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

BRIEF FOR THE UNITED STATES AS RESPONDENT SUPPORTING PETITIONER

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QUESTION PRESENTED

The Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394, generally prohibits the use of an "automatic telephone dialing system" to place a call to "any telephone number assigned to a * * * cellular telephone service." 47 U.S.C. 227(b)(1)(A)(iii). The Act defines "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 presented is as follows:

Whether Section 227(a)(1)'s definition of "automatic telephone dialing system" encompasses a device that has the capacity to store and automatically dial telephone numbers, even if the device does not "us[e] a random or sequential number generator."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 926 F.3d 1146. The orders of the district court (Pet. App. 23-38, 39-52) are not published in the Federal Supplement but are available at 2016 WL 1169365 and 2017 WL 635117.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 2019. A petition for rehearing was denied on August 22, 2019 (Pet. App. 21-22). The petition for a writ of certiorari was filed on October 17, 2019, and was granted limited to the second question presented on July 9, 2020. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 227(a)(1) of Title 47 of the United States Code provides:

> The term "automatic telephone dialing system" means 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).

Other pertinent statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-34a.

STATEMENT

A. Statutory and Regulatory Background

1. By the 1990s, "use of the telephone to market goods and services" had become "pervasive," Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 102-243, § 2(1), 105 Stat. 2394. "More than 300,000 solicitors [were] call[ing] more than 18,000,000 Americans every day." § 2(3), 105 Stat. 2394. In making those calls, a growing number of telemarketers were using equipment that could "automatically dial a telephone number and deliver to the called party an artificial or prerecorded voice message." S. Rep. No. 178, 102d Cong., 1st Sess. 2 (1991) (Senate Report); see H.R. Rep. No. 317, 102d Cong., 1st Sess. 10 (1991) (House Report) (describing the use of "automatic dialing systems").

Telemarketing offered businesses a cost-effective way to "broaden their markets." House Report 6; see TCPA § 2(1)-(4), 105 Stat. 2394 (describing "the increased use of cost-effective telemarketing techniques" in generating $435 billion in sales in 1990, "a more than

four-fold increase since 1984"). But many who received such calls found them "to be a nuisance and an invasion of privacy," "regardless of the content or the initiator of the message." TCPA § 2(10), 105 Stat. 2394. And the use of automated systems to dial randomly or sequentially generated telephone numbers could tie up the phone lines of emergency and other public-service organizations, raising serious public-safety issues, as well as impose unwanted and unintended costs on paging and cellular telephone services. See Senate Report 2; House Report 10; *Telemarketing/Privacy Issues: Hearing Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 112-114 (1991) (statement of Michael J. Frawley, President, Gold Coast Paging). To address those concerns, Congress enacted the TCPA as a new section of Title II of the Communications Act of 1934, ch. 652, 48 Stat. 1070 (47 U.S.C. 201 *et seq.*).

Among other measures, the TCPA imposes various "restrictions on the use of automated telephone equipment." § 3(a), 105 Stat. 2395 (capitalization omitted). One of those restrictions prohibits "any person within the United States" from "mak[ing] any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice" (i) "to any emergency telephone line"; (ii) "to the telephone line of any guest room or patient room" of a healthcare facility; or (iii) "to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or * * * any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. 227(b)(1)(A); see TCPA

§ 3(a), 105 Stat. 2395-2396. That prohibition is referred to here as the "automated-call restriction."[1]

For purposes of the TCPA, the term "automatic telephone dialing system" 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." 47 U.S.C. 227(a)(1). The Federal Communications Commission (FCC or Commission) has construed the term "call" in the automated-call restriction to encompass both voice calls and text messages. See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14,014, 14,115 (2003) (*2003 TCPA Order*); see also *Barr* v. *American Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2344 n.1 (2020) (plurality opinion) (recognizing that construction); *Campbell-Ewald Co.* v. *Gomez*, 136 S. Ct. 663, 667 (2016) ("A text message to a cellular telephone, it is undisputed, qualifies as a 'call' within the compass of [the automated-call restriction]."") (citation omitted).

The TCPA authorizes private plaintiffs to sue to enjoin violations of the automated-call restriction and to recover the plaintiffs' "actual monetary loss" or $500 for each violation, "whichever is greater." 47 U.S.C. 227(b)(3)(A)-(B). The TCPA also "authorizes States to bring civil actions to enjoin prohibited practices and to recover damages on their residents' behalf." *Mims* v. *Arrow Fin. Servs., LLC*, 565 U.S. 368, 371 (2012); see 47 U.S.C. 227(g)(1). The FCC "must be notified of such

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[1] A neighboring provision bans 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." 47 U.S.C. 227(b)(1)(D); see TCPA § 3(a), 105 Stat. 2396.

suits and may intervene in them." *Mims*, 565 U.S. at 371; see 47 U.S.C. 227(g)(3).

2. The FCC is charged with administering the TCPA. See 47 U.S.C. 154(i), 201(b); 47 U.S.C. 227(b)(2). Since the TCPA's enactment, the agency has interpreted the statute's definition of an "automatic telephone dialing system"—sometimes referred to as an autodialer—on several occasions.

Throughout the 1990s, the FCC took the view that a device is an autodialer under the TCPA only if it randomly or sequentially generates telephone numbers to be called. See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8773, 8776 (1992) (*1992 TCPA Order*); *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 FCC Rcd 12,391, 12,400-12,401 (1995) (*1995 TCPA Order*). The FCC determined, for example, that functions like "speed dialing" and "call forwarding" were not regulated by the automated-call restriction "because the numbers called are not generated in a random or sequential fashion." *1992 TCPA Order* 8776.

By 2003, however, "the telemarketing industry ha[d] undergone significant changes in the technologies and methods used to contact consumers." *2003 TCPA Order* 14,017. Among other developments, the growing prevalence of "predictive dialers" presented new regulatory challenges. *Id.* at 14,090. Those devices generally "store[d] pre-programmed numbers or receive[d] numbers from a computer database and then dial[ed] those numbers in a manner that maximize[d] efficiencies for call centers." *Ibid.* "[I]n most cases, telemarketers program[med] the numbers to be called into the equipment, and the dialer call[ed] them at a rate to ensure that

when a consumer answer[ed] the phone, a sales person [wa]s available to take the call." *Id.* at 14,091.

The Commission concluded that predictive dialers qualified as autodialers under the TCPA, regardless whether they had the capacity to randomly or sequentially generate telephone numbers. It reasoned that a contrary determination would undermine Congress's purpose of addressing the "increasing number of automated and prerecorded calls to certain categories of numbers." *2003 TCPA Order* 14,092; see *id.* at 14,093. The Commission reaffirmed that conclusion in 2008, 2012, and 2015. See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd 559, 566-567 (2008) (*2008 TCPA Order*); *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd 15,391, 15,392 n.5 (2012) (*2012 TCPA Order*); *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd 7961, 7971-7973 (2015) (*2015 TCPA Order*).

In 2018, the D.C. Circuit set aside the FCC's *2015 TCPA Order* in relevant part. See *ACA Int'l* v. *FCC*, 885 F.3d 687, 701-703. Finding the order to be internally inconsistent in some respects, the court held that the Commission had failed to provide "'meaningful guidance' to affected parties * * * on whether their equipment is subject to the statute's autodialer restrictions." *Id.* at 701 (citation omitted). Since then, the FCC has twice sought comment on the question presented here. See *Public Notice: Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's* ACA International *Decision*,

33 FCC Rcd 4864, 4865-4866 (2018); *Public Notice: Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's* Marks v. Crunch San Diego, LLC *Decision*, 33 FCC Rcd 9429, 9429 (2018). But the Commission has not yet issued an order resolving the question.

B. The Present Controversy

1. Respondent Noah Duguid brought this putative class action against petitioner, the operator of a popular social-media service, alleging violations of the TCPA's automated-call restriction. J.A. 30-50. Duguid asserts that, although he has never created an account with petitioner, petitioner sent him multiple text messages stating that his account had been accessed by an unrecognized device or web browser. J.A. 33-40. Duguid alleges that petitioner used an automatic telephone dialing system to send those text messages, in violation of the TCPA's restriction on making automated calls to cell phones. J.A. 40-43, 48-49. He seeks statutory damages and injunctive relief. J.A. 50.

Petitioner moved to dismiss Duguid's initial complaint. Petitioner argued that Duguid had not plausibly alleged that petitioner had used an automatic telephone dialing system to send the text messages, D. Ct. Doc. 24, at 7-12 (May 18, 2015), and that the messages fell within the exception for calls made for emergency purposes, *id.* at 12-15. Petitioner further contended that subjecting it to liability for the messages would violate the First Amendment. *Id.* at 15-18. The United States intervened to defend the constitutionality of the TCPA. D. Ct. Doc. 43, at 1 (Dec. 11, 2015); see 28 U.S.C. 2403(a).

The district court granted petitioner's motion to dismiss, holding that Duguid had not adequately alleged

that petitioner had used an automatic telephone dialing system to send the text messages. Pet. App. 23-38. Duguid filed an amended complaint, J.A. 30-50, and petitioner again moved to dismiss, arguing that Duguid still had not adequately alleged that petitioner had used an automatic telephone dialing system, D. Ct. Doc. 65, at 9-18 (May 26, 2016). Petitioner also argued that the exception for calls "made solely to collect a debt owed to or guaranteed by the United States," 47 U.S.C. 227(b)(1)(A)(iii), rendered the restriction impermissibly content-based, in violation of the First Amendment. D. Ct. Doc. 65, at 20-24.

The district court dismissed the amended complaint with prejudice. Pet. App. 39-52. The court agreed with petitioner that Duguid had still "failed to plausibly allege the use of an [automatic telephone dialing system]." *Id.* at 46. The court held that Duguid's allegations suggested a "direct targeting" of his cell-phone number that would be "inconsistent with the sort of random or sequential number generation required for an [automatic telephone dialing system]." *Id.* at 47 (citation omitted). Having found the amended complaint deficient on statutory grounds, the court did not address petitioner's First Amendment challenge. *Id.* at 51.

2. The court of appeals reversed and remanded for further proceedings. Pet. App. 1-20.

The court of appeals concluded that Duguid's allegations plausibly suggested that petitioner had sent him text messages using an automatic telephone dialing system. Pet. App. 6-9. Relying on its prior decision in *Marks* v. *Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018), cert. dismissed, 139 S. Ct. 1289 (2019), the court held that "the adverbial phrase 'using a random

or sequential number generator'" in the TCPA's definition of "automatic telephone dialing system" "modifies only the verb 'to produce,' and not the preceding verb, 'to store.'" Pet. App. 6 (quoting *Marks*, 904 F.3d at 1052). The court thus took the view that a device can qualify as an automatic telephone dialing system as long as it has "the capacity to 'store numbers to be called' and 'to dial such numbers automatically.'" *Ibid.* (quoting *Marks*, 904 F.3d at 1053). The court found that Duguid's "nonconclusory allegations plausibly suggest that [petitioner's] equipment falls within th[at] definition." *Id.* at 7. And the court declined to adopt petitioner's suggestion that, in order to avoid covering "ubiquitous devices" like consumer smartphones that can also "store numbers and * * * dial those numbers automatically," the court should narrow the definition of "automatic telephone dialing system" that it had previously adopted in *Marks*. *Ibid.*; see *id.* at 7-9.

The court of appeals rejected petitioner's contention that the text messages at issue fell within the TCPA's exception for calls made for emergency purposes. Pet. App. 9-10. The court also held that petitioner's First Amendment challenge did not provide a basis for dismissing Duguid's complaint. *Id.* at 10-18. The court concluded that the government-debt exception to the automated-call restriction violated the First Amendment, but that the exception should be severed from the rest of the TCPA, leaving the automated-call restriction in place. *Id.* at 19.[2]

3. The court of appeals denied rehearing en banc without noted dissent. Pet. App. 21-22.

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[2] This Court's subsequent decision in *Barr* v. *American Association of Political Consultants, Inc.*, *supra*, adopted the same resolution of both the First Amendment and severability questions.

SUMMARY OF ARGUMENT

A. Under the TCPA, an "automatic telephone dialing system" must, *inter alia*, have 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). Various features of that language indicate that the participial phrase "using a random or sequential number generator" modifies both of the verbs "store" and "produce." When a modifying phrase appears at the end of a list, the phrase typically modifies each item within the list rather than only the last item. The fact that the phrase "using a random or sequential number generator" is set off by a comma reinforces that inference. And the interposition of the phrase "telephone numbers to be called" between the verbs and the modifying phrase confirms that reading, since that phrase is the direct object of both "store" and "produce," and it would be odd to construe the modifying phrase to reach back over that shared object to modify only one of the two verbs that shares it.

The court below relied on its prior holding in *Marks* v. *Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018), cert. dismissed, 139 S. Ct. 1289 (2019), that the phrase "using a random or sequential number generator" in Section 227(a)(1)(A) modifies only the verb "produce." The *Marks* court viewed it as anomalous to describe a number *generator* as "stor[ing]" numbers. But at the time Congress enacted the TCPA, some automated dialing devices used a random or sequential number generator to identify numbers for contemporaneous dialing, while other devices used such a generator to compile a list of numbers that could be dialed at a later time. To eliminate any doubt that both sorts of devices were covered, the Congress that drafted Section 227(a)(1)(A)

may well have used the term "produce" to describe the first type and "store" to describe the second.

The *Marks* court also relied in part on a structural inference that it drew from the consent and government-debt exceptions to the automated-call restriction. The court believed that a device incorporating a random or sequential number generator could not feasibly be used to make calls falling within those exceptions. The court concluded that Congress would not have enacted the exceptions unless it intended the definition of "automatic telephone dialing system" to sweep more broadly. That reasoning is unsound. The automated-call restriction applies not only to calls for which an "automatic telephone dialing system" is used, but also to calls using an "artificial or prerecorded voice." Because calls to deliver prerecorded-voice messages unquestionably can fall within the consent and government-debt exceptions, adopting the most natural construction of Section 227(b)(1)(A) would not render those exceptions superfluous.

The *Marks* court's reliance on 47 U.S.C. 227(b)(1)(A) and 227(c)(3) was similarly misplaced. Construing Section 227(a)(1)(A) to require the use of a random or sequential number would not render any language within those two provisions superfluous or unworkable.

B. When Congress enacted the TCPA in 1991, it did not write on a blank slate, but legislated against the backdrop of numerous state laws that already regulated the use of automated devices for telemarketing. Of the state laws in effect at that time, at least 25 encompassed automated equipment that did not utilize a random or sequential number generator. Congress departed from those state-law models, however, in its definition of "au-

tomatic telephone dialing system." Congress's rejection of available state-law language that would have unambiguously achieved the result that Duguid advocates reinforces the most natural reading of Section 227(a)(1)(A)'s text.

The TCPA's automated-call restriction differs from its state-law predecessors in another respect as well. Most of the prior state laws applied only if a specified type of dialing technology was used *and* the system could deliver a message using an artificial or prerecorded voice. The TCPA's automated-call restriction, by contrast, applies to calls made using *either* an automatic telephone dialing system *or* an artificial or prerecorded voice. Because the TCPA restricts prerecorded-voice calls to cell phones regardless of the dialing technology used, Congress could adopt a comparatively narrow definition of "automatic telephone dialing system," while still covering a broader range of calls than most of the antecedent state laws had covered.

C. The FCC's prior interpretations of Section 227(a)(1)(A) provide no sound reason for rejecting the most natural reading of the statutory text. The Second Circuit has suggested that the FCC has consistently adopted the interpretation that Duguid now advocates. But in the early years of the TCPA, the Commission construed Section 227(a)(1)(A) to require the use of a random or sequential number generator. And while the agency adopted a broader interpretation of that provision beginning in 2003, the FCC's most recent iteration of that view (in an order issued in 2015) was vacated by the D.C. Circuit, and the Commission has not yet completed its reconsideration of the question presented here. There is consequently no current FCC interpretation to which a court could potentially defer.

The Ninth Circuit in *Marks* suggested that, by adding the government-debt exception in 2015 without disapproving the FCC's then-extant interpretation of Section 227(a)(1)(A), Congress conveyed its "tacit approval" of that interpretation. 904 F.3d at 1052. But the 2015 law that added the government-debt exception neither amended nor reenacted Section 227(a)(1)(A) itself; the legislative history of that amendment did not discuss the autodialer definition; and the relevant FCC interpretation was then under review (and ultimately was vacated) by the D.C. Circuit. There is consequently no sound reason to infer congressional approval of that interpretation.

D. Policy concerns provide no sound reason to reject the most natural reading of Section 227(a)(1)(A)'s text. Particularly because the automated-call restriction was intended to discourage the use of random or sequential number generators, the present near-obsolescence of those devices is better viewed as evidence of the TCPA's success than of its failure. If those number generators have been replaced with devices that fall outside the TCPA's definition of "automatic telephone dialing system," but that cause equivalent aggravation to consumers, Congress is the appropriate body to address that problem.

Adopting Duguid's expansive view of Section 227(a)(1)(A), moreover, would give rise to a potential argument that an ordinary smartphone is an "automatic telephone dialing system." To be sure, the practical effect of a ruling for Duguid could be ameliorated by giving *other* TCPA provisions a narrow construction. But the most natural reading of Section 227(b)(1)(A) already accomplishes that result.

ARGUMENT

UNDER THE TCPA, A DEVICE IS AN "AUTOMATIC TELEPHONE DIALING SYSTEM" ONLY IF IT HAS THE CAPACITY TO USE A RANDOM OR SEQUENTIAL NUMBER GENERATOR TO STORE OR PRODUCE TELEPHONE NUMBERS

The TCPA generally prohibits the use of any "automatic telephone dialing system" to make calls to emergency telephone lines, to guest and patient rooms at healthcare facilities, and to paging or cellular telephone services. 47 U.S.C. 227(b)(1)(A)(i)-(iii). An "automatic telephone dialing system" is "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 presented here is whether that definition encompasses any equipment that has the capacity to store telephone numbers and automatically dial them (even if a "random or sequential number generator" is not used to store the numbers), or whether the capacity to use a number generator is a required feature of all automatic telephone dialing systems.

In answering that question, the Court can begin and end with the statutory text. As a matter of basic grammar, the phrase "using a random or sequential number generator" in Section 227(a)(1)(A) is best read to modify *both* "store" and "produce." No countervailing textual indicator provides a sound reason to depart from that reading. And no other indicia of statutory meaning suggest that the Court should adopt anything other than the most natural reading of the definition contained in Section 227(a)(1)(A). The TCPA's autodialer definition is thus best understood to encompass only those devices that have the capacity to use a random or sequential

number generator. The court of appeals' judgment should be reversed.

A. The Text Of Section 227(a)(1)(A) Is Best Read As Limited To Devices That Have The Capacity To Use A Random Or Sequential Number Generator

1. Basic rules of grammar indicate that the capacity to use a random or sequential number generator is a required feature of all "automatic telephone dialing system[s]," 47 U.S.C. 227(a)(1), within the meaning of the TCPA. When a modifying phrase appears "at the end of a single, integrated list," it is most naturally read to modify each antecedent. *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 344 n.4 (2005); see Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012) ("When there is a straightforward, parallel construction that involves all nouns or verbs in a series, a * * * postpositive modifier normally applies to the entire series."). So, for example, "the natural construction" of a statutory provision establishing a punishment for a felon "who receives, possesses, or transports in commerce or affecting commerce" is that the phrase "in commerce or affecting commerce" modifies not just "transport," but also "receives" and "possesses." *United States* v. *Bass*, 404 U.S. 336, 337, 339 (1971) (citations omitted); see *id.* at 337-340. And in a statement about "[i]nstitutions or societies that are charitable in nature," "the institutions as well as the societies must be charitable." Scalia & Garner 148 (emphasis omitted). In the same way, the phrase "using a random or sequential number generator" in the clause "to store or produce telephone numbers to be called, using a random or sequential number generator," 47 U.S.C. 227(a)(1)(A), is best read to modify both "produce" and "store."

Congress's use of a comma to offset the modifying participial phrase in Section 227(a)(1)(A) reinforces that conclusion. See *Bass*, 404 U.S. at 340 n.6 (noting that "commas at the end of series can avoid ambiguity" as to whether a postpositive modifier applies to all antecedents). As leading treatises on statutory construction agree, a drafter's use of a comma to set off a postpositive modifying phrase indicates an intent for that phrase to apply equally to all preceding elements. See William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* 67-68 (2016) ("A qualifying phrase separated from antecedents by a comma is evidence that the qualifier is supposed to apply to all the antecedents instead of only to the immediately preceding one.") (citation omitted); 2A Norman J. Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction* § 47:33, at 499-500 (7th ed. 2014) ("A qualifying phrase separated from antecedents by a comma is evidence that the qualifier is supposed to apply to all the antecedents instead of only to the immediately preceding one."); Scalia & Garner 161 ("Punctuation in a legal text * * * will often determine whether a modifying phrase or clause applies to all that preceded it or only to a part.").

Finally, the interposition of the phrase "telephone numbers to be called" between the verbs and the modifying phrase further confirms this reading. 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") (emphasis added). As transitive verbs, "store" and "produce" each require an object to express a complete thought. See *The Chicago Manual of Style* ¶ 5.96 (17th ed. 2017). It is undisputed in this case that both verbs accept the direct object "telephone numbers

to be called." See Duguid Br. in Opp. 28. "When two conjoined verbs ('to store or produce') share a direct object ('telephone numbers to be called'), a modifier following that object ('using a random or sequential number generator') customarily modifies both verbs." *Glasser* v. *Hilton Grand Vacations Co.*, 948 F.3d 1301, 1306 (11th Cir. 2020). Neither the court of appeals nor Duguid has identified any rule of grammar suggesting, or any other sound reason to conclude, that "using a random or sequential number generator" should be read to reach back over that shared direct object to modify only one of the two verbs that shares it. See *Gadelhak* v. *AT&T Servs., Inc.*, 950 F.3d 458, 466 (7th Cir. 2020) (describing such "splic[ing]" and "reorder[ing]" as "a significant judicial rewrite"), petition for cert. pending, No. 20-209 (filed Aug. 17, 2020).

In the absence of a comma, the phrase "using a random or sequential number generator" might be understood to modify "to be called," rather than "store or produce." See *Gadelhak*, 950 F.3d at 467-468 (considering and rejecting this interpretation). On that reading, the phrase would describe a means of calling, rather than a means of storing or producing—*i.e.*, an autodialer would be a device with the capacity to store or produce numbers that would later be *called* "using a random or sequential number generator." See *id.* at 467. But the comma between "called" and the modifying phrase precludes that reading. See p. 16, *supra*. No court of appeals has adopted that interpretation; Duguid has not endorsed it; and nothing in the record below suggests that the device petitioner used to send the offending texts had the capacity to use a random or sequential generator to make the calls at issue here.

2. In *Marks* v. *Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018), cert. dismissed, 139 S. Ct. 1289 (2019), the court of appeals concluded that the phrase "using a random or sequential number generator" modifies only "produce," and not "store." *Id.* at 1052. Finding the text of Section 227(a)(1)(A) ambiguous, the court concluded that the "structure and context of the TCPA" indicate that Congress intended to regulate "equipment that made automatic calls from lists of recipients," in addition to those devices that dialed blocks of sequential or randomly generated numbers. *Id.* at 1051. The *Marks* court thus "read § 227(a)(1) to provide that the term automatic telephone dialing system means equipment which has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator." *Id.* at 1052. The court below treated that holding as dispositive. See Pet. App. 6. The *Marks* court's reasoning is unpersuasive.

a. As to the text of Section 227(a)(1)(A) itself, the court of appeals focused on the purported oddity of "stor[ing]" telephone numbers "using a random or sequential number generator." As the court put it, "a number generator is not a storage device." *Marks*, 904 F.3d at 1050; see *Allan* v. *Pennsylvania Higher Educ. Assistance Agency*, 968 F.3d 567, 572 (6th Cir. 2020) ("[I]t is hard to see how a number *generator* could be used to 'store' telephone numbers.") (citation omitted; brackets in original). Because the primary function of a number *generator* is to produce numbers, the court of appeals concluded that Section 227(a)(1)(A) "is not susceptible to a straightforward interpretation based on the plain language alone." *Marks*, 904 F.3d at 1051.

Even courts that have adopted petitioner's reading of Section 227(a)(1)(A) have viewed this observation as having some force. See *Gadelhak*, 950 F.3d at 464; *Glasser*, 948 F.3d at 1307. There is no grave anomaly, however, in the idea that a random or sequential number generator could be used either to "store * * * telephone numbers to be called" or to "produce" such numbers. Congress may well have had in mind two slightly different types of automated dialing technology. One would use a random or sequential number generator to identify numbers for contemporaneous dialing. The other would use a random or sequential number generator to compile a list of numbers that could be dialed at a later time. The word "produce" could naturally be used to describe the first scenario, and the word "store" to describe the second.

Indeed, at the time the TCPA was passed, available autodialing devices operated in each of those ways. See Noble Systems Corp., *Comments on FCC's Request for Comments on the Interpretation of the TCPA*, 14–15 (Oct. 16, 2018) FCC DA 18-493 (Noble Systems Comments) (discussing U.S. Patent No. 4,741,028 (issued Apr. 26, 1988)). Some patents issued before the TCPA's enactment describe devices that had the capacity to generate numbers randomly or sequentially for immediate dialing. See, *e.g.*, U.S. Patent No. 4,922,520 (issued May 1, 1990); U.S. Patent No. 4,188,510 (issued Feb. 12, 1980); U.S. Patent No. 3,943,289 (issued Mar. 9, 1976). Others describe devices that had the capacity to generate numbers randomly or sequentially and store them for dialing at a later time. See, *e.g.*, Patent

No. 4,741,028; U.S. Patent No. 4,160,125 (issued July 3, 1979); U.S. Patent No. 3,860,765 (issued Jan. 14, 1975).[3]

Section 227(a)(1)(A) can therefore reasonably be understood as "occup[ying] the waterfront, covering devices that randomly or sequentially generated telephone numbers and dialed those numbers, or stored them for later dialing." *Glasser*, 948 F.3d at 1307. To be sure, even in the second scenario, a plaintiff could plausibly argue that the number generator had been used to "produce" the numbers to be called, in the sense that use of the generator to produce the numbers was a necessary step along the way to ultimately dialing them. See *Allan*, 968 F.3d at 573 ("Common sense suggests that any number that is stored using a number-generator is also *produced* by the same number-generator.") (citation omitted). On that view, the express statutory reference to "stor[ing]" numbers would be superfluous. See *ibid.* But the defendant might counter that a device "produce[s] telephone numbers to be called" only if the production occurs at the time of calling, and that the intervening storage step had broken the causal chain. Eliminating that potential ambiguity would be a sufficient reason to include the word "store" in Section 227(a)(1)(A).

Even if "store" and "produce" in this context do little independent work, construing Section 227(a)(1)(A) to contain that minimal surplusage is more natural than

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[3] In addition, some automated dialing systems stored randomly or sequentially generated numbers that had already been dialed in order to avoid repeat calls to those numbers. See Noble Systems Comments 13 (discussing Patent No. 4,741,028). Upon randomly generating new numbers, the device would check the new numbers against previously dialed numbers, so that only numbers that had not been called previously would be called. *Ibid.*

the alternative interpretation. "Sometimes the better overall reading of the statute contains some redundancy." *Rimini St., Inc.* v. *Oracle USA, Inc.*, 139 S. Ct. 873, 881 (2019). This Court has previously recognized that Congress sometimes uses redundant language in an effort to comprehensively regulate a technical field. See, *e.g.*, *Freeman* v. *Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012) (recognizing that certain statutory terms "all mean the same thing"). Such "a belt and suspenders approach" is compatible with the scheme here. *Atlantic Richfield Co.* v. *Christian*, 140 S. Ct. 1335, 1350 n.5 (2020); see *Fort Stewart Sch.* v. *Federal Labor Relations Auth.*, 495 U.S. 641, 646 (1990) (recognizing that Congress might employ "technically unnecessary" language "out of an abundance of caution"); Scalia & Garner 176-177 ("Sometimes drafters *do* repeat themselves and *do* include words that add nothing of substance.").

b. As to the structure of the TCPA, the court of appeals placed significant weight on the exceptions to the automated-call restriction. See *Marks*, 904 F.3d at 1051. Section 227(b)(1)(A), for example, excludes from the automated-call restriction calls "made with the prior express consent of the called party." 47 U.S.C. 227(b)(1)(A). The *Marks* court inferred from that exception that Congress must have contemplated that an autodialer could be configured "to call selected numbers." 904 F.3d at 1051; see *Allan*, 968 F.3d at 574-575. The court observed that, "[t]o take advantage of this permitted use, an autodialer would have to dial from a list of phone numbers of persons who had consented to such calls, rather than merely dialing a block of random or sequential numbers." *Marks*, 904 F.3d at 1051.

The *Marks* court drew a similar inference from the ill-fated government-debt exception. That provision,

enacted in 2015, created an exception for automated calls to cell phones "made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. 227(b)(1)(A)(iii); see Bipartisan Budget Act of 2015 (Bipartisan Budget Act), Pub. L. No. 114-74, Tit. III § 301, 129 Stat. 588. Last Term, the Court in *Barr* v. *American Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020), declared that provision unconstitutional. See p. 9 n. 2, *supra*. In the court of appeals' view, "this debt collection exception demonstrates that equipment that dials from a list of individuals who owe a debt to the United States is still an [autodialer] but is exempted from the TCPA's strictures." *Marks*, 904 F.3d at 1052. The Second Circuit similarly reasoned that "the only way this exception makes sense is if an [autodialer] can make calls or texts using a human-generated list of phone numbers." *Duran* v. *La Boom Disco, Inc.*, 955 F.3d 279, 285 (2020). That structural inference is unsound.

The most fundamental problem with the court of appeals' reasoning is that the underlying restriction on calls made to cell phones applies not only to calls made using an "automatic telephone dialing system," but also to calls made using "an artificial or prerecorded voice." 47 U.S.C. 227(b)(1)(A). An artificial or prerecorded voice unquestionably can be used to make calls to which the recipient has consented, or calls made to collect government-backed debts. Under petitioner's interpretation of the statute, the consent and government-debt exceptions therefore would have meaningful work to do,

whether or not those exceptions would ever apply to calls made using an automatic telephone dialing system.[4]

The court of appeals' partial-superfluity argument rests on the implicit premise that, if Congress had intended petitioner's proposed reading of Section 227(a)(1)(A), and had believed that an "automatic telephone dialing system" so defined would never be used to make calls falling within the consent and government-debt exceptions, it would have made those exceptions applicable only to the "artificial or prerecorded voice" prong of the underlying automated-call restriction. But drafting the statute that way could well have obscured rather than clarified Congress's intent. A court construing that hypothetical statute might note Congress's careful effort to prohibit autodialed calls even when consented to or made to collect government-backed debts and conclude that Congress would not have undertaken that effort unless an autodialer might otherwise actually be used for those purposes. And in an attempt to make Congress's choice to prohibit such calls meaning-

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[4] The structural inference drawn by the court of appeals is flawed in other respects as well. Even using a random or sequential number generator, an autodialed call might be placed by happenstance to an individual who had previously consented to receive calls from that source. Regardless of the calling party's intentions, Congress could reasonably conclude that the called party in that circumstance should not be entitled to up to $1500 in statutory "damages" for receiving the consented-to call. See 47 U.S.C. 227(b)(3)(B) (awarding "actual monetary loss" or $500, "whichever is greater," for each violation, which may be trebled for willful or knowing violations). And because the government-debt exception was not added to the statute until 2015, it sheds no meaningful light on the intent of the Congress that defined the term "automatic telephone dialing system" in 1991.

ful, the court might strain to read the autodialer definition to cover devices with that capability—the opposite of what the hypothetical Congress intended.

c. The Ninth Circuit has also suggested that two other TCPA provisions "indicate Congress's understanding that an [autodialer] was not limited to dialing wholly random or sequential blocks of numbers, but could be configured to dial a curated list." *Marks*, 904 F.3d at 1051 n.7 (citing 47 U.S.C. 227(b)(1)(A)(i)-(iii) and (c)(3)). Neither provision supports the court's interpretation of Section 227(a)(1).

Section 227(c)(3) authorizes the FCC to compile a database of residential telephone subscribers "who object to receiving telephone solicitations," and to "prohibit any person from making or transmitting a telephone solicitation" to any number included in that database. 47 U.S.C. 227(c)(3); see 47 U.S.C. 227(a)(4) (defining "telephone solicitation" as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services"). The Commission's authority under that provision is not limited to autodialed calls. And the provision does not even mention autodialers, much less speak to whether those devices must have the capacity to use a random or sequential number generator.

The other provision, Section 227(b)(1)(A)(i)-(iii), is the automated-call restriction, which prohibits using an "automatic telephone dialing system" (or an artificial or prerecorded voice) to place a call to (i) emergency telephone lines; (ii) guest and patient rooms at healthcare facilities; or (iii) paging or cellular telephone services. 47 U.S.C. 227(b)(1)(A)(i)-(iii). The court in *Marks* observed that, "to comply with such restrictions," a tele-

marketer *could* in theory configure an "automatic telephone dialing system" (as the court construed the term) to "dial a list of permitted numbers." 904 F.3d at 1051 n.7. But the court recognized that a telemarketer using an autodialer could also comply by "block[ing] prohibited numbers when calling a sequence of random or sequential numbers." *Ibid.* The former means of compliance would not use a random or sequential number generator, but the latter would. Congress's inclusion of prohibited categories of telephone numbers thus says nothing about the question presented here.

B. The Differences Between The TCPA's Prohibitions And The Predecessor State Laws On Which The TCPA Was Based Support Petitioner's Reading Of Section 227(a)(1)(A)

Congress did not write on a blank slate when it enacted the TCPA. Rather, Congress acted against the backdrop of numerous preexisting state laws that regulated automated telemarketing and the use of autodialers. See *Mims* v. *Arrow Fin. Servs., LLC*, 565 U.S. 368, 371 (2012). When the TCPA was enacted, Congress noted that "[o]ver half the States" had already adopted laws "restricting various uses of the telephone for marketing." TCPA § 2(7), 105 Stat. 2394. It expressed concern that telemarketers could "evade the[se] prohibitions through interstate operations," which were considered beyond the States' power to regulate. *Ibid.*; see *Mims*, 565 U.S. at 372-373. In enacting the TCPA, Congress sought "to supplement [existing] restrictions on intrastate calls." Senate Report 3; see House Report 9-10.

The majority of state-law restrictions on automated telemarketing in effect at the time applied only if a specified type of automatic dialing technology was used *and*

the system was capable of delivering a message using an artificial or prerecorded voice.[5] And of the state laws in effect at the time, at least 25 covered equipment that automatically dialed phone numbers, without regard to whether the numbers called were randomly or sequentially generated or drawn from a preexisting list.[6]

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[5] See Ariz. Rev. Stat. Ann. § 13-2919.A (1986); Ark. Code Ann. § 5-63-204(a)(1) (1981); Cal. Pub. Util. Code § 2871 (West 1980); Colo. Rev. Stat. Ann. § 18-9-311(1) (West 1988); Conn. Gen. Stat. § 52-570c(a) (West 1990); Ga. Code Ann. § 46-5-23(a)(1) (1990); 815 Ill. Comp. Stat. 305/5(a) (1991); 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. tit. 10, § 1498.1.A (Supp. 1990); Mass. Gen. Laws. ch. 159, § 19B (1986); Minn. Stat. § 325E.26.2 (Supp. 1987); Miss. Code Ann. § 77-3-451 (1989); Nev. Rev. Stat. § 597.814 (1989); N.H. Rev. Stat. Ann. § 359-E:1.I (1989); N.Y. Gen. Bus. Law § 399-p (McKinney 1988); N.C. Gen. Stat. Ann. § 75-30(c) (West 1979); Okla. Stat. tit. 15, § 752.10 (1991); Or. Rev. Stat. § 759.290(3)(a) (1989); 52 Pa. Code § 63.1 (1988); R.I. Gen. Laws § 11-35-26(b) (1987); S.D. Codified Laws § 37-30-23 (1991); Tenn. Code Ann. § 47-18-1501(b)(1) (1990); 16 Tex. Admin. Code § 23.32(a) (1986); Utah Code Ann. § 13-25-1(1) (West 1990); Wash. Rev. Code § 80.36.400(1)(a) (1987).

[6] See Ariz. Rev. Stat. Ann. § 13-2919.A (1986); Ark. Code Ann. § 5-63-204(a)(1) (1981); Cal. Pub. Util. Code § 2871 (West 1980); Colo. Rev. Stat. Ann. § 18-9-311(1) (West 1988); Conn. Gen. Stat. § 52-570c(a) (West 1990); D.C. Code § 34-1701(a)(1) (1991); Fla. Stat. § 501.059(7)(a) (1991); Ga. Code Ann. § 46-5-23(a)(1) (1990); Ind. Code § 24-5-14-1 (1988); Iowa Code § 476.57.1 (1991); Kan. Stat. Ann. § 50-670(a)(5) (1991); La. Rev. Stat. Ann. § 45:810.B(1) (1991); Me. Rev. Stat. tit. 10, § 1498.1.A (Supp. 1990); Minn. Stat. § 325E.26.2 (Supp. 1987); Miss. Code Ann. § 77-3-451 (1989); Nev. Rev. Stat. § 597.814 (1989); N.Y. Gen. Bus. Law § 399-p (McKinney 1988); N.C. Gen. Stat. Ann. § 75-30(c) (West 1979); Okla. Stat. tit. 15, § 752.10 (1991); Or. Rev. Stat. § 759.290(3)(a) (1989); 52 Pa. Code § 63.1 (1988); S.C. Code Ann. § 16-17-446(A) (1991); Tenn. Code Ann. § 47-18-1501(b)(1) (1990); 16 Tex. Admin. Code § 23.32(a) (1986); Wash. Rev. Code § 80.36.400(1)(a) (1987).

Laws in California and New York, for example, defined an autodialer as "any automatic equipment" that (i) "incorporates a storage capacity of telephone numbers to be called or a random or sequential number generator capable of producing numbers to be called" and (ii) has the capability to "disseminate a prerecorded message to the telephone number called." Cal. Pub. Util. Code § 2871 (West 1980); N.Y. Gen. Bus. Law § 399-p (McKinney 1988); see Miss. Code Ann. § 77-3-451 (1989) (using nearly identical phrasing). Kansas law similarly defined autodialers to include "any user terminal equipment which * * * 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," and that, when connected, "disseminate a recorded message." Kan. Stat. Ann. § 50-670(a)(5) (1991). Oklahoma law regulated any "automatic equipment that: a. stores telephone 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." Okla. Stat. tit. 15, § 752.10 (1991).

Congress departed from those state-law antecedents in two significant respects. First, and most directly relevant here, Congress enacted a definition of "automatic telephone dialing system" that is most naturally read to encompass only those automated systems that "us[e] a random or sequential number generator." 47 U.S.C. 227(a)(1)(A); see pp. 15-18, *supra*. That language is especially noteworthy because Congress had before it readily available state-law alternatives (such as the Oklahoma statute quoted in the preceding paragraph)

whose incorporation into the TCPA would have unambiguously adopted the position that Duguid advocates in this case. "That departure in language suggests a departure in meaning." *Thryv, Inc.* v. *Click-to-Call Techs., LP*, 140 S. Ct. 1367, 1376 (2020).

Second, Section 227(b)(1)(A) prohibits calls that are placed to certain sensitive categories of telephone numbers (including cell phones) using *either* an "automatic telephone dialing system" *or* an "artificial or prerecorded voice." 47 U.S.C. 227(b)(1)(A). And Section 227(b)(1)(B) prohibits "any telephone call to any residential telephone line using an artificial or prerecorded voice," regardless of the technology used to place the call. 47 U.S.C. 227(b)(1)(B). Most of the TCPA's state-law predecessors, by contrast, applied only to calls that were made using a specified dialing technology *and* delivered a prerecorded message. Even under petitioner's reading of the "automatic telephone dialing system" definition, the TCPA *as a whole* therefore would restrict a broader set of automated calls to the covered types of telephone lines than the bulk of the antecedent state laws, since the TCPA's substantive restrictions encompass *all* calls made using an artificial or prerecorded voice, regardless of the dialing technology used.

Consistent with its intent to supplement existing state-law measures, Congress thus could adopt an "automatic telephone dialing system" definition that was narrower than most of its state-law predecessors because that definition served a different purpose under the TCPA than under most of the state laws. Under the typical state law, the relevant definition *limited* the statute's coverage by rendering it applicable to some but not all prerecorded-voice calls. Under the TCPA,

by contrast, the definition *expands* the statute's coverage to encompass additional calls that do not use an artificial or prerecorded voice. And to accommodate those uncommon instances where a predecessor state law might sweep more broadly than the combined scope of the federal prohibitions in the TCPA, Congress included a savings clause providing that "nothing in [the TCPA] * * * shall preempt any State law that imposes more restrictive intrastate requirements or regulations on * * * the use of automatic telephone dialing systems," "the use of artificial or prerecorded voice messages," or "the making of telephone solicitations." 47 U.S.C. 227(f)(1).

C. The TCPA's Regulatory History Provides No Sound Reason For The Court To Reject The Most Natural Reading Of Section 227(a)(1)(A)

In adopting Duguid's reading of Section 227(a)(1)(A), some courts have relied on the FCC's prior interpretations of the definition. The Second Circuit has concluded that the "aptness of [that court's] interpretive approach is * * * confirmed by the FCC's consistent interpretation of the TCPA." *Duran*, 955 F.3d at 285; see *id.* at 285-287. The Ninth Circuit has suggested that, by failing to "overrule the FCC's interpretation" of Section 227(a)(1)(A) when it added the government-debt exception in 2015, Congress "gave the [agency's] interpretation its tacit approval." *Marks*, 904 F.3d at 1052. The regulatory history of the TCPA is more complicated than that analysis acknowledges, and it provides no sound reason to deviate from the most natural reading of the statutory text.

1. Contrary to the Second Circuit's statement, the FCC has not consistently interpreted the TCPA to apply to "non-random- or non-sequential-number-

generating technology." *Duran*, 955 F.3d at 286. Rather, in the immediate wake of the statute's enactment, the FCC concluded, as petitioner argues here, that a device is not an "automatic telephone dialing system" unless it uses a random or sequential number generator. The Commission explained in its first TCPA rulemaking that certain technologies, such as speed-dialing or call-forwarding systems, would not qualify as autodialers because they call numbers that "are not generated in a random or sequential fashion." *1992 TCPA Order* 8776; see *id.* at 8773. Three years later, the Commission reiterated that view, explaining that the autodialer restrictions in the TCPA cover calls made to "randomly or sequentially generated telephone numbers," not those "directed to * * * specifically programmed contact numbers." *1995 TCPA Order* 12,400.

The FCC did not construe Section 227(a)(1)(A) to encompass autodialing equipment with the capacity to dial from a preselected list of numbers until more than a decade after the TCPA's enactment. In 2003, in response to the proliferation of so-called predictive dialers, the agency explained that the "evolution of the teleservices industry ha[d] progressed to the point where using lists of numbers is far more cost effective." *2003 TCPA Order* 14,092. In light of those changing patterns of use, the agency stated that "to exclude * * * equipment that use[s] predictive dialing software from the definition of 'automat[ic] telephone dialing equipment' simply because it relies on a given set of numbers would lead to an unintended result." *Ibid.* The FCC reiterated that view in subsequent rulings. See *2015 TCPA Order* 7971-7972; *2012 TCPA Order* 15,392 n.5; *2008 TCPA Order* 559. Regardless of the scope of the FCC's authority to adopt these different interpretations of

"automatic telephone dialing system," the Second Circuit was wrong to find confirmation of its view in any perceived consistent regulatory interpretation.

In addition, the most recent FCC pronouncement on the scope of the autodialer definition (the *2015 TCPA Order*) was vacated by the D.C. Circuit. See *ACA Int'l* v. *FCC*, 885 F.3d 687, 702-703 (2018). And while the Commission has since solicited comments on the proper resolution of the question presented here, it has not announced a view on the matter since the D.C. Circuit ruled. There is consequently no current FCC interpretation of the term "automatic telephone dialing system" to which a court could potentially defer.

2. The Ninth Circuit also erred in holding that Congress had tacitly ratified the FCC's more expansive interpretation of Section 227(a)(1)(A) by amending the TCPA in 2015 to add the government-debt exception. See *Marks*, 904 F.3d at 1052 (citing *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978)). As the court of appeals recognized (*ibid.*), "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard*, 434 U.S. at 580. But the 2015 law that added the government-debt exception to the TCPA modified the automated-call restriction, 47 U.S.C. 227(b)(1)(A), and the prohibition on calls made to residential telephone lines using an artificial or prerecorded voice, 47 U.S.C. 227(b)(1)(B). See Bipartisan Budget Act § 301, 129 Stat. 588. That law did not amend or reenact the TCPA's definition of "automatic telephone dialing system." The Commission's most recent order addressing the autodialer definition (the *2015 TCPA Order*), moreover, was already under review by the D.C. Circuit when the 2015 amendments

were enacted. And the legislative history of those amendments does not discuss the autodialer definition or the Commission's interpretation of it. There is consequently no reason to suppose that Congress intended to ratify the view reflected in the *2015 TCPA Order*.

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

1. In 2015, the FCC observed that, unless the autodialer definition is construed broadly, "little or no modern dialing equipment would fit the statutory definition." *2015 TCPA Order* 7976. Duguid views it as a "telling indication that [petitioner's] reading is wrong" that, under petitioner's view, the TCPA's autodialer definition "'refers to a small universe of rapidly obsolescing robocalling machines.'" Br. in Opp. 29-30 (quoting Pet. 13-14). That argument is misconceived.

Because it is often difficult to anticipate "how business needs and technology w[ill] evolve," *Glasser*, 948 F.3d at 1309, the possibility that technological developments might give a statutory provision diminishing practical effect provides no basis for adopting anything other than the best reading of the statutory text. The TCPA "also generally prohibits nonconsensual calls to numbers associated with a 'paging service' or 'specialized mobile radio service,' yet those terms have largely ceased to have practical significance" as the technologies to which they refer have become obsolete. *ACA Int'l*, 885 F.3d at 699 (quoting 47 U.S.C. 227(b)(1)(A)(iii)). The inference that Duguid would draw is particularly unwarranted because the decreased use of random or sequential number generators is an effect that the TCPA was *intended* to produce. Standing alone, the obsolescence of such devices would more naturally be viewed as evidence of the TCPA's success than of its failure.

Technological changes or changes in patterns of use might result in widespread use of devices that do not utilize random or sequential number generators (or transmit messages that use an artificial or prerecorded voice), but that cause the same annoyance to consumers as the devices that the TCPA restricts. If Congress concludes that this has occurred, it can amend the TCPA to take account of those changes. But even compelling evidence of such developments would provide no sound reason for the Court to adopt Duguid's reading of existing law.

2. To the extent policy concerns inform this Court's analysis of the statutory text, legitimate policy concerns support petitioner's reading as well. As petitioner explains (and the court of appeals did not deny), under Duguid's and the court's reading of Section 227(a)(1)(A), the TCPA's definition of "automatic telephone dialing system" could potentially sweep in every modern smartphone. See Pet. 26-27; Pet. App. 7-9; see also *ACA Int'l*, 885 F.3d at 702-703. Any ordinary smartphone can "store * * * telephone numbers to be called," 47 U.S.C. 227(a)(1)(A), even though it does not use a random or sequential number generator to perform that function. Under Duguid's view, that is enough to satisfy the first of the two prongs of the TCPA's autodialer definition. And with respect to the second prong, a modern smartphone certainly has, in the ordinary sense, "the capacity * * * to dial such [stored] numbers," 47 U.S.C. 227(a)(1)(B), since smartphones function as telephones even though they have many other features as well.

To be sure, if the Court adopted Duguid's interpretation of Section 227(a)(1)(A), the ultimate practical effect of its decision would depend substantially on the

way in which Section 227(a)(1)(B) and other TCPA provisions are construed. Both in this case and in *Marks*, for example, the Ninth Circuit construed Section 227(a)(1)(B) to require that the relevant device be capable of dialing stored numbers "automatically." Pet. App. 6 (quoting *Marks*, 904 F.3d at 1053). But while the defined term at issue here is "automatic telephone dialing system," 47 U.S.C. 227(a)(1), the word "automatically" does not appear in Section 227(b)(1)(B) itself. The *Marks* court's approach would also mean that various subsidiary issues—for example, the extent to which prohibited dialing must be accomplished without human intervention in order to occur "automatically," see *Allan*, 968 F.3d at 578; *Duran*, 955 F.3d at 289 n.39; and "how much is required to enable" the requisite functions before a device has that "capacity," see *ACA Int'l*, 885 F.3d at 695-696—would be important in determining the TCPA's practical effect.

The present uncertainty regarding the proper interpretation of neighboring TCPA provisions makes it difficult to assess with confidence the practical consequences of adopting Duguid's construction of Section 227(a)(1)(A). But the possibility that Duguid's interpretation could be adopted without sweeping in ordinary smartphones provides no *affirmative* reason to reject the most natural reading of Section 227(a)(1)(A)'s text. For the reasons set forth above, the Court should hold that Section 227(a)(1)(A) requires the capacity to use a random or sequential number generator, leaving the political Branches free to amend the statute if they believe that other policy considerations warrant that step.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

47 U.S.C. 227 provides:

Restrictions on use of telephone equipment

(a) Definitions

As used in this section—

(1) The term "automatic telephone dialing system" means 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.

(2) The term "established business relationship", for purposes only of subsection (b)(1)(C)(i), shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that—

(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G)).[1]

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[1] So in original. Second closing parenthesis probably should not appear.

(3) The term "telephone facsimile machine" means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(4) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

(A) to make any call (other than a call made for emergency purposes or made with the prior

express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes, is made solely pursuant to the collection of a debt owed to or guaranteed by the United States, or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless—

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through—

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if the sender possessed the facsimile machine number of the recipient before July 9, 2005; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission—

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe—

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines—

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement;

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a

cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect;

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if—

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes—

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule re-

quire the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (d);

(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—

(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and

(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine;

(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only—

(i) by regulation issued after public notice and opportunity for public comment; and

(ii) if the Commission determines that such notice required by paragraph (1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements;

(G)(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall—

(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to

the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and

(IV) determine whether with respect to small businesses, the costs would not be unduly burdensome; and

(ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-month period that begins on July 9, 2005;

(H) may restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service to collect a debt owed to or guaranteed by the United States; and

(I) shall ensure that any exemption under subparagraph (B) or (C) contains requirements

for calls made in reliance on the exemption with respect to—

(i) the classes of parties that may make such calls;

(ii) the classes of parties that may be called; and

(iii) the number of such calls that a calling party may make to a particular called party.

(3) Private right of action

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(4) Civil forfeiture

(A) In general

Any person that is determined by the Commission, in accordance with paragraph (3) or (4) of section 503(b) of this title, to have violated this subsection shall be liable to the United States for a forfeiture penalty pursuant to section 503(b)(1) of this title. Paragraph (5) of section 503(b) of this title shall not apply in the case of a violation of this subsection. A forfeiture penalty under this subparagraph shall be in addition to any other penalty provided for by this chapter. The amount of the forfeiture penalty determined under this subparagraph shall be determined in accordance with subparagraphs (A) through (F) of section 503(b)(2) of this title.

(B) Violation with intent

Any person that is determined by the Commission, in accordance with paragraph (3) or (4) of section 503(b) of this title, to have violated this subsection with the intent to cause such violation shall be liable to the United States for a forfeiture penalty pursuant to section 503(b)(1) of this title. Paragraph (5) of section 503(b) of this title shall not apply in the case of a violation of this subsection. A forfeiture penalty under this subparagraph shall be in addition to any other penalty provided for by this chapter. The amount of the forfeiture penalty determined under this subparagraph shall be equal to an amount determined in accordance with subparagraphs (A) through (F) of

section 503(b)(2) of this title plus an additional penalty not to exceed $10,000.

(C) Recovery

Any forfeiture penalty determined under subparagraph (A) or (B) shall be recoverable under section 504(a) of this title.

(D) Procedure

No forfeiture liability shall be determined under subparagraph (A) or (B) against any person unless such person receives the notice required by section 503(b)(3) of this title or section 503(b)(4) of this title.

(E) Statute of limitations

Notwithstanding paragraph (6) of section 503(b) of this title, no forfeiture penalty shall be determined or imposed against any person—

(i) under subparagraph (A) if the violation charged occurred more than 1 year prior to the date of issuance of the required notice or notice of apparent liability; or

(ii) under subparagraph (B) if the violation charged occurred more than 4 years prior to the date of issuance of the required notice or notice of apparent liability.

(F) Rule of construction

Notwithstanding any law to the contrary, the Commission may not determine or impose a forfeiture penalty on a person under both subparagraphs (A) and (B) based on the same conduct.

(c) Protection of subscriber privacy rights

(1) Rulemaking proceeding required

Within 120 days after December 20, 1991, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall—

(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific "do not call" systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

(C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;

(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

(2) Regulations

Not later than 9 months after December 20, 1991, the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

(3) Use of database permitted

The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase. If the Commission determines to require such a database, such regulations shall—

(A) specify a method by which the Commission will select an entity to administer such database;

(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established under this paragraph,

that such subscriber objects to receiving telephone solicitations;

(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection under subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;

(D) specify the methods by which such objections shall be collected and added to the database;

(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the database that are incurred by the entities carrying out those activities;

(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with the regulations prescribed under this subsection;

(J) be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify methods for protection of the privacy rights of persons whose numbers are included in such database; and

(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

(4) Considerations required for use of database method

If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall—

(A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;

(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and—

(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;

(ii) reflect the relative costs of providing such lists on paper or electronic media; and

(iii) not place an unreasonable financial burden on small businesses; and

(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

(5) Private right of action

A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State—

(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive up to $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(6) Relation to subsection (b)

The provisions of this subsection shall not be construed to permit a communication prohibited by subsection (b).

(d) Technical and procedural standards

(1) Prohibition

It shall be unlawful for any person within the United States—

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile

machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

(2) Telephone facsimile machines

The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after December 20, 1991, clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

(3) Artificial or prerecorded voice systems

The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that—

(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and

(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(e) Prohibition on provision of misleading or inaccurate caller identification information

(1) In general

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States, in connection with any voice service or text messaging service, to cause any caller identification service to knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value, unless such transmission is exempted pursuant to paragraph (3)(B).

(2) Protection for blocking caller identification information

Nothing in this subsection may be construed to prevent or restrict any person from blocking the capability of any caller identification service to transmit caller identification information.

(3) Regulations

(A) In general

The Commission shall prescribe regulations to implement this subsection.

(B) Content of regulations

(i) In general

The regulations required under subparagraph (A) shall include such exemptions from the prohibition under paragraph (1) as the Commission determines is appropriate.

(ii) Specific exemption for law enforcement agencies or court orders

The regulations required under subparagraph (A) shall exempt from the prohibition under paragraph (1) transmissions in connection with—

(I) any authorized activity of a law enforcement agency; or

(II) a court order that specifically authorizes the use of caller identification manipulation.

(4) Repealed. Pub. L. 115–141, div. P, title IV, §402(i)(3), Mar. 23, 2018, 132 Stat. 1089

(5) Penalties

(A) Civil forfeiture

(i) In general

Any person that is determined by the Commission, in accordance with paragraphs (3) and (4) of section 503(b) of this title, to have violated this subsection shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this paragraph shall be in addition to any other penalty provided for by

this chapter. The amount of the forfeiture penalty determined under this paragraph shall not exceed $10,000 for each violation, or 3 times that amount for each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $1,000,000 for any single act or failure to act.

(ii) Recovery

Any forfeiture penalty determined under clause (i) shall be recoverable pursuant to section 504(a) of this title. Paragraph (5) of section 503(b) of this title shall not apply in the case of a violation of this subsection.

(iii) Procedure

No forfeiture liability shall be determined under clause (i) against any person unless such person receives the notice required by section 503(b)(3) of this title or section 503(b)(4) of this title.

(iv) 4-year statute of limitations

No forfeiture penalty shall be determined or imposed against any person under clause (i) if the violation charged occurred more than 4 years prior to the date of issuance of the required notice or notice or apparent liability.

(B) Criminal fine

Any person who willfully and knowingly violates this subsection shall upon conviction thereof be fined not more than $10,000 for each violation, or 3 times that amount for each day of a continuing violation, in lieu of the fine provided by section 501

of this title for such a violation. This subparagraph does not supersede the provisions of section 501 of this title relating to imprisonment or the imposition of a penalty of both fine and imprisonment.

(6) Enforcement by States

(A) In general

The chief legal officer of a State, or any other State officer authorized by law to bring actions on behalf of the residents of a State, may bring a civil action, as parens patriae, on behalf of the residents of that State in an appropriate district court of the United States to enforce this subsection or to impose the civil penalties for violation of this subsection, whenever the chief legal officer or other State officer has reason to believe that the interests of the residents of the State have been or are being threatened or adversely affected by a violation of this subsection or a regulation under this subsection.

(B) Notice

The chief legal officer or other State officer shall serve written notice on the Commission of any civil action under subparagraph (A) prior to initiating such civil action. The notice shall include a copy of the complaint to be filed to initiate such civil action, except that if it is not feasible for the State to provide such prior notice, the State shall provide such notice immediately upon instituting such civil action.

(C) Authority to intervene

Upon receiving the notice required by subparagraph (B), the Commission shall have the right—

(i) to intervene in the action;

(ii) upon so intervening, to be heard on all matters arising therein; and

(iii) to file petitions for appeal.

(D) Construction

For purposes of bringing any civil action under subparagraph (A), nothing in this paragraph shall prevent the chief legal officer or other State officer from exercising the powers conferred on that officer by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(E) Venue; service or process

(i) Venue

An action brought under subparagraph (A) shall be brought in a district court of the United States that meets applicable requirements relating to venue under section 1391 of title 28.

(ii) Service of process

In an action brought under subparagraph (A)—

(I) process may be served without regard to the territorial limits of the district or of the State in which the action is instituted; and

(II) a person who participated in an alleged violation that is being litigated in the civil action may be joined in the civil action without regard to the residence of the person.

(7) Effect on other laws

This subsection does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States.

(8) Definitions

For purposes of this subsection:

(A) Caller identification information

The term "caller identification information" means information provided by a caller identification service regarding the telephone number of, or other information regarding the origination of, a call made using a voice service or a text message sent using a text messaging service.

(B) Caller identification service

The term "caller identification service" means any service or device designed to provide the user of the service or device with the telephone number of, or other information regarding the origination of, a call made using a voice service or a text message sent using a text messaging service. Such term includes automatic number identification services.

(C) Text message

The term "text message"—

(i) means a message consisting of text, images, sounds, or other information that is transmitted to or from a device that is identified as the receiving or transmitting device by means of a 10-digit telephone number or N11 service code;

(ii) includes a short message service (commonly referred to as "SMS") message and a multimedia message service (commonly referred to as "MMS") message; and

(iii) does not include—

(I) a real-time, two-way voice or video communication; or

(II) a message sent over an IP-enabled messaging service to another user of the same messaging service, except a message described in clause (ii).

(D) Text messaging service

The term "text messaging service" means a service that enables the transmission or receipt of a text message, including a service provided as part of or in connection with a voice service.

(E) Voice service

The term "voice service"—

(i) means any service that is interconnected with the public switched telephone network and that furnishes voice communications

to an end user using resources from the North American Numbering Plan or any successor to the North American Numbering Plan adopted by the Commission under section 251(e)(1) of this title; and

(ii) includes transmissions from a telephone facsimile machine, computer, or other device to a telephone facsimile machine.

(9) Limitation

Notwithstanding any other provision of this section, subsection (f) shall not apply to this subsection or to the regulations under this subsection.

(f) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits—

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

(2) State use of databases

If, pursuant to subsection (c)(3), the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

(g) Actions by States

(1) Authority of States

Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive $500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the preceding sentence.

(2) Exclusive jurisdiction of Federal courts

The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application,

such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Rights of Commission

The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(4) Venue; service of process

Any civil action brought under this subsection in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the violation occurred or is occurring, and process in such cases may be served in any district in which the defendant is an inhabitant or where the defendant may be found.

(5) Investigatory powers

For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency

designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) Effect on State court proceedings

Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

(7) Limitation

Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

(8) "Attorney general" defined

As used in this subsection, the term "attorney general" means the chief legal officer of a State.

(h) Annual report to Congress on robocalls and transmission of misleading or inaccurate caller identification information

(1) Report required

Not later than 1 year after December 30, 2019, and annually thereafter, the Commission, after consulta-

tion with the Federal Trade Commission, shall submit to Congress a report regarding enforcement by the Commission of subsections (b), (c), (d), and (e) during the preceding calendar year.

(2) Matters for inclusion

Each report required by paragraph (1) shall include the following:

(A) The number of complaints received by the Commission during each of the preceding 5 calendar years, for each of the following categories:

(i) Complaints alleging that a consumer received a call in violation of subsection (b) or (c).

(ii) Complaints alleging that a consumer received a call in violation of the standards prescribed under subsection (d).

(iii) Complaints alleging that a consumer received a call in connection with which misleading or inaccurate caller identification information was transmitted in violation of subsection (e).

(B) The number of citations issued by the Commission pursuant to section 503(b) of this title during the preceding calendar year to enforce subsection (d), and details of each such citation.

(C) The number of notices of apparent liability issued by the Commission pursuant to section 503(b) of this title during the preceding calendar year to enforce subsections (b), (c), (d), and (e), and details of each such notice including any proposed forfeiture amount.

(D) The number of final orders imposing forfeiture penalties issued pursuant to section 503(b) of this title during the preceding calendar year to enforce such subsections, and details of each such order including the forfeiture imposed.

(E) The amount of forfeiture penalties or criminal fines collected, during the preceding calendar year, by the Commission or the Attorney General for violations of such subsections, and details of each case in which such a forfeiture penalty or criminal fine was collected.

(F) Proposals for reducing the number of calls made in violation of such subsections.

(G) An analysis of the contribution by providers of interconnected VoIP service and non-interconnected VoIP service that discount high-volume, unlawful, short-duration calls to the total number of calls made in violation of such subsections, and recommendations on how to address such contribution in order to decrease the total number of calls made in violation of such subsections.

(3) No additional reporting required

The Commission shall prepare the report required by paragraph (1) without requiring the provision of additional information from providers of telecommunications service or voice service (as defined in section 227b(a) of this title).

(i) Information sharing

(1) In general

Not later than 18 months after December 30, 2019, the Commission shall prescribe regulations to establish a process that streamlines the ways in which a private entity may voluntarily share with the Commission information relating to—

(A) a call made or a text message sent in violation of subsection (b); or

(B) a call or text message for which misleading or inaccurate caller identification information was caused to be transmitted in violation of subsection (e).

(2) Text message defined

In this subsection, the term "text message" has the meaning given such term in subsection (e)(8).

(j) Robocall blocking service

(1) In general

Not later than 1 year after December 30, 2019, the Commission shall take a final agency action to ensure the robocall blocking services provided on an opt-out or opt-in basis pursuant to the Declaratory Ruling of the Commission in the matter of Advanced Methods to Target and Eliminate Unlawful Robocalls (CG Docket No. 17–59; FCC 19–51; adopted on June 6, 2019)—

(A) are provided with transparency and effective redress options for both—

(i) consumers; and

(ii) callers; and

(B) are provided with no additional line item charge to consumers and no additional charge to callers for resolving complaints related to erroneously blocked calls; and

(C) make all reasonable efforts to avoid blocking emergency public safety calls.

(2) Text message defined

In this subsection, the term "text message" has the meaning given such term in subsection (e)(8).