

A Chainsaw, Rather than a Scalpel: Supreme Court Holds Telephony Must Include Random or Sequential Number Generator to Qualify as ATDS under TCPA

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In a [unanimous decision](#), the U.S. Supreme Court decided *Duguid v. Facebook*, finding once and for all that an automatic telephone dialing system (ATDS) as defined by the Telephone Consumer Protection Act (TCPA) requires a system to have the capacity to store a telephone number using a random or sequential generator, or to produce a telephone number using a random or sequential number generator. In the Court's words, "a necessary feature of an autodialer under [the statute] is the capacity to use a random or sequential number generator to either store or produce phone numbers to be called." The ATDS prohibition does **not** cover telephone systems that do not use a random or sequential number generator.

Background

In its late 2018 *Marks* decision, the Ninth Circuit found that storage of telephone numbers, without random or sequential number generation, was enough to satisfy the first prong of the TCPA's definition of an ATDS. In 2020, the Second and Sixth Circuits joined the Ninth Circuit, while the Third, Seventh, and Eleventh Circuits have concluded that a system must have the capacity to generate random or sequential numbers to qualify as an ATDS.

In *Duguid*, Facebook challenged the Ninth Circuit's definition, contending that it was too broad. In defending the lawsuit, Facebook argued that its equipment was not an ATDS, because it stores numbers only to be called "reflexively" in response to "outside stimuli," such as a suspicious log-in. Facebook's equipment, it argued, does not "use a random or sequential number generator," and as a result, does not constitute an ATDS. According to Facebook, if the definition of ATDS is not read to exclude equipment that only stores numbers for "responsive" calling, all smartphones will be considered autodialers. The Ninth Circuit disagreed, doubled-down on *Marks*, and ruled that the plaintiff's claims could go forward.

Petition for Certiorari

In response, Facebook petitioned the Supreme Court for a writ of certiorari. In addition to questioning the validity of the government-backed debt collection exemption, [a provision the Supreme Court struck down](#) in the *Barr* decision, Facebook specifically asked the Supreme Court to decide "[w]hether the definition of ATDS in the TCPA encompasses any device that can 'store' and 'automatically dial' telephone numbers, even if the device does not 'us[e] a random or sequential number generator.'"

The Opinion

The Court rejected the expansive definition of an ATDS suggested by Duguid, and sided with Facebook. The Court reversed the Ninth Circuit, and issued a decision aligned with the Third, Seventh, and Eleventh Circuits, finding that a telephone system must include a random or sequential number generator to qualify as an ATDS, based on the plain language of the statute.

The opinion, authored by Justice Sotomayor, features a very readable analysis of the textual arguments, rejecting all of Duguid's contentions that Facebook's definition of an ATDS violates canons of construction. Instead, the Court found that the ATDS definition "hangs together as a unified whole," and it "would be odd to apply the modifier ('using a random or sequential number generator') to only a portion of this cohesive preceding clause." The decision reads as a hybrid of the Seventh and [Eleventh Circuit's](#) opinions on the issue – with the Seventh Circuit opinion authored by then-Circuit Judge Amy Coney Barrett – addressing numerous canons of construction, noting that the most straightforward reading of the statute is not a perfect one, yet still better than all other alternatives.

With the proper definition of an ATDS in hand, the Court turned its attention to the implications of Duguid's proposed definition. Specifically, Justice Sotomayor noted that an expanded definition of an ATDS to encompass equipment that stores and dials telephone numbers "would take a chainsaw to these nuanced problems when Congress meant to use a scalpel." Additionally, the Court met the concerns over human intervention with little more than a shrug of the shoulders. "[A]ll devices require some human intervention," the opinion noted, and the Court specifically declined to wade into the weeds of line-drawing between too much or not enough human intervention. The Court further assumed, without deciding, that the TCPA covers text messages, a point raised by Justice Thomas in oral argument.

And the concerns driving Justice Sotomayor's own question in oral argument echo throughout the opinion. During oral argument, Justice Sotomayor pressed Bryan Garner, counsel for Duguid, about the impact of his proposed reading of the TCPA, noting that Duguid's interpretation of an ATDS would expand liability to everyday cell-phone users, given the increase in automatic-response capabilities. The opinion directly addresses these concerns, stating that, "by classifying almost all modern cell phones as autodialers, would produce an outcome that makes even less sense." In other words, the Court had serious concerns about an interpretation that would turn a consumer protection statute into a weapon to be used *against* consumers.

The Court further rejected the parade of horrors that Duguid insisted would result from adopting the proper definition of an ATDS. The Court noted that the statute separately prohibits the use of calls using an artificial or prerecorded voice, and stated that the decision does not affect that prohibition. Duguid's concerns, however, are better suited for Congress, in the eyes of the Court. "Duguid's quarrel is with Congress, which did not define an autodialer as malleable as he would have liked." Regardless of Duguid's fears, the Court was unwilling to interpret the statute in any way other than "the best reading of § 227(a)(1)(A)," a reading that requires random or sequential number generation.

Justice Alito issued a concurrence that addressed the Court's reliance on the "series-qualifier" canon. "To the extent that interpretive canons accurately describe how the English language is generally used, they are useful tools," wrote Justice Alito. "But they are not inflexible rules." Flexibility aside, the Court unanimously held that an

ATDS must include a random or sequential number generator.

What Comes Next

For those businesses attempting to get in touch with customers, the Court's opinion is reason to celebrate, as the decision will significantly reduce the TCPA's expansive reach. Few statutory provisions have been litigated more in the past five years, and the Court's decision provides definitive word on the beleaguered definition of an ATDS. As Justice Sotomayor noted, the quarrel is with Congress, and it remains to be seen whether legislators will step in to address the statute.

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