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 NORTH CAROLINA, INDIANA, AND 35 OTHER STATES AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI* STATES[1]

The States of North Carolina, Indiana, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, Washington, and Wisconsin, and the District of Columbia, respectfully submit this brief as *amici curiae* in support of respondent Noah Duguid.

As this Court recognized last Term, the States "field a constant barrage of complaints" about robocalls. *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2343 (2020) (plurality opinion). This case is about a telephone technology that generates this barrage of complaints to States across the country: the automatic telephone dialing system, also known as an autodialer. An autodialer calls telephone numbers at a rapid clip, bombarding consumers with live or prerecorded messages.

Unsurprisingly, autodialers often find themselves at the center of telemarketing scams. This is true now more than ever, with the COVID-19 pandemic unleashing a torrent of telephone fraud. *See* Sarah

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[1] No counsel for any party authored this brief, in whole or in part, and no person or entity other than *amici* contributed monetarily to its preparation.

O'Brien, *Robocalls Are Spiking as Fraudsters Prey on Covid-19 Fears*, CNBC (May 19, 2020), https://cnb.cx/2RJjydi. In a shameless effort to profit off a public-health crisis, telemarketing schemes have falsely promised anxious consumers everything from free testing, to financial help, to miracle cures. Fed. Commc'ns Comm'n, *COVID-19 Robocall Scams* (July 17, 2020), https://bit.ly/2ZVbDhG.

States are on the front lines in the fight to prevent these and other abuses of telephone technology. Indeed, States frequently invoke their authority under the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. § 227, as well as overlapping state laws, to sue robocallers who misuse autodialers. *See* Fed. Trade Comm'n, *Call It Quits: Robocall Crackdown 2019* (June 2019), http://bit.ly/2wxX0F9 (summarizing recent federal and state enforcement actions). Invoking a federal law allows States to collaborate with other States and the federal government to bring joint TCPA enforcement actions in federal court. The TCPA therefore gives States a way to pool their resources against particularly abusive robocallers. In some circumstances, that type of collaboration can be more efficient and effective than individual States proceeding separately against robocallers under separate state laws.

While States use the TCPA as a critical tool to protect consumers from illegal and fraudulent calls, Facebook threatens to undermine that effort. The TCPA generally prohibits the use of "any automatic telephone dialing system or an artificial or

prerecorded voice" to make a call to numbers assigned to a cellular telephone service. 47 U.S.C. § 227(b)(1)(A). An automatic telephone dialing system, in turn, is defined as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." *Id.* § 227(a)(1).

Under petitioner's reading of the TCPA's autodialer definition, however, the statute would cover only a narrow subset of autodialers—those that use a random or sequential number generator. This cramped interpretation would hamper State efforts to enforce the TCPA and to protect consumers from illegal calls. It would also allow robocallers to easily evade the statute's prohibitions. The better reading of the TCPA recognizes that an automatic telephone dialing system can include any device with the capacity to store and dial numbers automatically, regardless of whether it uses a random or sequential number generator.

The States speak from experience. Congress enacted the TCPA in part at the behest of the States, who feared that their own telephone privacy laws might prove inadequate to fully address interstate telephone fraud and abuse. S. Rep. No. 102-178, at 3 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970. Every state statute on the books when Congress passed the TCPA in 1991 defined the term automatic telephone dialing system in a way that would have included a device—like petitioner's—with the

capacity to store and dial numbers, even if the device did not use a random or sequential number generator. And Congress explicitly enacted the TCPA to reinforce these preexisting state autodialer bans. *Amici* States therefore seek to vindicate the original understanding of the TCPA so that they can continue to protect consumers from the harms caused by illegal telephone calls, including those placed using autodialer devices of all kinds.

In addition, because the TCPA expressly disclaims federal preemption of state telephone privacy laws, 47 U.S.C. § 227(f)(1), at least forty-one States and the District of Columbia currently have enforceable prohibitions or restrictions on the use of autodialer devices.[2] As a result, the *Amici* States also have a

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[2] *See, e.g.*, Ala. Code §§ 8-19A-3, -15; Ariz. Rev. Stat. Ann. § 44-1278(B)(5); Ark. Code Ann. § 5-63-204(a)(1); Cal. Pub. Util. Code §§ 2871-2876; Colo. Rev. Stat. Ann. § 18-9-311(1); Conn. Gen. Stat. § 42-288a(h); Del. Code Ann. tit. 15, § 8045A; D.C. Code § 34-1701; Fla. Stat. § 501.059; Ga. Code Ann. § 46-5-23; Idaho Code Ann. § 48-1003C; 815 Ill. Comp. Stat. §§ 305/1 to /30; Ind. Code §§ 24-5-14-1 to -13; Kan. Stat. Ann. § 50-670; Ky. Rev. Stat. Ann. §§ 367.461 to .469; La. Rev. Stat. Ann. §§ 45:810 to :817; Me. Rev. Stat. Ann. tit. 10, § 1498; Md. Code Ann., Pub. Util. § 8-204; Mass. Gen. Laws ch. 159, §§ 19B-19D; Mich. Comp. Laws §§ 445.111(g), 484.125; Minn. Stat. §§ 325E.26 to .31; Miss. Code Ann. §§ 77-3-451 to -459; Mont. Code Ann. §§ 30-14-1601 to -1606; Neb. Rev. Stat. §§ 86-236 to -257; Nev. Rev. Stat. §§ 597.812 to .818; N.H. Rev. Stat. Ann. §§ 359-E:1 to :6; N.J. Stat. Ann. §§ 48:17-27 to -31; N.M. Stat. Ann. § 57-12-22; N.Y. Gen. Bus. Law § 399-p; N.C. Gen. Stat. § 75-104; N.D. Cent. Code

strong interest in ensuring that this Court preserves their ability—under state law, as well as federal law—to protect their citizens from the harms caused by automatic telephone dialing systems. They therefore urge this Court to affirm the judgment of the Ninth Circuit.

SUMMARY OF THE ARGUMENT

Amici States acknowledge that the TCPA's definition of an automatic telephone dialing system is susceptible to multiple, plausible interpretations. As the thorough and thoughtful court of appeals decisions on this issue show, the autodialer definition is hardly a model of clarity.

Amici States respectfully submit, however, that respondent has the better reading of the TCPA based on the statute's plain text. Importantly, respondent's interpretation is the only reading of the autodialer definition that is consistent with the ordinary meaning of the definition's two key verbs: "store" and "produce." Moreover, this interpretation avoids rendering another portion of the TCPA superfluous.

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§§ 51-28-02, -04; Okla. Stat. tit. 15, § 755.1; Or. Rev. Stat. §§ 646A.370 to .376; 73 Pa. Stat. Ann. §§ 2241-2249; R.I. Gen. Laws § 5-61-3.4; S.D. Codified Laws §§ 37-30-23 to -29; Tenn. Code Ann. §§ 47-18-1501 to -1527; Tex. Util. Code §§ 55.121 to .138; Utah Code Ann. §§ 13-25a-101 to -111; Vt. Stat. Ann. tit. 9, § 2511; Va. Code Ann. §§ 59.1-518.1 to .4; Wash. Rev. Code § 80.36.400.

The original meaning of the TCPA when the statute was passed in 1991 also supports respondent's position. Congress enacted the TCPA in part out of concern that state consumer-protection laws might prove ineffective to fully address interstate telephone fraud and abuse. Every state statute that defined the term automatic telephone dialing system in 1991 understood that term to reach devices with the capacity to store and dial numbers from a predetermined list, regardless of whether a random or sequential number generator was used. Thus, it would have made little sense for Congress to intentionally depart from these state laws by adopting a *narrower* definition of an autodialer device in the TCPA. After all, it was Congress's explicit aim to supplement—not to shrink—preexisting state laws.

Moreover, Facebook's interpretation of the TCPA would lead to negative consequences. Narrowing the autodialer definition would harm the ability of States to protect consumers by collaborating with other States and the federal government to sue TCPA violators in federal court.

For these reasons, the Court should affirm the judgment of the Ninth Circuit.

ARGUMENT

I. Under The TCPA, An Automatic Telephone Dialing System Includes Devices That Dial Telephone Numbers From A Stored List.

A. The plain text supports respondent's reading of the statute.

Amici States acknowledge that the TCPA's definition of an automatic telephone dialing system is susceptible to multiple, plausible interpretations, but respectfully submit that respondent advances the most persuasive reading of the statute's plain text.

The TCPA defines an automatic telephone dialing system as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). The question here is: what word or words does the participial phrase "using a random or sequential number generator" modify?

Respondent contends that the participial phrase modifies only the verb "produce." Under that reading, the TCPA would cover devices with the capacity to (1) store telephone numbers to be called and dial them; or (2) produce telephone numbers to be called, using a random or sequential number generator, and dial them. In other words, a device would not need to use a random or sequential number generator to qualify as an autodialer. For example, a device that stores and dials telephone numbers from a targeted

list—say, a list of older individuals, who are most likely to fall prey to a telemarketing scam—would fall within the definition.[3]

By contrast, petitioner argues that the participial phrase modifies both the verb "produce" and the verb "store." Under that reading, the TCPA would cover devices with the capacity to (1) store telephone numbers to be called, using a random or sequential number generator, and dial them; or (2) produce telephone numbers to be called, using a random or sequential number generator, and dial them. In other words, only devices that use a random or sequential number generator would qualify as an autodialer. For example, a device that stores and dials telephone numbers from a targeted list—say, a list of financially distressed consumers whose personal financial information might be especially susceptible to being stolen—would fall outside the definition.[4] Or consider a more ambitious device that stores and then dials at random numbers from a list of every assigned U.S. cell

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[3] *See, e.g.*, Fed. Trade Comm'n, *Report to Congress: Protecting Older Consumers* 6 (Oct. 18, 2019), https://bit.ly/3ne7aRh ("Phone scams [are] most lucrative against older consumers," who "reported that a phone call was the initial contact method [for fraud] in numbers four times higher than all other contact methods combined.").

[4] *See, e.g.*, *FTC v. First Choice Horizon LLC*, No. 6:19-cv-1028 (M.D. Fla. 2019) (lawsuit involving a scam of this kind).

phone number currently in use. That would fall outside petitioner's definition too.

Lower court judges seeking to resolve this interpretive puzzle have managed to agree only that the text defies ready interpretation. As Judge Barrett put it, "[t]he wording of the provision . . . is enough to make a grammarian throw down her pen." *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 460 (7th Cir. 2020). Judge Sutton has similarly lamented that "[c]larity . . . does not leap off this page of the U.S. Code." *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1306 (11th Cir. 2020) (Sutton, J., sitting by designation). Judge Ikuta has confessed to "struggling with the statutory language," because "it is not susceptible to a straightforward interpretation based on the plain language alone." *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1051 (9th Cir. 2018). And Judge Cabranes has also admitted that "this statutory language leaves much to interpretation." *Duran v. La Boom Disco, Inc.*, 955 F.3d 279, 283 (2d Cir. 2020).

All told, lower court judges faithfully applying textualist methods of interpretation "have tried to fashion a plain text reading from these words," but have unanimously agreed that each possible interpretation "has its problems." *Allan v. Pennsylvania Higher Educ. Assistance Agency*, 968 F.3d 567, 572 (6th Cir. 2020).

That said, respondent's reading of the autodialer definition is the best interpretation of the statute's plain text. Recall that respondent interprets the participial phrase "using a random or sequential

number generator" to modify only the verb "produce," not the verb "store." That interpretation makes sense as a matter of ordinary English. A number generator, after all, *produces* numbers.

By contrast, under petitioner's reading, the participial phrase would also modify the verb "store." But a number *generator* cannot be used to *store* telephone numbers. *Marks*, 904 F.3d at 1050, 1052 & n.8; *Duran*, 955 F.3d at 284; *Allan*, 968 F.3d at 572. Indeed, consulting their plain meanings, a "generator" does not "store" in any sense of the word. *See Oxford English Dictionary* 437 (2d ed. 1989) (defining "generator" as "[s]omething which generates *or produces*" (emphasis added)).

Some courts have reasoned that a number generator can in fact store telephone numbers because, in the process of generating a random number, the device also stores that number—however briefly. *See Glasser*, 948 F.3d at 1307. But even if a generator could store telephone numbers in some metaphysical sense, that reading in turn creates a superfluity problem. Why include the verb "store" if any device that produces numbers stores those numbers too? Indeed, "[i]t would be odd for Congress to include both verbs if, together, they merely created redundancy in the statute." *Duran*, 955 F.3d at 284. This Court ordinarily interprets statutes to avoid creating redundancies of this kind. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001).

To be sure, "[r]edundancy is not a silver bullet." *Rimini Street, Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873,

881 (2019). But the redundancy caused by petitioner's interpretation is far greater than a single superfluous word. Petitioner's interpretation would render superfluous not only the verb "store," but also an entire portion of the TCPA's automated-call restriction—the statute's exception for calls "made with the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A). "[C]onsented-to calls by their nature are calls made to known persons, i.e., persons whose numbers are stored on a list and were *not* randomly generated." *Allan*, 968 F.3d at 575 (emphasis added). As a result, if the use of a random or sequential number generator were required for a device to qualify as an autodialer, the consent exception would have no meaningful application. *Id.*; *accord Marks*, 904 F.3d at 1051 (Ikuta, J.) (the existence of a consent exception "indicates that equipment that made automatic calls from lists of recipients was also covered by the TCPA"). And when, as here, "an interpretation would render superfluous another part of the same statutory scheme," "the canon against surplusage is strongest." *Marx v. Gen. Rev. Corp.*, 568 U.S. 371, 386 (2013).

Petitioner argues that even if the consent exception has no application to calls made using an autodialer, the exception would still apply to calls made using a prerecorded or artificial voice. Pet. Br. 40. But "the language of the statute does not make that distinction." *Duran*, 955 F.3d at 285 n.20. The TCPA says that the consent exception applies to *both* calls made using an automatic telephone dialing

system *and* calls made using an artificial or prerecorded voice. 47 U.S.C. § 227(b)(1)(A). Under petitioner's reading of the statute, however, the consent exception would be irrelevant to an entire category of calls that the TCPA otherwise prohibits.

In sum, although the TCPA's autodialer definition may not be a model of draftsmanship, *Amici* States respectfully submit that respondent has the better reading of the statute's text.

B. When Congress passed the TCPA in 1991, the ordinary meaning of an automatic telephone dialing system did not depend on the use of a random or sequential number generator.

Respondent's position also finds support in how the term "automatic telephone dialing system" was understood when Congress passed the TCPA. State consumer-protection statutes in place at the time show that the ordinary meaning of an automatic telephone dialing system did not require the use of a random or sequential number generator.

It is "a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary meaning at the time Congress enacted the statute." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (alterations and quotation marks omitted). The Court therefore "orient[s] [itself] to the time of the statue's adoption" to "examin[e] the key statutory terms." *Bostock v.*

Clayton Cty., 140 S. Ct. 1731, 1738-39 (2020); *see also id.* at 1767 (Alito, J., dissenting).

When Congress passed the TCPA in 1991, it wrote with the benefit of preexisting state efforts to curb telemarketing abuses. Indeed, by that time, more than half the States had already recognized the threat posed by automated calls and had enacted state laws to regulate them. S. Rep. No. 102-178, at 3, *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970. And Congress counted more than "43,000 bills touching on the practice of direct marketing pending before state legislatures." H.R. Rep. 102-317, at 10 (1991).

But Congress worried that a federal law was needed because state laws might prove less than fully effective at redressing interstate conduct. Given potential practical difficulties with interstate enforcement of state law, a committee report concluded that "federal legislation is needed to . . . relieve states of a portion of their regulatory burden." *Id.* The States even asked Congress for supplemental federal legislation. S. Rep. No. 102-178, at 3, *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970.

Congress delivered. By enacting the TCPA, Congress provided a uniform, federal ban on automated calls. 47 U.S.C. § 227(b)(1)(A). In the process, Congress also empowered the States, on their residents' behalf, to enforce the federal ban by suing illegal robocallers. *Id.* § 227(g)(1). And not only did Congress decline to preempt any state telephone privacy protections, it expressly *saved* from preemption any overlapping or more-stringent state

protections. *Id.* § 227(f)(1); *see Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1054 (7th Cir. 2013).

As this history shows, Congress designed the TCPA with state enforcement in mind. It is therefore all the more appropriate to look at the then-existing state laws that Congress aimed to supplement as evidence of the statute's ordinary meaning. *See New Prime*, 139 S. Ct. at 540 (relying in part on contemporaneous state statutes for evidence of a federal law's ordinary meaning).

Here is a survey of the 1991 state-law landscape. At least thirty-two States and the District of Columbia imposed some kind of prohibition on the improper use of autodialers. Nine of those States did not define the term.[5] The remaining States used one of four different formulations:

- At least ten States defined an autodialer as a device that (1) stored numbers to be called; or

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[5] Ariz. Rev. Stat. Ann. § 13-2918(A) (1986); Ark. Code Ann. § 5-63-204(a)(1) (1981); Colo. Rev. Stat. Ann. § 18-9-311(1) (1988); Conn. Gen. Stat. § 52-570c(a) (1990); Fla. Stat. § 501.059(7)(a) (1991); Nev. Rev. Stat. § 597.814 (1989); N.M. Stat. Ann. § 57-12-22(A) (1989); Wyo. Stat. Ann. § 6-6-104(a) (1987); *cf.* Mich. Comp. Laws § 484.125(4) (1980) (use of "automated dialing" is prima facie evidence of intent to violate prohibition on commercial advertising by prerecorded message).

(2) produced numbers to be called, using a random number generator.[6]

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[6] Cal. Pub. Util. Code § 2871 (1980) ("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"); Kan. Stat. Ann. § 50-670(a)(5) (1991) ("any user terminal equipment which . . . [w]hen connected to a telephone line can dial, with or without manual assistance, telephone numbers which have been stored or programmed in the device or are produced or selected by a random or sequential number generator"); Mass. Gen. Laws ch. 159, § 19B (1986) ("any automatic terminal equipment which is capable of storing numbers to be called or producing numbers to be called, using a random or sequential number generator"); Miss. Code Ann. § 77-3-451 (1989) ("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"); N.Y. Gen. Bus. Law § 399-p (1988) ("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"); N.C. Gen. Stat. § 75-30(c) (1979) ("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"); Okla. Stat. tit. 15, § 752(10) (1991) ("automatic equipment that . . . stores telephone numbers to be called, or has a random or sequential number generator capable of producing numbers to be called"); 52 Pa. Code § 63.1 (1988) ("[a]utomatic equipment used for solicitation which has a storage capability of multiple numbers to be called or a random or sequential number generator that produces numbers to be called . . . ."); R.I. Gen. Laws § 11-35-26(b) (1987) ("any automatic terminal equipment

- At least nine States did not use either the verb "store" or the verb "produce" to define an autodialer. Instead, these States used verbs like "select" and "dial," without any reference to a random or sequential number generator.[7]
- At least one State and the District of Columbia defined an autodialer only by looking to the device's ability to "convey" or "deliver" a prerecorded message, again without any reference to a random or sequential number generator.[8]
- And finally, at least three States defined an autodialer as a device that could store or produce numbers that were then called randomly or sequentially. Under these state

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which is capable of storing numbers to be called or producing numbers to be called, using a random or sequential number generator"); 16 Tex. Admin. Code § 23.32(a) (1986) ("automatic equipment . . . that is capable of storing numbers to be called, or has a random or sequential number generator capable of producing numbers to be called").

[7] Ga. Code Ann. § 46-5-23(a)(1) (1990); Ind. Code § 24-5-14-1 (1988); Iowa Code § 476.57(1) (1991); La. Rev. Stat. Ann. § 45:810(B)(1) (1991); Me. Rev. Stat. Ann. tit. 10, § 1498(1)(A) (1990); Minn. Stat. § 325E.26(2) (1987); Or. Rev. Stat. § 759.290(3)(a) (1989); Tenn. Code Ann. § 47-18-1501(b)(1) (1990); Wash. Rev. Code § 80.36.400(1)(a) (1987).

[8] D.C. Code § 34-1701(a)(1) (1991); S.C. Code Ann. § 16-17-446(A) (1991).

> laws, "randomly" and "sequentially" were adverbs used to describe how a call was placed, rather than adjectives used to describe a "number generator."[9] A number generator was not mentioned in these state laws at all.

Although these definitions varied substantially, they shared a common, critical feature: when Congress passed the TCPA, *every* state law that defined the term "autodialer" included a device with the capacity to store numbers to be called automatically, regardless of whether the device used a random or sequential number generator.

Pre-1991 state statutes therefore show that the ordinary understanding of an automatic telephone dialing system at the time Congress enacted the TCPA did not depend on the device's use of a random or sequential number generator. And as explained below, Congress explicitly acted against the backdrop of these state laws by passing a federal standard to supplement, not displace, preexisting state standards. *See* pp 18-19, *infra.* This history confirms that

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[9] 815 Ill. Comp. Stat. § 305/5(a) (1991) ("any telephone dialing or accessing device, machine, computer or system capable of storing telephone numbers which is programmed to sequentially or randomly access the stored telephone numbers"); N.H. Rev. Stat. Ann. § 359-E:1(I) (1989) ("any automatic terminal equipment which stores or produces numbers to be called randomly or sequentially"); S.D. Codified Laws § 37-30-23 (1991) (same).

respondent's interpretation of the TCPA is consistent with the statute's original meaning.

Supporting petitioner, the United States acknowledges some of this history, but draws precisely the wrong conclusion from it. According to the United States, Congress could have adopted any of the state-law autodialer definitions in place at the time, but chose not to. As a result, the United States contends, the TCPA's definition of an automatic telephone dialing system must necessarily be narrower than the definitions used in predecessor state laws. U.S. Br. 27-28. The United States therefore reads the statute to cover only devices using a random or sequential number generator. U.S. Br. 27.

It is true that the TCPA's autodialer definition differs from any of the contemporaneous state-law definitions. U.S. Br. 27-28. But as shown above, the state laws themselves were scattered, offering various formulations for what it meant for a device to qualify as an autodialer. So, it should come as little surprise that Congress chose not to adopt wholesale any specific state-law definition. There simply was no prevailing state-law model for Congress to replicate.

Instead, Congress drafted language to accomplish the same result as these disparate state laws. As explained above, the best reading of the TCPA's text is that an autodialer is a device with the capacity to (1) store telephone numbers to be called; or (2) produce telephone numbers to be called, using a random or sequential number generator. *See* pp 7-12, *supra*.

That was the most common formulation of the term among pre-TCPA state laws. *See* pp 15-16 n.6, *supra*. The prevalence of that definition among the state laws, which Congress sought to supplement, counsels in favor of reading the TCPA to be consistent with those preexisting laws.

The statute's enactment history supports this view as well. Congress passed the TCPA amid requests from the States for a federal automated-call restriction that would strengthen their own enforcement efforts. And the explicit aim of the legislation was to supplement—not shrink—the protections against autodialers that so many States already had in place. S. Rep. No. 102-178, at 3, *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970.

No state law on the books in 1991 required an autodialer to use a random or sequential number generator. It is therefore implausible that Congress—solicitous as it was of the compelling interests States have in protecting citizens from telephone abuse and fraud—would have adopted an autodialer definition so much more circumscribed than the definitions state laws were using at the time.

In sum, state laws prior to the TCPA's passage show that the ordinary meaning of an automatic telephone dialing system in 1991 did not require the use of a random or sequential number generator. Thus, respondent's reading of the autodialer definition is the only interpretation that is consistent with how that term was understood when Congress enacted the TCPA.

II. Facebook's Parade-of-Horribles Argument Is Unpersuasive.

Facebook resists respondent's textualist reading of the TCPA by pointing to consequences. But the consequences of respondent's interpretation of the TCPA would not be "catastrophic," as Facebook claims. *See* Pet. Br. 45.

Facebook argues that imposing TCPA liability for the kind of "sensible, but inherently fallible, business practices" at issue here would go beyond the scope of Congress's concerns when it passed the TCPA. Pet. Br. 45. But repeatedly sending "security alerts" to phone numbers not connected with a Facebook account is hardly "sensible"—indeed, it is abusive. It is well-established that individuals have an expectation of privacy in their cell phones. *See Riley v. California*, 573 U.S. 373, 386 (2014). Congress designed the TCPA to safeguard privacy interests of this kind. *See, e.g.*, *Olney v. Progressive Cas. Ins. Co.*, 993 F. Supp. 2d 1220, 1227 (S.D. Cal. 2014) (denying motion to dismiss TCPA action where defendants repeatedly called wrong number); *Harris v. World Fin. Network Nat. Bank*, 867 F. Supp. 2d 888, 895-96 (E.D. Mich. 2012) (holding that plaintiff was entitled to treble damages for calls defendants made after plaintiff informed them that they were calling the wrong number); *Johnson v. Navient Sols., Inc.*, 315 F.R.D. 501, 502 (S.D. Ind. 2016) (holding that "because the Act prohibits automated calls to any cell phone number, once the user of that phone notifies

the originating entity that there is a wrong number, those calls must stop").

At bottom, Facebook's consequentialist argument is not really about protecting college students and their communication habits, *see* Pet. Br. 45, but about "updating" the TCPA through judicial decree. Perhaps the TCPA is indeed outdated in many ways. When Congress passed it nearly thirty years ago, calls to cell numbers cost the recipient money, which is why cold calls to cell numbers, but not landlines, are prohibited. 47 U.S.C. § 227(b)(1). Now, of course, most cell phone plans offer unlimited calls and texts, meaning that cost structures for cell phones more closely resemble those for landlines. In addition, smart phones did not exist in 1991, and only a highly capitalized telemarketer would have possessed a high-tech device that could store and dial telephone numbers. Nowadays, a majority of middle-school students have access to such technology in their pocket.[10] Yet, as the Court reinforced just last Term, the Court applies the text of statutes as written and does not update them to fit the times—it leaves that role to Congress. *See Bostock*, 140 S. Ct. at 1738 ("If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk

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[10] *See, e.g.*, Anya Kamenetz, *It's a Smartphone Life: More Than Half of U.S. Children Now Have One*, NPR (Oct. 31, 2019), https://n.pr/3o9apKd.

amending statutes outside the legislative process reserved for the people's representatives.").

Even as the options grow for ordinary people to contact others without using telephone numbers, robocalls to cell numbers persist. Robocallers rely on cheap phone-number databases and cheap calling technology, even with a low hit rate, to make a profit. The TCPA therefore remains relevant. The Court should reject Facebook's attempt to update it into desuetude.

III. Facebook's Interpretation Of The TCPA Would Also Hinder State Enforcement Efforts.

Facebook's interpretation of the TCPA would also lead to negative consequences of its own. Specifically, Facebook's interpretation of the TCPA should be rejected because it would hinder state enforcement efforts.

States often use the TCPA to sue violators in federal court, asserting state-law claims using supplemental jurisdiction. For instance, Virginia recently settled a suit alleging both TCPA and state-law claims against a group of violators that "robocalled hundreds of thousands of consumers nationwide to pitch online car sale services, disregarding the National Do Not Call Registry, and deceiving consumers about the online car sale services they offer and their 'money back guarantee.'" *Virginia ex rel. Herring v. Skyline Metrics, LLC*, No. 7:19-cv-463, Dkt. 1 (W.D. Va. 2019). Moreover, the

TCPA's federal-law cause of action is especially critical for States that—unlike, in this example, Virginia—lack their own restrictions or prohibitions on autodialers under state law.

In addition, the TCPA allows multiple States to join forces in a single lawsuit against particularly abusive robocallers in a court that has undoubted jurisdiction over the violator, its records, and its financial accounts and other assets. In just one recent example, eight States brought suit in a Texas federal court against robocallers who "initiate millions of outbound telephone calls that deliver artificial or prerecorded voice messages . . . to residential and/or cellular telephone numbers." *Arkansas v. Rising Eagle Capital Grp. LLC*, No. 4:20-cv-2021, Dkt. 42 (S.D. Tex. 2020). In another example, four States, joined by the federal government, successfully sued a company that "committed more than 65 million violations of telemarketing statutes and regulations." *United States v. Dish Network LLC*, 954 F.3d 970, 973 (7th Cir. 2020).

Facebook's interpretation of the TCPA would undermine these types of multi-state and state-federal collaborations. By narrowing the TCPA's definition of an autodialer, Facebook would limit the universe of cases where States can pool their resources and bring enforcement actions—across multiple States or alongside the federal

government—to enforce the TCPA's protections against the most abusive robocall practices.

Indeed, without a federal-law violation to prosecute, States would be left to file separate, piecemeal lawsuits across a number of different state courts. To be sure, state enforcement actions of this kind can still be effective, but a federal claim under the TCPA is a particularly powerful tool for States seeking to enforce the law against the most abusive robocallers.

This Court should reject Facebook's interpretation of the TCPA and preserve the full ability of States to engage in multi-state and state-federal collaborations that protect consumers from illegal robocalls.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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