No. 19-511

IN THE

Supreme Court of the United States

FACEBOOK, INC.,

Petitioner,

v.

NOAH DUGUID, *ET AL.*

Respondents.

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

RESPONDENT NOAH DUGUID'S SUPPLEMENTAL BRIEF

SCOTT L. NELSON
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

SERGEI LEMBERG
Counsel of Record
STEPHEN TAYLOR
LEMBERG LAW LLC
43 Danbury Road
Wilton, CT 06897
(203) 663-2250
slemberg@lemberglaw.com

Attorneys for Respondent

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SUPPLEMENTAL BRIEF

Respondent Noah Duguid submits this supplemental brief under Rule 15.8 to address the proper disposition of this case in light of this Court's decision in *Barr v. American Ass'n of Political Consultants*, No. 19-631 (July 6, 2020), as well as intervening developments during the time this petition was held by the Court during *Barr*'s pendency.

As petitioner Facebook recognizes in its supplemental brief, *Barr* resolves Facebook's first question presented adversely to Facebook: The Court's decision agrees with the panel below in this case that the government-debt exception to the Telephone Consumer Protection Act (TCPA) violates the First Amendment and that the exception is severable from the remainder of the TCPA's provisions, which remain enforceable.

As Facebook also points out, however, *Barr* does not resolve Facebook's second question presented, which concerns the TCPA's definition of an "automated telephone dialing system," or ATDS. *Barr*'s holding means that Mr. Duguid's claims are not blocked by the First Amendment, but the outcome of the appellate proceedings in this case still turns on whether, as the court of appeals held, he properly alleged facts sufficient to claim that Facebook used an ATDS to call his cell phone.

At the time Facebook filed its petition for certiorari, the ATDS issue did not merit review for a number of reasons. As respondent's brief in opposition explained (at 20–26), there was then no genuine conflict among the circuits over whether, as Facebook claims, an ATDS must have random or sequential number generating capability in addition to the abil-

ity to place calls automatically from a stored list of numbers. The Ninth Circuit's decision in *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018), on which the panel below relied, was the only decision that had squarely addressed that issue, holding that the best reading of the statute is that random or sequential number generating capacity is not required.

Since the filing of the brief in opposition, however, three courts of appeals have addressed the ATDS issue. The Second Circuit, in *Duran v. La Boom Disco, Inc.*, 955 F.3d 279 (2d Cir. 2020), agreed with the holding in *Marks*. The Seventh and Eleventh Circuit, however, held to the contrary in *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458 (7th Cir. 2020), and *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301 (11th Cir. 2020).

In light of the disagreement among the circuits, the Court may find it appropriate to grant Facebook's petition, limited to the second question presented, to resolve that disagreement. In considering whether the conflict merits resolution at this time, the Court should also consider that the ATDS definition is one of a number of issues that is the subject of pending regulatory proceedings before the FCC.[1] Regulatory

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[1] *See Public Notice: Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's* Marks v. Crunch San Diego, LLC *Decision*, 33 FCC Rcd. 9429, 2018 WL 4801356 (Oct. 3, 2018); *Public Notice: Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's* ACA International *Decision*, 33 FCC Rcd. 4864, 4865–66, 2018 WL 2253215 (May 14, 2018).

action by the FCC, if within the scope of authority delegated to the agency, could potentially supersede a ruling by this Court on the best reading of the statute. *See Nat'l Cable & Telecommc'ns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–85 (2005). The Court may also wish to consider that, in its response to the petition in this case, the United States (which was an intervenor below and also thus a respondent in this Court), noted "the FCC's ongoing consideration of the statutory question presented here" but stated that it "expresse[d] no view at this time on the merits of that statutory issue or on whether the [ATDS] question warrants this Court's review." U.S. Resp. 10–11. The Court may find it helpful to request the views of the Solicitor General on whether, having decided *Barr*, it should now review this case.

The Court may also consider the procedural posture of this case, which arises from a motion to dismiss a complaint that alleges that Facebook's system satisfied Facebook's own proffered definition of an ATDS. Because of its posture, the case involves no developed factual record on the nature of the system Facebook used to send messages to Mr. Duguid. *See* Duguid Opp. Br. 33–34.

Finally, although *Barr* does not resolve the ATDS issue, Facebook's position on that issue reflects a view of the statute, and of Congress's objectives in enacting it, that is radically at odds of the one that pervades the majority opinion in *Barr*. Facebook continues to advance the false narrative that by holding that the ATDS applies to systems that store telephone numbers and place robocalls to millions of cell phones, *Marks* somehow makes any use of a smartphone illegal—despite the absence of any evi-

dence that anyone has ever sued someone under the TCPA merely for using a smartphone. In fact, it is Facebook's position that would radically transform the TCPA, turning its restriction on robocalls to cell phones from what this Court in *Barr* described as a sustained effort by Congress to "fight[] back" against millions of robocalls, *Barr*, slip op. 1, to a provision applicable only to, in Facebook's words, "a small universe of rapidly obsolescing robocalling machines," Pet. 13–14. That view of the statute contradicts *Barr*'s recognition that "Congress's continuing broad prohibition of robocalls" "proscribes *tens of millions* of would-be robocalls that would otherwise occur *every day*." *Barr*, slip op. 11. Facebook's reading of the statute would thwart the congressional purposes acknowledged in *Barr*. The Court may wish to consider whether further development of the ATDS issue in the lower courts in light of *Barr*'s explanation of the purposes of the statute is desirable—especially given that even the courts that have accepted Facebook's view have acknowledged that the statute does not unambiguously support their reading. *See Gadelhak*, 950 F.3d at 468.

CONCLUSION

The Court should consider whether to resolve the disagreement among the circuits over the ATDS issue at this time.

Respectfully submitted,

SCOTT L. NELSON
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

SERGEI LEMBERG
Counsel of Record
STEPHEN TAYLOR
LEMBERG LAW LLC
43 Danbury Road
Wilton, CT 06897
(203) 663-2250
slemberg@lemberglaw.com

Attorneys for Respondent

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