No. 19-511

IN THE

Supreme Court of the United States

FACEBOOK, INC.,

Petitioner,

v.

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

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR SALESFORCE.COM, INC., AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Amicus curiae salesforce.com, inc. ("Salesforce") is a global could computing company headquartered in San Francisco. It provides an Internet-based cloud computing platform that, among other things, facilitates effective communications between businesses and their current and potential consumers who have chosen to receive those communications.[1] Such communication services are valuable precisely because they are *not* random, but instead allow Salesforce's customers to connect to specific consumers who have affirmatively opted in to receiving communications from specific businesses—and are likely to be interested in the messages Salesforce's customers send.

Salesforce's platform, among other things, allows businesses to send personalized text messages to consumers who have provided their cell phone numbers for that purpose and consented to receiving such messages. Those text messages could be transactional texts—for example, alerting consumers that their monthly payments were received successfully. Or they could be marketing texts—for example, offering a discount off the consumer's next purchase. As explained further below, Salesforce does not permit its customers to send text messages to random cell phone numbers.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus curiae states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than amicus curiae or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

This case is important to Salesforce because, under the Ninth Circuit's incorrect interpretation of "automatic telephone dialing system" in the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227(a)(1), its customers could be subject to liability that Congress never intended. None of Salesforce's services uses "random or sequential number generator[s]," as the relevant provision of the TCPA requires. *Id.* Yet its platform has the "capacity" to allow its customers to "store" mobile telephone numbers and to "dial"—or send text messages to—"such numbers." Pet. App. 6. Indeed, under the Ninth Circuit's view that such capacity is sufficient to trigger TCPA liability, it is difficult to see how any company could provide targeted, non-random text-based communications services without risking TCPA liability; almost by definition, any device or system capable of sending text messages is capable of storing and dialing telephone numbers.

In other words, even though Salesforce designed its platform to help its customers comply with the plain text of the TCPA and to minimize the risk of unwanted text messages, its customers face potentially crushing liability under the TCPA if the Ninth Circuit's interpretation is allowed to stand. A statute designed to prevent *unwanted* communications would thereby deter sales and marketing communications that customers *want* to receive.

Accordingly, Salesforce has a strong interest in the outcome of this case. And Salesforce urges this Court to interpret the TCPA in accordance with its plain text and to reject the Ninth Circuit's erroneous and limitless interpretation of "automatic telephone dialing system."

INTRODUCTION AND SUMMARY OF ARGUMENT

As a technology-based effort to reduce unwanted communications, Congress in the TCPA imposed strict restrictions on calls placed using random or sequential number generators. The Ninth Circuit rewrote the statutory text to eliminate the requirement that an automatic telephone dialing system use a random or sequential number generator and instead applied the TCPA's restrictions to any device or system that stores and dials telephone numbers. To achieve that result, the Ninth Circuit ignored the plain text of the statute, basic rules of grammar, and the rule that statutes must be construed to avoid absurd results.

Salesforce submits this brief to explain some of the troubling effects of the Ninth Circuit's test, especially on Salesforce's business, and to urge this Court to confine the TCPA to its intended scope.

I. The Ninth Circuit's interpretation of the TCPA is unsupported by the plain text of the statute and violates bedrock rules of grammar. A modifier ("using a random or sequential number generator") that follows the direct object ("telephone numbers to be called") of two verbs ("store" and "produce")—and especially a modifier set off by a comma—is understood to modify both verbs. By adopting the atextual conclusion that the modifier here applies only to "produce" and not also to "store," the Ninth Circuit impermissibly rewrote the statute.

Although it is not entirely clear why the Ninth Circuit refused to interpret the statutory definition of "automatic telephone dialing system" based on its plain text, the court appears to have thought that it

could not do so because of the canon against surplusage. But even if the grammatical and natural reading of a statutory text produces some superfluity, that canon does not mean a court may rewrite the statute, because ordinary speech and legislative texts frequently include some redundancy.

II. Remarkably, the Ninth Circuit did not conclude that its interpretation was compelled by the text of the statute but instead reasoned that the statutory definition is ambiguous. Yet it resolved that supposed ambiguity by adopting an unreasonable reading that sweeps in numerous communications devices and services that Congress never intended to restrict.

Salesforce's platform could qualify as an automatic telephone dialing system under the Ninth Circuit's interpretation, even though it has nothing in common with the telemarketing practices Congress targeted. It "stores" contact information from specific consumers who want to receive—and have consented to receiving—text messages from specific companies. And it enables its customers to "dial"—or text—those numbers to consenting consumers automatically. Yet Salesforce has no interest in having its platform used to spam consumers with unsolicited texts. To the contrary, it has policies forbidding random and unwanted communications.

The Ninth Circuit's interpretation would also apply to ubiquitous communications devices like smartphones. It would sweep in hands-free dialing systems in cars—even though it would be absurd to suppose that a car is an automatic telephone dialing system. And it would apply even to systems designed to protect consumer privacy, such as two-factor authentication systems for sensitive accounts.

There is no way to cabin the far-reaching consequences of the Ninth Circuit's approach. Salesforce requires that its customers send text messages only to consumers who have expressly consented to receiving them. But the consent exception provides no protection in the event of good-faith and unavoidable mistakes—such as texts to recycled phone numbers or an accidental text sent to the wrong contact list. To minimize such absurdities, proponents of the Ninth Circuit's approach have read words into the statute, requiring that the relevant calls or texts be sent "automatically" or "without human intervention." But those limitations are found nowhere in the statutory text. And because they are hopelessly imprecise, they provide no clear guidance for companies like Salesforce to conform their communications systems to the statute.

III. Finally, the Ninth Circuit's interpretation violates the canon of constitutional avoidance. Its reading of the TCPA would conflict with the First Amendment by restricting the free flow of information in a way that is not remotely tailored to Congress's goal of preventing unsolicited calls. And it would deprive businesses like Salesforce of due process and fair notice because there is no way to discern from the text of the statute that any device capable of storing and dialing telephone numbers is an automatic telephone dialing system such that use of Salesforce's platform could subject its customers to liability. Interpreting a purportedly "ambiguous" statute to apply to Salesforce's platform—when it designed that platform to *avoid* random and unwanted calls and texts—is manifestly inconsistent with fair notice.

ARGUMENT

Under the Ninth Circuit's boundless interpretation of the TCPA's autodialer provision, using Salesforce's effective and efficient platform to send text messages could subject its customers to onerous liability. Salesforce's platform has nothing to do with the telemarketing practices that Congress sought to combat in the TCPA—calling random numbers to make unsolicited and unwanted sales pitches or calling sequential numbers and tying up entire cellular networks. Instead, Salesforce provides a platform that enables its customers to communicate with consumers who want to receive—and have consented to receiving—their texts. And Salesforce has policies in place to prevent random, unsolicited, or unconsented-to texts. None of that makes a difference in the Ninth Circuit's view, because Salesforce's platform is capable of helping its customers store and dial telephone numbers. Congress did not intend the TCPA to sweep so broadly or to prevent expected and desired communications between businesses and consumers.

I. THE NINTH CIRCUIT'S INTERPRETATION OF "AUTOMATIC TELEPHONE DIALING SYSTEM" IS INCORRECT.

In enacting the TCPA, Congress did not seek to restrict all calls to cell phones using any automated equipment, much less to block desired and expected communications between businesses and the public. Instead, Congress prohibited calls using an "automatic telephone dialing system," which Congress specifically and narrowly defined as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). As Facebook and the United States

correctly explain, that statutory definition encompasses "only equipment that uses random- or sequential-number-generation technology to store or produce numbers." Facebook Brief 2; *see also* U.S. Brief 14-15 ("The TCPA's autodialer definition is . . . best understood to encompass only those devices that have the capacity to use a random or sequential number generator.").

This conclusion follows from the plain text of the statute. *See Lamie* v. *U.S. Tr.*, 540 U.S. 526, 534 (2004) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.") (internal quotation marks omitted). Bedrock rules of grammar direct that the modifier "using a random or sequential number generator"—which follows the direct object of both "store" and "produce" and is set off by a comma—modifies both "store" and "produce." *See* Facebook Brief 23-25; *Glasser* v. *Hilton Grand Vacations Co.*, 948 F.3d 1301, 1306 (11th Cir. 2020) ("When two conjoined verbs ('to store or produce') share a direct object ('telephone numbers to be called'), a modifier following that object ('using a random or sequential number generator') customarily modifies both verbs.").

What grammar treatises teach, everyday speech confirms. For example, this Court's Rule 5.6 provides that "[t]he fee for a duplicate certificate of admission to the Bar bearing the seal of the Court is $15, and the fee for a certificate of good standing is $10, payable to the United States Supreme Court." It is obvious from the placement of the "payable" clause and the commas that a check for either type of fee must be made out to this Court.

In nevertheless concluding that the phrase "using a random or sequential number generator" in the statute modifies "produce" but not "store," the Ninth Circuit ignored this fundamental grammatical rule. It also "contort[ed] the statutory text almost beyond recognition." *Gadelhak* v. *AT&T Servs., Inc.*, 950 F.3d 458, 466 (7th Cir. 2020). The Ninth Circuit had to "separate the statute's two verbs ('to store or produce'), place the verbs' shared object ('telephone numbers to be called') in between those verbs, [and] then insert a copy of that shared object [in]to the statute." *Glasser*, 948 F.3d at 1311. That approach "looks more like 'surgery' . . . than interpretation." *Id.*

If the Ninth Circuit's reading were correct, the comma in the statute would have to be moved and text added—the statute would have to be changed to refer to "the capacity—(A) to store telephone numbers to be called, or to produce such numbers using a random or sequential number generator; and (B) to dial such numbers." It would have been easy for Congress to express what the Ninth Circuit read the statute as saying, but it did not do so.

The Ninth Circuit did not explain why it believed that the statutory definition "is not susceptible to a straightforward interpretation based on the plain language alone." *Marks* v. *Crunch San Diego, LLC*, 904 F.3d 1041, 1051 (9th Cir. 2018). But the court appears to have concluded that reading the statute naturally—and grammatically—would render the verb "store" superfluous. *See id.* at 1050 (noting plaintiff's argument "that a number generator is not a storage device; a device could not use 'a random or sequential number generator' to store telephone numbers"); *see also*, *e.g.*, *Duran* v. *La Boom Disco, Inc.*, 955 F.3d 279, 284 (2d Cir. 2020) ("It would be odd for Congress to

include both verbs if, together, they merely created redundancy in the statute.").

But, as this Court has frequently noted, an argument that a particular interpretation of a statue would introduce "surplusage or redundancy . . . is not a silver bullet." *Rimini St., Inc.* v. *Oracle USA, Inc.*, 139 S. Ct. 873, 881 (2019). After all, redundancy is common in ordinary speech—note the Court's use of both surplusage and redundancy in that sentence—and routine in legislation. Even if the word "store" in the statutory definition here is somewhat superfluous, that does not give a court license to rewrite the plain text of the statute, when "the better overall reading of the statute contains some redundancy." *Id.*

II. THE NINTH CIRCUIT'S INTERPRETATION OF THE STATUTE LEADS TO ABSURD AND PERNICIOUS RESULTS.

Remarkably, the Ninth Circuit did not suggest that its atextual and limitless interpretation was compelled by the plain text of the TCPA. Instead, it concluded that the statute was "ambiguous," *Marks*, 904 F.3d at 1051, and resolved the supposed ambiguity by adopting a reading that it believed "support[ed] the TCPA's animating purpose—protecting privacy by restricting unsolicited, automated telephone calls," Pet. App. 9. But even if the statute were ambiguous, the Ninth Circuit's interpretation is manifestly unreasonable. Any ambiguity should not be resolved by interpreting the TCPA to sweep in devices and systems—like those provided by Salesforce, which has policies *forbidding* unsolicited texts—that the TCPA was never designed to regulate.

1. Salesforce's text-messaging service could fall within the Ninth Circuit's definition of automatic telephone dialing system, even though it has nothing in

common with the pernicious telemarketing practices Congress enacted the TCPA to stamp out.

Salesforce's platform allows retailers and other businesses to send personalized text messages to specific consumers who have provided their cell phone numbers for that purpose—and consented to receiving such texts. That platform works precisely because it allows Salesforce's customers to "store" and "dial" cell phone numbers, and because it does *not* permit random or unsolicited text messages. In fact, Salesforce's customers "are forbidden to transmit unsolicited text messages or commercial email (spam) via [its] system." Salesforce.com, *Anti-Spam at ExactTarget*, https://sforce.co/33bOEj7 (last visited Sept. 11, 2020).

One of Salesforce's customers might, for example, want to use transactional texts to communicate with consenting consumers. Those texts could alert consumers that their automatic payments are about to be—or have been—debited from their checking account. The system permits Salesforce's customer to store the consumers' cell phone numbers when they sign up for text-messaging alerts, and then send a text message automatically on a particular date or when a payment is made. Another of Salesforce's customers might want to use marketing texts to alert its consenting clients of an upcoming promotion. Or it might want to stay in touch with consumers who have signed up to receive marketing messages on a weekly or monthly basis. Again, Salesforce's system allows its customers to store the numbers of consumers who sign up, and then send text messages to those consumers automatically.

In these ways (and many others), Salesforce's platform allows its customers to target *only* those consumers who are interested in and have consented to

receiving communications. Targeted communications—i.e., text messages sent to consumers who have expressed an interest in a business's products—are effective and efficient, benefitting both businesses who wish to speak to a receptive audience and consumers who want to hear their message.

Salesforce has no interest in allowing its platform to be used for spamming members of the public with unsolicited or unwanted text messages. Salesforce recognizes that such random text messages are annoying and counterproductive. And it has adopted policies that prevent this practice. *See*, *e.g.*, *Anti-Spam at ExactTarget, supra* (Salesforce "does not allow nor desire that any client use our services to send unwanted text messages or commercial emails."). Salesforce also has the right to suspend a customer's access to its services if the customer sends unwanted texts. *See id.* If Salesforce permitted text messages to be sent to random consumers, that would simply create negative consumer experiences, which would harm Salesforce's customers in the marketplace and ultimately harm Salesforce itself.

Salesforce's platform is designed to allow its customers to engage in expected and desired communications with consumers and to prevent random communications. Subjecting the use of that platform to liability under the TCPA simply because it has the capacity to store and dial telephone numbers would contravene Congress's intent. Congress "d[id] not intend for" the restrictions in the TCPA "to be a barrier to the normal, expected or desired communications between businesses and their customers." H.R. Rep. No. 102-317, at 17 (1991), *available at* 1991 WL 245201. Yet that is the necessary consequence of the Ninth Circuit's decision.

2. Under the TCPA, an "automatic telephone dialing system" includes any equipment which has a particular "capacity," *whether or not* the caller uses that capacity to make any particular call. 47 U.S.C. § 227(a)(1). Thus, under the Ninth Circuit's erroneous reading, a vast swath of communications devices would be automatic telephone dialing systems, because any number of devices have the "capacity" to store and dial telephone numbers.

For example, "[e]very iPhone today has that capacity right out of the box. An iPhone of course can store telephone numbers; it can also send text messages automatically, for example by using the 'Do Not Disturb While Driving' function." *Gadelhak*, 950 F.3d at 467. And so can every other smartphone. Yet nothing in the TCPA suggests "that Congress could have contemplated the applicability of the statute's restrictions to the most commonplace phone device used every day by the overwhelming majority of Americans." *ACA Int'l* v. *FCC*, 885 F.3d 687, 699 (D.C. Cir. 2018).

Devices that store and dial cell phone numbers not only are convenient, but also promote safety. Many modern cars either include or can be connected to voice-activated phones that store contact lists and can dial those numbers hands free, allowing drivers to keep their attention on the road. It is absurd to suppose that such cars are "automatic telephone dialing systems," and that Congress intended to make "any call" from such a car unlawful. 47 U.S.C. § 227(b)(1)(A).

Moreover, systems that store and dial cell phone numbers can further Congress's goal of "protecting privacy." Pet. App. 9. Consider multi-factor authen-

tication systems for websites storing sensitive or confidential consumer information. When a consumer logs in to his or her email or bank account from an unknown device, these systems can send via text message a code that the consumer must enter to access the account. The National Security Administration recommends multi-factor authentication, such as "[e]ntering a password . . . and receiving a one-time-use code via SMS on a registered mobile device" as "one of the most effective controls to protect an enterprise." NSA Cybersecurity Information, *Transition to Multi-Factor Authentication* 1 (Aug. 2019), https://bit.ly/35nCCpk. Yet such systems necessarily "store" and automatically "dial" mobile telephone numbers. By distorting the statutory definition of "automatic telephone dialing systems" to encompass such security systems, the Ninth Circuit hindered the very policy goal Congress was attempting to advance.

3. Under the Ninth Circuit's incorrect and unbounded interpretation, there would be no way under the TCPA to prevent these absurd consequences.

First, the statue permits the use of an automatic telephone dialing system for calls "made with the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A). But even with that exception, the Ninth Circuit's interpretation still would subject companies to potential liability despite good-faith attempts to comply with the TCPA.

Salesforce has policies designed to promote compliance with the TCPA. It requires its customers to follow applicable laws, including laws requiring consent: Its "clients certify that they will use [its] services *only* to send messages . . . to customers and prospects that have expressly consented (opted-in) to re-

ceive them." *Anti-Spam at ExactTarget, supra* (emphasis added). And it provides its customers with templates for securing "double" opt-in consent from consumers before their cell phone numbers are included on the customers' contact lists. *See id.* Consumers opt in first by providing express consent to receiving text messages when they provide their cell phone numbers to Salesforce's customer. Then consumers receive a text message asking them to confirm that they wish to be contacted through further texts. Only if consumers reply "yes" to that message will they remain on the relevant contact list for future texts.

Nonetheless, texts can be misdirected. As Facebook explains, recycling of cell phone numbers is routine, and there is no reliable way to know whether a particular number has been recycled. *See* Facebook Brief 45. As a result, there is no way for a company acting in good faith to guarantee that text messages will be sent in all cases *only* to customers who have expressly consented. Similarly, a consumer may try to opt out from receiving future text messages, but the systems designed to remove such consumers from contact lists may fail. Or the consumer may enter a mistaken cell number when signing up to receive product alerts. Finally one of Salesforce's customers may mistakenly send marketing text messages to the wrong contact list (perhaps a list of consumers who have opted *out* of receiving texts, rather than the list of those who have opted *in*).

The TCPA was not designed to impose potentially enormous penalties—of $500 per text or more—on companies who make good-faith mistakes. *See* 47 U.S.C. § 227(b)(3)(B)-(C). Yet because the statute de-

clares it unlawful to "make *any* call . . . using any automatic telephone dialing system" absent express consent, all of those mistakes could result in liability under the Ninth Circuit's holding. *Id.* § 227(b)(1)(A) (emphasis added).

Moreover, the statutory bar on using "an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously" has *no* exception for express consent. 47 U.S.C. § 227(b)(1)(D). Thus, if a company sends a marketing text to multiple work phones at the same company simultaneously, it could violate the TCPA, even if every recipient of those messages has consented to receiving texts.

Second, implicitly acknowledging the absurd scope of holding that any device capable of storing and dialing phone numbers is an automatic telephone dialing system, the Ninth Circuit and other courts that agree with its reading of the TCPA have tried to limit the implications of that approach by reading new words into the statute. The Ninth Circuit held that an automatic telephone dialing system must "have the capacity to store numbers to be called and to dial such numbers *automatically*." Pet. App. 6 (emphasis added; internal quotation marks omitted). And the Second Circuit likewise has said that an automatic telephone dialing system "is different from a non-[automatic telephone dialing system] merely because of its ability to 'dial' numbers automatically" or "*without human intervention*." *Duran*, 955 F.3d at 288 (emphasis added).

These attempted non-textual limitations cannot cure the more fundamental problems that the Ninth Circuit's incorrect reading creates, and in fact exacerbate the atextualism problem by adding text to the

statute that is not there. Under the plain text of the statute, an automatic telephone dialing system is equipment with the "*capacity*" to perform certain functions, not equipment that is actually *used* in certain ways. 47 U.S.C. § 227(a)(1) (emphasis added). And the TCPA declares it unlawful "to make any call" to a cell phone—absent an emergency or express consent—"using any automatic telephone dialing system," regardless of whether the call is placed automatically or with sufficient human intervention. *Id.* § 227(b)(1)(A). Thus, the only textually supportable basis for limiting the TCPA's sweep is to confine the definition of automatic telephone dialing system to its plain textual scope, not to invent additional limitations on the use of systems that Congress did not intend to cover in the first place.

More importantly, from the perspective of Salesforce, those limiting principles are hopelessly imprecise. If an iPhone user sets his or her phone to reply automatically "I'm driving with Do Not Disturb While Driving turned on. I'll see your message when I get where I'm going" to all incoming calls, is that sufficient human intervention? What if one of Salesforce's customers selects a particular contact list for a tailored message—are those messages sent automatically? Or suppose a small business owner manually adds cell phone numbers as the recipients of a text message, but sets the message to be delivered "automatically" at a later time—would that fall within the statutory prohibition under the Ninth Circuit's view?

The best way to avoid endless litigation over the line between permissible and impermissible conduct—and to provide certainty to companies that regularly communicate with consumers and prospects — is not to add new words to the statutory text to avoid

overbreadth problems created by an atextual expansion of the words that are actually there, but rather to interpret the TCPA as written. Although it is not this Court's business to change the meaning of text to correct bad policy choices, in this case the plain language of the text itself corrects the severe disconnect between the result reached by the Ninth Circuit and Congress's intent as manifested by the statute. The TCPA directs a bright line—to be an automatic telephone dialing system, a communications device or system must use "a random or sequential number generator." 47 U.S.C. § 227(a)(1). Salesforce has designed its platform not to do so, and that should put customers using its platform in the clear with respect to this aspect of the TCPA. Salesforce respectfully submits that this Court should construe the TCPA according to its plain text and reject the boundless and countertextual interpretation offered by the Ninth Circuit.

III. THE NINTH CIRCUIT'S INTERPRETATION CONFLICTS WITH THE PRINCIPLE OF CONSTITUTIONAL AVOIDANCE.

Although the question on which the Court granted certiorari is one of statutory interpretation, the TCPA (like all statutes) must be construed to avoid constitutional concerns. Even if the Ninth Circuit were correct that the autodialer definition is "ambiguous," in the sense that it is susceptible to two reasonable interpretations (it is not, for the reasons noted above), any such ambiguity would have to be resolved in favor of the construction that preserves the statute's constitutionality. *See Clark* v. *Martinez*, 543 U.S. 371, 380-81 (2005) ("when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice"). In other

words, if one construction "would raise a multitude of constitutional problems, the other should prevail." *Id.*

Here, the Ninth Circuit's interpretation of the TCPA raises a host of constitutional concerns. Facebook's merits brief explains the serious First Amendment problem posed by holding that any device capable of storing and dialing telephone numbers is an automatic telephone dialing system. *See* Facebook Brief 47-51. Salesforce agrees with those arguments. Its communications services are designed to promote "the free flow of commercial information" between their customers and receptive members of the public. *Thompson* v. *W. States Med. Ctr.*, 535 U.S. 357, 366 (2002) (internal quotation marks omitted). Penalizing that information exchange whenever it involves a device capable of storing and dialing telephone numbers is vastly "more extensive than is necessary to serve" the government's interests in protecting privacy and reducing unwanted telephone calls. *Id.* at 367 (internal quotation marks omitted).

In addition, "[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). Laws must give "fair warning" and permit "the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.*; *see also Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1228 (2018) (opinion of Gorsuch, J.) ("Fair notice of the law's demands . . . is the first essential of due process.") (internal quotation marks omitted). This concern is especially pronounced in cases involving First Amendment rights, where "rigorous adherence to those requirements is necessary to ensure that ambiguity does not

chill protected speech." *FCC* v. *Fox Television Stations, Inc.*, 567 U.S. 239, 253-54 (2012).

Salesforce has grown its business in reliance on reading the TCPA according to basic rules of grammar and common sense. It has designed products and systems that do not use a random or sequential number generator, and thus are not autodialers under a construction of the TCPA that even the Ninth Circuit acknowledged is plausible. Interpreting a statue that is "ambiguous on its face," *Marks*, 904 F.3d at 1051, to encompass communications systems that were carefully designed to *avoid* the use of random or sequential number generators violates due process and fair notice. To reinterpret the TCPA now to render any equipment with the capacity to store and dial telephone numbers unlawful is manifestly inconsistent with principles of fair notice. And it is inconceivable that there are any reliance or notice interests on the other side of the equation.

To be sure, "Congress in retrospect drafted the 1991 law for the moment but not for the duration. The focus on number generation eradicated one form of pernicious telemarketing but failed to account for how business needs and technology would evolve." *Glasser*, 948 F.3d at 1309. Salesforce does not dispute that novel forms of telemarketing may continue to proliferate. But it is up to the political branches, not the judiciary, to take account of three decades of evolving technology and update the TCPA to address current problems. By assuming for itself the power to address perceived problems raised by modern forms of telemarketing, the Ninth Circuit effectively outlawed systems—like Salesforce's—that facilitate effective and welcome communications between businesses

and the public. Whether that decision was inadvertent or otherwise, it was one for the political branches, not the judiciary, to make.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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