No. 20-308

In The
Supreme Court of the United States

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LA BOOM DISCO, INC.,

Petitioner,

v.

RADAMES DURAN, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Respondent.

♦

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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RESPONDENT'S RESPONSE TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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Respondent Radames Duran does not oppose Petitioner's Petition for a Writ of Certiorari in this case. While Respondent wholly disagrees with Petitioner on the legal merits, he agrees that the circuit split Petitioner identifies should be resolved, given the problematic interpretations of the TCPA endorsed in some circuits and now defended by Petitioner.

The first issue raised by Petitioner concerns the interpretation of the phrase "capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator," the prerequisite for qualifying as an ATDS under 47 U.S.C. § 227(a)(1)(A). The Second Circuit observed that the phrase admits of at least two interpretations. On one interpretation, "using a sequential number generator" modifies both the storing and the producing of the numbers to be called. To qualify as an ATDS, a technology must either store numbers using a random or sequential number generator or produce numbers using a random or sequential number generator. A system that merely stored numbers without having also generated those numbers—e.g., an uploaded a list of numbers—would not qualify as an ATDS. The Second Circuit rejected this interpretation in this case and held that "the clause requiring the use of 'a random or sequential number generator' modifies only the verb 'produce' in the statute, but not the word 'store,'" such that "the numbers to be called by an ATDS may be 'stored' *or* they may be 'produced,' but only if they are produced must they come from 'a random or sequential number generator[.]'" Accordingly, the mere fact that programs "'store' the lists of numbers is enough to render them ATDSs." *Duran v. La Boom Disco, Inc.*, 955 F.3d 279, 283-284 (2nd Cir. 2020).

Petitioner attacks this conclusion as an "atextual construction of the ATDS definition," Pet. at 16, which it argues frustrates the principle "that a statute must be interpreted in accordance with its terms and courts 'cannot construe a statute in a way that negates its plain text.'" Pet. at 19 (quoting *Honeycutt v. United States*, 137 S. Ct. 1626, 1635 n.2 (2017)). This argument has been spelled out clearly by the Eleventh Circuit:

> Start with conventional rules of grammar and punctuation. 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. Consider these examples to see the point. In the sentence, "Appellate courts reverse or affirm district court decisions using the precedents at hand," no one would think that the appellate judges rely on precedents only when affirming trial judges. Or if a law gives tax preferences for "[a] corporation or partnership registered in Delaware," then "a corporation as well as a partnership must be registered in Delaware" in order to be eligible for the preference. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 148 (2012). The same principle applies here. *See also Am. Nat'l Fire Ins. Co. v. Rose Acre Farms, Inc.*, 107 F.3d 451, 456-57 (7th Cir. 1997).
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> On top of that, the sentence contains a comma separating the phrase "to store or produce telephone numbers to be called" from the phrase "using a random or sequential number generator." That, too, indicates that the clause modifies both "store" and "produce" and does not modify just the second verb.

Glasser v. Hilton Grand Vacations Co., LLC, 948 F.3d 1301, 1306-1307 (11th Cir. 2020)

One immediate problem with this position this is what the Second Circuit identified as the problem of surplusage: "Common sense suggests that any number that is stored using a number-generator is also *produced* by the same number-

generator; otherwise, it is not clear what 'storing' using a number-generator could mean. It would be odd for Congress to include both verbs if, together, they merely created redundancy in the statute." *Duran*, 955 F.3d at 284. Even the Third Circuit has acknowledged the related point that "it is unclear how a number can be *stored* (as opposed to *produced*) using 'a random or sequential number generator.'" *Dominguez v. Yahoo, Inc.*, 629 F. App'x 369, 372 n.1 (3d Cir. 2015).

More fundamentally, any properly "textual" analysis must consider the entire text of the TCPA and not just the specific language at issue here. Even if one grants to Petitioner and the Eleventh Circuit that the Second Circuit's interpretation of "capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator" is slightly strained or unnatural, the alternative is to render crucial provisions of the TCPA entirely nonsensical. As the Second Circuit observed, Petitioner's preferred interpretation renders the exceptions to the general prohibition on ATDS calls utterly mysterious. One is permitted to use an ATDS "to collect a debt owed to or guaranteed by the United States[.]" But it would be highly inefficient to "requir[e] the Government to call numbers haphazardly until it luckily found someone who owed it money," for "the only way this exception makes sense is if an ATDS can make calls or texts using a human-generated list of phone numbers." Thus, "in creating the exception, Congress clearly recognized that ATDSs can store lists of such numbers." *Duran*, 955 F.3d at 285. On a related note, the Ninth Circuit observed that the exception for calls "made with the prior express consent of the called party," 47 U.S.C. § 227(b)(1)(A), only makes sense if the autodialier was dialing "from

a list of phone numbers of persons who had consented to such calls, rather than merely dialing a block of random or sequential numbers." *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1051 (9th Cir. 2018). Such provisions will never make any sense on Petitioner's interpretation, and this is reason enough to reject it. Given that several courts of appeal have adopted it, Respondent certainly agrees with petitioner that this Court should take up the issue.

Secondly, Petitioner asks the Court to vacate the Second Circuit's determination that the level of human intervention necessary to set the time at which a system will send out texts does not disqualify the system as an ATDS. On Petitioner's view, it is a human agent, and not the automated system, that has dialed thousands of numbers whenever he or she presses "send" to instruct the system to fire these off instantaneously. *See* Pet. at 22. As with the first issue discussed above, this interpretation threatens to eviscerate the TCPA, since the vast majority of mass texting programs today allow human beings to set the timing of the calls. Evading the TCPA would become child's play. Moreover, the distinction between a human being and a program setting the time is invidious in relation to the purposes of the TCPA, since the intrusion upon consumer privacy is not mitigated by the level of human involvement required to set the timing of a mass-texting campaign. Given that some courts have nevertheless adopted this distinction, Respondent agrees Petitioner that this case presents an excellent opportunity to adjudicate this issue and, in Respondent's opinion, restore sense where it has been lost.

Respectfully submitted,

/s/ C.K. Lee

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