# Skating Past Liability Under the TCPA: Robocalls and Unsolicited Texts and E-mails

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INTRODUCTION

*"The [Telephone Consumer Protection Act] does not
and was not intended to stop every type of call. . . . [I]t
was limited only to calls made using an autodialer or an
artificial or prerecorded voice."[1]*

Americans are expected to receive over 48 billion robocalls in 2021; if you got one, you are in good company.[2] Despite being irritants, robocalls' pervasive nature has unintended—and sometimes life-threatening—consequences. For instance, one New Hampshire woman, awaiting a life-saving liver transplant, received a call from an unknown Florida number and did not answer, believing it to be another robocall.[3] As it turned out, it *was* a robocall, but a robocall from Massachusetts General Hospital notifying her that a matching liver had been found for transplant.[4] If not for the voicemail identifying the caller as the hospital, she likely would not have known the important nature of the call.[5] Despite those dramatic turn of events, situations like this frequently arise all over the United States. To make matters worse, the number and frequency of robocalls have increased substantially over the last few years.[6]

The Telephone Consumer Protection Act of 1991 (TCPA or the Act) was enacted by Congress to address consumers' concerns of abusive telemarketers, specifically in restricting communications by use of certain technology, such as an "automated telephone dialing system" (autodialers).[7] In the last decade, circuit courts have struggled with how to interpret the definition of an autodialer: broadly or narrowly? This struggle was only further exacerbated when the Federal Communication Commission's (FCC) 2015 Order,[8] which built upon previous Orders that

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1. *Consumer and Governmental Affairs Bureau Issues Declaratory Ruling in P2P Alliance Petition for Clarification*, 35 FCC Rcd. 6,526 (8), at 4, ¶ 12 (adopted June 25, 2020), https://www.fcc.gov/document/cgb-issues-declaratory-ruling-p2p-alliance-petition [hereinafter *FCC 2020 Order*] [https://perma.cc/Q8MZ-3C6J].

2. Jeff John Roberts, *You Aren't Alone: Why Americans Will Receive 48 Billion Robocalls This Year*, FORTUNE (Feb. 27, 2021), https://fortune.com/2021/02/27/scam-calls-robocalls-phone-scams-car-warranty-calls-traced-act/ [https://perma.cc/85HZ-DNY9].

3. Shawne K. Wickham, *Manchester Mom Recovering After Successful Liver Transplant*, N.H. UNION LEADER (Aug. 24, 2019), https://www.unionleader.com/news/health/manchester-mom-recovering-after-successful-liver-transplant/article_f82c63b5-a264-5d07-9723-ad051a9510f8.html [https://perma.cc/5JCA-3AKX].

4. *Id.*

5. *See* Elaine S. Povich, *Legit Robocalls Get Snared in Crackdown on Scams*, STATELINE (Aug. 28, 2019), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/08/28/legit-robocalls-get-snared-in-crackdown-on-scams [https://perma.cc/HKY6-Q54Z].

6. *Id.*

7. *See* discussion *infra* Part I.

8. *See generally About the FCC*, FCC, https://www.fcc.gov/about/overview

interpreted the autodialer provision, was struck down by the D.C. Circuit in *ACA International v. FCC*.[9] In response, the Second and Ninth Circuits continued to interpret the autodialer provision broadly,[10] while the Third, Seventh, and Eleventh Circuits interpreted it narrowly.[11] The FCC was hesitant to communicate any further interpretations on the TCPA, specifically to the autodialer provision, and chose to wait until the United States Supreme Court rendered its decision in *Facebook, Inc. v. Duguid*.

On April 1, 2021, the Court decided *Duguid* and applied a textualist approach[12] to interpret the scope of technology the autodialer provision encompasses.[13] The Court's decision will no doubt impact future consumers who will be left without recourse from companies that have found ways around the autodialer requirements.

This Note argues that the applicability of the TCPA's autodialer provision should be interpreted broadly to include calls made on many types of dialing equipment. This broad interpretation would account for both the advancement of technology and the policy interests of consumers.

Part I of this Note offers a brief history of the TCPA and autodialers. Part II examines the FCC's Orders that interpret the TCPA's autodialer provision, and Part III assesses the varying interpretations of the provision

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[https://perma.cc/KD8U-RQWX] ("The [FCC] regulates interstate . . . communications by radio, television, wire, satellite, and cable in all [fifty] states . . . and enforc[es] America's communications law and regulations.").

9. ACA Int'l v. FCC, 885 F.3d 687, 700 (D.C. Cir. 2018) (holding that the FCC's "interpretation of the [TCPA] statute . . . is an unreasonabl[e], and impermissibly, expansive one."); *see also* Gadelhak v. AT&T Services, Inc., 950 F.3d 458, 463 (7th Cir. 2020) (explaining that when the "D.C. Circuit struck down the 2015 FCC interpretation in ACA International v. FCC, . . . [it] did not leave prior FCC Orders intact").

10. *See* King v. Time Warner Cable Inc., 894 F.3d 473, 481 (2d Cir. 2018) *(*holding that the term "capacity" in the Act's definition should be interpreted to mean that "a qualifying autodialer should be interpreted to refer to a device's current functions, absent any modifications"); Marks v. Crunch San Diego, LLC, 904 F.3d 1041, 1052 (9th Cir. 2018) *cert. dismissed*, 139 S. Ct. 1289 (2019) (holding that the definition of an autodialer is ambiguous and the statute provision should be construed as including "devices with the capacity to dial stored numbers automatically").

11. *See* Dominguez v. Yahoo, Inc., 629 F. App'x 369, 373 nn.1, 2 (3d Cir. 2015) (holding that an autodialer only applies to a message that is sent by a system that has the capacity to generate numbers randomly or sequentially; to store or produce those numbers; and has the capacity to dial those numbers); Gadelhak, 950 F.3d at 464–69 (7th Cir. 2020) (holding "that the phrase 'using a random or sequential number generator' describes how the telephone numbers must be 'stored' or 'produced,' and "the capacity to generate random or sequential numbers is necessary to the statutory definition"); Glasser v. Hilton Grand Vacations Co., 948 F.3d 1301, 1306–12 (11th Cir. 2020) (holding that a device that simply stores and dials telephone numbers is not an [autodialer]).

12. A textualist approach or textualism is regarded as a "strict or rigid adherence to a text," such as the U.S. Constitution and was championed by the late United States Supreme Court Justice, Antonin Scalia. MERRIAM WEBSTER, TEXTUALISM, https://www.merriam-webster.com/dictionary/textualism [https://perma.cc/F48Y-9M7E]. *See generally* PHILIP BOBBITT, CONSTITUTIONAL FATE (1984), for an in-depth examination of the six identified modes of constitutional argument that have been used by the United States Supreme Court.

13. *See* Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1169–70 (2021).

by the circuit courts. Part IV reviews the general facts and procedural history of *Duguid*, and the Court's interpretation of the autodialers provision. Last, Part V examines current efforts offered by Congress and potential next steps for consumers. This Note concludes by arguing that Congress must use its power to amend the provision to increase clarity and reflect the significant advancements in technology—advancements that legislators in 1991 could not have surmised.

## I. History of the TCPA and the Automated Telephone Dialing System

The TCPA was created to "protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls[.]"[14] An "autodialer" 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."[15]

In the 1990s, telemarketers used a single autodialer to cause upwards of 1,000 landline phones to ring. The autodialer delivered a prerecorded voice message[16] that could not be stopped when a consumer hung up the phone, but instead required the listener to listen to the entire prerecorded message before using the landline again.[17]

Despite the advancements in technology, the definition of what constitutes an autodialer has not been revised since the TCPA's enactment in 1991.[18] Until recently, the concern over what type of device or equipment meets the statutory definition was subject to different interpretations based on the volume of complaints filed with the FCC each year by consumers.[19] Thirty years since its enactment, the TCPA has weathered the tide of technological advancement with few amendments and three important exceptions: calls made using an autodialer (1) for "emergency purposes"; (2) "with the prior express consent of the called

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14. S. Rep. No. 102-178, at 1 (1991).

15. 47 U.S.C. § 227(a)(1)(A), (B).

16. S. Rep. No. 102-178, at 2 (1991).

17. *See* 137 Cong. Rec. H35, 305-06 (daily ed. Nov. 26, 1991) (statement of Rep. Roukema) (explaining the story of a young New York mother's "sheer terror" when she tried calling an ambulance for her child and "picked up the phone only to find it occupied by a computer call that would not disconnect").

18. *Compare* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394, *with* 47 U.S.C. § 227.

19. *See*, *e.g.*, Consumer Complaints Data - Unwanted Calls, FCC: Consumer Inquiries and Complaints Division (2021), https://opendata.fcc.gov/Consumer/Consumer-Complaints-Data-Unwanted-Calls/vakf-fz8e [https://perma.cc/WU6G-2XXG]; *see also The FCC's Push to Combat Robocalls & Spoofing*, FCC, https://www.fcc.gov/spoofed-robocalls [https://perma.cc/WM2X-ZKRC]. The FCC estimates that it receives 200,000 complaints from American consumers each year, which accounts for 60% of all complaints it receives per year.

party"[20]; or (3) "to collect a debt owed to[,] or guaranteed by[,] the United States" (the "government-debt exception").[21] The penalty for calls made using an autodialer not within any of these exceptions is a minimum of $500 per violation.[22]

In July 2020, however, the Supreme Court heard *Barr v. American Association of Political Consultants, Inc.* and struck down the government-debt exception for violating the First Amendment.[23] Instead of striking down the entire TCPA, the Court chose to sever and strike only the exception.[24] Following *Barr*, many consumer advocates argued that since Congress did not take any action to invalidate or amend the TCPA that meant Congress tacitly agreed with the FCC's expansive interpretation of what constitutes an autodialer and how the Court chose to interpret it.[25] Three days after its decision in *Barr*, the Court granted certiorari in *Facebook, Inc. v. Duguid* to resolve the circuit split on whether the TCPA's autodialer provision applies broadly to calls made on many types of dialing equipment or is limited to calls made on equipment from the early 1990s—equipment rarely in use today.[26] The Court's decision on this matter is of great importance because companies, like Facebook, that place high volumes of automated calls, texts, or notifications can avoid liability under the autodialer provision when using cell phones or other similar, modern technology that do not "store" or "produce" numbers using a "random or sequential number generator."[27]

## II. THE FCC'S INTERPRETATION OF AN AUTODIALER

The TCPA vests authority to the FCC to promulgate regulations in accordance with the TCPA.[28] Under the Hobbs Act, federal courts are

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20. 47 U.S.C. § 227(b)(1)(A) (2010).

21. Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301(a)(1)(A), 129 Stat. 584, 588; 47 U.S.C. § 227(b)(1)(A)(iii).

22. 47 U.S.C. § 227(b)(3).

23. Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2356 (2020) (holding that the government-debt exception violated the First Amendment because it impermissibly favored debt-collection speech over political or other speech).

24. *Id.* The Court's decision concluded that the Act continues to prohibit political consultants and debt collectors from making unsolicited robocalls to American's cellphones and offered a glimpse into the careful analysis the Court uses when considering exceptions to the Act.

25. *See* Glasser v. Hilton Grand Vacations Co., 948 F.3d 1301, 1310 (11th Cir. 2020) (explaining that Congress did not re-enact the Act in 2015, but merely offered an amendment to the Act itself, which has nothing to do with the issue of what an autodialer ought to be defined as).

26. Duguid v. Facebook, Inc., 926 F.3d 1146 (9th Cir. 2019), *cert. granted in part*, 141 S. Ct. 193 (2020). The question on appeal was whether the definition of an autodialer encompassed any device that could 'store' and 'automatically dial' telephone numbers, even if the device did not use a random or sequential number generator.

27. Facebook, Inc., v. Duguid, 141 S. Ct. 1163, 1169 (2021).

28. *See* 47 U.S.C. § 227(b)(2).

required to adopt FCC interpretations unless there is a direct appeal against an FCC order.[29] Essentially, this means that while the FCC offers guidance through its Declaratory Rulings on issues related to the TCPA, if a federal court were to directly appeal the FCC's interpretation of the statute, then federal courts are not required to follow the FCC's interpretation. This was recently seen in *ACA International v. FCC*.[30]

From 1992 to 2003, the FCC followed the statutory definition of an autodialer without issuing any modifications.[31] In 2003, the FCC authored its first interpretation of the autodialer provision in response to the rise of predictive dialers (utilized by telemarketers) and significant advancements in technology.[32] The FCC interpreted the statutory definition of an autodialer to include predictive dialers—telephone software that dials telephone numbers it has stored or can produce, until a call is answered and then transferred to an agent.[33]

In updating its interpretation, the FCC relied on the statutory language and legislative history of the TCPA to infer that Congress had anticipated the FCC would need to consider changes in technology when interpreting the TCPA.[34] The automated telemarketing devices of the 1990s were capable of only dialing random or sequential blocks of numbers, which were not programmed. Predictive dialers, on the other hand, are capable of automatically dialing from a preprogrammed list of numbers that are stored in the device or downloaded from a database.[35] The FCC's 2003 Order suggested that any device that operates like a predictive dialer and could be configured for that purpose has the capacity to meet the statutory definition of an autodialer.[36]

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29. Gadelhak v. AT&T Services, Inc., 950 F.3d 458, 463 (7th Cir. 2020) (explaining how the federal statute, the Hobbs Act, gives federal appellate courts exclusive jurisdiction to abrogate a federal agency's order).

30. *See ACA Int'l v. FCC,* 885 F.3d 687, 703 (D.C. Cir. 2018) (invalidating the FCC's 2015 Declaratory Ruling and removing any deference owed to the views of the FCC).

31. *See In re Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC Rcd. 8,752, 8,755 n.6, 8,792 (1992) [hereinafter *FCC 1992 Order*].

32. *See In re Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14,014, 14,017 (2003) [hereinafter *FCC 2003 Order*].

33. The FCC defined predictive dialers as "equipment that dials numbers and, when certain computer software is attached, also assists telemarketers in predicting when a sales agent will be available to take calls. The hardware, when paired with certain software, has the capacity to store or produce numbers and dial those numbers at random, in sequential order, or from a database of numbers." *Id.* at 14,091–92. Consideration of the predictive dialer against the statutory definition of an autodialer included examining whether the equipment was "automatic" and whether it had the "capacity" to function in the two relevant ways.

34. *Id.*; *see* 137 Cong. Rec. S18,784 (1991) (statement of Sen. Hollings) ("The FCC is given the flexibility to consider what rules should apply to future technologies as well as existing technologies.").

35. *FCC 2003 Order*, *supra* note 32, at 14,090.

36. *Id.* at 14,090–91.

In 2008, the FCC issued an Order in response to a petition filed by ACA International (the Association of Credit and Collection Professionals) which sought "clarification that the prohibition against autodialed or prerecorded calls to wireless telephone numbers . . . does not apply to creditors and collectors when calling wireless telephone numbers to recover payments . . . [from] consumers."[37] The FCC acknowledged "that [while] a predictive dialer constitutes an [autodialer] and is subject to the TCPA's restrictions on the use of autodialers," creditors may still use predictive dialers to call wireless phones if the number was provided by the consumer with an existing debt.[38]

Four years later, the FCC again updated its interpretation of the definition of an autodialer. The FCC's 2012 definition included "any equipment that has the specified *capacity* to generate numbers and dial them without human intervention[39] regardless of whether the numbers are randomly or sequentially generated or come from calling lists."[40]

The FCC's subsequent 2015 Order endorsed Congress's intention for a broad interpretation of what constitutes an autodialer.[41] This Order suggested that a device "need only have the 'capacity' to dial random and sequential numbers, rather than a 'present ability' to do so[,]"[42] and the developments in technology, such as pairing dialing equipment with predictive dialing software, "ha[d] not changed . . . [a device's] *capacity* to dial numbers without human intervention."[43] The FCC explained that the basic function of an autodialer is its ability to dial numbers without human intervention, but a device could still qualify as an autodialer even if it alone—without the use of predictive software—cannot dial numbers without human intervention.[44]

In response, eleven entities filed separate challenges seeking review of the FCC's 2015 Order. In the consolidated case, *ACA International v. FCC*, the D.C. Circuit held that the 2015 Order contradicted the standard

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37. *See In re Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 23 FCC Rcd. 559, 563 (2008) [hereinafter *FCC 2008 Order*].

38. *Id.* at 566.

39. The term "'human intervention' does not appear in the TCPA and only became part of the TCPA['s] lexicon following the FCC's massive expansion of the [autodialer] definition in its 2015 [Order]." Eric J. Troutman, *Facebook is Out!: The 6 Most Critical Take Aways–and One Most Important Question–Following the Supreme Court's Huge TCPA ATDS Ruling Today*, NAT'L L. REV. (Apr. 1, 2021), https://www.natlawreview.com/article/facebook-out-6-most-critical-take-aways-and-one-most-important-question-following [https://perma.cc/GL2W-8H6N].

40. *In re Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 27 FCC Rcd. 15,391, 15,392 n.5 (2012) (emphasis added).

41. *See In re Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7,961, 7,973–74 ¶¶ 14, 15 (2015) [hereinafter *FCC 2015 Order*].

42. *Id.* at 7,974 ¶ 15.

43. *Id.* at 7,973 ¶ 14 (emphasis added).

44. *Id.*

interpretation of the autodialer provision by suggesting that two forms of competing interpretations could co-exist.[45] The court held that a device qualified as an autodialer *only if* it could generate random or sequential numbers to be dialed, and that a device could still qualify as an autodialer even if it could only dial numbers from a stored list.[46] The court also determined that the FCC's expansive interpretation of the word "capacity" would allow "all smartphones [to] qualify as autodialers because they have the inherent 'capacity' to gain [autodialer] functionality by downloading an app."[47] The decision in *ACA International* effectively rendered all FCC interpretations of what constitutes an autodialer invalid and required that all future courts review these types of cases de novo—the only Order still in effect is from 1991. In light of this decision, the FCC solicited comments on the proper interpretation of what constitutes an autodialer.[48]

Recently, the FCC issued another Order on a request for clarification on whether certain peer-to-peer text messaging platforms constitute autodialers subject to the TCPA.[49] The FCC communicated that:

> whether the calling platform or equipment is an autodialer turns on whether such equipment [can dial] random or sequential telephone numbers without human intervention. If . . . [it] is not capable . . . without a person actively and affirmatively manually dialing each one, that platform is not an autodialer and calls made using it are not subject to the TCPA's restrictions on calls to wireless phones.[50]

The FCC stated that the TCPA "does not and was not intended to stop every type of call. . . . [I]t was limited only to calls made using an autodialer or an artificial or prerecorded voice."[51] The FCC indicated that it would not resolve the dispute over the definition of an autodialer and

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45. *ACA Int'l v. FCC,* 885 F.3d 687, 701–03 (D.C. Cir. 2018).

46. *Id. at 703* (rejecting the 2015 FCC Order as it espouses two competing interpretations on what may constitute an [autodialer]). The court additionally noted that the word "auto" in "autodialer" would seem to propose that the term as used in 47 U.S.C. § 227(a)(1) would amount to an "automatic" or "non-manual dialing of telephone numbers [,]" which evidences that the provision meant to bar any form of human intervention of an autodialer. *Id.*

47. *Id.* at 700. The court further stated that "[i]t cannot be the case that every uninvited communication from a smartphone infringes federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact." *Id.* at 698.

48. *See Consumer and Governmental Affairs Bureau Seeks Comments on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision*, CG Docket Nos. 18-152 and 02-278, Public Notice, 33 FCC Rcd. 4,864 (2018), https://www.fcc.gov/document/cgb-seeks-comment-tcpa-light-dc-circuit-decision-aca-intl [https://perma.cc/BYW5-GSSL].

49. *See* Petition for Clarification of the P2P Alliance, CG Docket No. 02-278 at 1 (filed May 3, 2018) (hereinafter P2P Alliance Petition).

50. *FCC 2020* Order, *supra* note 1, ¶ 8.

51. *Id.* ¶ 12.

instead would rely strictly on the statutory language of the TCPA.[52] It remains to be seen whether the FCC will offer any interpretation relating to this issue now that the Court has decided *Duguid.*

### III. CIRCUITS SPLIT ON THE MEANING OF AN AUTODIALER

#### A. Minority View: Broad Interpretation

The Second and Ninth Circuit Courts, until recently, interpreted the TCPA's autodialer provision to not require that a device generate random or sequential numbers so long as it can store and automatically dial those numbers. A brief overview of the two cases brought before these circuits are discussed below to aid in understanding the broad interpretation of the provision.

#### 1. Second Circuit

In *King v. Time Warner Cable Inc.*, the Second Circuit considered "whether the . . . broad understanding of the 'capacity' a device must have in order to qualify as an [autodialer] under the TCPA is a supportable interpretation of the statute."[53] The court relied on the plain meaning of the word "capacity" to determine that "an autodialer must necessarily obtain that *actual* ability before [it] pose[s] a concrete risk of causing the problems which the statute was enacted to prevent."[54] Interestingly, the court examined *ACA International* and noted that the D.C. Circuit's opinion did not limit the term "capacity" to a device's present ability, but rather proposed that:

> whether equipment has the 'capacity' to perform the function of an [autodialer] ultimately turns . . . on considerations such as how much is required to enable the device to function as an autodialer: does it require the simple flipping of a switch, or does it require essentially a top-to-bottom reconstruction of the equipment?[55]

The Second Circuit also suggested that easily activated devices, such as smartphones, could be autodialers under the TCPA.[56] Ultimately, it held

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52. *Id.* ¶ 1 n.2.

53. King v. Time Warner Cable Inc., 894 F.3d 473, 477 (2d Cir. 2018). The plaintiff in this case received 163 calls to her cell phone by Time Warner Cable's interactive voice response system, requesting payment on a delinquent account. *Id.* at 475. All 163 calls King received were actually for another, apparently delinquent, Time Warner customer whose account was erroneously associated with King's phone number. *Id.*

54. *Id.* at 478 (emphasis added).

55. *Id.* at 478–79 (quoting ACA Int'l v. FCC, 885 F.3d 687, 696 (D.C. Cir. 2018)).

56. *See id.*

that an autodialer is not limited only to devices with the capacity to call numbers, but also to devices that have the capacity to dial stored numbers automatically.[57]

## 2. Ninth Circuit

Similarly, in *Marks v. Crunch San Diego, LLC*, the Ninth Circuit considered whether in order to qualify as an autodialer, a device needs to dial numbers generated by a random and sequential number generator, or if it is sufficient that a device merely dials numbers from a stored list; and to what extent a device must function without human intervention to be considered an autodialer.[58]

Marks argued that a device qualified as an autodialer if it has capacity to store numbers and dial them automatically, whereas Crunch argued a device must store numbers that are produced using a random or sequential number generator to qualify as an autodialer.[59] The court concluded, after acknowledging its own struggle with the provisional language, that its analysis of the plain language alone was insufficient because the text was ambiguous.[60] Looking at the context and structure of the statutory scheme in its search for clarity, the court explained that Congress had intended to regulate devices that were capable of automatically calling consumers.[61] Although the equipment that the TCPA targets is much different than equipment in use today, the statutory language supports the idea that equipment that made automatic calls also fell under the statutory scheme.[62] The court concluded that the autodialer definition includes any device that 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–and to dial such numbers."[63] The Ninth Circuit expanded the reading of the autodialer provision to mean that equipment that can store numbers and dial them automatically is within the statutory language.

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57. *Id.* at 481.

58. Marks v. Crunch San Diego, LLC, 904 F.3d 1041(9th Cir. 2018), *abrogated by* Facebook, Inc. v. Duguid, 141 S. Ct. 1163 (2021). The plaintiff in this case was a member of a member of Crunch Fitness (Crunch) gym since 2012, and he received three texts over an 11-month period from Crunch's Textmunication system, which is a "web-based marketing platform designed to send promotional text messages to a list of stored telephone numbers." *Id.* at 1048. The plaintiff filed a class action suit against Crunch after he received charges from his cell phone provider. *Id.*

59. *Id.* at 1050–51.

60. *Id.* at 1051.

61. *Id.*

62. *Id.*

63. *Id.* at 1052.

### B. Majority View: Narrow Interpretation

In contrast, the Third, Seventh, and Eleventh Circuits—whose decisions are now aligned with the Supreme Court's—interpreted the TCPA's autodialer provision as requiring a device to have the capacity to both store or produce numbers using a random or sequential number generator. Again, a brief overview of the three cases brought before these circuit courts are discussed below to understand the narrow interpretation that the Court follows.

### 1. Third Circuit

In 2018, the Third Circuit in *Dominguez v. Yahoo, Inc.* considered whether a consumer demonstrated that a device used to contact him had the present capacity to function as an autodialer.[64] The court considered Dominguez' four expert reports to prove the present capacity issue but determined that three of the reports were reiterations of the potential capacities of the device, which is the exact type of hypothesizing that the D.C. Circuit had foreclosed.[65] The fourth report also failed because it did not explain how the device "actually did or could generate random telephone numbers to dial."[66] The court concluded that if a consumer is unable to prove and offer valid reasoning as to how a device is an autodialer and could generate random telephone numbers, then that consumer will lose every time.[67]

### 2. Eleventh Circuit

Two years after *Dominguez*, the Eleventh Circuit in *Glasser v. Hilton Grand Vacations Company, LLC* considered how it should interpret the autodialers' provisional phrase "using a random or sequential number generator" and whether the phrase modified both verbs "to store" and "to produce" or just the latter verb.[68] *Glasser* consisted of two consolidated cases, where the first plaintiff, Melanie Glasser, received thirteen unsolicited calls regarding vacation opportunities; the second plaintiff,

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64. Dominguez v. Yahoo, Inc., 894 F.3d 116, 119 (3d Cir. 2018). The plaintiff purchased a cellphone with a recycled phone number that apparently belonged to another Yahoo customer, and the previous customer had set up a subscription to Yahoo's Email SMS Service. *Id.* at 17. The plaintiff received approximately 27,800 text messages from Yahoo's Email SMS Service over a 17–month period. *Id.*

65. *Id.* at 119–21.

66. *Id.* at 120.

67. *See id.* at 121. Additionally, the Third Circuit explained that while Dominguez suffered a great annoyance, Yahoo sent those messages because its user gave it consent to do so and not because of a random number generation. *Id.*

68. Glasser v. Hilton Grand Vacations Co., 948 F.3d 1301, 1306 (11th Cir. 2020).

Tabitha Evans, received thirty-five unsolicited calls from a loan servicer regarding unpaid student loans.[69]

The court determined that "[c]larity . . . does not leap off [the] page" of the TCPA's autodialer provision and in the absence of an ideal alternative, the court chooses the better alternative, which in this case was interpreting the phrase to modify both verbs.[70] The court based its interpretation on three factors: (1) the FCC, in its Orders from 1991 to 2003, interpreted the phrase "random or sequential" as modifying both verbs[71]; (2) the D.C. Circuit's *ACA International* decision, which warned against extending the TCPA to include smartphones because simple, "unsolicited call[s] using voice activated software (think Siri, Cortana, Alexa) or an automatic 'I'm driving' text message could be a violation worth $500"[72]; and (3) the Ninth Circuit's take on the phrase, which the Eleventh Circuit noted has taken upon itself to perform a form of surgery upon the statutory language rather than an interpretation.[73]

The Eleventh Circuit concluded that in plaintiff Glasser's case, the system that the timeshare marketing firm used was not an autodialer because it was not squared with the assumption that the device is automatic.[74] In contrast, the court determined that in plaintiff Evans's case, thirteen of the prerecorded calls from the loan servicer warranted damages to Evans, but the remaining twenty-two calls were not supported by sufficient evidence of a system that possessed the capacity to operate as an autodialer.[75]

### 3. Seventh Circuit

In 2020, the Seventh Circuit in *Gadelhak v. AT&T Services, Inc.* interpreted "what the phrase 'using a random or sequential number generator' modifies."[76] Here, Gadelhak received five text messages from AT&T's Customer Rules Feedback Tool.[77] In its opinion, the court noted

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69. *Id.* at 1305.

70. *Id.* at 1306.

71. *Id.* at 1309.

72. *Id.* (parenthetical in original).

73. *Id.* at 1311. Additionally, the Eleventh Circuit argued that the Ninth Circuit's argument fails because it offered no explanation as to why other courts should follow its interpretation as opposed to reading the provision as applying to a device that randomizes or sequences a dialing order. *Id.*

74. *Id.* The Eleventh Circuit affirmed the decision of the district court on the grounds that Hilton Grand Vacations Company's system, Intelligent Mobile Connect, required a sales agent to review telephone numbers and manually click a button labeled "make call" to connect with a potential consumer. This type of human involvement superseded the bounds of the autodialer provision. *Id.* at 1312.

75. *Id.* at 1312–13.

76. Gadelhak v. AT&T Services, Inc., 950 F.3d 458, 460 (7th Cir. 2020).

77. *Id.* AT&T's Customer Rules Feedback Tool is device used by AT&T's customer service department to deliver surveys to customers following an interaction. The tool itself, like other systems

four primary interpretations of the phrase "using a random or sequential number generator" derived from the autodialer provision:

> First, the phrase . . . might modify both *store* and *produce*, which would mean that a device must be capable of performing at least one of those functions using a random or sequential number generator to qualify as an [autodialer]. . . . Second, the phrase might describe the *telephone numbers* themselves, specifying that the definition captures only equipment that dials randomly or sequentially generated numbers. . . . Third, the phrase might limit only the word *produce*, which would mean that the definition captures not only equipment that can produce numbers randomly or sequentially, but also any equipment that can simply store and dial numbers. . . . [Or f]inally, the phrase could describe the manner in which the telephone numbers are *to be called*, regardless of how they are stored, produced, or generated.[78]

The Seventh Circuit evaluated each of the differing interpretations and found all lacking but the first option. With the first interpretation, it was difficult for the court to understand how a number generator could be used to store telephone numbers.[79] The second interpretation allowed for the insertion of a significant word that is simply not in the provision: "generated."[80] If accepted, it would read as "to store or produce telephone numbers to be called, [*generated*] using a random or sequential number generator, and [] to dial such numbers."[81] The court stated that its task is to interpret the words of the TCPA, not add to them, and "[t]he words of Congress, as written, [would] not permit this second interpretation."[82] The third interpretation, which Gadelhak argued, emphasized the "disjunctive 'or' in 'store or produce' to mean an [autodialer] need not produce numbers at all," and all devices with capacities "to store telephone numbers to be called and to dial those numbers" would qualify as an autodialer.[83] The Seventh Circuit determined that it is unnatural to cut the statutory language up to where the phrase would modify only the latter

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used in the present, "pulls and dials numbers from an existing database of customers rather than randomly generating them." *Id.* at 461. Here, the tool requested the plaintiff to complete a survey in Spanish; however, he was not an AT&T customer, did not speak Spanish, and was listed on the do not call list. *Id.* at 460.

78. *Id.* at 463–64 (emphasis in original). The first interpretation reflects both the Third and Eleventh Circuits' position, the second interpretation best describes the district court's position in *Gadelhak*, the third interpretation describes the Ninth Circuit's position, and the fourth describes what some courts have alluded to as a possibility, but none have adopted. *Id.* at 464.

79. *Id.*

80. *Id.* at 465.

81. *Id.* at 465 (emphasis added) (alteration in original).

82. *Id.* at 466.

83. *Id.*

verb "produce."[84] The fourth interpretation, called for a reading of the provision as: "to store or produce telephone numbers *to be called [] using a random or sequential number generator*; and *[]* to dial such numbers."[85] However, in the court's view, the best choice of the four, although imperfect, was the first.[86]

## IV. *DUGUID V. FACEBOOK, INC.*

In January 2014, Noah Duguid received sporadic text messages from Facebook notifying him of an unrecognized IP address attempting to access his nonexistent Facebook account.[87] The text messages contained a boilerplate template: "'Your Facebook account was accessed [by/from] <browser> at <time>. Log in for more info.'"[88] Duguid made several attempts, both by replying directly to the text messages and by requesting via email that Facebook stop sending him messages; however, the automated messages persisted until October 2014.[89]

In response, Duguid filed a class action suit[90] alleging that the social media giant violated the TCPA's autodialer provision, specifically when he began receiving text messages from the company's use of an autodialer device.[91] In his complaint, Duguid argued that: "Facebook maintain[s] a database of phone numbers and—using a template and coding that automatically supplied the browser information and time of access— programmed its equipment to send automated messages to those numbers each time a new device accessed the associated account."[92]

Duguid further alleged that Facebook obtained his phone number, stored it, and sent automated text messages to that number,[93] much in the way that Facebook normally obtains its users' phone numbers when a user

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84. *Id.* Additionally, the Seventh Circuit Court was extremely hesitant to allow such a broad reading of the statute because it believed that without the prior express consent of the recipient of a text or call, every sender, including private consumers, could be at risk for liability under the TCPA. *Id.* at 467.

85. *Id.* (emphasis in original) (alteration in original). Because neither party advanced this interpretation nor had any court offered reasoning to support it, the Seventh Circuit gave this interpretation little weight. *Id.* at 468.

86. *Id.*

87. Duguid v. Facebook, Inc., 926 F.3d 1146, 1150 (9th Cir. 2019), *cert. granted in part*, 141 S. Ct. 193 (2020).

88. *Id.*

89. *Id.*

90. Duguid's class action suit was brought on behalf of two putative classes: "[P]eople who received a message from Facebook without providing Facebook their cell phone number; and people who notified Facebook that they did not wish to receive messages but later received at least one message." *Id.*

91. *Id.* at 1149.

92. *Id.* at 1150.

93. *Id.*

provides it when setting up an account.[94] The district court ruled that Duguid failed to state a proper claim that Facebook sent him messages using an autodialer device, a prerequisite that triggers the TCPA's liability.[95]

### A. Ninth Circuit Calls for Broad Interpretation

On appeal, the Ninth Circuit held that Duguid had adequately "allege[d] a concrete injury in fact."[96] First, the circuit court reviewed the TCPA's history, noting that the TCPA prohibits calls placed using an autodialer device, which includes messages sent via text.[97] The court stated that in the midst of this appeal, two rulings had shifted the conversation concerning this issue: *ACA International*—where the D.C. Circuit rejected the FCC's 2015 Order—and *Marks*—where the Ninth Circuit chose to "wipe the definitional slate clean, so [it could] beg[in] anew to consider the definition of an autodialer under the [TCPA]."[98]

Following the construction it employed in *Marks*, the Ninth Circuit held that the "adverbial phrase 'using a random or sequential generator' modifies only the verb 'to produce,' and not the preceding verb, 'to store.'"[99] This construction allows for a device to be considered an autodialer if it has the capacity to store numbers and automatically dial the number, which means it does not require the ability to produce the number using a random or sequential generator in addition.[100] Relying on this previously adopted interpretation, the circuit court held that Duguid stated a plausible claim.[101]

Facebook, in an effort to affirm its dismissal, argued that (1) Facebook's equipment is not an autodialer as defined in the TCPA because it only makes calls reflexively, not actively as required under the TCPA,[102] and (2) the court should acknowledge this distinction to avoid

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94. When creating a Facebook account, the website requires a first and last name; a mobile number or email; a password; a birthdate; and gender classification. *See* FACEBOOK, https://www.facebook.com/ [https://perma.cc/5HSZ-JPCT].

95. *Duguid*, 926 F.3d at 1150.

96. *Id.* at 1153–57. The Ninth Circuit also addressed Facebook's claim that the debt-collection exception to the Act is unconstitutional. *Id.* However, for the purposes of this Note, only the issue concerning the autodialer provision is addressed.

97. *Id.* at 1149 (citing 47 U.S.C. § 227(b)(1)); *see* Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 954 (9th Cir. 2009) ("[A] text message is a "call" within the TCPA.").

98. *Duguid*, 926 F.3d at 1149–50 (citing Marks v. Crunch San Diego, LLC, 909 F.3d 1041, 1049–50 (9th Cir. 2018)).

99. *Id.* at 1151.

100. *Id.*

101. *Id.* The Ninth Circuit Court determined that Facebook's equipment falls squarely within the autodialer definition; the device has the capacity to store numbers to be called and to dial such numbers automatically.

102. *Id.* at 1152.

encapsulating smartphones in any autodialer definition.[103] Facebook cautioned against following *Marks*'s broad interpretation because smartphones, which are capable of both storing numbers and dialing numbers using built-in automated response technology, like Siri, would be considered a type of autodialer.[104] According to Facebook, if smartphones are considered autodialers, then using a smartphone to place a call, even if not using an autodialing function, is a violation the TCPA.[105] The circuit court rejected this argument and reasoned that "[i]t cannot be the case . . . that every uninvited communication from a smartphone infringes on federal law, and that nearly every American is a TCPA-violator-in-waiting, if not a violator-in-fact."[106]

Relying on textual analysis, Facebook explained that the autodialer statute requires a device or equipment to "store numbers to be called."[107] Thus, *Marks* avoids deeming smartphones as a type of autodialer because Facebook, perhaps like other firms, stores its numbers "to be called only reflexively . . . as a preprogrammed response to external stimuli outside of Facebook's control[,]" as opposed to proactive messaging.[108]

The Ninth Circuit rejected this construction of the definition because the autodialer statute does not equate the phrase "to be called" as being the only purpose for which to store numbers.[109] Rather, the device itself needs to have the "capacity" to store those numbers.[110] The court offered several examples of numbers that are stored for reasons other than "to be called" and held that there is no silent implication within the statute that distinguishes between reflexive or active calls.[111] Further, even if the court were to find a distinction between active and reflexive calls, it would not avoid encapsulating smartphones, since the average American smartphone user stores numbers "to be called" proactively.[112] The circuit court thus reaffirmed its interpretation of the TCPA's purpose according to

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103. *Id.* at 1151–52.

104. *Id.* at 1152. Siri is capable of "mak[ing] calls or send[ing] texts for you whether you are driving, have your hands full, or are simply on the go." *Siri*, APPLE, https://www.apple.com/siri/ [https://perma.cc/JU7P-FGDR].

105. *Duguid*, 926 F.3d at 1151.

106. *Id.* (quoting ACA Int'l v. FCC, 885 F.3d 687, 698 (D.C. Cir. 2018) (internal quotations omitted).

107. *Id.* (citing 47 U.S.C. § 227(a)(1)(A)).

108. *Id.*

109. *Id.* at 1152.

110. *Id.* (citing 47 U.S.C. § 227(a)(1)).

111. *Id.* Examples of numbers being stored for other purposes include: "shops and restaurants [that] store numbers to identify customers in their loyalty programs" and "software for customer relations management [that] stores numbers to help businesses manage their clientele."

112. *Id.*

Congress's intent,[113] and it determined that Duguid alleged a plausible claim that Facebook used an autodialer when it contacted him via text.[114]

## B. Resolving the Split and Takeaways

Following the Ninth Circuit's ruling, Facebook promptly filed a petition for writ of certiorari with the United States Supreme Court in October 2019.[115] The Court granted cert in July 2020, to determine "[w]hether the definition of autodialer in the [TCPA] encompasses any device that can 'store' and 'automatically dial' telephone numbers, even if the device does not 'us[e] a random or sequential number generator.'"[116]

Justice Sotomayor, writing for the Court, concluded that the phrase *using a random or sequential number generator* "modifies both verbs that precede it (store and produce)], [and it] specif[ies] how [a device] must either 'store' or 'produce' telephone numbers."[117] Given that Facebook's notification system did not produce or store numbers using a random or sequential number generator, then it could not be an autodialer.[118]

The Court's analysis began with a review of the relevant statutory language. It relied on the series-qualifier canon, which states: "'[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series,' a modifier at the end of the list 'normally applies to the entire series[,]'"[119] to demonstrate that adhering to this canon offers "the most natural reading of a sentence."[120] The Court explained this construction fully in the following example and discussion:

> Imagine if a teacher announced that 'students must not complete or check any homework to be turned in for a grade, using online homework-help websites.' It would be strange to read that rule as prohibiting students from completing homework altogether, with or without online support. Here, the series-qualifier canon recommends qualifying both antecedent verbs 'store' and 'produce,' with the phrase 'using a random or sequential number generator.'[121]

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113. The TCPA's purpose, according to Congress, is "protecting privacy by restricting unsolicited, automated telephone calls." *Id.* (citing S. Rep. 102–178, at 1).

114. *Id.* at 1157.

115. Petition for Writ of Certiorari at ii, Duguid v. Facebook, Inc., 926 F.3d 1146 (2019) (No. 19-511), 2019 WL 5390116, at *1.

116. *Id.* at *1.

117. Facebook, Inc., v. Duguid, 141 S. Ct. 1163, 1169 (2021).

118. *Id.*

119. *Id.* (citing A. SCALIA & B. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 147 (2012)).

120. *Id.*

121. *Id.*

In finding that Duguid's interpretation was contrary to the plain reading of the text, the Court held that the definition of an autodialer requires "in all cases, whether storing or producing numbers to be called, the equipment [or device] in question must use a random or sequential number generator."[122]

Additionally, the Court noted that an expansion of the autodialer definition that seeks to encompass equipment, like cellphones, "would take a chainsaw to these nuanced problems when Congress meant to use a scalpel."[123] In the Court's view, Duguid's interpretation would encapsulate all modern cell phones, and average consumers could be held liable for everyday uses such as "speed dialing or sending automated text message[s]."[124] The Court refused to read into the Act any restrictive line drawing standard that would determine how much human intervention is too much for a device to qualify as an autodialer.[125]

Lastly, the Court considered Duguid's legislative purpose argument regarding the TCPA. Duguid argued Congress was concerned for consumers' privacy and in response enacted broad privacy-protection legislation.[126] The Court did not agree and, in fact, stated that Congress's broad concern of telemarketing tactics on consumers did not equate to enacting a broad definition of what constitutes an autodialer.[127] Thus, Duguid failed not only with respect to the Court's textualist approach to the definition of an autodialer, but also in his showing that Congress would support a broad interpretation of what qualifies as an autodialer.[128]

## V. COMPANIES CONTINUE TO SKATE PAST LIABILITY, BUT IS THERE HOPE?

Advocates, and now the United States Supreme Court, who argue that allowing a broadening of the autodialer provision would lead to a parade of horribles miss the point of the Act. Congress's aim was to prevent the onslaught of telemarketers from contacting consumers to the point of surpassing simple annoyance.[129] Smartphone users alleging

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122. *Id.* at 1170.

123. *Id.* at 1171.

124. *Id.*

125. *See id.* at n.6 (explaining that "all devices require some human intervention, whether it takes the form of programming a cell phone to respond automatically to texts received while in 'do not disturb' mode or commanding a computer program to produce and dial phone numbers at random. We decline to interpret the TCPA as requiring such a difficult line-drawing exercise around how much automation is too much.").

126*. Id.* at 1172.

127. *Id.*

128. *See id.*

129. *See, e.g.*, Telephone Consumer Protection Act of 1991, Pub. L. No. 102–243, § 2 (codified at 47 U.S.C. § 227). Congress, at the time of enactment of the TCPA, found that consumers were

violations of the Act over a single text message or voicemail by another smartphone user is not sure to follow. The Act should not be taken to reflect an ability for private citizens to sue one another, but rather a private right to sue telemarketing and telecommunication companies that use autodialers. Specifically, sue those companies who otherwise continue to skate past liability and utilize devices or equipment that store or produce numbers without using a random or sequential number generator, which is now required to trigger liability under the Act.

Further, the disagreement and varied interpretations offered by circuit courts, prior to *Duguid*, support the notion that action is needed by Congress to offer clarity on its words. The contentious phrase "using a random or sequential number generator" spurred a variety of grammatical and plain meaning arguments, but none of the interpretations offered a precise fit; even the majority on this split agrees.[130]

The Second and Ninth Circuits' interpretation[131] of what constitutes an autodialer would allow devices that either have the capacity to store numbers and dial them automatically or have the capacity to produce numbers using a random or sequential number generator and dial them automatically. By amending the Act with this interpretation in mind, Congress would ensure that companies using automatic storage and dialing devices, where numbers have been previously stored and then automatically dialed by the device, are captured by the Act.

While it is true that a minority of circuit courts did not offer the best explanation for why their interpretation was the better one, it is clear, from the facts of those same cases, that ordinary American consumers were the target of companies utilizing autodialers. At the same time, those companies were saving themselves from liability on the grounds that their pre-programmed list of numbers were not generated *using a random or sequential number generator*.[132] To allow companies and telemarketers to find loopholes in the Act goes against the very premise of what Congress

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"outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers[,]" and "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices." *Id.* at § 2(6), (9). Additionally, Congress recognized that any technology available at the time to avoid robocallers would be costly "or place an inordinate burden on [a] consumer." *Id.* at § 2(11).

130. *See* discussion *supra* Section III.B.3.

131. Again, the Second Circuit Court found that a device qualifies as an autodialer if the device has the capacity, both current and present functions, to act as an autodialer, absent any modifications. King v. Time Warner Cable, Inc., 894 F.3d 473, 481 (2d Cir. 2018). Similarly, the Ninth Circuit took the approach that autodialer provision should be construed as including any device with the capacity to dial stored numbers automatically. Marks v. Crunch San Diego, LLC, 904 F.3d 1041, 1052 (9th Cir. 2018) *cert. dismissed*, 139 S. Ct. 1289 (2019).

132. *See* discussion *supra* Section III.B.

sought to do: to protect the privacy interests of consumers from unsolicited calls and texts from companies without their express consent.[133]

The definition of an autodialer, as it stands now, is ill-equipped to protect consumers. If acting alone, a consumer is charged with not only providing evidentiary support that the device in-fact is an autodialer, but also that the device either stores numbers using a random or sequential number generator or produces numbers using a random or sequential number generator, and then dials those numbers automatically. The odds are stacked against a consumer, unless and until Congress offers guidance on what constitutes an autodialer through a broader interpretation. By allowing the phrase at issue to modify only the verb "produce," it allows the Act to capture some of the modern systems of technology, i.e., cell phones used by companies, rather than only capturing technology that is rapidly becoming obsolete.

However, the call for help has been heard. Shortly after the decision in *Duguid* was handed down, Senator Edward J. Markey (D-MA), one of the original authors of the Act, and Representative Anna G. Eshoo (D-CA 18) criticized the Court's ruling and threatened legislative action.[134] In a joint statement, both Senator Markey and Representative Eshoo denounced the Court for "abandoning consumers" and stated that:

> [T]he Supreme Court tossed aside years of precedent, clear legislative history, and essential consumer protection to issue a ruling that is disastrous for everyone who has a mobile phone in the United States. . . . By narrowing the scope of the [Act], the Court is allowing companies the ability to assault the public with a non-stop wave of unwanted calls and texts, around the clock. Fortunately, we can and will act to make right what the Supreme Court got wrong. We plan to soon introduce legislation to amend the [Act], fix the Court's error, and protect consumers. If the Justices find their private mobile phones ringing non-stop from now until our legislation becomes law, they'll only have themselves to blame.[135]

While these statements signal a call for relief, the reality remains the same: consumers will be unable to rely on the TCPA to combat unwarranted robocallers, texts, and emails. Therefore, consumers' best

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133. Telephone Consumer Protection Act of 1991, Pub. L. No. 102–243, § 2(9) (codified at 47 U.S.C. § 227) ("[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.").

134. Press Release, Senator Edward J. Markey and Representative Anna G. Eshoo, Sen. Markey & Rep. Eshoo Blast Sup. Ct. Decision on Robocalls as "Disastrous" (Apr. 1, 2021), https://www.markey.senate.gov/news/press-releases/senator-markey-and-rep-eshoo-blast-supreme-court-decision-on-robocalls-as-disastrous [https://perma.cc/3FSD-7M38].

135. *Id.*

option in the interim is three-fold: (1) plaintiffs may still bring claims against companies they believe are using an autodialer device to target them, if they can make a capacity argument, and they can additionally "raise claims under state unfair and deceptive trade practice laws"[136]; (2) plaintiffs can await further orders by the FCC that may address *Duguid*, and determine whether a device could be considered an autodialer if it only has the *potential* capacity to store or produce numbers using a random or sequential number generator and not the present ability to do so; and (3) plaintiffs may rely on their cellphone carriers.

Taking option one first, although the Court has impeded the ability of consumers to bring TCPA claims *unless* they show that the device at issue used a "random or sequential number generator" to store or produce the number that was called, texted, or emailed, a consumer can still argue that a device that has the *potential* capacity to acquire that function is an autodialer.[137] Additionally, the *Duguid* Court notes that an autodialer may use a number generator to choose phone numbers from a pre-produced list.[138] With appropriate means of obtaining information about companies' devices and analyzing the devices to determine how they are used, such as by discovery, a consumer advocate may be able to allege a plausible claim on behalf of consumers that the device is an autodialer if it is using a number generator not to produce or store numbers, but to choose from a completed list of numbers that may not have used a number generator. Further, forty-three states and the District of Columbia have Unfair and Deceptive Acts and Practices (UDAP) statutes that are a common tool to protect consumers from unfair, predatory, or unconscionable business practices.[139] UDAP statutes, which are primarily civil statutes, typically allow consumers to seek remedies such as return of payments, or compensation for consumer loss, or an injunction against fraudulent business practices, and attorney fees.[140]

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136. Robert Van Arnam, *TCPA Litigation Update: The Aftermath of the Supreme Court's Facebook v. Duguid Decision*, WILLIAMS MULLEN: NEWS (Apr. 19, 2021), https://www.williamsmullen.com/news/tcpa-litigation-update-aftermath-supreme-courts-facebook-v.-duguid-decision [https://perma.cc/ATM5-E7J4]. Van Arnam highlights that in footnote 7 of the Court's opinion in *Duguid*, "the Court provided an example where equipment might still qualify as an autodialer if it uses a random number generator to determine the order in which to pick phone numbers from a pre-produced list and stores those numbers to be dialed at a later time."

137. *See* Facebook, Inc., v. Duguid, 141 S. Ct. 1163, 1169 (2021). The Court did not address in *Duguid* the distinctions between present capacity and potential capacity but instead focused on Facebook's notification system's use, which leaves room for lower courts to weigh in on this issue. *See id.* at 1171–72.

138. *Id.* at 1172 n.7.

139. CAROLYN L. CARTER, NAT'L CONSUMER L. CTR., A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES 11 (2009), https://www.nclc.org/images/pdf/udap/report_50_states.pdf [https://perma.cc/3K49-PQPE].

140. *Id.* at 6; *see id.* at 11 (discussing the practices prohibited by UDAP statutes).

Next, with respect to option two, any order issued by the FCC can be appealed directly to a circuit court and may be struck down.[141] At the time of this Note, the FCC has neither announced requests for comments regarding the *Duguid* decision or its impact on autodialers nor has it released any press release regarding the decision.[142] However, the lesson from *ACA International* must be remembered: any order issued by the FCC can be appealed directly to a circuit court and may be struck down.[143] If and until the FCC issues further guidance, it is important to note the agency's efforts within the last year and half, specifically towards combatting robocalls.[144]

Finally, option three: plaintiffs can rely on their cellphone carriers to combat robocallers. Following Congress's passing of the Telephone Robocall Abuse Criminal Enforcement and Deterrence Act in 2019,[145] the FCC, in March 2020, adopted new rules to combat robocallers[146] and mandated that cell phone carriers implement the STIR/SHAKEN[147] standard by June 30, 2021.[148] The standard allows for the digital verification and authentication of calls passing through the complex web of networks, which would allow phone carriers to verify that a call is in fact from the number displayed on the caller ID.[149] In July 2020, T-Mobile became the first phone carrier to implement the STIR/SHAKEN standard when it unveiled its latest software "Scam Shield,"[150] which happens to be

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141. *See* Gadelhak v. AT&T Services, Inc., 950 F.3d 458, 463 (2020); *see also* discussion *supra* Part II.

142. *See generally* CONSUMER AND GOVERNMENTAL AFFAIRS HEADLINES, FCC, https://www.fcc.gov/news-events/headlines/509 [https://perma.cc/EC8C-KQCR].

143. *See* ACA Int'l v. FCC, 885 F.3d 687, 703 (D.C. Cir. 2018); *see also* discussion *supra* Part II.

144. FCC CALLS ON CARRIERS TO ENSURE FREE CONSUMER TOOLS ARE AVAILABLE TO BLOCK ROBOCALLS AND ISSUES NEW ROBOCALL CEASE-AND-DESIST LETTERS, FCC (Apr. 13, 2021), https://docs.fcc.gov/public/attachments/DOC-371553A1.pdf [https://perma.cc/YLY7-T9YZ].

145. Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act, Pub. L. No. 116-105, 133 Stat. 3274 (2019) ("deter[ring] robocall violations and improving enforcement of section 227(b) of the Communications Act of 1934.").

146. FCC MANDATES THAT PHONE COMPANIES IMPLEMENT CALLER ID AUTHENTICATION TO COMBAT SPOOFED ROBOCALLS, FEDERAL COMMC'NS COMM'N (Mar. 31, 2020), https://docs.fcc.gov/public/attachments/DOC-363399A1.pdf [https://perma.cc/PU79-3RWH].

147. COMBATING SPOOFED ROBOCALLS WITH CALLER ID AUTHENTICATION, FEDERAL COMMC'NS COMM'N, https://www.fcc.gov/call-authentication [https://perma.cc/ZR9X-K7DG].

148. *Id.*

149. *Id.*

150. T-MOBILE UNVEILS LATEST UN-CARRIER MOVE: SCAM SHIELD—A MASSIVE SET OF FREE SOLUTIONS TO PROTECT CUSTOMERS FROM RAMPANT SCAMS AND ROBOCALLS, T-MOBILE (July 16, 2020) [hereinafter T-MOBILE UNVEILS SCAM SHIELD], https://www.t-mobile.com/news/un-carrier/scam-shield-protects-customers-from-scams-robocalls [https://perma.cc/64N3-A7WL]; *see also Scam Shield*, T-MOBILE, https://www.t-mobile.com/customers/scam-shield [https://perma.cc/4TZV-MH4B] (T-Mobile's Scam Shield offers consumers free "anti-scam protections like Scam ID, Scam Block, and Caller ID, and is available to all [its] customers.").

free compared to other carriers that charge monthly fees for these protections.[151] Though perhaps a drastic measure, consumers do have the option to switch phone carriers to T-Mobile to combat robocallers; the network appears to be more effective in identifying other robocallers,[152] but it may end up being more of a hassle than simply stomaching the flow of robocalls.

Until the TCPA has been amended to incorporate cell phones and devices that are used without need of a random or sequential number generator to store or produce numbers, then companies using these forms of autodialers will continue to skate past liability.

## CONCLUSION

The Supreme Court resolved the long-standing circuit split and appropriately followed the plain-text interpretation of the autodialer provision. As TCPA claims for calls, texts, or emails made with an autodialer diminish, however, it is important to note that the Court never rejected the position that the capacity of device can be potential.[153] This oversight may still leave hope for plaintiffs to argue that a device qualifies as an autodialer and an entity can be held liable because the device has the potential capacity as opposed to a present, actual capacity to operate as an autodialer. Of course, now may seem the perfect time for the FCC to offer its own interpretation on the *Duguid* decision. Although, the FCC's orders can be struck down, as shown in *ACA International*, and it is entirely possible the Court may take up another case concerning potential capacity versus actual, present capacity.

Last, the Court's ruling in favor of Facebook, while acknowledging the narrow interpretation as the better option, leaves us with the obvious realization that Congress is still ultimately the better commentator in understanding what it meant when it wrote the Act and all provisions within it. With respect to amending the statute, it is in Congress's best interest to adopt the Second and Ninth Circuits' minority interpretation on this issue. With the ever-evolving advancement in technology and software, it is crucial that Congress adapt its writings to reflect the changes that telemarketers and companies have chosen to avoid liability, and more specifically in avoiding action against it with its use of autodialers that store a list of numbers and call those numbers automatically.

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151. T-MOBILE UNVEILS SCAM SHIELD, *supra* note 150 ("Verizon charges up to $7.99 per month—nearly $100 a year—for protections including something as simple as Caller ID!").

152. *Id.* (citing GLOBALDATA, TAKING ON THE UNWANTED ROBOCALL CHALLENGE: COMPARISONS AND TESTING OF OPERATOR SOLUTIONS 9, https://www.t-mobile.com/news/_admin/uploads/2020/07/GlobalData-Report_Unwanted-Robocall-Challenge.pdf [https://perma.cc/S32Z-XCUM]).

153. *See generally* Facebook, Inc., v. Duguid, 141 S. Ct. 1163, 1171–72 (2021).

APPENDIX

| Case(s) | Holding(s) | Method of Interpretation | View (Majority or Minority) |
|---|---|---|---|
| King v. Time Warner Cable, Inc., 894 F.3d 473 (2d Cir. 2018) | the term capacity in the TCPA's definition means any device that has the current (present) functions to act as an autodialer, absent any modifications, qualifies as an autodialer | Broad | Minority |
| Marks v. Crunch San Diego, LLC, 904 F.3d 1041 (9th Cir. 2018) *cert. dismissed*, 139 S. Ct. 1289 (2019) | the definition of an autodialer is ambiguous and the statute provision should be construed as including devices with the capacity to dial stored numbers automatically | Broad | Minority |
| Dominguez v. Yahoo, Inc., 629 F. App'x 369 (3d Cir. 2015) | an autodialer only applies to a message that is sent by a system that has the capacity to generate numbers randomly or sequentially; to store or produce those numbers; and has the capacity to dial those numbers | Narrow | Majority |
|  |  |  |  |

| Gadelhak v. AT&T Services, Inc., 950 F.3d 458 (7th Cir. 2020) | the phrase 'using a random or sequential number generator' describes how the telephone numbers must be 'stored' or 'produced,' and "the capacity to generate random or sequential numbers is necessary to the statutory definition | Narrow | Majority |
|---|---|---|---|
| Glasser v. Hilton Grand Vacations Co., 948 F.3d 1301 (11th Cir. 2020) | a device that simply stores and dials telephone numbers is not an autodialer | Narrow | Majority |