No. 19-511

In the Supreme Court of the United States

FACEBOOK, INC., PETITIONER

v.

NOAH DUGUID, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 19-511

FACEBOOK, INC., PETITIONER

v.

NOAH DUGUID, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The statutory provision at issue in this case defines an "automatic telephone dialing system" as equipment with the capacity "to store or produce telephone numbers to be called, using a random or sequential number generator." 47 U.S.C. 227(a)(1)(A). That definition is best read as limited to devices that have the capacity to use a random or sequential number generator either to store or to produce telephone numbers for dialing. That interpretation is more consistent with basic rules of grammar, and with the history and purpose of the Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 102-243, 105 Stat. 2394, than the broader reading adopted by the court below and endorsed by Duguid.

In advocating a substantially broader construction of Section 227(a)(1)(A), Duguid disregards usual rules of syntax and grammar, dismisses reasonable understandings of Congress's objectives, and misconceives the provision's limited role in the larger statutory scheme. If adopted, his construction of Section 227(a)(1)(A) would

cast doubt on the legality of ubiquitous private uses of ordinary smartphones. For those reasons and others, this Court should reject Duguid's construction of Section 227(a)(1)(A) and reverse the court of appeals' decision.

A. Section 227(a)(1)(A) Is Most Naturally Read As Limited To Devices With The Capacity To Use A Random Or Sequential Number Generator

For three reasons, Section 227(a)(1)(A)'s text is best understood as encompassing only devices that are capable of "using a random or sequential number generator" either to "store" or to "produce" telephone numbers. First, where, as here, "there is a straightforward, parallel construction that involves all nouns or verbs in a series, a * * * postpositive modifier normally applies to the entire series." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012). Second, a comma used to offset such a postpositive modifier provides further "evidence that the qualifier is supposed to apply to all the antecedents." 2A Norman J. Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction* § 47:33, at 499-500 (7th ed. 2014). Third, where a direct object (here, "telephone numbers to be called") that is shared by both verbs is interposed between the verbs and the modifying phrase, construing the modifying phrase to apply to one verb but not the other would require "a significant judicial rewrite," *Gadelhak* v. *AT&T Servs., Inc.*, 950 F.3d 458, 466 (7th Cir. 2020), petition for cert. pending, No. 20-209 (filed Aug. 17, 2020). See U.S. Br. 15-17.

1. Duguid principally contends that the meaning of Section 227(a)(1) should be determined "not by the rules of syntax but by the sense of the passage." Br. 11 (quoting Bryan A. Garner, *Garner's Modern English Usage* 1031 (4th ed. 2016)); see Br. 11-15. Invoking a concept

known as "'synesis,'" he argues that statutory interpretation "turns not on grammar alone, but on an understanding of how 'the meaning of each word inform[s] the others.'" Duguid Br. 11 & n.3 (citations omitted; brackets in original). Duguid suggests (Br. 11-15) that the "sense" of Section 227(a)(1) is that "using a random or sequential number generator" modifies "produce," but not "store."

Whatever the soundness of "synesis" as an interpretive tool, it appears to have little to do with this case. Duguid's own authority explains that synesis principally refers to the idea that, "[i]n some contexts, meaning—as opposed to the strict requirements of grammar or syntax—governs SUBJECT-VERB AGREEMENT." Garner 886 (defining "synesis"); see *id.* at 1031. The "classic example" of this "antigrammatical" concept is "the phrase *a number of*," which is regularly followed by a plural verb"—*e.g.*, "a number of people were there"—"even though technically the singular noun *number* is the subject." *Id.* at 886.

This case, however, does not turn on any question of subject-verb agreement or the sense of anything. It turns on the precise meaning of a particular statutory phrase. Absent absurdity or "scrivener's error," *United States Nat'l Bank* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 462 (1993), a court in construing a statute "must presume that a legislature says in a statute what it means and means in a statute what it says." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). And because legislators "are presumed to be grammatical in their compositions," Scalia & Garner 140, "matters of syntax are critical" in determining what a statute says, *Babb* v. *Wilkie*, 140 S. Ct. 1168, 1173 (2020).

2. Duguid contends that, under the "correct grammatical reading" of Section 227(a)(1)(A), and the "most analogous canons of construction," the phrase "using a random or sequential number generator" modifies only "produce" and not "store." Br. 16, 19 (emphasis omitted). Duguid's arguments are unpersuasive.

Duguid invokes (Br. 20) the "distributive-phrasing canon." Also known as *reddendo singula singulis* ("referring each to each"), that canon applies "[w]here a sentence contains several antecedents and several consequents," such that the sentence is most naturally understood to pair each consequent with the matching antecedent. Singer & Singer § 47:26, at 448. Thus, the sentence "Men and women are eligible to become members of fraternities and sororities" is most naturally read to mean that men are eligible to join fraternities and women are eligible to join sororities, rather than "to suggest an unconventional commingling of sexes in the club membership," whereby persons of either sex could join either type of organization. Scalia & Garner 214.

"Fortunately, this sort of syntactic construction * * * has largely fallen into disuse." Scalia & Garner 215-216; see Singer & Singer § 47:26, at 451 (noting that "[c]areful statutory drafting could almost entirely eliminate the interpretative difficulties which require the rule of *reddendo singula singulis*"). And as Duguid recognizes, the rule does not apply here because Section 227(a)(1)(A) lacks the "one-to-one matching" that gives the canon its Latin name. Br. 20 (citation omitted). Although Duguid attempts to minimize that problem, the Court relied on precisely that distinction in declining to apply the canon in *Encino Motorcars, LLC* v. *Navarro*, 138 S. Ct. 1134, 1141 (2018). It should do the same here.

Duguid's invocation (Br. 20-21) of the last-antecedent rule is similarly unavailing. That rule provides that "a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Lockhart* v. *United States*, 136 S. Ct. 958, 962 (2016) (citation and emphasis omitted). Even where that rule applies, it "can assuredly be overcome by other indicia of meaning." *Id.* at 963 (citation omitted); see, *e.g.*, *Cyan, Inc.* v. *Beaver County Emps. Ret. Fund*, 138 S. Ct. 1061, 1076-1077 (2018); *Paroline* v. *United States*, 572 U.S. 434, 446-447 (2014); *United States* v. *Hayes*, 555 U.S. 415, 425-426 (2009). For at least three reasons, the last-antecedent rule does not support Duguid's reading of Section 227(a)(1)(A).

First, the last-antecedent rule does not apply to a modifier that appears "at the end of a single, integrated list." *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 344 n.4 (2005). A statute that bars a felon from "receiv[ing], possess[ing], or transport[ing] in commerce or affecting commerce * * * any firearm" does not prohibit purely intrastate receipt or possession. *United States* v. *Bass*, 404 U.S. 336, 337, 339 (1971) (citations omitted); see *id.* at 337-340. And a reference to "[a] corporation or partnership registered in Delaware" does not encompass a corporation registered in Maine. Scalia & Garner 148 (emphasis omitted).

Second, the rule does not apply when the modifier is set off by a comma. Inclusion of a comma at the end of a series before a modifier can "avoid [any] ambiguity" about whether the modifier is meant to apply to each term in the series or only to the one that immediately precedes it. *Bass*, 404 U.S. at 340 n.6; see Singer & Singer § 47:33, at 499-500. Although Duguid appears to accept that general understanding, he argues that the

comma merely "tells the reader to look farther back," but not "how far." Br. 22. That is incorrect. Use of a comma in these circumstances makes clear that the "modifying phrase * * * applies to *all* that preceded it," not "only to a part." Scalia & Garner 161 (emphasis added).

Finally, the last-antecedent rule cannot demonstrate that the adverbial phrase "using a random or sequential number generator" modifies "produce" but not "store," because "produce" is *not* the immediately preceding verb—"called" is. See 47 U.S.C. 227(a)(1)(A) ("to store or produce telephone numbers to be called, using a random or sequential number generator"); see also *Black's Law Dictionary* 1533 (10th ed. 2014). No one contends that a device that stores or produces telephone numbers must be capable of using a random or sequential number generator to *call* those numbers in order to qualify as an automatic telephone dialing system under the TCPA. Cf. Duguid Br. 22.

3. a. All of Duguid's other textual arguments ultimately rely on the assertion that "*[s]tore* denotes retention; *produce* denotes creation." Br. 8. From this premise, Duguid repeatedly declares that "using a * * * number generator" can sensibly describe only "a way of producing numbers to be called, not of storing them." Br. 12; see Br. 12-13, 19 (urging the court to ignore rules of syntax for that reason); Br. 20 (applying a modified distributive-phrasing canon on that basis); Br. 21 (applying a modified last-antecedent rule on that basis); *ibid.* (rejecting the series-qualifier canon on that basis); Br. 22 (ignoring the comma separating the modifier on that basis). That reasoning is misguided.

The 1991 Congress that enacted the TCPA very sensibly could have chosen to regulate the use of random

or sequential number generators to store telephone numbers. Patents issued before 1991 describe technologies with the capacity to generate random or sequential numbers either for immediate dialing, or for immediate storage and subsequent dialing. See U.S. Br. 19-20; PACE Amicus Br. 15-21. The latter approach can readily be described as using a random or sequential number generator to store telephone numbers to be called (at a later time).

Duguid suggests (Br. 27 n.11) that such devices do not use a random or sequential number generator to store numbers, but rather "use[] a file in a computer's memory." That is simply word play. Just as one can *use* a banking application to deposit money *into* a banking account, a telemarketer can *use* a number generator to store a telephone number *in* a file or other computer memory. See U.S. Patent No. 4,741,028, fig. 1, col. 4 (issued Apr. 26, 1988) (illustrating a "system for randomly generating telephone numbers" that "store[s]" the generated numbers for later dialing) (capitalization omitted).

In arguing that a number "generator" is inherently used to "produce" rather than to "store" numbers, Duguid observes (Br. 12 & nn.4-5) that the verb "produce" can describe the act of creating or generating something. But the purpose of using a random or sequential number generator in telemarketing or similar activities is not to *create* telephone numbers. The numbers are useful for this purpose only if they have already been assigned to actual telephones. Thus, for purposes of Section 227(a)(1)(A), the word "produce" should likely be read to mean "[t]o bring forward * * * as, to *produce* a witness in court." *Webster's New International Dictionary* 1974 (2d ed. 1942); see *Webster's*

Third International Dictionary 1810 (1961) (same). If the word "produce" is understood in that way, it has no greater inherent connection to a random or sequential number generator than does the word "store."

b. Duguid invokes (Br. 17-18) other "hypothetical definitions" with a grammatical structure similar to that of Section 227(a)(1)(A). But even if Duguid had accurately captured the most "natural reading" of each of those hypothetical definitions, that would be so only because "the mind rebels against reading the [definitions] literally, in line with the logical and canonical principles described" in our opening brief. *Advocate Health Care Network* v. *Stapleton*, 137 S. Ct. 1652, 1660 (2017). Verbal formulations may exist in which faithful application of ordinary canons of construction produces readings so substantively unnatural that they can appropriately be rejected. A court should reach that conclusion, however, only upon a showing of "contextual implausibility," *i.e.*, only when the "usual rules of interpreting text * * * will lead to a 'must be wrong' outcome." *Id.* at 1661. The government's interpretation of Section 227(a)(1)(A) produces no such anomaly.

The same insights explain why the most natural reading of Section 227(a)(1)(A) does not render any term within that provision superfluous. Cf. Duguid Br. 22-27. Congress's inclusion of devices that use number generators either to "store" *or* "produce" numbers to be called may reflect the fact that, in 1991, some devices used random or sequential number generators to produce numbers for immediate dialing, while others stored numbers to be dialed at a later time. See pp. 6-7, *supra*. Duguid's contention (Br. 24) that the latter category of devices "would still fall outside the statute" is based on his misguided assertion that such devices

"use" only a file (rather than the random or sequential number generator itself) to store the generated numbers. See p. 7, *supra*. And if "produce" is understood to mean "bring forward," rather than "create," pp. 7-8, *supra*, the lack of redundancy becomes clearer still. On that understanding, a random or sequential number generator can be used to store numbers but not to produce them if (for example) the number generator is used to compile a list from which a human operator later selects particular numbers to be dialed.

B. The TCPA's Predecessor State Laws Support The Most Natural Reading Of Section 227(a)(1)(A)

1. The contrast between Section 227(a)(1)(A) and the predecessor state laws on which the TCPA was based reinforces the government's reading. See U.S. Br. 25-29. Those laws make clear that, if Congress had intended to define "automatic telephone dialing system" to encompass devices that do not use a random or sequential number generator, it had several model definitions to choose from. Congress's decision not to adopt such "'obvious alternative[s]'" "indicates that Congress did not in fact want what [Duguid] claim[s]." *Advocate Health Care Network*, 137 S. Ct. at 1659 (quoting *Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 16 (2014)).

When the TCPA was enacted, at least 25 state telemarketing laws covered some categories of automated calls that did not involve the use of a random or sequential number generator. See U.S. Br. 26 n.6. Some States achieved that result by including random or sequential number generators within a larger catalogue of technological attributes whose presence would trigger the statute. See, *e.g.*, Okla. Stat. tit. 15, § 752.10 (1991) (regulating "automatic equipment that: a. stores tele-

phone numbers to be called, or has a random or sequential number generator capable of producing numbers to be called, and b. conveys a prerecorded or synthesized voice message to the number called without the use of a live operator"). Other States adopted definitions under which the manner of selection of called numbers was simply irrelevant. See, *e.g.*, Ind. Code § 24-5-14-1 (1988) (including any "device that: (1) selects and dials telephone numbers; and (2) working alone or in conjunction with other equipment, disseminates a prerecorded or synthesized voice message to the telephone number called"). Congress eschewed both approaches, instead adopting a definition that is most naturally read to require the use of random or sequential number generators for either storage or production of telephone numbers.

2. Duguid appears to be of two minds about the relevance of these state laws. On the one hand, he suggests (Br. 14) that the state definitions provide the "general meaning of an automatic dialing system" on which the Court should place significant weight. That assertion implies that the Court should demand a particularly clear indication that Congress did not seek to replicate those laws when it enacted Section 227(a)(1)(A)'s definition of "automatic telephone dialing system." Duguid also argues (Br. 15), however, that any differences in terminology between those state definitions and Section 227(a)(1)(A) "suggest[] no difference in meaning" because the predecessor laws are only "*state* statutes." *Ibid.* Both contentions are wrong.

Although Congress enacted the TCPA in an effort to supplement preexisting state laws, see TCPA § 2(7), 105 Stat. 2394; *Mims* v. *Arrow Fin. Servs., LLC*, 565 U.S. 368, 371 (2012), it did not simply replicate the States'

approach on the federal level. As our opening brief explains (Br. 25-26), most state-law restrictions applied only to automatic dialing systems that were capable of delivering a message using an artificial or prerecorded voice. Duguid acknowledges (Br. 14), and Congress well knew, that those state laws regulated "automatic dialing *and announcing* devices (ADADs)," S. Rep. No. 178, 102d Cong., 1st Sess. 2 (1991) (Senate Report) (emphasis added)—often by name. See, *e.g.*, Cal. Pub. Util. Code § 2871 (West 1980) (defining "automatic dialing-announcing device"); Ind. Code § 24-5-14-1 (1988) (same); N.Y. Gen. Bus. Law § 399-p (McKinney 1988) (same); Okla. Stat. tit. 15, § 752.10 (1991) (same).

In the TCPA, Congress took a different approach. The Act *separately* prohibits (1) calls to certain sensitive telephone lines placed using an "automatic telephone dialing system," defined without regard to whether the device is capable of delivering a prerecorded message, 47 U.S.C. 227(b)(1)(A); see 47 U.S.C. 227(a)(1); and (2) calls to deliver messages with an artificial or prerecorded voice, made either to the same sensitive telephone lines or to any residential telephone line, without regard to the technology used to make the call, 47 U.S.C. 227(b)(1)(A)-(B). In light of that obvious departure from the antecedent state-law regimes, Duguid is wrong to infer (Br. 15) that Congress used different words in Section 227(a)(1)(A) to "describe the same devices."

The fact that the predecessor language appeared in state rather than federal laws does not detract from those laws' significance in construing Section 227(a)(1)(A). Contrary to Duguid's suggestion (Br. 15), this Court has not confined its comparisons of statutory alternatives to "different words in different parts" of a

federal statute. The Court has considered Congress's failure to adopt even a *hypothetical* "ready alternative" to be instructive as to the meaning of the words Congress actually enacted. *Advocate Health Care Network*, 137 S. Ct. at 1659; see *Lozano*, 572 U.S. at 16. Particularly in light of Congress's stated intent to supplement existing state-law restrictions on telemarketing, those state-law precursors provided "readymade language," *Thryv, Inc.* v. *Click-to-Call Techs., LP*, 140 S. Ct. 1367, 1375 (2020), that Congress could have incorporated into the TCPA if it had wished to adopt Duguid's preferred definition. Congress enacted significantly different language, and this Court should not "revisit that choice." *Lozano*, 572 U.S. at 16.

C. The Government's Reading Of Section 227(a)(1)(A) Is Consistent With The TCPA's Purpose

Duguid contends (Br. 29) that the government's reading of Section 227(a)(1)(A) is "dramatically at odds with the broad objectives evident from [the TCPA's] text and structure." See Br. 27-44. That argument misconceives the role of the automated-call restriction in the statutory scheme and the relatively narrow function that Section 227(a)(1)(A) performs.

1. Duguid argues that Congress's "predominant concern" in enacting the TCPA was "not just about calls to random or sequential numbers, but about how 'computer driven telemarketing tools ha[d] caused the frequency and number of unsolicited telemarketing calls [to] increase markedly.'" Br. 34 (quoting H.R. Rep. No. 317, 102d Cong., 1st Sess. 6 (1991) (House Report)). He emphasizes Congress's findings about the privacy harms caused by unrestricted telemarketing and the "proliferation of [such] intrusive, nuisance calls." Br. 28 (quoting TCPA § 2(6), 105 Stat. 2394). He highlights a

brief discussion from the House Report of the telemarketing industry's use of databases of current and prospective clients. See Br. 34-35 (citing House Report 6-7). And he flags (Br. 36-37) broad concerns about telemarketing calls noted in congressional hearings. None of that supports his argument here.

The telemarketing abuses that the TCPA *as a whole* addresses doubtless extend beyond the abuses that Congress associated with random or sequential number generators. It does not follow, however, that Section 227(a)(1)(A)'s definition of "automatic telephone dialing system" must encompass devices that do not use such generators. The TCPA prohibits calls that are made to specified sensitive categories of telephone numbers (*e.g.*, cell phones and emergency telephone lines) "using any automatic telephone dialing system *or an artificial or prerecorded voice*." 47 U.S.C. 227(b)(1)(A) (emphasis added).[1] A separate TCPA provision bans certain calls to residential telephone lines. 47 U.S.C. 227(b)(1)(B). That provision prohibits calls "using an artificial or prerecorded voice," but it contains no reference to an automatic telephone dialing system. *Ibid.* And another provision authorizes the FCC to "prescribe regulations to implement [additional] methods and procedures" for protecting "residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object," also without reference to automatic telephone dialing systems. 47 U.S.C. 227(c)(1)-(2).

In enacting the TCPA, Congress appears to have been principally concerned with protecting consumers' *residential* privacy. Congress found that "consumers

---

[1] See also 47 U.S.C. 227(b)(1)(D) (prohibiting the use of an automatic telephone dialing system "in such a way that two or more telephone lines of a multi-line business are engaged simultaneously").

[we]re outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers" and that "[b]anning such automated or prerecorded telephone calls to the home * * * [wa]s the only effective means of protecting telephone consumers from this nuisance and privacy invasion," TCPA § 2(6) and (12), 105 Stat. 2394-2395. The TCPA's lead Senate sponsor colorfully described such calls as "the scourge of modern civilization," "hound[ing] us until we want to rip the telephone right out of the wall." 137 Cong. Rec. 30,821 (1991) (statement of Sen. Hollings). And the Senate and House Reports describe the law's purpose as, first and foremost, "protect[ing] the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home." Senate Report 1; see House Report 5 ("The purpose of the bill * * * is to protect residential telephone subscriber privacy rights.").[2]

Duguid is correct that, in order to vindicate those privacy interests, the TCPA prohibits a substantial set of automated calls that do not involve any random or sequential number generator. Congress achieved that objective, however, not by adopting the broad definition of "automatic telephone dialing system" that Duguid advocates, but by separately prohibiting calls made using

---

[2] In 1991, residential landlines were far more widely used than cell phones. In 1991, only 7.5 million of the country's 253 million people owned a cell phone. See Chamber of Commerce Amici Br. 9 (citing *In re Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993*, 10 FCC Rcd 8844, 8874 Tbl.1 (1995)). And even for those individuals, cell-phone plans were limited—measured in costly minutes, rather than the unlimited talk and text plans that prevail today. *Ibid.* In that environment, it would have made little sense for telemarketers or Congress to treat calls to cell phones as their central focus.

an "artificial or prerecorded voice," regardless of the technology used. 47 U.S.C. 227(b)(1)(A) and (B). Indeed, with respect to the nuisance calls to *residential* telephone lines that were the 1991 Congress's primary concern, Duguid's broader reading of Section 227(a)(1)(A) would provide no additional increment of protection, since the TCPA provision that governs calls to residential telephone lines prohibits "artificial or prerecorded voice" calls but contains no reference to automatic telephone dialing systems. See 47 U.S.C. 227(b)(1)(B).

2. Duguid contends (Br. 32) that construing Section 227(a)(1)(A) to require use of a random or sequential number generator would advance "no rational policy." That is wrong. The legislative record identifies several specific problems that use of such number generators can cause or exacerbate.

First, legislators and others expressed concern that "automatic dialers [that] dial numbers in sequence" can "t[ie] up all the lines of a business," and that the resulting problem was particularly acute when "automated calls [we]re placed to lines reserved for emergency purposes, such as hospitals and fire and police stations." Senate Report 2; see House Report 10 (noting that autodialers often "dial sequential blocks of telephone numbers, * * * includ[ing] those of emergency and publish service organizations," and thereby "'seize' [the] recipient's telephone line and not release it until the prerecorded message is played"); see also House Report 24; *S. 1462, The Automated Telephone Consumer Protection Act of 1991; S. 1410, The Telephone Advertising Consumer Protection Act; and S. 857, Equal Billing For Long Distance Charges: Hearing Before the Senate Subcomm. on Communications of the Comm. on Commerce, Science, and Transportation*,

102d Cong., 1st Sess. 33 (1991) (Senate Commc'ns Subcomm. Hr'g) (statement of Richard A. Barton, Sr. Vice President, Direct Marketing Ass'n) (endorsing a "ban [on] sequential and random dialing because of the great difficulties that they cause in hospital emergency rooms").

Second, legislators and witnesses worried that autodialed calls to lists of random or sequential numbers could reach even unlisted telephone numbers (like patient and guest rooms at healthcare facilities). See Senate Report 2 ("Having an unlisted number does not prevent those telemarketers that call numbers randomly or sequentially."); House Report 10 ("Telemarketers often program their systems to dial sequential blocks of telephone numbers, which have included * * * unlisted telephone numbers."); *Telemarketing/Privacy Issues: Hearing Before the Subcomm. Telecommunications and Finances of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 1 (1991) (1991 House Telecommc'ns Subcomm. Hr'g) (statement of Rep. Markey) ("These machines place calls randomly, meaning they sometimes call unlisted numbers.").

Third, legislators and witnesses expressed concern that random and sequential dialing often resulted in costly, unwanted, and unintended calls to pagers and cell phones. See Senate Report 2 ("[U]nsolicited calls placed to * * * cellular or paging telephone numbers often impose a cost on the called party."). Witnesses explained that cellular and paging services were "unique[ly] vulnerab[le] * * * to automatic telephone dialers" because "mobile carriers obtain large blocks of consecutive phone numbers for their subscribers." Senate Commc'ns Subcomm. Hr'g 45-46 (statement of Thomas Stroup, President, Telocator). Accordingly,

"automatic dialer transmitted calls can run through whole groups of paging and cellular numbers at one time" and thus can "seiz[e] a paging carrier's facilities" in a manner that "effectively block[s] service to its customers." *Id.* at 46; see 1991 House Telecommc'ns Subcomm. Hr'g 112 (statement of Michael J. Frawley, President, Gulf Coast Paging) ("Programmed 'autodialer' calls can and have run through whole blocks of numbers assigned to mobile users, * * * producing unwanted and expensive calls to cellular subscribers.").

Because health professionals often relied on paging services, witnesses complained that in some instances, as a result of autodialed calls, "[l]ives literally 'hung in the balance' while hospitals were unable to page doctors, to reach code blue teams, rescue squads, etc." *Telemarketing Practices: Hearing Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce on H.R. 628, H.R. 2131, and H.R. 2184*, 101st Cong., 1st Sess. 79 (1989) (1989 House Telecommc'ns Subcomm. Hr'g) (statement of Steven Seltzer, President, Modern Commc'ns Corp.). In other cases, witnesses worried that organ transplant candidates, who were provided free paging services to be notified when an organ had been found, were receiving errant telemarketing calls from autodialers, "caus[ing] extreme emotional distress to the candidates and their families." 1991 House Telecommc'ns Subcomm. Hr'g 113 (statement of Michael J. Frawley, President, Gulf Coast Paging).

Based on the technological limitations that existed at the time, witnesses explained that "everyone—the consumer, the telemarketer, and the service provider—loses when telemessaging calls are placed to numbers assigned to pagers and to cellular phones." 1989 House

Telecommc'ns Subcomm. Hr'g 94 (testimony of Steven Seltzer, President, Modern Commc'ns Corp.). The problems persisted, however, "because the people using the autodialers * * * [we]re not really aware of exactly what they [we]re doing." *Ibid.* They simply "enter[ed] a starting range and an ending range of numbers" with "no idea whose phone numbers * * * [we]re within that range." *Ibid.*

3. Given the increasing prevalence of cell phones and the pervasive use of text messaging, automated text messages today might plausibly be regarded as the "modern equivalent of the prerecorded or artificial voice robocall[s]" that Congress largely prohibited in 1991. EPIC Amicus Br. 7. Duguid's own experience suggests that unwanted text messages can subject consumers to "the same kind of frustration" caused by prerecorded-voice calls to cell phones or residential telephone lines. *Ibid.*; see Senate Report 4 (noting that calls made using an artificial or prerecorded voice "do not allow the caller to feel the frustration of the called party"). It was plainly rational, however, for the 1991 Congress to focus on the unique burdens posed by the use of random or sequential number generators under then-prevailing technological circumstances. Whether subsequent technological changes warrant an expansion of the automated-call restriction is a decision for today's Congress, not this Court.

D. Policy Concerns Provide No Sound Reason To Reject The Most Natural Interpretation Of Section 227(a)(1)(A)

1. Duguid argues that adopting the government's reading of Section 227(a)(1)(A) would limit the TCPA's definition of "automatic telephone dialing system" to "a small universe of rapidly obsolescing" machines. Br. 38

(citation omitted). He contends that adopting that construction "would unleash [a] torrent of robocalls." *Ibid.* (emphasis omitted). But the possibility that developments in technology and patterns of use may diminish the practical effect of a statutory provision provides no sound basis for the Court to adopt anything other than the best reading of the statutory text. See U.S. Br. 32-33. In any event, Duguid's concerns are overstated.

Regardless of the scope of the TCPA's definition of "automatic telephone dialing system," the statute will continue to prohibit robocalls that deliver a artificial or prerecorded voice, rather than connecting a live operator, and are placed to cell phones, emergency telephone lines, guest or patient rooms at healthcare facilities, or residential telephone lines.[3] Unless a call is made for emergency purposes or with the consent of the called party, the TCPA prohibits calls using an artificial or prerecorded voice to any of those telephone lines, whether or not an automatic telephone dialing system is used. See p. 13, *supra*. The TCPA therefore will continue to prohibit the alleged conduct that led to the settlement (see Duguid Br. 43) in *Abdeljalil* v. *General Electric Capital Corp.*, No. 12-cv-2078 (S.D. Cal. filed Aug. 22, 2012). See Third Am. Compl. ¶ 15, *Abdeljalil*, *supra* (No. 12-cv-2078) (alleging the receipt of numerous unconsented-to calls to a cell phone "using an 'artificial or prerecorded voice' * * * on almost a daily basis for approximately three months").

Other federal and state restrictions likewise protect consumers from nuisance calls, whether or not an auto-

---

[3] See Federal Trade Comm'n, *Robocalls*, https://go.usa.gov/x7N7v (last visited Nov. 16, 2020) ("If you answer the phone and hear a recorded message instead of a live person, it's a robocall.").

matic telephone dialing system is used. See FCC, *Report on Robocalls*, CG Docket No. 17-59, at 3 (Feb. 2019), https://go.usa.gov/x7NAU; see also Quicken Loans Amicus Br. 16-23; Midland Credit Mgmt. Amicus Br. 29-31. For example, the Telemarketing Sales Rule, 60 Fed. Reg. 43,842 (Aug. 23, 1995) (16 C.F.R. Pt. 310), imposes nationwide do-not-call restrictions. Pursuant to that regulation, consumers may register their residential and cell phone numbers in the National Do-Not-Call Registry. Telemarketers are prohibited from calling any telephone number in that registry without an established business relationship or the consumer's express prior consent. 16 C.F.R. 310.4(b)(1)(iii)(B); see 47 C.F.R. 64.1200(c)(2). Telemarketers violating these rules may be subject to federal or state enforcement actions, as well as private suits in some circumstances. See 47 U.S.C. 227(c)(5); 16 C.F.R. 310.7.

The Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692 *et seq.*, makes it unlawful for a debt collector to call a person who has notified the debt collector in writing that the consumer "wishes the debt collector to cease further communication with the consumer." 15 U.S.C. 1692c(c). Any debt collector who violates that restriction is liable to the individual for actual damages and "such additional damages as the court may allow," not to exceed $1000 in an individual action or $500,000 in a class action. 15 U.S.C. 1692k(a)(2)(A).

In addition, the FCC has recently issued a series of orders that allow voice-service providers to adopt certain prophylactic measures, including: (i) automatically blocking calls that the provider reasonably determines are unwanted, see *In re Advance Methods to Target & Eliminate Unlawful Robocalls*, 35 FCC Rcd 7614 (2020); (ii) offering default robocall-blocking programs,

see *In re Advance Methods to Target & Eliminate Unlawful Robocalls*, 34 FCC Rcd 4876 (2019); and (iii) blocking calls from invalid or unused numbers and numbers that have been placed on a do-not-originate list, see *In re Advance Methods to Target & Eliminate Unlawful Robocalls*, 32 FCC Rcd 9706 (2017). Even before the 2020 order, AT&T reported having blocked nearly 4.3 billion calls since 2016 under such programs, and Comcast reported blocking more than 158 million robocall attempts in December 2019 alone. See FCC, *Call Blocking Tools Now Substantially Available to Consumers: Report on Call Blocking*, CG Docket No. 17-59, at 12, 15 (June 2020), https://go.usa.gov/x7EKG. Congress has directed the FCC to ensure that providers offer such "robocall blocking services" at no additional charge. See Pallone-Thune TRACED Act, Pub. L. No. 116-105, § 10(b), 133 Stat. 3284 (47 U.S.C. 227(j)). None of these programs depends on the definition of "automatic telephone dialing system" in Section 227(a)(1)(A).

2. By contrast, Duguid's construction of Section 227(a)(1)(A) could potentially sweep in every modern smartphone. See U.S. Br. 33-34.

To fend off that possibility, Duguid endorses (Br. 31, 45) the Ninth Circuit's view that Section 227(a)(1) is limited to devices that are capable of dialing telephone numbers "automatically." But the relevant prong of the definition states only that the equipment must have the "capacity * * * to dial [the stored or produced] numbers." 47 U.S.C. 227(a)(1)(B). It does not use the word "automatic" or "automatically." And while Duguid suggests (Br. 31) that such a requirement is implied, any telephone might be described as having the capacity to dial telephone numbers, even though human intervention is required.

Duguid also points out that "the TCPA's robocalling prohibition applies only when a call is made *using* an" automatic telephone dialing system. Br. 47; see 47 U.S.C. 227(b)(1)(A). Duguid suggests that, even if an ordinary smartphone is an "automatic telephone dialing system," Section 227(b)(1)(A)'s restrictions on automated calls to cell phones and other specialized lines will apply only to "calls made using the equipment's [automatic telephone dialing system] functionality." Br. 47 (citation omitted). But that limiting construction of Section 227(b)(1)(A) would not solve the problem. If the Court adopts Duguid's reading of Section 227(a)(1)(A), but does not construe Section 227(a)(1)(B) to require the capacity to dial stored numbers *automatically*, then every telephone call from an ordinary smartphone's contact list will use the "capacities that define autodialing equipment," *ibid.*, *i.e.*, the capacities to "store" telephone numbers and to "dial" them.

Finally, Duguid notes the absence of any evidence that individual consumers have been or will be sued "based on typical use of smartphone technology." Br. 45 (citation omitted). The absence of such suits may reflect the fact that some lower courts, having endorsed Duguid's preferred interpretation of Section 227(a)(1)(A), have adopted one or more of his proposed narrowing constructions of *other* TCPA language to ensure that the automated-call restriction does not cover ordinary smartphone uses. It may also reflect the absence of any significant economic incentive to bring suits against ordinary smartphone users, even if a violation could be shown. Duguid thus may be correct that resolving the question presented here in his favor would not inevitably produce widespread liability for typical smartphone uses. The more straightforward way of avoiding that

result, however, is to hold, in accordance with the most natural reading of Section 227(a)(1)(A)'s text, that the capacity to use a random or sequential number generator to store or produce numbers is a necessary attribute of an "automatic telephone dialing system." 47 U.S.C. 227(a)(1)(A).

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

NOVEMBER 2020