No. 19-511

IN THE

Supreme Court of the United States

FACEBOOK, INC.,

Petitioner,

v.

NOAH DUGUID, et al.,

Respondents.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[*]

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SUMMARY OF ARGUMENT

"Ours is a society of written laws." *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1754 (2020). Although a court is likely, now and then, to find itself unimpressed by "the written word" of the law before it, *id.* at 1737, that is no excuse to "abandon the statutory text" and "appeal to assumptions and policy," *id.* at 1749. Sometimes these textualist principles are hard to apply, cf. *id.* at 1755-56 (Alito, J., dissenting); *King v. Burwell*, 576 U.S. 473, 517-18 (2015) (Scalia, J., dissenting), but most everyone agrees that they exist, that they are binding, and

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[*] No party's counsel authored any part of this brief. No person or entity, other than WLF and its counsel, helped pay for the brief's preparation or submission. All parties have consented in writing to the brief's being filed.

that, outside the rare absurdity or scrivener's error, there are *no exceptions*. Not for old laws, not for new laws. Not for bold laws, vague laws, or blue laws.

Not even for the Telephone Consumer Protection Act. Courts have opined that the TCPA is too intricate, too narrow, or too outdated. This they are entitled to do. What they may *not* do, however, is treat these qualms as a reason to edit the statute. Yet when a court starts to exalt a statute's "animating purpose," Pet. App. 9, or to insist that the statute "is *at heart* a straightforward law," *Duran v. La Boom Disco, Inc.*, 955 F.3d 279, 280-81 (2d Cir. 2020) (emphasis added), it's often a tipoff that the Third Branch is effectively about to take a red pen to the United States Code. The temptation, in some TCPA cases, has been to replace the detailed and balanced law Congress passed with an all-purpose anti-robocall law. See Noah Duguid's July 8, 2020, Supp. Brief at 4.

This case is one example. The TCPA bans the use of an "automatic telephone dialing system"—an autodialer—for making unconsented calls to cellphones. 47 U.S.C. § 227(b)(1)(A)(iii). The TCPA defines an autodialer as a device that can dial telephone numbers it either stores or produces "using a random or sequential number generator." *Id.* § 227(a)(1). Several circuits have read the definition this way, and their view accords with grammar, the canons of construction, statutory context, legislative history, and common sense. See Pet. Br. 23-34. Other circuits, however, have decided that the definition requires merely that a device be able to store telephone numbers and then dial them. Those circuits have been all too quick simply to

enlist the TCPA's overall "purpose" and Congress's general "intent" in their cause. Pet. App. 9; *Duran*, 955 F.3d at 285; *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1051 (9th Cir. 2018); see also *Allan v. Penn. Higher Educ. Assistance Agency*, 968 F.3d 567, 574-75 (6th Cir. 2020).

We would like to present an even more arresting example of unwarrantable TCPA expansion—the strange fate of text messages. The TCPA bans only certain "calls" to cellphones. 47 U.S.C. § 227(b)(1)(A). The law never mentions texts. Yet the FCC and at least six circuits agree—and this Court has assumed—that a text message is a "call" under the TCPA. No normal person refers to text messages as calls; and no one suggests that Congress meant, when it passed the TCPA, for "call" to mean "call or text message." The wide agreement that a text is a TCPA call has arisen, not from attentive analysis of the TCPA's words, but from overreliance on the statute's purpose and a game of follow the leader. After the FCC did little more than *declare* that a text message *should* count as a call, the courts fell in line, one by one. An unexamined consensus emerged that the judiciary should rewrite the TCPA to cover text messages; that letting it do so is simply a good idea. It is in fact quite a bad idea, because only Congress can craft substantive rules that keep pace as technology changes. Judicial stopgaps and "fixes" reduce Congress's incentive to pass more thorough statutory reforms.

In TCPA litigation, courts are making a habit of trying to "repair" a statute that strikes them as defective. But a court may not edit those laws that, in its view, are incomplete, poorly designed, or

behind the times. That is a job for the legislature. "It is up to Congress to design its laws with care, and it is up to the people to hold them to account if they fail to carry out that responsibility." *Burwell*, 576 U.S. at 516 (Scalia, J., dissenting). The Court should use this case to remind the lower courts that these fundamental principles apply even to statutes that govern fast-moving technologies. Even, indeed, to the TCPA.

ARGUMENT

AS THE WIDESPREAD TREATMENT OF TEXTS AS TCPA "CALLS" SHOWS, THIS CASE IS PART OF A BROADER FAILURE TO APPLY THE TCPA AS WRITTEN.

The TCPA declares it unlawful, except in an emergency or with prior consent, to use an autodialer to "make any call" to a cellphone. 47 U.S.C. § 227(b)(1)(A)(iii). A call is not a text message any more than a megaphone is a typewriter; so who would ever suppose that a text message is a "call" under the TCPA? A person first encountering that question today would have every right to feel confused. The FCC has said that a text message is indeed a TCPA "call." Six circuits have said the same in published opinions, and one more has done so in an unpublished opinion. No circuit has gone the other way. And this Court has assumed that the majority view is correct.

How did this startling conventional wisdom come to be? Might it be the product of a simple snowball effect? We think so. The predominant view appears to be the product of what Cass Sunstein calls a

"precedential cascade," in which "all circuits come into line" with a few decisionmakers' initial judgments. Cass Sunstein, *Conformity: The Power of Social Influences* 42 (2019). As the authority on one side accumulates, courts stop looking at the matter with fresh eyes. They feel "the great weight of the unanimous position of the others, and perhaps insufficiently appreciate[e] the extent to which that weight is a product of an early and somewhat idiosyncratic judgment." *Id.* "This can happen a lot," actually, and "it makes for bad law." *Id.*

Consider, to begin with, the power of an offhand statement from this Court. Two issues were disputed in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016): first, whether the plaintiff's TCPA lawsuit was rendered moot by an unaccepted offer of judgment; second, whether the defendant, a federal contractor, could invoke sovereign immunity. In teeing up the disputes at hand, however, the Court wrote: "A text message to a cellular telephone, it is undisputed, qualifies as a 'call' within the compass of § 227(b)(1)(A)(iii)." *Id.* at 667. This line has led parties not to challenge, and lower courts to treat as settled, a text message's status as a "call" under the TCPA. See, e.g., *Duran*, 955 F.3d at 280 n.4; *Warciak v. Subway Restaurants, Inc.*, 949 F.3d 354, 356 (7th Cir. 2020); *Breda v. Cellco P'ship*, 934 F.3d 1, 4 n.1 (1st Cir. 2019). But "the Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions," and "such assumptions . . . are not binding in future cases[.]" *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990). *Campbell-Ewald* does not rule on what counts as a "call" under the TCPA; it merely notes that no party had elected to

contest the matter. But it's not easy to challenge a proposition this Court is willing to accept, even just in passing and provisionally, as undisputed.

Next, notice how *Chevron* deference can curtail debate. The FCC declared in a 2003 order that text messages are "calls" under the TCPA. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14115 ¶165 (2003). The FCC order does little more than cite the purpose of the TCPA—the protection of privacy—and then rename text messages "text calls." *Id*. Yet the courts of appeals, often citing *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), have been brisk in accepting the FCC's decree as an accurate reading of the law, see, e.g., *Salcedo v. Hanna*, 936 F.3d 1162, 1166 (11th Cir. 2019); *Gager v. Dell Fin. Services, LLC*, 727 F.3d 265, 269 n.2 (3d Cir. 2013); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952-54 (9th Cir. 2009); *Keating v. Peterson's Nelnet, LLC*, 615 Fed. Appx. 365, 370-71 (6th Cir. 2015).

The FCC's reasons for declaring that a text is a call "would not withstand a gentle breeze." *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 110 (2015) (Scalia, J., concurring). Although it's true that the TCPA aims to protect privacy, "even the most formidable argument concerning the statute's purposes could not overcome . . . the statute's text." *Kloeckner v. Solis*, 568 U.S. 41, 55 n.4 (2012). And even under *Chevron*, an agency's understanding of a statute's words must be a reasonable one. 467 U.S. at 844. Yet there is nothing reasonable about referring to text messages as "calls."

When an average person says "I'll call you," she does not mean "I'll send you a text." No sane human being, meanwhile, has ever said "I'll give you a text call!" *Campbell-Ewald* itself refers only to "text messages"; it never refers to "text calls." Indeed, the phrase "text call" appears to have been created for the sole purpose of declaring that text messages are "calls" subject to the TCPA. When the TCPA is not at issue, people do not conflate calls and texts. See, e.g., *United States v. Miller*, 954 F.3d 551, 565 (2d Cir. 2020) (" . . . hundreds of calls and text messages . . ."); *United States v. Rounds*, 749 F.3d 326, 332 (5th Cir. 2014) ("[They] communicate[d] via text messages and phone calls."); *United States v. Kramer*, 631 F.3d 900, 901 (8th Cir. 2011) ("[H]e used his cellular telephone . . . to make voice calls and send text messages[.]"); *United States v. Ford*, 183 F. Supp. 3d 22, 35 (D.D.C. 2016) (". . . text messages and telephone calls . . ."); *Burdette v. Panola Cnty.*, 83 F. Supp. 3d 705, 707 (N.D. Miss. 2015) ("Text messages and phone calls . . ."); *Fikre v. FBI*, 142 F. Supp. 3d 1152, 1166 (D. Or. 2015) (". . . telephone calls, emails, and text messages . . ."); *Speight v. Sonic Restaurants, Inc.*, 983 F. Supp. 2d 1324, 1330 (D. Kan. 2013) ("[H]er supervisor failed to return her phone calls and text messages."); *Weinstein v. AT&T Mobility LLC*, 553 F. Supp. 2d 637, 638-39 (W.D. Va. 2008) ("[They] exchanged phone calls and text messages[.]").

When they do not cite *Campbell-Ewald* or the FCC order, courts cite cases that in turn cite one or both of those authorities. The Federal Reporter contains precious little original discussion of why "text," when (and only when) it comes near the acronym "TCPA," should mean "call."

One opinion, *Satterfield*, 569 F.3d 946, at least notes that "Webster's defines 'call' in this context as 'to communicate with or try to get into communication with a person by a telephone," *id*. at 953-54. Treating a "text" as a "call" is therefore "consistent with the dictionary's definition." *Id*. at 954. But this is a beautiful illustration of why "dictionaries must be used as sources of statutory meaning only with great caution." *United States v. Costello*, 666 F.3d 1040, 1043 (7th Cir. 2012) (Posner, J.). "The choice among meanings of words in statutes must have a footing more solid than a dictionary—which is a museum of words, an historical catalog rather than a means to decode the work of legislatures." *Id*. (quoting Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv. J.L. & Pub. Pol'y 61, 67 (1994)). You could try to "communicate with . . . a person by a telephone" by throwing one at her head. But throwing a phone is no more a "call" than is sending a text message. That's not what anyone means when she uses that word. (For what it's worth, dictionary definitions of "text message" do *not* use the word "call." A text message is "a short message sent electronically[,] usually from one cell phone to another." *Merriam-Webster Online*, https://bit.ly/39X1B3j.)

It's almost like there is a conspiracy, within polite legal society, quietly to sweep text messages into the TCPA. Because "the first text message was not sent until . . . almost a full year *after*" the TCPA was passed, the Congress that passed that law "did not address," did not "intend to address," and "could not have addressed" text messages. *Keating*, 615

Fed. Appx. at 370. Yet Americans are "united in their disdain" for junk texts. *Barr v. Am. Assoc. of Political Consultants, Inc.*, 140 S. Ct. 2335, 2343 (2020). Isn't it obvious, then, that the courts should lend Congress a hand, expand the TCPA to cover robotexts, and make the world a better place? But that people *really want* texts to be "calls" under the TCPA does not make it so. "When the express terms of a statute give . . . one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law[.]" *Bostock*, 140 S. Ct. at 1737. "Only the words on the page constitute the law adopted by Congress and approved by the President." *Id*. at 1738.

Not only do judges have no *authority* to "update . . . old statutory terms," *id*.; they create a lot of problems when they try. When it "repeatedly do[es] what it thinks the political branches ought to do," the judiciary "encourages [those branches'] lassitude." *Hamdi v. Rumsfeld*, 542 U.S. 507, 577 (2004) (Scalia, J., joined by Stevens, J., dissenting). It matters that Congress tackle problems for itself.

Take text messages. It's possible to send a lot of them to strangers using a peer-to-peer system. The FCC recently confirmed that, because they are not autodialers (a person must manually enter each number), P2P systems are not subject to the TCPA. *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Declaratory Ruling (June 25, 2020). "The fact that . . . equipment . . . is used to . . . send texts to a large volume of telephone numbers," the FCC observed, "is not determinative of whether that equipment constitutes an autodialer under the

TCPA." *Id*. But some P2P mass texts are causing precisely the sort of privacy and nuisance problems that spurred passage of the TCPA. See Roger Cheng, *Trump campaign texts are being flagged as spam: What you need to know*, CNET, https://cnet.co/3gwBVwF (July 25, 2020). The wireless trade group CTIA has issued guidelines on obtaining consent for, and putting opt-out language in, mass texts, but obviously "the trade group has no ability to enforce these guidelines." *Id*.

So have courts really made the world better by rolling text messages into the TCPA? The most creative judge can do little more than declare texts either *in* or *out* of, *covered* or *not covered* by, that law. She cannot "find" in the TCPA a new body of rules governing mass P2P texts. Only Congress can study the matter, hold hearings, and then pass a law that draws the necessary lines between abusive junk texts and legitimate mass texts. Yet when a court takes matters into its own hands, when it tries to "rewrit[e] the law under the pretense of interpreting it," *Burwell*, 576 U.S. at 516 (Scalia, J., dissenting), it invites Congress to put off the hard work of crafting sound policy.

* * *

What's the upshot for this case? For one thing, if a text is not a "call" under the TCPA, Facebook wins this appeal. We acknowledge, however, that the parties have not locked horns on the matter.

The bigger point is about how to read statutes. The opinion below paints the TCPA as something of a relic—a law passed "in the age of fax machines and

dial-up internet" that has "weathered the digital revolution with few amendments." Pet. App. 1-2. The opinion also leans heavily on "the TCPA's animating purpose—protecting privacy[.]" *Id.* at 9. By now it should be clear that these are common themes in TCPA jurisprudence. Indeed, the plaintiff's position in this case appears to have been born when the FCC, "concerned that technological innovation might defeat the [TCPA's] purpose," tried "to use . . . an all-encompassing view of [that] purpose to expand the statute's coverage and fill [a] gap." *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1309 (11th Cir. 2020) (Sutton, J., visiting). But no special rules of interpretation apply to statutes that regulate technology. There is no "fear of obsolescence" exception or "overriding purpose" proviso. Not when the issue is what qualifies as a "call"; not when the issue is what qualifies as an "autodialer."

It may well be true that "Congress in retrospect drafted the 1991 law for the moment but not for the duration." *Id.* And it is certainly true that fast-changing technology generates litigation. But judges may not rewrite the law simply because they think that Congress is too slow and that some new form of technology *simply must* be regulated right away. The courts must leave the job of legislating to Congress. They may not "add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and [their] own imaginations." *Bostock*, 140 S. Ct. at 1738.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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