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## Answering the Call for Telephone Consumer Protection Act Reform: Effectuating Congressional Intent Within 47 U.S.C. § 227(B)(1)(A)

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**ANSWERING THE CALL FOR TELEPHONE CONSUMER  
PROTECTION ACT REFORM: EFFECTUATING CONGRESSIONAL  
INTENT WITHIN 47 U.S.C. § 227(B)(1)(A)**

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Justice M. Hubbard\*

ABSTRACT

*This Note analyzes the current state of the civil law surrounding the Telephone Consumer Protection Act (TCPA) and highlights a glaring flaw within the current practice of assigning liability to telephonic solicitors utilizing an automatic telephone dialing system (autodialer): solicitors can be subjected to liability even though their actions are not what Congress intended to prevent. Congress enacted the TCPA in response to unique consumer privacy and public safety concerns. For example, the use of an autodialer created a substantial likelihood that autodialers would call emergency services and could “seize” their telephone lines and prevent those lines from being utilized to receive calls from those needing emergency services. The Federal Communications Commission (FCC) and the judiciary, however, have developed differing interpretations of the TCPA, which created unintentional dangers for businesses properly utilizing telemarketing strategies. These dangers that were left unresolved by the Supreme Court’s ruling in *Facebook, Inc. v. Duguid*. This fragmented interpretation and application of federal law within various jurisdictions has left callers liable to substantial fines, so long as they use a device that merely has the capacity to act as an autodialer—even if the device did not actually use autodialer functionality. Such a broad interpretation places a heavy burden on companies using technology that does not create the kind of harm against which the TCPA was meant to protect. To effectuate Congressional intent, this Note proposes that the FCC should issue a new interpretation of the TCPA by declaratory ruling that will attach liability to defendants who make use of autodialer functionality, not those whose devices merely have the capacity to do so. Alternatively, this Note proposes that either Congress amend the TCPA in a manner that better aligns with its goals, or the Supreme Court provide clarification to the lower courts as to how one acquires liability. This change will provide certainty and fairness to businesses, consumers, and the judiciary.*

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## INTRODUCTION

It is dinner time and like clockwork, right before the evening grace, a telemarketer’s call arrives. Since the 1980s, with the advent of the automatic telephone dialing system (autodialer or ATDS) which can automatically dial a telephone number and play a recorded message, this is a

common experience.<sup>1</sup> With the use of equipment that can create and dial ten-digit telephone numbers randomly or sequentially, a single firm can handle 50,000 calls an hour.<sup>2</sup> As an industry, “more than 300,000 solicitors call more than 18 million Americans each day.”<sup>3</sup> These calls were such a nuisance that U.S. Senator Ernest F. Hollings described them as “the scourge of modern civilization. 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.”<sup>4</sup>

Pressured by consumer’s privacy and public safety concerns, Congress enacted the Telephone Consumer Protection Act (TCPA), which was intended to prohibit making any call, using any automatic telephone dialing system (autodialer), to any telephone number without an emergency purpose or the “prior express consent of the called party.”<sup>5</sup> The TCPA defined an autodialer 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.”<sup>6</sup>

The TCPA enforced Congress’s prohibition by providing a private right of action to any individual who was unlawfully contacted by an autodialer.<sup>7</sup> With this right, an individual may sue the telemarketer and either collect actual monetary loss for each violating call they have received, or receive \$500 in damages for each violating call, whichever is greater.<sup>8</sup> The damages triple if a court finds that the defendant willfully or knowingly violated the statute.<sup>9</sup> To see the full force of the consequences of violating the Act, consider class actions. For example, in 2017 Caribbean Cruise Lines settled a TCPA class action lawsuit that accused several cruise marketing companies of robocalling potentially millions of Americans for \$76 million.<sup>10</sup> At the time of the settlement, the class action could have consisted of up to 930,000 individuals who had received at least one unlawful call from Caribbean Cruise Lines.<sup>11</sup>

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1. See Caroline E. Mayer, *Telemarketers Just Beginning to Answer Their Calling*, WASH. POST (Aug. 31, 1997), <https://www.washingtonpost.com/archive/business/1997/08/31/telemarketers-just-beginning-to-answer-their-calling/c64bab4b-cc8a-497a-be8c-15b5eb26fedd/> [https://perma.cc/9XQF-7KRA].

2. *Id.*

3. *Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2344 (2020) (citing TCPA, § 2, 15 U.S.C. § 227, 105 Stat. 2394, note following 47 U.S.C. § 227 (2018)).

4. *Id.* (citing 137 Cong. Rec. 30821 (1991)).

5. 47 U.S.C. § 227(b)(1)(A).

6. 47 U.S.C. § 227(a)(1).

7. *Id.* at (b)(3).

8. *Id.* at (b)(3)(B).

9. *Id.*

10. Joyce Hanson, *\$76M Cruise Robocall Class Settlement Gets Final Approval*, LAW360 (Mar. 2, 2017, 7:53 PM), <https://www.law360.com/articles/897756> [https://perma.cc/5432-R96Z].

11. See *Birchmeier v. Caribbean Cruise Line, Inc.*, 302 F.R.D. 240, 245 (N.D. Ill. 2014).

This would mean that, at a minimum, Caribbean Cruise Lines could have been liable for \$465,000,000 in damages if they lost at trial.<sup>12</sup>

Similarly, in *Barry v. Ally Fin., Inc.*, Barry filed a class action complaint against Ally Financial Inc. in violation of § 227 by placing four automated calls to her, a non-customer, without consent to collect a debt that is owed by Barry's brother.<sup>13</sup> Barry defined her class as any United States citizen who: (a) did not have an existing account with Ally Financial; (b) was called by Ally Financial, or a third party acting on Ally's behalf, using an automatic telephone dialing system; (c) in connection with a delinquent car loan that is not owned by him/her; and (d) was called at any time in the period that begins four years before August 31<sup>st</sup>, 2020<sup>14</sup> through the date of class certification.<sup>15</sup> Ally Financial's equipment, however, would make targeted automated calls to individuals whose numbers were not randomly or sequentially generated.<sup>16</sup> Nevertheless, Barry claimed that Ally Financial willingly and knowingly violated the TCPA because even if the system did not use a random or sequential number generator, it had the capacity to do so.<sup>17</sup> There, Barry drew from Ninth Circuit precedent which provides that actual use of the random or sequential number generator function is not necessary to hold a party liable.<sup>18</sup> According to the Ninth Circuit, liability simply requires the device to be capable of using this function.<sup>19</sup> Thus, Barry sought statutory damages of no less than \$500 and up to \$1,500 per call for each member of the class.<sup>20</sup>

While the exact number of the class is unknown, damages for Barry herself could have reached up to \$6,000.<sup>21</sup> If Barry were to have found

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12. Presuming that each of the 930,000 individuals within the class action only received *one* unlawful call, and their recoverable damages are only the minimum allowed per 47 U.S.C.S. § 227(b)(3)(B), \$500 per call, then the total damages would \$465,000,000 in damages. (930,000 calls multiplied by \$500.) Note that it is likely that not all the 930,000 potential class members are eligible to be members, and it is likely that these class members were contacted more than once. This would suggest that the actual number of damages owed could be more or less than the projected \$465,000,000.

13. *Barry v. Ally Fin., Inc.*, No. 20-cv-12378, 2021 U.S. Dist. LEXIS 129573, at \*3-4 (E.D. Mich. July 13, 2021).

14. Complaint, *Barry v. Ally Fin., Inc.*, No. 20-cv-12378, 2021 U.S. Dist. LEXIS 129573 (E.D. Mich. July 13, 2021). The filing date of the complaint was August 31, 2020.

15. *Id.* at 4-5.

16. *Barry*, 2021 U.S. Dist. LEXIS 129573 at \*12.

17. Class Action Complaint at 8, ¶¶ 58-59, *Barry v. Ally Fin., Inc.*, No. 20-cv-12378, 2021 U.S. Dist. LEXIS 129573 (E.D. Mich. July 13, 2021); see *Barry*, 2021 U.S. Dist. LEXIS 129573, at \*9-10.

18. See *Barry*, 2021 U.S. Dist. LEXIS 129573, at \*10.

19. See *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009).

20. See Class Action Complaint at 8, *Barry v. Ally Fin., Inc.*, No. 20-cv-12378, 2021 U.S. Dist. LEXIS 129573 (E.D. Mich. July 13, 2021).

21. \$1,500 for each of the allegedly unlawfully made calls that Barry received.

as little as 167 similarly situated individuals who were contacted by Ally Financial between August 3, 2016, through August 31, 2021, the potential damages could have totaled \$1,002,000.<sup>22</sup> Considering the class action against Caribbean Cruise Lines consisted of up to 930,000 members, it is likely that Ally Financial would have been liable for a sizable number of damages despite not actually using the autodialer features.<sup>23</sup>

The potential damages for any company facing a TCPA class action can be substantial. This begs the question: what happens when the potential violator is a start-up or a small business? Imagine a small business hires a third-party marketing company that makes 5,000 calls per month on the small business' behalf. A year later, the small business is sued in a class action because those calls were made using a device that has the capacity to act as an autodialer despite not actually using those features. Under this scenario, a small business could be liable for \$30,000,000.<sup>24</sup> Damages this large could mark the end of a small business. Moreover, this potential liability encourages gamesmanship amongst class action plaintiffs and wastes judicial resources.<sup>25</sup> With such a heavy burden, the TCPA should be carefully interpreted to target the precise harms that Congress cited: to protect consumer privacy and public safety.

Recently, in *Facebook, Inc. v. Duguid*, concerning the definitional issue of an autodialer, the Supreme Court held that an autodialer is a device that has the capacity to: (1) store numbers using a random or sequential number generator; or (2) produce numbers using a random or sequential number generator.<sup>26</sup> But in doing so, the Court left open a more crucial

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22. Presuming that each of the 167 individuals within the class action received as many unlawful calls as Barry (4 calls), and their recoverable damages were set at the max allowed per 47 U.S.C.S. § 227(b)(3)(B), \$1,500 per call, then the total damages would have been \$1,002,000 in damages. (668 calls multiplied by \$1,500). Note that it is likely that not all the putative class members are eligible, and it is likely that these class members were contacted more or less than four times. This would suggest that the actual number of damages owed could be more or less than the projected \$1,002,000.

23. See *supra* notes 11–12 and accompanying text.

24. 5,000 calls per month is a total of 60,000 calls per year. Presuming that each of the 60,000 calls was made using a device that has the capacity to act as an autodialer, despite not actually using those features, potential damages could add up to a minimum of \$30,000,000. (60,000 calls x \$500).

25. See *Lawsuit Abuse and the Telephone Consumer Protection Act: Hearing on [H.R. X] Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 115th Cong. 5 (2017) (testimony of Adonis E. Hoffman, former Chief of Staff and Senior Legal Advisor to Federal Communications Commission Chairperson Mignon Clyburn) (“The law has become the second most popular vehicle for class action lawyers to reap millions in the name of consumer protection. As an attorney, a consumer and a citizen, this really bothers me because it is a bastardization of the public interest and a travesty to our legal system. As a matter of equity, it just seems to be plain wrong.”).

26. *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1167 (2021).

question—whether assignment of liability should solely target the precise harms Congress cited.<sup>27</sup> The Ninth Circuit finds a party liable, and therefore subject to substantial fines, when they use a device that has the capacity to use a random and/or sequential number generator (R&SG)—even if they did not actually use it.<sup>28</sup> Such a broad interpretation places a heavy burden on companies using technology that does not harm consumer privacy or public safety. As illustrated in *Barry*, however, it does create opportunities for gamesmanship within class action lawsuits in contradiction of Congress' intentions. Despite acknowledging that an autodialer's functionality was never used, plaintiffs can claim statutory damages and subject businesses to costly litigation merely because the device had the capacity to use those functions. Inevitably, this will lead to an increase of frivolous lawsuits and burden the court's efficiency.

This Note contends that a system must use a random and/or sequential number generator to constitute an unlawful use of an autodialer for the purposes of the TCPA. To effect this definitional change, this Note advocates for the FCC to issue a declaratory judgment clarifying the boundaries of TCPA liability through statutory interpretation. Alternatively, this Note proposes that: (1) Congress enacts legislation that is more aligned with the purpose of TCPA liability; or (2) the Supreme Court revisits the decisional uncertainty of an autodialer and clarifies what constitutes liability in accordance with Congressional intent.

Part I will explain the history of the TCPA up to the current definition of an autodialer and the FCC's history of applying and interpreting that definition. Part II examines how the differing interpretations between the FCC and circuit courts have created unintentional dangers for businesses properly utilizing telemarketing strategies and how the Supreme Court's recent ruling has created more problems than solutions. Part III argues that the FCC should interpret § 227(b)(1)(A) to impose liability only where an autodialer makes actual use of the device's random and/or sequential number generator. Additionally, this part will propose two alternative methods for achieving this goal.

## I. BACKGROUND INFORMATION

To understand this Note's proposed reform, it will be useful to examine the relationship between an autodialer and the TCPA through the

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27. See *Barry v. Ally Fin., Inc.*, No. 20-cv-12378, 2021 U.S. Dist. LEXIS 129573, at \*12 (E.D. Mich. July 13, 2021); see also *McEwen v. NRA of Am.*, No. 20-cv-00153-LEW, 2021 U.S. Dist. LEXIS 72133, at \*19 (D. Me. Apr. 14, 2021).

28. *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009).

lens of three questions. First, Part I will examine the purpose of the TCPA and examine the question of why Congress found autodialers to present a threat. Second, through examination of the FCC's 2015 Order, and the D.C. Circuits' reversal in *ACA International v. FCC*, Part I will explore the definitional question surrounding the term "capacity." Third, through examination of the Supreme Court's recent ruling in *Facebook, Inc. v. Duguid*, Part I will explore the question of what functions are required to constitute as an autodialer.

### A. *The Purpose of the TCPA*

In the 1980's, consumer annoyances were not the only problem with the large volume of calls made by telemarketers.<sup>29</sup> Since autodialers either called randomly or sequentially generated numbers, they would inevitably call emergency services such as hospitals, firefighters, and police.<sup>30</sup> Not only would this waste police resources and tie the lines for the duration of the call, but some autodialers would "not release [the line] until the prerecorded message is played, even when the called party hangs up."<sup>31</sup> This creates the danger that the autodialers could "seize" emergency or medical assistance telephone lines, rendering them inoperable, and "dangerously preventing those lines from being utilized to receive calls from those needing emergency services."<sup>32</sup> Pressured by consumer's privacy and public safety concerns, in 1991 Congress enacted the TCPA, which defines an automatic telephone dialing system, regulates its use, and delegates authority to the FCC to declare regulations implementing the TCPA.<sup>33</sup>

The purpose of the bill was simple: "to address a growing number of telephone marketing calls and certain telemarketing practices Congress found to be an invasion of consumer privacy."<sup>34</sup> Moreover, to prevent calls which act as a "disruption to essential public safety services."<sup>35</sup>

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29. See Walter Allison, Note, *Unplanned Obsolescence: Interpreting the Automatic Telephone Dialing System After the Smartphone Epoch*, 119 MICH. L. REV. 147, 148–49 (2020).

30. *Id.*

31. H.R. REP. NO. 102-317, at 10 (1991).

32. *Id.* at 24.

33. 47 U.S.C.S. § 227(a-c).

34. *In re Rules & Regulations Implementing the Telecomm. Consumer Prot. Act of 1991*, 23 FCC Rcd. 559 (2008).

35. See S. REP. NO. 102-177, at 9; see also Kristen P. Watson & Katherine E. West, *What's in a Name? How the Definition of "Automatic Telephone Dialing System" and Ever-Changing Technology Required Supreme Court Intervention*, 44 Am. J. Trial Advoc. 293, 295 n.15 (2021).

### B. *The Definitional Question of Capacity*

Despite its purpose to protect consumer privacy and public safety, the history of TCPA litigation and agency interpretation reveals other intentions. Per § 227(b)(2) of the TCPA, the FCC was delegated authority to make rules and regulations in accordance with the TCPA's requirements.<sup>36</sup> For example, by 2003 technology had evolved, and telemarketers were now using a new system called predictive dialing.<sup>37</sup> Predictive dialers were devices that would dial a phone number from a list while the sales agent was on a different call.<sup>38</sup> The system could automatically transfer the newly made call to the sales agent as soon as they finished their previous call.<sup>39</sup> Predictive dialers increased efficiency among telemarketers,<sup>40</sup> but the advantage of calls coming in more frequently also brought more potential issues of violating the privacy and public safety rights that Congress intended to protect.<sup>41</sup> Nevertheless, by their nature, predictive dialers did not have the present capacity to store or produce numbers using a random or sequential number generator.<sup>42</sup> Rather, they simply dialed telephone numbers from a pre-produced list.<sup>43</sup>

Fearing that these dialers would slip past the TCPA, the FCC issued a declaratory ruling in 2015 to clarify its interpretation of what constitutes an autodialer.<sup>44</sup> Couching its reasoning on the term “capacity” and an understanding that Congress intended for a broad interpretation of the statute, the FCC ruled that autodialers only needed the “potential capacity” to dial random and sequential numbers, rather than the “present ability” to do so.<sup>45</sup> This would suggest that any device that can be modified or combined with another device to gain such features would also be considered an autodialer—even if it has yet to be modified.<sup>46</sup> Accordingly, under this broad interpretation of the TCPA, designation as

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36. 47 U.S.C.S. § 227(b)(2) (“The Commission shall prescribe regulations to implement the requirements of this subsection.”).

37. Allison, *supra* note 29, at 153.

38. See Telemarketing Sales Rule, Federal Trade Commission, 67 Fed. Reg. 4492 at 4522 (Jan. 30, 2002) (to be codified at 16 C.F.R. pt. 310) (FTC Notice).

39. *Id.*

40. Allison, *supra* note 29, at 153.

41. Rules & Regulations Implementing the Telecomm. Consumer Prot. Act of 1991, 23 FCC Rcd. 559, 559 (2008).

42. Allison, *supra* note 29, at 153.

43. *Id.*

44. See generally Rules & Regulations Implementing the Telecomm. Consumer Prot. Act of 1991, 30 FCC Rcd. 7961 (F.C.C. July 10, 2015).

45. *Id.* at 7974.

46. See *id.*

an autodialer does not require the device to call random or sequentially generated numbers.<sup>47</sup> For liability purposes, it is enough that it has the present or future capability to do so.<sup>48</sup>

Consequently, telemarketers comparable to those in *Barry v. Ally Financial* are outside the intended purpose of the TCPA, but are, nevertheless, encompassed due to overly broad statutory interpretation. Recognizing the excessive costs associated with liability, the FCC's 2015 interpretation placed an overly burdensome weight on soliciting firms using technology that does not invade consumer privacy or threaten public safety.

In response to the FCC's 2015 Order, various telemarketing servicers sought judicial review.<sup>49</sup> In *ACA International v. FCC*, the D.C. Circuit focused on two aspects of the 2015 Order: the use of the "potential capacity" interpretation and the necessary elements for liability.<sup>50</sup>

Beginning with the issue of "potential capacity," the D.C. Circuit found the FCC's interpretation unreasonably expansive.<sup>51</sup> If the court were to accept the broad "potential capacity" interpretation raised by the FCC, they would have to accept that all smartphones are autodialers.<sup>52</sup> A smartphone, after all, would only need to download the requisite software to gain the same random and/or sequential number generator features as a traditional autodialer to be considered an autodialer under the FCC's interpretation.<sup>53</sup> The inclusion of every smartphone, or consequently every smart device, would "assume an eye-popping sweep."<sup>54</sup>

For example, imagine if Susan accidentally texted a party invite to 10 people she didn't know, without their consent. Simply for using a device that has the potential capacity to dial random or sequential num-

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47. See *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009) (using the FCC's broad approach to find liability under the TCPA even when the device did not use autodialer functionality).

48. *Id.*

49. Kirsten P. Watson & Katherine E. West, *What's in a Name? How the Definition of "Automatic Telephone Dialing System" and Ever-Changing Technology Required Supreme Court Intervention*, 44 AM. J. TRIAL ADVOC. 293, 305 (2021) (citing *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) ("In this case, a number of regulated entities seek review of a 2015 order in which the Commission sought to clarify various aspects of the TCPA's general bar against using automated dialing devices to make uninvited calls.")).

50. *ACA Int'l v. FCC*, 885 F.3d 687, 695 (D.C. Cir. 2018).

51. Caroline M. Burkard, *Breaking Up Via Robocall: Will the Supreme Court's Conservative Majority Dismantle Protections Under the TCPA?*, 22 J. HIGH TECH. L. 95, 105 (2021).

52. *ACA Int'l*, 885 F.3d at 696–97.

53. *Id.*

54. *Id.* at 697.

bers, Susan is liable for up to \$5,000 in damages.<sup>55</sup> Despite not actually using the features proscribed in § 227(a), under the FCC's interpretation, liability is acquired by mere potential capacity. For this reason, the D.C. Circuit court found this interpretation to be "utterly unreasonable" and incompatible with the statute.<sup>56</sup>

It is important to note, however, that the D.C. Circuit court supported an interpretation that the TCPA prohibited the use of devices that had a *capacity* to be an autodialer.<sup>57</sup> But considerations of whether devices have the "capacity," "ultimately turn[] less on labels such as 'present' and 'potential' and more on considerations such as how much is required to enable the device to function as an autodialer."<sup>58</sup> Nonetheless, in either the FCC's or the D.C. Circuit's interpretation, telemarketers such as in *Barry*, would still be liable under the TCPA since their devices have the capacity to function as an autodialer even though they did not actually use them. Ultimately, the D.C. Circuit overturned the FCC's 2015 Order, holding that the FCC's definition of an autodialer was unreasonably expansive.<sup>59</sup>

### C. *The Functions Required to Constitute as an Autodialer*

Following *ACA International*, courts have continued to struggle with the statutory uncertainty of the TCPA. After the FCC's guidance was struck down, many courts needed to propose their own interpretation, which further caused instability in TCPA litigation. As a result, *ACA International* left open two major questions: (1) How do we define an autodialer under the TCPA; and (2) is mere capacity to use autodialer functions sufficient to establish liability? As the circuit split over the definitional question of an autodialer deepened, the Supreme Court attempted to resolve the issue in *Facebook, Inc. v. Duguid*.<sup>60</sup> Facebook has a login notification program in which it automatically sends users text

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55. Under the TCPA, violators are liable for a minimum of \$500 per violating call. Under the FCC's interpretation, by texting 10 friends without consent Susan has become liable for at least \$5,000.

56. *ACA Int'l*, 885 F.3d at 699.

57. *Id.* at 704 (acknowledging that the question of whether liability is established in the case where a device has the capacity to act as an autodialer but does not use those functions, is unanswered and leaves that question to the FCC).

58. *Id.* at 696.

59. *Id.* at 700.

60. *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021). Note that as of October 28<sup>th</sup>, 2021, Facebook, Inc. has changed their name and is currently operating, and doing business, as Meta Platforms, Inc. For the ease of readability of this Note, Meta Platforms, Inc. will hereinafter be referred to as "Facebook."

messages when an attempt is made to access their Facebook account from an unknown device or browser.<sup>61</sup> Duguid, however, received several notifications to his telephone despite not owning a Facebook account nor providing Facebook with his phone number.<sup>62</sup>

Referring to the Ninth Circuit, Duguid subsequently filed suit against Facebook claiming a violation of the TCPA by “maintaining a database that stored phone numbers and programming its equipment to send automated text messages.”<sup>63</sup> The Ninth Circuit defined an autodialer as a device that “need not be able to use a random or sequential generator to store numbers; it need only have the capacity to ‘store numbers to be called’ and ‘to dial such numbers automatically.’”<sup>64</sup> Facebook, on the other hand, argued that their program was not an autodialer because it did not send text messages to numbers that were either randomly or sequentially generated or stored.<sup>65</sup> Rather, it sent individualized texts to numbers linked to specific accounts.<sup>66</sup> Thus, the question left for the Supreme Court was whether § 227(a)’s phrase “using a random or sequential number generator” either applied to the verbs “store,” “produce,” or both.<sup>67</sup> Facebook argued the phrase modified both verbs (“store” and “produce”), while Duguid argues it modifies only the closest one (“produce”).<sup>68</sup>

In a unanimous decision, the Court ruled in favor of Facebook, cementing the definition of an autodialer as a device that has the capacity to use a random or sequential number generator to either store or produce phone numbers to be called.<sup>69</sup> Writing for the Court, Justice Sotomayor began with the text of the TCPA, and applied the series qualifier canon which provides that “[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series,” a modifier at the end of the list “normally applies to the entire series.”<sup>70</sup> In this

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61. *Id.* at 1168.

62. *Id.*

63. *Id.*

64. *Facebook, Inc.*, 141 S. Ct. at 1168 (citing *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1053 (9th Cir. 2018)).

65. *Id.*

66. *Id.*

67. *Id.* at 1169.

68. *Id.*

69. *Id.* at 1173; see also Kristen Evans, *No Caller ID: The Impact of Consumer Protection Post Facebook, Inc. v. Duguid*, 5 BUS., ENTREPRENEURSHIP & TAX L. REV. 161, 171 (2021).

70. *Facebook, Inc.*, 141 S. Ct. at 1173 (quoting ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 147 (2012)).

case, the Court determined this cannon created the most natural reading of the statute.<sup>71</sup>

The Court also referred to §227(a)'s statutory context. As previously mentioned, in enacting the TCPA, Congress was pressured by consumer and safety concerns.<sup>72</sup> As noted by the Court, § 227 was designed to “target a unique type of telemarketing equipment that risks dialing emergency lines randomly or tying up all the sequentially numbered lines at a single entity.”<sup>73</sup> None of these concerns exist if a device calls from a list of stored numbers that were neither randomly or sequentially generated.<sup>74</sup> The Ninth Circuit's interpretation, however, would have expand the definition of an autodialer to encompass any equipment that merely has the capacity to store and dial telephone numbers automatically.<sup>75</sup> Their interpretation, however, would subject users to liability for using phones that have the mere capacity to use common-place functions such as speed-dialing or automated text-message response. Notably, the Court found that such an expansion would be like “using a chainsaw on these nuanced problems when Congress meant to use a scalpel.”<sup>76</sup> Ultimately, the Court held that to constitute an autodialer, Congress' definition “requires that in all cases, whether storing or producing numbers to be called, the equipment in question must use a random or sequential number generator.”<sup>77</sup>

## II. AN ERA OF UNCERTAINTY

In solving the definitional question of what functions constitute an autodialer, the Supreme Court reinvigorated the question of capacity.<sup>78</sup> Namely, the Supreme Court left unanswered whether one's device simply needs the capacity to use the functions of an autodialer as de-

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71. *Id.* (explaining that “if a teacher announced that ‘students must not complete or check any homework to be turned in for a grade, using online homework-help websites[,]’ [i]t would be strange to read that rule as prohibiting students from completing homework altogether, with or without online support.”).

72. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951–54 (9th Cir. 2009).

73. *Facebook, Inc.*, 141 S. Ct. at 1171.

74. *Raphael Aus. v. Alorica, Inc.*, No. 20-cv-05019, 2021 U.S. Dist. LEXIS 240677, at \*10–11 (C.D. Cal. Dec. 16, 2021).

75. *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 (9th Cir. 2018).

76. *Facebook, Inc.*, 141 S. Ct. at 1171.

77. *Id.* at 1170.

78. *See Eric J. Troutman*, *140 Days Later: Here Are Five Things To Know (RIGHT NOW) About How Courts Are Handling ATDS Cases Post Facebook*, TCPAWORLD, (Aug. 17, 2021), <https://tcpaworld.com/2021/08/17/140-days-later-here-are-five-things-to-know-right-now-about-how-courts-are-handling-atds-cases-post-facebook/> [<https://perma.cc/SN8Q-YC4K>].

fined in *Facebook*, or whether one must actually use those functions to be held liable for damages.<sup>79</sup> This Note adds to the modicum of scholarship on this question and asserts that the appropriate standard is the latter.<sup>80</sup> First, through examination of pre-*Facebook* decisions, Part II.A explores the governing interpretation of “capacity” as it relates to liability. Second, through the examination of post-*Facebook* decisions, Part II.B explores the current split among lower courts brought about by the Supreme Court’s ruling in *Facebook*.

#### A. *The “Capacity” to be an Autodialer Prior to Facebook*

Prior to *Facebook*, the Ninth Circuit consistently held that a “system need not actually store, produce, or call randomly or sequentially generated telephone numbers, it need only have the capacity to do it.”<sup>81</sup> Similar to *Barry*, in *Satterfield v. Simon & Schuster, Inc.*, Laci Satterfield filed a class action in federal district court against Simon & Schuster for text messaging an advertisement to a cellular phone she owned in violation of the TCPA.<sup>82</sup> Simon & Schuster filed a motion for summary judgment, among other things, claiming that their device did not “store, produce, or call numbers randomly or sequentially” as required by the TCPA to establish an autodialer.<sup>83</sup> The court, however, denied the motion reasoning that, when determining whether a device is an autodialer, the inquiry begins with the statutory text.<sup>84</sup> Reviewing § 227(a) of the TCPA, the court determined that:

The statute’s clear language mandates that the focus must be on whether the equipment has the *capacity* ‘to store or produce telephone numbers to be called, using a random or sequential number generator.’ Accordingly, a system need not actually store,

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79. *Id.* (“The Supreme Court’s loose/intentional (depending on your point of view) language regarding the ‘use’ of an R&SNG in a system might be interpreted to require that only calls actually made as a result of an R&SNG trigger the statute.”).

80. While there may not have been many published scholarly contributions regarding the question of actual use, legal blogs such as TCPAWorld have provided insight and maintained coverage on TCPA developments. See, e.g., *Facebook Ruling Resource Page*, TCPAWORLD, <https://tcpaworld.com/facebook-ruling-resource-page/> [<https://perma.cc/KUR9-JAWQ>] (last visited Oct. 27, 2022).

81. *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009).

82. *Id.* at 949.

83. *Id.* at 950–51.

84. *Id.* at 951.

produce, or call randomly or sequentially generated telephone numbers, it need only have the *capacity* to do it.<sup>85</sup>

The Ninth Circuit followed this statutory interpretation in *Meyer v. Portfolio Recovery Assocs., LLC*.<sup>86</sup> There, the plaintiff filed suit against the soliciting firm for violation of the TCPA after receiving a debt collection call.<sup>87</sup> Like in *Barry* and *Satterfield*, however, the defendant used a device that had the capacity to be an autodialer but did not use any autodialer functions.<sup>88</sup> Nevertheless, the court ruled that liability is conditioned on mere capacity and not actual use.<sup>89</sup>

In contrast, the D.C. Circuit Court questioned the Ninth Circuit's interpretation in *ACA International*. There, the D.C. Circuit inserted a brief section of dicta leaving open the question of whether mere capacity was sufficient to attach TCPA liability.<sup>90</sup> Notably, the D.C. Circuit made a special note to highlight the ambiguities of another provision in the TCPA.<sup>91</sup> The TCPA's prohibition against the unlawful uses of an autodialer is supported by two provisions. First, § 227(a) defines an autodialer as equipment that 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."<sup>92</sup> Second, § 227(b)(1)(A) incorporates the definition of an autodialer into the scope of the TCPA's authority by making it unlawful for "any person . . . to *make any call* (other than a call made for emergency purposes or made with the prior express consent of the called party) *using* any automatic telephone dialing system . . . to any telephone number assigned to a . . . cellular telephone service."<sup>93</sup> Without ruling either way, the D.C. Circuit acknowledged that the phrase "make any call . . . using [an autodialer]" is ambiguous.<sup>94</sup> The FCC presumed that this provision allows for a broad understanding in which any calls from a device with the capacity to function as an autodialer are prohibited—regardless of whether autodialer features are used to make a call.<sup>95</sup> But this Note contends that there are more reasonable interpretations.

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85. *Id.* (emphasis added).

86. *Watson & West, supra* note 49, at 301.

87. *Meyer v. Portfolio Recovery Assocs.*, 707 F.3d 1036, 1040 (9th Cir. 2012).

88. *Id.* at 1043.

89. *Id.*

90. *ACA Int'l v. FCC*, 885 F.3d 687, 704 (D.C. Cir. 2018).

91. *Id.*

92. 47 U.S.C. § 227(a)(1).

93. *ACA Int'l*, 885 F.3d. at 704 (citing 47 U.S.C. § 227(b)(1)(A)(iii)) (emphasis added).

94. *Id.*

95. *Id.*

For example, in the FCC's 2015 Order a dissenting commissioner focused on the word "using," and interpreted the phrase to mean "that the equipment must, in fact, be used as an autodialer to make the calls' before a TCPA violation can be found."<sup>96</sup> Without resolving the ambiguity of the phrase, the D.C. Circuit acknowledged that the dissenting commissioner's interpretation would preclude the FCC's unreasonable interpretation regarding cellphones.<sup>97</sup> In his interpretation, what matters is the use of autodialer features.<sup>98</sup> Nevertheless, the D.C. Circuit court left the issue of whether mere capacity or actual use determines liability for the FCC to raise in a future rulemaking or declaratory order.<sup>99</sup>

Moreover, Judge Edwards, one of the presiding judges during *ACA International's* oral arguments, went a step further and even suggested that the TCPA should be limited to prohibit only the use of an autodialer.<sup>100</sup> According to Judge Edwards:

The statute doesn't talk about . . . 'you are violating the law if you have a device,' it talks about prohibitions to make any call *using* an automatic telephone dialing system. The prohibition is to use the system, not merely to have equipment that has the system in it or available to it . . . "The statute's prohibition is to "make any call using any automatic telephone dialing system... it is not a violation to have in your hand, or in your desk, or in your room, to have equipment that could be used for automatic dialing. That's not what the statute says...That isn't what Congress was going after."<sup>101</sup>

Despite *Satterfield*, Judge Edwards argued that the Ninth Circuit's interpretation of liability is over-expansive and unreasonable.

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96. *Id.* (citing *In the Matter of Rules & Reguls. Implementing the TCP Act of 1991*, 30 FCC Rcd. 7961, 8088 (2015) (Comm'r O'Rielly, dissenting in part and approving in part)).

97. *Id.* ("The dissenting commissioner's interpretation would substantially diminish the practical significance of the Commission's expansive understanding of "capacity" in the autodialer definition.").

98. *Id.* ("Under the dissent's understanding of the phrase, 'make any call,' then, everyday calls made with a smartphone would not infringe the statute: the fact that a smartphone could be configured to function as an autodialer would not matter unless the relevant software in fact were loaded onto the phone and were used to initiate calls or send messages.").

99. *Id.*

100. Oral Argument at 06:52-11:07, *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (No. 15-1211), <https://www.cadc.uscourts.gov/recordings/recordings.nsf/DocsByRDate?SearchView&Query=aca&Start=1&Count=10&SearchOrder=1&SearchWV=TRUE>. [<https://perma.cc/Y6JE-9W5Y>].

101. *Id.* (emphasis added).

B. *The “Capacity” to be an Autodialer Post-Facebook*

Following *Facebook*, district courts have been reviewing the question of liability as it relates to a defendant whose equipment has the capacity to function as, but does not make use of, an autodialer.<sup>102</sup> In *Barry*, as in *Facebook*, the defendant’s equipment would make targeted automated calls to individuals.<sup>103</sup> Nevertheless, drawing on cases such as *Satterfield* and *Meyer*, Barry argued that mere capacity was sufficient to protect her claims from being precluded.<sup>104</sup>

The Michigan Eastern District Court, however, dismissed Barry’s argument for capacity following the Supreme Court’s ruling in *Facebook*.<sup>105</sup> Recognizing that Congress designed the TCPA to address a unique harm caused by an autodialer, and not simply the existence of an autodialer, the district court determined that the capacity argument would have “the effect of imposing liability on a defendant whenever it has such a system, with admittedly no nexus to the alleged harm to the plaintiff.”<sup>106</sup> Likewise, *Facebook* emphasized that “Congress’ definition of an autodialer requires that, *in all cases*, whether storing or producing numbers to be called, the equipment in question must *use* a random or sequential number generator.”<sup>107</sup> Essentially, if mere capacity was all it took to determine liability, then this rule would broaden the scope of the TCPA and force damages on individuals whose actions are unrelated to Congressional intention.

The *Barry* court’s rationale has been followed by the District of Maine, the Southern District of Florida, the Northern District of Texas, and, as of June 2022, the Third Circuit Court of Appeals.<sup>108</sup> All of these cases involved a defendant who, as in *Barry*, called a particularly chosen

102. See *Barry v. Ally Fin., Inc.*, No. 20-cv-12378, 2021 U.S. Dist. LEXIS 129573 (E.D. Mich. July 13, 2021); see also *McEwen v. Nat’l Rifle Ass’n of Am.*, U.S. Dist. LEXIS 72133 (D. Me. Apr. 14, 2021); *Evans*, *supra* note 69, at 172 (arguing that a potential problem that is raised by *Facebook* is whether equipment must actually use the random or sequential number generator or if mere capacity is enough).

103. See *supra* text accompanying notes 13–14.

104. See *supra* notes 15–17 and accompanying text.

105. *Barry*, 2021 U.S. Dist. LEXIS 129573, at \*2.

106. *Id.* at \*11.

107. *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1170 (2021) (emphasis added).

108. See *McEwen v. NRA of Am.*, No. 20-cv-00153, 2021 U.S. Dist. LEXIS 72133 \*19 (D. Me. Apr. 14, 2021); see *Evans v. Ocwen Loan Servicing, LLC*, 2021 U.S. Dist. LEXIS 203427 \*11 (S.D. Fla. Oct. 21, 2021); see *Hunsinger v. Alpha Cash Buyers, LLC*, No. 21-cv-1598, 2021 U.S. Dist. LEXIS 209119 \*7 (N.D. Tex. Oct. 29, 2021); see *Panzarella v. Navient Sols., Inc.*, 37 F.4th 867, 876–80 (3d Cir. 2022); see Eric J. Troutman, *Did the NRA Just Take Down the TCPA? CRITICAL New Ruling Holds Facebook Requires “Use” of R&SNG and Not Just Capacity*, TCPAWORLD, (Apr. 15, 2021), <https://tcpaworld.com/2021/04/15/did-the-nra-just-take-down-the-tcpa-critical-new-ruling-holds-facebook-requires-use-of-rsng-and-not-just-capacity/> [<https://perma.cc/GP62-J6YU>].

individual with a device that has the capacity to function as an autodialer, but did not actually use those functions.<sup>109</sup> And in each of these cases, the courts determined that, following *Facebook*, a claim of improper use of an autodialer requires an allegation that the defendant used a random or sequential number generator to place a call to the plaintiff. Allegations that the defendant's dialing system has the capability to use those functions is not enough.<sup>110</sup>

This new wave of interpretation, however, is not universally settled.<sup>111</sup> In fact, some federal courts are still firmly applying *Satterfield's* and *Meyer's* reasoning.<sup>112</sup> For example, in *Grome v. USAA Sav. Bank*, the plaintiff alleged that USAA violated the TCPA by making 224 collections calls to collect on alleged debts.<sup>113</sup> Similar to the facts of *Barry*,<sup>114</sup> the *Grome* plaintiff was the specific target of these calls, which came from a device that automatically dialed numbers.<sup>115</sup>

Unlike the device used in *Barry*, however, the USAA's device did not have the capacity to randomly or sequentially generate numbers.<sup>116</sup> Rather, it could only dial numbers that were given to it by a USAA representative.<sup>117</sup> The plaintiff acknowledged that the device used to call her did not use a random or sequential number generator. Similar to the plaintiffs in *Barry*, *Satterfield*, and *Meyer*, however, the plaintiff argued that USAA had still violated the TCPA because their device had the capacity to use the functions of an autodialer—even if it did not actually

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109. *See id.*

110. *See id.*

111. Eric J. Troutman, *140 Days Later: Here Are Five Things To Know (RIGHT NOW) About How Courts Are Handling ATDS Cases Post Facebook*, TCPAWORLD, (Aug. 17, 2021), <https://tcpaworld.com/2021/08/17/140-days-later-here-are-five-things-to-know-right-now-about-how-courts-are-handling-atds-cases-post-facebook/> [<https://perma.cc/2BKP-EK5QJ>] (noting that some courts will disagree with *McEwen* and find that the TCPA is triggered anytime a system with the “capacity” to dial using an R&SNG is deployed—even if no R&SNG is “used” to make the calls at issue.).

112. *See Jance v. Homerun Offer, LLC*, No. 20-cv-00482, 2021 U.S. Dist. LEXIS 143145 \*8 (D. Ariz. July 29, 2021) (quoting *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009)) (“In determining whether a defendant called with an ATDS, the central issue is not whether the defendant used an ATDS when making the call, but whether defendant’s equipment has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator.”); *see also Grome v. USAA Sav. Bank*, 557 F. Supp. 3d 931, 936 (D. Neb. 2021) (noting that while the 8th Circuit has not specifically addressed what the term “capacity” means, the district court has chosen to cite to pre-*Facebook* decisions such as, *King v. Time Warner Cable Inc.*, 894 F.3d 473, 481 (2d Cir. 2018) and *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018), which firmly held that liability is assigned so long as there is mere capacity).

113. *Grome*, 557 F. Supp. 3d at 934.

114. *See supra* notes 13–15 and accompanying text.

115. *Grome*, 557 F. Supp. 3d at 935.

116. *Id.* at 936.

117. *Id.*

use them.<sup>118</sup> In particular, the plaintiff argued that the device's programming could be changed to create a random or sequentially generated list of phone numbers that the device would call.<sup>119</sup>

Despite *Grome's* similarities to the facts in *Barry*, it is important to note the distinctions between the courts' rulings. First, unlike in *Barry*, the Nebraska District Court determined that the device was incapable of dialing telephone numbers beyond those stored in given lists.<sup>120</sup> Thus, applying *Facebook*, the Nebraska District Court determined that the device was not an autodialer for the purpose of the TCPA.<sup>121</sup> In addition, the district court's ruling was couched on the term "capacity."<sup>122</sup> To resolve the argument that USSA's device did not have the necessary capacity to constitute an autodialer, the Court determined that even if it was possible for the device to gain the functions of an autodialer in the future, it did not mean it had the capacity to function as one at the time.<sup>123</sup> Recognizing that the Supreme Court and the Eighth Circuit have not specifically addressed what "capacity" means, the Nebraska court cited *ACA International* and other pre-*Facebook* decisions to determine that the inquiry ends at the capacity of the device at the time the call was made.<sup>124</sup> In other words, simply having the *potential* capacity to use autodialer functions is insufficient for TCPA purposes.

The *Grome* court's reasoning, however, is harmful to defendants like the one in *Barry*. Unlike the device in *Grome*, the device in *Barry* did have the capacity to function as an autodialer.<sup>125</sup> Like in *Grome*, however, those functions were not used.<sup>126</sup> Nevertheless, under this court's interpretation, even though the device did not actually use these functions prohibited by the TCPA, they are still liable. Such an interpretation would be akin to "tak[ing] a chainsaw to these nuanced problems when Congress meant to use a scalpel."<sup>127</sup> Therefore, to effectuate this consideration, this Note asserts that a system must use a random and/or sequential number generator to constitute an unlawful use of an autodialer for the purposes of the TCPA.

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118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 936–37.

123. *Id.*

124. *Id.* at 937.

125. See *supra* note 14, 17 and accompanying text.

126. See *Barry v. Ally Fin., Inc.*, No. 20-cv-12378, 2021 U.S. Dist. LEXIS 129573, at \*11 (E.D. Mich. July 13, 2021).

127. *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1171 (2021).

### III. PROPOSING A CHANGE TOWARD STABILITY, CERTAINTY, AND FAIRNESS IN INTERPRETING THE TCPA

While *Facebook* was unable resolve all the uncertainty regarding TCPA doctrine, it did open a potential path that could ensure that those who are held liable under the TCPA are the parties Congress intended. The FCC should issue a new interpretation of § 227(b)(1)(A) by a declaratory ruling that will attach liability to a defendant who made use of a random and/or sequential number generator, not those whose device merely has the capacity to do so. In doing so, the FCC will provide certainty and fairness to businesses, consumers, and the judiciary. First, Part III.A will explore the consequences of a fragmented approach to applying the TCPA. Second, Part III.B will discuss *Chevron* deference and how, if adopted by the FCC, this Note's proposal will cement an interpretation throughout the nation. Third, Part III.C will propose a new interpretation of § 227(b)(1)(A) that will effectuate Congressional intentions in drafting the TCPA. Finally, Part III.D will propose alternative methods to effectuate Congressional intent if the FCC chooses not to adopt this proposal.

#### A. *The Consequences of a Fragmented Application of Law*

Per § 227(b)(2) of the TCPA, the FCC has the delegated authority to make rules and regulations in accordance with the TCPA's requirements.<sup>128</sup> This means that the onus is on the FCC to provide guidance and certainty in how the TCPA should be adopted. Since *ACA International's* reversal of the FCC's "utterly unreasonable" and "expansive" interpretation, judicial understanding of liability has fragmented.<sup>129</sup> Consequently, courts in various jurisdictions are scrambling to apply the text of the TCPA in competing ways.<sup>130</sup>

To comprehend the consequences of the district courts' lack of cohesion when applying a statute, it is helpful to perceive the effects

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128. 47 U.S.C. § 227(b)(2). ("The Commission shall prescribe regulations to implement the requirements of this subsection.")

129. *ACA Int'l v. FCC*, 885 F.3d 687, 689–99 (D.C. Cir. 2018); see also *McEwen v. NRA of Am.*, No. 20-cv-00153, 2021 U.S. Dist. LEXIS 72133, at \*20 (D. Me. Apr. 14, 2021); see also *Evans v. Ocwen Loan Servicing, LLC*, 2021 U.S. Dist. LEXIS 203427, at \*10 (S.D. Fla. Oct. 21, 2021); but cf. *Jance v. Homerun Offer, LLC*, No. 20-cv-00482, 2021 U.S. Dist. LEXIS 143145, at \*8 (D. Ariz. July 29, 2021); cf also *Grome v. USAA Sav. Bank*, 2021 U.S. Dist. LEXIS 164255, at \*14 (D. Neb. Aug. 31, 2021).

130. *ACA Int'l*, 885 F.3d at 689–99; see also *McEwen*, 2021 U.S. Dist. LEXIS 72133, at \*20; see also *Evans*, 2021 U.S. Dist. LEXIS 203427, at \*10; but cf. *Jance*, 2021 U.S. Dist. LEXIS 143145, at \*8; cf also *Grome*, 2021 U.S. Dist. LEXIS 164255, at \*14.

through an illustration. Courts like the Maine and Florida district courts held that one must use autodialer functionality to attach liability and not merely have a device which has the capacity to do so.<sup>131</sup> But that is not the case in other jurisdictions like the Nebraska or Arizona district courts. In these jurisdictions, “the central issue is not whether the defendant used an ATDS when making the call, but whether defendant’s ‘equipment has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator.’”<sup>132</sup> Recall *Barry*, in which a debt collection company made targeted automated calls without using autodialer functionality.<sup>133</sup> Recall also that if *Barry* could have found as few as 167 similarly situated individuals who were contacted by the company, the damages for her class action suit would have totaled \$1,002,000.<sup>134</sup> And recall that a similar class action suit against Caribbean Cruise Lines consisted of up to 930,000 members.<sup>135</sup> In the Maine and Florida district courts, the company-defendant is not liable because these calls were targeted towards specific individuals, and thus do not represent the danger that Congress sought to address.<sup>136</sup> But in the Nebraska or Arizona district courts the company is liable simply because the device has the capacity to use autodialer functions.<sup>137</sup> The fragmented application of federal law within the varied jurisdictions creates many opportunities for gamesmanship within class action lawsuits and contradicts Congressional intent when enacting the TCPA.<sup>138</sup>

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131. See *McEwen*, 2021 U.S. Dist. LEXIS 72133, at \*19–20; see *Evans*, 2021 U.S. Dist. LEXIS 203427, at \*11.

132. *Jance*, No. 20-cv-00482, 2021 U.S. Dist. LEXIS 143145, at \*8 (quoting *Flores v. Adir Int’l, LLC*, 685 Fed. Appx. 533, 534 (9th Cir. 2017); see also *Grome*, 557 F. Supp. 3d at 933.

133. See *supra* note 13 and accompanying text.

134. Presuming that each of the 167 individuals within the class action received as many unlawful calls as *Barry* (4 calls), and their recoverable damages were set at the max allowed per 47 U.S.C.S. § 227 (b)(3)(B) (2020), \$500 per call, then the total damages would \$334,000. (668 calls multiplied by \$500). Note that it is likely that each putative class member would be eligible, and it is likely that these class members were contacted more or less than four times. This would suggest that the actual damages award could have been more or less than the projected \$334,000.

135. See *supra* text accompanying note 11.

136. See *McEwen*, 2021 U.S. Dist. LEXIS 72133 at \*19 ; *Evans*, 2021 U.S. Dist. LEXIS 203427, at \*11.

137. See *Jance v. Homerun Offer, LLC*, 2021 U.S. Dist. LEXIS 143145 \*8 (D. Ariz. July 29, 2021); see also *Grome v. USAA Sav. Bank*, 557 F. Supp. 3d 931, 937 (D. Neb. Aug. 31, 2021).

138. See *Hearing on Lawsuit Abuse and the Telephone Consumer Protection Act Before the U.S. H.R. on the Judiciary Subcomm. on the Const. and Civ. Just.*, 115th Cong. 5 (2017) (Testimony of Adonis E. Hoffman, former Chief of Staff and Senior Legal Advisor to Federal Communications Commissioner Mignon Clyburn) (“The law has become the second most popular vehicle for class action lawyers to reap millions in the name of consumer protection. As an attorney, a consumer and a citizen, this really bothers me because it is a bastardization of the public interest and a travesty to our legal system. As a matter of equity, it just seems to be plain wrong.”).

Congress enacted the TCPA due to its concerns for consumer privacy and safety across the nation. Therefore, no interpretation will resolve Congressional concern unless applied evenly across jurisdictions.<sup>139</sup> Considering the severity of potential damages TCPA litigation can accrue to a defendant, and the harm that actual use of an autodialer can cause to consumers, the courts need an authority to cement the standard for which the defendant will be held—the FCC should be that authority.

### B. *The FCC Can Create Uniformity Through the Chevron Doctrine*

If the FCC were to adopt this Note's proposal, it would receive judicial acceptance and thus create uniformity throughout the nation through the *Chevron* Doctrine. In *Chevron, U.S.A., Inc. v. NRDC, Inc.*, the Supreme Court held that an agency's interpretation of an ambiguous statute should be given deference if they have been given regulatory authority.<sup>140</sup> The purpose of this principle was to acknowledge three main facts: (1) administrative agencies generally have a specialized or technical expertise in a subject matter that a court does not possess;<sup>141</sup> (2) agencies are politically accountable for their decisions;<sup>142</sup> and (3) it is presumed that when Congress passes ambiguous statutes they are delegating legislative authority to the relevant agency.<sup>143</sup> Therefore, that deference should be maintained so long as the agency interpretation is reasonable and not arbitrary or capricious.<sup>144</sup>

The *Chevron* doctrine, however, has faced criticism by legal scholars and the Supreme Court.<sup>145</sup> Recently, the Supreme Court's ruling in *West*

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139. Jonathan M. Cohen & Daniel S. Cohen, *Iron-ing out Circuit Splits: A Proposal for the Use of the Irons Procedure to Prevent and Resolve Circuit Splits Among United States Courts of Appeals*, 108 CALIF. L. REV. 989, 1010 ("Circuit splits can undermine a legal principle that many believe is fundamental: courts should apply federal laws uniformly. The growth and persistence of circuit splits . . . create a fragmented federal legal system that apportions rights and restrictions according to geography.").

140. *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

141. Patrick M. Garry, *Accommodating the Administrative State: The Interrelationship between the Chevron and Nondelegation Doctrines*, 38 ARIZ. ST. L.J. 921, 943 (2006).

142. *Id.*

143. *Id.*

144. *Chevron*, 467 U.S. at 844.

145. See generally Christopher J. Walker, Symposium, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103 (2018); see also Nicholas Bagley, *Chevron deference at stake in fight over payments for hospital drugs*, SCOTUSBLOG (Nov. 29, 2021, 9:28 AM), <https://www.scotusblog.com/2021/11/chevron-deference-at-stake-in-fight-over-payments-for-hospital-drugs/> [<https://perma.cc/2FRD-RW3T>]; see also *Util. Air Regul. Grp. (UARG) v. EPA*, 573 U.S. 302, 324 (2014).

*Virginia v. EPA* has renewed concerns about the doctrine's viability.<sup>146</sup> One of the main incursions into the *Chevron* doctrine, and the principle statutory interpretation tool used in *West Virginia*, has been the major questions doctrine,<sup>147</sup> which provides that "if an agency seeks to decide an issue of major national significance, its action must be supported by clear statutory authorization."<sup>148</sup> Accordingly, "there are 'extraordinary cases' . . . in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."<sup>149</sup> The rationale behind this principle is that we presume that Congress "intends to make major policy decisions itself, not leave those decisions to agencies."<sup>150</sup> Likewise, courts recognize that "[e]xtraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].'"<sup>151</sup> Therefore, the extent of an agency's regulatory authority is what is expressly provided to them by Congress.<sup>152</sup>

The major questions doctrine has traditionally stood as an exception to *Chevron* deference.<sup>153</sup> In *Ala. Ass'n of Realtors v. HHS*, under its authority "to prevent the introduction, transmission, or spread of communicable diseases," the CDC argued that its powers include the ability to enact a nationwide eviction moratorium in response to COVID-19.<sup>154</sup> In rejecting this claim, the Supreme Court explained that the CDC's interpretation would affect eighty percent of the country, create an economic impact of billions of dollars towards renters and landlords, and

146. See Martin T. Booher et al., *West Virginia v. EPA: What This Means for Federal Agency Rulemaking Going Forward*, BAKERHOSTETLER (Aug. 12, 2022), <https://www.bakerlaw.com/alerts/west-virginia-v-epa-what-this-means-federal-agency-rulemaking-going-forward> [perma.cc/DEU4-8XY5].

147. *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022); see DANIEL J. SHEFFNER, CONG. RSCH. SERV. IF12077, THE MAJOR QUESTIONS DOCTRINE 1-2 (2022); see also *UARG*, 573 U.S. at 324.

148. SHEFFNER, *supra* note 147, at 1; see also *West Virginia*, 142 S. Ct. at 2605.

149. *West Virginia*, 142 S. Ct., at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)); *Util. Air Regul. Grp. (UARG)*, 573 U.S., at 324; *Brown & Williamson Tobacco Corp.*, 529 U.S. at 162 (rejecting the FDA's claim that they had the authority to regulate the tobacco industry given their statutory authority over "drugs" and "devices") ("Given the economic and political significance of the tobacco industry at the time, it is extremely unlikely that Congress could have intended to place tobacco within the ambit of the FDCA absent any discussion of the matter."); *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

150. *West Virginia*, 142 S. Ct. at 2609.

151. *Id.*

152. *Id.*

153. See Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 83, 93–94 (2018).

154. *Ala. Ass'n of Realtors v. Dep't of Health and Hum. Services*, 141 S. Ct. 2485, 2487 (2021).

invade into the domain of state law.<sup>155</sup> Taking these effects into consideration, and without clear language from Congress stating otherwise, the Court determined that it was not Congress's intention to delegate power of such political and economic significance to the agency.<sup>156</sup>

Similarly, in *West Virginia v. EPA*, under the powers granted to it by the Clean Air Act, the EPA created the Clean Power Plan.<sup>157</sup> The regulation's goal was to reduce carbon dioxide emissions by forcing existing coal-fired power plants to reduce or eliminate operations in favor of renewable sources.<sup>158</sup> There, the Court found that such a regulation would "substantially restructure the American energy market."<sup>159</sup> An effect that is so significant that "the basic and consequential tradeoffs involved in such a choice are ones that Congress would likely have intended for itself."<sup>160</sup> Finding no clear statutory authorization that would support agency action, the Court held the EPA was acting beyond the scope of its authority.<sup>161</sup>

Unlike eviction moratoriums or forcibly shifting sources of energy production, however, narrowing the scope of liability to accurately cover the individuals the TCPA intended does not meet the level of "vast political or economic significance." While the eviction moratorium would have affected eighty percent of the population and created billions of dollars in financial burdens, this Note's proposal narrows those affected by the TCPA and would relieve financial burdens imposed on telemarketers who are not actually using autodialer functions. Likewise, unlike regulations that would restructure the energy market, this Note's proposal does not increase the FCC's regulatory authority, nor does it cause a restructuring of the telemarketing industry. Rather, this Note's proposal will simply ensure that the TCPA is adequately enforced in accordance with Congressional intent. In fact, it is the contrary interpretation that would conflict with the major questions doctrine. Under the Ninth Circuit's interpretation, a caller is liable merely for using a device that has the capacity to use autodialer functions, even if those functions were not used. Like eviction moratoriums or forcibly shifting sources of energy production, the Ninth Circuit's interpretation can restructure the telemarketing market and create billions of dollars in financial burdens. As exemplified in *Barry*, such a broad-sweeping interpretation

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155. *Id.* at 2489; see SHEFFNER, *supra* note 147, at 2.

156. *Id.*; see *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

157. *West Virginia v. EPA*, 142 S. Ct. 2587, 2602 (2022).

158. *Id.* at 2603.

159. *Id.* at 2610.

160. *Id.* at 2613.

161. *Id.* at 2616.

will lead to gamesmanship, wastes of judicial resources, and unjust punishments for those not within Congress' intentions.

A second incursion into *Chevron* deference is when a court's prior interpretation supersedes a subsequent agency interpretation otherwise entitled to deference. In *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, the Court held that an agency's subsequent interpretation of a statute will supersede a court's prior interpretation unless the court's prior decision held the statute to be unambiguous and left no room for agency discretion.<sup>162</sup> Here, not only has the FCC been given explicit regulatory authority,<sup>163</sup> but also, as evident by judicial precedent, § 227(b)(1)(A) is ambiguous.<sup>164</sup>

In its dicta and during opening arguments, the judges deciding *ACA International*, found this section ambiguous.<sup>165</sup> The FCC and the Ninth Circuit presumed that this provision allows for a broad understanding in which any calls from a device with the capacity to function as an autodialer is prohibited—regardless of whether autodialer features are used to make a call.<sup>166</sup> But as the D.C. Circuit court mentioned, there are more reasonable interpretations.<sup>167</sup> In fact, both a dissenting FCC commissioner and Judge Edwards plainly stated that this section should be limited to prohibit only the use of an autodialer.<sup>168</sup> Noting the ambiguities of this section, the D.C. Circuit called on the FCC to determine this issue in future rulemaking or declarations.<sup>169</sup>

It is now time for the FCC to act. A declaratory ruling is the best mechanism to effectuate Congressional intent because, as the regulatory authority, an FCC declaration would eliminate the need for courts to create competing interpretations and allow them to settle on a uniform standard.

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162. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–84 (2005).

163. 47 U.S.C. § 227(b)(2).

164. *ACA Int'l v. FCC*, 885 F.3d 687, 689–99 (D.C. Cir. 2018); see also *McEwen v. NRA of Am.*, No. 20-cv-00153, 2021 U.S. Dist. LEXIS 72133 \*20 (D. Me. Apr. 14, 2021); *Evans v. Ocwen Loan Servicing, LLC*, 2021 U.S. Dist. LEXIS 203427 \*10 (S.D. Fla. Oct. 21, 2021); *Jance v. Homerun Offer, LLC*, No. 20-cv-00482, 2021 U.S. Dist. LEXIS 143145 \*8 (D. Ariz. July 29, 2021); *Grome v. USAA Sav. Bank*, 557 F. Supp. 3d 931, 936–37 (D. Neb. 2021).

165. *ACA Int'l*, 885 F.3d at 704.

166. *Id.*

167. *Id.* (citing In re Rules & Regulations Implementing the TCP Act of 1991 et al., 30 FCC Rcd. 7961, 8088 (F.C.C. July 10, 2015) (Comm'r O'Reilly, dissenting in part and approving in part)).

168. *Id.*; see also Oral Argument at 06:52-11:07, *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (No. 15-1211), [https://www.cadc.uscourts.gov/recordings/recordings.nsf/DocsByRDate?SearchView&Query=aca&Start=1&Count=10&SearchOrder=1&SearchWV=TRUE\[https://perma.cc/T3YQ-CX6C\]](https://www.cadc.uscourts.gov/recordings/recordings.nsf/DocsByRDate?SearchView&Query=aca&Start=1&Count=10&SearchOrder=1&SearchWV=TRUE[https://perma.cc/T3YQ-CX6C]).

169. *ACA Int'l*, 885 F.3d. at 704.

### C. *Proposing the New FCC Interpretation*

The FCC should issue a new interpretation of § 227(b)(1)(A) via a declaratory ruling that will attach liability to a defendant who made use of an autodial functions without prior express consent, not those who's device merely have the capacity to do so.<sup>170</sup> Thus, the FCC will provide certainty and fairness while acting in accordance with the statutory text, congressional intent, and public policy. When interpreting a statute, the FCC does not need the best interpretation; rather, it needs only a reasonable one.<sup>171</sup> Therefore, even if there are other possible interpretations of § 227(b)(1)(A), this Note's proposal to narrow liability to actual use of autodialer functionality is reasonable and will allow the FCC to effectuate Congressional intent. This interpretation also provides certainty to businesses and the judiciary while ensuring fairness and accountability.

To illustrate that this proposal would be entitled to *Chevron* deference, this section will first examine the statutory text of § 227(b)(1)(A) to show that the best reading provides that the statute is focused on the use of autodialer functionality. Second, this section will examine Congressional intent in enacting the TCPA to show that it is in accord with the new interpretation. Finally, this section will examine how the economic and social status quo contradicts public policy.

#### 1. Statutory Language of § 227(b)(1)(A)

This Note's reading of the relevant statutes provides that the TCPA prohibits the unlawful "use" of an ATDS, not merely the existence of such systems. § 227(b)(1)(A), provides that "it shall be unlawful for any person . . . to make any call . . . using any automatic telephone dialing system . . ."<sup>172</sup> The ambiguities of this provision start when one attempts to apply the provision to a scenario like in *Barry*, where one uses a device that has the capacity to function both as an autodialer and as a traditional phone. Does § 227(b)(1)(A) make it unlawful to make any calls with equipment that uses the autodialer functionality?<sup>173</sup> Or does the provision prohibit making any calls with equipment that has the "ca-

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170. See *Panzarella v. Navient Sols., Inc.*, 37 F.4th 867, 876–80 (3d Cir. 2022) (finding that Congress drafted this statute to prohibit making calls that use an ATDS's autodialing functionalities).

171. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

172. 47 U.S.C. § 227(b)(1)(A).

173. *Id.*

capacity,” even if the call did not use autodialer functions?<sup>174</sup> If the answer to the latter question is in the affirmative, does that suggest mere possession of an autodialer can create liability?

To start, one must look at the statute. When interpreting a provision of a statute, one must read it in the context of the whole statutory scheme.<sup>175</sup> In fact, “[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.”<sup>176</sup> Notably, § 227(b)(1)(A) specifically focuses on prohibiting actions: “It shall be unlawful for any person . . . to *make* any call . . . *using* any automatic telephone dialing system . . . .”<sup>177</sup> When determining statutory definitions, nontechnical words are given their ordinary meaning.<sup>178</sup> In this case, the terms “make” and “use” indicate that Congress’ intent was to prohibit actions and not mere possession.<sup>179</sup> Read on its own, however, this provision is ambiguous and has left many jurisdictions with competing interpretations that have allowed the TCPA to become overly broad and intrusive.<sup>180</sup>

Therefore, one must examine § 227(b)(1)(A) within the context of its statutory scheme. The TCPA’s prohibition against the unlawful uses of an autodialer is supported by two provisions: § 227(a)(1) which defines an autodialer, and § 227(b)(1)(A), which incorporates the definition into the scope of the TCPA’s authority. As stated in *Facebook*, an autodialer is a device that has “the capacity both ‘to store or produce telephone numbers to be called, using a random or sequential number generator,’ and to dial those numbers.”<sup>181</sup> Notably, in *Facebook*, the Supreme Court emphasized that “Congress’ definition of an autodialer requires that, *in all cases*, whether storing or producing numbers to be called, the equipment in question *must use* a random or sequential number generator.”<sup>182</sup> Considering the statutory scheme, this provides further support that

174. *Id.*

175. See *King v. Burwell*, 576 U.S. 473, 492 (2015); see also *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 221 (1991).

176. *King*, 576 U.S. at 492.

177. 47 U.S.C. § 227(b)(1)(A) (emphasis added).

178. See, e.g., *Chapman v. United States*, 500 U.S. 453, 462 (1991); see also *Nix v. Hedden*, 149 U.S. 304 (1893).

179. See *Use*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/use> (last visited Apr. 2, 2020) (defining “use” as “to put into action or service”); see also *Make*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/make> (last visited Apr. 2, 2020) (defining “make” as “to cause to exist, occur, or appear”).

180. See discussion *supra* Part II.

181. *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1167 (2021); 47 U.S.C.S. § 227(a)(1).

182. See *Facebook*, 141 S. Ct. at 1170 (emphasis added).

the TCPA's focus is on the use of an autodialer's functions, and not mere possession of these functions.

## 2. Legislative Intent

Such an interpretation is also consistent with legislative intent. The TCPA was enacted due to the unique threat that an autodialer created towards consumer privacy and public safety.<sup>183</sup> A review of the 1991 Committee report by the Senate Committee on Commerce, Science, and Transportation (Committee) reveals Congress' intent to limit the scope of liability under the TCPA.<sup>184</sup> In describing the regulatory impact of the TCPA, the Committee stated "[t]his bill, as reported, imposes a *limited* regulatory burden on some . . . telemarketers."<sup>185</sup> The Committee further provided that "telemarketers must obtain the express consent of any residential telephone subscriber before *placing* an automated telephone call to that subscriber . . . . These restrictions are necessary to accomplish the objectives of the bill."<sup>186</sup> Moreover, when describing the economic impact the TCPA would have on the telemarketing industry, the Committee stated that it would be minimal.<sup>187</sup> As opposed to a broad chainsaw-like approach, the Committee's designation of a "limited regulatory burden," their use of the active phrase "placing an automated call," and their intention to create only a minimal economic burden to the telemarketing industry suggests Congress intended enforcement of the TCPA to be limited to the actual use.

Congress' intent becomes clearer when looking at what the TCPA actually prohibits. Consider §227(b)(1)(A), which prohibits the use of an autodialer to call emergency telephone lines as well as lines "for which the called party is charged for the call."<sup>188</sup> Likewise, §227(b)(1)(D) prohibits the use of an autodialer which calls two or more telephone lines of a multi-line business if the calls were made simultaneously.<sup>189</sup> Compare these prohibitions with the 1991 Committee report.<sup>190</sup> In enacting the TCPA, Congress was not intending "to make all unsolicited telemarket-

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183. See discussion *supra* Part I.A.

184. U.S. Senate Comm. on Com., Sci., and Transp., S. REP. NO. 102-178 (1991).

185. *Id.* at 7 (emphasis added).

186. *Id.* at 7-8 (emphasis added).

187. *Id.* at 8-9.

188. 47 U.S.C. § 227(b)(1)(A).

189. *Id.* at § 227(b)(1)(D).

190. S. REP. NO. 102-178.

ing or facsimile advertising illegal.”<sup>191</sup> Rather, their focus is on balancing “individuals’ privacy rights, public safety interests, and commercial freedoms of speech and trade . . . in a way that protects the privacy of individuals and permits legitimate telemarketing practices.”<sup>192</sup> A device that could automatically call numbers randomly or sequentially poses a unique threat of tying up communications for emergency services as well as business spaces. But a device that isn’t using these functions does not pose this threat. Congress is specifically referencing actions that could only cause the unique substantial harm Congress is concerned about if the call was made using the functions of an autodialer. Therefore, we can see Congress’ concern is not the use of a device that simply dials numbers automatically. Common functions such as speed-dialing or automatic do-not-disturb messages do not represent the threat Congress has depicted in its prohibitions. Rather, Congress intended the TCPA to hold liable those who actually use a random or sequential number generator.

### 3. Public Policy Concerns

This Note’s reading of the statute also comports with other statutory conventions rooted in public policy. Namely, it preserves the principles of promoting fairness and eliminating undue gamesmanship. For example, the Court held in *King v. Burwell* that when interpreting a statute, it should be applied to avoid a reading that is “untenable in light of the statute as a whole.”<sup>193</sup> Under this doctrine, interpretations which would “otherwise be the most natural reading” are to be avoided if alternatives consistent with the legislative purpose are available.<sup>194</sup> This doctrine suggests that statutory interpretation is focused on ordinary meaning rather than literal meaning.<sup>195</sup> Therefore, the doctrine recognizes that the literal meaning can often fail to account for settled nuances when interpreting a statute.<sup>196</sup> Thus, “the prime directive in statutory interpretation is to apply the meaning that a reasonable reader

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191. H.R. REP. NO. 102-317, at 6 (1991); see also *Panzarella v. Navient Sols., Inc.*, 37 F.4th 867, 879 (3d Cir. 2022).

192. Telephone Consumer Protection Act of 1991, 105 Stat. 2394, 2395, §2(9).

193. *King v. Burwell*, 576 U.S. 473, 497 (2015); see also Mendelson, *supra* note 153, at 92 (describing a similar statutory canon called the rule against absurdity canon).

194. *King*, 576 U.S., at 497; see also *Griffin v. Oceanic Contractors*, 458 U.S. 564 (1982); see also *United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 542-543; see also *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940).

195. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1827 n.65 (2020) (Kavanaugh, J., dissenting).

196. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2392-2393 (2005).

would derive from the text of the law,' so that . . . the ordinary meaning (or... the "commonsense" reading) of the relevant statutory text is the anchor for statutory interpretation."<sup>197</sup> The rule laid out in *King* is meant to make sense of the text.

Here, however, a broad sweeping reading of the TCPA would not make sense. In *Facebook*, the court noted that "expanding 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."<sup>198</sup> Here too, by expanding the liability to any device that merely has autodialer capacities, regardless of whether the device functioned in this manner, would be taking a chainsaw to the nuanced concerns Congress had. As Senior Judge Edwards said in oral arguments as he was grappling with breadth of the TCPA proposed by the advocates:

I'm holding something in my hand, that has capacity... but I'm not intending to make a robo call. I want to call my sister, a non-robo call, and I am violating the statute if I don't have her consent? That makes no sense.<sup>199</sup>

The status quo of interpreting TCPA liability creates a broad and eye-popping sweep which leads to uncertainty amongst telemarketers, gamesmanship amongst consumers, and inconsistency amongst the judiciary.

If one is strictly liable to pay damages of up to \$500 per call within a class action suit for merely using a device that has the capability to function as an autodialer, then just as in *Barry*, we will see an increase in gamesmanship among plaintiffs that will affect not only businesses, but individuals as well. For example, recall Susan who accidentally texted a party invite to 10 people she didn't know without their consent.<sup>200</sup> Now assume that due to COVID-19, she was hired by Telemarketers Incorporated to work from home. She loads onto her personal phone Telemarketer Incorporated's app, which includes programming that allows for autodialer functionality, but she only uses the functions in accordance

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197. *Bostock*, 140 S. Ct. at 1825 (quoting WILLIAM N. ESKRIDGE, INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 33, 34–35 (2016)).

198. *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1171 (2021).

199. Oral Argument at 10:15–10:37, *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (No. 15-1211), <https://www.cadc.uscourts.gov/recordings/recordings.nsf/DocsByRDate?SearchView&Query=aca&Start=1&Count=10&SearchOrder=1&SearchWV=TRUE>.

200. See *supra* notes 54–55 and accompanying text.

with the TCPA.<sup>201</sup> Under current interpretations, Susan has violated the TCPA despite not using the autodialer functions once she sent the invites because she used a device that had the capacity to function as an autodialer without getting express consent from the texted parties. In fact, under the current interpretation, Susan violates the TCPA if she uses her phone to order takeout. The current interpretation's "mere capacity" interpretation wreaks havoc on Congressional intent. So much so that Circuit Judge Pillard, in *ACA's* oral argument even questioned, whether there was any interest in subjecting individuals to strict liability for using their smartphones on Sunday to call their parents merely because they use it the rest of the week in accordance with their job at Telemarketer Inc.<sup>202</sup> As a matter of public policy, the "mere capacity" interpretation is so broad that it would be absurd to think Congress envisioned this when enacting the TCPA.

#### D. Alternative Methods of Effectuating Congressional Intent

While this Note maintains that its proposal is a reasonable and non-arbitrary interpretation of an ambiguous statute, and therefore would be entitled to *Chevron* deference, if the FCC does not take up this Note's proposal, there are two other avenues that could ensure the TCPA acts in accordance with Congressional intent. First, Congress can amend the TCPA in a manner that better aligns with its goals. Alternatively, much like how the Supreme Court resolved the definitional issue of an autodialer in *Facebook*, they can provide clarification to the lower courts as to how one acquires liability under the TCPA.

#### 1. Congressional Action

Congress should amend § 227(b)(1)(A) of the TCPA and carefully design the statute to exempt from liability those who did not actually use the autodialer features. As mentioned, Congress's intent in drafting the Telephone Consumer Protection Act was to resolve consumer privacy and public safety concerns.<sup>203</sup> It was not to place strict liability, and the resulting statutory damages, on parties like those in *Barry*, who did not

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201. See 47 U.S.C. § 227(b)(1)(A) (stating that the use of an autodialer is lawful with prior express consent from the called party).

202. Oral Argument at 01:20:08-01:20:36, *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (No. 15-1211), <https://www.cadc.uscourts.gov/recordings/recordings.nsf/DocsByRDate?SearchView&Query=aca&Start=1&Count=10&SearchOrder=1&SearchWV=TRUE>.

203. See discussion *supra* Part I.A.

actually use the harmful features of an autodialer that Congress was expressly concerned about. Using its Article I power,<sup>204</sup> Congress can amend the TCPA to better fit this unique and nuanced need.<sup>205</sup>

Accordingly, this Note proposes that Congress amends § 227(b)(1)(A) to read as follows:

*a. Restrictions on use of automated telephone equipment*

1. Prohibitions. It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—
  - A. to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using [*the functions of*] any automatic telephone dialing system or an artificial or prerecorded voice . . .<sup>206</sup>

Such a proposal would attempt to specifically target calls coming from a device that actually uses the functions of an autodialer. However, this amendment cannot guarantee that a court, or the FCC, will not rule that the statute is still ambiguous. Therefore, an alternative amendment would read as the following:

*b. Restrictions on use of automated telephone equipment*

1. Prohibitions. It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—
  - A. to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice— . . .<sup>207</sup>

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204. U.S. CONST. art. I, § 1.

205. See Evans, *supra* note 69, at 172 (arguing that congressional action is the appropriate venue for reform).

206. 47 U.S.C. § 227(b)(1)(A) (emphasis added).

207. *Id.*

- B. *[For purposes of assigning liability, this section will not be construed to apply towards devices that have the capacity to store or produce numbers using a random or sequential number generator but does not actually use this function when making the relevant call. For matters concerning the pleading stage, there must be at least circumstantial evidence of actual use of autodialer functionality.]*

While this Note asserts that liability only encompassing actual use of autodialer functionality is the reading of the current §227(b)(1)(A) that best effectuates congressional intent, this amendment will provide clear and unambiguous support. Doing so would provide certainty to businesses and the judiciary, while also ensuring fairness and accountability. The downside of relying on congressional action, however, is that reliance is subject to bureaucratic sluggishness and political agitation.<sup>208</sup> Thus, it is appropriate to suggest a third alternative to ensure the TCPA acts in accordance with Congressional intent.

## 2. Judiciary Action

Alternatively, upon the opportunity, the Supreme Court can revisit the statutorily ambiguous language of § 227(b)(1)(A) and clarify what constitutes liability. While the Court does not have legislative power and must practice judicial restraint, it is the judiciary's duty to interpret the law in accordance with congressional intent.<sup>209</sup> In this case, congressional intent is clear: discourage use of functions that create a significant threat towards consumer privacy and public safety.<sup>210</sup> Circuit Judge Pillard was correct to question the FCC as to why Congress would be interested in subjecting an individual to strict liability for calling

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208. See, e.g., U.S. CONST. art. I, §§ 1, 7 (stating that Congress is the sole legislative authority, and the President cannot dictate how Congress operates. Moreover, legislators use separate procedures in the House and Senate that then must be reconciled before the President can sign a bill to become law. Thus, by constitutional design, U.S. policymaking moves slowly); see also Tyler Hughes & Deven Carlson, *How Party Polarization Makes the Legislative Process Even Slower When Government Is Divided*, LSE BLOG (May 19, 2015), <https://blogs.lse.ac.uk/usappblog/2015/05/19/how-party-polarization-makes-the-legislative-process-even-slower-when-government-is-divided/> [perma.cc/6Z8D-WSS3].

209. *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) (“The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent”); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each”).

210. See *supra* Part III.C.2.

their parents merely because the device could use the functions of an autodialer.

The “mere capacity” interpretation advanced by the FCC, the Ninth Circuit, and various district courts is too expansive and does not align with concerns expressed by Congress.<sup>211</sup> If the Court receives the opportunity to hear arguments on the issue, this Note proposes the Court should use the *King* doctrine to find that the best reading of the TCPA is one that attaches liability only to defendants who makes use autodialer functions without prior express consent, not those who’s devices merely have the capacity to do so.

## CONCLUSION

In enacting the TCPA, Congress focused on balancing “individuals’ privacy rights, public safety interests, and commercial freedoms.”<sup>212</sup> Their goal was to lay out a carefully designed framework which would protect individual interests without unduly burdening legitimate telemarketing practices. As it stands, federal courts are fragmented on how to appropriately assign liability under the TCPA. Thus liability, and the substantial economic penalties that come with it, are apportioned based on geography. Recall Susan, who merely texted her 10 friends with her cellphone which has the capacity to act as an autodialer. Recall *Barry v. Ally Financial*, in which a debt collection company made targeted automated calls without using autodialer functionality. And, lastly, recall that the TCPA allows damages of up to \$1,500 per call. Not only are businesses and individuals vulnerable to paying substantial damages despite not using the prohibited autodialer features, but they are also vulnerable to an unstable and unpredictable judicial landscape in which their conduct violates the TCPA in one district but not another. Courts will not give effect to congressional intent until there is fairness and uniformity amongst the federal courts.

While congressional or judiciary action are both viable options, a declaratory ruling by the FCC adopting this Note’s proposal would be the best method of effectuating Congressional intent. Unlike Congress or the judiciary, the FCC would be able to act swiftly and has more power and access to knowledge to regulate and conduct proper rulemaking. Thus, it is time for the FCC to answer the call of *ACA International*, and bring stability, certainty, and fairness to TCPA litigation.

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211. See *supra* Part II.A; but see Part. III.C.2.

212. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(9) (codified at 47 U.S.C. § 227).

