No. 19-511

IN THE

Supreme Court of the United States

FACEBOOK, INC.,

Petitioner,

v.

NOAH DUGUID, ET AL.,

Respondents.

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

BRIEF FOR *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND BUSINESS ROUNDTABLE IN SUPPORT OF PETITIONER

STEVEN P. LEHOTSKY
TARA S. MORRISSEY
U.S. CHAMBER LITIGATION CENTER
1615 H St., N.W.
Washington, DC 20062

LIZ DOUGHERTY
BUSINESS ROUNDTABLE
1000 Maine Avenue, S.W.
Washington, DC 20024

SHAY DVORETZKY
Counsel of Record
JEFFREY R. JOHNSON
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents an underlying membership of three million businesses and professional organizations of every size, in every economic sector, and from every region of the country.

An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community, including in cases concerning the scope of liability under the Telephone Consumer Protection Act, *see, e.g.*, *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (the Chamber as petitioner), and the First Amendment rights of businesses, *see, e.g.*, *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). It participated as amicus below.

The Business Roundtable is an association of chief executive officers who collectively have more than & trillion in annual revenues and employ more than 15 million people. The association was founded on the belief that businesses should play an active and effective role in the formation of public policy. It participates in litigation as amicus curiae in a variety

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[1] Pursuant to Rule 37.2(a), counsel for all parties received timely notice of the Chamber's intent to file this brief, and consented in writing. No counsel for any party authored this brief in any part, and no person or entity other than *amici*, *amici's* members, or *amici's* counsel made a monetary contribution to fund its preparation or submission.

of contexts where important business interests are at stake.

INTRODUCTION

In the 1980s, Gold Coast Paging and Telocator ran the LifePage program, a "free service" that provided pagers to would-be transplant recipients so that doctors could page them when an organ had been found. There was one problem. "Autodialers"—devices that randomly or sequentially generated and then dialed numbers, usually to deliver a recorded message—would reach these unlisted pager numbers, leading to the "traumatic" scenario in which a patient got her "hopes up" before learning the "beep" on her pager promised a new timeshare, not a new heart.[2]

These patients weren't alone. "An auto-dialer called telephones sequentially throughout" a hospital in New York, tying up the lines in "exam rooms, patient rooms, offices, labs, emergency rooms, and x-ray facilities" with a "recorded pitch … for a 900-number contest."[3] Another "seized" a wireless carrier's "system … on three separate occasions for approximately 3 hours" as it worked its way through the "large block[] of consecutive phone numbers" that the wireless carrier had secured, leaving its customers unable to "make []or receive calls, including emergency notifications to

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[2] *S. 1462, The Automated Telephone Consumer Protection Act of 1991: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong. 110 (1991) (statement of Michael J. Frawley).

[3] *Id.* at 43 (statement of Michael Jacobsen).

medical personnel."[4] Time and again, these random and sequential dialers caused harms far different from—and more serious than—the annoyance inherent in receiving an unwanted call.

Congress responded. It banned unconsented prerecorded or automated voice message calls to residential and wireless numbers. *See* 47 U.S.C. § 227(b)(1)(A), (b)(1)(B). But it singled out emergency-service numbers, hospital lines, and numbers "assigned to a paging service [or] cellular telephone service" for special protection. It prohibited calls to them made with an "automatic telephone dialing system" (ATDS) absent "prior express consent." *Id*. § 227(b)(1)(A). An ATDS 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." *Id*.§ 227(a)(1).

The statute worked. According to Westlaw, there were just seventeen lawsuits between 1991 and 2003 that mentioned the term "automatic telephone dialing system." By 2003, the FCC could remark that "[i]n the past, telemarketers may have used dialing equipment to create and dial 10-digit numbers arbitrarily."[5]

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[4] *S. 1462, The Automated Telephone Consumer Protection Act of 1991; S. 1410, the Telephone Advertising Consumer Protection Act; and S. 857, Equal Billing for Long Distance Charges: Hearing Before the Subcomm. on Commc'ns of the Senate Commerce, Sci., & Transp. Comm.*, 102d Cong. 45 (July 24, 1991) (statement of Thomas Stroup).

[5] *In re Rules & Regulations Implementing the TCPA*, 18 FCC Rcd. 14014, 14092 (2003) ("2003 TCPA Order").

Fast forward 30 years, and TCPA litigation has exploded. After the FCC began hinting that the statute might cover any equipment that dials from a list, the plaintiffs' bar adopted this new argument, bringing thousands of cases for communications that—like Facebook's here—bore no resemblance to those targeted in the TCPA. To avoid sweeping TCPA liability, Congress exempted calls "made solely to collect a debt owed to or guaranteed by the United States" from the provision's purported reach.[6]

The decision below is the high water mark of these developments. The Ninth Circuit held that the statute *does* cover anything that stores and automatically dials numbers—even if it dials those numbers from a list and does not use a random or sequential number generator. That approach transforms every smartphone—yes, smartphone—into an ATDS, subjecting callers to $500 in presumed liability for every call or text to another wireless number. By contrast, the Third Circuit held that ATDSs must have the ability to generate random or sequential numbers, *see Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3d Cir. 2018), and the D.C. Circuit held that, no matter what, the TCPA cannot cover smartphones, *see ACA Int'l*, 885 F.3d 687.

The Ninth Circuit also held that the debt-collection exemption violates the First Amendment. But the court "cured" that problem by striking the exemption, not the TCPA's prohibition. It thus restricted *more* speech, rather than less, again departing from precedents of this Court and others.

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[6] Pub. L. No. 117-74, 129 Stat. 584 (Nov. 2, 2015)

Abusive litigation under the TCPA has long been a scourge, and the Ninth Circuit made it worse. This Court should intervene.

SUMMARY OF ARGUMENT

I. The Ninth Circuit held that any equipment with the capacity to store and then automatically dial or text wireless numbers qualifies as an ATDS. That capacious understanding, which would cover millions of smartphones, violates the First Amendment and misconstrues the statutory text.

A. The Ninth Circuit's interpretation would impose TCPA liability on smartphone users for each call and text that they place to wireless users without prior express consent. For example, through pre-installed autoreply software, smartphones deploy the capacity to store and automatically dial numbers all the time. Indeed, this feature closely resembles the equipment that the Ninth Circuit held qualified as an ATDS in this case.

If the Ninth Circuit is right, then nearly everyone has an ATDS in her pocket and faces $500 in damages anytime she calls or texts someone else's smartphone without that person's prior express consent. Such a broad prohibition on speech necessarily flunks First Amendment requirements for content-neutral restrictions on the time, place, or manner of speech, which must be narrowly tailored and "leave open ample alternative channels for communication." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

B. The Ninth Circuit's reading is also textually indefensible. The statute defines an ATDS as equipment that "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).

Contrary to the Ninth Circuit's claim, the statute's key modifying phrase must modify both verbs ("store" and "produce"), not just the latter. That result flows from basic principles of grammar: where two conjoined verbs share a direct object, an adverbial phrase that *follows* the direct object modifies both verbs, not just one of them. For example: If this Court "grants or denies certiorari, using Rule 10's criteria," it accepts *and* rejects cases based on Rule 10. The Ninth Circuit's reading violates this principle.

The Ninth Circuit's interpretation also fails as a matter of context and purpose. It makes no sense—and is superfluous—to restrict all devices that "store" and dial numbers, but to restrict devices that "produce" and dial numbers only if they use a random or sequential number generator. And if Congress wanted to ban machine-assisted dialing in general, why did it leave residential wireline numbers open to ATDS calls?

C. Given these problems with the Ninth Circuit's reading, Facebook's interpretation—that the modifier covers both verbs—must prevail if it is at all plausible. It is much more than that. It comports with the rules of grammar by subjecting the same conjoined verbs to the same adverbial modifier. And it comports with the TCPA's history and purpose, which demonstrate Congress's focus on the unique harms of random and sequential dialing.

Against all this, the Ninth Circuit cited two flaws. First, it thought equipment could not "store" a number "using a random or sequential number generator." But Facebook has explained how equipment did just that

at the time of the TCPA's enactment. *See* Pet. 27. In any event, Duguid can't benefit from the canon against superfluity, because his interpretation creates its own. Nor does it matter that some of the TCPA's provisions suggest targeted dialing using an ATDS. Because courts have held that an ATDS need only have the "capacity" to perform the requisite functions, one can send directed calls with equipment otherwise capable of scattershot dialing. Without these exemptions, even targeted calls would trigger liability.

II. The Ninth Circuit also imposed a backwards remedy for Facebook's claim that the TCPA is an invalid content-based restriction on speech. Focusing on the exemption for calls made to collect government-owned or government-backed debt, the court concluded that the exemption—rather than the prohibition on speech itself—violated the First Amendment. It "remedied" that violation by striking the exemption, not the prohibition on speech.

Amici do not seek to discuss the merits of Facebook's argument, thoroughly addressed by the petition, but instead address the question of remedy. The remedy for a First Amendment violation is to allow more speech, not less. If the TCPA's government-debt exemption violates the First Amendment, then that violation must be remedied by invalidating the ATDS restriction, not severing the exemption.

That approach makes sense. Those who successfully challenge content-based restrictions should get something for their trouble. But the Ninth Circuit's rule leaves challengers liable for speech proscribed by an unconstitutional statute. And legislatures, not courts, should decide what speech, if any, is restricted.

Finally, once courts start blue-penciling speech codes, they won't know where to stop. For example, the TCPA and its implementing regulations contain a host of similar exemptions; federal courts should not decide which are "important" enough to keep.

III. This Court should grant both questions presented. The scourge of meritless TCPA litigation—thousands of cases per year, often seeking tremendous damages for ordinary communications—will only increase in the wake of the Ninth Circuit's rule. Granting both questions presented will give this Court the most flexibility in addressing that chaos. By doing so, it could avoid the constitutional question—as it prefers to do—by reversing the Ninth Circuit's misreading of the ATDS provision. And if callers across the country *should* somehow be liable under a content-based restriction for humdrum calls placed from mundane equipment, that significant decision should come from this Court, not the Ninth Circuit.

ARGUMENT

I. AN ATDS MUST HAVE THE CAPACITY TO GENERATE RANDOM OR SEQUENTIAL NUMBERS

The decision below reaffirms the Ninth Circuit's conclusion that an ATDS need only have the capacity to "dial stored numbers automatically." *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 (9th Cir. 2018); *see* Pet. App. 6 (same). That reading conflicts with decisions of the Third and D.C. Circuits. *See* Pet. 29–31. It also conflicts with the First Amendment and with the TCPA itself.

A. The Ninth Circuit's Interpretation Unconstitutionally Covers Smartphones

1. Content-neutral restrictions on the time, place, or manner of speech must be "narrowly tailored to serve a significant governmental interest," and they must "leave open ample alternative channels for communication." *Ward*, 491 U.S. at 791. Accordingly, this Court and others have invalidated content-neutral restrictions that make it unreasonably difficult to speak. *See, e.g.*, *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 153 (2002) (prohibition on "door-to-door advocacy without first registering … and receiving a permit"); *Vincenty v. Bloomberg*, 476 F.3d 74 (2d Cir. 2007) (sale of spray paint to persons under 21).

If the ATDS provision covers smartphones, it flagrantly violates these principles. Smartphones are "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Riley v. California*, 573 U.S. 373, 385 (2014). Hundreds of millions of Americans use smartphones to place billions of calls and text messages every day. If smartphones are ATDSs, then every one of those calls or texts, if placed to another wireless user, exposes the sender to $500 in damages absent "prior express consent." *See* 47 U.S.C. § 227(b)(1)(A); *id.* § 227(b)(3) (statutory damages); 2003 TCPA Order, 18 FCC Rcd. at 14115 & n.606 (2003) (text messages qualify).

That cannot be the law. Presumptively banning most of the communications in this country is not a narrowly tailored means of achieving any interest the Government might have in restricting unwanted

automated solicitations. And depriving Americans of the equipment through which they send tens of billions of calls and texts to each other does not leave open ample alternative channels of communication. If the TCPA renders every American "a TCPA-violator-in-waiting, if not a violator-in-fact," *ACA Int'l*, 885 F.3d at 698, then it violates the First Amendment.

2. The Ninth Circuit's interpretation does just that. Recall that, per the Ninth Circuit, a device need not contain a random or sequential number generator to qualify as an ATDS; it need only have the capacity to "store numbers" and to "dial such numbers automatically." *Marks*, 904 F.3d at 1053; *see also Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009) (a call violates the TCPA if the equipment has the requisite "capacity," whether or not that capacity was "actually" used in placing the call).

Smartphones have that capacity. Take first a smartphone's ability to autoreply. Each iPhone that runs iOS 11 or later—at least 93% of the nearly 200 million iPhones in use in the United States[7]—comes with a feature called "Do Not Disturb." An iPhone user who wishes not to be disturbed may activate this functionality and instruct her phone to send automated responses, either to all incoming calls and messages or to a select group (such as recent callers, her favorites list, or her contacts list). "If someone

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[7] *See* Apple, Developer Support, https://developer.apple.com/support/app-store (Oct. 15, 2019) (93% of iPhones use iOS 12 or iOS 13); Luke Dormehl, Cult of Mac, *189 Million iPhones Are Currently in Use in the U.S.*, https://bit.ly/2qHZnSQ (Feb. 7, 2019).

sends [the user] a message, they receive an automatic reply letting them know" the user is unavailable.[8] Android phones have similar abilities.[9]

As this case itself demonstrates, an autoreply feature transforms a smartphone into an ATDS, at least in the Ninth Circuit. Facebook "maintained a database of phone numbers and … programmed its equipment to send automated messages to those numbers each time a new device accessed the associated account." Pet. App. 5. The Ninth Circuit concluded that, even though Facebook's system sent text messages only in *response* to access from new devices, it still qualified as an ATDS: Facebook's system "store[d] numbers" to be called, and it texted those numbers "automat[ically]" after a new device logged on. Pet. App. 8–9. If that is true for Facebook's security-alert system, it is also true for smartphones.

Group texting leads to a similar result. In *Marks*, the defendant used the "Textmunication system," a "marketing platform" that allowed clients to "select[] the recipient phone numbers," "generate[] the content of the message," and "select[] the date and time for the message to be sent." 904 F.3d at 1048. "The

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[8] Apple, How To Use Do Not Disturb While Driving, https://apple.co/2w8nurH; *see also* Nick Douglas, Lifehacker, *Add an Auto-Responder to Do Not Disturb*, https://bit.ly/2NDKQxg (May 7, 2018) (explaining how to configure the feature to autoreply generally, not just while driving).

[9] *See, e.g.*, Nancy Messieh, Make Use Of, *How To Send Automatic Replies to Text Messages on Android*, https://bit.ly/2IRgGWA (May 10, 2017); Verizon, Turn On Auto Reply, https://vz.to/2A5tqpH (discussing the autoreply functionality in Verizon's often pre-installed messaging app).

Textmunication system … [would then] automatically send" the message. *Id.* Per the Ninth Circuit, this system "store[d] numbers and dial[ed] them automatically," qualifying it as an ATDS. *Id.* at 1053.

Any smartphone sending a group text resembles the Textmunication platform, on a smaller scale. The user "select[s]" the recipients by entering numbers or selecting them from her contacts. She "generate[s] the content of the message" by typing the desired text. And when she taps send, her phone "automatically send[s] the text messages" to multiple numbers at once. In light of its conclusion that Textmunication runs an ATDS, the Ninth Circuit also may conclude that every smartphone user runs one as well.

If a smartphone is an ATDS, then *any* text or call from one smartphone to another could trigger TCPA liability. Courts have held that the TCPA imposes liability for every call or text made from an ATDS, regardless of whether that call or text was autodialed. Therefore, under the Ninth Circuit's broad interpretation of ATDS, everyday texts and calls from a smartphone would trigger TCPA liability, unless the user has the recipient's prior express consent. That absurd result violates the First Amendment.

B. The Ninth Circuit's Interpretation Conflicts with the TCPA's Text

"[W]hen deciding which of two plausible statutory constructions to adopt," a court should pick the one that avoids "constitutional problems." *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005). The Ninth Circuit's *im*plausible reading runs headlong into the First Amendment.

1. An ATDS 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 chief interpretive question is what to do with the modifier—what does the phrase "using a random or sequential number generator" restrict? Per the Ninth Circuit, it modifies "produce" but not "store"; a device that "produces" numbers must do so "using a random or sequential number generator," but a device that merely "stores" them qualifies without limitation. Pet. App. 6.

That reading is a grammatical monstrosity. A "postpositive modifier"—that is, one that alters the meaning of something earlier in the sentence—"normally applies to the entire series" that it follows. Antonin Scalia & Bryan A. Garner, "Series-Qualifier Canon," *Reading Law* 147 (2012). Under this rule, for instance, if a statute provides tax preferences to "a corporation or partnership registered in Delaware," "a corporation as well as a partnership must be registered in Delaware" to qualify. *Id.* at 148.

This rule applies with particular force to postpositive modifiers that are separated from the verbs in question by those verbs' direct object. Imagine you told your friend that "Netflix produces and distributes movies using cutting-edge technology." You would be baffled if your friend was surprised by Netflix's state-of-the-art studios; you just told him, that it "produces *and* distributes" movies in such fashion. Similarly, if you have a coupon to "buy or rent a movie using a 25% off code," that code should work whether you want to own the movie outright or just watch it once. Formally put, when a postpositive

modifier follows the direct object of two conjoined verbs, it modifies both of those verbs, not just one.

The Ninth Circuit recognized the strength of these principles when violating them. It interpreted the provision to cover equipment with the capacity "(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator." *Marks*, 904 F.3d at 1053. That is, because of the rules governing postpositive modifiers, the Ninth Circuit had to separate the statute's paired verbs; shove the verbs' shared object in between those verbs; and insert an added copy of that object into the statute, *after* the now-separated verb "to produce," all just to clarify that the modifier affects only "produce." That's surgery, not statutory interpretation.

2. The problems don't stop there. For instance, it is difficult to imagine a calling device that "produces" numbers to be called without "storing" them; what happens to the numbers between the time they are "produced" and when they are dialed? But if that is so, then the modifier does no work. And even if there may be rare pieces of machinery that "produce" numbers to be called without "stor[ing]" them, it would be strange to give such limited effect to the statute's key phrase. It "account[s] for" nearly "half of [subsection (A)'s] text," yet would "lie dormant in all but the most unlikely situations." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

Then there is context and purpose. It makes no sense to prohibit every device that stores numbers, but only those devices that produce them "using a random or sequential number generator." And if Congress did want to ban automated dialing in general (rather than

just machines that generated random or sequential numbers), why not just say so? And why leave residential lines—far more prevalent at the time—open to ATDS calls? *See supra* p.3. The Ninth Circuit never even addressed these conundrums.

C. Facebook Plausibly Construes the Text and Avoids Unconstitutional Absurdity

It didn't have to be this way. As Facebook explains—and as the Third Circuit held—the ATDS provision covers only equipment that stores *or* produces telephone numbers to be called, *using a random or sequential number generator*. *See* Pet. 29–30; *Dominguez*, 894 F.3d at 121. This Court should grant certiorari and adopt that coherent, constitutional interpretation.

1. The strengths of this interpretation mirror the flaws in the Ninth Circuit's. It avoids the need to saw § 227(a)(1)'s conjoined verbs in half, because (in keeping with the series-qualifier canon and the rules regarding postpositive modifiers) it reads the modifier to cover both preceding verbs. This interpretation also avoids the Ninth Circuit's other bit of reconstructive surgery, the addition of another copy of the direct object into the sentence.

Facebook's interpretation also makes much more sense of the TCPA's context and history. It explains why Congress limited the ATDS provision to calls to certain then-specialized lines: those lines were uniquely susceptible to the harms caused by random and sequential dialing. It explains why the legislative history regarding the ATDS provision emphasizes random or sequential dialing, not simply unwanted phone calls. *See supra* pp.2–3. And it explains why, for

nearly two decades after its enactment, no one appears to have believed that the ATDS provision targeted automated dialing in general.

Last—but certainly not least—this interpretation complies with the First Amendment. As the FCC recognized long ago, *see supra* p.3 n.5, few modern calling devices have the ability, as presently programmed, to generate and dial random or sequential numbers. Under this reading, then, the ATDS provision maintains its original, constitutional focus—it targets those whose equipment imposes the harms associated with random or sequential dialing.

2. In light of these strengths, the Ninth Circuit conceded that the statute was at least "ambiguous." *Marks*, 904 F.3d at 1051. Given the constitutional flaws in the Ninth Circuit's interpretation, that should have ended the matter. But even setting avoidance aside, the Ninth Circuit's reasons for resolving the ambiguity as it did do not withstand scrutiny.

The Ninth Circuit primarily reasoned that it makes no sense to read "store" as modified by the phrase "using a random or sequential number generator," because equipment cannot "store" something "using" a generator. *See Marks*, 904 F.3d at 1051. Facebook has explained why that is not true. *See* Pet. 27 (describing contemporaneous devices with number generators that "stored" numbers to "avoid generating and calling the same number multiple times"). It is also irrelevant. "[T]he canon against surplusage assists only where a competing interpretation [itself] gives effect to every clause and word of a statute." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013). The Ninth Circuit's does not; it leaves nothing for "produce" to do, because

equipment capable of "producing" and then dialing numbers can store them in between. *See supra* p.14.

The Ninth Circuit also reasoned that the TCPA's consent defense (and debt-collection exemption) would make little sense if the ATDS provision covered only randomly or sequentially generated calls, which are not directed toward specific recipients. *See Marks*, 904 F.3d at 1051. But, per the courts, an ATDS need only have the *capacity* to generate random or sequential numbers. *See Satterfield*, 569 F.3d at 951. And the TCPA imposes liability on any call made from an ATDS, regardless of whether automated dialing functions were used in a particular call. One can obviously direct a call (to a consenting recipient or a debtor) from equipment that, on other occasions, might be used to generate and dial random or sequential numbers. Without these defenses, such directed calls would trigger TCPA liability.

Finally, the Ninth Circuit reasoned that Congress tacitly approved the dial-from-a-list reading when it enacted the debt-collection exemption in 2015. *See Marks*, 904 F.3d at 1052. This argument is difficult to take seriously. The FCC's pre-2015 statements "left significant uncertainty about the precise functions an autodialer must have the capacity to perform." *ACA Int'l*, 885 F.3d at 701. And the FCC's now-vacated 2015 TCPA Order made matters worse, because it "seem[ed] to give both answers" to the key question here: whether "a device qualif[ies] as an ATDS only if it can generate random or sequential numbers." *Id.* at 702–03. Congress could not have ratified an agency position that had long been muddled and that was set aside as so self-contradictory that it "fail[ed] to satisfy the requirement of reasoned decisionmaking." *Id.* at 703.

II. IF THE ATDS PROHIBITION IS CONTENT-BASED, IT MUST BE STRICKEN DOWN, NOT EXPANDED

After unconstitutionally and unnecessarily transforming every smartphone into an ATDS, the Ninth Circuit committed another error: even though it *agreed* with Facebook that the TCPA's content-based scheme flunked strict scrutiny, it "remedied" that violation by severing the exemption and prohibiting more speech. That, too, deserves this Court's review.

1. This Court has often confronted a broad, content-neutral speech restriction coupled with a content-based exemption. Every time, it did what the Ninth Circuit would not: it struck down the challenged prohibition, not the speech-permitting exemption.

Take *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972), and *Grayned v. City of Rockford*, 408 U.S. 104 (1972), decided the same day. Two municipalities banned picketing near schools, but exempted "the peaceful picketing of any school involved in a labor dispute." *Mosley*, 408 U.S. at 93; *Grayned*, 408 U.S. at 107. Mosley sued because he wished to continue protesting outside a school that he believed "practice[d] black discrimination," 408 U.S. at 93, while Grayned sought to overturn his conviction for protesting for equal rights, *see* 408 U.S. at 105.

This Court agreed with Mosley and Grayned that the ordinances "ma[de] an impermissible distinction between labor picketing and other peaceful picketing." *Mosley*, 408 U.S. at 94; *see Grayned*, 408 U.S. at 107. But rather than do what the Ninth Circuit did here, this Court then held that the *content-neutral ordinances*, not the content-based exemption, had to go. *See Mosley*, 408 U.S. at 102; *see Grayned*, 408 U.S.

at 107 (reversing Grayned's conviction because it came "under [an] invalid ordinance").

Indeed, in *Grayned*, the municipality had *already* "delete[d] the labor picketing proviso" by the time the case reached this Court. 408 U.S. at 107 n.2. It did not matter. "This amendment and deletion ha[d], of course, no effect on [Grayned's] personal situation," because the Court had to "consider the facial constitutionality of the ordinance in effect when [he] was arrested and convicted." *Id.*

The same should have been true here. Duguid's putative class seeks to hold Facebook liable for text messages sent after the TCPA had been amended to include the content-based exemption. *See* Pet. App. 10. But rather than assess the constitutionality of the actual TCPA "in effect when" Facebook sent the challenged texts, the Ninth Circuit concluded that Facebook may somehow be held retroactively liable for violating its new, now-content-neutral restriction. *See* Pet. App. 20. That approach cannot be squared with *Mosley* or *Grayned*. Nor are those cases outliers. *See, e.g.*, *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (invalidating the application of a state sales tax to magazines rather than striking the content-based exemptions to that tax); *Carey v. Brown*, 447 U.S. 455 (1980) (invalidating a residential antipicketing ordinance rather than striking its labor-dispute exemption); Pet. 19 (collecting other cases).

2. In addition to being compelled by precedent, striking the prohibition rather than severing the exemption makes sense. To begin, courts generally deploy remedies that "create incentives to raise [constitutional] challenges." *Lucia v. SEC*, 138 S. Ct.

2044, 2055 n.5 (2018). But under the Ninth Circuit's approach, the prize for *successfully* challenging an unjustified content-based scheme is, well, nothing.

In fact, it's worse than that. In the Ninth Circuit, the reward for defeating a content-based scheme is a *broader prohibition on speech*. Given the "special status of speech in our constitutional scheme," *Rappa v. New Castle County*, 18 F.3d 1043, 1073 (3d Cir. 1994), courts should leave it to legislatures to craft any restrictions that meet the high bar for speech prohibitions, not draft them themselves. *See id.* ("[A]bsent quite specific evidence of a legislative preference for elimination of an exception," courts should not assume that the "legislature would prefer" to "restrict more speech.").

Once courts get into the business of blue-penciling speech codes, it will be difficult to divine any principled place to stop. The ATDS provision offers a great example. In addition to adding a content-based exemption directly into the statute, Congress empowered the FCC to exempt speech it preferred. *See* 47 U.S.C. § 227(b)(2). The FCC has liberally deployed that power, exempting "package delivery notifications,"[10] calls about "financial and healthcare issues" like "money transfers" and "exam reminders," [11] calls "closely related to [a] school's mission, such as notification of an upcoming teacher

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[10] *In re Cargo Airline Ass'n Pet. for Expedited Declaratory Ruling*, 29 FCC Rcd. 5056, 5056 (2014).

[11] *In Re Rules & Regs. Implementing the TCPA*, 30 FCC Rcd. 7961, 8023, 8026, 8030 (2015).

conference or general school activity,"[12] and calls by "utility companies" on "matters closely related to the utility service, such as a service outage."[13]

Who's to say whether these exemptions are "severable" under the Ninth Circuit's approach? The general saving clause (incorporated into the telecommunications laws decades ago) doesn't help; it applies, at most, where a court invalidates "a[] provision *of this chapter*," not a regulation. 47 U.S.C. § 608 (emphasis added). History doesn't help either. While these exemptions (like the debt-collection exemption) are rather recent, that can't be enough to demonstrate that they are severable. After all, Congress conferred upon the FCC *ongoing* power to craft exemptions, not just exemptions promulgated in or around 1991.

In the end, then, a court determining whether to strike these exemptions must compare the importance of the exempted speech with the purported harms of ATDS calls. That is no business for federal courts.[14]

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[12] *In Re Rules & Regs. Implementing the TCPA*, 31 FCC Rcd. 9054, 9061 (2016).

[13] *Id.*

[14] The Ninth Circuit dodged these issues by holding that it lacked jurisdiction to review the administrative exemptions. *See Gallion v. United States*, 772 F. App'x 604, 606 (9th Cir. 2019). *But see PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051 (2019) (reserving judgment on whether the Hobbs Act requires such a result). Whatever the Hobbs Act means, it does not prevent this Court from considering the consequences of the Ninth Circuit's approach to severability.

III. THE COURT SHOULD GRANT BOTH QUESTIONS

Uncertainty surrounding the TCPA has wreaked havoc throughout the federal courts. This Court should grant both questions to stop the chaos.

1. The litigation sparked by the TCPA is remarkable. Between 2014 and 2017, roughly 5,000 TCPA cases were filed in state and federal court.[15] By end of October 2018, nearly 3,000 TCPA lawsuits had been filed in that year alone.[16] *Marks* has only made things worse. For example, one plaintiff's firm planned a "massive uptick in TCPA filings (80–100 in the next month) in light of renewed confidence in the TCPA."[17]

The causes of this explosion are obvious. The TCPA promises damages of $500 per call or text, leading to massive claimed damages in class-action cases. *See, e.g.*, *Wakefield v. ViSalus, Inc.*, 2019 WL 2578082 (D. Or. June 24, 2019) (denying request to treble $925,220,000 damage award). But because of the uncertainty surrounding the ATDS provision, *see* Pet. 32–33 & nn.3–4, businesses and other callers cannot know in advance how to avoid lawsuits while still communicating with their customers or other supporters. Indeed, because wireless numbers are often reassigned from one person to another without notice to third parties, callers can't even secure and

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[15] U.S. Chamber Inst. for Legal Reform, *TCPA Litigation Sprawl* 2 (2017), *available at* https://bit.ly/2WpfFMa.

[16] TCPALand, *Happy Halloween TCPALand! More Ghoulish TCPA Statistics To Freak You Out*, https://bit.ly/322ex2o (Nov. 1, 2018) ("*Ghoulish TCPA Statistics*").

[17] *Id.*

rely upon consent; a desired communication intended for a consenting recipient may end up reaching another, non-consenting one, as likely happened here. *See ACA Int'l*, 885 F.3d at 705.[18]

It is no surprise, then, that defendants have paid out hundreds of millions of dollars in settlements to avoid this nightmare.[19] It is also no surprise that plaintiffs have turned pro in shaking down callers. *See, e.g.*, *Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782, 788 (W.D. Pa. 2016) (plaintiff purchased "at least thirty-five cell phones … for the purpose of filing lawsuits" under the TCPA); *Nghiem v. Dick's Sporting Goods, Inc.*, 318 F.R.D. 375, 382 (C.D. Cal. 2016) (plaintiff signed up for promotional texts "for the specific purpose of finding a TCPA violation").

2. Granting both questions presented provides this Court with the most options for ending this onslaught. For instance, if the Court concludes that Facebook has not been plausibly accused of using an ATDS under the proper interpretation of that term, it could resolve the case on that basis. By so doing, the Court would follow its usual preference for avoiding constitutional questions where possible. The Court would also bring much-needed clarity to the scope of a provision that has twisted the lower courts in knots. And it would ensure that millions of smartphone users across the

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[18] The FCC has established a reassigned number database, but it will not launch until January 2020 at the earliest, *see In re Advanced Methods To Target and Eliminate Unlawful Robocalls*, 2019 WL 4392267 (FCC Sept. 12, 2019), and its effectiveness and cost remain unknown.

[19] *See Ghoulish TCPA Statistics*.

country are not subject to TCPA liability for everyday communications.

To be sure, if the Court granted certiorari and reversed solely on the First Amendment question, that would provide clarity as well: no one could be held liable for using an ATDS until Congress enacts a content-neutral prohibition. But unless Congress also amends the definition of an ATDS, this interpretive problem will once again vex litigants and the courts in the future. And the Ninth Circuit's approach will continue to expose millions of smartphone users to TCPA liability for any text or call that is made without the recipient's prior express consent.

CONCLUSION

The Court should grant both questions presented and reverse the decision below.

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Respectfully submitted,

STEVEN P. LEHOTSKY
TARA S. MORRISSEY
U.S. CHAMBER
LITIGATION CENTER
1615 H St., N.W.
Washington, DC 20062

LIZ DOUGHERTY
BUSINESS ROUNDTABLE
1000 Maine Avenue, S.W.
Washington, DC 20024

SHAY DVORETZKY
Counsel of Record
JEFFREY R. JOHNSON
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com