute must
21 be able to withstand attacks by an intellect
22 fired with a desire to skew the meaning. And I
23 think that's a problem.

24 CHIEF JUSTICE ROBERTS: What
25 significance does it make that the ordinary

1 speaker of English we've been talking about
2 would -- would have a very different knowledge
3 background about these things today than
4 would -- one would have in 1991?

5 MR. GARNER: Your Honor, I believe
6 that TCPA is more important today than ever
7 because of advances in technology. The social
8 media companies know exactly where you are at
9 all times. They know every mouse click that
10 you've made for the last 20 years. And they can
11 target in a very manipulative way.

12 So the -- the basic technology of
13 getting a message through to somebody who's
14 carrying a handheld device remains the same.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice Thomas.

18 JUSTICE THOMAS: Thank you, Mr. Chief
19 Justice.

20 Mr. Garner, the -- sort of taking off
21 your last point, the technology has changed. I
22 think we're talking about the average person.
23 Most people would have no idea today what some
24 of the technology was in -- in -- in 1991, a
25 pager. The -- most people would not realize

1 that caller IDs were cutting-edge and had to be
2 purchased separately, that most people did not
3 have cell phones. In fact, very few people did,
4 and they were large. And car phones had to be
5 installed.

6 So technology has changed and moved
7 along very rapidly. And don't you think it's
8 rather odd that we are applying a statute that's
9 almost anachronistic, if not vestigial and -- to
10 a -- to -- to modern technology like Facebook
11 and instant messaging, et cetera? Don't you
12 think that at some point there's a -- there's at
13 least a sense of futility?

14 MR. GARNER: Your Honor, I -- I -- I
15 don't. The average American is very well
16 familiar with robocalls and understands that
17 these numbers -- actually doesn't care whether
18 they were randomly generated or -- or whether
19 they were sold because they gave their number to
20 somebody and, in fact, would probably be more
21 offended if they understood that somebody that
22 they had dealt with and trusted had sold their
23 numbers.

24 JUSTICE THOMAS: But you make my --

25 MR. GARNER: Everybody --

1 JUSTICE THOMAS: -- point, because it
2 doesn't have to be randomly generated anymore.
3 It's generated in other ways, but you make my
4 point about technology.

5 In the old days, it would be randomly
6 generated because there was no way anyone could
7 have that much instant -- information and use it
8 that instantaneously.

9 MR. GARNER: Your Honor, in 1991,
10 there were lots of stored numbers that were
11 called. In fact, I -- I hesitate to talk about
12 legislative history because I don't like talking
13 about legislative history, but lists and
14 databases of known numbers came up over 200
15 times, generators came up only four times in the
16 whole legislative history.

17 JUSTICE THOMAS: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Breyer.

20 JUSTICE BREYER: Interesting. Mr.
21 Garner, you -- let's go back to when they wrote
22 it. As you read it, it is unlawful to call a
23 hospital, for example, using a phone that stores
24 telephone numbers, period. Right? Is that
25 right or not?

1 MR. GARNER: That's not quite right,
2 Your Honor. It's -- it's illegal for the
3 equipment to call. It has to be an automated
4 dialing system, not just someone on just a cell
5 phone.

6 JUSTICE BREYER: Okay. So you can't
7 have equipment, I see. Well, where is the
8 automated, where does it say that? Let's see.
9 Using an automatic system, I got it, okay.

10 MR. GARNER: Yes.

11 JUSTICE BREYER: So you can't use an
12 automatic system that stores numbers. Now then
13 were there a lot?

14 MR. GARNER: Your Honor, there were
15 databases --

16 JUSTICE BREYER: Were there or a lot,
17 or -- or did -- were there a lot, or did they --
18 what was the -- what was the situation like
19 then?

20 MR. GARNER: Your Honor, there were
21 databases and lists that were sold, and -- and
22 there were also numbers automatically generated,
23 but those are shots in the dark. That's why
24 those have become superseded.

25 Facebook's interpretation --

1 JUSTICE BREYER: Yeah. Okay. I've
2 got it. So -- so there -- at the time, there
3 were systems that stored numbers both ways?

4 MR. GARNER: Yes, Your Honor.

5 JUSTICE BREYER: And that's why you
6 think they wanted to get it both ways?

7 MR. GARNER: Yes, Your Honor.

8 JUSTICE BREYER: Then, over time, what
9 happens is the world changes so everybody and
10 his uncle has a system that fits within that
11 ordinary definition of -- cell phones storing,
12 then automatically dialing. We all have one.
13 And so it gets too broad. And so should you
14 narrow it?

15 Now that seems like the converse of a
16 situation where, you know, the famous -- you
17 know all these examples, the -- the -- the
18 silver fox is not thought to be an endangered
19 animal, an endangered species, when they wrote
20 the statute, but later it is, and so you say,
21 well, there's a dynamic meaning which changes
22 over time to pick things up, or it's a static
23 meaning, just look back to see what they
24 intended at the time.

25 And Nino Scalia always used to say,

1 oh, that's just done to expand the statute.
2 But, here, we're using it to contract the
3 statute. Any comment? Is that totally wrong?
4 I suddenly began to think about it that way.

5 MR. GARNER: Reading it to be just
6 random number generators which produce numbers,
7 to that specific technology would wither the
8 entire statute. That's why I called it
9 viperine.

10 JUSTICE BREYER: It would contract --
11 it would contract --

12 MR. GARNER: Yes.

13 JUSTICE BREYER: -- if we do that.
14 You say "wither," that's pejorative. But in the
15 -- in -- so often we interpret a statute
16 dynamically to adapt to changing circumstances,
17 looking at the context in which it is passed and
18 how it's changed, in order to decide how to do
19 so. And to do so here, there are a few words
20 over there that really help.

21 Is there anything wrong with reading a
22 statute, looking for the intent in terms of
23 change over time, did Congress intend it to
24 change over time as technology changed, and then
25 using the tools at hand in the context at hand

1 to produce a more sensible interpretation? What
2 do you think?

3 MR. GARNER: Your Honor, I'd have no
4 quarrel with any justice who wanted to do that,
5 even though I think --

6 JUSTICE BREYER: No, but, I mean, you
7 -- I'm looking at you and your expert view.
8 What do you actually think about such a thing?
9 I haven't really seen it. I -- I just -- it
10 suddenly occurred to me that this fits in that
11 box possibly.

12 MR. GARNER: I'm a proponent of the
13 fixed-meaning canon, but I do think that the
14 words "store" and "or," it makes Congress look
15 almost prescient. Given what has happened in
16 the last 29 years, Congress looks prescient
17 having said "store" and "or" before "produce."

18 JUSTICE BREYER: All right. I'll
19 think about it. Thank you.

20 CHIEF JUSTICE ROBERTS: Justice Alito.

21 JUSTICE ALITO: Guido Calabresi has
22 argued that courts should have the power to
23 declare statutes obsolescent and obsolete. And
24 if -- if we had that power, this statute might
25 be a good candidate. But we haven't claimed it

1 so far, and assuming we don't, perhaps we have
2 to put out of our mind the whole parade of
3 horrors that arises as a result of the advent
4 of smartphones and social media.

5 So, if we think about the technology
6 that existed at the time when this statute was
7 enacted, the -- the biggest technology that
8 seems to me to provide the -- the greatest
9 practical problem for your interpretation is
10 call forwarding, which I think was widely
11 available when this statute was enacted.

12 So would any machine that had a call
13 -- a call forwarding capacity at that time be
14 covered under your interpretation?

15 MR. GARNER: Your Honor, no. Nor
16 would --

17 JUSTICE ALITO: Okay.

18 MR. GARNER: -- an immediate answer.
19 In fact, a normal cell phone and normal uses of
20 cell phones do not amount to an ATDS. It would
21 have to have -- it would have to be altered
22 significantly to be -- to become an autodialer.

23 But human intervention is the thing
24 that makes it something that is not automatic,
25 anything that needs a push of a button to send a

1 message. Automatic dialing has been
2 preprogrammed to send messages automatically at
3 intervals without human involvement.

4 JUSTICE ALITO: Well, isn't it true
5 that, at least as of now, everything that
6 computers do requires at some point some degree
7 of human intervention, some degree of human
8 instruction?

9 MR. GARNER: That is true, Your Honor.
10 But that involves not uploading a list of
11 numbers; that involves human involvement, but
12 it's the selecting of the number to be called
13 and when to call, that is the human
14 intervention.

15 The immediate placing of the call that
16 the FCC, the ACA, and the -- the D.C. Circuit
17 and the -- and the Eleventh Circuit have all
18 held that human intervention does exclude those
19 calls from definitions of ATDS.

20 JUSTICE ALITO: And how would you
21 define the degree of human intervention that's
22 required?

23 MR. GARNER: Your Honor, it could be
24 pressing buttons. It could be clicking a mouse
25 on a number. It involves a human being

1 placing -- sending a message or placing a call.

2 And it's the direct placement of a call.

3 JUSTICE ALITO: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Sotomayor.

6 JUSTICE SOTOMAYOR: Counsel, if we
7 rule your way, the logical consequence is that
8 every cell phone owner would be subject to the
9 harsh criminal and civil penalties of the CPA.

10 Could you give me a reason, other than
11 that it hasn't happened yet, for -- for why
12 Congress would have intended that?

13 MR. GARNER: Yes.

14 JUSTICE SOTOMAYOR: And, by the way,
15 it seems -- don't -- please don't answer by
16 saying it hasn't happened yet, and the reason I
17 say that is because, if you get a ruling in your
18 favor, I know for sure that there will be
19 lawsuits against individuals that will follow.

20 MR. GARNER: And, Your Honor, I
21 believe Article III judges know how to deal with
22 those, what I imagine to be frivolous claims.
23 But Facebook's scary argument that all cell
24 phones might, with alterations, be made into
25 automatic dialers really should be no more

1 availing than the realization that all of us
2 have hundreds of deadly weapons in our homes.
3 Law-abiding Americans just don't use rope and
4 kitchen knives that way.

5 JUSTICE SOTOMAYOR: I think you're
6 going to have to answer me more clearly than
7 that. You don't think that cell phone users
8 will do what?

9 MR. GARNER: They won't do automated
10 mass dialing or blitz messaging, which isn't a
11 normal function on a cell phone.

12 JUSTICE SOTOMAYOR: Well, I mean, I do
13 e-mail blasts with friends.

14 MR. GARNER: Yes.

15 JUSTICE SOTOMAYOR: I can do all sorts
16 of -- now with FaceTime and things of that
17 nature, Zoom, we're doing basically automatic
18 dialing and -- and -- and people being joined
19 together by that process.

20 So I don't -- I, for one, don't
21 believe that we should think that our
22 interpretation couldn't affect the development
23 of new technology to help people do things more
24 quickly but in -- in -- in the process end up
25 violating the statute.

1 MR. GARNER: Your Honor, it seems to
2 me that this Court, like the D.C. Circuit, could
3 actually disclaim the result that normal uses of
4 cell phones would produce liability.

5 But there is a question of functional
6 equivalence, and the prohibition speaks of
7 consent. The difference between text messaging
8 groups and friends is that everybody has
9 consented. There's -- there's not a problem.
10 The difficulty is when people's privacy is being
11 invaded. That's what the statute was driving
12 at.

13 JUSTICE SOTOMAYOR: Thank you,
14 counsel.

15 CHIEF JUSTICE ROBERTS: Justice Kagan.

16 JUSTICE KAGAN: Mr. -- Mr. Garner, you
17 started off by noting that there are some kinds
18 of statutes or sentences where the meaning of
19 the words is so clear that the mind gravitates
20 toward the ungrammatical reading.

21 And that might well be, but -- but
22 would you at least acknowledge that the reading
23 that you're asking us to adopt is, in fact,
24 ungrammatical? That you have two verbs, "store"
25 and "produce." They have a shared direct

1 object, "numbers to be called." And then a
2 modifier following all of that.

3 So sort of setting aside the semantic
4 arguments for the moment, do you -- do you agree
5 that the grammar favors Facebook?

6 MR. GARNER: No, Your Honor, I don't
7 think there's anything ungrammatical about this
8 sentence. It's an unusual sentence, unusual
9 syntax. It rather shows the infinite variety of
10 the kinds of sentences that English speakers can
11 devise, but just as in using a spatula, lift the
12 omelet and tilt the pan, there's nothing
13 ungrammatical about that.

14 There's no -- there's no rule of
15 grammar that any grammarian has recognized that
16 would render this ungrammatical. Perhaps a
17 little awkward, but not -- not ungrammatical.

18 JUSTICE KAGAN: Well, I think you just
19 made the statute into something it's not. I
20 mean, you took out the shared direct object.
21 You took out the fact that the placement of the
22 "using a random number generator" phrase is
23 after both verbs. So you've considerably
24 cleaned it up, I would say.

25 MR. GARNER: Your Honor, maybe my

1 better example is to maintain or acquire lands
2 to be developed using eminent domain. That may
3 be --

4 JUSTICE KAGAN: Well, that --

5 MR. GARNER: -- the better example.

6 JUSTICE KAGAN: -- that's one where I
7 -- I take the point that it's just like
8 sometimes you just -- grammar has to give way
9 because the meaning is so clear. And, there,
10 the meaning is so clear because you can't
11 imagine eminent domain being used to maintain
12 land. It's kind of like what is -- that's
13 impossible. And so too for your argument in
14 your brief about, you know, what does it mean
15 for a domestic airline to drive.

16 But I think that the point that Mr.
17 Clement might make here is that the meaning here
18 is not so impossible. You know, there's a
19 little bit of awkwardness about saying that a
20 number generator stores numbers, but, actually,
21 that can be explained by looking at the kinds of
22 dialing devices that existed at the time, where
23 there were devices that generated numbers for
24 immediate dialing and devices that stored
25 numbers for later dialing.

1 So -- so, if that meaning is possible,
2 shouldn't we go with that meaning when combined
3 with the fact that it's the most grammatically
4 proper way to read the sentence?

5 MR. GARNER: Your Honor, again, I
6 would not concede that it's a more grammatically
7 proper way of reading the sentence. To me, the
8 -- if you look at the sentence, it seems clear
9 and deducible from the text itself that Congress
10 was concerned about known numbers, previously
11 known numbers obtained from any source, those
12 are stored, and numbers not previously known but
13 generated by one of these machines. That --
14 that covers the universe of numbers, and the --
15 the wording, therefore, makes sense.

16 Another little thing I might mention
17 linguistically is that some verbs, lexical verbs
18 they're called, feel complete on their own, and
19 "store" is one of those. We all know what
20 computer storage is. But a word like "produce,"
21 if you say "and produce the numbers," you think,
22 what does that mean?

23 It's -- it's sort of like a sentence,
24 the bird chirps and lies. We know what the bird
25 chirps means, but lies, what -- what do you mean

1 lies? Well, the bird chirps and lies
2 comfortably in its nest. Now we wouldn't think
3 that comfortably modifies chirps.

4 And it's -- it's that kind of need to
5 have the adverbial modifier explain to us what
6 we mean by "produce." Computer production could
7 be the manufacture of computers. It just
8 doesn't -- it doesn't feel complete. I think
9 that's the reason for the --

10 JUSTICE KAGAN: Thank you, Mr. Garner.

11 MR. GARNER: Yes.

12 CHIEF JUSTICE ROBERTS: Justice
13 Gorsuch.

14 JUSTICE GORSUCH: Good morning, Mr.
15 Garner.

16 MR. GARNER: Good morning.

17 JUSTICE GORSUCH: You -- you conceded
18 that the grammar here is awkward, but I'd like
19 to pick up where Justice Kagan left off. And --
20 and I -- I think you -- you have -- certainly
21 have an argument that grammar doesn't exhaust
22 meaning, fine.

23 But on what basis is this sentence
24 grammatical? I -- I think it's so awkward I'd
25 anticipate you'd rewrite it if it were given to

1 you.

2 And when -- when we look at the
3 adverbial phrase, there's nothing to indicate in
4 the statute that it -- that it modifies only one
5 of the verbs. And rules of grammar usually
6 indicate that when you have a clause like that
7 offset by a comma, it would modify both of the
8 prior verbs, right?

9 MR. GARNER: No, Your Honor, that
10 is -- that is a rule that you sometimes find as
11 an exception to the rule of the last antecedent.
12 That's about the only place. And you find that
13 rule only in law books, not -- not in grammar.
14 It's unrecognized by grammars.

15 But the -- the point of synesis is
16 simply that we must look at the semantic content
17 of the words. We don't take the words as just
18 fungible morphemes and say once you hit the
19 comma, everything before it gets modified.

20 JUSTICE GORSUCH: Well, let me ask you
21 this. In -- in response to Justice Alito, you
22 were talking about what happens if -- if we were
23 to interpret the statute your way.

24 And I guess I'm still a little unclear
25 about the answer there. To store a number, if

1 it's totally divorced from the random or
2 sequential number generator, and then to dial
3 such number would seem to be enough.

4 Others have worried about our -- our
5 contemporary cell phones that can do that. But
6 even in -- at the time of the statute's
7 adoption, there were phones that captured
8 numbers that had been dialed and you could press
9 redial.

10 Why wouldn't -- and that was common
11 even -- even in the 1990s, I believe. Certainly
12 a lot earlier than cell phones. Why wouldn't
13 this statute make a -- a criminal of us all?

14 MR. GARNER: Your Honor, each of those
15 actions that you described involves human
16 actuation.

17 JUSTICE GORSUCH: I understand it
18 requires a human person to -- to push the redial
19 button, but -- but in what -- what way does the
20 statute require that on your reading?

21 MR. GARNER: Just to make sense of the
22 provisions. Say you put --

23 JUSTICE GORSUCH: Well, all -- all
24 the -- all the statute says is you have to have
25 equipment that stores a number and can be used

1 to dial the number.

2 MR. GARNER: And it --

3 JUSTICE GORSUCH: I -- I don't see
4 where it excludes human actuation as part of the
5 equation.

6 MR. GARNER: Well, it -- that --
7 that's the word being defined, automatic dialing
8 system, and it must be the equipment itself that
9 does the dialing.

10 JUSTICE GORSUCH: No, the equipment
11 has to have the capacity to store and it has to
12 have the capacity to dial. It doesn't say it
13 must do it solely by itself.

14 I mean, now we're really changing the
15 grammar, aren't we?

16 MR. GARNER: No, I don't mean to, Your
17 Honor. That is in the definition, the capacity
18 to store and dial.

19 JUSTICE GORSUCH: Right, the capacity
20 to dial. Nobody doubts that my redial button --
21 my phone with a redial button circa 1990 has a
22 capacity to redial a stored number, do they?

23 MR. GARNER: Your Honor, it's -- it's
24 not considered automatic when -- when you place
25 the call if you press the button. That's --

1 that's what -- that's what --

2 JUSTICE GORSUCH: Congress can define
3 anything to mean anything it wishes, right?

4 MR. GARNER: That's correct, Your
5 Honor.

6 JUSTICE GORSUCH: All right. So it
7 can define an automatic dialing system to mean
8 whatever it wishes, and, here, it defined it to
9 mean equipment which has the capacity to dial a
10 stored number on your interpretation.

11 MR. GARNER: Yes. And the equipment
12 itself does the dialing, not the person.

13 JUSTICE GORSUCH: Where does that come
14 from, though? You're -- you're putting a lot of
15 words there.

16 MR. GARNER: I don't think so, Your
17 Honor. The -- it -- it -- I'm looking at the
18 definition itself. The term "ATDS" means
19 equipment that has the capacity to dial such
20 numbers. It's the equipment that dials.

21 And the word "automatic" is the word
22 being defined. That's -- that's where the
23 courts and the FCC have gotten the idea that
24 human intervention is so critical to take it out
25 of the -- to take a normal cell phone use out of

1 the realm of ATDS.

2 JUSTICE GORSUCH: I -- I certainly
3 understand it's necessary to avoid a -- a parade
4 of horrors. Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Kavanaugh.

7 JUSTICE KAVANAUGH: Thank you, Chief
8 Justice.

9 And good morning, Mr. Garner.

10 MR. GARNER: Good morning.

11 JUSTICE KAVANAUGH: This case will
12 depend heavily ultimately on the text, and
13 that's been well covered in the briefs and in
14 other questions. I'm not going to belabor that
15 in my time, but I want to ask some more
16 questions to follow up on my prior ones. I'm
17 trying to understand how this worked in 1991 and
18 how it works now and what it's getting at.

19 So, first of all, even if we agree
20 with the other side here, robocalls are still
21 prohibited, art -- meaning artificial or
22 prerecorded calls. That part is not affected --
23 is not involved in this case. That part of the
24 statute's not obsolete at all. And that part of
25 the statute, even if you were to lose, will

1 still operate to prohibit prerecorded or
2 artificial calls to the home or to cell phones
3 unless an exception applies, correct?

4 MR. GARNER: Your Honor, I -- I -- I
5 don't believe that is correct. Robocalls is
6 defined in the TRACE Act from last year.
7 Congress defined it to include all violations of
8 this statute. That is --

9 JUSTICE KAVANAUGH: Okay. Just --

10 MR. GARNER: -- robocalls --

11 JUSTICE KAVANAUGH: -- assume I'm
12 using it just to mean artificial or prerecorded
13 calls.

14 MR. GARNER: Yes.

15 JUSTICE KAVANAUGH: If I use it that
16 way, that part of the statute is not at issue in
17 this case. That part of the statute will still
18 apply even if you were to lose this case,
19 correct?

20 MR. GARNER: Yes, Your Honor.

21 JUSTICE KAVANAUGH: Okay. Then you
22 said that the purpose -- I think you started
23 with this, the purpose of this separate ATDS
24 prohibition, separate from the prohibition on
25 artificial or prerecorded calls, the purpose of

1 this was privacy at least in part I think you
2 suggested. The problem --

3 MR. GARNER: Yes, Your --

4 JUSTICE KAVANAUGH: -- in seeing that
5 --

6 MR. GARNER: Yes, Your Honor. I --
7 the whole -- the entire TCPA is about privacy.

8 JUSTICE KAVANAUGH: Okay. But it --
9 but this provision in particular. And the
10 problem with the structure of the statute that
11 that creates is that the ATDS prohibition does
12 not apply to calls to the residence. And that
13 suggests that the ATDS prohibition was about
14 something other than privacy.

15 How do you respond to that?

16 MR. GARNER: Your Honor, I -- there
17 were different protections given in different
18 ways by Congress. The residents did prohibit
19 those prerecorded calls. It was -- and they
20 also have a do not call list that they are
21 protected by.

22 In the case of cell phones and pagers
23 and emergency numbers and so on, it was a do not
24 call mandate across the board, unless you have
25 consent or it's an emergency.

1 So there were -- then there were
2 reasons, perhaps, for this. One is that cell
3 phones are carried on the person and they're
4 therefore with you at all times. Like pagers,
5 they receive text messages, and residential
6 lines don't.

7 And people were having to pay for
8 receiving calls, and some people still do, by
9 the way, on some plans. But, as one of the
10 opinions in Barr said, in 1991, the cell phone
11 owner not only suffered the pleasure of
12 receiving robocalls but also paid for the
13 privilege.

14 JUSTICE KAVANAUGH: Okay. As -- you
15 -- you referenced in the brief the state
16 statutes. Those, of course, prohibited at the
17 time ATDS technology combined with prerecorded
18 or artificial messages.

19 Congress severed those two things and
20 separately prohibited prerecorded or artificial
21 messages and then separately ATDS, even with a
22 live operator, presumably.

23 Does that -- doesn't that suggest the
24 state statutes aren't especially probative here?

25 MR. GARNER: Your Honor, I think they

1 are worth looking at. For example, the -- the
2 placement of using an artificial -- using a
3 random or sequential number generator.

4 But there was a great deal of
5 variation among the states, and what we ended up
6 with is a federal statute that is very nuanced
7 and represents a great many legislative
8 compromises.

9 JUSTICE KAVANAUGH: Thank you very
10 much.

11 CHIEF JUSTICE ROBERTS: Justice
12 Barrett.

13 JUSTICE BARRETT: Mr. Garner, you've
14 talked in a number of these -- in response to a
15 number of the questions that you've been asked
16 about the need for human intervention.

17 You know, in -- in response to Justice
18 Gorsuch, you talked about the finger hitting the
19 redial button or the finger hitting the stored
20 number in the phone.

21 What about --

22 MR. GARNER: Yes, Your Honor.

23 JUSTICE BARRETT: -- using the auto
24 reply function on an iPhone? So I can set that
25 up to say do not disturb me, I'm driving, or do

1 not disturb me, I'm sleeping. And I can program
2 the phone -- and this just comes with the
3 iPhone, it's not special software -- to be sent
4 to my favorites or to all my contacts.

5 So is that the necessary human
6 intervention? I'm not pressing a button each
7 time.

8 MR. GARNER: Your Honor, it's not an
9 auto dialer because the -- the communication is
10 prompted --

11 JUSTICE BARRETT: That's --

12 MR. GARNER: -- by the person.

13 JUSTICE BARRETT: -- that's not what I
14 asked you. I asked about human intervention.
15 Is that considered human intervention?

16 MR. GARNER: I think that is a -- a
17 different circumstance, Your Honor, where,
18 actually, programming it would not involve human
19 inter- -- intervention, but the consent
20 provision --

21 JUSTICE BARRETT: I -- I'm not asking
22 whether --

23 MR. GARNER: -- takes it out of the
24 prohibition.

25 JUSTICE BARRETT: -- Mr. Garner, I

1 didn't ask whether it was covered by the
2 statute. I asked you whether that counts as
3 human intervention, because a lot of your
4 argument lands on this idea that, well, you
5 know, human intervention means that we're
6 pressing the buttons on the phone that
7 automatically makes a call.

8 Justice Alito asked you, you know, how
9 far back does that go, because, obviously, human
10 intervention is present at -- at some point.
11 And -- and, you know, many people, your
12 opponents, several of the lower courts, the
13 Seventh Circuit in Gadelhak has said that it
14 seems like on one reading of the text the auto
15 reply function would be brought within and --
16 within the statute.

17 And I'm not asking you for all of the
18 arguments to that effect. I'm only asking you
19 about the human intervention point.

20 Would that be enough, one step
21 removed, by using the auto reply function, does
22 that count as human intervention?

23 MR. GARNER: Your Honor, I don't
24 believe it is.

25 JUSTICE BARRETT: And -- and why? How

1 do you tell when human intervention is close
2 enough to not be human intervention anymore or
3 to be human intervention?

4 MR. GARNER: The -- there -- there are
5 difficult cases and shades of gray, and -- and
6 -- and I think a clean -- the clean bright-line
7 test that Congress devised is consent.

8 The -- the idea that -- there are
9 going to be a lot of cases about --

10 JUSTICE BARRETT: Okay. Mr. Garner --

11 MR. GARNER: -- degrees of human --

12 JUSTICE BARRETT: -- let me -- let me
13 just stop, because I wasn't asking about the
14 consent, because I want to ask you about
15 something else too.

16 So you talked in your brief about this
17 concept of synesis, and I'm wondering whether
18 you can identify any case, because your
19 opponents say there is none, in which a court
20 has relied on that concept.

21 And I ask because it strikes me as the
22 kind of concept that might make sense in some
23 interpretive context, when one interprets some
24 kind of language, say literary language.

25 You know, you lean heavily on this

1 idea that the ordinary speaker of language or
2 what would make sense to people. And synesis
3 kind of gets at that but gives it a different
4 name.

5 Is that a legal concept? I mean, you
6 -- you actually -- you and Justice Scalia don't
7 talk about it in reading law, but you do talk
8 about it in modern English usage, which, of
9 course, gets at a far broader range of
10 interpretive problems and grammar problems.

11 So is it a legal concept? Is it
12 appropriately applied in the law?

13 MR. GARNER: Your Honor, it's a
14 linguistic concept that has been often
15 recognized in the law.

16 In fact, this Court has frequently
17 said that we go by the sense of the words more
18 than by some pedantic rules of grammar. The
19 courts said that through the -- through the
20 decades many times.

21 JUSTICE BARRETT: And is that -- is
22 that a proposition that you would endorse? It
23 seems like going through the sense of the words
24 and the purpose of the statute would be contrary
25 to the -- the method of interpretation that

1 you've endorsed in other contexts.

2 MR. GARNER: Your Honor, I don't
3 endorse that broadly as it commonly appears. It
4 tends not to appear in the post-Scalia years.
5 And I -- I -- I -- I don't endorse it broadly.
6 And yet it does recognize that we must look at
7 the sense of the words to understand the
8 sentence.

9 JUSTICE BARRETT: Thank you, counsel.

10 CHIEF JUSTICE ROBERTS: Mr. Garner,
11 you can take a few minutes to wrap up.

12 MR. GARNER: Thank you, Your Honor.
13 I'll take 60 seconds.

14 On Facebook's reading, it would have
15 been possible even in 1991 to download the
16 entire phone book and autodial every number with
17 impunity, thousands per minute, as long as you
18 stored the numbers on a floppy disk or hard
19 drive.

20 Just don't store them on an
21 algorithmic number generator, a piece of
22 equipment not even meant for storage. The
23 statute never sensibly meant that.

24 This case isn't about cell phones
25 calling. It's about cell phones being called.

1 It's about computer systems that send out
2 millions of illegal calls and messages per day.

3 There's no reason to think that
4 Congress thought haphazard non-consensual calls
5 to be bad but targeted non-consensual calls, far
6 more intrusive, to be quite acceptable.

7 In Barr, this Court said that debt
8 collectors aren't free to send in the robots.
9 Now Facebook wants to free up all the robots for
10 unsolicited calls.

11 We urge the Court to reject this
12 misreading and affirm.

13 CHIEF JUSTICE ROBERTS: Thank you, Mr.
14 Garner.

15 Mr. Clement, rebuttal.

16 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

17 ON BEHALF OF THE PETITIONER

18 MR. CLEMENT: Thank you, Mr. Chief
19 Justice. Just a few points in rebuttal.

20 First, the point has been made that
21 there's some awkwardness between talking about
22 the verb "store" and using a random or
23 sequential number generator. That awkwardness
24 can only matter for one of two reasons.

25 One, it could matter if it were just

1 impossible to use a random or sequential number
2 generator to store numbers. But it's not
3 impossible. It's not technologically
4 impossible, as the PACE and Noble brief makes
5 clear, nor is it impossible as a matter of
6 ordinary usage because, as long as I'm using the
7 generator as part of the storage process, the
8 word makes sense just like dialing using a
9 random or sequential number generator.

10 The other reason it could matter is
11 because there's a superfluity problem such that
12 anything that uses a random number generator to
13 store numbers will also use the generator to
14 produce the numbers.

15 But if we're talking about superfluity
16 here, there's a far greater superfluity problem
17 on the Respondents' side of the case because
18 they would essentially read the words "using a
19 random or sequential number generator" out of
20 the statute. And you can't read this statute,
21 particularly when you understand the limited
22 scope of the ATDS prohibitions, without thinking
23 that that phrase is at the heart of the statute.

24 Second, there's been some discussion
25 about how automatic something needs to be and

1 whether that could save the cell phones.
2 There's two points to make about that, Your
3 Honor.

4 First of all, the adverb
5 "automatically," the adverbial phrase "without
6 human intervention," the adverbial phrase "en
7 masse," none of those phrases is in the statute.

8 And what is in the statute and the
9 modifier that actually gives an Automatic
10 Telephone Dialing System a sense of
11 automaticness is using a random or sequential
12 number generator.

13 But even if you read that word into
14 the statute, it doesn't solve the problem. If I
15 tell Siri to dial a number from one of my stored
16 contacts, that's about as automatic as dialing
17 gets.

18 And call forwarding, even back in
19 1991, was just as automatic. You'd call
20 somebody's number thinking you were getting one
21 line, and it would automatically forward you to
22 a different line.

23 And, of course, if you typed in the
24 wrong line to forward it to, you could be
25 looking at a lot of liability under the ATD --

1 under the TCPA.

2 Finally, a lot of discussion about the
3 importance of 1991 versus 2020. Obviously, 1991
4 is what's most important for interpreting the
5 statute itself. And if you look at that, things
6 even that existed in 1991, like call forwarding,
7 the problem was raised and the response from the
8 FCC was, no, look at the statutes. Those aren't
9 covered because they don't use a random or
10 sequential number generator.

11 If you look at the testimony before
12 Congress in 1991, it's telling. The Direct
13 Marketing Association did oppose the Automatic
14 Telephone Dialing System prohibition because
15 that's not what they were doing, even though
16 they were using stored lists.

17 The person who opposed it was a guy
18 named Ray Coker, who made these automatic
19 dialing systems that used a random or sequential
20 numbering device.

21 And, lastly, just let me say that 2020
22 may be relevant particularly for constitutional
23 avoidance.

24 So, for all those reasons, Your Honor,
25 we ask that you reverse the Ninth Circuit.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel. The case is submitted.
3 (Whereupon, at 11:23 a.m., the case
4 was submitted.)
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