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BREAKING UP VIA ROBOCALL: WILL THE SUPREME COURT'S CONSERVATIVE MAJORITY DISMANTLE PROTECTIONS UNDER THE TCPA?

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I. Introduction

If the Telephone Consumer Protection Agency ("TCPA") eliminated robocalls in 1991, then why did Americans receive 58.5 billion robocalls in 2019?[1] The answer is simple: in 2015, President Obama wrongfully enacted an Amendment to the TCPA, allowing debt collectors from the federal government, mortgage companies, and student loan providers, to berate their consumers through automatic, prerecorded, and artificial voice messages.[2] Fortunately,

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[1] *See* Mike Snider, *Robocalls rang up a new high in 2019. Two or more daily is average in some states*, USA TODAY (Jan. 15, 2020), *archived at* https://perma.cc/ZXY5-523V (examining the number of robocalls Americans received in 2019). *See also* Michael O'Rielly, *TCPA: It is Time to Provide Clarity*, FCC (Mar. 25, 2014), *archived at* https://perma.cc/M496-MZQ9 (explaining the purpose of the FCC). *See also* Jason C. Miller, *Regulating Robocalls: Are Automated Calls the Sound of, or a Threat to, Democracy?*, 16 MICH. TELECOMM. & TECH. L. REV. 213, 216 (2009) (describing robocalls and what they are used for). Robocalls are automated phone calls made through software and computer programs "to deliver messages to targeted lists." *Id.*

[2] *See* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2343–44 (2020) (highlighting the debt-collector's exception to the rule against robocalls). *See also* *TCPA Update-Amendment Exempting Federal Debts Held Retroactive*, MCGUIRE WOODS (Apr. 12, 2016) [hereinafter *TCPA Update*], *archived at* https://perma.cc/YU8G-7CVE (analyzing the consequences of the 2015 amendment

in 2020, the Supreme Court severed the 2015 Amendment to the TCPA.[3] The Supreme Court held that by favoring "debt-speech" over "political speech," the 2015 Amendment of the TCPA violated the First Amendment of the United States Constitution.[4]

Despite the Supreme Court's decision in 2020, the Seventh and Eleventh Circuit Courts permitted companies to slip by these restrictions.[5] These business entities argued that their actions did not

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to litigation). The 2015 Amendment stated that "federally backed mortgage loans and federally funded student loans are exempt from the TCPA." *Id.*

[3] *See Barr*, 140 S. Ct. at 2343 (arguing that this amendment was unconstitutional because it caused the government to favor debt-collection speech over all other forms of speech).

[4] *See id.* at 2346–47 (focusing on content-based speech). The Supreme Court held that it was a "content-based restriction" because the 2015 amendment favored speech made for the purposes of collecting a debt, rather than speech made for the purposes of promoting political thought. *Id. See also Barr v. American Association of Political Consultants*, ELEC. PRIV. INFO. CTR. (Oct. 1, 2020), *archived at* https://perma.cc/92HE-MV6J (summarizing the reasons why the Supreme Court severed the 2015 amendment to the TCPA). "[W]ithout the autodialer ban, the assault of unwanted calls could make cell phones unusable." *Id.* "A minor amendment to an otherwise constitutional law, passed decades after the original enactment, should not take down an act of Congress." *Id. See also* Peter A. Stokes et al., *TCPA Updates: SCOTUS strikes down government debt exception but may provide needed clarification in the fall*, NORTON ROSE FULBRIGHT (Aug. 17, 2020), *archived at* https://perma.cc/4ZXA-H2AT (outlining the updates to the TCPA). "Last month, the Supreme Court ruled in Barr v. American Association of Political Consultants (AAPC), 140 S. Ct. 2335 (2020) that an exception to the TCPA's automated call restriction—for calls made to collect government debts—violated the First Amendment." *Id.*

[5] *See* Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 467 (7th Cir. 2020) (holding that numbers already stored in customer data bases did not equate to an "automatic telephone dialing system"). The Seventh Circuit 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." *Id.* Justice Barrett concluded that when a machine dialed numbers is already stored in a company's database, it was not technically "an automatic telephone dialing system." *Id.* at 460. *See also* Glasser v. Hilton Grand Vacations Co., 948 F.3d 1301, 1304–05 (11th Cir. 2020) (holding that if a dialing system required human intervention, it did not fall under an "automatic dialing system"). The Eleventh Circuit stated that to be considered an "automatic dialing system," the machine must "(1) store telephone numbers and dial them or (2) produce such numbers using a random or sequential number generator and dial them. Under this reading, the statute extends to phone calls that target a pre-existing list of prospects or debtors, even though they were not randomly or sequentially identified." *Id.* at 1306. *See also* Rafael Reyneri, *FCC Issues Two TCPA Declaratory Rulings, One Clarifying Autodialer Definition*, INSIDE PRIV. (July 1, 2020), *archived at*

fall under the TCPA because their automatic telephone dialing systems ("ATDS") required human contact and did not technically "store" and "produce" numbers.[6] According to the TCPA and the FCC, an ATDS was a machine that had the "capacity" to dial numbers using an automated system.[7] The Seventh and Eleventh Circuits held that because human intervention was necessary, these machines did not qualify as "automatic telephone dialing systems," ("auto-dialers") and thus, should not be liable under the TCPA.[8] Conversely, the Second, Sixth, and Ninth Circuits held that these random number generators should still be liable under the TCPA because they produced and stored phone numbers."[9]

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https://perma.cc/UF5C-LN38 (analyzing the extent of human intervention with regards to the status of an ATDS).

[6] *See Gadelhak*, 950 F.3d at 458 (holding that because the numbers are randomly generated, the TCPA does not apply, even if companies like AT&T use their own customer's numbers). The Seventh Circuit determined that to "store" a number, a company could keep generated lists in their own databases whereas to "produce" a number, a piece of equipment had to have the capacity to generate and dial out a number. *Id.* at 460.

[7] *See* Douglas A. Samuelson, *Predictive Dialing for Outbound Telephone Call Centers*, 29 INTERFACES 66, 67 (1999) (depicting the system of auto dialers).

[8] *See Gadelhak*, 950 F.3d at 458 (outlining the Seventh Circuit's decision). *See also Glasser*, 948 F.3d at 1304 (reviewing the Eleventh Circuit's decision). *See also* Anthony Jankoski & Zoe Wilhelm, *Seventh Circuit Reaffirms Gadelhak, Rejects Challenge to Narrow ATDS Definitions*, FARGRE DRINKER (Mar. 4, 2021), *archived* https://perma.cc/U7KT-YS62 (discussing the human intervention element). *See also The Eye of the Beholder: New TCPA Human Intervention Decision Underscores Elusive Nature of ATDS Definition*, JDSUPRA (Aug. 21, 2018), *archived at* https://perma.cc/9NR2-EM9Q (summarizing the definition of an automated telephone dialing system ("ATDS")). *See also* John Nelson, *Focusing on Human Intervention, Multiple Courts Find Calling Devices Are Not Autodialers*, WOMBLE BOND DICKINSON (Sept. 26, 2018), *archived at* https://perma.cc/DZV6-C7RK (describing that when machines use human intervention, the devices lose their "auto dialer" status). Nelson stated that in order for a machine to be held liable under the TCPA, it must "both generate the numbers and dial them." *Id.* He further stated that because the "agent's human intervention initiates the calling process," the machine itself does not qualify as an "auto-dialer." *Id.*

[9] *See* Duran v. La Boom Disco, Inc., 955 F.3d 279, 290 (2d Cir. 2020) (holding that because the text messages were sent automatically using a text messaging platform, they were liable under the TCPA). Judge Reiss stated that even though the machines required "a human to click 'send,'" they were considered "auto-dialers" because they still had the capacity to dial "automatically." *Id. See also* Allan v. Pa. Higher Educ. Assistance Agency, 968 F.3d 567, 579 (6th Cir. 2020) (asserting that if a machine has the capacity to dial a number automatically, it could be considered an ATDS). In reference to the Seventh and Eleventh Circuit decisions, the Sixth Circuit stated, "[y]et, when it comes to interpreting the word 'store,' they pivot and play up the

In 1991, the TCPA eliminated the use of all automatic, artificial, and prerecorded voice calling for a reason.[10] Automated phone calls were aggravating tools that businesses used in order to cut down on their own personal costs.[11] Consequently, individuals were constantly bombarded by these anonymous calls on a daily basis.[12] The TCPA's primary purpose was to protect consumers from automated phone calls, regardless of human contact.[13] With the

administrative history and 'practical effects,' while downplaying a textual reading of surrounding provisions that would open up a broader application of the autodialer ban." *Id. See also* Marks v. Crunch San Diego, LLC, 904 F.3d 1041, 1043 (9th Cir. 2018) (examining the statutory definition of ATDS). The Court held that "the statutory definition of ATDS includes a device that stores telephone numbers to be called, whether or not those numbers have been generated by a random or sequential number generator." *Id.*

[10] *See id.* at 1051 (analyzing the significance of the TCPA). The TCPA's purpose was to regulate all devices that made automatic calls. *Id.* This included "equipment that dialed blocks of sequential or randomly generated numbers" as well as "equipment that made automatic calls from lists of recipients." *Id. See also Robocalls, Automated Messages, and The Telephone Consumer Protection Act (TCPA)*, Ryder L. (Oct. 7, 2020) [hereinafter Ryder], *archived at* https://perma.cc/2MYN-RKGC (outlining the TCPA). "15 U.S.C. 1692 d(5) prohibits 'causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.'" *Id. See also* Simon van Zuylen-Wood, *How robo-callers outwitted the government and completely wrecked the Do Not Call list*, The Wash. Post (Jan. 11, 2018), *archived at* https://perma.cc/BP5Q-FADX (evaluating the amount of money made through robocalling as opposed to money lost in lawsuits regarding the legality of robo-calls). "The financial rewards of bothering people on the telephone are clearly greater than the risks." *Id. See also* Eric J. Troutman, *FIREWORKS! Here's Everything You Need to Know About The Explosive Oral Argument in Facebook's Big TCPA ATDS Battle*, Nat'l Law Review (Dec. 8, 2020) [hereinafter Troutman, *Fireworks*], *archived at* https://perma.cc/PT5K-7VQ8 (explaining the importance of the TCPA in terms of regulating robocalls).

[11] *See* Justin (Gus) Hurwitz, *Telemarketing, Technology, and the Regulation of Private Speech: First Amendment Lessons from the FCC's TCPA Rules*, 84 Brook. L. Rev. 1, 9 (2018) (explaining that businesses used telemarketing in order to reach millions, while still cutting back on costs). *See also* Agit Pai, *FCC is voting to end robocalls, the 'scourge of civilization'*, The Hill (Mar. 23, 2017), *archived at* https://perma.cc/MHE6-J29T (stating that robocalls cease to have boundaries). Pai stated, "we're all repeatedly being interrupted by the ring of pre-recorded calls at what always seems to be the worst possible moment." *Id.*

[12] *See* Laura Daily, *Stop the ringing! How to block those annoying robocalls*, The Wash. Post (Apr. 14, 2020), *archived at* https://perma.cc/BH5E-YUG3 (highlighting how bothersome robocalls are).

[13] *See Marks*, 904 F.3d at 1051 (highlighting that the TCPA's purpose is to eliminate the use of automated phone calls to nonconsenting persons).

impending decision of *Duguid v. Facebook*, many hope that the Supreme Court will not only clarify the definition of an auto-dialer, but will also eliminate robocalls in their entirety.[14] Even though companies attempted to avoid the TCPA by randomly dialing numbers from their customer databases, their actions should still be held liable under the TCPA because these robocalls are an invasion of privacy and meet the prerequisites of an "auto-dialer" under the TCPA.[15]

I.   History

A.   *The Communications Act of 1934*

In response to a growing number of advertisers contacting consumers through telecommunications without any restrictions, Congress passed the Communications Act of 1934, which created the Federal Communications Commission ("FCC").[16] For example, prior

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[14] *See* Michelle Pector & Jared Wilkerson, *Facebook v. Duguid—US Supreme Court to Decide Crucial Issue Affecting TCPA Liability*, JDSUPRA (Nov. 4, 2020), *archived at* https://perma.cc/ACD2-K6MA (emphasizing the importance of the Supreme Court hearing oral arguments for *Duguid v. Facebook*).

[15] *See* Duran v. La Boom Disco, Inc., 955 F.3d 279, 284 (2d Cir. 2020) (distinguishing whether or not a randomly generated phone number could escape the terms of the TCPA). The Second Circuit stated, "in order for a program 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, then we must conclude that the programs here can qualify as ATDSs." *Id. See also* Craig Johnson, *The government is finally getting serious about robocalls*, CLARK (Feb. 4, 2019), *archived at* https://perma.cc/8W4X-5P56 (setting forth the privacy implications of robocalls). In reference to robocalls, Johnson exclaims, "Night and day, Americans are being inundated by spam calls. It's more than an annoyance – it's an invasion of privacy being used to deceive and take advantage of unsuspecting victims." *Id.*

[16] *See* 47 U.S.C.A. § 151 (1996) (establishing the creation of the Federal Communications Commission (FCC)). The four purposes of the FCC were:

> [R]egulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy

to the Act, male stock brokers would call residences at all hours in order to give updates on the stock market, and male solicitors would travel door to door in order to sell products.[17] When most men were drafted into the war, the entire in-person system shifted to telemarketing without any official restrictions.[18] Due to these disruptions, the FCC incorporated telephone and telegraph communications into its jurisdiction as well as its already established radio and wire communications.[19] Traditionally, "interstate telegraph companies" had jurisdiction over telephone and telegraph communications.[20] The Communications Act of 1934 transferred

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by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication.

Id. See also Kia Kokalitcheva, *The most important Internet law was written in 1934*, VENTURE BEAT (Nov. 13, 2014), *archived at* https://perma.cc/Y7B5-WNYS (describing the installment of the FCC through the 1934 Communications Act). The FCC took charge of regulating wire, airwave, telephone, telegraph, and broadcast radio communications. *Id.* These forms of communication were determined to be "'interstate commerce' by earlier Supreme Court decisions, putting them in the federal government's jurisdiction" was solely responsible to limiting interference for the communication between "military, emergency responders, police, and entertainment companies." *Id. See also THE HISTORY OF THE FEDERAL COMMUNICATIONS COMMISSION (FCC)*, MITEL NETWORKS CORP. (Oct. 2, 2020), *archived at* https://perma.cc/AK9X-FA5R (analyzing the evolution of the FCC). In 1934, the FCC replaced the FRC and added telephone communications to its list. *Id.*

[17] *See* Howard E. Berkenblit, *Can Those Telemarketing Machines Keep Calling Me? — The Telephone Consumer Protection Act of 1991 After Moser v. FCC*, 36 B.C. L. REV. 85, 95 (1994) (recalling the persistence of stock brokers).

[18] *See id.* (discussing the shift from door-to-door sales to remote phone calls).

[19] *See* Russell J. Davis et al., Annotation, *§ 20. The Federal Communications Commission*, 103 N.Y. Jur. 2d Telecommunications § 20 (2020) (stating that the FCC included telephone and telegraph communication into its jurisdiction). Prior to the enactment of the Communications Act of 1934, communication under the FCC was limited to radio and wire communication. *Id. See also* People v. Broady, 158 N.E.2d 817, 821 (N.Y. 1959) (providing the significance of the installment of the Communications Act of 1934). The goal of the Communications Act of 1934 was "to extend the jurisdiction of the existing Radio Commission to embrace telegraph and telephone communications as well as those by radio." *Id.*

[20] *See* Elizabeth Lauzon, *Construction and Application of Communications Act of 1934 and Telecommunications Act of 1996—United States Supreme Court Cases*, 32 A.L.R. FED. 2D ART. 1, 9 (2008) (analyzing the construction of the 1934 Communications Act). The Communications Act of 1934 gave authority to the FCC over interstate communication and was "enacted to secure and protect the public interest and to insure uniformity of regulation." *Id.*

jurisdiction from the "interstate telegraph companies" to the FCC.[21] As a result, telephone and telegraph companies had to follow the FCC's rules and regulations.[22]

B.   The Telephone Consumer Protection Act of 1991

Just as the emerging technology urged Congress to pass the Communications Act of 1934, Congress had to act once again in 1991.[23] The United States experienced a drastic increase in automated phone calls from the late 1930s through the 1980s."[24] In addition to

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[21] *See* Davis et al., *supra* note 19 (reiterating the authority of the FCC). *See also* W.R. Habeeb, *Legal Aspects of Radio Communication and Broadcasting*, 171 A.L.R. 765 ART. 1, 18 (1947) (explaining the significance of the 1934 Communications Act in order to deter broadcasting monopolies). In addition to the FCC obtaining authority over telephone and telecommunication, this act also gave Congress the ability "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." *Id.*

[22] *See* Sims v. Western Union Tel. Co., 236 N.Y.S.2d 192, 194 (N.Y. Sup. Ct. 1963) (holding that plaintiffs as "sendees" must follow the regulations as mapped out by the FCC). *See also Broady*, 158 N.E.2d at 821 (summarizing the authority of the FCC through the Communications Act of 1934). The Communications Act of 1934 "is a comprehensive scheme for the regulation of interstate communications." *Id. See also* Habeeb, *supra* note 21, at 18 (exhibiting the purposes of the enactment of the Communications Act of 1934). Prior to the Communications Act of 1934, broadcasting monopolies took over frequencies and caused undue interferences. *Id.* The Communications Act of 1934 sought to "secure effective execution of its policy of making available 'a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.'" *Id.*

[23] *See* Spencer Weber Waller et al., *The Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology*, 26 LOY. CONSUMER L. REV. 343, 352 (2014) (summarizing the new technology that telemarketers began using). "In a ten-year period beginning in 1981, spending on telemarketing activities increased from $1 billion to $60 billion." *Id.* Advertisers used technology to analyze the most time efficient way to contact as many consumers as possible without causing delays while waiting for consumers to pick up their telephones. *Id.* at 352-53.

[24] *See* Irela Aleman, *Ringless Voicemails: How an Emerging Unregulated Technology May Hinder the Intent of Telephone Consumer Protection Act of 1991*, 71 FED. COMMC'NS. L. J. 253, 257 (2019) (explaining the evolution of technology under the Communications Act of 1934). Congress justified the implementation of the TCPA because unlike a television advertisement, you could turn the television off, whereas with a telephone, you could not because you could be expecting an emergency phone call. *Id. See also* Berkenblit, *supra* note 17, at 95–96 (describing the history and disturbances caused by robocalls). *See also* Dan Patterson, *The inevitable and inescapable rise of robocalls*, TECHREPUBLIC (Oct. 3, 2016), *archived at* https://perma.cc/7E8L-ARET (exposing the use of robocalls for political

political campaigns utilizing robocalls, magazines and newspapers sold subscriptions and other products, which significantly contributed to an increase in automatic calls.[25] By 1991, the amount of sales generated by telemarketers annually came close to $435 billion."[26] While these businesses did not have to pay for advertising because they relied so heavily on automated phone calls, the public paid the price through blocked phone lines, preventing them from accessing emergency phone lines, such as 911.[27] This was not only an invasion of privacy; it was dangerous.[28]

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campaigns). Patterson argued that "[r]obocalls have been a staple of political campaigns since the 1980s." *Id. See also* M.J. Stephey, *A Brief History of Robo-Calls*, TIME (Oct. 23, 2008), *archived at* https://perma.cc/2SUG-ULHU (defining the history of political robocalls). Stephey explained that since "improved technology and decreased cost, the campaign tactic has become the leading method to reach voters." *Id.*

[25] *See* Berkenblit, *supra* note 17, at 95 (stating that the sales model shifted from advertising in-person to making cold calls in the 1940s).

[26] *See* Waller et al., *supra* note 23, at 354 (analyzing the profits of telemarketers). Sending faxes as well as calling consumers became a cost-effective strategy that businesses relied upon. *Id.* Additionally, "[u]nlike 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." *Id.* Companies were able to fax to millions of customers daily and over "300,000 telemarketers were able to reach over 18 millions Americans per day." *Id.* at 352. *See also Telemarketers Law & Legal Definition*, US LEGAL (Oct. 8, 2020), *archived at* https://perma.cc/426V-CH7X (defining telemarketers and the annual revenue that is generated). "[T]he American Telemarketing Association found that spending on telemarketing activities increased from $1 billion to $60 billion between 1981 and 1991." *Id.*

[27] *See* Berkenblit, *supra* note 17, at 98 (articulating the public's concerns regarding blocked phone lines due to telemarketers). *See also* H.R. Rep. No. 102-317, at 10 (1991) (summarizing the public's concern in regard to Telemarketers). "Telemarketers often program their systems to dial sequential blocks of telephone numbers, which have included those of emergency and public service organizations, as well as unlisted telephone numbers." *Id. See also* Waller et al., *supra* note 23, at 353 (examining the extent of technology robocalls used). "These predictive dialers were developed to 'find better pacing (scheduling of dialing attempts) by collecting and analyzing data on the proportion of call attempts that are answered, durations of time from call initiation to answer, and durations of service.'" *Id.*

[28] *See* Berkenblit, *supra* note 17, at 96 (examining the dangers of blocked emergency lines due to robocalls). Individuals had difficulty calling numbers like 911 because either their own phone lines were busy from robocalls or emergency services were busy with similar robocalls. *Id.* Additionally, patients in hospital rooms were prevented from calling for assistance because of the constant bombardment from robocalls. *Id.*

To prohibit certain practices that invaded consumer privacy, Congress passed the TCPA to ban particular actions.[29] Congress gave the FCC the sole authority to include exemptions to the TCPA, such as calls made for "non-commercial uses" or non-profit organizations.[30] Under the FCC, telemarketers had to adhere to a new set of guidelines,

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[29] *See* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2343 (2020) (highlighting the severe intrusion of privacy). "[C]onsumers were 'outraged' and considered robocalls an invasion of privacy 'regardless of the content or the initiator of the message.'" *Id.* at 2344. In addition, Congress found that banning robocalls was "the only effective means of protecting telephone consumers from this nuisance and privacy invasion." *Id. See also* Duran v. La Boom Disco, Inc., 955 F.3d 279, 280 (2d Cir. 2020) (explaining the purpose of implementing the TCPA). "[I]n 1991, Congress set out to cure America of that 'scourge of modern civilization': telemarketing. Alarmed that unsolicited advertising calls were inundating the phones of average Americans, it passed the Telephone Consumer Protection Act ("TCPA"), prohibiting certain kinds of calls made without the recipient's prior consent." *Id. See also* S. REP. NO. 102–178, at 1 (1991) (justifying that TCPA protects the public's privacy). *See also* H.R. REP. NO. 102-317, at 10 (1991) (summarizing the TCPA). *See also* Berkenblit, *supra* note 17, at 95 (examining the history of the TCPA). *See also* Waller, *supra* note 23, at 347 (recalling the history of telemarketers). "[T]he original purpose of the TCPA was to regulate certain uses of technology that are abusive, invasive, and potentially dangerous." *Id.* at 347. Prior to the TCPA, members of the public not only received countless telemarketers calling at all hours, but also received countless junk mail faxes. *Id.* It was estimated in 1991, that over 30 billion pages of information were sent via fax. *Id.* at 353. *See also* Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368, 371 (2012) (determining the reasons why the TCPA was enacted). *See also FCC Actions on Robocalls, Telemarketing*, FCC (July 23, 2018), *archived at* https://perma.cc/D8DS-U65E (recalling the components of the TCPA).

[30] *See* Telephone Consumer Protection Act of 1991, 47 C.F.R. § 64, 68 (1992) (identifying the exemptions to the TCPA). The exemptions are applied to an automated phone call that "(a) is not made for a commercial purpose; (b) does not transmit an unsolicited advertisement; (c) is made by a calling party with whom the called party has an established business relationship; or (d) is made by a tax-exempt nonprofit organization." *Id. See also Mims*, 565 U.S. at 371 (focusing on the reasons why Congress passed the TCPA). "[C]ongress determined that federal legislation was needed because telemarketers, by operating interstate, were escaping state-law prohibitions on intrusive nuisance calls." *Id. See also What Messages are Exempt From TCPA Regulations?*, TATANGO (Oct. 8, 2020), *archived at* https://perma.cc/B8TD-T46H (examining the TCPA's exemptions). Under these exemptions, members of the public are still able to receive messages if there can be some proof that the user consented. *Id.* In addition, "[a]ny messages necessary to prevent harm to health or safety does not require consent from the consumer." *Id. See also* Creola Johnson, *Relief for Student Loan Borrowers Victimized by Relief Companies Masquerading as Legitimate Help*, 11 UC IRVINE L. REV. 105, 116–17 (2020) (recognizing that companies attempt to hide under the veil of a nonprofit organization when in fact, they are merely telemarketers).

including only calling during an appropriate window of time, while also following the National Do Not Call Registry guidelines.[31] However, because Congress passed the TCPA as an amendment to the Communications Act of 1934, future legislators saw this as an invitation to add additional amendments.[32]

C.   The FCC's Failed Attempt to Clarify the Language of the TCPA

In an attempt to keep up with technology and its relevance to the TCPA, the FCC issued several Declaratory Rulings between 2003 and 2015.[33] These Declaratory Rulings were issued to specifically address the rapid growth of cellular phone use and clarify language used in the TCPA.[34] In 2003, the FCC stated that if a piece of equipment did not store numbers as its primary purpose, but still dialed numbers using that same piece of equipment, it could still be considered an ATDS because it had the "capacity" to do so.[35] Additionally, in 2015, the FCC stated that a machine could be considered an ATDS even if it simply had the potential to randomly dial numbers.[36]

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[31] *See* James Sweet, *OPTING OUT OF COMMERCIAL TELEMARKETING THE CONSTITUTIONALITY OF THE NATIONAL DO-NOT-CALL REGISTRY*, 70 TENN. L. REV. 921, 923 (2003) (detailing the restrictions on making automated phone calls). Solicitors were only allowed to call between the hours of 8:00 a.m. and 9:00 p.m. and had to adhere to the Do Not Call Registry. *Id. See also* Arianna Evers, *TCPA: FCC Provides Additional Guidance on Autodialers, Declines to Create Exemption from the Prior Express Consent Requirement for Certain Health Care Communications*, WILMERHALE (July 1, 2020), *archived at* https://perma.cc/6JQ3-UCXK (analyzing the FCC's guidance in regard to the TCPA). In addition to entities adhering to the Do Not Call Registry, "[t]he Bureau reiterated that express consent was needed prior to making such calls or texts and that more than just a pre-existing relationship was needed between the consumer and the caller to establish the requisite level of consent under the TCPA." *Id.*

[32] *See* Berkenblit, *supra* note 17, at 100 (analyzing the TCPA's relation to the Consumer Protection Act of 1934).

[33] *See* Marks v. Crunch San Diego, LLC, 904 F.3d 1041, 1046 (9th Cir. 2018) (summarizing the FCC's actions).

[34] *See id.* at 1049 (reasoning that the FCC issued declaratory rulings in an attempt to keep the TCPA clear and relevant).

[35] *See id.* at 1045 (quoting *In re* R. and Regulations Implementing the Tel. Consumer Protec. Act of 1991, 18 F.C.C. Rcd. 14014, 14019 (F.C.C. 2003)) (analyzing what machines had the capacity to dial using a random number generator under the TCPA).

[36] *See* 30 FCC Rcd 7961, 7971–72 (2015) (stating the definition of an ATDS).

The FCC's explanation that an ATDS had "the capacity to perform auto-dialer functions" confused the courts even more.[37] While the FCC attempted to clarify what an ATDS was under the TCPA in its 2015 order, the D.C. Circuit disregarded it.[38] The D.C. Circuit suggested that with such a broad definition, a smartphone could eventually qualify as an ATDS because it had the "capacity" to "store" and "produce" phone numbers using an auto-dialer.[39] While rejecting the FCC's broad scope, the D.C. Circuit also found the FCC to be inconsistent when prohibiting machines that "only generated random numbers" but also, machines that dialed numbers from a database.[40] Because of this, the D.C. Circuit set aside the FCC's order regarding the definition of an ATDS.[41] As a result, the FCC ceased to have any

> [W]e reaffirm our previous statements that dialing equipment generally has the capacity to store or produce, and dial random or sequential numbers (and thus meets the TCPA's definition of "auto dialer") even if it is not presently used for that purpose, including when the caller is calling a set list of consumers.

Id.

[37] *See Marks*, 904 F.3d at 1045–46 (analyzing the wording and results of the FCC's 2015 order).

[38] *See generally* ACA Int'l. v. FCC., 885 F.3d 687, 692 (D.C. Cir. 2018) (summarizing that the D.C. Circuit set aside parts of the FCC's 2015 order).

[39] *See id.* at 696 (juxtaposing a cellphone to an ATDS). *See also Marks*, 904 F.3d at 1047 (examining the possibility of personal cell phones being privy to private action under the TCPA). "[B]ecause 'it cannot be the case that every uninvited communication from a smartphone infringes federal law, and that nearly every American is a TCPA violator- in-waiting, if not a violator-in-fact.'" *Id. See also* Duguid v. Facebook, Inc., 926 F.3d 1146, 1151 (9th Cir. 2019) (affirming the notion that if the definition of an ATDS is expanded, the TCPA will be able to regulate smartphones). *See also* Troutman, *Fireworks*, *supra* note 10 (highlighting the importance of the words "capacity," "store," and "human intervention"). Troutman argued that if the term "capacity" is interpreted too broadly, companies like Facebook would be successful in suit because of how far it could be taken. *Id.* For example, Garner, the Counsel for the plaintiff, took it one step further and compared this equipment to ropes and knives in the kitchen; just because they have the "capacity" to kill another does not mean that they are actually guilty of killing another. *Id.*

[40] *See id.* (indicating that the FCC's language contradicted itself).

[41] *See id.* (stating the Circuit Court's holding). While the D.C. Circuit found that parts of the FCC's 2015 order were acceptable, it found that its definition of what an ATDS was unacceptable). *Id.*

real authority to enforce the TCPA, leading to even more confusion within the circuit courts.[42]

D. The 2015 Bipartisan Budget Act

While the courts struggled to interpret the TCPA's language, President Obama signed the Bipartisan Budget Act, which expanded the type of organizations and business entities that could use automated dialing to contact consumers.[43] For example, mortgage companies, the Federal Government, and student loan servicers could conduct automatic, artificial, and prerecorded voice calls in order to collect debts.[44] The original notion of protecting consumers translated into protecting creditors.[45] As a result, individuals were once again

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[42] *See* Eric Troutman, *Waiting Game: Taking Stock of the TCPA One-Year Removed from ACA Int'l*, TCPAWORLD (Mar. 26, 2019), *archived at* https://perma.cc/HK4C-D9TF (questioning the FCC's authority in regard to the TCPA).

[43] *See* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2352 (2020) (examining the 2015 amendment to the TCPA). "[E]nacted in 2015, the government-debt exception added an unconstitutional discriminatory exception to the robocall restriction." *Id. See also Congress Amends TCPA Liability for Certain Debt-Collection Calls*, PRAC. L. LEGAL UPDATE w-000-8596 (2015) (outlining the Amendment to the TCPA). This Amendment made it possible for the Federal government to use automated, prerecorded, and artificial voice calling in order to collect a debt owed to the government. *Id.*

[44] *See also* 47 U.S.C.A. § 227 (2020) (showing the 2015 amendment to the TCPA). It states, section 227(b) of the Communications Act of 1934 is amended—(1) in paragraph (1)—(A) in subparagraph (A)(iii), by inserting, "unless such call is made solely to collect a debt owed to or guaranteed by the United States" after "charged for the call." *Id. See also Barr*, 140 S. Ct. at 2343 (analyzing the amendment in respect to the 1991 TCPA). "[T]he 2015 amendment to the TCPA allows robocalls that are made to collect debts owed to or guaranteed by the Federal Government, including robocalls made to collect many student loan and mortgage debts." *Id. See also TCPA Regulations and Guidelines*, EXPERIAN (Oct. 6, 2020), *archived at* https://perma.cc/KW75-5JEC (outlining the 2015 regulations of the TCPA). The "FCC has stated that with respect to autodialed or prerecorded debt collection calls, to the extent that they do not contain telemarketing messages, would not require any consent when made to residential wireline consumers, but require either prior written or oral consent if made to a consumer's wireless number." *Id.*

[45] *See TCPA Update*, *supra* note 2 (analyzing the shift from consumer protection to creditor protection).

subjected to the annoyances of robocalls.[46] This "debt-exception" was the basis for rightful and continuous litigation in the upcoming years.[47]

E.   *Barr v. American Association of Political Consultants, Inc.*

In *Barr*, the Supreme Court ruled the 2015 Amendment to the TCPA violated the First Amendment because the government infringed upon content-based speech.[48] Though many believed that this decision would clarify the TCPA, the Court only addressed the debt-exception portion.[49]   In *Barr,* nonprofit and political organizations argued that the 2015 Amendment favored "debt

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[46] *See* Johnson, *supra* note 30 (exposing the amount of disruption caused by robocalls after the 2015 amendment). *See also* Daniel JT McKenna & Stefanie Jackman, *SCOTUS rules TCPA exception for automated calls to collect government debts violates First Amendment but leaves TCPA's general automated call restriction in place*, BALLARD SPAHR LLP (July 7, 2020), *archived at* https://perma.cc/PG34-SEMS (stressing the disturbances caused by robocalls).

[47] *See also* Duguid v. Facebook, Inc., 926 F.3d 1146, 1149 (9th Cir. 2019) (affirming the 2015 Amendment is ordered to assess non-creditors' liability in regard to the TCPA). In *Diguid*, the plaintiff sued Facebook for violating the TCPA because it was sending out sporadic messages about an unauthorized user trying to log into a Facebook account. *Id.* at 1151. The Court held that "[o]ur reading supports the TCPA's animating purpose—protecting privacy by restricting unsolicited, automated telephone calls. The messages Duguid received were automated, unsolicited, and unwanted." *Id.* at 1152. *See also* Shay Dvoretzky & Jeffrey Johnson, *Hot Topics In TCPA Litigation After Barr v. American Association of Political Consultants*, U.S. CHAMBER LITIG. CTR. (July 13, 2020), *archived at* https://perma.cc/7JBR-8LPV (evaluating how businesses feel towards the TCPA). "[L]egitimate businesses would finally be free to do what they and their customers both want: send timely, important communications in a convenient, consumer-friendly way." *Id.*

[48] *See Barr*, 140 S. Ct. at 2335 (evaluating the 2015 amendment and how it violated the Free Speech Clause). Justice Kavanaugh stated, "[t]he Free Speech Clause provides that government generally 'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Id.* at 2341. *See also The Supreme Court Acts Twice on the TCPA: What It Means for Automated Callers, the First Amendment, and Statutory Challengers*, DEBEVOISE & PLIMPTION (July 10, 2020) [hereinafter Debevoise], *archived at* https://perma.cc/3FFY-5D5P (explaining the Supreme Court ruling). "The Court determined that the appropriate remedy was to sever the invalid exception, thereby making the TCPA's restrictions uniformly applicable to all subject entities." *Id.*

[49] *See Barr*, 140 S. Ct. at 2341 (summarizing that the 2015 amendment to the TCPA violated the first amendment). *See also* Stokes, *supra* note 4 (explaining that further clarification is needed regarding the TCPA and what exactly is an ATDS).

collection speech over political and other speech" because the TCPA allowed for debt collectors to use robocalls to contact consumers whereas political and nonprofit organizations were barred from doing so.[50] The Supreme Court precedents enabled the government to place restrictions on speech as long as it was based on the "content" of the expression.[51] In this case, the government allowed for debt collection speech but prohibited political speech.[52]

    The Supreme Court first looked at whether the 2015 Amendment was content-based.[53] After determining that it was

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[50] *See Barr*, 140 S. Ct. at 2343 (arguing that the entire TCPA should be abolished because of its unconstitutionality rather than removing the 2015 amendment). The Supreme Court held that by favoring "debt-collection speech," the government was discriminating against all other speech, including political speech. *Id. See also* Olivia Hahn, *2019 to 2020 A.L.R. United States Supreme Court Review*, 53 A.L.R. Fed. 3d Art. 7 (2020) (stating that the Supreme Court held the 2015 Amendment to the TCPA "impermissibly favored debt-collection speech over political and other speech, in violation of the First Amendment." *Id.* The Court concluded that instead of dissolving the entire TCPA, it would simply sever the 2015 Amendment, thus treating the political speech "equally with debt-collection speech." *Id.*

[51] *See Barr*, 140 S. Ct. at 2346 (examining what prior courts had the authority to limit speech). *See also* Police Dept. of Chi. v. Mosley, 408 U.S. 92, 95 (1972) (highlighting the meaning and significance of the First Amendment). "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id. See also* Rodney A. Smolla, *Restrictions on automated political calls and recorded messages* §16:41 (2020) (analyzing the meaning of content-based speech). The Supreme Court compared the U.S. government asking an individual to pay their debt to a political organization asking for a political donation. *Id.* "While it was true that the law did not draw distinctions based on speakers, the Court concluded, the lack of speaker-based discrimination did not render the law content-neutral." *Id.*

[52] *See Barr*, 140 S. Ct. at 2346 (explaining that the government favored debt-collection speech over political speech).

[53] *See id.* (interpreting whether the 2015 Amendment violated the First Amendment). The Supreme Court held that the 2015 Amendment was unconstitutional because it was a content question under the "government-debt exception." *Id.* at 2348. The Supreme Court described a hypothetical situation in which the U.S. government banned all trucks from playing political speech. *Id.* at 2346. The fact that the U.S. government would only ban political speech made the entire issue a content-based issue and thus unconstitutional under the First Amendment. *Id. See also* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (identifying what constitutes "content-based speech"). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id. See also* Debevoise, *supra* note 48 (examining whether the 2015 Amendment to the TCPA violated the First Amendment). "The plurality found that the government debt exception violated the First Amendment because it discriminates on the basis of the content of speech." *Id.*

content-based, and thus subject to the First Amendment, the Supreme Court then looked to whether it could sever the 2015 Amendment from the 1991 TCPA or, if the entire TCPA had to be dissolved.[54] Fortunately, the Supreme Court ruled that it was possible to preserve the TCPA because it had functioned for over twenty years prior to the 2015 debt-exception amendment.[55]

III. Premise

While Courts still followed the decision in *Barr*, which held that automatic calls were banned, the question of what "automatic" meant lingered.[56] As a result, the different interpretation of this term in the TCPA led to a circuit split.[57] The courts still followed the

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[54] *See Barr*, 140 S. Ct. at 2346 (outlining the possible outcomes for the Justices to decide upon). *See also* Debevoise, *supra* note 48 (analyzing the argument before the Supreme Court). The American Association of Political Associations filed suit because it wanted to be able to have the authority to send automatic political voice calls. *Id.* Instead of dismantling the entire TCPA, the Supreme Court severed the 2015 Amendment that allowed for debt-collectors to use automating calling to collect a debt. *Id.*

[55] *See Barr*, 140 S. Ct. at 2352 (holding that it was possible to only sever the 2015 Amendment because the statute was "capable of functioning independently").

[56] *See* Eric J. Troutman, *Grin and Barrett– Judge that Wrote Ruling Narrowly Interpreting TCPA's ATDS Definition Sworn Into SCOTUS Ahead of Big Facebook TCPA Challenge*, THE NAT'L L. REV. (Oct. 27, 2020) [hereinafter Troutman, *Grin and Barrett*], *archived at* https://perma.cc/C582-EX2K (highlighting that Circuits were still unable to define the term "automatic" following *Barr's* holding).

[57] *See* Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 460 (7th Cir. 2020) (summarizing the split among different courts when determining whether or not a machine is "automatic" and therefore falls under the TCPA). Justice Barrett stated, "[w]e must decide an issue that has split the circuits: what the phrase 'using a random or sequential number generator' modifies." *Id*. When interpreting the TCPA, the Seventh Circuit stated that a machine's ability to "store" and "produce" is dependent on whether the machine has access to a database that already "stores" numbers in addition to whether or not a random number generator must be used while "storing" and "producing phone numbers." *Id*. *Contra* Duran v. La Boom Disco, Inc., 955 F.3d 279, 284 (2d Cir. 2020) (maintaining that all phone numbers that are randomly generated and have the capacity to "produce" and "store" qualify as automatic dialing systems and are liable under the TCPA). Justice Cabranes stated that "in order for a program 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, then we must conclude that the programs here can qualify as ATDSs." *Id.* Furthermore, "the TCPA creates a general prohibition on ATDS calls and texts." *Id.* at 285. *See also* Allan v. Pa. Higher Educ. Assistance Agency, 968 F.3d 567, 579 (6th Cir. 2020) (holding that if a number generator has the ability to store a number, it falls under

Supreme Court's decision in *Barr* by agreeing that all automatic phone calls were banned, but the argument still lingered over what "automatic" actually meant.[58]

A.   Equipment That Had the Capacity to "Store" Numbers

The TCPA prohibited the ability for sequential and random number generators to store numbers.[59] The Circuit Courts argued whether it was possible to store numbers that were already stored in a customer database.[60] Two Circuit Courts determined that it was impossible to accumulate numbers that were already stored in their

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the TCPA's jurisdiction, regardless of whether or not the numbers are already stored in customer databases).

[58] *See* 47 U.S.C. § 227(a)(1)(A) (outlining the requirements of being considered "automatic"). In order to be considered an automatic dialing system, a machine must have the capability to produce and store numbers, while also utilizing a random number generator to call phone numbers. *Id. See also Gadelha*k, 950 F.3d at 458 (interpreting that "automatic" means that the machine has to both store and produce numbers while also being able to use that technology to call random phone numbers, rather than calling numbers that already exist in customer databases). Justice Barrett stated, "[a]t the time that the Telephone Consumer Protection Act was passed, telemarketers primarily used systems that randomly generated numbers and dialed them, and everyone agrees that such systems meet the statutory definition." *Id.* at 461.

[59] *See* 47 U.S.C. § 227(a)(1)(A) (defining the conditions of the TCPA in regard to automated phone calls). *See also Duran*, 955 F.3d at 279 (analyzing the possible definitions of the word "store" in terms of the TCPA). Justice Cabranes stated, "an ATDS if it can 'store' numbers, even if those numbers are generated elsewhere, including by a non-random- or nonsequential-number-generator—such as a person." *Id*. at 285. *See also* Aleman, *supra* note 24, at 4 (providing additional meanings of the word "store"). "The FCC determined that equipment that lacks the 'present' ability to dial random and sequential numbers but has the 'potential' to do so in the future is still subject to the TCPA." *Id.*

[60] *See Duran*, 955 F.3d at 279 (providing a possible interpretation of the TCPA). Justice Cabranes even made the argument that the TCPA should be interpreted generally, including "systems which dial from stored lists—so that the statute's prohibitions maintain their general deterrent effect on telemarketers, even when telemarketers switch to newer non-random- or nonsequential-number-generating technology." *Id.* at 286. *See also* Aleman, *supra* note 24, at 11 (summarizing the fact that with human intervention, a machine cannot be truly "automatic"). "[T]he fact that the equipment used to deliver ringless voicemails requires no human intervention to deliver tens of thousands of voicemails instantaneously; thus, it has a proven present capacity to store or generate telephone numbers using sequential or random number generators and to dial these numbers by automated means." *Id.*

customer databases.[61] For example, in *Gadelhak*, the Seventh Circuit determined that AT&T's "Customer Feedback Tool" did not have the capability to "store" numbers because it accessed its own customer databases.[62] However, a majority of Circuit Courts interpreted the phrase, "capacity to store" as number generators that had the ability to store numbers, regardless of their current customer databases.[63]

Unlike the Seventh Circuit, in *Allan*, the Sixth Circuit stated that regardless of the presence of numbers already stored in the system, these generators still had the capability to "store" phone numbers and access numbers that were already stored on separate databases.[64] The Sixth Circuit further stated that if they removed the word, "stored" from the TCPA, companies would escape liability by using a separate

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[61] *See Gadelhak*, 950 F.3d at 458 (holding that if a company already has a database of stored customer's phone numbers and the machine is accessing those numbers, it is not possible for the machine to store those numbers again). The Seventh Circuit argued that when a machine dials numbers already in a customer database, it does not have the capacity to store those numbers again. *Id.* at 464–65. *See also* Glasser v. Hilton Grand Vacations Co., 948 F.3d 1301, 1304 (11th Cir. 2020) (holding that already stored phone numbers prevent a machine from having the capacity to store numbers again). Justice Sutton stated, "if all you need to show is storing and calling, that would apply to the 'capacity' of nearly every piece of equipment, whether designed to produce randomly generated numbers or not." *Id.* at 1307.

[62] *See Gadelhak*, 950 F.3d at 460 (concluding that machines that generate phone numbers from a pre-existing list do not constitute an automatic machine under the TCPA). A machine is not considered an ATDS because "it exclusively dials numbers stored in a customer database." *Id. See also Glasser*, 948 F.3d at 1304 (explaining that when a machine calls a phone number that is already stored in its company's database, it does not qualify as an automatic dialer and is not liable under the jurisdiction of the TCPA).

[63] *See Gadelhak*, 950 F.3d at 461 (explaining how certain machines access customer databases). In *Gadelhak*, AT&T used its customer database to make phones calls. *Id.* "The system, like others commonly used today, pulls and dials numbers from an existing database of customers rather than randomly generating them." *Id.* In *Gadelhak*, a man received messages that he believed to be automatically generated but was called due to a "typographical error." *Id.* The Court held that AT&T was not liable under the TCPA because it used its own customer database, rather than an "automatic number generator." *Id.* at 460.

[64] *See* Allan v. Pa. Higher Educ. Assistance Agency, 968 F.3d 567, 573 (6th Cir. 2020) (explaining the consequences of what could happened if the term "store" was interpreted too strictly). "If stored-number systems are not covered, companies could avoid the autodialer ban altogether by transferring numbers from the number generator to a separate storage device and then dialing from that separate storage device." *Id.*

storage system to autodial numbers without consent.[65]   Different Circuit Courts took it upon themselves to determine the true meaning of "store" when deciding if a machine was actually a random number generator.[66]

B.   *Equipment That Had the Capacity to "Produce" Numbers*

Further, courts considered whether a machine had the ability to produce numbers when determining whether a machine was a random number generator.[67] Some Circuit Courts held that when a customer's phone number was already in the customer database, these machines did not have the ability to "produce" the same number again.[68] For example in *Glasser*, the Eleventh Circuit determined that numbers already stored in the customer databases did not have the ability to produce the numbers, whereas in *Marks*, the Ninth Circuit Court held that because these machines created phone numbers, they were in fact

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[65] *See id.* at 569 (summarizing the importance of the word "store" in the language of the TCPA).

[66] *See id.* (justifying that regardless of using separate databases, companies should still be held liable under the TCPA because their machines still have the ability to "store" numbers). *See also* Marks v. Crunch San Diego, LLC, 904 F.3d 1041, 1043 (9th Cir. 2018) (concluding that all numbers called through a machine have the ability to "store" and should be held liable under the TCPA). Justice Ikuta from the Ninth Circuit stated, "the statutory definition of ATDS includes a device that stores telephone numbers to be called, whether or not those numbers have been generated by a random or sequential number generator." *Id.*

[67] *See Gadelhak*, 950 F.3d at 458 (holding that if a machine has access to a number already stored in a database, it is unable to "produce" the number again). *Contra Allan*, 968 F.3d at 567 (holding that liability under the TCPA is not dependent on a machine's ability to "produce" a number). *Contra* Karl Koster, *Reply Comments of Noble Systems Corp.*, FCC DA 18-493, 3 (2018) (explaining that a machine must be able to "produce" a number in order to be liable under the TCPA). Koster argued there is no difference between a machine producing a number that is either randomly "produced" or "produced" through a customer database. *Id.*

[68] *See Gadelhak*, 950 F.3d at 458 (recognizing the idea that when a machine uses a customer database to create numbers, it is not "producing" new numbers and thus not under the jurisdiction of the TCPA). *See* Glasser v. Hilton Grand Vacations Co., 948 F.3d 1301, 1304–05 (11th Cir. 2020) (holding that a machine is unable to "produce" a number when it is already in a customer database that it has access to). *See also* Koster, *supra* note 67, at 1 (demonstrating that some machines have the ability to produce phone numbers using databases). A "number can be generated and immediately dialed, or generated, stored in a file, and then subsequently dialed." *Id.* at 5.

"producing" numbers.[69] The Ninth Circuit held that the mere fact that these companies already had the numbers in their databases did not affect the machines actual ability to "produce" numbers.[70] The debate still stood within the differing Circuit Courts because of a company's ability to use phone numbers that were already stored in their databases.[71]

C. Equipment That Did Not Require Human Intervention

Moreover, Circuit Courts have also disputed the true definition of "automated."[72] The Eleventh and the Seventh Circuits are argued that

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[69] *See Glasser*, 948 F.3d at 1304–05 (providing that when a number is already in a customer database, it is not randomly or sequentially generated). Justice Sutton of the Eleventh Circuit further argued that to be liable under the TCPA, the random number generator must produce a phone number, rather than accessing an existing customer database to dial that specific number. *Id.* at 1309. *Contra Marks*, 904 F.3d at 1050 (advocating that if a machine creates a phone number, it is also producing that number). *Contra Allan*, 968 F.3d at 577 (contending that the word "produce" and "store" are redundant). "Congress intended to regulate (1) number-producing devices, (2) number-storing devices, and (3) dual-function devices." *Id.* In *Allan*, the Sixth Circuit argued that instead of nitpicking the grammar, including the comma placement, of the TCPA, Circuit Courts should analyze and interpret what was actually meant by 47 U.S.C. § 227. *Id.* at 574.

[70] *See Marks*, 904 F.3d at 1051 (repeating that the purpose of the TCPA was to eliminate robocalls). The Ninth Circuit held that the "language in the statute indicates that equipment that made automatic calls from lists of recipients was also covered by the TCPA." *Id.* The Court further argued that the TCPA allowed auto dialers to call customers after receiving prior consent under 47 U.S.C. § 227(b)(1)(A), which meant that "an autodialer would have to dial from a list of phone numbers of persons who had consented to such calls, rather than merely dialing a block of random or sequential numbers." *Id.*

[71] *See Gadelhak*, 950 F.3d at 464 (summarizing the interpretations the different Circuit Courts have adopted). When analyzing the grammar of the statute, the Seventh Circuit referenced the Eleventh Circuit, which held that "[w]hen two conjoined verbs ('to store or produce') share a direct object ('telephone numbers to be called'), a modifier following that object ('using a random or sequential number generator') customarily modifies both verbs." *Id.* (quoting *Glasser*, 948 F.3d at 1306). "The placement of the comma before 'using a random or sequential number generator' in the statute further suggests that the modifier is meant to apply to the entire preceding clause." *Id.* *See also* Brief for Petitioner at 2, Facebook v. Duguid, 926 F.3d 1146 (9th Cir. 2019) (No. 19-511) [hereinafter *Brief*] (analyzing the importance of the grammar of the Statute).

[72] *See Glasser*, 948 F.3d at 1312 (arguing a machine that requires human intervention does not qualify as "automated"). *Contra Marks*, 904 F.3d at 1044 (maintaining that all robocalls are considered "automated"). "Recipients deemed that 'automated' telephone calls that deliver an artificial or prerecorded voice message are more of a

if a machine required any form of human intervention, calling that machine "automated" was no longer available.[73] The *Glasser* Court held that because the number generator required a person to click "send," it lost its status as an automatic generator.[74] Nevertheless, the Second, Sixth, and Ninth Circuits still determined that even if an individual spent a moment clicking "send," it did not erase the status of an automated phone number generator.[75] Ultimately without

nuisance and a greater invasion of privacy than calls placed by 'live' persons." *Id.* (quoting 137 Cong. Rec. S16, 205 (Nov. 7, 1991)). *Contra Allan*, 968 F.3d at 576 (holding that even a small amount of human intervention did not disqualify a machine from retaining the status of an automatic machine). The Sixth Circuit notes that even if a machine dials a number that was created through a human-generated list, it would still be liable under the TCPA as an "automatic" machine. *Id.*

[73] *See Gadelhak*, 950 F.3d at 464 (summarizing that not all number generators qualify as "automated"). When interpreting the meaning of the TCPA, the Seventh Circuit held that "the phrase 'using a random or sequential number generator' describes how the telephone numbers must be 'stored' or 'produced,'" rather than a human generating the phone number or a human instructing the machine to make the phone call. *Id.* at 468. *See also Glasser*, 948 F.3d at 1306 (providing that if a machine requires human intervention to dial phone numbers, it does not qualify as "automated"). In *Glasser*, "the telephone equipment in her case required human intervention and thus was not an 'automatic' dialing system in the first place." *Id.* at 1312.

[74] *See id.* (explaining the importance and relevance of human intervention when determining if a machine is considered "automatic"). In *Glasser*, the machine randomly generated phone numbers and employees had to press "make call" in order for the machine to dial the number. *Id.* The Eleventh Circuit stated, "[f]ar from automatically dialing phone numbers, this system require[d] a human's involvement to do everything except press the numbers on a phone." *Id.* The Court further held that because the machine's performance was dependent on an individual's actions, it was not possible to consider the machine "automatic." *Id.*

[75] *See* Duran v. La Boom Disco, Inc., 955 F.3d 279, 283 (2d Cir. 2020) (holding that even if a machine relied upon a human to make a voice call or text message, the machine itself could still be considered "automatic"). "Clicking 'send' does not require enough human intervention to turn an automatic dialing system into a non-automatic one." *Id.* at 290. The Second Circuit argued that "[a]ny system—ATDSs included—will always require some human intervention somewhere along the way, even if it is merely to flip a switch that turns the system on." *Id.* at 287. *See also Allan*, 968 F.3d at 569 (stating that other Circuit Courts should look to the original meaning of the TCPA, rather than analyzing the level of human dependence). The Sixth Circuit stated that "when it comes to interpreting the word 'store,' they [the Seventh and Eleventh Circuits] pivot and play up the administrative history and 'practical effects,' while downplaying a textual reading of surrounding provisions that would open up a broader application of the autodialer ban." *Id.* at 579. *See also Marks*, 904 F.3d at 1044 (reasoning that even if a machine required human intervention, it still should be considered "automatic"). Regarding the difference

clarification from the Supreme Court, Circuit Courts will remain split over this issue.[76]

D. Could a Person Consent to Receiving Robocalls?

The TCPA clearly stated that robocalls were not permitted unless there was "prior express consent."[77] If a consumer contested

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between a human solicitor calling a customer rather than an automated system, "'[t]hese automated calls cannot interact with the customer except in preprogrammed ways, do not allow the caller to feel the frustration of the called party' and deprive customers of 'the ability to slam the telephone down on a live human being.'" *Id.*

[76] *See Allan*, 968 F.3d at 569 (holding that the Sixth Circuit finds "automatic" phone calls includes phone numbers dialed through a customer database). *See also Duran*, 955 F.3d at 279 (noting that the Second Circuit finds "automatic" phone calls are all phone calls made through machines). *See also Marks*, 904 F.3d at 1042 (explaining that when phone numbers are dialed using a random number generator, the Ninth Circuit finds these machines to be considered "automatic"). *See also* Jason C. Gavejian & Maya Atrakchi, *Supreme Court Will Take on The TCPA Again*, THE NAT'L L. REV. (July 21, 2020), *archived at* https://perma.cc/9BMF-UR35 (comparing the different interpretations of the TCPA among different Circuit Courts). "The Second and Ninth Circuit have both broadly interpreted the definition of an ATDS, while the Third, Seventh and Eleventh have taken a much narrower reading." *Id. See also* Ronald G. London, *Split Among Federal Appellate Courts on Autodialer Definition Deepens*, DAVIS, WRIGHT, TREMAINE LLP (July 9, 2020), *archived at* https://perma.cc/X588-LKRB (examining the Circuit Court Split). *Contra Gadelhak*, 950 F.3d at 458 (arguing that the Seventh Circuit finds numbers called through a customer database do not qualify as "automatic"). *Contra Glasser*, 948 F.3d at 1304–05 (summarizing that the Eleventh Circuit finds that random number generators do not qualify as "automatic" because they are dependent on some form of human intervention).

[77] *See* Cecily Fuhr, *What Constitutes "Prior Express Consent" Under Telephone Consumer Protection Act (TCPA), 47 U.S.C.A. § 227*, 93 A.L.R. FED. 2d 343 (2015) (summarizing what prior express consent means in terms of the TCPA). *See also IN THE MATTER OF RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991*, 27 FCC Rcd. 1830, 1844 (2012) (setting forth the FCC's regulations in terms of enforcing the TCPA).

> [A] consumer's written consent to receive telemarketing robocalls must be signed and be sufficient to show that the consumer: (1) received "clear and conspicuous disclosure" of the consequences of providing the requested consent, i.e., that the consumer will receive future calls that deliver prerecorded messages by or on behalf of a specific seller; and (2) having received this information, agrees unambiguously to receive such calls at a telephone number the consumer designates.

Id. See also Stuart L. Pardau, *GOOD INTENTIONS AND THE ROAD TO REGULATORY HELL: HOW THE TCPA WENT FROM CONSUMER*

their initial consent, the seller had the burden to provide evidence that the consumer not only expressly consented to receiving robocalls, but also clearly understood the extent of which types of robocalls they consented to.[78] However, most companies hid from their consumers what constituted "prior express consent" and as a result, these consumers failed to understand that they agreed to robocalls in the first place.[79] Further, even if some were aware of whether or not they consented, they likely were unable to realize the extent of what these calls actually entailed.[80] For example, courts held that when an individual applied for a line of credit either through credit cards or similar types of accounts, and listed their phone number, they were actually giving permission to receive robocalls from that company.[81] These robocalls ranged from fraud alerts, to debt collections, and even

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PROTECTION STATUTE TO LITIGATION NIGHTMARE, 2018 U. ILL. J. L. TECH. & POL'Y 313, 335–36 (2018) (outlining how a company can gain consent from a consumer). *See also FCC Actions on Robocalls, Telemarketing*, *supra* note 29 (summarizing how the FCC has interpreted consent in terms of the TCPA).

[78] *See* Fuhr, *supra* note 77, at 9 (comparing the extent to which companies have repeatedly contacted their consumers to collect debts). *See also* Douglas A. Samuelson, *Predictive Dialing for Outbound Telephone Call Centers*, 29 INTERFACES 66, 67 (1999) (recalling the different types of technology). One specific "system was able to collect, virtually instantaneously, durations of service, proportions of dialing attempts that resulted in an answer, and durations of successful dialing attempts." *Id.* at 70–71. Telemarketing became a type of science that was analyzed in order to make the most of the telemarketers' time. *Id.*

[79] *See* Fuhr, *supra* note 77, at 10 (evaluating the different ways companies contacted their customers via robocall). *See also* Kenny v. Mercantile Adjustment Bureau, LLC, 10-CV-1010, 2013 WL 1855782, at *2 (W.D.N.Y. May 1, 2013) (acknowledging that consent can be achieved by merely providing a phone number). In *Kenny v. Mercantile Adjustment Bureau*, the plaintiff provided his number on his brother-in-law's hospital admission form. *Id.* Years later, the plaintiff received calls from a debt-collection agency in regard to his brother-in-law's hospital stay. *Id.* The Court held that because the plaintiff had released his phone number on the hospital admission's form, he had consented to being contact in regard to all matters, including financial payments, regarding his brother-in-law's hospital stay. *Id.* at *6.

[80] *See* Pardau, *supra* note 77, at 329 (analyzing how companies were able to bombard their customers with robocalls in order to collect a debt). *See also* Reynari, *supra* note 5, at 1 (stating that an individual consents to robocalls when he/she provides their phone number on any type of form).

[81] *See* Fuhr, *supra* note 77, at 9–10 (stating that by merely listing a phone number on a credit application, an individual is consenting to particular robocalls). In *Himes v. Client Services Inc.*, the plaintiff filled out an application for cellphone service and provided her number. *Id.* The Court held that by releasing her phone number on the application, she consented to being contacted via robocall to collect her debt. *Id.*

to further advertisements.[82] What most individuals did not realize was that in order to bypass these robocalls, individuals had to give a written notice revoking their consent, and sometimes, that still was not enough to stop these robocalls from interrupting.[83]

E.   How Organizations Avoided the TCPA

Prior to 2020, the debate involved outside advertisers because they accessed private customer information in order to collect debts.[84] Even though the Supreme Court determined in *Barr* that debt-related robocalls were not liable under the TCPA, there still remained the question of what exactly was an ATDS under the TCPA.[85] While those issues   were   still   present,   the   real   issue   took   shape   in

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[82] *See id.* at 28–29 (juxtaposing the different varieties of robocalls). *See also* Pardau, *supra* note 77, at 329–30 (providing examples of the types of robocalls consumers received). *See also* 47 U.S.C. § 227(a)(4) (identifying advertisers and telemarketers). Robocalls included "telemarketing" 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." *Id.*

[83] *See* Emily Headlee, *SHEDDING "REYES" OF LIGHT ON RULES OF REVOCATION*, 22 J. OF INT. L. 3, 4–5 (2018) (pointing to the FCC's order in 2015 regarding revocation of consent). "[T]he TCPA permits consumers to revoke their prior express consent to be contacted by telephone autodialing systems." *Id.* (quoting Van Patten v. Vertical Fitness Group, LLC, 847 F.3d 1037, 1048 (9th Cir. 2017)).

[84] *See* ACA Int'l. v. FCC., 885 F.3d 687, 693 (D.C. Cir. 2018) (explaining that the FCC attempted to define what was considered an ATDS under the TCPA in order to prevent solicitors from unlawfully contacting individuals). *See also* Berkenblit, *supra* note 17, at 95 (summarizing the history of robocalls in the United States). Prior to the 1920s, men would visit houses to make "door to door sales." *Id.* When the war began, the style of sales shifted from men knocking on doors to women making phone calls. *Id.* This surge in phone calls and violations of privacy led Congress to create the TCPA. *Id.* "Representative Edward J. Markey of Massachusetts, one of the Act's framers, the Telephone Consumer Protection Act of 1991 represented an attempt by Congress to balance an individual's right to privacy in his or her home with technological advances in telemarketing." *Id.*

[85] *See* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2356 (2020) (explaining that debt collectors were unable to conduct robocalls). *See also* Eric J. Troutman, *Stacked Deck?: Trump Nominates Judge that Has Already Ruled on TCPA's ATDS Definition to Supreme Court Just In Time For Facebook ATDS Appeal*, THE NAT'L L. REV. (Sept. 28, 2020) [hereinafter Troutman, *Stacked Deck*], *archived at* https://perma.cc/9JNU-7GQR (evaluating Justice Barret's role in TCPA related cases).

telecommunications companies.[86] Companies like AT&T enabled the use of their random number generators and were not liable under the TCPA in different states because the phone numbers created were actually generated from their own customer databases.[87] As a result, multi-billion dollar companies, like Facebook, attempted to avoid the TCPA through grammatical discrepancies.[88]

In *Duguid v. Facebook*, Facebook sent countless and unconsented text messages and emails to the plaintiff, who was not a customer.[89] The lower court initially dismissed this case because the plaintiff only speculated that Facebook had used an ATDS and the lower court required sufficient evidence.[90] On appeal, the plaintiff argued that Facebook violated the TCPA because it did in fact use an ATDS to contact both customers and non-customers.[91] However, Facebook argued that because it never "called" individuals, its

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[86] *See* Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 467–68 (7th Cir. 2020) (examining that when telephone companies, like AT&T, already have customer databases, the numbers dialed through their machines should not count as "automatic" and should not be held liable under the TCPA). *See also* Glasser v. Hilton Grand Vacations Co.*,* 948 F.3d 1301, 1312 (11th Cir. 2020) (supporting the position of the Seventh Circuit regarding the TCPA and how machines that use a customer database do not qualify as an "automatic dialing system" and thus should not be liable under the TCPA).

[87] *See id.* (summarizing that machines which utilize customer databases to access phone numbers do not qualify as "automatic"). *See also* Gavejian & Atrakchi, *supra* note 76 (discussing the holdings of different Courts regarding the actual meaning of the TCPA). "[T]he Eleventh and Seventh Circuit Courts reached similar conclusions, back-to-back, narrowly holding that the TCPA's definition of Automatic Telephone Dialing System (ATDS) only includes equipment that is capable of storing or producing numbers using a 'random or sequential' number generator, excluding most 'smartphone age' dialers." *Id.* The Ninth Circuit held that when companies access numbers already in their customer databases in order to call numbers, they are not liable under the TCPA because these machines did not "store" or "produce" these phone numbers. *Id.*

[88] *See* Duguid v. Facebook, Inc., 926 F.3d 1146, 1150 (9th Cir. 2019) (summarizing Facebook's debated violation of the TCPA). *See also* Pector & Wilkerson, *supra* note 14 (concluding that Facebook violated the TCPA under *Duguid v. Facebook*).

[89] *See Duguid*, 926 F.3d at 1150 (articulating that Facebook sent automated messages without consent). Facebook also attempted to argue that under the emergency exception, these messages were sent to protect the safety of its customers by alerting them that a different browser was attempting to access its users accounts. *Id.* at 1152. However, this argument failed because Duguid was not a customer of Facebook. *Id.*

[90] See Duguid v. Facebook, No. 15-CV-00985-JST, 2016 WL 1169365, at *1 (N.D. Cal. Mar. 24, 2016) (summarizing the lower court's decision to dismiss the case).

[91] *See Duguid*, 926 F.3d at 1151 (maintaining that Facebook used an auto dialer to contact individuals).

machine was not considered an ATDS.[92] The Ninth Circuit went back to the original purpose and intention of the TCPA, rather than using a textualist approach and dissecting each word and comma.[93] It held that Facebook was liable under the TCPA because it sent "automated, unwanted, and unsolicited" messages to the plaintiff, instead of trying to interpret the grammar and semantics of the TCPA.[94] Even though the appellate court ruled in favor of the plaintiff, the Supreme Court accepted this case.[95] Many believed that this case acted as a path for the Supreme Court to clarify the definition of an ATDS.[96]

While the TCPA originally intended to protect individual privacy rights, Justice Barrett's appointment to an already conservative majority of Justices to the Supreme Court may affect this outcome.[97] Justice Barrett, acting as an Appellate Judge of the Seventh Circuit, previously ruled that phone numbers stored in customer databases did not equate to "auto-dialers" because the machines could not randomly dial a number if it was already stored in its own database.[98] Under this assumption, the equipment was not liable under

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[92] *See id.* (recognizing that 47 U.S.C. § 227 requires a phone number "to be called" in order to qualify under the TCPA). Facebook "differentiates its equipment because it stores numbers 'to be called' only reflexively—as a preprogrammed response to external stimuli outside of Facebook's control." *Id.*

[93] *See id.* at 1152 (concluding that the purpose of the TCPA was to protect the privacy of individuals). Judge McKeown stated, "Our reading supports the TCPA's animating purpose—protecting privacy by restricting unsolicited, automated telephone calls." *Id.* Under this assumption, it appeared that even though Facebook could have had a case because it did not technically "call" phone numbers, the Ninth Circuit deliberately ignored it because it applied the original reasoning of the TCPA when assessing what an ATDS was. *Id.*

[94] *See Duguid*, 926 F.3d at 1151–52 (defending the idea that the intention of the TCPA trumps its own grammar).

[95] *See* Pector & Wilkerson, *supra* note 14 (explaining the importance of the Supreme Court hearing oral arguments for *Duguid v. Facebook*).

[96] *See* Troutman, *Grin and Barrett*, *supra* note 56 (analyzing the significance of *Duguid v. Facebook* in terms of the TCPA). *See also* Pector & Willkerson, *supra* note 14 (asserting that the Supreme Court will clarify the meaning of an ATDS under the TCPA). This case will clarify what the Circuits have split on and "[r]egardless of how the Supreme Court rules, its decision will hopefully provide more certainty to companies seeking to align their telemarketing strategies with applicable legal requirements." *Id.*

[97] *See* Troutman, *Grin and Barrett*, *supra* note 56 (evaluating Justice Barrett's position of what an ATDS is under the TCPA).

[98] *See* Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 460 (7th Cir. 2020) (concluding that numbers dialed out of customer stored databases did not constitute as "auto dialers").

the TCPA by definition because it failed to "produce" these particular phone numbers.[99] Because the Supreme Court failed to explicitly state a clear definition of an ATDS in *Barr*, future cases still face the same the dilemma: what exactly is an ATDS?[100] With the Supreme Court's interception of *Duguid v. Facebook*, individuals may soon have an answer, but many wonder if Justice Barrett, in addition to the conservative majority of Supreme Court Justices, will be the deciding factor in determining what an ATDS is under the TCPA.[101]

IV.   Analysis

Just as the Ninth Circuit concluded that an ATDS included devices that stored numbers with or without the use of a random number generator, the Supreme Court should also hold that numbers dialed from a stored database are liable under the TCPA.[102] Congress implemented the TCPA to protect the public from receiving constant

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[99] *See id.* at 463 (holding that a machine had to produce a number in order to qualify as an "automatic telephone dialing system"). *See also* Daniel L. Delnero, *Seventh Circuit Joins The Party: Another Circuit Rejects Marks And Holds A Random or Sequential Number Generator Is Required For A System to be An ATDS*, TCPAWORLD (Feb. 19, 2020), *archived at* https://perma.cc/3H7N-9JMM (explaining the significance of the Seventh Circuit's holding in terms of the future of the TCPA).

[100] *See generally* Delnero, *supra* note 99 (emphasizing the lack of clarity in regard to the definition of an ATDS).

[101] *See* Troutman, *Grin and Barrett*, *supra* note 56 (predicting the consequences of Barrett's nomination into the Supreme Court in regard to the TCPA). *See also* Troutman, *Stacked Deck*, *supra* note 85 (stating that although Barrett must withdraw from *Gadelak* because she presided over it, she still has the option to use her sway in other similar cases). Troutman stated, "The legal issue to be determined in *Facebook* is certainly the same as the issue determined by Judge Barrett in *Gadelhak*, but the two cases are not technically related." *Id. See also Supreme Court Oral Arguments on TCPA Case Focus on Grammar and Technology*, DNC (Dec. 9, 2020) [hereinafter *Supreme Court Oral Arguments*], *archived at* https://perma.cc/SC2Y-ZM5W (highlighting the importance of the Supreme Court's decision in *Duguid v. Facebook*).

[102] *See* Marks v. Crunch San Diego, LLC, 904 F.3d 1041, 1043 (9th Cir. 2018) (stating that regardless of whether a number is stored, if a piece of equipment dials a phone number using a random and automated system, it should still be liable under the TCPA). *See also* Delnero, *supra* note 99 (stating that the TCPA was written in a way to include all machines that both produce and store phone numbers, rather than believing that the legislatures wrote "to store" as a way for multi-million dollar companies to escape liability under the TCPA).

unsolicited robocalls.[103]   Rather than abide by its regulations, companies found ways to avoid liability through grammar.[104] *Barr* was supposed to provide clarification but instead, allowed companies to continue to bombard individuals with incessant robocalls.[105] When the Supreme Court accepted *Duguid v. Facebook* for review, it has the opportunity to clarify these policies.[106] However, with a majority of conservative Justices, including newly appointed, former Seventh Circuit Justice, Amy Coney Barrett, many fear that the TCPA could become obsolete or even worse, the Justices could ignore the original intention of the TCPA.[107]

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[103] *See* Berkenblit, *supra* note 17, at 86 (affirming the belief that most Americans do not enjoy the interruption of robocalls). *See also* Ryder, *supra* note 10 (observing the intrusiveness of robocalls). As a result of the seriousness of the nature of these calls, "if a debt collector makes impermissible robocalls to a consumer's cell phone, the debt collector is liable for $500 per call." *Id.*

[104]   *See* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2343 (2020) (condemning how robocalls interrupted daily lives). Justice Kavanaugh articulated that Americans differ about many issues except for one: "their disdain for robocalls." *Id. See also* Johnson, *supra* note 30 (reasoning that despite in place regulations, certain companies unlawfully contact consumers under the disguise of nonprofit and governmental organizations). Johnson argued that these companies deceived consumers by lying about their true identities in order to gain profit from an unsuspecting public through the use of robocalls. *Id.* Johnson further argued that these companies "spoofed" their phone number so when an individual believed the IRS was calling, it was actually a telemarketer. *Id.*

[105] *See* Stokes, *supra* note 4 (explaining that *Barr* only prohibited debt collectors from conducting robocalls).

[106] *See* Troutman, *Fireworks*, *supra* note 10 (explaining how conservative Justices could interpret the statute). "'Textualism' as it is called, is particularly important in Constitutional review– 'textualists' tend to read the Constitution narrowly to give Americans less freedom (and the government more power to regulate)," whereas the more liberal Justices consider how the law applies to today. *Id.*

[107] *See* Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 468–69 (7th Cir. 2020) (reasoning that the grammar must be examined in 47 U.S.C.A). *See also* Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1304 (11th Cir. 2020) (recalling that the statute was written grammatically for a reason and that grammar must be taken into account when identifying an ATDS). *See also Brief*, *supra* note 71, at 4 (explaining the extent of challenging grammar when decoding the TCPA). *See also* Troutman, *Grin and Barrett*, *supra* note 56 (describing that the TCPA is "one of the worst written statutes in American history"). *See also Supreme Court Oral Arguments*, *supra* note 101 (examining the relevance of grammar in the statue). While listening to oral arguments, "Chief Justice John Roberts mused about whether or not the proper way to handle this issue was to 'look to the sense of the passage and not the syntax.'" *Id.*

A.   *The Supreme Court Should Not Follow the Textualist Approach When Deciding on Duguid v. Facebook*

Rather than focus on the exact grammar from 1991, the Supreme Court Justices should apply the drafter's original intentions because the placement of a single comma should not dictate an entirely new interpretation of the TCPA.[108] A law comes into existence because of legislative intent, and as such, cannot be ignored.[109] Prior to the TCPA, three hundred thousand telemarketers contacted eighteen million Americans daily.[110] Without the Supreme Court's support of the TCPA's original intent, it is possible that consumers will lose their protections and once again, be bombarded by a gargantuan amount of robocalls.[111]

Currently, there are six conservative Justices on the Supreme Court, including one who has already found that numbers dialed from stored databases do no not qualify as an ATDS under the TCPA.[112]

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[108] *See* Duran v. La Boom Disco, Inc., 955 F.3d 279, 285 (2nd Cir. 2020) (arguing that the placement of the comma does not change the intended meaning of the TCPA). The Second Circuit held that rather than focus attention on the grammar of the statute, the focus should instead be on what the statute actually meant. *Id.* at 283. *See also* Allan v. Pa. Higher Educ. Assistance Agency, 968 F.3d 567, 572 (6th Cir. 2020) (holding that the entire interpretation of a statute should not rest on a single comma). *See also* Troutman, *Fireworks*, *supra* note 10 (highlighting the significance of the future ruling of *Duguid v. Facebook* in terms of the TCPA). *See* Troutman, *Grin and Barrett*, *supra* note 56 (evaluating what it means for the Supreme Court to rule on *Duguid v. Facebook*). *See also* London, *supra* note 76 (affirming the level of importance of the holding in *Duguid v. Facebook*). "The Supreme Court has agreed to resolve the circuit split on the auto dialer issue by granting the petition for certiorari in the *Facebook v. Duguid* case, in what will surely be one of the most closely watched cases of the upcoming Term." *Id.*

[109] *See* Duguid v. Facebook, Inc., 926 F.3d 1146, 1152 (9th Cir. 2019) (defending the idea that the intention of the TCPA trumps its own grammar).

[110] *See* Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368, 370–71 (2012) (evaluating the extent that telemarketers contacted individuals). "Voluminous consumer complaints about abuses of telephone technology—for example, computerized calls dispatched to private homes—prompted Congress to pass the TCPA." *Id. See also* Waller, *supra* note 23 (examining the extent to which telemarketers were able to contact consumers). Prior to the TCPA, it was estimated that over "300,000 telemarketers contacted more than 18 million Americans every day." *Id.*

[111] *See Supreme Court Oral Arguments*, *supra* note 101 (predicting the outcome of the TCPA while Justices rule on *Duguid v. Facebook*).

[112] *See* Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 458 (7th Cir. 2020) (examining Justice Barrett's interpretation of an ATDS under the TCPA). *See* Troutman, *Grin and Barrett*, *supra* note 56 (predicting how Justice Barrett's interpretation of an ATDS under the TCPA will be applied in cases like *Duguid v. Facebook*). *See also*

With this majority, it is likely that the Justices will adopt a "textualist" view of the statute.[113] This means that the Justices will dissect the statute word by word and hold that an ATDS is only a piece of equipment that could store or produce phone numbers, use a random number generator, and dial those specific numbers.[114] Like the Seventh and Eleventh Circuits, these conservative Justices will argue that the placement of a comma within the clause "using a random or sequential number generator," modifies both "produce" and "store" as verbs.[115] Therefore, they will argue that to be considered a true ATDS, a particular form of equipment has to be able to store numbers using a random number generator or produce numbers using a random number generator.[116] For companies like AT&T, it would be nearly impossible

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See Troutman, *Fireworks*, *supra* note 10 (analyzing how a conservative court would interpret what an ATDS is under the TCPA). "Courts are supposed to apply certain very specific (sometime arcane) rules to discern the meaning intended by Congress." *Id.*

[113] *See id.* (outlining how textualists interpret statutes). "'[T]extualists' tend to read the Constitution narrowly to give Americans less freedom (and the government more power to regulate)." *Id.*

[114] *See* Glasser v. Hilton Grand Vacations Co., 948 F.3d 1301, 1304–05 (11th Cir. 2020) (affirming the belief that an ATDS must have the capability to store numbers that were randomly generated and without the dependency of human intervention). The Eleventh Circuit held that when a machine currently stored phone numbers and still required human intervention to dial the number, its status as an ATDS would not sustain. *Id.* at 1313. *See also Gadelhak*, 950 F.3d at 468 (advocating for the grammar be taken seriously in the Statute). "[A] qualifying phrase separated from antecedents by a comma is evidence that the qualifier is supposed to apply to all the antecedents instead of only to the immediately preceding one." *Id.* (quoting William N. Eskridge Jr., *Interpreting Law: A Primer on How To Read Statutes and the Constitution* 67–68 (2016)). *See also* Troutman, *Fireworks*, *supra* note 10 (defining how a conservative justice is considered a "Textualist," and will likely read the statute verbatim and take a literal approach to it rather than an interpretative approach that could be applied to today). "The battle between the 'at the timers' (textualists) and the 'now matters' justices was on plain display in the questioning." *Id.*

[115] *See Brief*, *supra* note 71, at 4 (reasoning that the grammatical language of the Statute must be taken seriously). Counsel for the Petitioner stated that "[t]he immediate context thus strongly suggests that 'store or produce' is an integrated phrase and that both the direct object and the adverbial phrase that follow 'produce' attach to both verbs." *Id.*

[116] *See Gadelhak*, 950 F.3d at 468 (analyzing the writing mechanics specified in the statute). *See also Glasser*, 948 F.3d at 1306 (upholding the requirement to study the meaning of the purposeful grammar in the statute). *See also Brief*, *supra* note 71, at 4 (highlighting the importance of syntax in the Statute).

to generate random phone numbers because they already stored these numbers in their customer databases.[117]

This interpretation of the TCPA should be rejected because Congress originally intended to protect consumers from unwarranted intrusions of privacy.[118] Prior to 1991, advertisers called and faxed at all hours of the day and had free reign to conduct their business without any tangible regulations.[119] Congress did not enact the TCPA with the purpose of companies finding ways around it due to language choice.[120] The Legislature implemented the TCPA to protect consumers who suffered at the hands of advertisers and it is the responsibility of the Supreme Court to protect these consumers by upholding its original meaning.[121]

The Supreme Court should follow the Second, Sixth, and Ninth Circuits when deciding *Duguid* because all three Circuits properly looked at the original intention of TCPA rather than its complex grammatical structure.[122] In addition, these Circuits analyzed the

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[117] *See Gadelhak*, 950 F.3d at 460 (summarizing that when a company has a customer database that it uses to dial phone numbers from, it is not possible to be called an ATDS because it does not use a random number generator to create the phone numbers to call). *See also Brief*, *supra* note 71, at 6 (focusing on the true grammatical meaning of the Statute). Counsel for the Petitioner argued that due to the comma placement the phrase, "using a random or sequential number generator" had to apply to both store and produce and therefore those machine that accessed current customer databases could not qualify as an ATDS. *Id.*

[118] *See* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2344 (2020) (evaluating the purpose of the TCPA). The Supreme Court held that the TCPA was rightfully enacted because "[c]onsumers were 'outraged' and considered robocalls an invasion of privacy 'regardless of the content or the initiator of the message.'" *Id.*

[119] *See id.* at 2343 (condemning how robocalls interrupted daily lives). Justice Kavanaugh articulated that Americans differ about many issues except for one: "their disdain for robocalls." *Id. See also* Berkenblit, *supra* note 17, at 99 (affirming the belief that most Americans do not enjoy the interruption of robocalls).

[120] *See* Allan v. Pa. Higher Educ. Assistance Agency, 968 F.3d 567, 573 (6th Cir. 2020) (arguing that the strict grammatical interpretation of the statute loses its intended meaning). The Sixth Circuit held that "[t]he last antecedent rule 'is "not an absolute and can assuredly be overcome by other indicia of meaning."'" *Id.* at 572 (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)). *Contra Gadelhak*, 950 F.3d at 468 (proposing that the language of the statute is paramount when interpreting its meaning).

[121] *See* Ryder, *supra* note 10 (observing the intrusiveness of robocalls). As a result of the seriousness of the nature of these calls, "if a debt collector makes impermissible robocalls to a consumer's cell phone, the debt collector is liable for $500 per call." *Id.*

[122] *See Allan*, 968 F.3d at 579–80 (holding that the intention of the TCPA is more important than its grammar). *See also* Duran v. La Boom Disco, Inc., 955 F.3d 279,

extent of human intervention required to be considered an ATDS, whether or not an individual consented to the robocall, and the TCPA's role in consumer protection.[123] The Sixth Circuit argued that even though grammatically "using a random or sequential number generator" could technically modify both "produce" and "store," this strict reading failed to encompass the purpose of the TCPA.[124] Additionally, the Sixth Circuit suggested that if "stored number systems" were not included in the TCPA, corporations could transfer their customer databases to a separate system and then use that system to generate phone calls and still avoid liability under the TCPA.[125] The Ninth Circuit's decision could also be beneficial to the Supreme Court because there, the Court analyzed the level of human intervention, which would preclude systems from falling under the ATDS definition.[126] Because technology has advanced and the term "dial" has evolved into "send" and "call," the level of human intervention has

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283 (2nd Cir. 2020) (explaining the significance of Congress's intent when enacting the TCPA). When interpreting the TCPA, one must pay "close attention to Congress's intent, as expressed in the particular language of the statute, as well as to the interpretation of the statute over the last two decades by the Federal Communications Commission." *Id. See also* Marks v. Crunch San Diego, LLC, 904 F.3d 1041, 1051 (9th Cir. 2018) (highlighting the purpose of the TCPA). The "language in the statute indicates that equipment that made automatic calls from lists of recipients [is] also covered by the TCPA." *Id.*

[123] *See Allan*, 968 F.3d at 567 (holding that numbers stored in customer databases are still subject to the TCPA). *See also Duran*, 955 F.3d at 279 (supporting the positions that robocalls dialed from stored customer databases are also subject to the TCPA). *Contra Gadelhak*, 950 F.3d at 458 (objecting the idea that robocalls made through stored customer databases are subject to the TCPA). *Contra* Glasser v. Hilton Grand Vacations Co., 948 F.3d 1301, 1304–05 (11th Cir. 2020) (holding that a machine that dials numbers found in customer databases is not considered an ATDS by definition). *See also Marks*, 904 F.3d at 1051 (highlighting that the TCPA's purpose to protect consumers from unlawful robocalls, including calls made through customer databases). *See also* McKenna & Jackman, *supra* note 46 (explaining that the purpose of the TCPA was to eliminate unlawful robocalls).

[124] *See Allan*, 968 F.3d at 573 (reiterating that the intent of the TCPA trumps its grammatical structure).

[125] *See id.* (predicting how companies would avoid liability under the TCPA). "If stored-number systems are not covered, companies could avoid the auto dialer ban altogether by transferring numbers from the number generator to a separate storage device and then dialing from that separate storage device." *Id.* Because these companies would not be technically using number generators to store phone numbers, they would prevent liability under the TCPA because each piece of equipment would not be considered an ATDS. *Id.*

[126] *See Duran*, 955 F.3d at 288–89 (analyzing what amount of human intervention prevents a piece of equipment being called an ATDS).

decreased.[127] But, companies should not have the ability to escape the regulations of the TCPA because there is no physical dialing.[128] Rather, the Supreme court should take into account the original intent of limiting intrusive behavior.[129]

B.   The Supreme Court Should Follow the Precedent Set by Barr

The Supreme Court should follow its own example set in *Barr* because the Justices already held that all unconsented robocalls calls were a violation of the TCPA.[130] In his opinion, Justice Kavanaugh stated that the one thing that most Americans agree with is their distaste of robocalls.[131] Since the enactment of the TCPA in 1991, this has not changed.[132] When the Supreme Court severed the debt exception to the TCPA, it reaffirmed the importance of an individual's privacy.[133] However, in the dissent, Justice Breyer, Justice Ginsberg, and Justice Gorsuch argued that the debt-exception should not have been severed because robocalls enabled the government to collect debt at the most efficient rate.[134] These dissenting Justices were incorrect because the purpose of the TCPA was to prohibit all unconsented

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[127] *See id.* at 289–90 (describing how technology has aided a decrease in human intervention required for contacting an individual).

[128] *See id.* at 288–89 (arguing that the simple touch of "send" should not preclude companies from avoiding liability under the TCPA).

[129] *See id.* at 289 (justifying Congress's purpose in enacting the TCPA). "This approach seems to defy Congress's ultimate purpose in passing the TCPA, which was to embrace within its scope those dialing systems which can blast out messages to thousands of phone numbers at once, at least cost to the telemarketer." *Id.*

[130] *See generally* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2335 (2020) (recognizing that consumer protection is important).

[131] *See id.* at 2343 (reiterating that robocalls are a nuisance). During congressional hearings, one member of the Senate stated that robocalls were "the scourge of modern civilization." *Id.* "They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall." *Id.* (quoting 137 Cong. Rec. 30821 (1991).

[132] *See* Ryder, *supra* note 10 (observing the intrusiveness of robocalls). As a result of the seriousness of the nature of these calls, "if a debt collector makes impermissible robocalls to a consumer's cell phone, the debt collector is liable for $500 per call." *Id.*

[133] *See Barr*, 140 S. Ct. at 2344 (concluding that robocalls are a violation of an individual's privacy). *See also* Johnson, *supra* note 30 (listing ways in which telemarketers were able to deceive the public).

[134] *See Barr*, 140 S. Ct. at 2357 (stressing the need for the federal government to be able to collect debt).

robocalls.[135] Furthermore, because the Supreme Court prohibited the Federal government from collecting debts using robocalls, it seems highly unlikely and unacceptable for companies to hide behind their "customer databases" in order to avoid liability.[136] Just as the Supreme Court maintained that consumer privacy was its utmost goal in *Barr*, so too should the Justices hold the same in *Duguid* and assert that the TCPA's regulations include devices that also store phone numbers.[137]

C.   The Supreme Court Should Not Deem the TCPA Obsolete

Technology has changed drastically since 1991, and some speculate that the TCPA is obsolete, including Justice Thomas.[138] During the Oral Arguments for *Duguid v. Facebook*, the Supreme Court Justices questioned the TCPA's effectiveness regarding the rise

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[135] *See* Duguid v. Facebook, Inc., 926 F.3d 1146, 1152 (9th Cir. 2019) (concluding that the purpose of the TCPA was to protect the privacy of individuals). Judge McKeown stated, "[o]ur reading supports the TCPA's animating purpose— protecting privacy by restricting unsolicited, automated telephone calls." *Id.* Under this assumption, it appeared that even though Facebook could have had a case because it did not technically "call" phone numbers, the ninth circuit deliberately ignored it because it applied the original reasoning of the TCPA when assessing what an ATDS was. *Id.*

[136] *See* Duran v. La Boom Disco, Inc., 955 F.3d 279, 285–86 (2nd Cir. 2020) (maintaining that if the government is unable to make robocalls in an attempt to collect tax payments, it is more than likely that outside advertisers will be held the same standard). The Second Circuit even suggests that Congress intended for human generated lists as well as random number generating machines. *Id. See also* Allan v. Pa. Higher Educ. Assistance Agency, 968 F.3d 567, 572 (6th Cir. 2020) (affirming the Second Circuit's remarks).

[137] *See Duran*, 955 F.3d at 279 (asserting that all automated phone calls fall under the TCPA's jurisdiction). *Contra* Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 458 (7th Cir. 2020) (rejecting the notion that all automated numbers fall under the TCPA, especially if numbers are already stored in customer databases). *Contra* Glasser v. Hilton Grand Vacations Co., 948 F.3d 1301, 1304–05 (11th Cir. 2020) (highlighting that when numbers are already stored in customer databases, they do not have the ability to store numbers and thus, are unable to be under the TCPA's jurisdiction).

[138] *See* Troutman, *Fireworks*, *supra* note 10 (determining that the Supreme Court could find the TCPA obsolete). Even though the Supreme Court Justices have never exercised the authority to deem a statute as obsolete, Justice Gorsuch stated that the TCPA "certainly seemed to be a candidate." *Id. See also Supreme Court Oral Arguments*, *supra* note 101 (holding that the TCPA may in fact be obsolete because it no longer applicable in the same way as it was intended to be in 1991).

in current technology.[139]   The Justices evaluated the grammar of the
statute and whether it was applicable to modern technology.[140] Justice
Thomas even suggested that the statute may be "obsolete" because
technology had changed so much since 1991.[141]   For example,
applications have been designed to send messages through cellular
applications and social media platforms.[142]

Rather than deem the TCPA "obsolete," start over, and create
new language that will again be nit-picked and enable companies to
once again escape liability under the TCPA, the Supreme Court should
provide a clear definition of what an ATDS is and prohibit companies
from finding loopholes.[143] The Supreme Court could have dismantled
the Communications Act in 1991, but did not.[144]   Technology has
drastically changed since 1934, but that does not mean that the
overarching intent and purpose of the Communications Act has

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[139] *See* Troutman, *Fireworks*, *supra* note 10 (summarizing the Supreme Court
Justices' responses to the Oral Arguments). The Justices questioned the meaning of
a robocall and attempted to evaluate what Congress intended when writing the
statute. *Id.* Additionally, counsel for Facebook exclaimed that there must be a clear
definition rather than letting each Court interpret its own meaning of an ATDS. *Id.*
See also Supreme Court Oral Arguments, *supra* note 101 (suggesting that the entire
TCPA should be dismantled).

[140] *See id.* (examining the oral arguments).

[141] *See id.* (identifying the emphasis on the grammar of the TCPA).   "In oral
arguments, the Justices and advocates for each side parsed and re-parsed the ATDS
definition, sparring over rules of grammar, an obscure grammatical concept known
as synesis, and even meta-concepts about how to read and interpret statutes." *Id.*
See also Troutman, *Fireworks*, *supra* note 10 (analyzing the Justices' view during
oral arguments in *Duguid v. Facebook*). "At one point Justice Thomas was rather
directly suggesting that the statute might be obsolete and the Court should not waste
resources interpreting it out of 'futility,'" which caused others to think about whether
the TCPA was still applicable today. *Id.*

[142] *See Supreme Court Oral Arguments*, *supra* note 101 (examining the challenges
the Justices face when evaluated the TCPA).   "Another important aspect of the
ATDS question that was discussed throughout the arguments is the way dialing
technology and the basic communications infrastructure has changed dramatically
since 1991." *Id. See also* O'Rielly, *supra* note1 (advocating that the TCPA must be
reformed in order to reflect modern technology).

[143] *See* Troutman, *Fireworks*, *supra* note 10 (observing that the Supreme Court has
never deemed a statute as obsolete). *See also Supreme Court Oral Arguments*, *supra*
note 101 (reaffirming Justice Gorsuch's position that the Supreme Court had never
exercised its authority to deem a statute as obsolete).

[144] *See* Aleman, *supra* note 24 (reasoning that the TCPA was enacted because
technology had changed).

changed.[145] The Communications Act is still relevant because its sole purpose was to protect individuals from unregulated solicitors.[146]

With an increase in lawsuits and a change in technology, the FCC realized that the TCPA needed improvement and attempted to clarify its language.[147] Again, the Supreme Court could have deemed the TCPA obsolete back in 2003, but did not because the intent of the Communications Act of 1934 had not changed.[148] What had changed was neither the fault of Congress nor the FCC.[149] The Supreme Court must make a clear statement that can be heard by each of the Circuit Courts.[150] By following history, the Supreme Court should not deem the TCPA obsolete.[151] Rather, by accepting *Duguid v. Facebook* for

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[145] *See* Habeeb, *supra* note 21, at 20 (reaffirming the purpose and intent of the Communications Act). *See also* Lauzon, *supra* note 20, at 9 (highlighting the importance of regulations in terms of telecommunication). *See also* Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368, 370–71 (2012) (reiterating the purpose of the Communications Act of 1934 and the TCPA). "Voluminous consumer complaints about abuses of telephone technology—for example, computerized calls dispatched to private homes—prompted Congress to pass the TCPA." *Id.*

[146] *See* Lauzon, *supra* note 20, at 9 (evaluating the purpose of the 1934 Communications Act). The FCC was "enacted to secure and protect the public interest and to insure uniformity of regulation" and the Communications Act was enacted for this specific purpose. *Id.* *See also* Waller, *supra* note 23, at 347 (demonstrating the importance of enacting the Communications Act and TCPA). "The TCPA was born out of abusive telemarketing practices, made more intrusive by advances in technology." *Id.*

[147] *See FCC Actions on Robocalls, Telemarketing*, *supra* note 29 (summarizing the FCC's decision to update the TCPA).

[148] *See* Waller, *supra* note 23, at 347 (addressing the need for the Communications Act to evolve just like technology had). "The TCPA has since been expanded and adapted by administrative rule, judicial interpretation, and congressional amendment." *Id.*

[149] *See* Allan v. Pa. Higher Educ. Assistance Agency, 968 F.3d 567, 573 (6th Cir. 2020) (arguing that the strict grammatical interpretation of the statute loses its intended meaning). The Sixth Circuit held that "[t]he last antecedent rule 'is "not an absolute and can assuredly be overcome by other indicia of meaning."'" *Id.* (quoting Barnhart v. Thomas, 540 U.S. 20, 26 (2003)). *Contra* Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 468 (7th Cir. 2020) (proposing that the language of the statute is paramount when interpreting its meaning).

[150] *See* Pector & Wilkerson, *supra* note 14, at 2 (analyzing the significance of *Duguid v. Facebook* in terms of the TCPA). This case will clarify what the Circuits have split on and "[r]egardless of how the Supreme Court rules, its decision will hopefully provide more certainty to companies seeking to align their telemarketing strategies with applicable legal requirements." *Id.* at 3.

[151] *See Supreme Court Oral Arguments*, *supra* note 101(highlighting that the Supreme Court has never deemed a statute as "obsolete").

review, the Supreme Court has the opportunity to remind each Circuit what the intention of the Communications Act has been since 1934 and will continue to be.[152]

V.   Conclusion

Congress enacted the TCPA in order to protect the privacy of its citizens from the countless intrusions of robocalls.   It is unacceptable that companies like AT&T continue to bypass liability under the TCPA due to the minute errors of grammar.   In order to prevent the further violations against the TCPA, the Supreme Court must issue a holding in a TCPA related case, like *Duguid v. Facebook*, and make it more than clear that all robocalls are prohibited under the TCPA unless individuals expressly and knowingly consent to them. When evaluating these cases, these conservative Justices must think of what was originally intended by the TCPA rather than allowing for the tick of a comma to dismantle the entire statute.

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[152] *See* Duguid v. Facebook, Inc., 926 F.3d 1146, 1151 (9th Cir. 2019) (explaining its relevance in terms of the TCPA). *See also* Gavejian & Atrakchi, *supra* note **76** (identifying the next steps regarding the TCPA). The Supreme Court heard oral arguments regarding what the actual wording of the TCPA actually means and "[w]hile it appears that courts are generally leaning towards the narrowing of the TCPA in a myriad of aspects, organizations are still advised to err on the side of caution, during this period of uncertainty, when implementing and updating telemarketing and/or automatic dialing practices." *Id.* Furthermore, the Supreme Court "is expected to hear oral arguments on this dispute at the start next term, in the fall, and issue a decision by the summer of 2021." *Id.*