

# The Supreme Court's Unanimous Decision Narrows TCPA's Reach

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The United States Supreme Court recently issued its long-awaited opinion clarifying what qualifies as an "autodialer" and is therefore governed by the Telephone Consumer Protection Act of 1991 (TCPA), potentially providing class action relief to many businesses.

On April 1, 2021, the Supreme Court resolved a circuit split regarding the TCPA's definition of "automatic telephone dialing system," known as ATDS or autodialers. The TCPA defines an autodialer as equipment that has the capacity "to store or produce telephone numbers to be called, using a random or sequential number generator." In *Facebook, Inc. v. Duguid*, the Court held that an autodialer must have the capacity to either (i) store a telephone number using a random or sequential number generator or (ii) produce a telephone number using a random or sequential number generator.

Facebook uses automated text messages to notify users of potential security concerns. A user may register a phone number with Facebook, and Facebook will send a "login notification" text message to the user if an attempt is made to access their account from an unknown device. The user may then log into their account to ensure the account is secure. Plaintiff Noah Duguid received multiple login notification text messages from Facebook, but Duguid did not have a Facebook account and had not linked his telephone number to an account. Duguid brought a putative class action against Facebook, alleging that it violated the TCPA because it stored telephone numbers and sent automated text messages to those numbers.

Facebook moved to dismiss, arguing Duguid failed to allege that Facebook used an autodialer because he asserted Facebook sent targeted texts to telephone numbers registered to specific accounts, but failed to allege Facebook sent automatic text messages *to randomly or sequentially generated telephone numbers* as required by the TCPA. The district court agreed with Facebook and dismissed the suit. Duguid appealed to the Ninth Circuit, which reversed the lower court. The Ninth Circuit determined that an autodialer only needed to store numbers and dial the numbers automatically, and that the use of a random or sequential generator was not required. Applying this standard, it concluded that Duguid stated a claim under the TCPA when he alleged that Facebook's equipment automatically dialed stored telephone numbers.

Facebook appealed, and the specific question before the Supreme Court was whether the definition of "automatic telephone dialing system" included equipment that can store and dial telephone numbers, *even if*

*the equipment does not use a random or sequential number generator.* Justice Sotomayor wrote the opinion for the Court. In it, she decided a highly technological question affecting many businesses, based upon an old-school English grammar lesson that dissected the operative sentence in the TCPA. She framed the question as whether the phrase "using a random or sequential number generator" modified both of the two verbs that preceded it — "store" and "produce." The Court found that "[t]o qualify as an 'automatic telephone dialing system,' a device must have the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator." The Supreme Court reversed the Ninth Circuit and concluded that the TCPA's definition of autodialer did not include equipment that lacked the capability to use a random or sequential number generator to store or produce telephone numbers to be called. Justice Sotomayor stated that "[e]xpanding the definition of an autodialer to encompass any equipment that merely stores and dials telephone numbers would take a chainsaw to these nuanced problems when Congress meant to use a scalpel." She noted that the position advocated for by Duguid would "capture virtually all modern cell phones, which have the capacity to store...telephone numbers to be called" and "dial such numbers." She noted that common practices such as speed dialing or sending automated text message responses could be problematic under such an interpretation.

Some observers speculated that the Court might resolve the question of whether the TCPA reaches text messages. Although neither party focused on the question, it was raised in amicus briefs and at oral argument. The Court did not answer the question, sticking to the narrower login verification text messages that Facebook used, and "assuming" the TCPA applied.

This unanimous decision is significant because it provides clarity in analyzing whether technology used to communicate with customers is an autodialer and subject to the TCPA. The Facebook opinion makes clear that in many cases, business communications to customers do not fit under the TCPA. The opinion is expected to curtail numerous TCPA class actions filed against companies across the country. The battles, however, are far from over. The opinion leaves some unanswered questions, and there is already discussion of Congress or the FCC weighing in further. Companies should continue to be diligent in designing and monitoring their dialing and text messages platforms.

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