No. 19-511

In the
Supreme Court of the United States

FACEBOOK, INC.,
Petitioner,

v.

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

and

UNITED STATES OF AMERICA,
Respondent-Intervenor.

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

REPLY BRIEF

The TCPA defines an "automatic telephone dialing system" as a device with the capacity "to store or produce telephone numbers to be called, using a random or sequential number generator" and "to dial such numbers." 47 U.S.C. §227(a)(1). Under the plain text, basic rules of grammar, and the directly applicable canons of construction, the entire phrase "telephone numbers to be called, using a random or sequential number generator" applies to both "store" and "produce." That reading ensures that the ATDS definition captures only devices that use random- or sequential-number-generation technology. That, in turn, allows the TCPA's ATDS *definition* to dovetail with the statute's closely related ATDS *prohibitions*, which target the kind of lines (emergency, business, and cellular) and dynamics (tying up multiple business lines simultaneously) that are distinctly vulnerable to that technology.

By contrast, if "using a random or sequential number generator" is decoupled from the verb "store," such that the ATDS definition reaches any device that merely can store and dial numbers, then the scope of the ATDS prohibitions—with their focus on tying up business and cellular lines and their failure to include residential lines—makes little sense. What is more, decoupling "store" from the very technology that makes an ATDS automatic, as respondent urges, expands the statute's scope exponentially, reaching every smartphone and raising serious First Amendment concerns.

Respondent ignores the targeted nature of the TCPA's ATDS prohibitions and proceeds as if every

provision in the TCPA broadly protected residential privacy. He then advocates interpreting the ATDS definition expansively based on "synesis," and not syntax, so as to maximize the TCPA's impact on unwanted nuisance calls. But Congress protected residential privacy in the TCPA by broadly prohibiting true robocalls—those using artificial or prerecorded voices—to all lines *including* residential lines. Its objective in preventing ATDS calls was different and narrower; if the ATDS prohibitions were designed to protect residential privacy, their failure to reach residential lines would be inexplicable.

Respondent recognizes that decoupling "store" from the restrictive modifier "using a random or sequential number generator" creates a statute of impossible breadth. He offers four different atextual suggestions for re-cabining the statute, most of which involve introducing a different restrictive modifier into the statute, such as requiring dialing to occur "automatically" or "en masse." But such efforts to add words into the statute are misconceived. It is not at all clear that they prevent his ATDS definition from reaching every smartphone; it *is* clear that they violate cardinal rules of statutory construction. Those rules provide a clear answer here: The TCPA's ATDS prohibitions address distinct problems posed by random- and sequential-number generators, and its ATDS definition captures devices that use that technology, whether to store or to produce numbers.

I. The Plain Text And Applicable Canons Of Construction Dictate That "Using A Random Or Sequential Number Generator" Modifies Both "Store" And "Produce."

Respondent does not seriously dispute that his reading of the statute flouts basic rules of grammar, as even courts that have gone his way acknowledge. *See, e.g.*, *Allan v. Pa. Higher Educ. Assistance Agency*, 968 F.3d 567, 572-73 (6th Cir. 2020). Indeed, he essentially concedes that the "syntax" (by which he appears to mean the text and ordinary rules of grammar) is against him, and that he can prevail only based on the application of "synesis" (a term that has not yet graced a single page of the U.S. Reports). Resp.Br.11 & n.3.

Respondent's need to resort to such novel modes of interpretation is understandable. The TCPA defines an ATDS as equipment having the capacity "(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. §227(a)(1). Under a straightforward reading of that text, the adverbial phrase—"using a random or sequential number generator"—modifies both disjunctive verbs—"store or produce"—just as the direct object—"numbers to be called"—concededly attaches to both verbs. Interpreting the direct object that follows "produce" to attach to "store," but then reading the adverbial phrase that follows the shared direct object to attach only to "produce," is unnatural. It "looks more like 'surgery' … than interpretation." *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1311 (11th Cir. 2020). Under the plain text,

everything that follows produce—"telephone numbers to be called, using a random or sequential number generator"—applies to both disjunctive verbs.

1. The directly applicable canons of construction reinforce that reading, starting with the series-qualifier canon. Petr.Br.23-24. That canon provides that a single adverbial phrase that follows disjunctive verbs modifies both. Respondent cannot seriously dispute that the series-qualifier canon is directly applicable to the structure of the ATDS definition. He can only note that the canon is context-dependent. Resp.Br.21. But, here, the context reinforces that the material that follows the verb "produce" modifies "store" as well. After all, respondent concedes that the direct object that follows "produce" attaches equally to "store," as the statute otherwise would never explain what must be "store[d]" or what the "such numbers" in subsection (b) refers to. The immediate context thus strongly suggests that "store or produce" is an integrated phrase and that both the direct object and the adverbial phrase that follow "produce" attach to both verbs.

That result is strongly reinforced by the punctuation canon. Petr.Br.25. When a qualifying phrase is preceded by a comma (as in ", using a random or sequential number generator"), the "'comma is evidence that the qualifier is supposed to apply to all the antecedents instead of only to the immediately preceding one.'" *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 465 (7th Cir. 2020) (quoting William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* 67-68 (2016)). Respondent retorts that this Court has

cautioned against relying exclusively on punctuation. But the punctuation canon does not operate alone here. It confirms the interpretation indicated by the series-qualifier canon. *Id.*

That same result is reinforced by the whole-text canon, which looks to how a provision fits with related textual provisions. Petr.Br.28. Reading "using a random or sequential number-generator" to modify both store and produce ensures that the ATDS definition captures only devices that use that technology. That, in turn, allows the TCPA's ATDS *definition* to dovetail with the statute's closely related ATDS *prohibitions*, which target the kind of lines (emergency, businesses and cellular) and dynamics (tying up multiple business lines simultaneously) that are distinctly vulnerable to that technology. What drove Congress' concern with ATDSs, as reflected in the scope of the prohibitions on their use, was plainly not the bare ability to store (or produce) numbers, but the use of random- or sequential-number-generation technology to do so. *See infra* Part II.

The TCPA's enforcement provisions confirm that the statute targets specialized technology employed by telemarketers, not commonplace devices with the bare ability to store and dial numbers. The TCPA imposes substantial statutory penalties that lend themselves to class actions and crippling liability. But its enforcement provisions do not end there. The TCPA authorizes civil forfeiture actions brought by a specialized agency, 47 U.S.C. §227(e)(5)(A), criminal fines, *id.* §227(e)(5)(B), and extraterritorial application, *id.* §227(b)(1). Such strong medicine makes perfect sense as a means to enforce a

prohibition on the use of specialized equipment by professional telemarketers. As responses to the use of devices that merely store and dial numbers, such draconian remedies would be wholly disproportionate and misplaced. Thus, the whole text of the TCPA reinforces what the plain text of its ATDS definition indicates: The entire phrase "telephone numbers to be called, using a random or sequential number generator" applies to both "store" and "produce."

2. The competing canons respondent invokes, by contrast, are *not* directly applicable to the ATDS definition and ultimately undermine his proffered construction. For example, he invokes the last-antecedent canon—*i.e.*, that a "'limiting clause or phrase … should ordinarily be read as modifying only the noun or phrase that it immediately follows,' unless context dictates otherwise." Resp.Br.20 (quoting *Lockhart v. United States*, 136 S. Ct. 958, 962 (2016)). But that canon is inapplicable here by its terms, because what "using a random or sequential number generator," "immediately follows" is not "produce" but "numbers to be called." Even respondent does not argue that "using a random or sequential number generator" modifies how numbers must be "called" (presumably because that reading would doom his claim). Moreover, the comma before the restrictive modifier here defeats the last-antecedent canon and reinforces the series-qualifier canon. *See Gadelhak*, 950 F.3d at 465. Finally, the last-antecedent canon's inapplicability is underscored by the reality that if Congress had merely flipped the order of the two disjunctive verbs to "produce or store," even respondent would have to concede (based on his perceived affinity between "produce" and "generator")

that the series-qualifier canon controlled. But there is no indication that Congress thought that anything (let alone everything about the definition's scope) turned on the order of the two disjunctive verbs.

The "distributive-phrasing canon" is equally inapplicable and equally unhelpful to respondent's cause. As he concedes, that canon applies only when "a sentence contains *several antecedents* and *several consequents*," such that the latter are capable of being distributed "to the subjects which, by context, they seem most properly to relate." Resp.Br.20 (emphases added). It concededly does not apply when, as here, there are two antecedents but only *one* subsequent modifier. *Cf. Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141-42 (2018) (declining to apply distributive canon because of mismatch between number of antecedent nouns and subsequent modifying phrases). While respondent's example "[m]en and women are eligible to become members of fraternities and sororities" features two pairs of terms that naturally distribute or "pair up," Resp.Br.20, the ATDS definition contains two antecedents and only one subsequent modifier. It is more analogous to a reference to "fraternities or sororities hosting formals," which does not implicate the distributive-phrasing canon at all and plainly does not cover every fraternity, without regard to its party plans, but only a subset of sororities.

That conclusion is even more obvious (and the distributive-phrasing canon even less applicable) when there is intervening text that plainly applies to both antecedents. If a reference to "fraternities or sororities with more than 20 members, hosting

formals" concededly excludes small fraternities, it plainly also excludes large fraternities without formals. The whole phrase "with more than 20 members, hosting formals" modifies both fraternities and sororities. Here too, the only grammatically sound reading is that the whole phrase "telephone numbers to be called, using a random or sequential generator" attaches to both "store" and "produce." At a minimum, that reading "is certainly the most natural one based on sentence construction and grammar." *Gadelhak*, 950 F.3d at 464.

3. Unable to reconcile his reading with settled rules of grammar and construction, respondent urges the Court to eschew those rules in favor of "synesis," a mode of construction that he describes as interpreting texts "'in accordance with the sense rather than the syntax.'" Resp.Br.11 n.3 (quoting 2 *A Standard Dictionary of the English Language* 1826 (1909)). In his view, the verb "produce" sensibly pairs with "using a random or sequential number generator," while "store" is a poor "fit" for that phrase. But when a modifier applies to two disjunctive verbs based on plain text, ordinary rules of grammar, and applicable rules of construction, courts are not empowered to radically expand the statute by untethering one of the disjunctive verbs from the restrictive modifier based on a vague sense that the other verb better fits the modifier. Even where (unlike here) the preconditions for the distributive-phrasing canon are met, the standard for decoupling a modifier from a disjunctive antecedent is that the combination is "linguistically impossible," such that it "'would involve a contradiction in terms,'" *Encino*, 138 S. Ct. at 1141 (quoting *Huidekoper's Lessee v. Douglass*, 7 U.S. (3

Cranch) 1, 67 (1805) (Marshall, C.J.)), not that it merely strikes the reader as having an inferior fit.

Here, there is nothing nonsensical, let alone "linguistically impossible," about a dialing system "using a random or sequential number generator" "to store" numbers. To the contrary, devices employing random- or sequential-number-generation technology to store numbers to be called existed when the TCPA was enacted. *See* PACE&Noble.Amicus.Br.11-25. A telemarketer might use such equipment to store caches of random or sequential numbers from a broad universe of numbers for subsequent dialing, *id.* at 22, or to store randomly generated numbers to avoid duplication, *id.* at 16. Indeed, respondent's real complaint is not that dialing systems using random- or sequential-number-generation technology to store numbers are oxymorons or unicorns, but that such systems would also produce numbers using that same technology and create a superfluity problem. That too is incorrect, *see infra* pp.10-12, but it underscores that there is nothing nonsensical or linguistically impossible about a device that stores numbers using a random- or sequential-number generator.

That readily distinguishes the ATDS definition from respondent's purportedly parallel hypotheticals. Resp.Br.17-18. "Using a domestic airline" to "drive across an international border" is a linguistic and practical impossibility, for one cannot use an airline to drive. Using a random- or sequential-number generator to store numbers presents no comparable mismatch, let alone a linguistic impossibility. Given that respondent's counterexamples depend on just such fundamental incompatibility, they provide no

basis to depart from the normal rules of grammar and statutory construction.

4. Ultimately, respondent's real complaint is not that "using a random or sequential number generator" to "store" numbers is a complete misfit or linguistically impossible, but that any device that did so would also produce numbers using the same technology, rendering the words "store or" superfluous. Resp.Br.23. The premise of that argument is dubious. While many uses of random- or sequential-number-generation technology to store numbers would also produce them and vice-versa, PACE&Noble.Amicus.Br.11-15, there were some extant technologies in 1991 that could be understood to use the technology only for storage, *id.* at 15-21. For example, a device that selected and stored a subset of numbers randomly or sequentially from a larger set of numbers could be said to store the subset of numbers using random- or sequential-number-generation technology while producing the larger universe of numbers (say, every number in the 202 area code) without such technology.

Alternatively, Congress could have attempted to preclude efforts to circumvent the prohibition on using the targeted technology by separating out number production from number storage and dialing. Or perhaps Congress was simply so concerned with stamping out the use of random- and sequential-number generators that it erred on the side of inclusion, addressing both potential uses of the technology without worrying too much if storage involved incidental production (and vice-versa). Addressing the principal evil at which the statute was

directed with a belt-and-suspenders approach does not create superfluity that justifies rewriting the statute. "It is no superfluity for Congress to clarify what" would have otherwise been "at best unclear" or to ensure that it weeds out all use of a disfavored technology. *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 543 n.7 (1994); *accord* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2161-62 (2016). If Congress made it unlawful "to store or copy copyrighted documents on a computer without permission," pointing out that computer storage necessarily involves some incidental copying would not be sufficient to render "to store" superfluous or to uncouple "store" and "without authorization" and radically expand the statute to prohibit even the authorized storage of copyrighted documents. Finally, even if devices that store numbers using the requisite technology also produce them using that technology (and vice-versa), that would simply render "store or produce" a doublet. *Glasser*, 948 F.3d at 1307.

In all events, "the canon against superfluity assists only where a competing interpretation gives effect to every clause and word of a statute." *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011). Respondent's reading fails that test and creates a far more serious superfluity problem. Respondent has not identified any equipment that has the specialized capacity to "produce telephone numbers to be called, using a random or sequential number generator," but lacks the ubiquitous capacity to store and dial telephone numbers.[1] Thus, under respondent's

[1] Respondent suggests that devices that store numbers only fleetingly while a random/sequential-number generator produces

reading, the inclusion of devices with the capacity to store numbers to be called and dial them covers the waterfront. His reading leaves both "to produce" and "using a random or sequential number generator" with no independent work to do. But that language constitutes the heart of the definition and includes the only phrase that describes anything automatic. Reading that language to lack practical effect "in all but the most unusual circumstances" does not create a mere superfluity problem; it fundamentally repurposes the statute. *TRW Inc. v. Andrews*, 534 U.S. 19, 29 (2001).

At bottom, respondent would parlay a perceived natural affinity between "to produce" and "using a random and sequential number generator" to read both words out of the statute as a practical matter. That would truly make nonsense of the statute. The one thing Congress plainly targeted in both the ATDS definition and the TCPA's ATDS prohibitions is the use of random- and sequential-number generators. The choice between reading the statute to ensure that the use of such technology was prohibited whenever it is used to store or produce numbers to be called (or both), or reading it to render the use of such technology beside the point, is not close.

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them do not "store" the numbers for ATDS purposes. Resp.Br.25-26. Mooting contentions that incidental storage or incidental production do not suffice may explain why Congress covered the use of the targeted technology to store *or* produce numbers. But even if ephemeral storage does not count, respondent still leaves "using a random or sequential number generator" with no real work to do, for the capacity to retain numbers for subsequent dialing is ubiquitous today and was common in 1991.

II. Respondent Ignores The Targeted Scope Of The ATDS Prohibitions And Renders Their Failure To Reach Residential Lines Inexplicable.

1. Both petitioner and the United States emphasized in their opening briefs that the TCPA does not contain a single unitary ban on "robocalls." Instead, the TCPA contains multiple prohibitions of significantly different scope. The TCPA's prohibition on "artificial or prerecorded voice" calls, what might be thought of as true "robocalls," is comprehensive and reaches all lines, including ordinary residential lines. In contrast, the TCPA's ATDS prohibitions are more targeted: They reach only emergency, business, and cellular lines. They do not reach residential lines at all. Moreover, the one prohibition unique to ATDS calls, 47 U.S.C. §227(b)(1)(D), bars tying up multiple business lines simultaneously, a problem specific to the use of random- or sequential-number-generation technology. The differential scope of the TCPA's ATDS prohibitions and its broader artificial-and-prerecorded-voice-call prohibition is fundamental to understanding the TCPA and its ATDS definition. For example, as petitioner specifically emphasized, all of the statements in the legislative materials about residential privacy, including Senator Hollins' colorful statement about wanting to rip the phone out of the wall, had nothing whatsoever to do with the targeted ATDS prohibitions, which do not reach residential phone lines. *See* Petr.Br.31-32.

Respondent chooses to ignore all this, right down to invoking Senator Hollins' floor statement and trumpeting legislative findings about the importance

of residential privacy. But by ignoring the targeted nature of the ATDS prohibitions and suggesting that broadening the ATDS definition will further the TCPA's broader objectives, respondent ignores that the ATDS prohibitions on calls to emergency, business, and cellular lines were never aimed at protecting residential privacy (which was the office of the broader prohibition on artificial- and prerecorded-voice calls).

To be clear, Congress was concerned with the need "to control residential telemarketing practices" and protecting people from "intrusive, nuisance calls to their home." 47 U.S.C. §227 notes (6)-(7). But Congress addressed the concerns of "residential telephone subscribers" by "[b]anning such automated or prerecorded telephone calls to the home, except when the receiving party consents." *Id.* (10), (12). Accepting the position urged by petitioner and the United States will not undermine those protections for residential privacy in the least, because the ATDS definition and prohibitions are separate and target the distinct problems posed by the use of random- or sequential-number generators.

Respondent's failure to acknowledge the limited and targeted nature of the ATDS prohibitions permeates his entire brief. Respondent complains that when consumers receive an unwanted robocall, they neither know nor care about the precise technology that was utilized to store their number. No doubt. They also presumably do not know or care about the technology used to *produce* the number. But that only underscores that the TCPA's ATDS definition and its ATDS prohibitions were not directed

at consumer annoyance or residential privacy, but targeted different problems. A business owner with multiple lines tied up simultaneously probably does know and care that random- or sequential-number-generation technology is the culprit.

Decoupling "store" from the adverbial modifier "using a random or sequential number generator," as respondent urges, leaves an ATDS definition that covers dialing systems that do not use random- or sequential-number-generation technology *at all*, either to produce or to store numbers. Respondent concedes, of course, that the ATDS definition does not reach a system that merely *produces* numbers to be dialed without using a random- or sequential-number generator. But Congress was no more concerned with systems that merely stored numbers to be dialed. Such systems do not pose any special risk to multiple business lines or to the expensive pay-for-the-incoming-call-by-the-minute cellphones of 1991. Respondent's reading thus creates a broad ATDS definition that is a fundamental mismatch for the statute's targeted ATDS prohibitions.

2. Instead of confronting that problem, respondent crafts a different narrative, positing that Congress was just following the lead (albeit with more "economical" language) of state laws that defined an ATDS as "a device that called either stored lists of numbers or randomly or sequentially generated numbers." Resp.Br.14. Even putting aside the enormous problems of using disparately worded state laws defining a different term (typically "automated dialing and announcement device," or ADAD, not ATDS) to inform quite different congressional

language, respondent misdescribes what the contemporaneous state laws did.

While those state laws were far from uniform, consistent with their focus on automatic dialing *and* announcement devices, they typically targeted systems that *combined* various forms of "autodialing" technology with "prerecorded messages" (*i.e.*, announcements), rather than imposing standalone prohibitions on automatic-dialing technology.[2] The law respondent reproduces is illustrative: California required an "automatic dialing *and announcing device*" to have "the capability, working alone or in conjunction with other equipment, to disseminate a prerecorded message to the telephone number called." Cal. Pub. Util. Code §2871 (emphasis added); *see also* U.S.Br.26 n.5.

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[2] The one possible exception is a Kansas law defining an ADAD as equipment that "(A) when connected to a telephone line can dial, with or without manual assistance, telephone numbers which have been stored or programmed in the device or are produced or selected by a random or sequential number generator, *or* (B) when connected to a telephone line can disseminate a recorded message to the telephone number called." Kan. Stat. §50-617 (1991) (emphasis added). That law is something of an outlier, but the reason respondent does not highlight it is obvious: It not only addresses storage in language with no analog in the TCPA, but prohibits the use of a random- or sequential-number generator to "produc[e] or selec[t]" telephone numbers. Because select comes second, it is plainly modified by the adverbial phrase referencing random- or sequential-number-generation technology without any hint that there is anything anomalous about selecting numbers using that technology or any superfluity problem because the selected numbers were produced using the same technology.

"The main difference between the TCPA's phrasing and that of" laws like California's ADAD prohibition thus is manifestly *not* "that Congress economized by using 'numbers to be called' only once." Resp.Br.15. It is that Congress created two separate prohibitions and gave them substantially different scopes. Congress considerably broadened the restrictions on the use of prerecorded messages, prohibiting virtually *any* call made using "an artificial or prerecorded voice" without consent, no matter the type of device used or the kind of line dialed. 47 U.S.C. §227(b)(1)-(2). Congress then coupled that broad prohibition with *separate* standalone ATDS prohibitions, which apply even when an ATDS is used without an artificial- or prerecorded-voice message. Those standalone prohibitions were accompanied by the definition of a distinct term (ATDS) that tracks no definition found in any state law. And Congress excluded from its new, standalone ATDS prohibitions the principal type of line in use by the average consumer at the time—*i.e.*, residential lines—an exclusion that makes sense *only* if Congress' distinct ATDS definition and ATDS prohibitions had a different objective than the state ADAD laws. The net result is a distinct federal statute that looks nothing like the state laws respondent invokes, which dooms his novel and strained effort to treat laws of different sovereigns defining different terms as *in pari materia*.

III. Respondent Cannot Avoid The Untenable Practical And Constitutional Consequences Of His Statutory Reconstruction.

Text, syntax, context, and even synesis are reason enough to read "using a random or sequential number

generator" to modify both "store" and "produce." But there is yet another reason: Respondent has no meaningful answer to the massive practical and constitutional difficulties that his contrary reading produces. He does not and cannot deny that, if the phrase "using a random or sequential number generator" is decoupled from "store," then the ATDS definition would sweep in any telephone that has the capacity both (A) "to store … telephone numbers to be called," and (B) "to dial such numbers." *See* Resp.Br.17, 31. He does not and cannot deny that all 269 million smartphones in the nation—not to mention countless landlines with auto-dialing features that were common in 1991 and are ubiquitous today—can do both those things. And he does not and cannot deny that, so read, the statute would pose serious First Amendment problems.

Instead, respondent offers the Court no less than four atextual suggestions for re-cabining a statutory definition that takes on implausible breadth when "store" is decoupled from its restrictive modifier. *See* Resp.Br.45-47. Those atextual suggestions are insufficient to restore a sensible scope to the ATDS definition, but they do succeed in making a persuasive argument for sticking with the text and leaving any updating of the statute to Congress.

1. Respondent most frequently implores the Court to insert the words "automatically" or its rough equivalent after the phrase "to dial such numbers." A remarkable three-dozen times in a 51-page brief, respondent describes the statute as covering only equipment that "can *automatically* dial numbers." But that is simply not what the statute says. The

statute defines an ATDS as equipment having 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). The words "automatically," "by itself," or "without substantial human intervention" appear nowhere in either subsection. Subsection (B), in particular, is entirely bereft of adverbs.

By artificially limiting the reach of the adverbial phrase that *is* in the statute—subsection (A)'s requirement that the system utilize a random- or sequential-number generator—and confining it to "produce," respondent has little choice but to smuggle a different adverb into subsection (B). Otherwise, there is nothing "automatic" about an automatic dialing system at all.[3] But such statutory "enlargement" not only violates "a fundamental principle of statutory interpretation," *Rotkiske v. Klemm*, 140 S. Ct. 355, 360-61 (2019) (*citing* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 94 (2012)), but also leaves the courts with no ready benchmark for how automatic dialing must be. Respondent seems confident that speed-dialing is insufficiently automatic, even though pushing a single button dials a stored number, but he is less clear why. And what about call-forwarding? It seems quite automatic.

[3] Under the statute as written, it is precisely the use of a random- or sequential-number generator to store or produce numbers that makes a telephone dialing system automatic. Respondent suggests that "automatic" modifies only dialing (and italicizes dialing to make his point), but there are no italics in the actual statutory text, and "automatic" in fact modifies system.

There is no ready answer to such questions because the statute is utterly silent on the point. By contrast, under the plain-text construction, there is no question about whether a telephone dialing system is sufficiently automatic. If it uses a random- or sequential-number generator to store or produce numbers, it is covered. If it does not, it is not covered.

Moreover, even adding a modifier like "automatically" does not prevent respondent's reading from sweeping in smartphones. Smartphones can dial stored numbers "automatically," as can any phone with the speed-dial, call-back, or call-forwarding functionality that was already prevalent in 1991. *See* Petr.Br.11; *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC Rcd. 8,752, 8,776 (1992). Seemingly recognizing this problem, respondent suggests that an ATDS must be able to store and dial numbers "by itself." Resp.Br.31, 45. But adding that phrase proves too much, as no device can dial numbers without *some* human intervention at some juncture. Respondent thus finally settles on equipment that can dial stored numbers "without *substantial* human intervention." Resp.Br.45 (emphasis added). What counts as "substantial" remains unexplained (and neither text nor even legislative history can provide a clue, as the statute contains none of those words). Asking Siri (or the equivalent) to make a call (or using a do-not-disturb-I-am-driving message) would surely count, and that alone sweeps in most smartphones. *See, e.g.*, Chamber.Amicus.Br.14-16; Salesforce.Amicus.Br.16; CUNA.Amicus.Br.9-10.

Perhaps recognizing as much, respondent suggests adding a few more words: An ATDS should have the capacity "to dial such numbers" not only "automatically," but "en masse." Resp.Br.45, 49. But those words are equally absent from a statute that provides no ready metric for determining how many calls make up a "masse." Congress was distinctly concerned with simultaneously tying up "two or more telephone lines of a multi-line business." 47 U.S.C. §227(b)(1)(D). If two recipients are enough, then virtually all smartphones are still covered. *See, e.g.*, Apple, *Send a group text message on your iPhone, iPad, or iPod touch*, https://apple.co/3ogRdKx (last visited Nov. 16, 2020). Yet ironically this restriction may be sufficient *for respondent to lose this case*, which involves unique messages sent only to him. *See* Pet.App.35 (noting messages here were not sent "en masse").

Respondent next posits that because the TCPA's prohibitions apply "only when a call is made *using* an ATDS," they "can permissibly be read" to apply only when the call is placed using the device's ATDS functionality. Resp.Br.47. The statute seems to be written in terms of the system's capability, not whether the capability was used to place a specific call, but unlike his other proposals, this limitation has at least some textual grounding. *See ACA Int'l v. FCC*, 885 F.3d 687, 704 (D.C. Cir. 2018). But whether it would accomplish anything useful depends entirely on the antecedent question of what functionality makes an ATDS an ATDS. If the bare capacity to store numbers and dial them is enough, then that functionality will be employed routinely. Respondent's constraint thus would be meaningful

only if this Court first read into the statute one or more of his other suggested modifiers (*i.e.*, "automatically," "by itself," "without substantial human intervention," or "en masse"). And that would still leave a wide range of calls made with ordinary smartphones covered by statutory prohibitions that carry daunting penalties.

2. Having finally emptied his extra-textual toolbox, respondent tries turning the tables, insisting that *petitioner*'s reading would also sweep in every smartphone since "a few select applications" can *give* smartphones the capacity to generate numbers randomly or sequentially. Resp.Br.49. Wrong again. What counts is present capacity, and under respondent's reading, a typical smartphone is already an ATDS because it has the *present* capacity to store and dial numbers. No unusual subsequent modifications are necessary.

Respondent is thus left assuring the Court not to worry itself with the breadth of his argument because most "personal texts and calls made by smartphone users" involve recipients who have given consent, and plaintiffs' lawyers are not targeting ordinary smartphone users. Resp.Br.47. But common practices like forwarding contacts to friends and mistakenly entering contact information make calls without consent inevitable. And as this case well illustrates, sometimes both ordinary smartphones users and businesses reach recycled numbers whose prior, but not current, owner gave consent. Despite respondent's blithe assurances, there is no reliable database of recycled numbers and no way for either smartphone users or businesses to ensure they never reach a

recycled number. Chamber.Amicus.Br.28-29. In all events, the point is not that everyone who receives a call or text from a wrong number will demand statutory damages. The point is that respondent can identify no plausible reason why Congress would have cast a dragnet of potential liability that wide.

That result is particularly implausible given the grave First Amendment concerns that a statute of such staggering breadth would pose. The presumption of constitutionality requires reading statutes in a manner that assumes Congress endeavored to respect constitutional rights, not obliterate them. And there is every reason to think that Congress was sensitive to the obvious First Amendment interests at stake when drafting the TCPA. *See* S. Rep. No. 102-178, at 4-5 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 1968, 1971-72. In fact, Congress expressly recognized the need to strike a "balanc[e]" between "privacy rights" and "commercial freedoms of speech and trade." 47 U.S.C. §227 note (9). Respondent invokes this Court's "recognition that a content-neutral prohibition on using robocalling technology serves a legitimate 'interest in consumer privacy.'" Resp.Br.48 (quoting *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2348 (2020) (plurality op.)). But the First Amendment problem with his reading concerns means, not ends, *i.e.*, the absence of "balanc[e]." Penalizing virtually every wrong-number call in the nation would be the antithesis of narrow tailoring (and the ATDS prohibitions still would not protect the legitimate interest in *residential* consumer privacy).

The problems with respondent's reading do not end there. It would also have profoundly disruptive effects on businesses providing services that consumers *welcome*, like security alerts. Whatever assurances respondent may try to offer about the reticence of lawyers to sue ordinary smartphone users, there is no comparable restraint in suing businesses, and there is no denying that the TCPA has become the "poster child for lawsuit abuse." *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7,961, 8,073 (2015) (dissenting statement of Comm'r Pai). Nationwide TCPA class-actions seeking massive damages for trivialities having nothing to with the abusive practices Congress targeted have proliferated ever since respondent's expansive interpretation of the ATDS definition first surfaced. *See* Petr.Br.13-14; RLC.Amicus.Br.14-18. A world in which businesses face crippling liability simply because they do not know when a customer's cellular plan expires would have been unimaginable to the Congress that wanted to preserve "legitimate telemarketing practices," 47 U.S.C. §227 note (9), and disclaimed creating any "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.

Fortunately, there is an easy way to cabin the statute and restrain these lawsuits, and it does not require adding any words to the text. All the Court need do is read the statute in the manner most consistent with its text, syntax, and context: The entire phrase "numbers to be called, using a random or sequential number generator" modifies both "store" and "produce." That reading comports with ordinary

canons of construction; it ensures that the scope of the ATDS definition matches the scope of the ATDS prohibitions; and it avoids extending a statute designed to protect ordinary consumers from the esoteric technology of telemarketers to reach the ubiquitous technology of those ordinary consumers.

CONCLUSION

This Court should reverse.

Respectfully submitted,

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