Santa Clara University School of Law

Santa Clara Law Review

Volume 62 | Number 2 Article 5

2022

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THE TELEPHONE CONSUMER PROTECTION ACT OF 1991: ADAPTING AN "ODD" LAW

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The Telephone Consumer Protection Act ("TCPA") was introduced in 1991 before the rise of the cell phone, text messages, and broadband internet. It placed restrictions on then-contemporary technology used to reach consumers in an automated way and its primary purpose was to protect consumer's privacy interests and public safety. Yet, it has proven to be an odd and increasingly outdated law. The federal government has made a good-faith effort to maintain the TCPA's relevancy. However, evolving technology and inconsistent interpretations of the law's fundamental elements have resulted in harm to consumers and businesses. During the COVID-19 pandemic, the law also interfered with efforts to disseminate information quickly and efficiently to the public at the detriment of consumers.

Last year, the Supreme Court brought some relief to businesses after it issued its highly anticipated decision in Facebook v. Duguid. *The Court held that the capacity to use a random or sequential number generator to either store or produce phone numbers is a necessary feature of an Autodialer, rather than technology only needing the capacity to store phone numbers to be called and to dial such phone numbers automatically, a definition that once reached every American using a smartphone.*

Unfortunately, the Court was unable to modernize the law. With innovative technologies and government-enabled programs directed at protecting consumers' privacy and economic interests, restrictions on the type of technology used to make the calls are no longer necessary today. The government can effectively accomplish its goal by regulating the contents of the call, not the technology used to make the call.

* J.D., Santa Clara University School of Law, 2022. Editor-in-Chief, SANTA CLARA LAW REVIEW, Volume 62.

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I. INTRODUCTION

Nearly thirty years ago—when less than one percent of homes had internet and only six percent of Americans had a cell phone[1]—Congress passed the Telephone Consumer Protection Act of 1991 (hereinafter referred to as the "TCPA") to regulate intrusive telephone marketing practices.[2] Throughout the decades, all three branches of the government, compliance-minded businesses, and consumers have struggled to understand the statute, which is now virtually inapplicable to today's technology.[3] The United States Supreme Court first interpreted the TCPA in 2012. The Justices took turns reflecting on the law's puzzling phraseology and referred to the statute as "odd."[4] Nearly a decade later, in *Facebook v. Duguid,* Justice Thomas used the same adjective to describe the issue before him—odd.[5]

At the time of the TCPA's enactment, the advent of sophisticated technology enabling computers to automatically dial telephone numbers and transmit prerecorded messages allowed marketers to reach more consumers than ever before.[6] This latest technology offered a new and lucrative opportunity for businesses, but consumers bore the cost as unwanted calls began flooding their homes. Consumers were charged costly per-minute rates, and more importantly, the calls tied up emergency lines, creating public safety problems.[7] As a result, Congress approved legislation in November of 1991 to curb growing concerns.[8]

Initially, the TCPA prohibited the use of virtually all unsolicited calls using prerecorded voice messages (i.e., robocalls),[9] restricted the

1. Reuben Fischer-Baum, *What 'Tech World' Did You Grow Up In?*, WASH. POST (Nov. 26, 2017), https://www.washingtonpost.com/graphics/2017/entertainment/tech-generations/.

2. Telephone Consumer Protection Act of 1991, Pub. L. No. 102–243, § 2, 105 Stat. 2394, 2394 (codified as amended at 47 U.S.C. § 227 (2018)). The TCPA amended Title II of the Communications Act of 1934. 47 U.S.C. § 201 (2018).

3. *See infra* Section II.B.

4. *See* Transcript of Oral Argument at 55, Mims v. Arrow Financial Services, LLC, 565 U.S. 368 (2012) (No. 10-1195) ("If both sides agree it's odd, and all nine Justices agree it's odd, I mean, I think we can say this statute is odd.").

5. *See* Transcript of Oral Argument at 32, Duguid v. Facebook, Inc., 141 S. Ct. 1163 (2021) (No. 19-511) ("I think it's a little odd when we use these – we make great effort to interpret a statute that really wasn't intended for the universe in which we are operating now.").

6. An autodialer can reach 1,000 households a day, while a telemarketer could only make roughly sixty-three calls each day. *See* 137 CONG. REC. 35302-07 (1991) (statement of Rep. Markey).

7. *Id.*

8. *See* Telephone Consumer Protection Act of 1991 § 2.

9. *Id.* § 3. In 1992, the FCC exempted from the prohibition calls: (1) not made for commercial purposes; (2) made for commercial purposes which did not transmit an unsolicited advertisement; (3) made to a party when there was an established business

use of automatic telephone dialing systems (hereinafter referred to as both an "ATDS" or "Autodialer"),[10] and directed the Federal Communications Commission ("FCC") to develop rules.[11] Since the enactment, a technological revolution turned traditional landline telephones into cellular telephones and cellular telephones into smartphones; however, the statute has largely remained the same. The FCC has endeavored to maintain the TCPA's applicability to modern technologies through numerous administrative rules and orders.[12] The judicial branch has also opined on thousands of inquiries, questioning the FCC's interpretation and overall applicability.[13] Despite these efforts, the TCPA remains out of touch with the needs of both business and consumers and does not achieve its laudable goals.

While the original purpose of the TCPA was to regulate abusive, invasive, and risky technology,[14] it has been interpreted to regulate much more. The TCPA has been construed to reach areas of communication that do not include marketing[15] and to new and contemporary technologies,[16] impacting millions of Americans. Furthermore, due to inconsistent interpretations of the TCPA's most fundamental terms, it has also been wielded as a powerful tool to unleash devastating

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relationship; and (4) non-commercial calls made by nonprofit organizations. Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 FCC Rcd. 8752, 8755 (1992) [hereinafter 1992 FCC Order].

10. Telephone Consumer Protection Act of 1991 § 3(b). An automatic telephone dialing system "means equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers." *Id.* § 3(a)(1).

11. 47 U.S.C. § 227 §3(b)(2) (2018). The FCC implemented its first rules in Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 FCC Rcd. 8752, 8753 (1992).

12. *See, e.g.*, 1992 FCC Order, *supra* note 9; *see also e.g.*, Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991 et al., 30 FCC Rcd. 7961, 7965 (2015) [hereinafter 2015 FCC Order]. These rules and orders prescribe implementation procedures for the Act. 1992 FCC Order, *supra* note 9, at 8753.

13. *See* Alex McFall & Benjamin William Perry, *Untouchable No More: Reinforcements Arrive for TCPA Defendants Battling the FCC's Aggressive Expansion of the Statute*, JDSUPRA (Dec. 16, 2020), https://www.jdsupra.com/legalnews/untouchable-no-more-reinforcements-13691 ("[The TCPA] is the basis for thousands of lawsuits each year, with one study reporting that TCPA actions have increased by 740 percent in the last decade alone.").

14. H.R. REP. NO. 102-317, at 5-6 (1991).

15. *See* Griffith v. Consumer Portfolio Serv., Inc., 838 F. Supp. 2d 723, 727 (N.D. Ill. 2011) ("[W]e reject [the] argument that the TCPA only applies to telemarketing . . . .").

16. Facebook argues in *Duguid v. Facebook* that the *Marks* expansive reading would capture smartphones. *See* Duguid v. Facebook, Inc., 926 F.3d 1146, 1151 (9th Cir. 2019), *rev'd*, 141 S. Ct. 1163 (2021).

punishments on large and small businesses.[17] The TCPA is an odd law, and it is odd that we are applying an "anachronistic, if not vestigial"[18] law that is virtually inapplicable to today's technology.[19]

On April 1, 2021, the Supreme Court issued its highly anticipated decision in *Facebook v. Duguid*.[20] The Court reversed the Ninth Circuit's interpretation and resolved a long-standing circuit split on the definition of an Autodialer.[21] The Court held that for technology to be considered an Autodialer, it must have the capacity to use a random or sequential number generator.[22] While this decision narrows the interpretation of an Autodialer,[23] the law and its subsequent enforcement remain unclear. The TCPA's ambiguous terms and uncertain future is a substantial source of legal risk for compliance-minded businesses seeking to communicate with their customers.[24] Moreover, Congress' very own policy goals for enacting the law are now in question with the introduction of consumer protection programs and the advancement of technology.[25]

This Note will first discuss the original purpose and history of the TCPA.[26] It will examine the journey of the irresolute definition of an "automatic telephone dialing system," recent FCC and judicial interpretations of an Autodialer, and the negative impact the law has on businesses and consumers.[27] Additionally, the Note will discuss *Facebook v. Duguid,* which was recently decided by the Supreme Court, including the relief it provided, as well as its shortcomings.[28] Finally, this Note will make a call to Congress to amend and modernize the

17. *See* JOSH ADAMS, ACA INT'L, THE IMPERATIVE TO MODERNIZE THE TCPA: WHY AN OUTDATED LAW HURTS CONSUMERS AND ENCOURAGES ABUSIVE LAWSUITS (2016), https://www.acainternational.org/assets/tcparesearchstatistics/the-imperative-to-modernize-the-tcpa-june-2016.pdf.

18. Transcript of Oral Argument at 55, Facebook, Inc. v. Duguid, 141 S. Ct. 1163 (2021) (No. 19-511).

19. *See generally* Thomas Koulopoulos, *The End Of The Digital Revolution Is Coming: Here's What's Next*, INC. (Aug. 11, 2019), https://www.inc.com/thomas-koulopoulos/the-end-of-digital-revolution-is-coming-heres-whats-next.html (discussing the potential capabilities of quantum computing).

20. *See* Facebook, Inc. v. Duguid, 141 S. Ct. 1163 (2021).

21. *Id.*

22. *Id.*

23. *Id.*

24. When George Bush signed the TCPA into law, he encouraged the Federal Communications Commission to limit the law's reach so that legitimate business activities would not be affected. DENNIS BROWN, TELEPHONE TERRORISM THE STORY OF ROBOCALLS AND THE TCPA 21-22 (2019) (ebook).

25. *See infra* Section IV.C.

26. *See infra* Section II A-B.

27. *See infra* Section II.C.

28. *See infra* Section II.C.2.b.

TCPA.[29] It is abundantly clear that the TCPA cannot keep up with modern technology and the judiciary's limited power indicates that Congress must drive the necessary change. This Note suggests that Congress must acknowledge that it is not the technology used to make the call that is intrusive to consumers, but rather the *content* of the calls.

II. BACKGROUND

A. The Enactment and Purpose of the Telephone Consumer Protection Act

In the 1980s, during the heyday of telemarketing, telemarketing calls were cheap and easy to make.[30] Spending on telemarketing increased from $1 billion in 1981 to $60 billion in 1991 and by the mid-1990s, it accounted for more than $450 billion in annual sales.[31] In response to a growing concern over the prevalent use of telephone marketing practices and numerous consumer complaints, Congress enacted the Telephone Consumer Protection Act of 1991[32] and empowered the FCC with authority to interpret and implement the law.[33]

At the time, the primary means of telephone communication was the home phone or a business phone, as opposed to a cellular telephone.[34] Phone calls were expensive. Long distance calls generally started at $3.00—$6.12 in today's dollars—and each additional minute cost more money depending on the time of day or whether it was the week or weekend.[35] And for the six percent of Americans who were able to

29. *See infra* Section V.

30. Nick Jiwa, *A Brief History Of Outbound Telesales*, HELLER GROUP: BLOG (Apr. 11, 2018), http://www.thehellergroupinc.com/brief-history-outbound-telesales ("[T]elemarketing proved to be an efficient model for driving sales."). Telemarketing is the process of using the telephone to generate leads, make sales, or gather marketing information. *Telemarketers Law and Legal Definition*, USLEGAL, https://definitions.uslegal.com/t/telemarketers/ (last visited Dec. 29, 2020).

31. *Telemarketers Law and Legal Definition*, *supra* note 30.

32. *See* Telephone Consumer Protection Act of 1991, § 2, 105 Stat. 2394-95 (codified as amended at 47 U.S.C. § 227 (2018)) (describing that evidence compiled by congress suggests that both residential telephone subscribers and businesses consider automated or prerecorded telephone calls to be a nuisance and an invasion of privacy).

33. *See id.* ("The Federal Communications Commission should consider adopting reasonable restrictions on automated or prerecorded calls to businesses as well as to the home, consistent with the constitutional protections of free speech.").

34. *See* Reuben Fischer-Baum, *supra* note 1.

35. *See* FED. COMMC'N COMM'N, STATISTICS OF COMMUNICATIONS COMMON CARRIERS 217-27 (1991/1992 ed. 1992), https://www.fcc.gov/file/11628/download. I used the US inflation calculator to determine the usage fees in today's dollars. *See* Inflation Calculation of the U.S. Dollar's Value from 1913-2021, US INFLATION CALCULATOR, usinflationcalculator.com (last visited Jan. 17, 2022).

afford an expensive cellular telephone, they incurred high usage fees.[36] It was at this time that Congress compiled evidence suggesting consumers and businesses were frustrated with the costly per-minute telephone charges[37] and considered automated or prerecorded telephone calls a nuisance and an invasion of privacy, regardless of the caller's identity or the contents of the message.[38] Congress considered the use of telephone marketing a "risk to public safety"[39] because telemarketers could program technology to automatically dial random and sequential blocks of telephone numbers (as opposed to manual dialing), thereby producing a risk of tying up emergency telephone lines.[40]

Technology that restricted telephone marketing calls (e.g., caller ID or call blocking) was not commonly available or was even more costly to consumers at the time.[41] Therefore, Congress determined that the "*only* effective means of protecting telephone consumers" was to impose restrictions on the use of automated and prerecorded telephone calls.[42] First, Congress prohibited nearly all unsolicited calls using "an artificial or prerecorded voice" (i.e., robocalls).[43] Second, Congress banned the use of automatic telephone dialing systems to make calls to emergency lines, hospital lines, and cellular telephones absent an emergency or express consent from the consumer.[44] Congress did not ban the use of an Autodialer to *all* calls, only calls to those specific types of telephone lines. This prevented the lines "from being utilized to receive calls from those needing emergency services."[45] Congress also included cell phones because the recipients were "inconvenienced and . . . charged for receiving unsolicited calls."[46] Finally, Congress restricted fax machines from sending unsolicited advertisements.[47]

36. *See* Reuben Fischer-Baum, *supra* note 1.

37. Samantha Duke, *Hope Resets with Supreme Court to Clarify How TCPA Applies to Current Tech*, JDSUPRA (Jan. 21, 2021), https://www.jdsupra.com/legalnews/hope-rests-with-supreme-court-to-9856965/.

38. Telephone Consumer Protection Act of 1991 § 2.

39. *Id.* § 2(5) ("Unrestricted telemarketing, however, can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety.").

40. H.R. REP. NO. 102-317, at 10 (1991).

41. Telephone Consumer Protection Act of 1991 § 2.

42. *Id.* at 2395 (emphasis added).

43. *Id.* § 2(b)(1).

44. *Id.*

45. H.R. REP. NO. 102-317, at 24.

46. *Id.*

47. Telephone Consumer Protection Act of 1991 § 2(b)(1) ("[F]acsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine . . . .")

At the time, Congress rejected concerns that the TCPA was inconsistent with Frist Amendment protections.[48] The committee believed that the restrictions on calls were constitutional because they were "a reasonable time, place and manner restriction on speech."[49] Besides, it was "clear that automated telephone calls that deliver[ed] an artificial or prerecorded voice message [were] more of a nuisance and a greater invasion of privacy than calls placed by 'live' persons."[50] Notably, the reasoning didn't touch on the fact that Autodialers can be used by live callers.

The TCPA endeavors to protect consumers by offering a robust source of recovery for those that receive a call in violation of the statute. It is a strict liability statute offering no cap or limitation on damages.[51] With a private right of action for actual damages or statutory damages, call recipients can recover a minimum of $500 per violation and injunctive relief.[52] The TCPA also includes a provision allowing the court to increase the amount of the award by up to $1,500 per willful violation.[53] Additionally, Congress authorized state attorneys general to bring civil actions and empowered the FCC to intervene thereby increasing the number of potential litigants seeking corrective action.[54] Thus, the TCPA's damages provisions act as a substantial deterrent for compliance-minded businesses and makes the legislation ripe for class actions.

The FCC was tasked with implementing the law in a way that accommodated individuals' rights to privacy as well as legitimate business interests.[55] In fact, when President Bush signed the TCPA into law, he encouraged the FCC to limit the law's reach so that legitimate business activities would not be affected.[56] In response, the FCC released its first order in 1992 exempting Autodialer prohibitions from "established business relationship calls," because if it "barr[ed] Autodialer solicitations" where such a business relationship exists, the law would "significantly impede communications between businesses and their customers."[57] The law was not intended to "unduly interfere

48. S. REP. NO. 102-178, at 4 (1991).
49. *Id.*
50. *Id.*
51. 47 U.S.C. § 227(b)(3)(B) (2018).
52. *Id.* § 227(b)(3).
53. *Id.* ("If the court finds that the defendant willfully or knowingly . . . , the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount . . . .").
54. *See id.* § 227(f)(3).
55. 1992 FCC Order, *supra* note 9, at 8754.
56. BROWN, *supra* note 24.
57. 1992 FCC Order, *supra* note 9, at 8770.

with ongoing business relationships."[58] Neither the legislative nor the executive branch intended to regulate *all* autodialing, only the especially bothersome type of autodialing.

B. The Evolution of the TCPA

In the decades since the TCPA's enactment, society has experienced a digital revolution.[59] All three branches of the government have tried to decipher the odd law and clarify how the TCPA applies to new and emerging technologies. Congress has amended the TCPA three times,[60] the FCC has released more than ten rulings,[61] and the judiciary has interpreted the TCPA in thousands of cases.[62] However, these attempts to maintain the law's applicability to combat intrusive calls have been unavailing and are routinely overturned by another authority.

1. TCPA Amendments

The TCPA was first amended to permit businesses that have a direct relationship with a consumer to send unsolicited fax advertisements.[63] Initially, the TCPA prohibited the use of "any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine."[64] And, for over a decade the FCC interpreted the law to provide businesses with an exception to the ban, allowing them to send fax advertisements to their customers.[65] However,

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58. *Id.*

59. Katherine Schaeffer, *U.S. has changed in key ways in the past decade, from tech use to demographics*, PEW RES. CTR. (Dec. 20, 2019), https://www.pewresearch.org/fact-tank/2019/12/20/key-ways-us-changed-in-past-decade/ ("The past decade in the United States has seen technological advancements, demographic shifts and major changes in public opinion.").

60. The TCPA was amended once to permit businesses with a direct relationship with a consumer to send unsolicited fax advertisements. *See* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359. Additionally, the TCPA was amended to prohibit the manipulation of caller ID information. *See* Truth in Caller ID Act Of 2009, Pub. L. No. 111-331, 124 Stat. 3572. Finally, the TCPA was amended to exempt government debt collection calls from TCPA restrictions. *See* Bipartisan Budget Act of 2015, Pub. L. 114-74, 129 Stat. 584. The Bipartisan Budget Act was subsequently found unconstitutional in *Barr v. American Association of Political Consultants*. *See* Barr v. Am. Ass'n of Political Consultants, 140 S. Ct. 2335 (2020).

61. *FCC Actions on Robocalls, Telemarketing*, FED. COMM. COMMISSION, https://www.fcc.gov/general/telemarketing-and-robocalls (last visited Jan. 28, 2020).

62. *See* McFall, *supra* note 13.

63. *See* Telephone Consumer Protection Act of 1991, § 2, 105 Stat. 2394, 2396 (codified as amended at 47 U.S.C. § 227 (2018)).

64. *Id.* § 2(b)(1)(C).

65. *The Junk Fax Prevention Act of 2004: Hearing Before the Subcomm. on Telecomms. & the Internet of the H. Comm. on Energy & Commerce*, 108th Cong. 1 (2004) (statement of Hon. Fred Upton, Chairman, Subcomm. on Telecomms & the Internet),

in 2003 the FCC pivoted its interpretation of the law and required "every business, small [and] large . . . to obtain prior written approval from each individual before it sent a commercial fax."[66] Shortly before the new rules were effectuated, the FCC agreed to stay the implementation and Congress stepped in to "fix the law to resolve any lingering statutory interpretation problems."[67] Congress recognized the logistical and economic costs of the proposed rules and passed the Junk Fax Prevention Act, amending the TCPA to affirm the previously established business exemption allowing businesses to send commercial faxes to their customers without first receiving written consent.[68]

Congress also passed the Caller ID Act to amend the TCPA to prohibit the manipulation of caller ID information.[69] Next, Congress passed the Bipartisan Budget Act to exempt government debt collection calls from TCPA restrictions.[70] The Bipartisan Budget Act limited liability for debt collectors for "debts owed to or guaranteed by the Federal Government, including robocalls made to collect many student loan and mortgage debts."[71] The amendment provided that these collectors were no longer prohibited from using (1) an Autodialer or a prerecorded call to cell phones; and (2) a prerecorded call to home phones.[72] However, the Supreme Court later overturned this amendment.

2. SCOTUS Interpretations of the TCPA

In 2012, the Supreme Court interpreted the statutory text of the TCPA for the first time in *Mims v. Arrow Financial Services*.[73] The issue before the Court was whether both federal and state courts had jurisdiction to enforce the TCPA.[74] At the time, the TCPA authorized private suits for actual and statutory damages, stating that "a person or entity may, if otherwise permitted by the laws or rules of court of a State, bring [an action] in an appropriate court of that State."[75] The text *oddly*

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https://www.govinfo.gov/content/pkg/CHRG-108hhrg95441/pdf/CHRG-108hhrg95441.pdf [hereinafter *Junk Fax Prevention Act Hearing*]; *see also* 1992 FCC Order, *supra* note 9, para. 54, n.87, at 8779 (stating that the established business relationship was evidence that the recipient has invited receipt of advertisements).

66. *Junk Fax Prevention Act Hearing*, *supra* note 65.
67. *Id.* at 2.
68. *Id.*
69. *See* Truth in Caller ID Act Of 2009, Pub. L. No. 111-331, 124 Stat. 3572.
70. *See* Bipartisan Budget Act of 2015, Pub. L. 114-74, § 301, 129 Stat. 584, 588.
71. Barr v. Am. Ass'n of Political Consultants, 140 S. Ct. 2335, 2343 (2020).
72. *Id.*
73. *See* Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368 (2012).
74. *See id.* at 376.
75. 47 U.S.C. § 227(b)(3) (2018).

excluded federal courts,[76] which left TCPA enforcement primarily to state and small claims courts.[77] The Court unanimously reversed the lower court's ruling, explaining that the TCPA's permissive grant of jurisdiction to state courts was not a barrier to exercising federal question jurisdiction.[78]

Two years ago, the Supreme Court found the Bipartisan Budget Act unconstitutional. In *Barr v. American Association of Political Consultants*, the Court found that that the exemption for the use of an Autodialer to make government debt collection calls "impermissibly favored debt-collection speech over political and other speech, in violation of the First Amendment."[79] The Court applied strict scrutiny because the law was making a content-based restriction on speech.[80] While the Court struck down the provision, it rejected the plaintiff's argument for holding the entire 1991 restriction unconstitutional by relying on severability principles.[81]

Most recently, the Court was asked to resolve a circuit split and clarify the definition of an Autodialer in *Facebook v. Duguid*.[82] The Court issued a unanimous opinion rejecting a more expansive definition which provided welcomed relief for businesses.[83] However, as discussed later in this Note, the ruling has raised complex questions relevant to the context and application of the TCPA.[84]

3. FCC Orders and Rulings

In 1992, the FCC completed its first rulemaking mandated by the TCPA.[85] The order discussed the purpose of the TCPA and proposed processes and procedures for eliminating unwanted telephone solicitations.[86] In accordance with the TCPA's directive, it also considered and rejected several regulatory alternatives to address the

76. *See id.*

77. There was also a split among the circuit courts on whether the federal courts could hear private TCPA actions. *See Mims*, 565 U.S. at 376.

78. *Id.* at 386-87.

79. Barr v. Am. Ass'n of Political Consultants, 140 S. Ct. 2335, 2343; *see also infra* Section V.A.

80. *Id.* at 2346-47. The Government conceded that its justification of collecting government debt was not sufficient to satisfy strict scrutiny. *Id.*

81. *Id.* at 2349.

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

83. *Id.*

84. *See infra* Section III.A.

85. Notice of Proposed Rulemaking, 7 FCC Rcd. 2736, para. 1 (Apr. 17, 1992).

86. *See* 1992 FCC Order, *supra* note 9, at 8755-81.

growing concern surrounding the use of automated technology and telephone solicitations.[87]

The FCC first examined and rejected the idea of creating a federally supported national do-not-call list as an alternative solution.[88] The FCC's concerns associated with costs for the administration of such a database and "the privacy concerns of consumers on a database list when such a list [would be] maintained and accessible widely by private entities" outweighed the benefit at the time.[89] Second, the FCC considered and rejected a network technology solution that required telemarketers to use a particular telephone prefix and "allow[ed] callers to screen out [those] telephone solicitations" because "it [wa]s not clear whether the telephone numbering plan could support such a prefix."[90] The FCC also rejected and deferred ideas for comment, including special directory markings requiring carriers to collect and tag customer's contact preferences in their directory, time of day call restrictions, and industry or company-based do-not-call lists.[91] As discussed later in the Note, some of these alternatives are in fact viable, and the FCC and Federal Trade Commission ("FTC") have and are leveraging new technology to provide consumers with the control to manage their call preferences with much more precision than the TCPA's restrictions on Autodialers and pre-recorded messages.[92]

Since the enactment of the TCPA, the FCC has released additional rulings in hopes of adapting the law to technology and marketplace changes. A decade after its enactment, the FCC realized that "the telemarketing industry ha[d] undergone significant changes in the technologies and methods used to contact consumers," and such marketplace changes justified modifications to the implementation rules.[93] Thus, from 2003 to 2015, the FCC released a series of rulings relying "on policy and legislative history to support its application of the definition of ATDS to new technology."[94] However, as discussed below, the FCC's rules and orders have been met with controversy and disagreement.[95]

87. Notice of Proposed Rulemaking, *supra* note 85, at 2741.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 2742.
92. *See infra* Section IV.C.
93. *See* Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 FCC Rcd. 14014, 14017 (2003) [hereinafter 2003 FCC Order].
94. Marks v. Crunch San Diego, LLC, 904 F.3d 1041, 1046 (9th Cir. 2018).
95. *See infra* Section II.C.

C. The Evolution of an "Automatic Telephone Dialing System"

The statutory definition of an Autodialer has never changed.[96] However, interpretations have differed.[97] In an attempt to address the TCPA's reach, the FCC has promulgated rules on the contours of an Autodialer and the use of such technology.[98] At the same time, businesses and consumers have looked to the courts to examine the FCC's rules—examinations generally leading to different outcomes. Unfortunately, because of the lack of consistency, there has been little success in maintaining a clear understanding of what technology constitutes an "automatic telephone dialing system" and the associated use limitations thereof.

For purposes of the TCPA, Congress defined an "automatic telephone dialing system" as "equipment which has the capacity–(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."[99] The TCPA restricted the use of an Autodialer to make a call to certain telephone lines, such as cellular phones, emergency lines, and hospital rooms.[100] This definition has been subject to extensive litigation that culminated before the Supreme Court last year in *Facebook v. Duguid*.[101]

Early FCC ruling and orders were consistent with the statutory text and the then-existing practices that powered its inception. The FCC's

96. *See* 47 U.S.C. § 227(a)(1) (2018); *cf.* Telephone Consumer Protection Act of 1991, § 227, 105 Stat. 2394, 2395 (codified as amended at 47 U.S.C. § 227 (2018)); *see also* Marks v. Crunch San Diego, 904 F.3d 1041, 1045 (9th Cir. 2018) ("Congress has never revised the definition of an ATDS.").

97. *See* 2015 FCC Order, *supra* note 12, at 7974 ("[T]he capacity of an Autodialer is not limited to its current configuration but also includes its potential functionalities."); *c.f.* ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687, 698 (D.C. Cir. 2018) ("[T]he Commission's expansive understanding of 'capacity' in the TCPA is incompatible with a statute.").

98. The FCC released guidance on what constitutes an ATDS (or Autodialer) in 2003, 2008, and 2015. *See* 2003 FCC Order, *supra* note 93; *see also* Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 23 FCC Rcd. 559 (2008) [hereinafter 2008 FCC Order]; 2015 FCC Order, *supra* note 12.

99. 47 U.S.C. §227(a)(1) (2018).

100. Telephone Consumer Protection Act of 1991 § 2; BROWN, *supra* note 24, at 49.

101. *See, e.g.*, Glasser v. Hilton Grand Vacations Co., 948 F.3d 1301 (11th Cir. 2020) (holding that device must contain a random or sequential number generator to qualify as an ATDS under the TCPA); *see also* Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 465 (7th Cir. 2020) (holding that device must contain a random or sequential number generator to qualify as an ATDS under the TCPA); ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687, 698 (D.C. Cir. 2018) ("[T]he Commission's expansive understanding of 'capacity' in the TCPA is incompatible with a statute . . . ."); Marks v. Crunch San Diego, LLC, 904 F.3d 1041 (9th Cir. 2018) (holding that "using a random or sequential number generator" only modifies the verb "produce."); Facebook, Inc. v. Duguid, 141 S. Ct. 1163 (2021); *cf.* Duran v. La Boom Disco, Inc., 955 F.3d 279, 284 (2nd Cir. 2020) (concluding that for technology to qualify as an ATDS, it must have the "capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator[.]").

first order affirmed the need of telemarketing restrictions on autodialing technology to protect consumer's privacy interests and alleviate risk to public safety.[102] It also acknowledged that the Autodialer prohibitions "clearly do not apply" to the *functionality* of then-standard phones "like 'speed dialing,' 'call forwarding,' or public telephone delayed message services . . . because the numbers called [we]re not generated in a random or sequential fashion."[103] At the time, however, the rules did not provide any additional information about the necessary functionality of equipment qualifying as an Autodialer.[104] Shortly thereafter, in 1995, the FCC reiterated that the TCPA did not extend to calls "directed to specifically programmed contact numbers," because those calls were not "directed to randomly or sequentially generated telephone numbers."[105]

Over a decade later, limitations on autodialing technology were extended to *all* calls, not only telemarketing calls.[106] In its 2008 order, the FCC stated that the statute prohibited the use of an Autodialer "to make any call to a wireless number in the absence of . . . prior . . . consent of the called party."[107] Therefore, the prohibition applied "regardless of the *content* of the call[]," and was "not limited only to calls that constitute 'telephone solicitations.' "[108] Following the FCC order, the courts have similarly rejected assertions that the TCPA should only be applied to telemarketers.[109] Thus, the prohibition on the use of an Autodialer, absent consent or emergency purposes, applied to all calls, regardless of the content of the call.

One of the fundamental principles of the TCPA, is that calls made using an Autodialer cannot be made without prior express consent.[110] Prior express consent is required to make non-solicitation calls to certain phone lines using an Autodialer and prior *written* express consent is

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102. 1992 FCC Order, *supra* note 9, at 8773.

103. *Id.* at 8776.

104. *See generally* 1992 FCC Order, *supra* note 9, at 8792 ("The terms automatic telephone dialing system and Autodialer mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.").

105. Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 10 FCC Rcd. 12391, 12400 (1995).

106. *See* 2008 FCC Order, *supra* note 98, at 565 ("We note that this prohibition applies regardless of the content of the call, and is not limited only to calls that constitute 'telephone solicitations.' "); *see also* Griffith v. Consumer Portfolio Serv., Inc., 838 F. Supp. 2d 723, 727 (N.D. Ill. 2011) (relying on the FCC 2008 order to hold that "we reject [the] argument that the TCPA only applies to telemarketing.")

107. *Griffith*, 838 F. Supp. 2d at 727-8.

108. *Id.* at 728 (emphasis added).

109. *See, e.g.*, *Griffith*, 838 F. Supp. 2d at 727 ("[W]e reject CPS's argument that the TCPA only applies to telemarketing, not debt collection.").

110. S. REP NO. 102-178, at 4 (1991); 47 U.S.C. § 227(b)(1)(A)-(B) (2018).

required to make telephone solicitation calls (i.e., telemarketing or advertising) using an Autodialer.[111] Without said consent, a business may not place a call using an Autodialer, even if they have an established business relationship. Both the FCC and the courts have construed solicitation calls broadly.[112] In fact, neither the proposition of a sale nor an actual sale needs to occur during the call for the call to be a telephone solicitation call.[113] In addition, calls made for both non-solicitation and solicitation purposes are considered telemarketing calls under the TCPA.[114]

So, regardless of the content of the call, consent is required. The type of consent varies depending on the type of the call. But the types of calls are interpreted broadly. As a result, it is difficult to decipher when and what type of consent is required when an Autodialer is involved. The TCPA provides a limited exception to the consent requirement for calls placed using an Autodialer if they are made for emergency purposes.[115] However, similar to other fundamental TCPA terms, the definition of "emergency purpose" is unclear.[116] It is highly contextual, and it does not apply to *every* call related to health or safety.[117]

1. The Emergence of New Technology and a New Definition of an Autodialer

In 2002, after the advent of more sophisticated technologies and a surge of TCPA-related inquiries,[118] the FCC invited comments on the

111. An "advertisement" is defined by the Code of Federal Regulations as "any material advertising the commercial availability or quality of any property, goods, or services," and "telemarketing" is defined as "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." 47 C.F.R. § 64.1200(f)(1), (12) (2012); *see* Mark A. Olthoff & Robert V. Spake, Jr., *Consent and Revocation Under the TCPA*, IX NAT'L L. REV. (Mar. 27, 2019), https://www.natlawreview.com/article/consent-and-revocation-under-tcpa.

112. Josh Stevens, *TCPA Requirements FAQ*, MACMURRAY & SHUSTER (July 11, 2021), https://mslawgroup.com/tcpa-requirements-faq/.

113. *Id.*

114. *Id.*

115. 47 U.S.C. § 227(b)(1)(A)-(B) (2018).

116. *See* Dorsey & Whitney LLP, *Emergency Text Messages Can Save Lives in a Pandemic Without Running Afoul of the TCPA* (Mar. 12, 2020), https://www.dorsey.com/newsresources/publications/client-alerts/2020/03/emergency-text-can-save-lives-in-a-pandemic.

117. *See id.*

118. From June 2000 to December 2001, the Commission's Consumer & Governmental Affairs Bureau received over 26,900 TCPA-related inquiries. Rules & Regulations Implementing Telephone Consumer Protection Act of 1991, 17 FCC Rcd. 17459, 17466 (2002) [hereinafter 2002 FCC Order].

definition of an Autodialer and its impact on technology.[119] The FCC expressed interest in more popular tools and then-contemporary technologies such as caller ID and predictive dialers.[120]

At the time, the FCC attributed the increase in telemarketing calls to predictive dialers.[121] Predictive dialers are list-based dialers that allowed "telemarketers to devote more time to selling products and services rather than dialing phone number[s]."[122] However, the use of predictive dialers "inconvenienced" consumers because they "initiate[d] phone calls" from a specific list of phone numbers "while telemarketers [were] talking to other consumers, [which] frequently abandoned calls before a telemarketer [was] free to take the next call."[123]

In 2003, the FCC expanded their interpretation of "capacity" from the statutory definition of an Autodialer to cover predictive dialers.[124] Before this expansion, legal experts believed that the TCPA did not impact list-based dialers, like predictive dialers, because these dialers did not use random or sequential number generators.[125] The FCC disagreed, reasoning that autodialing 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," essentially meant "the capacity to dial numbers without human intervention."[126] Predictive dialers arguably enabled callers to do exactly what the Autodialer restrictions attempted to prevent: "dial thousands of numbers in a short period of time."[127] Thus, an "unintended result" would occur if the restrictions did not apply to predictive dialers simply because the technology relied on a specific list of phone numbers.[128] As a result, companies had to obtain permission before using a predictive dialer to call their customers' wireless numbers or "any other numbers for which the consumer [wa]s charged for the call."[129]

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119. *See id.* at 17473.
120. *Id.* at 17472-73.
121. 2003 FCC Order, *supra* note 93, at 14054.
122. 2002 FCC Order, *supra* note 118, at 17465.
123. *Id.* at 17465.
124. *See* 2003 FCC Order, *supra* note 93, at 14092. Predictive dialers are "dialing systems that 'store pre-programmed numbers or receive numbers from a computer database and then dial those numbers in a manner that maximizes efficiencies for call centers.' " Dominguez v. Yahoo!, Inc., No. 13-1887, 2017 WL 390267, at *4 (E.D. Pa. Jan. 27, 2017).
125. BROWN, *supra* note 24, at 51.
126. 2003 FCC Order, *supra* note 93, at 14091-92 (emphasis added).
127. *Id.* at 14092.
128. *Id.*
129. *Id.*

In 2008, the FCC reinforced its 2003 guidance that predictive dialers qualified as an Autodialer.[130] It affirmed the extension of the definition of an Autodialer to equipment that stores and later dials, even if the phone numbers were not randomly generated.[131] As technology continued to advance, the FCC determined that the statute's restriction on "calls" encompassed additional methods of telemarketing, including text messages.[132] Similar to the concern for fees incurred for unsolicited calls to a cell phone, the FCC reasoned that consumers incurred fees for the receipt of unsolicited text messages.[133] It argued that regardless of whether a cell phone subscriber purchased a set of allotted minutes in advance or after they were used, their minutes could be exhausted more quickly if they received numerous unsolicited calls or texts.[134]

After incorporating new technologies into the meaning of the statutory definition of an Autodialer for several years,[135] the FCC issued an order in 2015 confirming the sprawling interpretation.[136] The ruling also expanded the definition of "capacity," holding that "the capacity of an [Autodialer] is not limited to its current configuration but also includes its potential functionalities" with modifications such as software updates.[137] In other words, technology that did not currently have the ability to act as an Autodialer was now subject to the same restrictions if it was at all possible that it could be converted into an Autodialer.

Those in opposition argued that the FCC's interpretation was flawed "in the same way that saying an 80,000 seat stadium has the capacity to hold 104,000."[138] The FCC disagreed, claiming that Congress intended a broad definition.[139] It affirmed both the statutory definition and that an Autodialer need only have the "potential capacity" to dial numbers randomly or sequentially, rather than possess the present

130. 2008 FCC Order, *supra* note 98, at 566.

131. 2003 FCC Order, *supra* note 93, at 14091-93; 2008 FCC Order, *supra* note 98, at 566-67.

132. *See* 2003 FCC Order, *supra* note 93, at 14115; *see, e.g.*, Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 954 (9th Cir. 2009) ("[A] text message is a 'call' within the TCPA.").

133. *See* 2003 FCC Order, *supra* note 93, at 14115. The FCC determined that telemarketers had no way to determine how consumers were charged for their mobile service. *Id.*

134. *Id.*

135. *See id.* at 14093 (finding that predictive dialers fall within the meaning of an ATDS); *cf.* 2008 FCC Order, *supra* note 98, at 566 (stating that the capacity to dial numbers without human intervention is basic functionality of an ATDS).

136. 2015 FCC Order, *supra* note 12, at 7964.

137. *Id.* at 7974.

138. *Id.*

139. *Id.*

ability to do so.[140] The FCC argued it had already implicitly rejected a "present use" or "current capacity" test after its determination that predictive dialers fell under the definition of an Autodialer.[141] This change meant that "capacity" could be achieved through modifications or updates to the technology.[142] The technology did not have to currently possess the capacity to dial numbers randomly or sequentially or utilize such technology during a call to a consumer.[143]

Shortly thereafter, in *ACA International v. FCC*, the U.S. Court of Appeals for the Seventh Circuit[144] considered challenges to the FCC's 2015 guidance on the definition of an Autodialer and rejected elements of the FCC's rulings.[145] The court held that if "capacity" included "potential functionalities" or "future possibility," not just a "present ability,"[146] the FCC's expansive interpretation was unreasonable given that the interpretation would extend the TCPA to millions of everyday callers using a smartphone.[147] The FCC's guidance was impermissible because it was "arbitrary and capricious."[148] Therefore, the court overturned the 2015 interpretation.[149] Months later, the Third Circuit followed suit and also set aside the FCC's "potential capacity" interpretation.[150] The court held that for equipment to qualify as an

140. *Id.* The FCC rationalized its determination by stating a present use or present capacity test might render the protections meaningless because modern dialing equipment could circumvent the definition of an ATDS. *Id.* at 7976.

141. 2003 FCC Order, *supra* note 93, at 14091. A predictive dialer is "equipment that dials numbers" and, when connected to 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.* Both the FCC and courts have concluded that predictive dialers may fall within the scope of the TCPA because it has the capacity to dial phone numbers without human intervention. *Id.* at 14092–93; *see, e.g.*, Nunes v. Twitter, Inc., No. 14-cv-02843-VC, 2014 WL 6708465, at *1 (N.D. Cal. Nov. 26, 2014) (finding that an ATDS "appears to encompass any equipment that stores telephone numbers in a database and dials them without human intervention").

142. 2015 FCC Order, *supra* note 12, at 7974 ("[T]he capacity of an Autodialer is not limited to its current configuration but also includes its potential functionalities.").

143. *See id.* at 7974 ("[A]utodialers need only have the 'capacity' to dial random and sequential numbers, rather than the 'present ability' to do so.").

144. Hereafter, federal appellate courts will be referenced to informally, e.g., the D.C. Circuit.

145. *See* ACA Int'l v. Fed. Commc'n Comm'n, 885 F.3d 687, 695 (D.C. Cir. 2018).

146. 2015 FCC Order, *supra* note 12, at 7974.

147. *See ACA Int'l*, 885 F.3d at 700 (discussing a smartphone could qualify as an Autodialer because it has the inherent capacity to gain the necessary ATDS functionality by downloading an application).

148. *See id.* at 699-700.

149. *Id.* at 703.

150. *See* Dominguez on Behalf of Himself v. Yahoo, Inc., 894 F.3d 116, 119 (3d Cir. 2018).

Autodialer, it must have "the *present* capacity to function as [an] autodialer."[151]

2. A Fresh Start for the Definition of an Autodialer

After *ACA International,* courts agreed that the decision invalidated the FCC's guidance from 2003, 2008, and 2015.[152] At the end of 2018, in *Marks v. Crunch San Diego,* the Ninth Circuit took the opportunity to rearticulate the meaning of an Autodialer.[153] The court reasoned that "only the statutory definition of [an] ATDS as set forth by Congress in 1991 remains," and that after the Seventh Circuit's decision in *ACA International*, "we must begin anew to consider the definition of ATDS under the TCPA."[154] Yet, what this really meant was that the court must begin anew to consider the interpretation of the statutory definition because the statutory definition of an Autodialer had (and has) never been altered. The court was in fact reimagining both the interpretation and reach of the same words that have been present since the enactment of the TCPA in 1991.

a. The Marks *Definition of an Autodialer*

In a dispute over whether Crunch Fitness utilized an Autodialer to send gym members text messages, the Ninth Circuit held "that the statutory definition of ATDS is not limited to devices with the capacity to call numbers produced by a 'random or sequential number generator,' but also includes devices with the capacity to dial stored numbers automatically," even if those numbers are not automatically generated.[155] The court's opinion unquestionably evoked the FCC's recently overturned expansive interpretation, reasoning that Congress had never updated the definition of an Autodialer, therefore,

> Congress's intent [was] to regulate equipment that is "automatic," and that has "the capacity" to function in two specified ways: "to store or produce telephone numbers to be called, using a random or

151. *See id.* at 119 (emphasis added). Here, the Third Circuit affirmed the lower court's decision to grant summary judgment in defendant's favor because the text-message service did not have the present capacity to store or produce telephone numbers using a random or sequential number generator. *Id.* at 121.

152. *See, e.g.*, Marks v. Crunch San Diego, 904 F.3d 1041, 1049 (9th Cir. 2018); *see also e.g.*, Richardson v. Verde Energy U.S.A., Inc., 354 F. Supp. 3d 639, 648 (E.D. Pa. 2018).

153. *See Marks*, 904 F.3d at 1052.

154. *Id.* at 1049-50.

155. *Id.* at 1052.

> sequential number generator" and "to dial" those telephone numbers.[156]

Therefore, its "decision to regulate only those devices which have the aforementioned functions" remained unchanged.[157]

The court concluded that "using a random or sequential number generator" modifies only the verb "to produce," and not the preceding verb, "to store."[158] As a result, an Autodialer was "equipment which has the capacity": (1) "to store numbers to be called . . . and to dial such numbers automatically" or (2) "to produce numbers to be called, using a random or sequential number generator and to dial such numbers automatically."[159] This meant the use of a random or sequential number generator was not required for a device to be considered an Autodialer. A device that stored numbers and dialed them automatically fell under this *new* definition.

Furthermore, the court rejected the argument that an Autodialer must be fully automatic (meaning that it must function without human intervention) and that any equipment that "could engage" (i.e., capacity to engage) in automatic dialing qualified as an Autodialer.[160] This meant that an Autodialer didn't actually need to *use* automatic dialing, mere *capacity* for such use was sufficient.[161] In other words, a device which stores numbers and has the *capacity* to use automatic dialing (e.g., via software updates) was an Autodialer.

Thus, the interpretation of an Autodialer *again* did not require the technology to use a random or sequential number generator, and only required the *capacity* (not present ability) to automatically dial stored numbers. The Ninth Circuit's interpretation unmistakably returned to the once expansive Autodialer interpretation, the same expansive interpretation that reached smartphones and was found unreasonable because placing restrictions on every smartphone holder is absurd.[162]

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156. *Id.* at 1044-45 (citing Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 227, 105 Stat. 2394, 2395).

157. *Id.* at 1045.

158. *Id.* at 1052.

159. *Marks*, 904 F.3d at 1052-3.

160. *Id.* at 1052 ("Congress made it clear that it was targeting equipment that could engage in automatic *dialing*, rather than equipment that operated without any human oversight or control.").

161. *See generally id.*

162. *See, e.g.*, ACA Int'l v. Fed. Commc'n Comm'n, 885 F.3d 687, 698 (D.C. Cir. 2018) ("It is untenable to construe the term 'capacity' in the statutory definition of an ATDS in a manner that brings within the definition's fold the most ubiquitous type of phone equipment known, used countless times each day for routine communications by the vast majority of people in the country."); Brief of Defendant-Appellee at *3, Duguid v. Facebook, Inc., 926 F.3d 1146 (9th Cir. 2019) (No. 17-15320) ("Under Plaintiff's definition, the term ATDS

b. Emerging Split of Authority and Facebook v. Duguid

In the few years since *Marks,* a deepening split of authority emerged. Some courts adopted *Marks*,[163] while others aligned with *ACA International* requiring a *present capacity* to generate random or sequential telephone numbers in order to qualify as an Autodialer under the TCPA.[164] In 2017, a class action lawsuit was filed against Facebook, alleging Facebook's use of an Autodialer in sending text messages without prior express consent as a security precaution after an unrecognized device logged into an account.[165] In July 2017, the district court dismissed the complaint for a second time for failure to sufficiently allege that the text messages received by plaintiffs were sent using an Autodialer.[166] The court concluded that the plaintiff's alleged facts actually suggested that Facebook did not dial the phone numbers randomly.[167] Rather, the text messages were targeted and, therefore, there was no indication that Facebook used an Autodialer.[168]

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encompasses millions of recent-generation smartphones, all of which are equipped with a 'do not disturb' function that (once activated by a user with a simple tap) *automatically* sends responses to incoming messages from people in the user's contact list (or a select subset of them).").

163. *See, e.g.*, Gonzales v. Hosopo Corp., 371 F. Supp. 3d 26 (D. Mass. 2019); *see also* King v. Time Warner Cable, Inc., 894 F.3d 473 (2d Cir. 2018) (concluding that for a dialing system to qualify as an ATDS, "the phone numbers it calls must be either stored in any way or produced using a random-or sequential-number-generator"); *see also, e.g.*, Allan v. Pa. Higher Educ. Assistance Agency, 968 F.3d 567, 579-80 (6th Cir. 2020) (holding that under the TCPA, an Autodialer is defined as "equipment which has the capacity (A) to store [telephone numbers to be called]; or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers").

164. *See, e.g.*, Glasser v. Hilton Grand Vacations Co., 948 F.3d 1301 (11th Cir. 2020) (holding that device must contain a random or sequential number generator to qualify as an ATDS under the TCPA); *see also, e.g.*, Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 465 (7th Cir. 2020) (holding that device must contain a random or sequential number generator to qualify as an ATDS under the TCPA); *see also, e.g.*, Collins v. Nat'l Student Loan Program, 360 F. Supp. 3d 268 (D.N.J. 2018) (holding that the predictive dialer was not an ATDS because there was no proof that the device had the present capacity to randomly or sequentially generate numbers); *see also, e.g.*, Fleming v. Associated Credit Servs., Inc., 342 F. Supp. 3d 563 (D.N.J. 2018) (arguing that based on the statutory text, technology is not an ATDS if it dials numbers from a list that was not randomly or sequentially generated at its creation); *see also, e.g.*, Smith v. Navient Sols., LLC, No. CV 3:17-191, 2019 WL 3574248, at *8 (W.D. Pa. Aug. 6, 2019) ("the device itself must have the capacity to generate numbers").

165. Duguid v. Facebook, Inc., No. 15-CV-00985-JST, 2017 WL 635117, at *1 (N.D. Cal. Feb. 16, 2017), *rev'd*, 926 F.3d 1146 (9th Cir. 2019), *rev'd*, 141 S. Ct. 1163 (2021). Duguid claimed Facebook sent him text messages, despite him not being a Facebook user. The text messages were sent to alert the account owner that the account had been accessed by an unrecognized device. *Id.*

166. *Id.* at 5.

167. *Id.*

168. *Id.*

In 2019, after the *Marks* decision, the Ninth Circuit leveraged its new (and reminiscent) Autodialer definition and overturned the lower court's ruling.[169] Facebook argued that the court should not apply the *Marks'* definition of an Autodialer because its reach captured smartphones since smartphones can "store numbers and, using built-in automated response technology, dial those numbers automatically."[170] Facebook explained that

> [S]martphones have the capacity *as currently programmed* to "store numbers" and—via their "do not disturb" function—to respond automatically to incoming messages. Thus, if an ATDS encompasses all devices with that capacity, then tens of millions of modern smartphone users are subject to a $ 500 to $ 1,500 penalty every time they text a friend or family member (unless they have obtained prior express consent).[171]

If smartphones were an Autodialer, then Congress was unconstitutionally "imposing crippling financial penalties on tens of millions of Americans."[172]

Facebook further argued that *Marks* was inapplicable because Facebook had stored phone numbers to be called in response to activity outside of Facebook's control. Facebook's stored phone numbers were, therefore, distinct from the traditional telephone solicitations found in *Marks*.[173] However, the court dismissed the argument and reasoned that such a distinction would not prevent smartphones from qualifying as an Autodialer.[174] As a result, Facebook's argument did not support their original contention that smartphones qualify as an Autodialer under the *Marks* definition.[175] Moreover, the court didn't seem to appreciate Facebook's argument that the *Marks* definition encompassed smartphones and ultimately rejected Facebook's arguments.[176]

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169. Marks v. Crunch San Diego, 904 F.3d 1041, 1052 (9th Cir. 2018).

170. *See* Duguid v. Facebook, Inc., 926 F.3d 1146, 1151 (9th Cir. 2019), *rev'd*, 141 S. Ct. 1163 (2021).

171. Brief of Defendant-Appellee at *37, *Duguid*, 926 F.3d 1146 (No. 17-15320).

172. *Id.*

173. The text messages at issue in Facebook v. Duguid were security alerts intended to notify the Facebook account user associated with the phone number that the account had been accessed on an unrecognized browser. *See Duguid*, 926 F.3d 1146. Whereas in *Marks v. Crunch San Diego*, the messages at issue were "marketing text messages." Brief of Plaintiff-Appellant, Marks v. Crunch San Diego, 904 F.3d 1041 (9th Cir. 2018) (No. 14-56834).

174. *See Duguid*, 926 F.3d at 1151-52.

175. *Id.* at 1152 ("Facebook's argument that any ATDS definition should avoid implicating smartphones provides no reason to adopt the proposed active-reflexive distinction. Even if Facebook's premise has merit, the quintessential purpose for which smartphone users store numbers is 'to be called' proactively. In other words, excluding equipment that stores numbers 'to be called' only reflexively would not avoid capturing smartphones.").

176. *Id.*

Left with a definition that an Autodialer need only have the *capacity* to store phone numbers to be called and to dial such numbers automatically, Facebook submitted a writ of certiorari to the Supreme Court.[177] The Supreme Court granted certiorari, heard oral arguments on December 8, 2020,[178] and released its opinion on April 1, 2021.[179]

The unanimous decision, delivered by Justice Sotomayor, focused on the construction of the statutory language of the definition of an Autodialer.[180] Agreeing with Facebook, the Court reasoned that given the "most natural reading of the text . . . it would be *odd* to apply" the clause "using a random or sequential number generator" to only store or produce.[181] Thus, the Court held that the "necessary feature of an autodialer . . . is the capacity to use a random or sequential number generator to either store or produce phone numbers to be called."[182] This meant that technology using a random or sequential number generator must be applied to the storage or production of telephone numbers to be considered an Autodialer. In other words, technology which simply had the *capacity* to store phone numbers to be called and to dial such numbers automatically was not sufficient to trigger the Autodialer restrictions; it needed to use a random or sequential number generator. The Court concluded that the definition "excludes equipment like Facebook's login [security] notification system," which sends automated login notification texts to its users.[183]

The Court's interpretation (and thus the new definition) that an Autodialer must have the capacity to generate numbers randomly or sequentially—not simply the capability to dial from a list[184]—significantly limits the technology subject to the TCPA's restrictions. A definition that once could be interpreted to extend to smartphones (and thus millions of Americans) was now properly tailored to apply to technology using a random or sequential number generator.[185] Despite the welcomed outcome, the opinion left some uncertainty. Latent

177. *See* Brief for Petitioner, Facebook, Inc. v. Duguid, 141 S. Ct. 1163 (2021) (No. 19-511).

178. Facebook Inc. v. Duguid, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/facebook-inc-v-duguid/ (last visited Jan. 29, 2021).

179. *Duguid*, 141 S. Ct. 1163.

180. *Id.*

181. *Id.* at 1165, 1169 (emphasis added).

182. *Id.* at 1173.

183. *Id.* at 1166.

184. *Id.* at 1173.

185. *Duguid*, 141 S. Ct. at 1170 ("Congress' definition of an autodialer requires that in all cases, whether storing or producing numbers to be called, the equipment in question must use a random or sequential number generator.").

ambiguities will undoubtedly lead to lawsuits testing the new definition, and the threat of lawsuits will surely chill speech.

III. IDENTIFICATION OF THE LEGAL PROBLEM

Congress enacted the TCPA nearly a year before the first text message was ever sent, [186] and when cell phones were a luxury.[187] As drafted, the law struggles to account for contemporary technologies, yet it has endured a digital revolution. The original purpose of the TCPA was designed to curb "telemarketing" abuses by "solicitors."[188] However, inconsistent interpretations of fundamental terms and the inherent ambiguity and anachronistic nature of the law negatively impacts companies' ability to communicate with consumers, even after the favorable Supreme Court ruling in *Facebook v. Duguid*.[189]

A. Lingering Issues After Facebook v. Duguid

Once again, the court has limited the definition of an Autodialer.[190] This will certainly provide some reprieve for businesses using automated technology to call or text their customers for legitimate business purposes. However, in its opinion, the Court avoided and advanced several issues. First, the Court refrained from discussing the meaning of the word "automatic" or how much human intervention was required to avoid qualifying as an Autodialer.[191] It also introduced uncertainty into the longstanding "use" versus "capacity" debate by stating in its opinion that "Congress' definition of an Autodialer requires that . . . the equipment . . . must *use* a random or sequential number generator."[192]

186. Charles Arthur, *Text messages turns 20 – but are their best years behind them?*, THE GUARDIAN (Dec. 3, 2012, 2:45 AM), https://www.theguardian.com/technology/2012/dec/02/text-messaging-turns-20. The first text message was sent on December 3, 1992, and a responsive text was not sent until nearly a year later. *Id.*

187. *See generally* Fischer-Baum, *supra* note 1.

188. 47 U.S.C. § 227 (2018).

189. Mark Olthoff, *TCPA Litigation: Widening Circuit Split Over Autodialer May Drive Supreme Court Consideration*, JDSUPRA (Mar. 9, 2020), https://www.jdsupra.com/legalnews/tcpa-litigation-widening-circuit-split-35969/ ("Changing technologies and divergent district court rulings have created a patchwork of often inconsistent interpretations. . . . Companies with text messages flowing to people in various jurisdictions can be left with significant uncertainty about their operations, and potentially substantial liability simply dependent upon the location of the recipient.").

190. *See* discussion *supra* Section II.C.

191. Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1171 n.6 ("[A]ll 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.").

192. *Id.* at 1170 (emphasis added).

The absence of "capacity" may have been a simple oversight. Yet, regardless of the reason, the absence will cause more confusion for the definition of an Autodialer. Finally, the Court expressly declined to opine on whether the lower courts correctly interpreted text messages as "calls" under the TCPA.[193]

The opinion also triggered an emotional response from Congress, suggesting an uncertain future. Senator Markey, one of the original authors of the TCPA, along with Senator Eshoo were shocked by the opinion and threatened legislation to amend the TCPA in a way that could make the ruling obsolete.[194] In a joint statement, the lawmakers said: "It was clear when the TCPA was introduced that Congress wanted to ban dialing from a database. By narrowing the scope of the TCPA, the Court is allowing companies the ability to assault the public with a non-stop wave of unwanted calls and texts, around the clock."[195]

In considering the Senators' response to the Supreme Court's opinion, it's hard to imagine that Congress intended to ban all dialing from a database. Every smartphone arguably stores a database of phone numbers for the caller to choose from at their discretion. The intent was to protect telephone holders, not subject them to the TCPA's restrictions.

B. Lingering Issues with the Fundamentals

Since its enactment, the TCPA has been a source of significant legal risk for companies. Fundamental definitions have fluctuated over the years, causing confusion for decades. With unreliable definitions, it is hard for compliance-minded businesses to know whether they are complying with the law, ultimately chilling their speech with consumers.

Originally, the TCPA regulated telemarketers.[196] Yet since its enactment, the TCPA has been wielded against *all* calls, regardless of the content of the call, not just telemarketers.[197] Additionally, as discussed at length in this Note, the interpretation of an Autodialer has differed throughout the years, at one time reaching smartphones.[198]

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193. *Id.* at 1168 n.2 (noting that the court assumed that the TCPA's prohibition also extends to sending unsolicited text messages, therefore, the court declined to consider or resolve the issue.); *cf. infra* note 74.

194. *See* Press Release, Ed Markey, U.S. Sen. for Mass., Senator Markey and Rep. Eshoo Blast Supreme Court 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.

195. *Id.*

196. *See* H.R. REP. NO. 102-317, at 10 (1991).

197. *See* 2008 FCC Order, *supra* note 98, at 565.

198. *See supra* Section II.C.

The FCC's idea of "consent" has also varied throughout the years. The Junk Fax Prevention Act is evidence that Congress didn't intend for TCPA restrictions to apply to businesses who have established relationships with their customers.[199] In these cases, the business relationship alone was evidence of consent.[200] Even so, express consent is still required for all autodialed calls, and prior *written* express consent is required for all autodialed solicitation calls.[201] To make matters even more challenging for companies sending legitimate messages to consumers, the statutory definition of "solicitation calls" continues to be construed broadly. A sale nor a proposition of a sale need to occur for a call to be deemed a solicitation call.[202] This provides businesses with little to no help in knowing whether they are complying with the TCPA when they are using autodialing technology to support communications with their customers or employees. Finally, the "emergency purposes" exception to the general rule requiring consent to use an Autodialer is also unclear and context specific.[203]

The TCPA has been used to attack numerous pro-consumer business practices over the years.[204] One of the primary reasons for this is the statutory damages provisions providing an award of $500-$1,500 *per call*[205] which acts as a considerable multiplier in class action litigation. Businesses seeking to communicate with their customers are

199. *Junk Fax Prevention Act Hearing*, *supra* note 65.

200. *Id.* Moreover, the FCC itself has previously concluded that a solicitation to a consumer whom the business has a relationship does not adversely affect their privacy interests. 1992 FCC Order, *supra* note 9, at 8770-71, para. 34.

201. If an autodialed or prerecorded call is not for telemarketing purposes, consent may be written or oral. 47 C.F.R. § 64.1200(a) (2012). For autodialed or prerecorded-voice telemarketing calls to a mobile phone number, prior express consent must be written. Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 27 FCC Rcd. 1830, 1838 para. 20 (2012); *see also* 2015 FCC Order, *supra* note 12, at 7968 ("If the call includes or introduces an advertisement or constitutes telemarketing, consent must be in writing.").

202. Stevens, *supra* note 112. A "telephone solicitation means the initiation of a telephone call for the purpose of encouraging the purchase or rental, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship or (C) by a tax exempt nonprofit organization." 47 U.S.C. § 227(a)(4) (2018).

203. *See* Jason C. Gavejian & Maya Atrakchi, *FCC's Declaratory Ruling on the TCPA's "Emergency Purposes" Exception During COVID-19: Does it apply to Workplace Correspondence?*, X NAT'L L. REV. (Apr. 22, 2020) https://www.natlawreview.com/article/fcc-s-declaratory-ruling-tcpa-s-emergency-purposes-exception-during-covid-19-does-it (discussing limited guidance and a narrow interpretation).

204. *See, e.g.*, Facebook, Inc. v. Duguid, 141 S. Ct. 1163 (2021) (discussing security text messages).

205. *See* 47 U.S.C. § 227(b)(3) (2018).

left to choose between silence or defending an action where the alleged statutory damages could be in the millions (or billions).

While consumers deserve protection against unwanted calls, the TCPA has not proven to be the source of relief Congress once hoped it would be. Rather, it has proven to be a source of confusion. Even when businesses strive to comply with the law, the uncertainties and deficiencies create a risk of litigation requiring businesses to limit communications with their customers. This played out during the COVID-19 pandemic. Cautious businesses limited their communications, generally to the detriment to the consumer.

1. The TCPA's Impact on Communications During the COVID-19 Pandemic

At the outset of the pandemic, companies were probing the FCC about the limitations of efficient communication with their customers, prospective customers, and employees.[206] In response to these questions and only nine days after the World Health Organization declared the COVID-19 outbreak a pandemic, the FCC issued a declaratory ruling on March 20, 2020.[207] It provided clarification and context around the narrow emergency-related exception to automated and prerecorded restrictions during the pandemic.[208] However, the ruling was not without the TCPA's all-too-common ambiguities.[209]

The ruling clarified that calls and texts using an Autodialer necessitated by the pandemic fell under the "emergency purposes" safe harbor.[210] This meant that pandemic-related calls and texts weren't subject to the same consent requirements as other calls and texts. The caller had to be a hospital, health care provider, health official, or other government official, or a person under their express direction and acting on their behalf.[211] Additionally, the call had to be solely informational,

206. *See, e.g.*, Petition for Expedited Declaratory Ruling on Emergency Purposes Exception (2020) (No. 02-0278), https://www.cuna.org/content/dam/cuna/advocacy/removing-barriers-blog/2020/documents/ABA_JointTrades_Petition_Emergency_Purposes_Exception_2020_03_30_final.pdf.

207. The World Health Organization declared the COVID-19 pandemic as a pandemic on March 11, 2020. World Health Organization, *Listings of WHO's response to COVID-19*, https://www.who.int/news/item/29-06-2020-covidtimeline (last updated Jan. 29, 2021); *see* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Declaratory Ruling, DA 20-318 (2020) [hereinafter 2020 FCC Order].

208. 2020 FCC Order, *supra* note 207.

209. *See id.* The FCC's requirement that calls be made by its specifically enumerated callers will likely raise questions as to whether this now excludes the same communications made by other callers.

210. *Id.*

211. *Id.*

"made necessary because of the COVID-19 outbreak, and directly related to the imminent health or safety risk arising out of the COVID-19 outbreak."[212] No other exceptions were provided.

Unfortunately, the pandemic created an environment "ripe for predatory lending and fraud" and scammers were capitalizing on trusting consumers.[213] Financial institutions seeking to protect their clients wanted to send fraud and security alerts to ensure they didn't fall for the surge of financial scams.[214] However, many financial institutions were cautious about communicating quickly with their customers because of the lack of precedent and threat of class action litigation.[215]

Financial institutions also sought to offer payment deferrals, fee waivers, extension of repayment terms, and other beneficial services "intended to protect or support the financial health or safety of consumers" when they needed it most.[216] The fear of debilitating damages led several financial institutions to petition the FCC on March 30, 2020 to provide an expedited ruling to clarify that phone calls and text messages on matters related to the COVID-19 pandemic were made for "emergency purposes."[217] They were seeking confirmation of an exemption from the restrictions,[218] but, that ruling never came.[219] It was clear from this experience that the law's uncertainty chilled communication during a time that consumers needed help the most.

The TCPA is odd; it is outdated and unclear. It has a confusing and complicated past with the FCC, Congress, and the judiciary disagreeing on its most essential components. Moreover, it limits well-intentioned businesses from communicating with their customers and harms those it was originally intended to protect.

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212. *Id.*

213. Petition for Expedited Declaratory Ruling on Emergency Purposes Exception, *supra* note 206, at 9-10.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* On July 28, 2020, the Consumer and Governmental Affairs Bureau released a public notice clarifying the FCC's 2020 ruling and emergency COVID-19 related calls. The public notice confirmed that the TCPA's emergency exception applied to calls and texts made by health care entities but did not include financial institutions. Fed. Commc'ns Comm'n, Public Notice on Consumer and Governmental Affairs Bureau Clarification On Emergency Covid-19 Related Calls (July 28, 2020), https://docs.fcc.gov/public/attachments/DA-20-793A1.pdf [hereinafter Public Notice]. *See infra* Section II.C.

219. *See, e.g.*, Public Notice, *supra* note 218.

IV. ANALYSIS

Since the enactment of the TCPA, technology has advanced rapidly, keeping up with consumer expectations and demand.[220] Cell phones, smartphones, and text messages are widespread[221] and a way of doing business by the touch of a button. The ever-expanding reach of the TCPA is incompatible with today's technology and it impedes basic business operations in a way that Congress could not have intended.[222] The Autodialer prohibitions now reach all calls utilizing specific technology, instead of specific types of calls and questions remain about the proper definition and use of an Autodialer. These lingering issues prevent legitimate and lawful communications between businesses and their customers and places businesses in the crosshairs of potentially devastating litigation. The continued application of an *odd* and archaic law is absurd and unnecessary, given there are more modern tools available to combat the same nuisance calls Congress sought to address with the TCPA.

A. The Ever-Evolving Definition of an Autodialer Negatively Impacts Consumers and Frustrates Privacy Protection Practices

In 1991, Americans relied on landlines as their primary means of communication, so businesses called these lines to reach their customers.[223] In fact, Congress found that "30,000 businesses actively telemark[ed] goods and services" to homes and businesses and "[m]ore than 300,000 solicitors call[ed] more than 18,000,000 Americans every day."[224] However, Congress did not restrict the use of an Autodialer for calls to landlines.[225] Congress sought to preserve everyday targeted communications and did not intend the TCPA to encompass businesses

220. *See* Mobile Fact Sheet, PEW RES. CTR. (April 7, 2021), https://www.pewresearch.org/internet/fact-sheet/mobile/ ("Americans today are increasingly connected to the world of digital information while 'on the go' via smartphones and other mobile devices.").

221. *See id.*

222. H.R. REP. NO. 102-317, at 17 (1991).

223. *See generally* Fischer-Baum, *supra* note 1; *Percentage of housing units with telephones in the United States from 1920 to 2008*, STATISTA (2021), https://www.statista.com/statistics/189959/housing-units-with-telephones-in-the-united-states-since-1920/.

224. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, 105 Stat. 2394, 2394.

225. *Id.* The restriction applied unless the call was made for emergency purposes or made with the prior express consent of the recipient. *Id.*

calls to customers.[226] Nevertheless, since the TCPA's enactment, the law has been extended to these types of calls, negatively impacting consumers.

Since the FCC has interpreted the TCPA's prohibitions to apply to *any* call that the recipient might receive and consider a surprise,[227] businesses are rightfully concerned about inadvertently violating the law even while communicating for the benefit or protection of their customers. Companies deliberately gather mobile phone numbers from consumers all the time. Call recipients often provide their cellular phone numbers, expecting to receive a phone call or a text from the business.[228] These phone numbers are also used to facilitate privacy and security controls to ensure customers' personal information and accounts are protected.

In *Facebook*, the Supreme Court expressly declined to decide whether text messages are a "call" covered by the TCPA.[229] Moreover, it is unclear whether automated text messages might constitute a "prerecorded call." This leaves companies at risk of being sued for the use of technology designed to protect consumer privacy, such as two-factor authentication. Banks,[230] online payments systems,[231] and thousands of small businesses[232] utilize SMS two-factor authorization to communicate with and protect their customers' privacy. When a consumer logs into their account, the technology can send a message via SMS text message to the consumer to provide an added layer of security. While newer multi-factor authentication technologies are on the rise,

226. H.R. REP. NO. 102-317, at 17 ("The Committee does not intend for this restriction to be a barrier to the normal, expected or desired communications between businesses and their customers.").

227. 2008 FCC Order, *supra* note 98, at 565.

228. *See, e.g.*, Blow v. Bijora, Inc., 855 F.3d 793, 803 (7th Cir. 2017) (noting that the TCPA plaintiff "gave her cell phone number to [the caller] on several different occasions," which was then added to a text messaging list).

229. Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1168 n.2 (2021) ("Neither party disputes that the TCPA's prohibition also extends to sending unsolicited text messages. We therefore assume that it does without considering or resolving that issue." (citation omitted)).

230. *See* Nelson Cicchitto, *Which Companies Use Multi-Factor Authentication With Their Customers?*, AVATIER (Mar. 27, 2018), https://www.avatier.com/blog/companies-use-multi-factor-authentication-customers/.

231. *See, e.g.*, PayPal Help Center, PAYPAL, https://www.paypal.com/bm/smarthelp/article/how-do-i-turn-on-or-off-2-step-verification-for-paypal-account-login-faq4057 (last visited Aug. 15, 2021).

232. *See* TEXTMAGIC, https://www.textmagic.com/2fa-sms/ (last visited Jan. 29, 2021) (stating that thousands of small businesses are using their SMS two-factor authentication technology).

SMS is still widely popular.[233] With cybercrime being one of the largest global threats,[234] restricting the use of security measures like SMS two-factor authorization would thwart the very policy goal Congress was attempting to advance in protecting privacy.

While *Facebook v. Duguid* never mentions two-factor authentication, it is a clear implication of the case. The text messages Facebook sent Duguid were sought to increase the security of the Facebook account associated with the mobile telephone number.[235] By sending a login notification, the text is meant to alert the user of a login attempt on an unrecognized device.[236] However, since the parties didn't raise the issue of whether a text message constitutes a prerecorded call (or a call, for that matter), there is room for interpretation and further exploitation of another ambiguity. Without classification, these types of prerecorded text messages might be illegal to send absent express consent. Therefore, this could undermine one of the most widely used authentication techniques, and adversely impact business' targeted communications with consumers and the same privacy rights Congress intended to protect with the TCPA.

B. A Change in the Monetization of Cellphone Plans Renders the Purpose for ATDS Restrictions Obsolete

The FCC initially adopted rules restricting the use of an ATDS to make a call to a cellphone[237] because the call recipient shouldered the cost.[238] At the time, it was standard practice for cell phone carriers to monetize cell phone plans by offering varying levels of a fixed number of minutes and/or texts. Today, however, when more people own a cell phone than a toothbrush,[239] the most popular cell phone carriers offer

233. Chris Hoffman, *SMS Two-Factor Auth Isn't Perfect, But You Should Still Use It*, HOW-TO GEEK (Mar. 4, 2019, 12:31 PM), https://www.howtogeek.com/361244/sms-two-factor-auth-isn%E2%80%99t-perfect-but-you-should-still-use-it/.

234. *See 5 Industries that Gain the Most from Two-factor Authentication*, ROUTEE (Sept. 12, 2019), https://www.routee.net/blog/5-industries-that-gain-the-most-from-two-factor-authentication/ ("[T]he WEF reported that cybercrime was the third largest global threat in 2018. In 2019, the cost of cybercrime will be greater than $2 trillion.").

235. *See* Duguid v. Facebook, Inc., 926 F.3d 1146, 1150 (9th Cir. 2019), *rev'd*, 141 S. Ct. 1163 (2021).

236. *See 5 Industries that Gain the Most from Two-factor Authentication*, *supra* note 234; s*ee also* Duguid v. Facebook, Inc., No. 15-CV-00985-JST, 2017 WL 3128912 (N.D. Cal. July 24, 2017), *rev'd*, 926 F.3d 1146 (9th Cir. 2019), *rev'd*, 141 S. Ct. 1163 (2021).

237. *See* 1992 FCC Order, *supra* note 9, at 8753.

238. *See* H.R. REP NO. 102-317, at 24 (1991) ("[C]ustomers who pay additional fees for cellular phones, pagers, or unlisted numbers are inconvenienced and even charged for receiving unsolicited calls from automatic dialer systems.").

239. Deyan Georgiev, *39+ Smartphone Statistics You Should Know in 2020*, REV. 42, https://review42.com/smartphone-statistics/ (last updated Mar. 7, 2022).

unlimited talk and text plans.[240] An incoming call or text will rarely, if ever, increase the recipient's cell phone bill. Moreover, wireless costs have only decreased.[241]

It is also important to remember that when the restrictions were enacted in 1991 only six percent of Americans had a cellphone.[242] Now, over ninety-seven percent of Americans have a cell phone[243] and cell phones have rendered residential telephones obsolete.[244] This means that Autodialer restrictions on "calls" to cell phones impacts exceedingly more communications than originally intended by Congress. Thus, Congress' initial reasons for restricting the use of an Autodialer to make calls to cell phones are outdated and no longer applicable to contemporary technology and modern-day monetization trends.

C. Government-Enabled Tools Are Now Available to Protect Consumers in the Same Way Congress Hoped to Protect Consumers with the Enactment of the TCPA

The problematic Autodialer (and prerecorded) prohibitions are not warranted because we now have several effective federally enabled tools to help combat nuisance calls, protect individuals' privacy, and regulate telemarketing. Call recipients certainly do not care what type of technology was used to reach them.[245] They care only that an unwanted call was blocked effectively. While telemarketing regulation is

240. *See* AT&T, https://www.att.com/plans/wireless/ (last visited Jan. 29, 2021); *see also* VERIZON, https://www.verizon.com/plans/ (last visited Jan. 29, 2021).

241. John R. Quain, *Is It Safe to Get Rid of Your Landline?*, AARP (Aug. 25, 2020), https://www.aarp.org/home-family/personal-technology/info-2020/get-rid-of-landline.html ("[A]s landline costs have risen — in urban areas the federal Bureau of Labor Statistics shows a 31 percent increase from May 2011 to May 2021 — wireless costs in the same 10-year period have decreased by 20 percent.").

242. Fischer-Baum, *supra* note 1.

243. *See* Mobile Fact Sheet, *supra* note 220.

244. Jacob Kastrenakes, *Most US households have given up landlines for cellphones*, THE VERGE (May 4, 2017, 12:54 PM), https://www.theverge.com/2017/5/4/15544596/american-households-now-use-cellphones-more-than-landlines ("Most US homes no longer use landline phone service and instead rely on cellphones to stay connected."); *see also* Quain, *supra* note 241 ("As of June 2020, . . . only 2.3 percent of adults said they had a landline alone without cellphone service.").

245. Daniel L. Delnero, *The TCPA and the First Amendment: Where We Are and Where We're Going*, X NAT'L L. REV. (July 13, 2020), https://www.natlawreview.com/article/tcpa-and-first-amendment-where-we-are-and-where-we-re-going ("If residential privacy is truly the concern addressed by the TCPA, then the ATDS and prerecorded message prohibitions are not necessary, because the TCPA's Do Not Call registry provision adequately addresses such concerns. Further, the Do Not Call provisions are more tailored to the actual consumer harm – to the extent any exists – because recipients of annoying telemarketing calls do not really care what technology was used to reach them. And fraud is better addressed by longstanding wire fraud statutes.").

necessary, maintaining a law that has caused confusion and chilled speech since its inception is not.

Congress initially empowered both the FCC and the FTC to enact rules and programs to combat nuisance telemarketing calls.[246] In 1995, the FTC promulgated the Telemarketing Sales Rule, which regulates telemarketers, sets limits on the time-of-day telemarketers may call consumers, and restricts calls to consumers who have requested not to be called again.[247] In 2003, the FTC created the Federal Do-Not-Call Registry, allowing consumers to register their home and mobile phone number to stop unwanted sales calls.[248] Congress described the legislation as "an important step toward a one-stop solution to reducing telemarketing abuses."[249] Yet, in 1992 the FCC initially rejected or deferred these same ideas due to cost and implementation concerns.[250] Since that time, the FCC and FTC have launched various programs to reduce the intrusiveness of telemarketing calls and empower consumers.

The FTC also collects consumer complaints of unwanted calls and, in partnership with law enforcement agencies, conducts investigations, and takes action against those responsible for the illegal calls for which fines can reach up to $42,530 per call.[251] Additionally, the FCC recently constructed a framework for stopping robocalls at the telephone carrier level, currently referred to as the SHAKEN/STIR.[252] These and other federally-enabled call blocking tools are now largely available to

246. Congress empowered the FTC with the authority to limit telemarketing with the Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C. §§ 6101-08) in 1994. Congress empowered the FCC with the TCPA.

247. *See Telemarketing Sales Rule*, FED. TRADE COMMISSION, https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/telemarketing-sales-rule (last visited Jan. 29, 2020).

248. *See National Do Not Call Registry*, FED. TRADE COMMISSION, https://www.donotcall.gov/ (last visited Jan. 29, 2020); *see also National Do Not Call Registry FAQs*, FED. TRADE COMMISSION CONSUMER ADVICE, https://www.consumer.ftc.gov/articles/0108-national-do-not-call-registry (last visited Mar. 20, 2022).

249. H.R. REP. NO. 108-8, at 3 (2003).

250. *See supra* Section II.B.3 and accompanying notes.

251. National Do Not Call Registry, *supra* note 248.

252. *FCC Mandates STIR/SHAKEN to Combat Spoofed Robocalls*, FED. COMM. COMMISSION, https://www.fcc.gov/document/fcc-mandates-stirshaken-combat-spoofed-robocalls (last visited Jan. 29, 2021). STIR/SHAKEN are acronyms for the Secure Telephone Identity Revisited (STIR) and Signature-based Handling of Asserted Information Using toKENs (SHAKEN) standards. *Id.*; *Combatting Spoofed Robocalls with Caller ID Authentication*, FED. COMM. COMMISSION, https://www.fcc.gov/call-authentication (last visited Mar. 20, 2022).

consumers, further empowering them to take corrective action against specific unwanted callers.[253]

These programs are intended to directly target and regulate the same telemarketing activities Congress initially hoped to curb with the TCPA. Instead of placing restrictions on technology used to streamline communications, these programs are rightfully tailored to the actual consumer harm. Most importantly, it puts the power directly into the consumer's hands.

D. ATDS Confusion Has Increased TCPA Litigation Leading to Class Action Abuse

In recent years, the TCPA has become a bountiful area of the law for nuisance lawsuits.[254] Class action lawyers are often rewarded with quick settlements,[255] even in cases that might not have merit, simply because of the litigation uncertainty and risk of massive monetary damages. The TCPA is very powerful because it holds offenders strictly liable.[256] This means that a caller will be held liable regardless of whether they were careless or had malicious intent.[257]

Congress' rationale for the strict liability statue and associated penalties was to give consumers a simple way to recover damages without the need for attorneys.[258] Prior to the TCPA's inception, Senator Hollings, who sponsored the law, explained that the law was intended to "make it as easy as possible for consumers to bring such actions, preferably in [state] small claims court."[259] However, after the Supreme

253. *See* CONSUMER & GOVERNMENTAL AFFAIRS BUREAU, FCC, CG DOCKET NO. 17-59, CALL BLOCKING TOOLS NOW SUBSTANTIALLY AVAILABLE TO CONSUMERS: REPORT ON CALL BLOCKING (2020), https://aboutblaw.com/RFJ.

254. Eric J. Troutman, *FAST START-TCPA Filings (and Class Actions) Spike to Start the New Year*, TCPAWORLD (Jan. 5, 2021), https://tcpaworld.com/2021/01/05/fast-start-tcpa-filings-and-class-actions-spike-to-start-the-new-year/.

255. *TCPA Robocalls Settlement*, CLASSACTION.COM, https://www.classaction.com/tcpa-robocalls/settlement/ (last visited Jan. 30, 2021).

256. 47 U.S.C. § 227(c)(5) (2018); *see also* Eric J. Troutman, *Recycled Number Blues: Good Faith Defense Rejected Again as Liberty University Trapped in TCPA Suit*, XII NAT'L L. REV. (Mar. 10, 2022), https://www.natlawreview.com/article/recycled-number-blues-good-faith-defense-rejected-again-liberty-university-trapped; *see also Seeking shelter from the (TCPA) storm: statutory safe harbor provides protection*, EVERSHEDS SUTHERLAND LLP (Feb. 22, 2022), https://us.eversheds-sutherland.com/NewsCommentary/Legal-Alerts/248819/
Seeking-shelter-from-the-TCPA-storm-statutory-safe-harbor-provides-protection.

257. *See Strict Liability*, L. DICTIONARY, https://thelawdictionary.org/strict-liability/ (last visited Jan. 31, 2021).

258. 137 CONG. REC. S16204-01, S16205-S16206 (1991).

259. *Id.* (stating that the TCPA contains a private right of action that "would allow consumers to bring an action in State court . . . preferably in small claims court.").

Court unanimously held that U.S. District courts have federal question jurisdiction over TCPA claims,[260] businesses who had once found reprieve invoking state laws limiting class actions[261] were now vulnerable. TCPA class actions lawsuits rose sixty-three percent that year.[262]

Another explosion of class action litigation occurred after the FCC affirmed its sprawling interpretation of an ATDS in 2015.[263] Shortly thereafter, the *ACA International* court narrowed the definition of an ATDS and we saw a significant decrease in individual TCPA filings.[264] All the while, class actions were still on the rise.[265]

Unfortunately, while the *Facebook* opinion provides some relief to businesses, it also introduces ambiguity which will lead to further litigation. While most of the opinion frames the ATDS definition in terms of "capacity," other parts of the opinion refer to "use."[266] The Court stated that the "equipment in question must use a random or sequential number generator."[267] This begs the question, does technology with the simple "capacity" to use a random or sequential number generator qualify as an ATDS? Or must it currently *use* a random or sequential number generator?

Without change, the TCPA will remain a hotbed for litigation.[268] Litigation risk will chill and impede business communications of important and time-sensitive information to the detriment of consumers.[269] Congress ought to remember the original intent in enacting the TCPA and compare it with the real results of enforcement today. Is it truly what they intended? Legislative history suggests that Congress intended TCPA actions—with damages set at $500 per

260. *See* Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368, 376 (2012).

261. *See, e.g.*, § 901(b) of New York's Civil Practice Law and Rules. These defendants had successfully argued that state laws prohibiting certain types of class actions trumped federal diversity jurisdiction over the class action.

262. Monica Desai et. al., *A TCPA for the 21st Century: Why TCPA Lawsuits are on the Rise and What the FCC Should do About it,* 8 IJMM 75 (2013), https://www.squirepattonboggs.com/-/media/files/insights/publications/2014/07/a-tcpa-for-the-21st-century/atcpaforthe21stcentury.pdf.

263. 2015 FCC Order, *supra* note 12, at 7964.

264. Desai et. al., *supra* note 262.

265. *Id.*; ACA Int'l v. Fed. Commc'ns Comm'n, 885 F.3d 687, 693 (D.C. Cir. 2018).

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

267. *Id.* at 1170.

268. *See* Desai et. al., *supra* note 262.

269. For example, risks might include notice that there is a billing issue or that a payment is due, receive basic information about time-sensitive prescription refill reminders or other healthcare notifications.

violation—would be most suitable for small claims court.[270] Yet, with the change in technology, businesses are now more vulnerable to class action lawsuits than ever. With no limit on the amount of damages,[271] courts can exact ruinous liability.[272]

V. PROPOSAL

Congress and the FCC have undoubtedly advocated for consumers through their commitment to the underlying principles of the TCPA. At the same time, it is critical that legislation keeps pace with modern day technology and allow businesses to communicate with their customers effectively and efficiently. Regulatory relief is required because compliance-minded businesses are consistently threatened with litigation and regularly compelled into sizable settlements for actions that don't threaten the interests the statute initially intended to safeguard.

The law is abused through litigation theories that were unimaginable at its inception. Congress can advance reforms without impairing its important work to combat harmful calls and protect the privacy and financial interests of consumers. With the implementation of recent federally enabled programs,[273] the FCC has already begun laying a foundation for which it can modernize the TCPA. These programs rightfully provide consumers with the power of choice.[274]

A. Regulate the Type of Call, Not the Technology

Congress should stop regulating technology because it is clear that the legislation cannot keep up. Instead of attempting to enforce a law with a checkered past, Congress should protect consumers by regulating the *types* of calls. Businesses should not be exposed to liability simply because of the technology they used to call their customers.

Naturally, any regulation of speech implicates the First Amendment. We saw this in *Barr*, where the Court held that the TCPA's debt-collection exemption impermissibly favored a particular type of

270. *See* 137 CONG. REC. S16204-01 (1991) (stating that the TCPA contains a private right of action that "would allow consumers to bring an action in State court . . . preferably in small claims court").

271. 47 U.S.C. § 227(b)(3) (2018).

272. The largest TCPA damages award was $925 million dollars against a company for improper marketing under the TCPA and an Oregon court found the award was not unconstitutionally excessive. Weiner Brodsky Kider PC, *Judge Rejects Due Process Arguments and Enters $925 Mil TCPA Award*, JDSUPRA (Sept. 5, 2020), https://www.jdsupra.com/legalnews/judge-rejects-due-process-arguments-and-44764.

273. *See* discussion *supra* Section IV.3.

274. *See* discussion *supra* Section IV.3. For example, consumers can place their phone number on the Do Not Call list to prevent telemarketing calls.

speech, thus violating the First Amendment.[275] However, the First Amendment does not protect all speech. For example, it does not provide protection for false statements of fact[276] or false advertising.[277] The First Amendment also does not protect forms of speech that are used to commit a crime, such as extortion or harassment.[278] As a result, the First Amendment should not serve as a barrier to legitimate regulation of intrusive calls.

Congress may continue advancing privacy and economic interests but should do so by focusing on combating the real issue, scam and fraud calls. Fraudsters should not be able to escape TCPA liability simply because they didn't utilize prohibited technology. These are the calls that invade American's privacy interests and are costly and dangerous to consumers today.

The harm caused by scam and fraud calls became even more obvious during the COVID-19 pandemic. Scam calls more than doubled from 2020 to 2021.[279] There were 88 million scam victims and over $44 billion in scam losses in 2021 alone.[280] In the same year, over forty-five percent of all Americans received a spam call on their cell phone every day and nearly one in three Americans fell victim to a phone scam, with the average reported loss of around $502.[281]

These scam calls follow a pattern. Scammers prey on vulnerable consumers and issues. They use fear and deception to prompt their victims to act and often include warranties, loans, taxes, the IRS, and social security.[282] In fact, debt relief, free offers, and credit repair scams saw an exorbitant increase during the COVID-19 pandemic.[283] While financial institutions petitioned the FCC to issue a rule clarifying their fraud and security alerts on matters related to the COVID-19 pandemic were exempt from the TCPA restrictions (a ruling which never came as

275. *See* Barr v. Am. Ass'n of Political Consultants, Inc., 140 S. Ct. 2335 (2020).

276. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

277. *See* Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91 (1990); *see also Barr*, 140 S. Ct. at 2360 (Breyer, J., concurring) (discussing the prohibition and regulation of false advertising as necessary content-based restrictions).

278. *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language, either spoken, written, or printed.").

279. *Looking Back: 2021 Scam Call Trends*, FIRST ORION, https://firstorion.com/2021-scam-call-trends/ (last visited Jan. 23, 2022).

280. *Id.*

281. Megan Leonhardt, *Americans lost $29.8 billion to phone scams alone over the past year*, CNBC (June 29, 2021, 9:00 AM), https://www.cnbc.com/2021/06/29/americans-lost-billions-of-dollars-to-phone-scams-over-the-past-year.html.

282. *Looking Back: 2021 Scam Call Trends*, *supra* note 279.

283. *Id.*

of the date of this Note), debt relief scams rose more than 4,000 percent, free offer scams rose more than 1,000 percent, and credit repair scams rose more than 800 percent.[284]

Thus, Congress should regulate unwanted calls based on the content of the call to protect consumer's financial and privacy interests. The TCPA could be revised or repealed. If revised, the TCPA should prohibit calls engaging in false advertising, deception, and/or harassment, instead of the type of technology used to make the call. Congress could also require phone carriers to regulate calls by encouraging or requiring network operators to block traffic from scammers. These changes would help curb abusive lawsuits against well-intentioned businesses and protect Americans from the widespread harms of today. Without necessary reforms, the TCPA will continue to harm consumers, the cohort of individuals it was enacted to protect.

VI. CONCLUSION

Since its enactment, the TCPA has been stretched and construed in various directions in an unsuccessful attempt to ensure its continued relevancy. Efforts to modernize and extend the reach of the TCPA have simply led to more confusion, a surge in TCPA litigation, and a negative impact on businesses and consumers. The TCPA has strayed too far from its original purpose, and Congress has the power to fix that.

Congress initially prohibited an Autodialer from making calls to emergency lines, hospital lines, and cellular telephones because of the intrusive nature of telemarketing and the costly fees associated with receiving unsolicited calls on cellphones.[285] However, with the change in technology, consumers are no longer incurring costly fees on their cell phones, and the restrictions on the type of technology used by businesses to communicate with consumers is chilling their speech and actually causing harm to consumers.

In *Facebook*, the Supreme Court rightfully narrowed the definition of an ATDS. However, it was unable to reform the law leaving well-intentioned businesses at risk and consumers in harm's way. Therefore, Congress must step up to modernize the *odd* law. With innovative technologies and government-enabled programs directed at protecting *consumers'* privacy and economic interests and regulating telemarketing, restrictions on the type of technology used to make the

284. *See* Public Notice, *supra* note 218; *see also Looking Back: 2021 Scam Call Trends*, *supra* note 279.

285. *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394, 2394 (codified as amended at 47 U.S.C. § 227 (2018)); *see also* H.R. REP. NO. 102-317, at 24 (1991).

calls are no longer necessary. The government can effectively accomplish its goal of protecting consumers and their privacy interests through these programs while updating the TCPA to regulate damaging calls, without punishing businesses. It is the content of the call that matters, not the technology used.

By addressing these important issues, Congress can help limit abusive lawsuits. Congress needs to provide businesses with certainty and ensure they have the ability to communicate in an efficient manner that best meets the demands of their customers. Congress must recognize that technology has changed since the TCPA's enactment, and it is time to modernize the rules for the realities of today.