No. 19-511

IN THE

Supreme Court of the United States

FACEBOOK, INC.,

Petitioner,

v.

NOAH DUGUID, *ET AL.*

Respondents.

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

BRIEF OF RESPONDENT NOAH DUGUID

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October 2020

QUESTION PRESENTED

Whether the Telephone Consumer Protection Act's definition of "automatic telephone dialing system," 47 U.S.C. § 227(a)(1), encompasses a device that can store and automatically dial telephone numbers without using a random or sequential number generator.

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INTRODUCTION

Facebook makes nearly all its money by selling advertisements to companies that target consumers based on factors including age, gender, location, interests, and behaviors.[1] Facebook knows nearly everything about us: our biographical details; our relationships; our work, education, and home addresses; places we go, friends we keep, searches we make, ads we click; and much more—including our phone numbers.[2] Facebook now asks this Court to let it and others use that information to make unwanted robocalls and texts to cellphones.

The Telephone Consumer Protection Act (TCPA) stands in the way. The TCPA embodies Americans' shared "disdain for robocalls" and Congress's 30-year effort to "fight[ ] back" against them. *Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2343 (2020) (lead opinion). Although Americans have ceded much private information to internet conglomerates, the TCPA bars possessors of that information from robocalling and robotexting us without our permission. As this Court stated earlier this year, the TCPA "prohibit[s] almost all robocalls to cell phones" without the recipient's consent. *Id.* at 2344. That prohibition, Congress found, is "the only effective means of protecting telephone consumers from this nuisance and privacy invasion." *Id.*

The TCPA outlaws two types of unwanted robocalls to cellphones: calls made using an "automatic

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[1] Facebook, Inc., Form 10-K, at 7 (2019), http://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/45290cc0-656d-4a88-a2f3-147c8de86506.pdf.

[2] https://www.facebook.com/help/930396167085762.

telephone dialing system" (ATDS), and calls using artificial voices or prerecorded messages. 47 U.S.C. § 227(b)(1)(A)(iii). Autodialers used by robocallers include (1) systems that dial from stored lists of numbers and (2) systems that dial numbers they generate randomly or sequentially. The TCPA targets both by defining an ATDS as a system that can "store or produce telephone numbers to be called, using a random or sequential number generator," *id.* § 227(a)(1)(A), and can dial those numbers automatically, *id.* § 227(a)(1)(B).

The statute minimizes burdens on legitimate businesses by freely allowing all calls made with consent—which consumers grant just by providing cellphone numbers to potential business callers. Hence the TCPA targets only calls made using particularly intrusive technologies to recipients who don't want them. That tailored prohibition "demonstrates Congress's continuing interest in consumer privacy" and "proscribes *tens of millions* of would-be robocalls that would otherwise occur *every day*." *Barr*, 140 S. Ct. at 2348.

Now Facebook seeks to legalize almost all these calls. Elevating a rigid view of syntax over the meaning of the TCPA's words, and relying heavily on revisionist legislative history, Facebook argues that a system that dials stored numbers rather than numbers it generates itself is not an ATDS. That reading would limit the TCPA's application to just a "small universe of rapidly obsolescing robocalling machines." Pet. 14. Robocallers would have free rein to inundate cellphones—and emergency numbers, hospital rooms, and business-phone systems—with unwanted, autodialed calls and texts.

The TCPA's text doesn't support that reading. The ATDS definition covers systems that store *or* produce numbers to be dialed automatically. The phrase "using a random or sequential number generator" logically modifies *produce*, not *store*. Facebook's reading would restrict the TCPA's application in ways that can't be squared with the statute's expressly stated purposes, its overall structure, and the context of its enactment and later amendment. It would also render the statutory words *store or* meaningless.

The best and most natural reading of the statute is that a system that dials telephone numbers automatically—whether those numbers are stored or generated by the system—is an ATDS.

STATUTES INVOLVED

The TCPA is reproduced in Facebook's statutory appendix, except for the statute's congressional findings, which are printed in the appendix to this brief.

STATEMENT

1. Congress enacted the TCPA in 1991 to stop widespread abuses of telephone technology that flooded consumers with intrusive robocalls to home phones, cellphones, and fax machines. *See Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 370–72 (2012). The principal impetus for the Act was the quantity and frequency of autodialed calls that led to "a torrent of vociferous complaints" from consumers. *Barr*, 140 S. Ct. at 2344. As the principal opinion in *Barr* put it: "A leading Senate sponsor of the TCPA captured the zeitgeist in 1991, describing robocalls as 'the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we

want to rip the telephone right out of the wall.' 137 Cong. Rec. 30821 (1991)." *Id*. Today, as in 1991, Americans object to automated calls and texts that besiege their cellphones, and robocalls still generate "a staggering number of complaints." *Id*. at 2343.

The TCPA allows use of any autodialing technology for calls or messages if the recipient consents. But absent consent or an emergency, it outlaws two kinds of robocalls to cellphones and certain other devices: calls made using (1) any ATDS or (2) any artificial or prerecorded voice. 47 U.S.C. § 227(b)(1)(A)(iii). An ATDS is equipment with 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." *Id.* § 227(a)(1). The TCPA also prohibits using an ATDS to call emergency numbers and rooms in healthcare facilities, *id.* § 227(b)(1)(A)(i) & (ii), or to tie up multiple business-telephone lines, *id.* § 227(b)(1)(D).

The FCC, which has regulatory authority to implement the TCPA, *see id.* § 227(b)(2), has explained that absent consent or an emergency, "it is unlawful to make *any call* using an [ATDS] … to any wireless telephone number." FCC, *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14115 (2003). The prohibition applies to "live" calls placed using autodialers, *id*. at 14116 n.611, as well as to "text calls," *id*. at 14115—a point Facebook does not dispute. And the prohibition applies regardless of whether the consumer is charged for a call, though the FCC can exempt calls for which a cellphone user is not charged. *See* 47 U.S.C. § 227(b)(2)(C).

The FCC has used its authority to ease the consent requirement by ruling that a consumer consents to robocalls just by providing a cellphone number during a business transaction, unless consent is expressly withheld or subsequently revoked. *See* FCC, *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd. 8752, 8769 (1992); FCC, *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 7998–99 (2015). In 2012, the FCC required express *written* consent to receive *telemarketing* robocalls, but otherwise left its business-friendly consent standard intact. *See* FCC, *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd. 1830 (2012). The FCC also recently mandated a database of disconnected cellphone numbers robocallers can check to ensure that consumers who provided consent still have the same number. *See* 47 C.F.R. § 64.1200(*l*) & (m). Checking can shield callers from some liability under the TCPA.

The FCC has also repeatedly held that "predictive dialers"—devices that automatically call thousands of stored numbers per minute at a rate calculated to optimize the chance that an operator will be available to speak when a consumer answers—are ATDSs regardless of whether they use number generators. *See* FCC, *In re Rules*, 18 FCC Rcd. at 14092 (2003); FCC, *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd. 559, 566 (2008); FCC, *In re Rules,* 30 FCC Rcd. at 7973 (2015). In 2018, the D.C. Circuit set aside the FCC's 2015 ruling on the issue on two grounds. First, the FCC had overreached in suggesting that a device's "capacity" depends not just on what it can do but also

what it can be *modified* to do. *ACA Int'l v. FCC*, 885 F.3d 687, 700 (D.C. Cir. 2018). Second, the FCC had made inconsistent statements about whether the ATDS definition applies to devices that store numbers but don't generate them. The court held that the FCC could permissibly take either view but could not "espouse both competing interpretations in the same order." *Id.* at 703.

2. This case arose after Facebook instituted a policy of automatically sending computer-generated text messages to cellphones when Facebook users' accounts were accessed from unknown devices. Respondent Noah Duguid, however, is not a Facebook user. He never gave Facebook his cellphone number. Yet Facebook's apparently defective robotexting system bombarded him with messages about someone else's account. JA 35–36. Duguid didn't just run to court: Following Facebook's published instructions, he asked Facebook to turn off the messages. Facebook responded that "Facebook texts are now off." JA 36–37. Still, the automated messages kept coming. JA 37–38.

Duguid sent Facebook an e-mail asking, again, that the messages cease. JA 39–40. Facebook responded with an automated e-mail telling him to log on to Facebook and report problematic "content." JA 40. Duguid sent another e-mail saying a "human needs to read this email and take action"; Facebook sent the same automated reply. *Id.*

After exhausting all available means to get the messages to stop, Duguid contacted a lawyer and, in 2016, sued Facebook under the TCPA in the Northern District of California. Facebook sought dismissal, arguing that its automated system did not use a random or sequential number generator and so was not an

ATDS. The district court accepted Facebook's argument and dismissed the case. Although the complaint alleged that Facebook's equipment *can* generate random or sequential numbers, JA 41–43, the court labeled those allegations conclusory.

Duguid appealed to the Ninth Circuit. While the appeal was pending, that court held in *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018), that the best reading of the statute is that the ATDS definition covers "equipment that ma[kes] automatic calls from lists of recipients" in addition to devices that generate numbers to be dialed. *Id.* at 1051. The court reasoned that the statute's language as well as its "context and structure" support broad application to "devices that make automatic calls." *Id.*

Based on *Marks*, the court held that Duguid had stated a claim under the TCPA by alleging that Facebook's system automatically dialed stored numbers. The court therefore did not address Duguid's allegations that Facebook's system also had number-generating capacity. *See* Pet. App. 6–7.

Facebook argued alternatively that the robocalling prohibition's exemption of calls made to collect government-backed debt violated the First Amendment. Anticipating this Court's holding in *Barr*, the court held the government-debt exception unconstitutional but severable—which did Facebook no good. *See* Pet. App. 11–20.

This Court deferred considering Facebook's petition for certiorari pending its decision in *Barr*. In the meantime, three more circuits ruled on the ATDS definition. The Second agreed with *Marks*. *Duran v. La Boom Disco, Inc.*, 955 F.3d 279 (2d Cir. 2020). The Seventh and Eleventh disagreed. *Gadelhak v. AT&T*

Servs., Inc., 950 F.3d 458 (7th Cir. 2020); *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301 (11th Cir. 2020). After this Court granted certiorari, the Sixth Circuit also sided with *Marks*. *Allan v. Pa. Higher Educ. Assistance Agency*, 968 F.3d 567 (6th Cir. 2020).

SUMMARY OF ARGUMENT

When the TCPA was passed, an automatic telephone dialing system meant a device that called numbers it either stored or generated (randomly or sequentially). The statute accordingly provides that a system meets the definition of an ATDS in either of two ways: if it can store *or* produce numbers to be called. The debate centers on the adverbial modifier ("using a random or sequential number generator") that follows those two alternatives. Does it modify both disjunctive verbs (*store or produce*) or only the second (*produce*)? Because *producing* equates with *generating* but *storing* does not, the fairest reading of the statute's words, in light of their accepted ordinary and technical meanings, is that *using a random or sequential number generator* modifies *produce*, not *store*. Although the verbs have a common object, the later adverbial modifier can only apply to *produce*. *Store* denotes retention; *produce* denotes creation.

Context buttresses this conclusion. Because two types of ATDS were in common use, earlier state statutes covered both by referring to the capacity to store numbers *or* to produce numbers. Congress did the same, using the disjunctive *or* and economizing on language by referring to the numbers to be stored or produced only once.

This Court does not gratuitously read words out of a statute. The words *store or* are critical to defining an ATDS. They come early in the definition. Yet

Facebook's reading would make them superfluous. Neither Facebook nor the Solicitor General offers a plausible reading that prevents superfluity and avoids rewriting the text. Congress intended both verbs to have meaning.

Prohibiting robocalls using both types of autodialers carries out the statute's broad goal of protecting personal privacy. Responding to a deluge of complaints about invasive, nonconsensual automated calls over many years, Congress carefully designed the TCPA to address the problem by prohibiting calls using an ATDS or an artificial or recorded voice while exempting consensual calls. Letting robocallers bypass consent by using a system that dials stored numbers would subvert Congress's goals. A call's intrusiveness does not depend on whether the recipient's number was stored in a purchased database or was machine-generated.

Facebook argues that only equipment with number-generating capacity falls within Congress's decision to target *automatic* dialing systems. But *automatic* modifies "telephone *dialing* systems." The statute requires automation of a system's *dialing* function, not its production of numbers. Equipment that automatically dials stored numbers is an ATDS.

The TCPA's history shows that Congress knew about both types of automatically dialed calls that the statute addresses, and that both contributed substantially to the number and frequency of unwanted automated calls that the statute targets. There's no evidence that Congress intended to regulate only part of the problem. And because few modern autodialing systems still rely on number generators, adopting Facebook's construction would remove almost all

restraints on autodialed robocalls despite both Congress's and this Court's recognition that such calls pose a continuing threat to privacy.

ARGUMENT

Like all exercises of statutory construction, determining whether the ATDS definition includes devices that automatically dial stored numbers as well as devices that generate numbers to be dialed requires a "fair reading" of the statutory language. *Bond v. United States*, 572 U.S. 844, 861 (2014); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 33–41 (2012). Because the FCC has not yet exercised its regulatory authority to resolve the issue clearly, the Court must use standard statutory-construction tools to decide the "best reading," even if other readings are permissible. *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1140 (2018); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983–86 (2005).

"As always," this task "begin[s] with the text of the statute," *Limtiaco v. Camacho*, 549 U.S. 483, 488 (2007), including the words of the provision and its grammar, structure, context, subject matter, and evident purpose. *See Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901–02 (2019); *Burgess v. United States*, 553 U.S. 124, 134 (2008); *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993). The Court's "duty is to give coherence to what Congress has done within the bounds imposed by a fair reading of legislation." *Achilli v. United States*, 353 U.S. 373, 379 (1957). The fairest and best reading is that the TCPA applies to systems that automatically dial stored numbers.

I. The most straightforward reading is that "using a random or sequential number generator" describes how ATDS equipment "produces" numbers, not how it "stores" them.

A. Ordinary and technical meanings of "random number generator" and "sequential number generator" refer to means of *producing* numbers.

Construction of a statute starts with its "key words," *NLRB v. SW General, Inc.*, 137 S. Ct. 929, 938 (2017). Here, those key words reveal that a system that automatically dials stored numbers is an ATDS whether or not it uses a number generator.

The ATDS definition unambiguously applies to equipment that can: (A) either store *or* produce telephone numbers to be called; *and* (B) dial those numbers. Determining whether "using a random or sequential number generator" applies to both of the evidently alternative ways of satisfying the first requirement—storing numbers or producing them—requires applying principles of grammar to the meanings of the statutory words that dictate understanding of their grammatical relationships. Grammarians recognize that construction of a text often is "governed not by the rules of syntax but by the sense of the passage."[3] Statutory interpretation likewise turns not on grammar alone, but on an understanding of how "the meaning of each word inform[s] the others,"

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[3] Bryan A. Garner, *Garner's Modern English Usage* 1031 (4th ed. 2016) (referring to such a construction as "synesis"). *See* 2 *A Standard Dictionary of the English Language* 1826 (1909) (defining *synesis* as "[c]onstruction in accordance with the sense rather than the syntax").

accounting for "a statute's full text, language as well as punctuation, structure, and subject matter." *U.S. Nat'l Bank of Or.*, 508 U.S. at 454–55. The commonsense meanings of the ATDS definition's key words signal that "using a random or sequential number generator" refers to how an ATDS *produces*—that is, generates—numbers, not how it *stores* them.

When "both the ordinary and technical meanings of [statutory words], as well as the statutory context in which the word[s] [are] found, lead to the [same] conclusion," there is no need to choose between them. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 572 (2012). This is such a case: Both the ordinary and technical meanings of the crucial words and phrases—*store*, *produce*, and *using a generator*—indicate that "using a generator" describes a way of producing numbers to be called, not of storing them.

Contemporaneous sources define a *generator* as "[o]ne that generates, causes, or *produces*."[4] The verb *produce* is so closely connected to the noun *generator* that it is hard to find a definition of the latter that doesn't include it.[5] In contrast, the verb *store* describes a very different activity: Its relevant meaning is "to

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[4] *Webster's Third New International Dictionary Unabridged* 945 (1976) (emphasis added); *see also Webster's Second New International Dictionary* 1045 (1934) (similar); *Oxford American Dictionary* 262 (1980) (*generate* means "to bring into existence, to produce"; "generator" means "a person or thing that generates").

[5] *See, e.g.*, 6 *Oxford English Dictionary* 437 (2d ed. 1989) (*generator* means "[s]omething which generates or produces"); *The Random House Dictionary of the English Language* 796 (2d ed. 1987) (*generator* in the computing sense means "a program that produces a particular type of output on demand, as random numbers, an application program, or a report").

leave or deposit in a ... place for keeping, preservation or disposal" and, even more relevant, "to record (information) in an electronic device (as a computer) from which the data can be obtained as needed."[6] In common usage, then, *using a number generator* means producing numbers—it is unrelated to how they are stored.

When the TCPA was enacted, computer specialists understood the technical meaning of *random number generator* in exactly this way. For example, a 1992 book on the subject states that "[a] *random number generator* is a computer procedure that scrambles the bits of a current number or set of numbers to *produce* a new number, in such a way that the result appears to be randomly distributed among the possible set of numbers and independent of the previously generated numbers."[7] Meanwhile, a 1970 patent for a "pseudorandom sequence generator"—a form of number generator—specifically disclaimed the generator's having any capacity to store and specified that it is to be "connected to a serial storage device … external to the generator." U.S. Patent No. 3633015 (patent description, col. 2, ll. 1, 21–22). Technical usage under-

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[6] *Webster's Third New International Dictionary Unabridged* 2252 (1976); *see also Webster's Second New International Dictionary* 2486 (1934) (*store* means "to collect as a reserved supply; to accumulate; to lay away"); 16 *Oxford English Dictionary* 790 (2d ed. 1989) (*store* means "[t]o keep in store for future use; to collect and keep in reserve; to form a store, stock or supply of; to accumulate, hoard").

[7] George Marsaglia, "The Mathematics of Random Number Generators," 46 *Proceedings of Symposia in Applied Mathematics* 73, 73 (1992) (emphasis added). *Cf.* Thomas J. Gogg & Jack R.A. Mott, *Improve Quality and Productivity with Simulation* (1992) ("A random number generator is any mechanism which produces independent random numbers.").

scores that at the relevant time (as now) *random and sequential number generators* referred to ways of *producing* numbers, not means of *storing* them.

Moreover, when the TCPA was passed, the general meaning of an automatic dialing system was a device that called either stored lists of numbers or randomly or sequentially generated numbers. The acronym *ADAD* was used for "automatic dialing (and) announcing device." A 1978 California statute defined an ADAD in words that closely track the later federal statute's ATDS definition: "any automatic equipment which incorporates a *storage capability of telephone numbers to be called* or *a random or sequential number generator capable of producing numbers to be called* and the capability, working alone or in conjunction with other equipment, to disseminate a prerecorded message to the telephone number called." West's Ann. Cal. Pub. Util. Code § 2871 (originally enacted in 1978 and codified in 1980) (emphasis added). Other statutes used similar language, describing storage before production and using the disjunctive *or* to distinguish the two. *See* U.S. Br. 27 (citing statutes from New York, Kansas, and Oklahoma). Similarly, a 1984 article in the *Computer Law and Tax Report* explained that "ADADs are automatic equipment that *either* stores telephone numbers to be called *or* uses a random or sequential number generator that can produce the numbers to be called." 11–13 *Computer Law Tax Report* 5 (1984) (emphasis added). All these examples use disjunctive phrasing—store or produce—to distinguish equipment used to store numbers from equipment used to generate them.

Congress chose the same disjunctive phrase to cover devices that store numbers plus devices that produce them, together with a phrase defining how

they are produced (*using a random or sequential number generator*) to satisfy the second alternative. The main difference between the TCPA's phrasing and that of the earlier references is that Congress economized by using "numbers to be called" only once to describe what an ATDS must store or produce instead of unnecessarily using the phrase twice. Such "economy of parallelism" is a common feature of legislative drafting. Bryan A. Garner, *Guidelines for Drafting and Editing Legislation* 92 (2015) (explaining that "economy of parallelism" helps "eliminate repetition and verbiage"). The most natural inference is that Congress used fewer words to describe the same devices, not that it limited the definition by applying the adverbial phrase *using a random or sequential number generator* to a verb to which the phrase has no relationship in ordinary or technical usage.

The Solicitor General wrongly insists that Congress's use of more economical language than the state statutes "suggests a departure in meaning." U.S. Br. 28 (quoting *Thryv, Inc. v. Click-to-Call Techs., LP*, 140 S. Ct. 1367, 1376 (2020)). Of course, Congress often intends to "convey differences in meaning" when it uses different words in different parts of the statutes it drafts. *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017). But Congress's use of language that differs from that of *state* statutes on the same subject by eliminating unnecessary words suggests no difference in meaning—especially when conjuring up a difference would require reading Congress's words to create a semantic mismatch between a modifier and a verb.

B. The correct grammatical reading of the definition aligns with the semantic content of the words.

The statutory sentence at issue may not be pretty, but its grammar, although complex, is readily discernible. No principles of construction require any reading that ignores the commonsense linkage between *produce* and *using a number generator*.

Grammatically, the provision is a "complex sentence" because it contains both an independent clause (*ATDS means equipment*) and a dependent clause (the clause beginning with the relative pronoun *which*).[8] The object in the dependent clause (*capacity*) has dual complements in subparagraphs (A) and (B). Both are complementary infinitives. Part (A) contains its own set of disjunctive complementary infinitives (*to store or produce*) with a common object (*telephone numbers to be called*), followed by an adverbial of manner beginning with *using*.[9] Part (B) consists of a conjunctive complementary infinitive—"conjunctive" because it's introduced by *and*.

The sentence can be diagrammed as follows:

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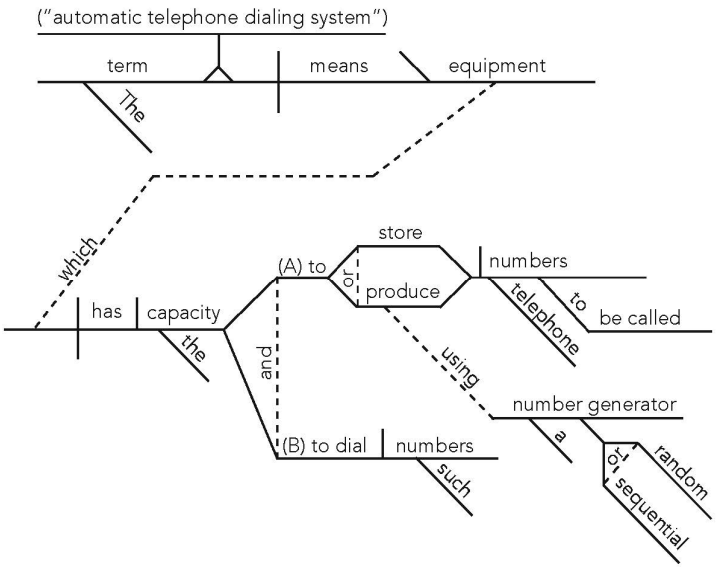
[8] Grammatical terms used in this paragraph are discussed in Bryan A. Garner, *The Chicago Guide to Grammar, Usage, and Punctuation* 85, 117, 130, 146, 147 & 159 (2016).

[9] *See* George O. Curme, *A Grammar of the English Language: Syntax* 279 (1931) (explaining that with adverbials of manner, "the present participle is exceedingly frequent" as the lead-in word—here *using*).



Although the adverbial (*using* …) could theoretically modify both disjunctive complementary infinitives in (A) rather than only the second one, the sense of the words—that is, the relationship between the adverbial phrase and the infinitive *to produce*—shows that the phrase modifies only *produce*, not *store*.[10]

Similar hypothetical definitions that mirror both the grammar and the semantic content of the statutory sentence illustrate the point:

- The term "studio-sound system" means equipment that has the capacity—
  - (A) to store or record music to be played, using a high-quality monodirectional microphone; and

[10] For comparison, a diagram of Facebook's construction is reproduced in the appendix together with this one.

(B)to play such music.

The microphone needn't store music.

- The term "application-software system" means component equipment that has the capacity—

  (A) to download or develop software to be run, using an artificial-intelligence content-code generator; and

  (B) to run such software.

  The content-code generator needn't download software.

- The term "international travel" means travel with an itinerary requiring the traveler—

  (A) to drive or fly to reach the destination, using domestic airlines; and

  (B) to cross international borders.

  The traveler needn't use an airline when driving.

The natural reading of each sentence, like that of the ATDS definition, is that the adverbial phrase modifies only the second verb because its semantic content relates only to that verb. Moreover, the sentences illustrate that the drafters' economical use of a common object for the two disjunctive complementary verbs does not, as Facebook insists, compel a reading in which the adverbial phrase applies to both. To use the first example, saying "to store music to be played or record music to be played" instead of the less wordy but otherwise identical "to store or record music to be played" could not have made it any clearer that "using a microphone" refers to a way of recording music, not storing it.

So too here. The adverbial phrase—*using a random or sequential number generator*—makes most sense as modifying only the closer verb: *produce*. Facebook's assertion that its contrary reading is "inescapable" because the two verbs share a common object, Pet. Br. 23, is grammatically insupportable, unprecedented, and illogical. Given the identical meaning of "to store telephone numbers to be called or produce telephone numbers to be called" and the more economical "to store or produce telephone numbers to be called," Congress's choice of the latter cannot require a different interpretation. And the examples Facebook offers to support its argument that the "only logical way to read" such a construction is to apply the modifier to both verbs, Pet. Br. 24, involve modifiers that are naturally as applicable to one verb as to the other. They prove only that relationships among words matter as much as syntax.

This Court has made the same point. In *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017), the Court recognized that a statute may establish "relatively distinct" criteria that "likely ... were designed to have standalone relevance," *id*. at 1660—such as, here, the alternative capacities to *store* numbers or to *produce* them. In such a case, the most natural meaning of a modifying phrase that sensibly applies to one and not the other is that the modifier applies only to that one, regardless of how a reader might parse a grammatically similar sentence in which the modifier readily applied to both. *See id.* at 1660–61.

The most analogous canons of construction express the same insight: A court should carefully consider the fit between multiple verbs or nouns and modifiers that follow them rather than indiscriminately applying

modifiers to terms to which they are not reasonably applicable.

The distributive-phrasing canon provides that in construing statutory language, courts should "appl[y] each expression to its appropriate referent." Scalia & Garner 214. Hence "[w]here a sentence contains several antecedents and several consequents," courts should "read them distributively and apply the words to the subjects which, by context, they seem most properly to relate." 2A N. Singer & S. Singer, *Sutherland Statutes and Statutory Construction* § 47:26, p. 448 (rev. 7th ed. 2014). For example, in the sentence, "Men and women are eligible to become members of fraternities and sororities," a reader could conclude that the semantic content of the words matches *men* with *fraternities* and *women* with *sororities*. Scalia & Garner 214. Here, the meaning of *generator* matches up with *produce* but not with *store*. The sole difference is that only one of the verbs has a modifying adverbial of manner, so the "one-to-one matching" of expressions and referents that calls most forcefully for application of the distributive canon is absent. *See Encino Motorcars LLC.*, 138 S. Ct. at 1141. But the principle that modifiers should be applied only to terms to which they properly relate solidly applies.

The last-antecedent canon leads to the same result. When a statute "include[s] a list of terms or phrases followed by a limiting clause," that "limiting clause or phrase ... should ordinarily be read as modifying only the noun or phrase that it immediately follows," unless context dictates otherwise. *Lockhart v. United States*, 136 S. Ct. 958, 962 (2016). This principle is especially applicable when it is a "heavy lift to carry the modifier across" all the entries in a list. *Id.*

at 963. One such circumstance is where a statute "does not contain items that readers are used to seeing listed together or a concluding modifier that readers are accustomed to applying to each of them." *Id.* That description aptly characterizes the ATDS definition, which uses two verbs (*store* and *produce*) with distinct and unconnected meanings followed by a modifier that readers would be accustomed to applying to *produce* but not *store*. As applied in *Lockhart*, the last-antecedent canon reflects sensitivity to the presence or absence of a natural relationship between a modifier and the terms to which it applies, a consideration that here favors applying the modifier to the closer of the two preceding verbs (*produce*) rather than the more remote one (*store*).

Ignoring these canons, Facebook mistakenly invokes the series-qualifier canon. That canon teaches that "[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series, ... a postpositive modifier normally applies to the entire series." Pet. Br. 23 (quoting Scalia & Garner, at 147). Facebook overlooks that the series-qualifier canon "is highly sensitive to context." Scalia & Garner 150. It requires not only that nouns or verbs in a series have a parallel construction, but also that the modifier be "applicable as much to the first and other words as to the last." *Paroline v. United States*, 572 U.S. 434, 447 (2014); *see also Lockhart*, 136 S. Ct. at 965. The latter is absent here: The idea of "generating" is applicable to "producing" but not to "storing." In that circumstance, "the sense of the matter prevails: *He went forth and wept bitterly* does not suggest that he went forth bitterly." Scalia & Garner 150.

Moreover, the modifier here does not, as Facebook asserts, follow a "concise and integrated clause." Pet.

Br. 23 (quoting *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1077 (2018)). The clause may be concise, but the two verbs, having little in common besides the object "telephone numbers to be called," are far from "integrated." Unlike the provision at issue in *Cyan*, this clause refers not to a "single thing," 138 S. Ct. at 1077, but to two very different things: storing numbers or producing them.

Facebook's argument that the comma before the adverbial phrase clinches the case is equally wrong. As this Court has cautioned, "a purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning." *U.S. Nat'l Bank of Or.*, 508 U.S. at 454. The Solicitor General acknowledges another explanation for the comma: to avoid the appearance that *using a random or sequential number generator* modifies *called*. U.S. Br. 17. The comma tells the reader to look farther back to see what must be done using a number generator but does not tell the reader how far back. And it certainly does not dictate that the phrase must be read to require using a number generator to perform an operation—storing—that has nothing to do with number generation.

C. Facebook's reading makes the words *store or* surplusage.

The flaws in Facebook's textual argument go deeper than its failure to offer a coherent explanation of how *using a random or sequential number generator* sensibly applies to *storing* numbers. Facebook's construction would read the words *store or* out of the statute altogether, violating the principle that courts should not "adopt an interpretation of a congressional enactment which renders superfluous another portion

of that same law." *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) (citations omitted).

Under Facebook's reading, a number generator is an essential component of an ATDS because any ATDS must have the capacity to use a number generator to store or produce numbers to be called. Because a number generator's function is to produce numbers, any dialing equipment that has such a generator necessarily can produce telephone numbers to be called using that generator. So even if it were meaningful to speak of *storing* numbers using a number *generator*, any system that had that capacity would already qualify as an ATDS because of its capacity to *produce* numbers using a number generator. "Store or" would be wholly superfluous.

Facebook's reading, then, would nullify Congress's use of language providing two distinct alternative ways for equipment to satisfy the definition: having capacity to store numbers *or* to produce them. It would "transform[ ] ... separate predicates into ... synonyms describing the same predicate" for the statute's application. *Lockhart*, 136 S. Ct. at 966. That result would disregard that "Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning." *Bailey v. United States*, 516 U.S. 137, 146 (1995). Reading *capacity to store* out of the statute would be especially anomalous given the common understanding when the statute was enacted that autodialers included both (1) devices that dialed from stored lists and (2) devices that generated random or sequential numbers. *See supra* p. 14. Facebook would ascribe to Congress the paradoxical intention of excluding the former from the ATDS definition even

while choosing a term that has meaning only if they are included.

Facebook "offer[s] no account of what function that language [*to store*] would serve on its proposed interpretation." *Stapleton*, 137 S. Ct. at 1659. The Solicitor General's brief recognizes the difficulty and tries to find an out, speculating that Congress could have added *store or* to ensure coverage of both autodialers that generate numbers for "immediate dialing" and those that generate numbers and "store them for dialing at a later time." U.S. Br. 19. As the Solicitor General acknowledges, however, this reading would still render *store* superfluous because either type of equipment would have the capacity to use a number generator to *produce* the numbers to be called, and thus would be covered by the definition without regard to the addition of *store*. *Id.* at 20.

To overcome this superfluity, the Solicitor General hypothesizes that Congress might have thought *store* necessary because, without it, storing numbers before calling them might somehow break the "causal chain" between producing numbers and calling them, *id.*, so that they would no longer be "numbers to be called"—even though calling them was the sole purpose of generating them. There is no evidence Congress was concerned about foreclosing such an implausible reading, but if Congress had intended to do so, adding the word *store* where Congress placed it—and reading *using a random or sequential number generator* to modify it—would not have done the job. Under the Solicitor General's odd reading, the devices the Solicitor General thinks Congress might have been trying to cover would still fall outside the statute because they did not *use* number generators to *store* the numbers generated; they used number generators to *produce*

numbers to be called and *stored* them using some other means. A Congress concerned only about the problem dreamed up by the Solicitor General would have written a definition covering equipment with the capacity to "produce telephone numbers to be called or stored, using a random or sequential number generator." But that is not the statute Congress wrote.

Also recognizing the superfluity problem, the Eleventh Circuit hypothesized that "store or produce" could be regarded as a redundant doublet, not as "independent elements." *Glasser*, 948 F.3d at 1307. Legal language is full of various (and sundry) doublets: *covenant and agree*, *force and effect*, *uphold and support*. Bryan A. Garner, *Garner's Dictionary of Legal Usage* 294–97 (3d ed. 2011). But typically, "the retrograde practice of stringing out synonyms and near-synonyms" is "easily detectable." Scalia & Garner, *Reading Law* 179. The phrase *store or produce* has none of its hallmarks. Nowhere in the annals of legal literature—outside *Glasser*—is *store or produce* recognized as a synonym string. *Store* and *produce* have unrelated meanings without redundancy or complementary sense. *See supra* pp. 12–13. And Congress's choice to link them with *or* shows that Congress intended them as independent ways of meeting the definition, not as an unlikely pair of synonyms.

Alternatively, the Eleventh Circuit posited that storage is an inherent aspect of producing and dialing numbers because, at some point, an ATDS would have to store numbers it generated, if only momentarily, before dialing them. *See Glasser*, 948 F.3d at 1307. The court therefore suggested the statute included "store" only to refer to an intermediate step that *necessarily* occurs between generating and dialing a number. *See id. Store* remains entirely superfluous

under that view. If Congress had intended to cover only devices that store numbers (even if only for a nanosecond) between producing and dialing them, it would have used the conjunctive *and* instead of *or* and would have placed the verbs in chronological order, applying the definition to equipment with the capacity to "produce and store numbers to be called, using a random or sequential number generator." Again, that is not what Congress did. The definition's textual sequence suggests distinct operations rather than a single process in which production precedes storage. And its use of the disjunctive calls into play the principle that "*or* creates alternatives." Scalia & Garner 116. These textual features underscore the conclusion that *generator* matches only the nearer verb, *produce*, rather than both verbs.

Finally, the Eleventh Circuit's suggestion that giving independent meaning to *store* would render *using a random or sequential number generator* superfluous because all systems that generate numbers necessarily store them momentarily is unconvincing. As the Solicitor General acknowledges, autodialers that generated numbers often did so for "immediate" dialing. U.S. Br. 19. A system that dialed numbers without retaining them would not conventionally be described as "storing" them even if the numbers briefly resided in its circuitry until it dialed them. Reading the storage alternative to refer to systems that *retain* numbers for dialing regardless of how they are generated, while the production alternative covers systems that

generate numbers regardless of whether they are stored for later use, gives both terms work to do. [11]

II. Applying the prohibition on unwanted robocalls to autodialers that do not use random or sequential number generators is consistent with the TCPA's structure, manifest purposes, and context.

All the considerations that go into reading a statute as a whole—its wording, overall structure, purposes, and context—reinforce that the ATDS definition encompasses autodialers that make robocalls to stored numbers without using number generators.

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[11] An amicus brief filed by the Professional Association for Customer Engagement (PACE) agrees that the statute's reference to storage cannot reasonably be read to mean momentary storage of a number in a number generator's circuits while the number is called. PACE Br. 14–15. But it cites a single U.S. patent issued in 1988 and asserts that the statute was written to cover systems of the kind the patent disclosed, which, it contends, used number generators to store numbers. PACE Br. 15. PACE provides no evidence that Congress was aware of the patent or wrote the statute to cover it. In any event, the patented system used its number generator to generate numbers to be dialed, and to select numbers for dialing after the system stored them. In both respects, it *produced* numbers to be dialed using a number generator. Adding *stored or* to the statute would be unnecessary to cover that system. Moreover, the system did not use its *number generator* to store numbers; it used a file in a computer's memory. PACE's example neither solves the superfluity problem nor illustrates using a number generator for storage. Finally, PACE does not explain why Congress would have gone out of its way to cover the patented invention if, as PACE posits, it was exclusively concerned with the problem of indiscriminate dialing tying up multiple phone lines. The patented system was designed to *avoid* that problem. *See* PACE Br. App. 6.

A. Congress drafted the robocalling prohibition to carry out the statute's broad privacy-protection goals.

This Court has recognized that the TCPA's provisions, including its prohibition on unconsented-to calls to cellphones using an ATDS, broadly protect the public against "intrusive nuisance calls" that are "rightly regarded by recipients as 'an invasion of privacy.'" *Mims*, 565 U.S. at 371. The statute reflects Congress's effort, over "nearly 30 years," to "fight[ ] back" against the robocalls that, despite the TCPA, still generate "a torrent of vociferous consumer complaints." *Barr*, 140 S. Ct. at 2343, 2344. As this Court has emphasized, the TCPA's "continuing broad prohibition of robocalls amply demonstrates Congress's continuing interest in consumer privacy." *Id.* at 2348.

The findings incorporated in the TCPA demonstrate Congress's broad concern about invasions of privacy attributable to the number and frequency of unwanted calls facilitated by autodialing technology. *See* TCPA § 2, 47 U.S.C. § 227 note. Congress found that telemarketing "can be an intrusive invasion of privacy," *id.* ¶ (5), and that "consumers are outraged over the proliferation of intrusive, nuisance calls," *id.* ¶ (6). The robocalling prohibition was an integral part of the response to those concerns, not a surgical strike at the more limited problem posed by calls to random or sequential numbers.

Congress also recognized the need to balance individuals' privacy rights and "legitimate telemarketing practices." *Id.* at ¶ (9). It struck that balance by permitting robocalls with the "prior express consent of the called party." 47 U.S.C. §§ 227(b)(1)(A), (B). Those provisions allow callers with a legitimate commercial

or other relationship with the recipient to obtain permission to use automated calling methods, while preserving consumers' ability to avoid automated calls they consider intrusive. Similarly, the statute's junk-fax prohibition permits faxes in circumstances that ensure that the recipient has consented. *See id.* §§ 227(b)(1)(C), (b)(2)(D).

Making the consent requirement's applicability turn on whether an autodialing system uses a number generator to *store* numbers to be called—as opposed to storing them using, say, a computer's hard drive or an external memory device—would fundamentally distort this statutory design. The statute's premise is that, absent consent, automatically dialed calls "are a nuisance and an invasion of privacy, regardless of the type of call." TCPA § 2(13). The statute's ban on robocalls to cellphones advances its stated objective of addressing the proliferation of such nuisance calls. TCPA § 2(12). Reading the statute to make the legality of a robocall to a cellphone depend on the caller's use of a number generator rather than on consent would disconnect the statute's congressionally enacted findings and objectives from its operation. Limiting the statute's application to robocalls using number generators would also be at odds with the statute's concern about calls and texts for which the recipient is charged. *See* 47 U.S.C. §§ 227(b)(1)(a)(iii), (b)(2)(C). Whether the recipient is charged for an unwanted autodialed call or text does not depend on whether the robocaller used a number generator. Nothing on the statute's face compels a reading so dramatically at odds with the broad objectives evident from its text and structure.

Limiting the ban on unwanted robocalls to autodialers that use number generators is impossible to

square with the statute's emphasis on consent. Robocallers can comply with the consent requirement only by using devices that dial from lists of persons who agreed to receive robocalls. Such a list could not be generated randomly or sequentially, so if the ATDS prohibition were limited to equipment that calls random or sequentially generated numbers, the consent exception could never come into play for autodialed calls. The consent requirement would still be operative for calls using recorded messages. But a reading that would make the exception meaningless for the first of the two categories of robocalls subject to it would contravene the statutory design.

B. Prohibiting robocalls to stored numbers accords with the statutory text's focus on automatically dialed calls.

Facebook contends that requiring number-generating capacity is essential to carry out Congress's intent to restrict only "automatic" equipment. 47 U.S.C. § 227(a)(1). Equipment that makes calls to stored numbers, Facebook asserts, doesn't do anything automatically and could not have been within the intended scope of restrictions on autodialing systems. Facebook's argument misreads the phrase on which it relies, misconstrues the structure of the ATDS definition, and misunderstands the nature of autodialers.

Facebook's mistakes start with ignoring that the adjective "automatic" modifies "telephone *dialing* systems." Even read in isolation (as Facebook would do), the words reveal that the ATDS definition is aimed at automation of a system's *dialing* function, not automation of its list of numbers.

The structure of the ATDS definition confirms that the element that must be automatic is dialing. To meet the definition, the *equipment* that makes up the system must have the capacity (A) to store or produce the numbers to be called, and (B) "*to dial such numbers*." 47 U.S.C. § 227(a)(1)(B) (emphasis added). Equipment that can dial numbers by itself is "automatic" under any reasonable understanding of the word. *See* 1 *The New Shorter Oxford English Dictionary* 152 (5th ed. 1993) (defining "automatic" as "(of a machine, device, etc.) working of itself, with little or no direct human actuation"); *Webster's Third New International Dictionary Unabridged* 148 (1961) (defining "automatic" as "having a self-acting or self-regulating mechanism that performs a required act at a predetermined point in an operation"). The requirement that the equipment have the capacity to do the dialing confirms that the ATDS definition is aimed at systems that automatically dial numbers that they store or produce. The FCC has accordingly construed the definition to embody the principle that the "basic function of ... dialing equipment" within the ATDS definition is "the capacity to dial numbers without human intervention"—that is, to do so automatically. FCC, *In re Rules*, 23 FCC Rcd. at 566 (2008).

Facebook's view—that a system that does not generate numbers is not "automatic"—is contrary to the common understanding, both now and when the statute was enacted, of what constitutes an autodialer. *Webster's Third*, for example, defines "autodial" as "a system or feature of a system by which a device (such as a telephone or computer) automatically dials a preprogrammed telephone number." *Webster's Third New International Dictionary* (Kindle ed. 2017). Usage when the TCPA was enacted was the same: An

"autodialer" was "a device that automatically dials telephone numbers until it detects that someone has answered." *Telemarketing/Privacy Issues: Hearing Before the Subcomm. on Telecomms. & Fin. of the H. Comm. on Energy & Commerce on H.R. 1304 & H.R. 1305*, Ser. No. 102-9, at 22 (1991). Congress's choice to restrict use of automatic dialers was in no sense limited to systems that generate numbers to be called.

C. Limiting ATDSs to systems that store numbers using a number generator would have illogical and anomalous consequences.

Adopting Facebook's construction would produce results contrary to the policies evident from the text of the statute. As explained above, reading *using a random or sequential number generator* to apply to the way a system *stores* as well as *produces* numbers would render the words *store or* superfluous. But even assuming there might exist a system that could *store* a list of numbers using a number generator but not *produce* them using that generator, there is no reason Congress would make a prohibition on automated calls to stored numbers hinge on whether they were stored using a number generator or another means. Whether a recipient perceives an automated call as an intrusive nuisance couldn't depend on how the phone number is electronically stored because the called party can't know how the system *stored* the number—that is, whether it used a number generator, a magnetic-tape reel, or a thumb drive. Facebook suggests no rational policy that Congress would advance by prohibiting automated calls based on whether numbers called were *stored* using a number generator.

Facebook's reading would also facilitate total evasion of the prohibition on unwanted ATDS calls to cellphones. A robocaller could readily buy a list of random or sequential blocks of numbers in an arms-length transaction from a third party, just as robocallers now buy targeted lists of nonrandom numbers. The equipment that created the list would fall outside the ATDS definition because it would lack the capacity to dial the numbers produced. *See* 47 U.S.C. § 227(a)(1)(B). The robocaller could then download the numbers to equipment that could store and dial them but had no number generator. Under Facebook's reading, that equipment, too, would fall outside the ATDS definition because it could not store numbers using a number generator. Facebook's interpretation would allow what even Facebook acknowledges the statute does prohibit: automated calls to randomly or sequentially generated numbers. On that reading, the statute would "destroy itself." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011).

Such "absurd results that the provision cannot have been meant to produce" would be grounds for rejecting even a literally correct reading of the statutory text. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2462 (2019). Because Facebook's construction does *not* reflect a fair reading of the text, these anomalous consequences provide even stronger reason to reject that construction.

D. The TCPA's historical context supports its application to systems that automatically dial stored numbers.

The context in which Congress enacted the TCPA confirms what the statute's language says: Congress

wrote it to cover systems that store numbers to be called automatically, regardless of whether they use number generators. Contrary to Facebook's revisionist view, the statute's legislative history reflects a predominant concern not just about calls to random or sequential numbers, but about how "computer driven telemarketing tools have caused the frequency and number of unsolicited telemarketing calls [to] increase markedly." H.R. Rep. No. 102-317, at 6 (1991). When the statute was enacted, the proliferation of automated dialing systems driving that increase, which Congress acted to regulate, included (1) systems that called numbers stored in databases without using random or sequential number generators and (2) systems that dialed random or sequential numbers. Both types of automatically dialed calls formed the universe of activities that the statute addressed, and there is no reason to think that Congress intended to regulate only part of the problem it confronted.

The growing use of systems that automatically dialed stored numbers *without* using number generators formed the factual backdrop to Congress's action. The House Committee Report on the legislation describes telemarketers' increasing reliance on "telemarketing software that organizes information on current and prospective clients into databases" containing detailed information on consumers targeted for automatically dialed calls. H.R. Rep. No. 102-317, at 7 (1991). The Report detailed the emergence of a market "to develop and enhance telemarketing databases," *id.*, as well as a growing industry supplying businesses with information allowing them to tailor databases to target automated telemarketing at chosen groups of consumers:

> Another market exists for companies that specialize in maintaining demographic and psychographic databases designed to provide businesses with a wealth of personal and lifestyle data on as many as 50 or 60 million people. Businesses routinely purchase data from multiple sources in an effort to create unique product- or service-specific databases. And, the databases can be developed from multiple starting points: a name, address, or telephone number; a drivers license number or license plate; or a personal check or credit card number.

Id. The Report also described another market providing businesses with confirmation of telephone numbers in their databases or, if those numbers have changed, "updating a company's file with new telephone numbers," for fees based on the number of telephone numbers input, confirmed, and changed. *Id.*

The use of such targeted databases to drive automatically dialed calls to stored telephone numbers derived from a wide range of sources—not just randomly or sequentially generated ones—was a key contributor to the central subject the TCPA addressed: the pervasive use of telephone marketing "due to the increased use of cost-effective telemarketing techniques." TCPA §2(1); *see also* H.R. Rep. No. 102-317, at 6 ("[R]apidly decreasing telecommunications costs coupled with nationwide business use of sophisticated, computer driven telemarketing tools have caused the frequency and number of unsolicited telemarketing calls [to] increase markedly.").

The factual circumstances when the TCPA was enacted refute the suggestion that autodialers using random or sequential number generators were the

exclusive or dominant technology of the day, or the primary drivers of the consumer "outrage[ ] over the proliferation of intrusive, nuisance calls" that the Act explicitly addressed. *See* TCPA, § 2(6). Calls using random or sequential number generators formed only one part of the universe of autodialed calls in 1991. *See* H.R. Rep. No. 102-317, at 10 (noting that telemarketers "often" called numbers sequentially); S. Rep. No. 102-178, at 2 ("some" autodialers dialed numbers sequentially). Those technologies were linked to a discrete problem: tying up lines of emergency facilities and businesses, *see* H.R. Rep. No. 102-317, at 10; S. Rep. No. 102-178, at 2, which is *one* of the concerns addressed by the TCPA's restrictions on autodialed calls. *See* 47 U.S.C. § 227(b)(1)(A)(i) (prohibiting ATDS calls to emergency telephone lines); *id.* § 227(b)(1)(D) (prohibiting ATDS calls that tie up multiple lines of a business). But the Act's central focus—the proliferation of nuisance calls to consumers—was implicated by all forms of automatic dialing in use at the time. The nuisance that generated consumer outrage was the calls themselves, not the way computers stored numbers.

Likewise, the hearings leading to the legislation didn't focus principally on problems posed by autodialers that called random or sequential numbers. Their predominant focus was the sheer number of intrusive calls that autodialers facilitated—a concern unrelated to autodialers' use of number generators. *See S. 1462, The Automated Tel. Consumer Prot. Act of 1991: Hearing Before the Subcomm. on Commc'ns of the S. Comm. on Commerce, Sci., & Transp.*, S. Hrg. 102-460, at 1 (1991).

The hearings highlighted that the quantity of calls was driven by all forms of autodialers. A leading

consumer-privacy advocate informed the subcommittee about the telemarketing industry's increasing use of predictive dialers, which were already used by 30 to 40 percent of national telemarketing firms. *Id*. at 16. The principal industry witness at the Senate hearing likewise acknowledged that autodialers were not limited to equipment using random or sequential dialing. Accordingly, he urged Congress not to "ban all unsolicited calls by automatic dialing," but instead to alter the draft legislation to ban or limit *only* "sequential and random dialing." *Id.* at 33; *see also id.* at 36. Congress did not take up that suggestion.

The factual context in which Congress acted sheds light on its choice not to define autodialers solely in terms of how they produced numbers to be dialed, but rather to include all systems capable of storing numbers and dialing them automatically. Far from aiming only at specific problems posed by calls to random and sequential numbers—which would not have necessitated any reference to a system's capacity to *store* numbers—Congress chose language that would apply to *all* technologies used to deluge cellphones with automated calls, including then-emerging technologies that did not employ number generation.

For that reason, when the FCC first addressed whether the TCPA's robocalling prohibition applies to calls from predictive dialers that do not use random or sequential number generation, the agency concluded that it does. *See* FCC, *In re Rules*, 18 FCC Rcd. at 14092 (2003); *see also* FCC, *In re Rules*, 23 FCC Rcd. at 566 (2008); *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd. 15391, 15392 n.5 (2012). The FCC may not have articulated its reading of the statutory language clearly and consistently enough to merit

deference under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). Nonetheless, the agency's longstanding view that limiting the statute to devices that use number generators would be inconsistent with its purposes and context merits respectful consideration. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

E. Facebook's reading of the statute would unleash the torrent of robocalls Congress wrote the TCPA to stop.

Facebook acknowledges that its position would render the TCPA's prohibition on unwanted ATDS calls inapplicable to the vast bulk of automatically dialed calls and texts to cellphones. With today's precision data, robocallers use autodialing systems that call or send messages to stored lists of numbers. For telephone calls, those systems often employ predictive-dialing technology. For texts, the same text can be sent to every number on the autodialer's list. In neither case are numbers to be called typically produced by a number generator—nor, of course, are they *stored* using a number generator. Hence, as Facebook has conceded, excluding systems that dial stored numbers and do not employ number generators will limit the prohibition on unwanted ATDS calls to "a small universe of rapidly obsolescing robocalling machines." Pet. 14.

The deluge of robocalls Congress designed the TCPA to address is a persistent problem, not an ephemeral one. Robocallers adapt to change. Even when the statute was enacted, random or sequential dialing was already being rapidly supplanted by predictive dialers, *see supra* p. 37, because autodialers targeting stored numbers selected according to

criteria tailored to a marketing message are more "cost-effective" than hit-or-miss dialing of random or sequential numbers. FCC, *In re Rules*, 18 FCC Rcd. at 14092 (2003). That such autodialers lack number generators does not alter their basic function: "the capacity to dial numbers without human intervention." *Id.* That capacity, employed by equipment "that either stores or produces numbers," *id.*, creates the specific problem addressed by the TCPA—the "increasing number of automated and prerecorded calls to certain categories of numbers," *id.* Because the tremendous volume of nuisance calls autodialers facilitate does not depend on whether they generate numbers or store them, excluding systems that automatically call stored numbers would have the "unintended result" of allowing unwanted nuisance calls the ATDS prohibition was written to stop. *Id.*

The level of consumer dissatisfaction with the ongoing deluge of unwanted autodialed calls and texts belies Facebook's view that the statute's ATDS provision has done its work and has no role to play regarding current autodialing technologies. Random and sequential autodialers may be on the decline, but consumer complaints over intrusive, nuisance autodialed calls—the problem the TCPA was expressly aimed at addressing—are not. In 2012, the FCC tightened regulations implementing the statute's express-consent requirement based on "the volume of consumer complaints we continue to receive over unwanted, telemarketing robocalls." FCC, *In re Rules*, 27 FCC Rcd. at 1838 (2012). Robocalls, the agency reported, still generate "thousands of complaints" reflecting consumers' continuing "frustration in receiving unwanted telemarketing robocalls." *Id.* at 1839. As this Court observed earlier this year, the

problem has not abated: Today, "[t]he Federal Government receives a staggering number of complaints about robocalls—3.7 million complaints in 2019 alone. The States likewise field a constant barrage of complaints." *Barr*, 140 S. Ct. at 2343.

Recent action by Congress confirms that it, too, understands that the ban on unwanted robocalls to cellphones remains a significant component of the protections the TCPA affords consumers, not a relic applicable only to obsolete technologies. As a 2019 House Committee Report noted, "Americans are receiving more unlawful robocalls than ever before," an estimated 48 billion in 2018 alone. H.R. Rep. No. 116-173, at 11 (2019). A Senate Report, citing an "estimate[ ] that in 2019, nearly 50 percent of all calls to mobile phones will be scam robocalls," likewise concluded that "robocalls are likely to increase and continue to be a major concern for consumers," and that robocalls already illegal under the TCPA remain "a clear problem." S. Rep. No. 116-41, at 2 (2019). Autodialed calls were at the center of the problem: The Senate Report highlighted "the availability of software that allows illegal robocallers to make thousands of automated calls with the click of a button." *Id.* at 4.

Congress's concern with the flood of illegal robocalls led to enactment last year of the Pallone-Thune Robocall Abuse Criminal Enforcement & Deterrence Act (TRACED Act), Pub. L. No. 116-105, 133 Stat. 3274 (2019). The TRACED Act amended the TCPA to give the government new forfeiture remedies for violations of the *existing* provisions of § 227(b). And it requires the FCC to report to Congress on complaints it receives concerning illegal robocalls, its use of the new forfeiture remedies, and its proposals for

reducing the number of illegal robocalls. *See id.* § 3(a) (adding 47 U.S.C. §§ 227(b)(4) & (h)).

Congress's continuing attention to the problem of illegal robocalls, and its decision to amend the TCPA to provide *stronger* remedies to reinforce its prohibition of those calls, weighs heavily against reading the statute to negate its application to most current autodialing technologies. Interpreting a statute in context as a "harmonious whole" often requires consideration of how "subsequent acts can shape or focus" its meaning. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 143 (2000). As Justice Scalia explained, the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." *United States v. Fausto*, 484 U.S. 439, 453 (1988). Opening the door to unlimited autodialed calls and texts to cellphones, regardless of consent, as long as they do not employ the senescent technology of random or sequential number generation, is inconsistent with the 30-year history of action against robocalls by "the people's representatives in Congress." *Barr*, 140 S. Ct. at 2343. The history of Congress's enactments reinforces the text and other indicia that the TCPA was "designed to provide an agile tool that can be used to combat robocalling abuses as technologies and methodologies of transmitting these pernicious calls evolve." S. Rep. No. 116-41, at 2. Facebook's contrary view "would disrespect the democratic process, through which the people's representatives have made crystal clear that robocalls must be restricted." *Barr*, 140 S. Ct. at 2356.

Indeed, congressional hearings on the TRACED Act highlighted that major corporations already make

millions of automated telemarketing and debt-collection calls to cellphones without consent, using technology that dials stored numbers without using random or sequential number generators. *See Legislation to Stop the Onslaught of Annoying Robocalls: Hearing Before the Subcomm. on Commc'ns & Tech. of the House Comm. on Energy & Commerce*, Written Testimony of Margot Saunders 2–7, 26–28 (April 30, 2019) (listing examples).[12] Consumers receive billions of such calls in the aggregate, and individuals sometimes receive thousands from a single source. If the ATDS definition were limited to exclude autodialers that do not use number generators, billions more robocalls to cellphones would certainly result. Robocallers would also be free to target emergency numbers, hospital beds, and multiple business lines as long as they avoided using random or sequential number generators. Facebook's construction "would end up harming ... the *tens of millions* of consumers who would be bombarded *every day* with nonstop robocalls." *Barr*, 140 S. Ct. at 2356.

The wrong-number texts that Duguid received illustrate one large dimension of the problem. Because Facebook sent repeated, unwanted automated texts to a number stored in its system rather than a number it generated, holding that the ATDS definition requires use of a number generator would allow Facebook and others to make such automated calls—without the recipients' consent and over their express objections and repeated requests to stop—with impunity.

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[12] https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Testimony_Saunders.pdf.

Duguid is not alone. Examples of innocent people inundated with unwanted robocalls from businesses—often misdirected debt-collection calls—abound. In *Abdeljalil v. General Electric Capital Corp.*, for example, the court approved relief to one million consumers who received multiple debt-collection robocall calls to their cellphones after the defendant's own records showed it had been informed that they were not account-holders. No. 12-cv-02078 (S.D. Cal. Dec. 22, 2016) (ECF No. 164). Other cases similarly show that companies regularly make repeated autodialed debt-collection calls to cellphone numbers even after they have been informed, often repeatedly, that they have the wrong person. *See, e.g.*, *Lavigne v. First Cmty. Bancshares, Inc.*, 2018 WL 2694457 (D.N.M. June 5, 2018); *Johnson v. Navient Sols., Inc.*, 315 F.R.D. 501 (S.D. Ind. 2016). Under Facebook's reading, such calls, which do not use number-generating technology, would not be covered by the statute's prohibition on autodialed calls to cellphones.

Unleashing such calls cannot be justified by concerns about burdening legitimate business practices, especially given the statute's liberal allowance for autodialed calls with consent. Facebook's amici, for example, assert interests in using autodialers to send consumers messages about package deliveries, product information, coupons, school notices, healthcare, insurance, debt collection, and a host of other subjects. But the statute does not prohibit such communications. It only requires a business to obtain consumers' consent. Businesses that wish to comply with the law can readily do so by limiting autodialed calls to numbers that they have received consent to call and using the FCC database to purge reassigned numbers from their lists. At the very least, callers can minimize

potential liability by ceasing robocalls or texts to cell-phone numbers after learning that recipients have not consented. But under Facebook's reading of the statute, the TCPA would not require even minimal efforts at compliance, and businesses would instead be subject to a patchwork of state regulations, creating compliance burdens of their own while offering insufficient protections for consumers.

Concerns about excessive litigation also cannot justify setting aside Congress's decision to regulate autodialers. Despite the billions of robocalls Americans receive each year, TCPA cases averaged only about 1,600 per year between 2014 and 2017,[13] less than 1% of cases filed in the federal courts.[14] To the extent industry's real worry is the possibility of high statutory damages awards, that is a matter properly addressed by Congress or, if circumstances warrant, through due-process protections against excessive damages. *See Golan v. FreeEats.com, Inc.*, 930 F.3d 950 (8th Cir. 2019).

F. Correctly applying the TCPA to autodialers that make robocalls to stored numbers poses no threat to ordinary smartphone users.

Facebook incorrectly argues that "[d]ecoupling" the ATDS definition from the use of number generators would mean that the TCPA's "prohibitions would cover calls from not just every modern smartphone, but from ordinary telephones with call-forwarding or speed-dial features that were already common in

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[13] *See* Chamber of Commerce Br. 25.

[14] *See* https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2017.

1991." Pet. Br. 20. The FCC concluded in 2015 that "there is no evidence ... that individual consumers have been sued based on typical use of smartphone technology." FCC, *In re Rules*, 30 FCC Rcd. at 7977 (2015). Neither Facebook nor any amicus cites cases substantiating this hypothetical nightmare scenario. If applying the TCPA to Facebook's robotexting system and other autodialers without number generators really would subject all smartphone users to liability, substantial evidence of the problem would surely have appeared by now. The reason it has not is that conventional use of a smartphone, or an ordinary telephone, is not the "functional equivalent" to using an ATDS and will not violate the TCPA regardless of the outcome of this case. *Duran v. La Boom Disco, Inc.*, 955 F.3d 279, 289 n.39 (2d Cir. 2020); c*f. Cty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020) (holding that functional equivalence "best captures, in broad terms, those circumstances in which Congress intended" a statutory definition to apply).

First, speed-dialed calls, whether from smartphones or landlines, aren't ATDS calls because phones that use speed-dialing lack the required capacity to dial mass calls *automatically*. 47 U.S.C. § 227(a)(1)(B). To place a speed-dialed call, or a call or text to a contact on a smartphone, a human caller selects the number to be dialed and dials it by pressing a single button instead of all ten digits. The telephone *itself* lacks the capacity to dial the number automatically—that is, without substantial "human intervention"—so it doesn't meet the second part of the ATDS definition even though it does store numbers. *Duran*, 955 F.3d at 289 & n.39. Facebook wrongly argues that the human-intervention criterion is an invention of courts without grounding in

statutory language. But the courts have appropriately relied on the FCC's intuitive view that, under the statute, equipment lacks the required capacity to dial numbers if it cannot do so without human intervention. *See* FCC, *In re Rules*, 30 FCC Rcd. at 7973 (2015); FCC, *In re Rules*, 23 FCC Rcd. at 566 (2008); FCC, *In re Rules*, 18 FCC Rcd. at 14092 (2003).

The statutory term "automatic telephone dialing system"—as Facebook itself argues—signifies that an ATDS must do something automatically, and that something is *dialing* numbers. 47 U.S.C. § 227(a)(1). That language, combined with the requirement that the *equipment* have the capacity to do the dialing, 47 U.S.C. § 227(a)(1)(B), amply supports the "human intervention" requirement. After all, "without human intervention" is just another way of saying "automatically." Even courts that have faulted the FCC's views in other respects have recognized that requiring substantial human intervention "makes sense" because the statutory language "would seem to envision non-manual dialing of telephone numbers." *ACA Int'l*, 885 F.3d at 703.

Second, it is now clear that the TCPA applies only to equipment that has the *capacity* to make automatic calls. The mere *potential* that a device may be transformed into one with that capacity does not, as the D.C. Circuit held in *ACA International*, suffice. *See* 885 F.3d at 695–700. *ACA* held that construing the statute to mean that "all smartphones qualify as autodialers because they have the inherent 'capacity' to gain ATDS functionality by downloading an app" would be "unreasonably, and impermissibly, expansive." *Id.* at 700. Facebook's contention that applying the TCPA to devices that have the *capacity* to autodial stored numbers would prohibit all smartphone calls

because of smartphones' *potential* to function as autodialers contradicts a key holding of a decision Facebook endorses.

Third, the TCPA's robocalling prohibition applies only when a call is made *using* an ATDS. Again, *ACA International* noted that a call that does not make use of the capacities that define autodialing equipment is not necessarily one using an ATDS. *Id.* at 704. That is, the statute may be read to prohibit only "calls made using the equipment's ATDS functionality." *Id.* Under that reading, "[e]ven if the definition encompasses any device capable of gaining autodialer functionality through the downloading of software, the mere possibility of adding those features would not matter unless they were downloaded and used to make calls." *Id. ACA International* didn't resolve that issue because the parties didn't raise it. But the decision shows that the statute can permissibly be read to exclude calls and texts that are genuinely not autodialed from the prohibition against *using* an ATDS. *See id.* Adopting such a reading would ensure that "everyday calls made with a smartphone would not infringe the statute," *id.*, without unleashing billions of unwanted autodialed calls to cellphones from devices that have and use the capacity to place calls automatically to stored lists of numbers.

Fourth, personal texts and calls made by smartphone users usually involve recipients who have given the caller their numbers and consented to receive calls from the caller's smartphone. *See* FCC, *In re Rules*, 7 FCC Rcd. at 8769.

For these reasons, Facebook's hypothetical concern about liability for ordinary smartphone users cannot justify undoing privacy protections for those same

users and all Americans. And in the improbable event that lawsuits against ordinary smartphone users ever materialized, the FCC could use its regulatory and interpretive authority under the TCPA, *see* 47 U.S.C. § 227(b)(2), to clarify that conventional use of smartphones does not implicate the capacities or use of an ATDS. Even absent such FCC action, courts would be exceedingly unlikely to apply the TCPA to everyday uses of smartphones that are not functionally equivalent to automatically dialed calls. *Duran*, 955 F.3d at 289 n.39. Construction of the statute should not be driven by Facebook's unlikely "parade of horribles." *Allan v. Pa. Higher Educ. Assistance Agency*, 968 F.3d at 579.

Likewise, Facebook's call for avoidance of First Amendment issues that might arise from prohibiting "virtually all calls and texts made from any smartphone without 'prior express consent,' " Pet. Br. 48, is a red herring: Applying the TCPA to autodialers that use stored numbers does not have the consequence Facebook asks the Court to avoid. Facebook does not contend that applying the TCPA's consent requirement to "specialized technology" that makes automated calls to stored numbers would raise similar concerns. *Id.* The broader suggestion of some amici that prohibiting unconsented-to calls from autodialers to cellphones would raise First Amendment overbreadth issues is strikingly at odds with *Barr*'s recognition that a content-neutral prohibition on using robocalling technology serves a legitimate "interest in consumer privacy." 140 S. Ct. at 2348.

In any event, if Facebook's concerns about smartphones were valid, its own reading of the statute would not address them. Facebook's argument presupposes a view of "capacity" and "use" of equipment

that would leave smartphone users vulnerable even if the ATDS definition were limited to equipment with number-generating capacity. Smartphones can be programmed to generate numbers to be dialed, just as they can be programmed to dial numbers automatically from stored lists. If a device's *potential* capacity prohibited all calls from it, using smartphones to call other cellphones would be illegal even under Facebook's reading.

Although typical smartphone users will be unaffected by a proper reading of the ATDS definition, robocallers who use smartphones, or any other digital technology, to send automated calls or texts to cellphones en masse are properly subject to the TCPA's ban on such calls. *See Allan*, 968 F.3d at 579. Today, "with a few select applications," smartphones can be given the capacity "to make spoofed robocalls." *Legislation to Stop the Onslaught of Annoying Robocalls: Hearing Before the Subcomm. on Commc'ns & Tech. of the House Comm. on Energy & Commerce*, Opening Statement of Rep. Pallone 1 (April 30, 2019).[15] That Congress did not anticipate in 1991 that powerful computers would be integrated with cellphones and supplied with software that would enable them to function as autodialers is no reason to limit the TCPA's application to such equipment. The application of a statute's language to circumstances Congress did not envision "simply demonstrates the breadth of a legislative command." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1749 (2020) (internal quotation marks omitted). When smartphones are actually used

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[15] https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/2019.4.30.PALLONE.%20Robocalls%20Hearing.CAT_.pdf

as the functional equivalent of autodialers, the Court should not shrink from reading the TCPA to regulate such uses consistently with its text, structure, and purposes.

This Court should not open the floodgates to autodialed calls and texts to cellphones based on the speculative fear of a trickle of lawsuits against ordinary smartphone users that would quickly be halted if it ever appeared. The rush of unwanted calls and texts that would follow such a ruling, unlike the imaginary prospect of liability for cellphone users, is a certainty. As *Barr* observes, incentives to make robocalls have in no way dwindled since the TCPA's passage. 140 S. Ct. at 2348. If the Court holds that the TCPA permits automatically dialed calls and texts to stored numbers from equipment that lacks obsolescent number-generating capacity, the tens of millions of calls foreseen in *Barr* will inevitably follow. *Id.* at 2356. That result is wholly incompatible with the principle that courts should ensure that a statute's "manifest purpose is furthered, not hindered." Scalia & Garner 63.

CONCLUSION

Facebook's attempt to limit the TCPA's application to autodialers that use number generators misreads the statute's words and all other indicia of Congress's intent. To further, not hinder, the TCPA's manifest purpose, the Court should hold it applicable to systems that automatically dial stored numbers and affirm the judgment of the court of appeals.

Respectfully submitted,

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October 2020

APPENDIX

1. Telephone Consumer Protection Act, Pub. L. No. 102-243, § 2, 105 Stat. 2394-95 (1991), 47 U.S.C. § 227 note (Congressional findings)

SEC. 2. FINDINGS.

The Congress finds that:

(1) The use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques.

(2) Over 30,000 businesses actively telemarket goods and services to business and residential customers.

(3) More than 300,000 solicitors call more than 18,000,000 Americans every day.

(4) Total United States sales generated through telemarketing amounted to $435,000,000,000 in 1990, a more than four-fold increase since 1984.

(5) Unrestricted telemarketing, however, can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety.

(6) Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.

(7) Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices.

(8) The Constitution does not prohibit restrictions on commercial telemarketing solicitations.

(9) Individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.

(10) Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.

(11) Technologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer.

(12) Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.

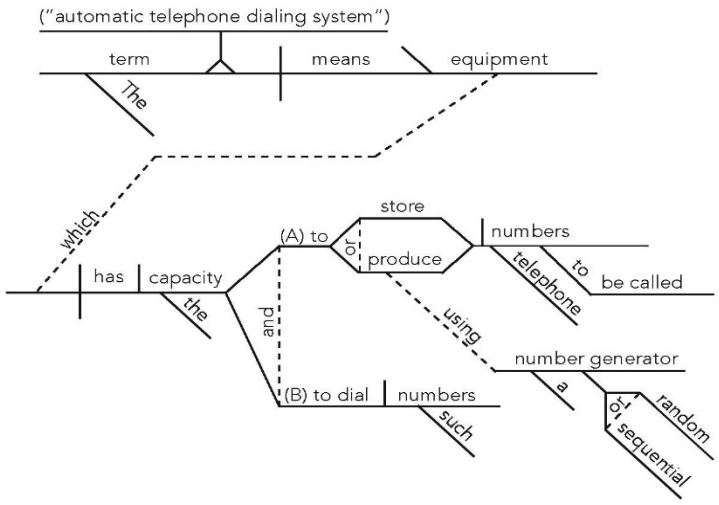
(13) While the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution.

(14) Businesses also have complained to the Congress and the Federal Communications Commission that automated or prerecorded telephone calls are a nuisance, are an invasion of privacy, and interfere with interstate commerce.

(15) The Federal Communications Commission should consider adopting reasonable restrictions on automated or prerecorded calls to businesses as well as to the home, consistent with the constitutional protections of free speech.

2. Sentence diagrams

Duguid:



Facebook: