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ALERT

After Years of Uncertainty, the Supreme Court Will Address "Autodialer" Under the TCPA

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Just days after issuing its much-anticipated decision in *Barr v. Association of Political Consultants, Inc.*, the Supreme Court on July 9, 2020, agreed to hear a case that will significantly impact the reach of the Telephone Consumer Protection Act (TCPA). The Court will take up Facebook's challenge to a Ninth Circuit TCPA ruling that broadly defined what qualifies as an "automatic telephone dialing system" (ATDS or autodialer) under the TCPA—granting certiorari to consider "[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.'" This question is at the heart of a circuit split, which has resulted in disparate and inconsistent rulings across jurisdictions.

A range of stakeholders should pay attention to this case in light of the central role that the ATDS definition plays in TCPA application and litigation. Given that the Supreme Court's action may further discourage the Federal Communications Commission (FCC or Commission) from weighing in on the ATDS issues pending before it, the cert grant presents an opportunity for stakeholders to engage on ATDS at the Court to resolve uncertainty that chills communication.

The Ninth Circuit Construed the TCPA Broadly, So That Modern Calling and Texting Could Trigger Strict Restrictions and Steep Penalties

The TCPA makes it unlawful to initiate any non-emergency call to a wireless number using an ATDS without the consent of the called party. In *Duguid v. Facebook*, the plaintiff alleged that Facebook sent unsolicited security alerts via text message using an ATDS. Facebook argued that its equipment was not an ATDS because it stored

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The Telephone Consumer Protection Act (TCPA)

numbers to be called only "reflexively" in response to "outside stimuli" such as a suspicious log-in. Because this equipment did not "use a random or sequential number generator," Facebook argued that it should not be considered an ATDS.

Facebook's argument stems from the ambiguous wording of the statute. The statute defines ATDS as: "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." Some courts—such as the Eleventh Circuit—have interpreted this definition to mean that the phrase "using a random or sequential number generator" modifies both "store" and "produce." Under these courts' reading, equipment cannot be an ATDS unless it uses a random or sequential number generator.

The Ninth Circuit disagreed with Facebook and these other courts. It interpreted ATDS to include equipment that stores numbers for purposes other than calling – specifically, "the equipment need only have the 'capacity' to store numbers to be called." The Ninth Circuit held that the phrase "using a random or sequential number generator" modified only the word "produce," *not* the word "store." Under this reading, equipment meets the first prong of the ATDS definition if they either (i) "produce" numbers using a random or sequential number generator *or* (ii) merely "store" numbers. Other courts, such as the D.C. Circuit, have noted that this interpretation would encompass every smartphone in America—as smartphones can "store" numbers—which would give the statute an "eye-popping sweep."

Facebook filed its petition for certiorari in October 2019 asking the Court to consider the ATDS definition, as well as whether the TCPA's prohibition on calls made using an ATDS is an unconstitutional restriction of speech. After months of waiting, yesterday the Court granted cert on the definition of ATDS.

The ATDS Definition Has Been a Source of Legal Uncertainty for Years; the Supreme Court's Ruling Will Have Profound Implications

Facebook's litigation over the scope of ATDS is not unique. The definition of an ATDS has been extremely fluid over the last several years and has generated an enormous amount of litigation. As the Chairman of the FCC —the agency charged with implementing the TCPA—said, the statute is "the poster child for abusive litigation."

As noted above, the statute defines ATDS as: "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." In 2015, the FCC issued an incredibly broad interpretation, which the Court of Appeals for the District of Columbia Circuit vacated in 2018. Since then, commenters have repeatedly urged the FCC to clarify the issue, and the FCC has sought comment on the scope of the definition on multiple occasions. To date, however, the full Commission has not acted. (A Bureau-level ruling published last month did tackle the definition of ATDS, but that decision does not purport to touch on the question that the Supreme Court is now set to hear.)

In the absence of a definitive decision from the expert agency, federal courts have inconsistently interpreted ATDS. As Facebook detailed in a supplemental brief filed in the wake of the Supreme Court's TCPA decision in *Barr v. Association of Political Consultants, Inc.,* there is an "irreconcilable conflict on an important and oft-

litigated question that dictates whether the statute reaches specialized robocalling equipment or every modern smartphone." In short, the Second and Ninth Circuits have interpreted ATDS more broadly, while the Third, Seventh, Eleventh and D.C. Circuits have taken a narrower approach.

This legal uncertainty comes at a high cost. TCPA liability triggers infamously steep penalties, with liability often hinging on whether the equipment used to place calls or texts is an ATDS. An overly broad definition—as Facebook's petition explains—can result in "calls that no one would describe as robocalls run[ning] the risk of up-to-$1,500-per-call statutory damages."

Given the central role of the ATDS definition under the TCPA, the Court's decision will have profound implications for a range of stakeholders and will influence TCPA litigation for years.

The Court's Ruling Is Expected Next Year

The Facebook petition was granted on the last day of the October Term 2019. The case will be argued and decided as part of the October Term 2020, which makes it likely a decision will come in 2021, after the election. The cert grant may make FCC action on numerous pending petitions unlikely, so interested parties should weigh in with the Court. The Supreme Court rarely takes TCPA cases, so addressing the statute twice in a month is remarkable. The issues at stake are important, and so far, the FCC has declined to address the meaning of ATDS, despite years of opportunity and plenty of activity on unwanted and illegal robocalling. If relief is to come, it may be from the Supreme Court and not the FCC.