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

SUPPLEMENTAL REPLY BRIEF FOR PETITIONER

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SUPPLEMENTAL REPLY BRIEF

Respondent's brief in opposition only confirms that this Court should grant plenary review to resolve two important and closely related questions regarding the TCPA's constitutionality and scope. As Facebook has explained, Reply.2, 9-12, this petition is an ideal vehicle because it provides a concrete context to address the constitutional question, which the government agrees warrants review, *see Barr v. Am. Ass'n of Political Consultants* (*AAPC*), No. 19-631 (U.S. filed Nov. 14, 2019); U.S.Br.7-8, and the related statutory question, which informs the constitutional issue and is independently certworthy.

Respondent nonetheless urges this Court to deny review by arguing that the Ninth Circuit's decision was correct on the merits and that the decision does not otherwise warrant this Court's review. As explained below, respondent is wrong on both scores. Indeed, respondent's vehicle arguments largely assume that granting this petition versus the government's *AAPC* petition is an either-or proposition. It is not. The Court often grants multiple petitions raising overlapping questions, *see* Reply.10-11 (collecting cases), and there is a particularly compelling case for doing so here as the statutory issue informs (and potentially narrows) the constitutional dispute and has divided the circuits on recurring questions of surpassing importance. The Court should grant plenary review of both questions presented.

I. The Court Should Grant The First Amendment Question.

Respondent offers no persuasive reason why this Court should decline to decide the constitutional

question in this case. Indeed, respondent has nothing to say in defense of the TCPA's constitutionality, and its "severability" arguments are as misguided as the Ninth Circuit's, while the purported vehicle problems he identifies are illusory.

1. Respondent perpetuates the Ninth Circuit's misguided approach of ignoring the speech prohibition Facebook actually challenged in favor of the speech-protecting exception, and then invoking "severability" analysis to eliminate the speech-protecting exception and abridge even more speech than Congress. That is wrong as a matter of severability law and wholly antithetical to the First Amendment. The remedy for a successful challenge to a speech-abridging prohibition is the abridgement of less speech, not more. That is apparent from the text of the First Amendment, which prohibits laws that "abridg[e] the freedom of speech." U.S. Const. amend. I; *see* Pet. 1, 12-13, 17-21, 34. It is particularly obvious here, where Facebook raised the First Amendment as a defense to respondent's effort to sue Facebook for violating the TCPA's prohibition on speech, not the exception. Having found the very provision that respondent sued under and Facebook challenged to be unconstitutional, the Ninth Circuit was in no position to invalidate a speech-protecting exception and broaden the prohibition to abridge more speech. And that misguided "severability" analysis is inextricably intertwined with the constitutional inquiry itself, as the government concedes. U.S.Br.7-8; *see also* AAPC.Pet.14-16.

Unable to mount a meaningful defense to the Ninth Circuit's approach, respondent complains that

the multiple cases Facebook cites that confirm that the proper remedy for a First Amendment violation is to strike the content-based prohibition, not the exception, "do[] not mention severability." BIO.15-20 (citing *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and other cases). Exactly. Those precedents do not invoke "severability" because they correctly recognize that, as a matter of substantive First Amendment law, a content-based *prohibition* is what is unconstitutional and must be invalidated upon a successful First Amendment challenge. That is why the Court in *Reed*, for example, struck down the Town of Gilbert's prohibition on outdoor signs, not the "exemptions" that allowed certain signs based on their "message." 135 S. Ct. at 2224. The only "severability" question that could theoretically arise is whether the rest of the statute can stand without the invalidated prohibition or must also fall. But the reason this Court did not invoke "severability" in invalidating the prohibition (and not the exception) is that those principles are not involved at that stage of the inquiry and certainly cannot be applied to resurrect and broaden the invalidated prohibition.

Respondent's reliance on this Court's Equal Protection Clause cases, BIO.15, 18, is also misplaced. The core protection of the Equal Protection Clause is *equal treatment*. That core protection can be achieved by "leveling up" or "leveling down." *See, e.g.*, *Comptroller of the Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1806 (2015). The Free Speech Clause is fundamentally different. The core protection of the Free Speech Clause is the *non-abridgment of speech*. And when the government impermissibly abridges

speech, the only available remedy is to allow *more* speech, not *less*.

2. Respondent's vehicle arguments fare no better. His argument that Facebook lacks standing to challenge the amended TCPA is a nonstarter. *See* BIO.2, 9-11. Respondent neglects to mention that the Ninth Circuit squarely rejected this argument, holding that "Facebook has standing to challenge the constitutionality of the post-amendment TCPA" because respondent "seeks damages on behalf of a putative class for violations that occurred in part in 2016, as well as forward-looking injunctive relief based on the post-amendment TCPA." Pet.App.10-11. In other words, the "class allegations and request for injunctive relief vest Facebook with a sufficient personal stake in the post-amendment TCPA to challenge its constitutionality." Pet.App.11. Respondent does not even mention this holding, much less provide any persuasive response. The Ninth Circuit was plainly right that this case squarely implicates the post-2015 statute.

Respondent's other vehicle arguments principally focus on why the government's petition in *AAPC* is superior to this one, but the two petitions are not an either-or proposition. This Court routinely grants multiple petitions raising the same or overlapping questions, including where private parties raise overlapping questions with a government petition. *See* Reply.10-11 (collecting cases). That approach would be especially beneficial here, as this petition presents a logically anterior statutory issue that informs and potentially narrows the constitutional dispute (and that is itself certworthy, as discussed

infra). And as respondent does not and cannot dispute, this petition has the additional benefit of arising in the context in which most TCPA disputes arise: when real-world plaintiffs have received real-world messages that allegedly violate the ATDS prohibition and subject the defendant to substantial statutory penalties. The overwhelming majority of TCPA cases arise in precisely this context, which helps sharpen the issues and underscores the chilling effect of suits like respondent's. At the same time, the *AAPC* litigation arises in a declaratory-judgment context that guarantees that the Court can resolve the constitutional issue no matter how it resolves the statutory question. The two cases give the Court the best of both worlds and the Court should grant them both.

II. The Court Should Also Grant The Statutory Question.

As explained in Facebook's reply to the government's response brief, the statutory question is logically anterior to and should be decided alongside the constitutional question. *See* Reply.6-9. It also is independently certworthy, as this Court's intervention is needed to resolve the open and acknowledged circuit conflict on this immensely important question.

1. There can be no serious question that the courts of appeals are split over the proper interpretation of the ATDS prohibition. The Ninth Circuit itself recognized that it broke with the Third Circuit when it expressly "decline[d] to follow" *Dominguez ex rel. Himself v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018). *See Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 n.8 (9th Cir. 2018); *see also* Pet.29-30. The

Ninth Circuit's interpretation is in direct conflict with the Third Circuit's. *Marks* said that "the statutory definition of ATDS is *not* limited to devices with the capacity to call numbers produced by a 'random or sequential number generator,' but also includes devices with the capacity to dial stored numbers automatically." 904 F.3d at 1052 (emphasis added). The Third Circuit said the opposite: that the "key … question" is whether the equipment "randomly or sequentially generat[es] telephone numbers, and dial[s] those numbers." *Dominguez*, 894 F.3d at 121. And the Ninth Circuit is not the only one to acknowledge the express circuit split. Myriad other courts and commentators have recognized that the holdings of the Third and Ninth Circuits on the ATDS question cannot be reconciled. *See* Pet.30 (collecting cases and sources).

There is also undeniable conflict between the Ninth Circuit's ruling and the D.C. Circuit's decision in *ACA International*, and respondent's contrary suggestion fails. The FCC itself has acknowledged that *Marks* and *ACA International* are fundamentally incompatible, *see* Pet.31-32, and for good reason. The Ninth Circuit's "gloss on the statutory text," Pet.App.8-9, classifies any device that has the capacity to store numbers and dial those numbers as an ATDS. *See Marks*, 904 F.3d at 1052. Any modern smartphone has that functionality, which is why the Ninth Circuit never denied that its statutory holding treats any modern smartphone as an ATDS. That result is flatly inconsistent with the D.C. Circuit's ruling that it "*cannot* be the case that every uninvited communication from a smartphone infringes federal law." *ACA Int'l v. FCC*, 885 F.3d 687, 698 (D.C. Cir.

2018) (emphasis added). That the D.C. Circuit made this point while discussing another component of the statutory definition (the "capacity" requirement) does not alter the fact that the D.C. Circuit rejected a statutory interpretation with the same scope as the Ninth Circuit's ruling as "an unreasonable, and impermissible, interpretation of the statute's reach." *Id.* at 697-98.

To avoid this conflict, respondent denies that the Ninth Circuit's reading reaches smartphones because using a smartphone to text or call a particular number "would involve too much human intervention." BIO.24. This "human intervention" limitation is wholly atextual, which is why the Ninth Circuit rejected it as part of the test. *See Marks*, 904 F.3d at 1052. It also is foreclosed by the plain language of the statutory definition, which provides that an ATDS need only possess the requisite technological "capacity." 47 U.S.C. §227(a)(1). A call from an ATDS then falls under the prohibition *regardless* of whether the particular call was actually made using that capacity. *Id.* §227(a)(1),(b)(1)(A)(iii); *see, e.g.*, *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009). Any modern smartphone has the capacity to dial numbers from a stored list, and so any smartphone call for which the caller has not received prior consent would be subject to the TCPA. *See* Br. of Amicus Curiae ACA Int'l 14; Br. of Amici Curiae Chamber of Commerce & Business Roundtable 9-12. This is precisely the result the D.C. Circuit correctly spurned: "it is untenable to construe … the statutory definition of an ATDS in a manner that brings within the definition's fold the most ubiquitous type of phone equipment known, used countless times each day for

routine communications by the vast majority of people in the country." *ACA Int'l*, 885 F.3d at 698.

That respondent felt the need to interpose a too-much-human-intervention limitation on the holding below that is absent from both the Ninth Circuit decision and the statutory text only underscores the need for this Court's review. Even respondent cannot embrace the decision below without imposing further atextual limitations, which is a sure sign that the Ninth Circuit has misconstrued the text and ignored the more sensible and far narrower interpretation proposed by Facebook and adopted by the Third Circuit. And the Ninth Circuit's error has profound constitutional consequences for the massive amount of speech that takes place through the medium of the smartphone. This is precisely why the Court should grant certiorari on *both* the statutory question and the First Amendment question, as determining the statute's breadth is a necessary precondition for assessing its constitutionality. *See United States v. Williams*, 553 U.S. 285, 293 (2008).

2. Respondent's attempt to justify the Ninth Circuit's decision on the merits is equally problematic. For instance, respondent argues that reading the phrase "using a random or sequential number generator" to both "store" and "produce" would "render[] the first category superfluous," BIO.28, but that reading ignores that, at the time of the TCPA's enactment, random number generators *could* "store" numbers and often needed to do so to avoid producing and calling the same number multiple times. *See* Pet.27 (citing Noble Systems Corp., *Comments on FCC's Request for Comments on the Interpretation of*

The TCPA in Light of Marks v. Crunch San Diego i-ii (Oct. 16, 2018), https://bit.ly/2n32vHd)). In all events, the "canon against surplusage is not an absolute rule," *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013), and respondent's preferred interpretation renders even *more* of the statute superfluous. In the Ninth Circuit's view, an ATDS is "equipment which has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers automatically." *Marks*, 904 F.3d at 1053. But since respondent believes that a number must necessarily be stored in a device once it is produced, there is absolutely no work to be done by the second half of the definition. Every device that qualifies under (2) would also qualify under (1), and the heart of the definition—the requirement that the ATDS use a random or sequential number generator—would become entirely superfluous.

3. Respondent never denies that the TCPA gives rise to a torrent of litigation, as evidenced not just by the circuit split but the district court chaos on the statutory issue in the thousands of cases that are filed under the TCPA each year. *See* Pet.29-34 & nn.3-4. Whatever might be the argument for further percolation in the face of a split on an obscure statute with no relationship to pending constitutional litigation, the need for immediate review here is obvious. Undeterred, respondent suggests that this Court should hold off until the FCC gets around to sharing its thoughts on the ATDS issue. BIO.30-33. But the FCC is poorly positioned to consider an interpretation that minimizes constitutional difficulties, when the Solicitor General is busy

resisting the notion that there is any constitutional problem. Moreover, the FCC has been considering the matter for nearly two years, without action, while individuals and entities face potentially ruinous liability to the tune of billions of dollars of exposure. Deferring to Nero while Rome burns has nothing to recommend it. In all events, the quickest way to get the benefit of the FCC's views on a time frame that recognizes the real-world costs of continued uncertainty is to grant certiorari.

Nor is there any reason to think that any FCC administrative action would bring closure to the ATDS definition. For almost 20 years the FCC "has sought to address … questions [about the definition of ATDS] in previous orders," and the results have been hopelessly contradictory. *ACA Int'l*, 885 F.3d at 701-03. Its "most recent effort" in 2015 was invalidated because it fell "short of reasoned decisionmaking" and "'offer[ed] no meaningful guidance' to affected parties in material respects on whether their equipment is subject to the statute's autodialer restrictions." *Id.* at 701. "[W]hile speaking to the question in several ways," the FCC gave "no clear answer (and in fact seem[ed] to give both answers)." *Id.* at 702-03. It took almost three years of costly litigation for the FCC's 2015 interpretation to be invalidated and interested parties are still awaiting further word. Given the stakes in TCPA litigation, any FCC interpretation will be challenged resulting in further litigation and further uncertainty. The only way to bring definitive guidance on this critical issue is for this Court to supply it.

4. Finally, respondent's claim that the Ninth Circuit would have to apply this Court's interpretation of the facts alleged here to resolve the statutory question is no basis for denying review. BIO.33-34. This Court routinely grants cert in this procedural posture. *See, e.g.*, *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018); *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015); *Chadbourne & Parke LLC v. Troice*, 134 S. Ct. 1058 (2014); *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135 (2011). And respondent's citation-free assertion that he adequately alleged an ATDS under the statutory text is meritless in all events. BIO.33-34. The district court found to the contrary and had no difficulty dismissing this case on the pleadings. *See* Pet.App.50-51. There is no reason to expect a different result on remand if this Court rejects the Ninth Circuit's expansive notion of an ATDS.

* * *

This Court should grant plenary review of both the constitutional question and the statutory question. It would be extremely difficult and highly artificial to decide the constitutionality of the ATDS prohibition without ascertaining the scope of the ATDS definition. Moreover, the Ninth Circuit's approach to the ATDS definition created a circuit split and has profound First Amendment overbreadth concerns. Granting this petition alongside the government's petition in *AAPC* would allow the Court to consider both of these questions together, and in a case that presents them in the real-world posture in which almost all TCPA litigation arises. There is no

reason to wait to decide these important questions, and this petition is an ideal vehicle to do so.

CONCLUSION

The Court should grant the petition in full.

Respectfully submitted,

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