Facebook v. Duguid: A 21st Century Question for a 20th Century Statute

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The Supreme Court just released its opinion on *Facebook, Inc. v. Duguid* in April of 2021. *Duguid* is a prime example of how telecommunications and privacy legislation struggle to keep up with rapidly changing technology. Ultimately, however, Congress is responsible for addressing deficiencies in legislation. It's high time for a more adaptive statute that incorporates all the new ways consumers use communication technology. While the Court's decision will likely have consequences that were never contemplated by Congress, the extent to which they will exist is exaggerated by both Facebook and Duguid. The case reflects the frustration courts face in determining how to apply a legal definition to an evolving technology that Congress never anticipated, as well as the need for Congress to adapt its legislative approach more quickly than it has had to in other areas of the law.

A technological boom in the late 1980s made it much simpler for telemarketers to contact consumers.[1] Telemarketers were able to use autodialers to automatically deliver prerecorded messages and analyze data on the rate of calls answered, eliminating the need for human representatives.[2] By 1990, 18 million Americans were being contacted by telemarketers each day.[3] The growing popularity of the fax machine also enabled telemarketers to use them as a means of advertising. [4] The use of these technologies soon became a nuisance to consumers resulting in calls for federal regulation.[5] In 1991, Congress enacted the Telephone Consumer

[1] Spencer Weber Waller, Daniel B. Heidtke, and Jessica Stewart, *The Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology*, 26 Loyola Consumer Law Review 343, 352 (2014) https://docs.house.gov/meetings/IF/IF16/20160922/105351/HHRG-114-IF16-20160922-SD008.pdf.
[2] *Id.* at 352.
[3] *Id.*
[4] *Id.* at 354.
[5] *Id.* ("Unlike mail advertisements where the cost is born by the marketer, sending unsolicited faxes came at a cost to the recipient in the form of ink, paper, and blocked phone lines.").

Protection Act ("TCPA") to address these nuisances to consumers, specifically regulating the use of computerized autodialing machines that deliver pre-recorded messages and the practice of sending unsolicited fax advertisements.[6] Automated technology allowed companies to execute large-scale telemarketing, and due to the sequential manner in which they could generate numbers, Congress was concerned about autodialers' ability to simultaneously tie up all the lines of any business with sequentially numbered phone lines.[7] It noted that this technology could be a threat to public safety by "seizing the telephone lines of public emergency services, dangerously preventing those lines from being utilized to receive calls from those needing emergency services."[8]

The TCPA specifically banned calls made with automatic telephone dialing systems ("ATDS") to cell phones. However, Congress enumerated several exceptions to this ban: calls for emergency purposes and calls made with express consent by the called party.[9] The Act defines an ATDS 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."[10] This definition, however, did not contemplate modern, powerful computing which allows for common consumer devices which both store and dial numbers from the palm of the hand: smartphones. As a result, the ever-outdating federal law intended to prevent phone lines from being unduly tied up with robotic calls fate of amendment or litigation challenge.

In 2003, the FCC revised the TCPA rules to establish a Do-Not-Call-Registry and then in 2012, the FCC revised the rules once again to require telemarketers "(1) to obtain prior express

[6] *Id.* at 355.
[7] Facebook, Inc. v. Duguid, 141 S.Ct. 1163, 1167 (2021).
[8] H. R. Rep. No. 102–317, p. 24 (1991).
[9] 47 U.S.C. § 227(b)(1)(A)
[10] 47 U.S.C. § 227(a)(1)

written consent from consumers before robocalling them, (2) to no longer allow telemarketers to use an "established business relationship" to avoid getting consent from consumers when their home phones, and (3) to require telemarketers to provide an automated, interactive "opt-out" mechanism during each robocall so consumers can immediately tell the telemarketer to stop calling."[11] As technology continues to change and advance, however, these measures have proven insufficient. FCC rules have not directly addressed the issues presented in *Duguid*, and in *Facebook v. Duguid* the Court was forced to decide how a 20-year-old law should apply to new technology. Specifically, *Duguid* asked the Supreme Court to clarify whether the clause "using a random or sequential number generator" in § 227(a)(1)(A) modifies both of the two verbs that precede it ("store" and "produce"), as Facebook contends, or only the closest one ("produce"), as maintained by Duguid.

Background

Noah Duguid claimed that Facebook used an ATDS to alert users, as a security precaution, when their account was accessed from an unrecognized device or browser.[13] For unknown reasons, Duguid received the messages despite not being a Facebook customer or user and never consenting to such alerts. His repeated attempts to terminate the alerts were unsuccessful.[14] Duguid filed a putative class action against Facebook, alleging violations of the TCPA's autodialer restriction.[15] Specifically, Duguid alleged in the amended complaint that Facebook established the automated login notification process as an extra security feature whenever a Facebook account is accessed from a new device.[16] According to Duguid, Facebook

[11] https://www.fcc.gov/general/telemarketing-and-robocalls
[13] *Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1149 (9th Cir. 2019), *cert. granted in part*, 141 S. Ct. 193, 207 L. Ed. 2d 1118 (2020).
[14] *Id.*
[15] *Id.* at 1150.
[16] *Id.*

maintained a database of phone numbers and, using a template and coding that automatically supplied the browser information and time of access, programmed its equipment to send automated messages to those numbers each time a new device accessed the associated account.[17] Somehow, Facebook acquired Duguid's number and (as it did with the numbers provided by its users) stored and sent automated messages to that number.[18] Although Duguid was neither a Facebook user nor consented to the company contacting his cell phone, in January 2014, Facebook began sending Duguid sporadic text messages stating that an unknown browser was attempting to access his nonexistent Facebook account.[19] Despite his repeated requests via text and email that Facebook stop sending him messages, Facebook continued to send Duguid the messages until October 2014.

Duguid sued on behalf of two putative classes: people who received a message from Facebook without providing Facebook their cell phone number; and people who notified Facebook that they did not wish to receive messages but later received at least one message.[20] Each putative class reaches back four years from April 22, 2016, when Duguid filed the amended complaint.[21] Duguid sought statutory damages for each message, plus declaratory relief and an injunction prohibiting similar TCPA violations in the future.[22]

Appeal to the Ninth Circuit

After concluding that Duguid failed to allege that Facebook sent its messages using an ATDS, which is a prerequisite for TCPA liability, the United States District Court for the Northern District of California dismissed the amended complaint with prejudice under Federal

[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*

Rule of Civil Procedure 12(b)(6).[23] The district court reasoned that Facebook's platform was not an ATDS because "[p]laintiff's own allegations suggest direct targeting that is inconsistent with the sort of random or sequential number generation required for an ATDS."[24]

Duguid appealed the dismissal to the United States Court of Appeals for the Ninth Circuit.[25] Specifically at issue on appeal was whether the equipment characterized in Duguid's amended complaint adequately alleged that Facebook's platform is an ATDS under the TCPA's definition 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."[26]

In reaching its holding, the Ninth Circuit Court applied its governing precedent in *Marks v. Crunch San Diego, LLC*.[27] The rearticulated definition of an ATDS which governed the appeal, as provided in *Marks*, is "equipment which has the capacity— (1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers automatically."[28] Based on this definition of ATDS, the Ninth Circuit reversed the lower court's decision, holding that Duguid's allegations under the Act were sufficient to withstand Facebook's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).[29]

The Ninth Circuit rejected the argument that an automatic telephone dialing system must use a random or sequential number generator to store numbers for purposes of the TCPA.[30] Rather, the Court stated that "it suffices to merely have the capacity to 'store numbers to be

[23] *Id.*
[24] *Id.* at 1149.
[25] *Id.* at 1152.
[26] *Supra* note **Error! Bookmark not defined.**.
[27] *Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1151 (9th Cir. 2019), *cert. granted in part*, 141 S. Ct. 193, 207 L. Ed. 2d 1118 (2020).
[28] *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1053 (9th Cir. 2018).
[29] *Duguid v. Facebook, Inc.*, 926 F.3d at 1149.
[30] *Id.* at 1149-51.

called' and 'to dial such numbers automatically.'"[31] It reasoned that the adverbial phrase "using a random or sequential number generator" modifies only the verb "to produce," and not the preceding verb, "to store."[32] Additionally, the court discussed the emergency exception, noting that because the plaintiff was "not a Facebook customer and has advised Facebook of that fact repeatedly and through various means of communication...his account could not have faced a security issue, and [thus] Facebook's messages fall outside even the broad construction the FCC has afforded the emergency exception."[33] Notably, the Court cited a footnote in the TCPA's Rules & Regulations which states in part: "[P]urported emergency calls cannot be targeted to just any person. These calls must be about a bona fide emergency that is relevant to the called party."[34]

In the Supreme Court

Brief of Petitioner Facebook

Petitioner Facebook appealed the Ninth Circuit's holding that Duguid alleged facts sufficient to establish that Facebook's system was an ATDS. Facebook argued that the court erred in its interpretation of the 1990s statutory language and took issue with respondent's contention that the ATDS definition now covers different technologies and practices, many of which arose long after 1991. ATDS is defined as equipment that has "the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers."[35]

[31] *Id.* at 1151.
[32] *Id.* at 1152.
[33] *Id.*
[34] *See* In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991.
[35] 47 U.S.C. §227(a)(1).

The Ninth Circuit read the phrase "using a random or sequential number generator" in the ATDS definition to modify only the verb "produce," not the verb "store." Facebook argued that in doing so, not only did the 9th Circuit ignore the plain language of the statute but also unduly expanded it in a way converts any telephone that can store and dial numbers, which is practically all cell phones, into an ATDS.[36] Facebook's preferred approach would result in "using a random number generator" modifying both the verbs "store" and "produce" and bases this argument on two grammar rules: the series-modifier rule and the punctuation canon.[37] The series-modifier rule instructs that a modifier applies to the entire preceding clause meaning that because the verbs "store" and "produce" are part of one clause and the modifying phrase "using a random or sequential number generator" immediately follows the Ninth Circuit's interpretation of the statutory language was incorrect.[38] Additionally, the punctuation canon instructs that when a "qualifying phrase is separated from its antecedents by a comma, the qualifying phrase applies to all antecedents."[39] "Using a random or sequential number generator" is separated by a comma from its antecedents "to store or to produce" and so it applies to both "store" and "produce" under the punctuation canon.

Facebook contended the Ninth Circuit "eschewed basic rules of statutory construction and grammar in favor of novel doctrines of acquiescence and its own perception of the statute's 'animating purpose.'"[40] This decision converted a statute that was intended to address abusive

[36] https://www.supremecourt.gov/DocketPDF/19/19-511/153176/20200904132145429_2020.09.04%20Facebook%20Merits%20Brief%20-%20FINAL.pdf
[37] https://www.supremecourt.gov/DocketPDF/19/19-511/153176/20200904132145429_2020.09.04%20Facebook%20Merits%20Brief%20-%20FINAL.pdf
[38] https://www.supremecourt.gov/DocketPDF/19/19-511/153176/20200904132145429_2020.09.04%20Facebook%20Merits%20Brief%20-%20FINAL.pdf
[39] https://www.supremecourt.gov/DocketPDF/19/19-511/153176/20200904132145429_2020.09.04%20Facebook%20Merits%20Brief%20-%20FINAL.pdf at 25.
[40] https://www.supremecourt.gov/DocketPDF/19/19-511/153176/20200904132145429_2020.09.04%20Facebook%20Merits%20Brief%20-%20FINAL.pdf

telemarketers into one that threatens ordinary consumers and businesses with TCPA liability like $1,500 for every call to a cell phone made without the recipient's prior express consent.[41] This overly broad statutory interpretation could have far reaching and unintended consequences on individuals' first amendment rights. TCPA liability would now extend to smartphone users who store numbers in their phones and send group chats. Facebook offered an example of a student who receives a list of ten classmates and texts them with an unsolicited invitation to a Zoom get together. In doing so, she would violate the TCPA ten times over, as her cellphone is an ATDS under the Ninth Circuit's interpretation and she did not have her classmates' prior express consent.[42]

Brief of Respondent Duguid

To the most sophisticated court in America, the less-sophisticated party in this action leaned into a straightforward, ordinary meaning of language.[43] Noah Duguid argued that the only reasonable interpretation of the TCPA is one which gives reasonable effect to every word in the statutory definition[44] of automatic telephone dialing systems[45] and achieves congressional privacy goals.[46] In Duguid's eyes, that same reading is the one reached by assigning to the language the meaning that an average reader would. Reading the TCPA to prohibit automatic dialing of stored telephone numbers, Duguid contended, would be the only means of effectuating both the words and intent of Congress.[47] For Duguid supposes, "[l]etting robocallers bypass consent by using a

[41] https://www.supremecourt.gov/DocketPDF/19/19-511/153176/20200904132145429_2020.09.04%20Facebook%20Merits%20Brief%20-%20FINAL.pdf
[42] *Id.* at 45.
[43] Brief of Respondent at 10, Facebook v. Duguid, (No. 19-511) (U.S. Oct. 16, 2020) (citing, *inter alia*, Limtiaco v. Camacho, 549 U.S. 483, 488 (2007); Va. Uranium, Inc. v. Warren, 139 S.C.t 1894, 1901–02 (2019)) ("'As always,' this task 'begin[s] with the text of the statute,' including the words of the provision and its grammar, structure, context, subject matter, and evident purpose.").
[44] 47 U.S.C. § 227.
[45] Brief of Respondent at 8–9, Facebook v. Duguid, (No. 19-511) (U.S. Oct. 16, 2020).
[46] *Id.* at 9.
[47] *Id.*

system that dials stored numbers," rather than by dialing those which are randomly or sequentially generated, "would subvert Congress's goals."[48]

According to the respondent's brief, as a fair reading of the statute only allows for one interpretation: the definition of ATDS includes devices that automatically dial stored numbers.[49] Respondent contended that (i) readings excluding the dialing of stored numbers, such as that advanced by Facebook, not only render portions of the definition superfluous but would require an illogical reading;[50] (ii) reading the statute as the Ninth Circuit did results in correct grammar and a sensible semantic structure;[51] and (iii) the technical words used in the definition dictate a reading in Duguid's favor.[52] In sum, the Respondent contended that no matter from which angle the definition of ATDS is viewed, there is only one interpretation that passes muster from each: that which includes the dialing of stored numbers.

Duguid argued that a broad definition of ATDS would further the privacy goals of the TCPA. That is, that a broad ATDS definition advances the TCPA's prohibition on unconsented-to-phone calls[53] that are "rightly regarded by recipients as an invasion of privacy."[54] Petitioner Facebook's position, according to Duguid, would permit businesses to drown consumers in the deluge of automatically dialed calls, so long as those calls were automatically dialed from a list of stored numbers and not generated on the spot.[55] In Duguid's words, "[a] robocaller could readily

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[48] *Id.*

[49] *Id.* at 10 (quoting Bond v. United States, 572 U.S. 844, 861 (2014); Achilli v. United States, 353 U.S. 373, 379 (1957) ("The Court's 'duty is to give coherence to what Congress has done within the bounds imposed by a fair reading of legislation.'").

[50] Brief of Respondent at 22–27, Facebook v. Duguid, (No. 19-511) (U.S. Oct. 16, 2020).

[51] *Id.* at 16–22. "Although the adverbial (*using* …) could theoretically modify . . . [both clauses of subsection] (A) rather than only the second one, the sense of the words—that is, the relationship between the adverbial phrase and the infinitive *to produce*—shows that the phrase modifies only *produce*, not *store*." *Id. a*t 17.

[52] *Id.* at 10–16.

[53] For congressional findings on privacy invasions attributable to autodialed calls, see TCPA § 2, 47 U.S.C. § 227.

[54] *Id.* at 28 (quoting Mims v. Arrow Financial Services, LLC, 565 U.S. 368, 371 (2012)).

[55] *See, e.g.*, Brief of Respondent at 33, Facebook v. Duguid, (No. 19-511) (U.S. Oct. 16, 2020).

buy a list of random or sequential blocks of numbers in an arms-length transaction from a third party," and "the list would fall outside the ATDS definition because [the list] would lack the capacity to dial. . .."[56] In sum, "A call's intrusiveness does not depend on whether the recipient's number was stored in a purchased database or was machine-generated,"[57] and an inclusive definition of ATDS as advanced by Duguid would best protect consumers.[58]

Supreme Court Opinion

The Supreme Court, in a unanimous decision, sided with Facebook's reading of the TCPA's autodialer definition. The Court reversed and remanded the case to the Ninth Circuit, holding that "[t]o qualify as an 'automatic telephone dialing system' a device must have the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential generator."[59] It sided with a strict statutory interpretation and only briefly touched upon the unintended effects raised by the parties.

The holding was based on what the Court concluded to be a natural reading of the sentence and conventional rules of grammar. In writing for the Court, Justice Sotomayor stated that the series qualifier canon generally reflects the most natural reading of a sentence, and in the instant case, produces the most natural construction of the statutory text.[60] Under the series qualifier canon and conventional rules of grammar, when there is a straightforward, parallel construction that involves all nouns or verbs in a series, a modifier at the end of the list normally applies to the entire series.[61] The Court proffered an analogous example to elucidate the canon's effect: "Imagine if a

[56] *Id.*
[57] *Id.* at 9.
[58] Duguid also rebuts Facebook's "hypothetical nightmare scenario" that "applying the TCPA to Facebook's robotexting . . . would subject all smartphone users to liability" by arguing that smartphones are not the statutory "functional equivalent" of an automatic telephone dialing system and, thus, will not be affected by the outcome of this case. *Id.* at 45. *See also, e.g., ACA Int'l v. FCC*, 885 F. 3d 687, 695-700 (2018).
[59] Facebook, Inc. v. Duguid, 141 S.Ct. 1163, 1167 (2021).
[60] *Id.* at 1170.
[61] *Id.* at 1169.

teacher announced that "students must not complete or check any homework to be turned in for a grade, using online homework-help websites." It would be strange to read that rule as prohibiting students from completing homework altogether, with or without online support."[62] Additionally, it noted that the placement of a comma before the modifying phrase "using a random or sequential number generator" suggests that the phrase applies to both preceding elements, i.e., to store and to produce.[63] The Court rejected Duguid's purported interpretation using the "rule of the last antecedent" based on the context dependency of the rule and commented that "even if the rule of the last antecedent were relevant here, it would provide no help to Duguid... [t]he last antecedent before "using a random or sequential number generator" is not "produce," as Duguid needs it to be, but rather "telephone numbers to be called.""[64]

In his concurring opinion, Justice Alito cautioned the Court on this approach. Although he agreed with much of the Court's analysis and its holding, he wrote separately to warn his colleagues against perfunctory application of construction canons: "Canons of interpretation can help in figuring out the meaning of troublesome statutory language, but if they are treated like rigid rules, they can lead us astray. When this Court describes canons as rules or quotes canons while omitting their caveats and limitations, we only encourage the lower courts to relegate statutory interpretation to a series of if-then computations. No reasonable reader interprets texts that way."[65] He further notes that the majority relied upon the treatise written by Antonin Scalia and Bryan A. Garner, counsel for respondents in this case, to explain the series qualifier canon's authority in interpretation. Yet in the same treatise, Scalia-Garner also emphasized that interpretive canons

[62] *Id.*
[63] *Id.*
[64] *Id.* at 1170.
[65] Facebook, Inc. v. Duguid, 141 S.Ct. 1163, 1174 (2021).

"are not 'rules' of interpretation in any strict sense but presumptions about what an intelligently produced text conveys."[66]

While Justice Alito provided a list of "sentences that clearly go against the canon" to further his point, the grammatical structure of each example omitted a comma and was materially dissimilar from that of the clause at issue in this case, undermining his point. Regarding the majority's example, Alito agreed that the phrase in the sentence ("using online homework-help websites") modifies both verbs it follows ("complete" and "check") and not just the latter.[67] But he argued that this understanding has little to do with sentence structure and everything to do with the common understanding that teachers do not want to bar students from doing homework.[68] He explained this point is clearly seen if, maintaining the same syntax, one replaces the verb "complete" with any verbs that describe something a teacher is not likely to want students to do, such as "ignore," "discard," "lose," "forget," "throw away," or "incinerate" their homework.[69] "The concept of "using online homework-help websites" to do any of those things would be nonsensical, and no reader would interpret the sentence to have that meaning—even though that is what the series-qualifier canon suggests."

Unintended Consequences

After all, what will the effect of *Dugiud* be in the long term? Both parties supplemented their statutory interpretations with arguments about unintended consequences that would result from a ruling in favor of the other party. On one hand, Facebook argued technology was different when the TCPA was drafted, and the TCPA should not be read to extend liability to a broad range of new technologies—including smartphones. On the other hand, Duguid asserted that a narrow

[66] A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 51,147 (2012).
[67] Facebook, Inc. v. Duguid, 141 S.Ct. 1163, 1174 (2021).
[68] *Id.*
[69] *Id.*

reading of the TCPA would frustrate the basic privacy protections intended by Congress. The Court sided with Facebook on these issues, assuming that Duguid's reading of the statute would improperly extend liability to "ordinary cellphone users in the course of commonplace use,"[70] and it refused to extend consumer protections to new technology without further guidance from Congress. While the Court failed to recognize important limitations on liability for ordinary cell phone use, the erosion of consumer protection in this area may be mitigated by other legislation and FTC rules as well as emerging technology.

The Court's assumption that the Ninth Circuit's ATDS definition would necessarily extend liability to ordinary smartphone usage, including "speed dialing or sending automated text message responses,"[71] is questionable. According to a hypothetical extended in Facebook's brief, a student who receives a list of ten classmates and texts them with an unsolicited invitation to a Zoom get together would be subject to the TCPA.[72] Facebook contended that because the student's smartphone is an ATDS and she did not have consent, sending the group text would be a violation of the TCPA.[73] The Court sided with Facebook's overarching argument but missed many important differences between ordinary cell phone use and uses that trigger liability under the TCPA. For starters, ordinary smartphone usage often involves consent, is not autodialing, and, thus, is not subject to the TCPA. While smartphones, like any computer, have the capacity to download autodialing software, *ACA Int'l v. FCC* overturned the FCC's broad interpretation of the word "capacity" so that ordinary smartphone usage is not autodialing.[74] Circuit courts have been

[70] Facebook, Inc. v. Duguid, 141 S.Ct. 1163, 1171 (2021).
[71] *Id.*
[72] *Supra* note 36, at 25
[73] *Id.*
[74] *ACA Int'l v. FCC*, 885 F. 3d 687, 695-700 (2018)

unified since the *ACA Int'l* decision that that capacity refers to a device's current functions, absent any modifications to the device's hardware or software.[75]

The Court overlooked important aspects of human input that will often distinguish ordinary smartphone usage from pesky autodialing. The opinion notes that "all devices require some human intervention, whether it takes the form of programming a cell phone to respond automatically to texts received while in "do not disturb" mode or commanding a computer program to produce and dial phone numbers at random."[76] Whether by touch or voice command, factory default smartphone applications require a human to cognitively select numbers to call or speed dial; however, they do not *automatically* dial stored contacts[77] In *Duran v. La Boom Disco, Inc.*, the Second Circuit summarized the distinction:

> Clicking on a name in a digital phonebook to initiate a call or text is a form of speed-dialing or constructive dialing that is the functional equivalent of dialing by inputting numbers. . . When one clicks on the card, one is constructively dialing the attached number. Therefore, when one sends a text message using a smartphone—which involves clicking on the card and then clicking a "send" button—one has already accomplished the dialing.
>
> However, when one clicks on the "send" button in the programs at issue here, one is not dialing a particular attached number beforehand or afterwards. Simply put, the "send" button, unlike a contact card, is not a short-cut for dialing a particular person. Rather, clicking "send" is accomplishing a different task altogether: it is telling the ATDS to go ahead and dial a separate list of contacts, often numbering in the hundreds or thousands.[78]

Although smartphones have some "automatic" features such as automatic "I'm driving" texts, these functions are not truly automatic. Since these functions are a result of the initial caller

[75] See *King v. Time Warner Cable*, 894 F. 3d 473, 481 (2018)("[W]e conclude that the term 'capacity' in the TCPA's definition of a qualifying autodialer should be interpreted to refer to a device's current functions, absent any modifications to the device's hardware or software."); *Allan v. Penn. Higher Ed. Assistance Agency*, 968 F. 3d 567, 578 (6th Cir. 2020)("That means that use of a cell phone would be subject to a fine under the TCPA only if it actually is used as an ATDS.")

[76] Facebook, Inc. v. Duguid, 141 S.Ct. 1163, 1171 (2021). FN6

[77] Brief of Amicus Curiae Dr. Henning Schulzrinne in Support of Noah Duguid, *Facebook, Inc. v. Duguid*, 141 S. Ct. 193 (2020) (No. 19-511), at 11.

[78] *Duran v. La Boom Disco, Inc.*, 955 F. 3d 279, 289, n.39 (2nd Cir. 2020).

triggering the system to return a call, they are neither automatic nor unsolicited.[79] As Dr. Henning Schulzrinne points out in his Amicus Curiae Brief in support of Duguid, per the FCC's TCPA Rules & Regulations the word "automatic" implies both "without direct human intervention" and "high volume."[80] The Rules & Regulations recognize that "autodialers can dial thousands of numbers in a short period of time" and that the "basic function of such equipment [is] the capacity to dial numbers without human intervention."[81] Built-in smartphone features merely return a text message to the incoming caller's number identification relayed by the caller through the carrier, this technology does not automatically call stored telephone numbers.[82]

Even if Facebook's concerns did exist in some non-hypothetical reality, the TCPA hands the FCC the authority to "proscribe regulations to implement the requirements of subsection (b)."[83] The FCC could specify when a smartphone used in the ordinary way is not an ATDS, thereby mitigating implication Facebook's concerns.The FCC recently issued a declaratory ruling on a petition seeking clarification of the definition of an ATDS under the TCPA in light of the D.C. Circuit's *ACA International* Decision, which opened the door to wider use of peer-to-peer ("P2P") texting, thereby negating Facebook's hypothetical concerns. In its ruling, the FCC held that if a texting platform actually requires human intervention to send a text and lacks the capacity to transmit more than one message without a human manually dialing each recipient's number, it is not an ATDS under the TCPA[84]

[79] Cf. In re Soundbite Decl. Ruling, 27 FCC Rcd. 15391, 15397-98 (2012) (finding that a single confirmatory message in response to an opt-out request is subject to prior consent).
[80] Supra note 77, at 12.
[81] In re TCPA Rules & Regulations, 18 FCC Rcd. 14014, 14092 (2003).
[82] Supra note 77, at 12.
[83] 47 U.S.C § 227(a)(1)(B)
[84] *See* Consumer and Governmental Affairs Bureau Issues Declaratory Ruling in P2P Alliance Petition for Clarification, 35 FCC Rcd 6526, ¶¶ 3, 8–12 (2020).

Despite the Court's narrow reading of the TCPA, important privacy protections exist outside of this statute. Not only is there the FTC's Do-Not-Call Registry but the CAN-SPAM Act also operates in conjunction with the TCPA. Through the CAN-SPAM Act, the FCC can regulate commercial texts sent to wireless devices as well as email communications. The Act makes it illegal for companies to send unwanted text messages to cell phone numbers and requires the messages be easily identifiable as an advertisement. Importantly, consumers must be able to *unsubscribe* from receiving messages, whether they be in the form of email or text.[85]

Understandably, none of the amicus briefs in this case mention the CAN-SPAM Act because *Duguid* centers around the inception of, not the remedy to, these intrusive calls, texts, or emails (i.e., what communications are deemed a violation of the TCPA). Because the CAN-SPAM Act covers only communications that are considered "commercial," the relational messages Duguid received are not covered by that Act. "Commercial electronic mail message" is defined by the CAN-SPAM Act as "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service."[86] Notably, transactional or relational messages are not included in the definition and the messages Duguid received, albeit erroneously, would fall under this excludable relational message category.[87] Duguid's situation—where security notifications are sent regarding a non-existent account—is

[85] CAN-SPAM Act of 2003, Pub. L: No 108-187, 117 Stat. 2699.
[86] CAN-SPAM Act, 15 U.S.C. 7702(2).
[87] 15 USC § 7702(17)(A) ("(A) In general The term "transactional or relationship message" means an electronic mail message the primary purpose of which is— (i) to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender; (ii) to provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient; (iii) to provide— (I) notification concerning a change in the terms or features of; (II) notification of a change in the recipient's standing or status with respect to; or (III) at regular periodic intervals, account balance information or other type of account statement with respect to, a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender; (iv) to provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled; or (v) to deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender.")

presumably uncommon. Nonetheless, Duguid chose to cite the consequences to commercial (more commonly considered spam), not relational, messages.

While the CAN-SPAM Act does not cover the specific scenario in Duguid, it does attenuate the consequences proffered by Duguid. He argues that Facebook's interpretation would "unleash [a] torrent of robocalls [and texts]" but in doing so he overstates the consequences. In the case of unwanted commercial emails, consumers can typically opt out with an *unsubscribe* button. For unwanted commercial text messages, the usual opt-out method is replying "stop." Additionally, for unwanted commercial calls, consumers can add themselves to the Do-Not-Call Registry and/or answer the call and asked to be put on the specific caller's do-not-call list. In the case of unwanted personal calls and messages, virtually all phones allow you to block phone numbers. The results of Facebook's interpretation, while not ideal, would not be as dire or as far reaching as Duguid argues because the CAN-SPAM Act and Do-Not-Call Registry exist. Even though it may be a nuisance to receive unwanted communications, the reality of current technology is that opt-out features exist, giving consumers a form of self-help that significantly mitigates the consequences Duguid argues would result in a ruling for Facebook.

Conclusion

In its decision, the Supreme Court refused to answer the call for a solution to the problems of applying the current regulatory regime to rapidly evolving technologies, clearly signifying that that call is meant to be answered by Congress. To the extent that the ATDS definition does not cover dialing technologies that were nonexistent when the TCPA's was enacted in 1991, Justice Sotomayor explained that it is not the judiciary's place to rewrite the statute:

> "Senescent" as a number generator (and perhaps the TCPA itself) may be, that is no justification for eschewing the best reading of §227(a)(1)(A). This Court must interpret

what Congress wrote, which is that "using a random or sequential number generator" modifies both "store" and "produce."[88]

In resolving this hotly disputed section of the TCPA in light of prevailing technology, the Supreme Court turned to longstanding canons of interpretation and unanimously resolved the statute in Facebook's favor. Although joining in the judgment, Justice Alito cautioned his colleagues against unduly applying canons of construction mechanically and as "if-then rules" And at the end of the day, neither of doomsday scenarios hypothesized in both parties' briefs are likely to result, and consumers will continue to be protected from unwanted calls and text messages from surrounding telecommunications regulations.

Perhaps the Court evaded the stickier questions of real-world fall out from ruling either way because they recognized (just as the parties surely knew but selected not to brief) the array of statutes and regulations which protect consumers from the dangers portrayed by Duguid. From the CAN-SPAM Act and company-specific Do-Not-Call registries to the FTC and FCC's power to promulgate updated definitions to protect consumers, a Supreme Court ruling is not the only means by which the real-world questions in this case could be resolved. The Court is, however, the only means by which the discreet legal question posed by the parties could be resolved—an undertaking that applied fixed canons of construction to a dated statute.

[88] Facebook, Inc. v. Duguid, 141 S.Ct. 1163, 1174 (2021).