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Supreme Court Answers the Call on the Definition of an Autodialer

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The U.S. Supreme Court heard oral argument today in *Duguid v. Facebook* to decide, once and for all, whether an automatic telephone dialing system (ATDS), as defined in the Telephone Consumer Protection Act (TCPA), requires 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. Earlier this year, the Sixth Circuit joined the Ninth Circuit, while the Third, Seventh, and Eleventh Circuits 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.'"

Oral Argument

On December 8, the Court heard oral argument. Throughout the argument, the justices engaged in even-handed questioning, with a slight favor to Facebook's argument that the statute should be interpreted narrowly. The United States joined Facebook's argument, also arguing that the language of the statute requires random or sequential number generation to qualify as an ATDS. The justices' questions focused primarily on three areas:

textualism, technology, and, surprisingly, human intervention.

All arguments began by analyzing the text of the statute. In her time on the Seventh Circuit, Justice Barrett famously declared the statute as one that "would make a grammarian throw down her pen," and the justices' questions focused on which interpretation of the beleaguered ATDS definition most closely adheres to canons of construction. Facebook focused on the presence of a disjunctive, the shared direct object, and the presence of a comma prior to the modifier, arguing that the modifier applies to both "storing" and "producing." Justice Kagan pushed back on the comma modifier argument, asking how one would interpret a statute that made it illegal "to stab or shoot someone, using a firearm." The petitioner replied that while certain words are more closely paired together, like shooting and firearms, there was no inherent logical inconsistency in applying the TCPA's modifier to "storing," as well as "producing." Justice Gorsuch also asked each party about a separate interpretation of the statute outlined in Justice Barrett's Seventh Circuit opinion, that "using" modifies the direct object "telephone numbers" rather than the verbs, suggesting another possible path to a Facebook victory despite grammatical complications caused by the presence of the comma in the statutory text. The respondent suggested that the concept of synesis, or following the "sense" of a statute, should govern here, because one must look at the sense of words to understand the sentence.

The justices also asked counsel to discuss the impact evolving technology should have on statutory interpretation, pressing each party to opine on how far courts could stretch statutes to include unforeseen technologies. Justice Kavanaugh asked both petitioner and respondent to discuss the TCPA's application when it was initially passed and Congress's policy goals in subsequent amendments. Justice Thomas, in particular, pressed the parties as to when courts should simply declare a statute obsolete and asked why the statute encompasses text messages — a technology that was not on the horizon of 1991 lawmaking. Justices Breyer and Sotomayor questioned the impact of various interpretations on ordinary individuals, and Justice Sotomayor expressed strong concern that Duguid's interpretation would expand liability to everyday cell phone users given the increase in automatic-response capabilities.

Near the end of Duguid's argument, several justices, including Justices Alito, Sotomayor, and Gorsuch, took up the question of what role human intervention plays in determining whether a device qualifies as an ATDS. The respondent seemingly eschewed the Ninth Circuit's ruling in *Marks* — the very decision he relies upon — and argued that the mere act of clicking a button could qualify as human intervention sufficient to remove a device from the realm of automatic dialers. However, Justice Gorsuch emphasized that the statute does not include the word "automatic" or foreclose the possibility of human intervention, but only states that the equipment must have the capacity to store and the capacity to dial numbers. Duguid admitted that the Court would have to read in the word "automatic" to take the ordinary cell phone out of the realm of an ATDS. The final colloquy of the argument featured a key intersection of technology and human intervention. Justice Barrett achieved a significant concession from Duguid when she questioned whether asking Siri to make a call provided sufficient human intervention. Duguid was forced to concede that this would not, highlighting a weakness in respondent's position that echoes the D.C. Circuit's admonition that the TCPA should not be expanded to make everyday Americans "TCPA-violators-in-waiting."

In the end, the justices will have to determine precisely how elastic a statute can become — whether a statute can expand to encompass technologies that were unheard of when a law was passed or whether Congress is the only entity that can expand the scope of a statute. Only time will tell whether the TCPA truly has nine lives.

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