COMMENT

STOP TELEPHONIN' ME: THE PROBLEMATICALLY NARROW CONCEPTION OF TELEMARKETING ABUSE UNDER THE TCPA

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In an era defined by outrage and tribalism, little unites the country more than a shared frustration or a common enemy. Few everyday frustrations are more inherently pervasive—and thus, universally shared—than the billions upon billions of unwanted telemarketing phone calls and text messages consumers and their cellphones endure each month.

To combat the blight of abusive telemarketing, Congress enacted the Telephone Consumer Protection Act of 1991 (TCPA). Among other things, the TCPA places an equipment ban on the use of "automated telephone dialing systems." Though the TCPA was marginally effective for a brief period following its enactment, subsequent technological innovations have far outstripped Congressional amendment to the TCPA, leaving consumers exposed to privacy abusing telemarketing practices without meaningful protection.

Using the recent Supreme Court case *Facebook, Inc. v. Duguid* as a starting point, this Note examines the underpinnings, crafting, and enforcement of the TCPA before concluding that the consumer protection law was never equipped to remain effective in its original state for even a single decade, let alone three. By confronting two primary issues at the core of the TCPA's construction and enforcement scheme, this Comment provides suggestions for future TCPA amendments.

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INTRODUCTION

On the evening of October 18, 2021, Colorado's Lake County Search and Rescue sent a team to Mount Elbert to locate a hiker who was many hours past his anticipated return.[1] The team attempted to contact the overdue hiker by calling a cellphone he was known to carry, yet each attempted call was immediately sent to the hiker's voicemail.[2] Fearing the worst, a five-person squad embarked on a multi-hour search in Mount Elbert's trickiest spots that was ultimately fruitless.[3] However, the hiker was found later that morning unharmed in his lodging, having apparently spent the entire night lost in the wilderness completely unaware that a team of people was actively trying to locate him and had called him several times.[4] After speaking with the hiker, the Lake County Search and Rescue team shared that "[o]ne notable take-away is that the subject ignored repeated phone calls from us *because they didn't recognize the number*."[5] The dark humor of this story is borne from quiet acceptance of a pervasive, modern presumption: every adult, including the hiker, is very likely equipped with a cellphone that they are just as likely reluctant to answer when called by an unknown number.

Cellphone ownership in the United States has grown rapidly. In 1993, just 6% of the national population had cellphones.[6] By 2004, 65% of Americans owned a cellphone; today, 97% of American adults own a cellphone.[7] These ubiquitous, pocket-sized supercomputers inarguably

1. Lake County Search and Rescue, FACEBOOK (Oct. 21, 2021, 7:03 AM), https://www.facebook.com/LakeCountyCOSAR/posts/329214695671604.

2. *See id.*

3. *Id.*

4. *Id.*

5. *Id.* (emphasis added).

6. Stuart L. Pardau, *Good Intentions and the Road to Regulatory Hell: How the TCPA Went from Consumer Protection Statute to Litigation Nightmare*, 2018 U. ILL. J.L. TECH. & POL'Y 313, 314 (2018).

7. *Mobile Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/mobile [https://perma.cc/WH9C-5Q9C].

provide countless benefits that only continue to evolve, but such innovation also fuels a seemingly perpetual rejuvenation of one hugely profitable and endlessly annoying arena of consumer abuse: telemarketing.[8]

In the late 1980s, advances in automated telephonic technology gave way to the burgeoning "use of telephone solicitations to market goods and services" in the United States.[9] Consequently, consumer outrage grew "over the proliferation of intrusive, nuisance calls to their homes from telemarketers."[10] In response, Congress enacted the Telephone Consumer Protection Act[11] (TCPA) in 1991—a federal consumer protection law that prohibits certain narrowly-defined, automated telemarketing practices.[12] It also imbues the Federal Communications Commission (FCC) with authority to create and implement further rules and regulations protecting consumers from abusive telemarketing practices over time.[13]

Since enactment, however, it has been increasingly clear that the enduring precision of the TCPA's statutory language pairs poorly with the ever-changing technological landscape. To quickly illustrate the problem: consider text messaging, which in 1991 simply did not exist.[14] That fact is reflected in the glaring absence of any meaningful reference to the now-preferred medium of communication in the law's language.[15] Further highlighting this dissonance, Congress has largely failed to legislate meaningful updates to the TCPA in light of three decades' worth of evolving technology, leaving modern consumers exposed to *billions* of

8. *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, 105 Stat. 2394, 2394 (codified at 47 U.S.C. § 227) ("Total United States sales generated through telemarketing amounted to $435,000,000,000 in 1990, a more than four-fold increase since 1984.").

9. *Id.*

10. *Id.*

11. 47 U.S.C. § 227.

12. *Id.*

13. The FCC is also instructed and authorized to implement exemptions to liability under the TCPA. *Id.*

14. The world's first text message—"merry Christmas"—was transmitted on December 3, 1992, by Neil Papworth to Vodafone director Richard Jarvis. The phone that received the first SMS text weighed an unbelievable 4.5 pounds. All Things Considered, *The First Text Message Celebrates 25 Years*, NAT'L PUB. RADIO, at 00:37 (Dec. 4, 2017, 4:41 PM), https://www.npr.org/2017/12/04/568393428/the-first-text-messages-celebrates-25-years [https://perma.cc/5BF6-LZ7Z].

15. *See* 105 Stat. at 2394–402. 47 U.S.C. § 227 refers to text messaging; however, the language concerning texting was added in 2018 by the Repack Airwaves Yielding Better Access for Users of Modern Services Act of 2018, Pub. L. No. 115-14, § 503, 132 Stat. 180, 1091–94. Moreover, nothing in that 2018 Act was intended to be "construed to modify, limit, or otherwise affect any rule or order adopted by the Commission in connection with . . . the Telephone Consumer Protection Act of 1991 . . . ." *Id.* § 503(d)(1). The law specifically amended certain portions of the Communications Act of 1934. *See*, *e.g.*, *id.* § 503(a)(2). Thus, the TCPA still does not address text messaging.

unwanted "spam texts" each month.[16] Instead, such revisions (or perhaps more accurately, reinterpretations) are expressly left to the FCC.[17] And, of course, because only Congress has authority to change or otherwise amend the statutory language, the FCC may only adapt the law by way of statutory interpretation. Nevertheless, the Supreme Court's recent decision in *Facebook, Inc. v. Duguid*[18] dismantled a vital, consumer-friendly FCC interpretation of TCPA language, which formerly animated the now-inert consumer protection law.[19] In theory, a law enshrining "consumer protection" in its very title ought to provide consumers with a potent arsenal of remedies and tools to wield against telemarketers engaged in invasive nuisance practices, including unsolicited telemarketing calls. Yet, as the dust settles in the post-*Duguid* landscape, it seems this is no longer true for the TCPA.

Perhaps there is a natural impulse to question the validity of any court's reasoning when a federal consumer protection law like the TCPA is rendered less effective by way of a grammatical technicality. All the same, there can be little doubt the *Duguid* Court properly dismantled three decades of expansive interpretation through the mere deployment of long-established canons of statutory construction, not judicial overreach.[20] Indeed, any perception of judicial impropriety playing a role in the deterioration of the TCPA's outdated and flimsy consumer protections mischaracterizes the inevitable conclusion of a regulatory law stubbornly stuck in the past.

Although the TCPA ostensibly provides consumer protection against the telemarketing industry's privacy-abusing telephonic practices, decades of technological innovations have eroded its once-protective enamel.

16. In 2021, the telemarketing industry placed a sickening 72.2 billion "spam calls" and sent over 87.8 billion "spam texts"—a thirty-two percent and fifty-eight percent increase from the prior year, respectively. ROBOKILLER, THE ROBOKILLER REPORT: 2021 PHONE SCAM INSIGHTS 3, 10 (2021), https://www.robokiller.com/robocall-insights/robokiller_yearly_phone_report_2021.pdf [https://perma.cc/ENC6-8DE7]; *see also* Spencer Weber Waller, Daniel B. Heidtke & Jessica Stewart, *The Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology*, 26 LOY. CONSUMER L. REV. 343, 367 (2014) ("Congress has amended the TCPA twice since 1991 to address new technologies and practices."). *But see* Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act, Pub. L. No. 116-105, § 4(a)(1), 133 Stat. 3274, 3276 (2019) [hereinafter TRACED Act] (codified as amended in 47 U.S.C. § 227(b)).

17. For further discussion of the FCC's authority to interpret new meaning into the TCPA via declaratory rulings, see *infra* Section I.B.2.

18. 141 S. Ct. 1163 (2021).

19. For review of the Court's decision and grammar lesson in *Duguid* see *infra* Section I.B.3.

20. *See Duguid*, 141 S. Ct. at 1167–72; *see also* MARK W. BRENNAN, ARPAN SURA, ADAM COOKE, ABBY WALTER & SOPHIE BAUM, TURNING THE TCPA TIDE: THE EFFECTS OF *DUGUID* 2, 12 (2021) (discussing the effects of the *Duguid* decision on TCPA litigation).

Duguid merely compounded preexisting problems present in the TCPA's narrow language. In examining this language and the law's limited enforcement mechanisms, this Note exposes critical flaws that have contributed to a gradual degradation in the consumer protection law's efficacy, which recently came to a head in *Duguid*. Part I offers an overview of the TCPA describing problems it was enacted to address, how it did so, and how irregularly issued FCC Declaratory Rulings have tried—and largely failed—to maintain TCPA relevance in the modern technological age. Part I ends with a review of the circuit split and its subsequent resolution in *Duguid*. Part II identifies the TCPA's two foundational flaws: (1) outdated statutory language enforcing an equipment ban; and (2) over-reliance on consumers' private right of action to enforce its regulations. To strike a balance between critical and constructive analysis, Part II also suggests potential TCPA revisions aimed at bolstering both enforcement of its prohibitions and consumer confidence in the modern era. Finally, Part III concludes that, without meaningful regulations, the telemarketing industry has and will continue to invade consumer privacy in more egregious ways.

I. THE TCPA'S ORIGINS, MOTIVATIONS, AND MECHANISMS

A. Calls for Federal Regulation Swell

In the latter half of the twentieth century, automated telemarketing calls emerged as a cheap and efficient means to reach the consumer masses.[21] Though telemarketers have existed since the early days of the telephone,[22] the advent of automated telephonic technology in the late 1980s and early 1990s removed the need for human representatives in telemarketing operations, which considerably streamlined the process.[23] In eliminating the costly human element from telemarketing, automation also greatly expanded its scope and reach.[24] Indeed, near the end of the pre-

21. *See* Waller, Heidtke & Stewart, *supra* note 16, at 352–53.

22. The practice of telemarketing was pioneered by the steel and financial services industries in the 1900s. Pardau, *supra* note 6, at 317 (citing Howard E. Berkenbilt, *Can Those Telemarketing Machines Keep Calling Me?—The Telephone Consumer Protection Act of 1991 After* Moser v. FCC, 36 B.C. L. REV. 85, 95 (1994)). These industries were among the first to use the newly minted telephone to contact and engage current and potential customers. *Id.*

23. *See* S. REP. NO. 102-177, at 2 (1991); *see also* Waller, Heidtke & Stewart, *supra* note 16, at 352 ("New technology made it easier for telemarketers to reach consumers . . . and thus remove[d] the need for human representatives.").

24. "Due to advances in autodialer technology machines can be programmed to deliver a prerecorded message to thousands of sequential phone numbers." *The Automated Telephone Consumer Protection Act of 1991; the Telephone Advertising Consumer Protection Act; and Equal Billing for Long Distance Charges: Hearing on S. 1462, S. 1410,*

automation era of telemarketing the average sale to a consumer was worth around $61, while the average sale to a business was close to $1,500.[25] Just a few years after the widespread adoption of automated telephonic technology, the telemarketing industry was generating about $435 billion in annual sales,[26] with nearly 18 million Americans receiving a call from just 300,000 telemarketers each day.[27] Unsurprisingly, the sharp uptick in efficient, cheap, profitable—and most importantly—*unregulated* telemarketing activity resulted in an influx of consumer complaints alleging abuses of automated telephonic technology constituting "nuisance and an invasion of privacy."[28]

Further indicating the national desire for robust telemarketing regulation, more than forty states enacted their own telemarketing consumer protections laws by the early 1990s or sooner.[29] However, since virtually all telemarketers maintain interstate operations, these laws were regularly unenforceable on jurisdictional grounds and consequently ineffective.[30] Thus, in response to the growing pressure from both consumers and states, Congress began work on a federal consumer protection law in early 1991.[31]

Although the telemarketing industry enjoyed staggering profit and growth in the absence of national regulation, it was generally unopposed

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and S. 857 Before the S. Subcomm. on Commc'ns of the S. Comm. on Com., Sci., and Transp., 102d Cong. 7 (1991) (statement of Sen. Larry Pressler, Member, S. Comm. on Com., Sci., and Transp.).

25. Pardau, *supra* note 6, at 317 (citing 3 JOHN MCDONOUGH & KAREN EGOLF, THE ADVERTISING AGE ENCYCLOPEDIA OF ADVERTISING 1509 (John McDonough, Karen Egolf & Jacqueline V. Reid eds., 1st ed. 2003)).

26. S. REP. NO. 102-177, at 2.

27. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14014, ¶ 8 (July 3, 2003) [hereinafter 2003 FCC Report and Order].

28. The FCC received over 2,300 complaints about telemarketing calls in 1990. *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) (quoting S. REP. NO. 102-177, at 1).

29. *See* Maisa Jean Frank & Julia C. Colarusso, *Vicarious Liability May Apply: TCPA-Compliant Text Message Advertising in Franchise Systems*, 35 FRANCHISE L.J. 421, 422 (2016). For example, the Texas legislature enacted a law that made it a Class C misdemeanor to advertise by sending unsolicited fax advertisements. *The Chair King, Inc. v. GTE Mobilenet of Houston, Inc.*, 184 S.W.3d 707, 710 n.5 (Tex. 2006).

30. Frank & Colarusso, *supra* note 29, at 422 (citing S. REP. NO. 102-177, at 3).

31. The TCPA originated in three different bills, all introduced in mid-1991. *See* Berkenbilt, *supra* note 22, at 96–99. In the House, H.R. 1304, the "Telephone Advertising Consumer Rights Act," was introduced by Representative Edward Markey; in the Senate, Senator Larry Pressley introduced S. 1410, the "Telephone Advertising Consumer Rights Act." *Id.* at 96–97. Finally, Senator Ernest Hollings introduced S. 1462, the "Automated Telephone Consumer Protection Act." *Id.* at 98. Following negotiations between the House and Senate, S. 1462 was passed as the "Telephone Consumer Protection Act of 1991" and signed into law on December 20, 1991. *Id.* at 99.

to the growing call for federal action.[32] Not only was it generally receptive to the need for regulations, but certain pockets of the industry even insisted on restricting blatantly nefarious telemarketing practices:

> The responsible telemarketers want to change the industry's image. They favor placing reasonable restrictions on the industry to curb those practices the industry itself has been unable to control through voluntary programs. The Telemarketing Legislative Coalition, for example, shares the concern over the growing misuse of the telephone in direct marketing.[33]

Nonetheless, the forward-facing support for regulation was likely a cynical but undeniably sensible industry strategy intended to acknowledge the reported massive abuses that saturated the telemarketing industry throughout the 1980s and early 1990s.[34] After all, theoretical resistance to the growing support for regulation would only damage the telemarketing industry and its already sordid reputation further. With seventy-five percent of the country favoring "some form of regulation of [unsolicited] calls," and fifty percent in favor of "prohibiting all unsolicited calls," the industry's involvement in the legislative process also may have helped ensure that Congress did not acquiesce to pervasive public frustration by blanketly restricting telemarketing practices altogether.[35] Indeed, the TCPA—the eventual product of the legislative process—both acknowledges and preserves "legitimate business practices"[36] of the

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32. *See* S. REP. NO. 102-177, at 3–4 ("The Direct Marketing Association and other groups representing companies that engage in telemarketing . . . do not oppose the restrictions contained [in the bill] . . . .").

33. H.R. REP. NO. 102-317, at 8 (1991).

34. The public was not only aware of past misconduct from the telemarketing industry, but the fear of further, even worse misconduct loomed large. For example, a 1990 article forecasted that "[u]ltra-sophisticated phone scams will cost consumers more than $10 billion a year—or more than $1 million an hour—during this decade. And some phone scams of the 1990s will make those of the 1980s look like child's play." Bruce Horovitz, *Telemarketing Scams Expected to Get Slicker: Fraud: A Consumer Coalition Warns That the Use of New Technologies by Con Artists Will Cost Victims More than $10 Billion a Year in the 1990s*, L.A. TIMES (Jan. 25, 1990, 12:00 AM), https://www.latimes.com/archives/la-xpm-1990-01-25-fi-1065-story.html [https://perma.cc/ZEW8-4B96].

35. S. REP. NO. 102-177, at 3.

36. Presidential Statement on Signing the Telephone Consumer Protection Act of 1991, 2 PUB. PAPERS 1651 (Dec. 20, 1991) [hereinafter Bush Statement]. Legitimate uses of automated telephonic technology are generally defined by the existence or absence of a consumer's express prior consent to be contacted by a business. For a significant portion of the TCPA's lifespan, a business was understood to have gained this consent merely from having a preexisting "established business relationship" with a consumer. *See* 2003 FCC Report and Order, *supra* note 27, ¶ 1. To clarify the ambiguity arising with the term "established," a 2012 FCC Ruling provided that when "any question about the consent

telemarketing industry, while designating "any call . . . using any automatic telephone dialing system or an artificial or prerecorded voice" without express prior consent from the recipient as "unlawful."[37]

B. The TCPA: An Overview

Two aspects of the TCPA's regulatory scheme are vital to its sustained efficacy. First, under the TCPA, three separate categories of actors enforce its prohibitions and restrictions: (1) consumers;[38] (2) state attorneys general;[39] and (3) the FCC.[40] Second, the TCPA explicitly delegates authority to the FCC to prescribe regulations that balance "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade."[41] The following subsections explore each of these vital aspects in more depth.

1. TCPA ENFORCEMENT MECHANISMS

The TCPA has three enforcement mechanisms.[42] First and foremost, the law creates a private right of action for consumers to sue entities that allegedly violate the TCPA for injunctive relief and relatively large statutory damages.[43] More specifically, under the TCPA consumers may seek damages of $500 per violation or actual monetary loss, whichever is greater.[44] What is more, in cases where a defendant is determined to have "willfully or knowingly violated" the TCPA, a court may discretionarily treble the award to $1,500 for each violation.[45]

The TCPA also provides a similar right of action for state attorneys general (or other officials or agencies designated by a state) to bring a civil

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arise[s], the [business] will bear the burden of demonstrating that a clear and conspicuous disclosure was provided and that unambiguous consent was obtained." *In re Rules & Reguls. Implementing the TCPA of 1991*, Report and Order, 27 FCC Rcd. 1830, ¶ 33 (Feb. 15, 2012) [hereinafter 2012 FCC Report and Order].

37. 47 U.S.C. § 227(b)(1)(A).

38. 47 U.S.C. § 227(b)(3).

39. 47 U.S.C. § 227(g).

40. *See* 47 U.S.C. § 503.

41. *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961, ¶ 2 (July 10, 2015) [hereinafter 2015 FCC Declaratory Ruling and Order] (quoting Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(9), 105 Stat. 2394, 2394).

42. *See generally* 47 U.S.C. § 227.

43. *See* 47 U.S.C. § 227(b)(3).

44. *Id.* It is difficult to imagine a single intrusive phone call being responsible for a monetary loss of more than $500. But as discussed later on in this Section, this was intentionally done to incentivize consumers' use of the private right of action. *Id.*

45. *See id.*

lawsuit on behalf of residents for damages and injunctive relief.[46] However, unlike the private right of action available to consumers, the state-attorney-general right of action is only available in cases where an entity has likely engaged in a "pattern or practice" of violations.[47] Accordingly, the capacity of a state attorney general to pursue protection is both retroactive and necessarily delayed until proof of a pattern develops.

Finally, the FCC may enforce monetary forfeiture penalties against entities operating in violation of the TCPA.[48] Unlike state attorneys general, the FCC may pursue monetary damages that exceed the $500 cap placed on consumers' private right of action. However, the FCC typically only intervenes when the private right of action proves ineffective in restricting a company's unlawful telemarketing practices.[49]

Out of these three enforcement mechanisms, the continuation of TCPA enforcement and adherence most heavily relies on the private right of action available to all consumers.[50] Indeed, this reliance is by design. Senator Ernest Hollings, one of the original sponsors of the TCPA, envisioned consumers pursuing the private right of action in "[s]mall claims court or a similar court [that] would allow the consumer to appear before the court without an attorney."[51] Although damages from a single violation would likely amount to only a few pennies worth of ink, paper, or phone minutes, the drafters of the TCPA intentionally provided an alluring $500 minimum damage award, aiming to motivate private redress of a consumer's grievance through relatively simple small claims court proceedings.[52]

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46. 47 U.S.C. § 227(g). Just like the private right of action, the damages in these lawsuits are $500 per violation, with the chance of treble damages if the court determines the defendant "willfully or knowingly violated" the TCPA.

47. *Id.*

48. *See* 47 U.S.C. § 503(b)(2)(E).

49. For an illustrative case study of this point, see Waller, Heidtke & Stewart, *supra* note 16, at 401–03. There, an in-depth discussion of the Fax.Com saga explains how dilatory litigation tactics enabled a massive telecommunication company to continue unlawful practices despite at least final judgment against it. Even with the FCC's eventual involvement, the company did not stop its unlawful practices until a California court issued an injunction that, if violated, would have likely resulted in criminal prosecution. *Id.* at 401.

50. *Id.* at 358.

51. 137 CONG. REC. 30821 (1991) (statement of Senator Hollings); *see also Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 404 (E.D. Pa. 1995) (holding the remedy provided in TCPA is "designed to provide adequate incentive for an individual plaintiff to bring suit on [their] own behalf").

52. *See generally* Deborah F. Buckman, Annotation, *Propriety of Class Actions Under Telephone Consumer Protection Act, 47 U.S.C.A. § 227*, 30 A.L.R. Fed. 2d § 2 (2008) (elaborating on Congressional intention underpinning the TCPA's generous statutory damages).

Yet, perhaps unsurprisingly, enterprising attorneys discovered in short order that the TCPA is a potent class action weapon.[53] Because there is no limit on the potential statutory damages, plaintiffs can aggregate their claims and seek astronomical damages.[54] In TCPA cases taken through trial, "verdicts have exceeded $200 million, and TCPA settlements regularly exceed seven figures."[55] As a result, modern TCPA litigation bears little resemblance to Senator Hollings' original vision and is presently characterized as a "cottage industry."[56]

2. FCC AUTHORITY AND LIMITATIONS TO MAINTAINING TCPA RELEVANCE

On the day the TCPA was signed into law, President George H.W. Bush issued a statement articulating the policy rationale underpinning the new law's delegation of authority to the FCC:

> I have signed the bill because it gives the Federal Communications Commission ample authority to *preserve legitimate business practices*. . . . I also understand that the [TCPA] gives the [FCC] flexibility to adapt its rules to changing market conditions. I fully expect that the Commission will use these authorities to ensure that the requirements of the [TCPA] are met *at the least possible cost to the economy.*[57]

In the years following enactment, the FCC attempted to keep up with changing technology by issuing various Rulings and Orders between 2003 and 2015.[58] More specifically, these various Rulings and Orders sought to address the modern explosion in cellphone use and other new technologies, while further clarifying increasingly ambiguous TCPA language.[59]

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53. Palash Basu, Leslie Hartford & Jason C. Kravitz, *Dial Away? The Future of the TCPA After* Facebook v. Duguid, 33 INTELL. PROP. & TECH. L.J. 15, 15 (2021) ("Because of the uncapped liability potential, the TCPA is an attractive instrument for class actions in which plaintiffs can aggregate their claims and seek astronomical damages.").

54. *Id.*

55. BRENNAN, SURA, COOKE, WALTER & BAUM, *supra* note 20, at 2.

56. Yuri R. Linetsky, *Protection of "Innocent Lawbreakers": Striking the Right Balance in the Private Enforcement of Anti "Junk Fax" Provisions of the Telephone Consumer Protection Act*, 90 NEB. L. REV. 70, 94–97 (2011) (comparing the state of TCPA litigation to a "cottage industry").

57. Bush Statement, *supra* note 36, at 1651–52 (emphasis added).

58. *See Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1045–46 (9th Cir. 2018) (summarizing the FCC's actions in relation to TCPA Rulings and Orders).

59. Caroline M. Burkard, Comment, *Breaking Up Via Robocall: Will the Supreme Court's Conservative Majority Dismantle Protections Under the TCPA?*, 22 J.

For instance, with an aim to "prohibit abusive patterns of calls from a seller or telemarketer to a person," both the FCC and Federal Trade Commission (FTC) once required telemarketers to maintain company-specific do-not-call lists.[60] The company-specific scheme theoretically empowers consumers by allowing them to confidently prevent calls from specific callers while maintaining the ability to receive other telemarketing calls.[61] Unsurprisingly, the telemarketing industry supported this scheme[62] with the vast majority of consumers feeling it was both inadequate and unduly burdensome.[63] Ultimately, FTC and FCC regulators agreed with consumers and removed the company-specific opt-out approach in early 2003, replacing it with the National Do-Not-Call Registry (DNCR).[64] Put simply, the DNCR is a universal opt-out list still in effect today that requires telemarketers to seek a recipient's consent prior to placing any calls.[65] The registry encompasses both interstate and intrastate calls and allows consumers to register their phone numbers for free.[66] Since its creation in October 2003, the registry has successfully prevented a large quantity of unwanted telephone calls.[67]

The DNCR is not the only example of the FCC maintaining the protective utility of the TCPA. As cellular technology has progressed, telephone calls and fax machines no longer occupy the premiere space in technologically assisted communication they occupied at the time of

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HIGH TECH. L. 95, 104 (2021); *see also Marks*, 904 F.3d at 1045–46 (reasoning that the FCC issued TCPA Rulings and Orders in an effort to keep the TCPA clear and relevant).

60. Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4629 (Jan. 29, 2003) (codified at 16 C.F.R. § 310) (providing background on the company-specific "do-not-call" provision in the final amended rule); *see also* Delivery Restrictions, 47 C.F.R. § 64.1200 (2020).

61. *See* Telemarketing Sales Rule, 68 Fed. Reg. at 4583.

62. From the perspective of the telemarketing industry, the company-specific do-not-call scheme provided "consumer choice and satisfie[d] the consumer protection mandate of the Telemarketing Act while not imposing an undue burden on industry." *Id.* at 4629 (highlighting comments made by telemarketing industry leaders).

63. "[T]he vast majority of individual commenters . . . joined by consumer groups and state law enforcement representatives, claimed that the company-specific 'do-not-call' provision [was] inadequate to prevent the abusive patterns of calls it was intended to prohibit." *Id.*

64. *Id.* at 4628–29.

65. *See* Frank & Colarusso, *supra* note 29, at 423–24.

66. *See generally* Telemarketing Sales Rule, 68 Fed. Reg. at 4629 (suggesting the company-specific do-not-call list have "proven ineffective"). To register a phone number on the DNCR for free online, see https://www.donotcall.gov/register.html [https://perma.cc/6WG9-RPA3]. This is surely a good investment of your time—the registration process takes mere moments and never expires.

67. *See FCC Actions on Robocalls, Telemarketing*, FED. COMMC'NS COMM'N, https://www.fcc.gov/general/telemarketing-and-robocalls [https://perma.cc/GHP5-4WFX] (last visited Sept. 16, 2022).

TCPA's enactment.[68] In a 2003 Declaratory Ruling demonstrating impressive foresight, the FCC interpreted the TCPA's ban on autodialers to encompass both voice calls and text messages.[69] That is, at least within the meaning of the TCPA, the FCC declared that "text messages" were tantamount to "calls."[70]

These examples offer a fair glimpse into the FCC's modest efforts to maintain the effectiveness or—perhaps more accurately—the relevance of the TCPA's consumer protections in the face of new, largely dissimilar technologies. The FCC's ability to imbue the TCPA with new, modern application is unavoidably curtailed and, in fact, defined by its inability to alter any of the actual statutory text Congress enacted in 1991.[71] The consequence of that truth is illustrated by a recently resolved circuit split regarding what constitutes an "automatic telephone dialing system" (ATDS or autodialer)—simple computers programmed to dial phone numbers randomly or sequentially—under the TCPA.

The statutory language of the TCPA defines an autodialer as "equipment which has the *capacity* [1] to store or produce telephone numbers to be called, using a random or sequential number generator; and [2] to dial such numbers."[72] Over the last couple decades, a circuit split developed around the interpretation of the word "capacity" within the "Definitions" subsection of the TCPA.[73] In 2015, the FCC attempted to resolve general ambiguity about the modern bounds of the TCPA by issuing an omnibus Declaratory Ruling and Order which broadly declared an autodialer to be "dialing equipment [that] generally has the capacity to store or produce, and dial random or sequential numbers . . . *even if it is not presently used for that purpose*."[74] However, the Court of Appeals for the D.C. Circuit later vacated the FCC's expansive interpretation in *ACA International v. FCC*,[75] finding it inconsistent with prior FCC Orders.[76] The D.C. Circuit held that because "smartphone apps can introduce ATDS functionality into the device," such an expansive reading would result in

68. 2003 FCC Report and Order, *supra* note 27, ¶¶ 1–2 (addressing "the more prevalent use of predictive dialers" in the advent of "significant changes in the technologies and methods used to contact customers" in the decade since the enactment of the TCPA).

69. *Id.* ¶ 165.

70. *Id.* (ordering that the TCPA's ban on telemarketing calls to wireless phones extends to voice and text calls); *see also* 2015 FCC Declaratory Ruling and Order, *supra* note 41, ¶ 2 (restating that text messages are "calls" within the meaning of the TCPA based on prior FCC determination).

71. *See* discussion *infra* Part II.

72. 47 U.S.C. § 227 (a)(1) (emphasis added).

73. *See id.*

74. 2015 FCC Declaratory Ruling and Order, *supra* note 41, ¶ 10 (emphasis added).

75. 885 F.3d 687 (D.C. Cir. 2018).

76. *Id.* at 702.

an "eye-popping sweep," threatening to bring every smartphone in the country under the TCPA's purview.[77]

The disagreement between the FCC and the D.C. Circuit established sides that eventually led to a circuit split. On one side the Second,[78] Third,[79] Seventh,[80] and Eleventh[81] Circuits agreed with the D.C. Circuit's narrow construction. On the other side, the Sixth[82] and Ninth[83] Circuits agreed with an interpretation more aligned with the FCC's broader construction. Ultimately, the split would have a short lifespan with the Supreme Court granting certiorari on the issue in the summer of 2020.[84]

3. *FACEBOOK, INC. V. DUGUID*: UNANIMOUS NARROWING OF TCPA RELEVANCE

In 2014, Noah Duguid received multiple login-notification text messages from Facebook alerting him that someone had attempted to access the Facebook account associated with his phone number from an unknown browser.[85] Because Duguid never had a Facebook account and never gave the company his phone number, he brought a putative class action against Facebook for violating the TCPA by "maintaining a database that stored phone numbers and programming its equipment to send automated text messages to those numbers each time the associated

77. *Id.* at 697.

78. *King v. Time Warner Cable, Inc.*, 894 F.3d 473, 477 (2d Cir. 2018) (holding that *ACA International* "invalidated that [2015 FCC Declaratory Ruling and Order] and thereby removed any deference we might owe to the views the FCC expressed in it").

79. *Dominguez ex rel. v. Yahoo, Inc.*, 894 F.3d 116, 119 (3d Cir. 2018) (holding that, considering the D.C. Circuit's holding, the court was free to interpret the statutory definition of an "autodialer" as it had prior to the issuance of the 2015 FCC Declaratory Ruling and Order).

80. *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 463–64 (7th Cir. 2020) (holding the TCPA phrase "using a random or sequential number generator" describes how the telephone numbers must be "store[d]" or "produce[d]") (original emphases omitted).

81. *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1309–10 (11th Cir. 2020) (agreeing with the D.C. Circuit's determination that 2015 FCC Declaratory Ruling and Order established an "autodialer" definition too expansive to be effective in protecting consumers).

82. *Allan v. Pa. Higher Educ. Assistance Agency*, 968 F.3d 567, 574 (6th Cir. 2020) (acknowledging the soundness of the D.C. Circuit's refusal of the FCC's expansive interpretation but nevertheless construing the more expansive definition).

83. *Marks v. Crunch San Diego, LLC,* 904 F.3d 1041, 1050–51 (9th Cir. 2018) (holding that the definition of "autodialer" in TCPA is ambiguous, but legislative history indicates Congressional intent for a more expansive interpretation in line with the 2015 FCC Declaratory Ruling and Order).

84. *See Facebook, Inc. v. Duguid*, 141 S. Ct. 193 (2020) (mem.).

85. *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1168 (2021).

account was accessed by an unrecognized device or web browser."[86] Facebook moved to dismiss the suit, arguing that Duguid failed to allege that Facebook used an autodialer because he did not claim Facebook sent text messages to numbers that were "randomly or sequentially generated," as the statutory language requires.[87] Furthermore, Facebook claimed Duguid inadequately alleged that Facebook sent targeted, individualized text messages to phone numbers linked to specific accounts.[88] The U.S. District Court for the Northern District of California agreed with Facebook and dismissed Duguid's complaint with prejudice, finding that Facebook did not "dial numbers randomly but rather directly target[ed] selected numbers based on the input of users and when certain logins were attempted."[89]

On appeal, the Court of Appeals for the Ninth Circuit reversed, holding that Duguid's "nonconclusory allegations" plausibly suggested that Facebook's equipment fell within the TCPA's definition of an autodialer.[90] Reiterating a prior holding from *Marks v. Crunch San Diego, LLC*,[91] the Ninth Circuit restated its view that the adverbial phrase "using a random or sequential number generator" modifies only the verb "to produce"—not the preceding verb "to store."[92] An autodialer "need not be able to use a random or sequential generator to store numbers—it suffices to merely have the capacity to 'store numbers to be called' and 'to dial such numbers automatically.'"[93] Put differently, the Ninth Circuit portrays an ATDS as being either (1) a device that uses random or sequential number generators to *produce* telephone numbers to subsequently call; or (2) a device that merely *stores* (without using random or sequential number generators) telephone numbers to subsequently call.[94] Because Facebook's devices stored Duguid's phone number and subsequently "called"[95] that stored number without engaging any random or sequential number generator, the Ninth Circuit reversed the lower court's dismissal on the grounds that Duguid's nonconclusory allegations plausibly suggested Facebook's equipment constituted an autodialer within the

86. *Id.*

87. *Id.*

88. *Id.*

89. *Duguid v. Facebook, Inc.*, No. 15-CV-00985-JST, 2017 WL 635117, at *5 (N.D. Cal. Feb. 16, 2017), *rev'd*, 926 F.3d 1146 (9th Cir. 2019), *rev'd*, 141 S. Ct. 1163 (2021).

90. *Duguid*, 926 F.3d at 1151.

91. *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1053 (9th Cir. 2018).

92. *Duguid,* 926 F.3d at 1151; *see also* 47 U.S.C. § 227 (a)(1)(A).

93. *Duguid*, 926 F.3d at 1151 (citing *Marks*, 904 F.3d at 1053).

94. *Id.*

95. Recall the FCC Report that declared text messages equivalent to a telephone call for the purposes of the TCPA. 2003 FCC Report and Order, *supra* note 27, ¶ 165.

meaning of the TCPA and therefore should have survived Facebook's motion to dismiss.[96]

The Supreme Court subsequently granted certiorari to resolve the circuit split regarding "whether an autodialer must have the capacity to generate random or sequential phone numbers."[97] Reversing the Ninth Circuit, parts of Justice Sotomayor's decision read like a grammar lesson on the so-called "series-qualifier canon,"[98] explaining 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.'"[99] Accordingly, the Court held that to qualify as an autodialer under the TCPA, a "device must have the capacity either to store a telephone number *using a random or sequential number generator* or to produce a telephone number *using a random or sequential number generator*."[100] In the wake of *Duguid*, a device that stores and dials numbers without using a random or sequential number generator—such as the one Facebook deployed against Duguid in 2014—does not qualify as an autodialer under the TCPA. Thus, the primary issue now facing consumers is the impossibility of knowing before engaging in litigation whether a company uses random or sequential number generators to store or produce telephone numbers. Such information may only be gathered through costly litigation, which obviously defeats the original purpose of the TCPA to be a consumer protection claim primarily processed in small claims courts. What is more, such precise articulation of the TCPA's protective boundaries provide bad actors with guidance to avoid liability under the TCPA.

II. EXPOSING FLAWS AND POTENTIAL FIXES TO THE TCPA

Since Congress enacted the TCPA in 1991, the Act has been amended by Congress three times,[101] augmented by several FCC rules and regulations,[102] and interpreted (rather inconsistently) in thousands of

96. *Duguid*, 926 F.3d at 1157.

97. *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1168–69 (2021).

98. *See Paroline v. United States*, 572 U.S. 434, 447 (2014) (citing *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920)); *see also United States v. Bass*, 404 U.S. 336, 339–41 (1971).

99. *Duguid*, 141 S. Ct. at 1169 (alteration in original) (quoting ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 147 (2012)).

100. *Id.* at 1167 (emphases added).

101. *See* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (codified at 47 U.S.C. § 227); Truth in Caller ID Act of 2009, Pub. L. No. 111-331, 124 Stat. 3572 (codified at 47 U.S.C. § 227); TRACED Act, *supra* note 16.

102. *See, e.g.*, *Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, Report and Order, 7 FCC Rcd. 8752 (Oct. 16, 1992) [hereinafter 1992 FCC Report and Order]; 2003 FCC Report and Order, *supra* note 27; *Rules and Reguls Implementing the*

judicial decisions.[103] These various institutions provide something akin to legislative maintenance but with conflicting aims: FCC regulators generally aim to maintain TCPA relevancy by expanding interpretation of the law's policy underpinnings to encompass evolving technologies and telemarketing practices; the judiciary embodies an opposite, restraining force that necessarily endeavors to interpret plain statutory language of the TCPA with limited weight given to the law's legislative history, its purpose, or its ineffective enforcement.[104] So, while the FCC works to maintain the "spirit" of the TCPA, courts are chiefly concerned with interpreting plain text of the law's meaning.[105] Because TCPA language predates practically all the technology presently deployed by modern telemarketers, judicial interpretation of the TCPA tends to reverse or otherwise restrain FCC efforts to expand the TCPA's reach through broader interpretations of the unchanging statutory language.[106]

Critics of the FCC's expanding approach tend to mischaracterize the TCPA as a law that strictly regulates telemarketing, arguing expansion into tangentially related realms is inappropriate and at odds with the original Congressional intent.[107] As always, the truth is more nuanced: legislative history indicates the TCPA was designed to (1) protect the privacy interests of consumers and (2) respond to advances in technology by way of maintenance from regular FCC Rulings and Orders.[108] Because modern

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Tel. Consumer Prot. Act of 1991, Declaratory Ruling, 23 FCC Rcd. 559 (Jan. 4, 2008); 2012 FCC Report and Order, *supra* note 36; 2015 FCC Declaratory Ruling and Order, *supra* note 41.

103. Indeed, circuit splits have spawned from the rigidly precise language of the TCPA. *See supra* Section I.B.2; *see also* Burkard, *supra* note 59, at 98 (describing the circuit splits surrounding the definition of ATDS as unresolved despite *Duguid*); Quinn Marker, *Injured by a Text: Article III Standing for TCPA Texting Claims*, 89 U. CIN. L. REV. 575 (2021) (exploring the circuit split regarding Article III standing in cases involving the receipt of a single, unsolicited text message).

104. *Duguid*, 141 S. Ct. at 1169–71 (examining the plain textual meaning of the TCPA's definition of "automatic dialing telephone systems" before considering any "statutory context" or legislative history).

105. *Id.* at 1173 ("Duguid's quarrel is with Congress, which did not define an autodialer as malleably as he would have liked . . . . This Court must interpret what Congress wrote . . . .").

106. *See, e.g.*, *ACA Int'l v. FCC*, 885 F.3d 687, 699 (D.C. Cir. 2018) (holding that the FCC's 2015 Declaratory Ruling was unreasonable in that it "could be conceived to leave room for concluding that smartphones do not qualify as autodialers"); *Salcedo v. Hanna*, 936 F.3d 1162, 1166–68, 1173 (11th Cir. 2019) (acknowledging that the FCC applied TCPA "regulations of voice calls to text messages" but ultimately dismissed plaintiff's reasoning that the receipt of an unsolicited text message does not incur a "concrete injury" as required under Article III standing).

107. Waller, Heidtke & Stewart, *supra* note 16, at 363.

108. *See* S. REP. NO. 102-177, at 1 (1991) ("The purposes of the bill are to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by

telephonic technology equips telemarketers with increasingly more direct and efficient access to consumers than ever before, it is clear the consumer privacy concerns that spurred Congress to enact the TCPA in 1991 are highly implicated today through new—and arguably more invasive—means, such as text messages and identity-spoofed phone calls.[109] If preservation of "residential telephone subscriber[s']" privacy remains the original focus underpinning the TCPA (as it has for thirty years), then surely the ubiquity and capacity of the modern cellphone indicate an even deeper invasion of consumer privacy that extends far beyond the "residential" sphere and warrants either judicial extension, considerable revision to the TCPA, or new legislation entirely.

From the perspective of consumers and the plaintiffs' bar, the *Duguid* Court's suffocatingly narrow interpretation of what constitutes an "automatic telephone dialing system" under the TCPA signaled the end of meaningful TCPA protection against abusive telemarketing practices invading consumer privacy.[110] Just hours after the Supreme Court issued the *Duguid* opinion, Senator Edward J. Markey—another of the TCPA's original authors—and Representative Anna G. Eshoo released a joint statement of frustration, accusing the Supreme Court of "toss[ing] aside years of precedent, clear legislative history, and essential consumer protection to issue a ruling that is disastrous for everyone who has a mobile phone in the United States."[111] The two legislators bitterly claimed, "[i]t was clear when the TCPA was introduced that Congress wanted to ban dialing from a database."[112] The pair then foreshadowed meaningful action, noting that they "can and will act to make right what the Supreme Court got wrong . . . [by] introduc[ing] legislation to amend the TCPA, fix[ing] the Court's error, and protect[ing] consumers."[113]

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restricting certain uses of facsimile (fax) machines and automatic dialers."); *see also* H.R. REP. NO. 102–317, at 5–6 (1991) ("The purpose of the bill . . . is to protect residential telephone subscriber privacy rights by restricting certain commercial solicitation and advertising uses of the telephone and related telecommunications equipment.").

109. Waller, Heidtke & Stewart, *supra* note 16, at 394 ("Currently, the growth in text message spam and identification-spoofing technology present the greatest challenges.").

110. *See* Jeffrey F. Gersh & Neil Elan, *The Viability of Future TCPA Litigation in Light of* Facebook, Inc. v. Duguid, NAT'L L. REV. (May 24, 2021), https://www.natlawreview.com/article/viability-future-tcpa-litigation-light-facebook-inc-v-duguid [https://perma.cc/TE54-SJ99] ("The impact of [*Duguid*] cannot be overstated . . . [and will] likely result in the dismissal of many pending TCPA lawsuits.").

111. Press Release, Sen. Edward J. Markey & Rep. Anna G. Eshoo, Senator Markey and Rep. Eshoo Blast Supreme Court Decision on Robocalls as "Disastrous" (Apr. 1, 2021), https://www.markey.senate.gov/news/press-releases/senator-markey-and-rep-eshoo-blast-supreme-court-decision-on-robocalls-as-disastrous [https://perma.cc/2JSR-GUA4].

112. *Id.*

113. *Id.*

The following section provides federal legislators, like Senator Markey and Representative Eshoo, with limited, but useful suggestions that can inform impending TCPA revisions. Before seriously contemplating solutions, however, it is necessary and helpful to identify the root causes of the TCPA's modern failings. For that reason, the initial focus is on two foundational flaws that have consistently inhibited meaningful expansion and enforcement across the TCPA's thirty-year lifespan. Proceeding that discussion are a few minor concepts for revision that could bolster enforcement of the TCPA. Finally, this section considers recent Congressional action that deserves credit as a step in the right direction but must be supplemented with further action to maximize its protective value.

A. The TCPA's Two Flaws

Over three decades of technological advancement, Congress has failed to usher the TCPA into the modern era of telephonic technology through legislative revision, instead leaving such maintenance to the FCC, which has struggled to imbue the unchanging statutory text with updated meaning.[114] As a result, privacy invasions enabled by modern abusive telemarketing practices, such as call spoofing, remain rampant and potentially even more harmful to consumers.[115] Furthermore, the heavy burden TCPA litigation thrusts onto consumers was made even more untenable by the unanimous *Duguid* Court's narrow interpretation of TCPA protections, highlighting the incongruity between consumers' unchanging desire for protection against invasions of privacy and the limited, crumbling protections at their disposal.[116] Two foundational flaws in the TCPA's language and regulatory scheme have inhibited any meaningful expansion of consumer utility into the modern era of telemarketing abuse: (1) unchanged statutory language enforcing an equipment ban on largely defunct technology; and (2) an over-reliance of enforcement through the private right of action, which now more than ever places the bulk of regulatory and financial burdens on consumers.

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114. *See supra* Section I.B.2.

115. *See* Katherine Teng, *Unmasking the Villain: Exposing Scammers' Identities to Defeat Harmful Calls*, 14 BROOK. J. CORP., FIN. & COM. L. 367, 367 (2020) (arguing telecommunication technology that masks caller identity is exploited by scammers in a manner that presents "a grave security risk for our nation, as scammers steal victims' information, money, and identities").

116. *See generally* 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 (2021) (considering the fallout of *Duguid* from the perspective of the TCPA's original purpose).

1. OUTDATED STATUTORY LANGUAGE ENFORCING AN EQUIPMENT BAN

A comprehensive understanding of the TCPA's inherent flaws requires an understanding of the technological state of telecommunication in 1991. In the late twentieth century, a fax machine was hailed as an important and state-of-the-art communication machine.[117] Around the same time, clunky, brick-like cellphones were only just becoming commercially available to consumers.[118] General consumer access to telephone services was typically limited to a single local exchange carrier, with limited competition in the long distance market.[119] Most American homes were equipped with a single telephone line (and number) connected to multiple phones in the house, which would all ring simultaneously when the associated number was called.[120] With commercially available Caller ID still many years away from the mainstream market,[121] consumers had no ability to discern wanted calls from unwanted calls, forcing them to either risk missing a wanted call from loved ones or inadvertently answering an unwanted call from a telemarketer.[122] These nuisance calls also thrust unavoidable economic cost onto consumers due to technological realities of the time. As Congress acknowledged:

> [U]nsolicited calls placed to fax machines, and cellular or paging telephone numbers often impose a cost on the called party (fax messages require the called party to pay for the paper used, cellular users must pay for each incoming call, and paging

117. Justin (Gus) Hurwitz, *Telemarketing, Technology, and the Regulation of Private Speech: First Amendment Lessons from the FCC's TCPA Rules*, 84 BROOK. L. REV. 1, 7 (2018) (citing Lynn Simross, *The Fax Revolution: At Home and at Work, Facsimile Machines Have Become the Essential Business Tools*, L.A. TIMES (Sept. 11, 1991), https://www.latimes.com/archives/la-xpm-1991-09-11-vw-1950-story.html [https://perma.cc/258S-XWTR]).

118. *See* Calvin Sims, *All About/Cellular Telephones; A Gadget That May Soon Become the Latest Necessity*, N.Y. TIMES (Jan. 28, 1990), https://www.nytimes.com/1990/01/28/business/all-about-cellular-telephones-a-gadget-that-may-soon-become-the-latest-necessity.html [https://perma.cc/9XER-UGSQ].

119. Hurwitz, *supra* note 117, at 7; *see also* Andrew Pollack, *Bell System Breakup Opens Era of Great Expectations and Great Concern*, N.Y. TIMES (Jan. 1, 1984), https://www.nytimes.com/1984/01/01/us/bell-system-breakup-opens-era-of-great-expectations-and-great-concern.html [https://perma.cc/M9PJ-FSEJ].

120. *See* Mark Landler, *Multiple Family Phone Lines, a Post-Postwar U.S. Trend*, N.Y. TIMES (Dec. 26, 1995), http://www.nytimes.com/1995/12/26/us/multiple-family-phone-lines-a-post-postwar-us-trend.html [https://perma.cc/VK5L-NAHR].

121. Hurwitz, *supra* note 117, at 2.

122. *Id.*

> customers must pay to return the call to the person who originated the call).[123]

While automated telephonic technology in the late 1980s and early 1990s did not necessarily enhance the degree or severity of consumer privacy invasion, it did increase the quantity of invasions by significant margins.[124] Before automation, the scope of telemarketing operations was mostly dictated by the number of employees calling consumers.[125] But through a combination of automated telephone dialing systems and prerecorded voice messages, telemarketers could suddenly configure a single automated machine to dial one-thousand telephone numbers in a single day, leading the telemarketing industry to commit roughly seven million daily invasions of consumer privacy.[126]

Even to Congress, it was clear that the influx of consumer complaints regarding privacy-invading telemarketing practices, was a direct result of the proliferation of automated technology.[127] Accordingly, rather than a constitutionally questionable content-based prohibition,[128] the TCPA constitutes an equipment ban, prohibiting the use of certain, explicitly defined equipment.[129] The equipment ban was not only appropriate, but also easy to understand in 1991 as it took direct and unambiguous aim at newly emerging automated equipment that enabled invasions of consumer privacy.

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123. S. REP. NO. 102-177, at 2 (1991). Of course, as previously mentioned, this objectively minor "harm" was not the motivation underpinning enactment of the TCPA and its private right of action for consumers. Rather, the invasion of residential telephone subscribers' privacy interests was the primary motivation. *Id.* at 1.

124. *See id.* ("The [FCC] received over 2,300 complaints about telemarketing calls over the past year. The [FTC], State regulatory agencies, local telephone companies, and congressional offices also have received substantial numbers of complaints."). In 2019, the federal government received 3.7 million consumer complaints about robocalls. *Barr v. Am. Ass'n Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2343 (2020). Today, "robocalls make up [the FCC's] biggest consumer complaint category, with over 200,000 complaints each year—around 60% of all the complaints it receives." PATRICIA MOLONEY FIGLIOLA, CONG. RSCH. SERV., FEDERAL COMMUNICATIONS COMMISSION: PROGRESS PROTECTING CONSUMERS FROM ILLEGAL ROBOCALLS 1 (2020).

125. S. REP. NO. 102-177, at 2.

126. *Id.*

127. *Id.* at 1.

128. *See Barr,* 140 S. Ct. 2335, 2343 (finding a debt-collection exception to TCPA's robocall restriction "impermissibly favored debt-collection speech over political and other speech, in violation of the First Amendment").

129. Though legislative notes do not reflect any debate or discussion about the TCPA implementing a content-based ban, one of the few subsequent Congressional revisions would, in fact, implement a content-based exemption for government debt collectors attempting to contact debtors. The Supreme Court subsequently invalidated the debt-collection exception on the grounds that the exception "impermissibly favored debt-collection speech over political and other speech, in violation of the First Amendment." *Id.*

Yet, the effectiveness of the once straightforward equipment ban grows less applicable over time due to the relentless cycle of new telephonic technology circumventing the TCPA's autodialer ban. As one expert observed, "decreases in the number of robocalls are sometimes followed shortly thereafter by spikes in those numbers, illustrating how robocallers continue to overcome measures to stop them."[130] From this perspective, regular judicial interpretation of the TCPA's requisite autodialer element may accidentally provide nefarious telemarketers a roadmap to avoid liability while maintaining telemarketing operations with modern devices that arguably violate the spirit of the TCPA without technically offending the law.[131]

One such device is the "predictive dialer"—a type of automated dialer capable of placing phone calls before a live telemarketing agent even becomes available.[132] If the recipient of a predictive dialer phone call does not answer or declines the call, the machine simply moves to a new number; once a caller answers, that call is quickly routed to the next available agent who then takes over, giving a naïve caller the impression they were called by a real person.[133] Telemarketing industry members contend that modern "predictive dialers do not dial numbers 'randomly or sequentially'" and instead "store pre-programmed numbers or receive numbers from a computer database and then dial those numbers in a manner that maximizes efficiencies for call centers."[134] Of course, drawing the legal distinction between traditional autodialers and predictive dialers cynically obfuscates the true issue: consumer privacy is invaded regardless of the manner in which their phone number is dialed. If the TCPA is meant to provide protection for consumer privacy interests, as the legislative history indeed indicates,[135] then the predictive dialer is a painfully clever loophole enabling telemarketers to reap the same benefits a traditional autodialer provides, while entirely escaping TCPA liability.

Loopholes like this are a result of precise language that is rigidly fixated on equipment from decades ago that has been all but removed from the market precisely because courts say it violates the TCPA. Any proposed legislative revision to the TCPA must take these loopholes into consideration and craft a less porous version of the TCPA. At the very least, legislators must understand that regulation of technology requires a

130. FIGLIOLA, *supra* note 124, at 9.

131. *See id.*

132. David Kalat, *How to Recognize Different Types of Dialers From Quite a Long Way Away*, 72 CONSUMER FIN. L.Q. REP. 212, 218–19 (2018) (discussing the technological hallmarks of a predictive dialer).

133. *Id.*

134. 2003 FCC Report and Order, *supra* note 27, ¶ 130.

135. *See* S. REP. NO. 102-177, at 1 (1991).

degree of vigilance not present in the TCPA or its history; the TCPA is an inadequate tool that Congress has left to rust in thirty years of rain.

2. PRIVATE RIGHT OF ACTION IS A FAILING PRIMARY ENFORCEMENT MECHANISM

The second foundational flaw of the TCPA's regulatory scheme is its over-reliance on consumers to enforce its restrictions. Among the handful of regulatory schemes enacted by Congress to address abusive telemarketing, the TCPA uniquely provides a private right of action with relatively large statutory damages, considering the actual harm incurred.[136] Consumers are entitled to seek $500 per violation, which may be trebled to $1,500 per violation when a court determines the defendant has "knowingly" or "willfully" violated the TCPA.[137] The incentive created by the private right of action is undeniably ripe for class action lawsuits.[138] As Americans adopted cellphones, the TCPA quickly gained notoriety as providing "fertile ground for nuisance [class action] lawsuits because class action lawyers are often rewarded with quick settlements, even in cases without any merit, simply because litigation uncertainty and the potential financial exposure resulting from a bad decision are too great a risk for a company to bear."[139] Furthermore, over time, entities responsible for modern TCPA violations have helpfully sorted themselves into two general categories: (1) those that unwittingly or unintentionally violate the TCPA; and (2) those that willfully violate it.[140]

Consumers' private right of action has been most effective in regulating unwitting violators engaged in otherwise legitimate telemarketing.[141] Such entities typically communicate with consumers in manners necessarily disclosing identity, which provides the consumer a

136. *See* 47 U.S.C. § 227(b)(3). Recall that the "actual harm" contemplated by Congress in legislating the TCPA was merely pennies in wasted paper, ink, and cell minutes. *See* S. REP. NO. 102-177, at 2.

137. 47 U.S.C. § 227(b)(3).

138. *See generally* Paul F. Corcoran, Marc J. Rachman & David S. Greenberg, *The Telephone Consumer Protection Act: Privacy Legislation Gone Awry?*, 26 INTELL. PROP. & TECH. L.J. 9 (2014) (describing the lucrative nature of the TCPA class action industry).

139. Monica Desai, Ryan King, Maria Wolvin & Maxine Martin, *A TCPA for the 21st Century: Why TCPA Lawsuits Are on the Rise and What the FCC Should Do About It*, 8 INT'L J. MOBILE MARKETING 75, 75–76 (2013).

140. *See* Waller, Heidtke & Stewart, *supra* note 16, at 391. These two general categories of violators are perhaps reflected in the structure of the TCPA's private right of action, which holds willful violators potentially liable for three times as much in monetary damages. 47 U.S.C. § 227(b)(3).

141. Waller, Heidtke & Stewart, *supra* note 16, at 391 ("The private right of action has been most effective at enforcing and deterring prohibited conduct of otherwise legitimate companies.").

target for a TCPA lawsuit.[142] For most of the TCPA's lifespan, the threat of a huge class action payout has likely deterred at least some legitimate telemarketing businesses from prohibited practices.[143] And when a TCPA action is commenced, defendants tend to stop litigating past a denied motion to dismiss, instead turning to settlement to avoid potential exposure to the full brunt of statutory damages.[144] Before *Duguid* resolved the circuit split regarding the definition of "automatic telephone dialing systems," a TCPA plaintiff—whether singularly or as part of a class action—generally followed this path: (1) the plaintiff brings an action against defendant exercising the TCPA's private right of action; (2) the plaintiff's factual pleadings indicate the reasonable possibility that the defendant used an automatic telephone dialing system to carry out an unsolicited call or text; and (3) the defendant moves to dismiss the case based on lack of evidence.[145] Depending on the facts of the case and the court's jurisdictional location, the defendant's motion might be granted—ending the lawsuit altogether—or denied, pushing the parties towards a settlement.[146] Ultimately, the threat of losing tremendous amounts of money for violating the TCPA compels legitimate companies to comply with restrictions.[147] Problematically, some TCPA-compliant companies also continue to pursue and cultivate new avenues of consumer access and technology that intentionally circumvent TCPA regulations.[148] Thus, the efficacy of consumers' private right of action in enforcing the TCPA's restrictions has waned over time and across evolving telecommunication innovations.

Even more problematically, entities that intentionally violate the TCPA are on the rise.[149] These entities take care to mask their identity behind call spoofing technology, which, for instance, can trick a

142. *See id.* ("When TCPA violators are located overseas or are judgment proof, there is little incentive for an individual or class of private plaintiffs to bring a lawsuit. The effort becomes futile when the violator cannot even be located.").

143. *Id.* at 348.

144. *See* Hurwitz, *supra* note 117, at 24. ("Faced with . . . large potential liability, few defendants in TCPA cases choose to litigate past motions to dismiss, instead settling any charges to avoid exposure to the full brunt of statutory damages.").

145. *See generally* Desai, King, Wolvin & Martin, *supra* note 139, at 75–76 (providing a roadmap of generic TCPA litigation). As previously noted, plaintiffs in the post-*Duguid* litigation landscape will likely struggle to prove the new additional element of the defendant's use of "random or sequential number generators" to store or produce telephone numbers. *See supra* Section I.B.3.

146. Hurwitz, *supra* note 117, at 24.

147. *See id.*

148. An example includes the use of "electronic faxes," which send a fax as an e-mail attachment. *See* Jason M. Ingber, *FCC Rules E-Faxes Are Outside the TCPA*, NAT'L L. REV. (Dec. 11, 2019), https://www.natlawreview.com/article/fcc-rules-e-faxes-are-outside-tcpa [https://perma.cc/F9PW-BS8Y].

149. *See* Waller, Heidtke & Stewart, *supra* note 16, at 388 fig.8 (highlighting data from the FTC and FCC).

consumer's phone into displaying a telephone number with the same area code as the recipient.[150] Under such circumstances, consumers are not only left with violated privacy interests, but they also lack the true identity of the caller to pursue a TCPA action against. According to the FTC, more than fifty-nine percent of phone spam cannot be traced or blocked because "the phone calls are routed through a web of automatic dialers, caller ID spoofing, and voice-over-Internet protocols" that effectively insulates the calling entity from being a party to a lawsuit.[151] As a result, at least in relation to these willful, faceless violators, the private right of action loses nearly all its vitally important force in the TCPA's regulatory scheme.[152] Because the TCPA's enforcement heavily relies on consumers exercising their private right of action, the growing number of intentional violators spoofing their identity is like salt on the exposed wound left by *Duguid*.

B. Revising the TCPA for the Modern Era

In anticipation of impending TCPA revisions, the following section provides a few ideas on how to restore the consumer protections the TCPA was intended to provide. While some of these suggestions are minor and easily implemented, some are admittedly more dramatic and likely require further development to be practical. In other words, these suggestions will not necessarily "fix" the failings of the TCPA; rather, they highlight and address certain areas that require thoughtful revision from legislators who are best positioned to undertake the legislative task.

1. MINOR CHANGE: EVOLVE THE TCPA'S ENFORCEMENT MECHANISMS

For reasons already discussed, the TCPA's enforcement scheme is, by design, heavily reliant on consumers exercising their private right of action. But in the wake of *Duguid*, consumers have been more reluctant to pursue TCPA violations, both on their own and in class action suits. Because the narrow *Duguid* decision made it more difficult for consumers to prevail against a TCPA violator, it is no wonder that in the six months following the decision there has been a decrease of roughly thirty-one percent in the number of TCPA-related federal lawsuits filed.[153] After all,

150. *See Caller ID Spoofing*, FED. COMMC'NS COMM'N (Mar. 7, 2022), fcc.gov/spoofing [https://perma.cc/T76X-QN79].

151. Laura J. Nelson, *FTC Hangs up on Robocalls from 'Rachel'*, L.A. TIMES (Nov. 1, 2012), https://www.latimes.com/business/la-xpm-2012-nov-01-la-fi-tn-ftc-robocalls-credit-card-services-20121101-story.html [https://perma.cc/F9NA-4QEU].

152. *See generally* Teng, *supra* note 115, at 387 ("With an identity attached to the caller, finally the veil of protection can be lifted to expose the face of scammers.").

153. BRENNAN, SURA, COOKE, WALTER & BAUM, *supra* note 20, at 4. At the same time, a further breakdown of these statistics reveals that pro se litigants have been

the possibility of recovering damages has always been the motivating factor underpinning the TCPA's reliance on consumer enforcement. In the post-*Duguid* TCPA landscape, it is doubtful that consumers can continue to fruitfully serve as the TCPA's primary enforcement mechanism absent new incentives or streamlined processes.

What is more, the companies increasingly responsible for the bulk of TCPA violations are located overseas.[154] Even with the proper incentive, consumers generally lack the resources necessary to track down and identify such foreign entities.[155] For this reason, the two remaining TCPA enforcement mechanisms—state attorneys general and the FCC—must become larger actors in enforcement. To increase the efficacy of government enforcement actions, Congress should revise the TCPA to (1) increase statutory damages per violation in cases brought by a state attorney general and the FCC, and (2) enable the FTC to bring enforcement actions against TCPA violators.[156]

The first of these revisions is the simplest: increasing statutory damages per violation for government agencies would likely encourage more government action by both the FCC and state attorneys general. Currently, the FCC may seek up to $10,000 per violation,[157] whereas state attorneys general may only seek the $500 statutory damages available to private consumers per violation.[158] Since consumers appear to be less incentivized in the wake of *Duguid*, it follows that state attorneys general are likely also less incentivized. Historically, state attorneys general have shown a willingness to bring TCPA claims against violators,[159] so providing them with an incentive that matches the FCC's upper limit of $10,000 per violation would likely increase motivation to bring enforcement actions on behalf of their state's citizens. Furthermore, equipped with more resources than the average consumer, the likelihood of government agencies prevailing is probably higher, even if only marginally.

Another seemingly minor revision that could have major implications on the efficacy of TCPA enforcement is to enable the FTC to bring enforcement actions against violators. Equipping the FTC with power to enforce the TCPA would supplement the agency's preexisting regulatory

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unperturbed with *Duguid*. In the six months before *Duguid*, pro se litigants filed 103 TCPA-related cases in federal court. In the six months after *Duguid*, pro se litigants filed one hundred TCPA-related cases in federal court. *Id.* at 10. This suggests TCPA attorneys have been noticeably impacted by *Duguid*. *Id.*

154. *See* Waller, Heidtke & Stewart, *supra* note 16, at 403.

155. *Id.*

156. *Id.* at 403–04.

157. 47 U.S.C § 227(e)(5)(A)(i).

158. *See id.* § 227(g)(1).

159. Waller, Heidtke & Stewart, *supra* note 16, at 404.

role under the FTC Act[160] and Telemarketing Sales Rule.[161] Furthermore, since the TCPA is not just a telemarketing regulation, empowering the FTC to bring suit under the TCPA would increase the ability of the FTC to effectively protect consumers, especially in light of the increasing amount of fraudulent, unsolicited calls and text messages.[162] Finally, implementing statutory guidelines for regular and more streamlined FCC rulemaking will likely dissolve many interpretative battles that arise from the TCPA's generally outdated language targeting equipment no longer in general use.

2. MAJOR CHANGE: BOLSTERING THE TRACED ACT WITH PHONE NUMBER REGISTRATION

Although the previous section suggested TCPA revisions that may help bolster enforcement, this Section aims to address the most pressing problem plaguing modern consumers: the inability to track down the true source and identity behind an automated unsolicited call.[163] And though enhancing governmental capacity to enforce the TCPA's prohibitions may theoretically help reduce the growing number of intentional foreign violators, there are other, powerful domestic entities much better positioned to help identify these willful violators: telecommunication companies. These companies enjoy astronomical profits from their phoneline use and services, regardless of whether the calls are wanted or unwanted.[164] What is more, despite possessing the ability to control the

160. The Federal Trade Commission Act empowers the FTC to, among other things, "prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce." *Federal Trade Commission Act*, FED. TRADE COMM'N, https://www.ftc.gov/legal-library/browse/statutes/federal-trade-commission-act [https://perma.cc/HNC9-BNV4] (last visited Sept. 16, 2022).

161. "The Telemarketing Sales Rule, which require telemarketers to make specific disclosures of material information; prohibits misrepresentations; sets limits on the times telemarketers may call consumers; prohibits calls to a consumer who has asked not to be called again; and sets payment restrictions for the sale of certain goods and services." *Telemarketing Sales Rule*, FED. TRADE COMM'N, https://www.ftc.gov/legal-library/browse/rules/telemarketing-sales-rule [https://perma.cc/PRS8-QMH9] (last visited Sept. 16, 2022).

162. *See* Waller, Heidtke & Stewart, *supra* note 16, at 404.

163. *See* Teng, *supra* note 115, at 380 ("The bigger issue is not about being able to file a complaint but rather tracking and finding the true source of the illegal call.").

164. David Lazarus, *Column: Phone Companies Could Stop Robocalls. They're Just Not Doing It*, L.A. TIMES (July 29, 2016, 3:00 AM), https://www.latimes.com/business/lazarus/la-fi-lazarus-fcc-robocalls-20160729-snap-story.html [https://perma.cc/2KMF-UYLD] ("All of these robocallers represent billable minutes.").

calls that travel through their networks,[165] these companies are generally shielded from liability because they are traditionally considered common carriers,[166] which, at least in the context of fax machines, exempts them from liability absent "a high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions."[167] Following this FCC guidance, courts have extended the fax machine common carrier exemption into the realms of phone calls and text messages, shielding telecommunication companies from virtually all TCPA liability.[168]

Fortunately, Congress has taken some—albeit incomplete—steps to remedy part of this problem by passing the bipartisan Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (TRACED Act) in 2019.[169] The TRACED Act amends a section of the TCPA and requires companies to implement SHAKEN/STIR technology that in essence prevents unverified numbers from traveling through the network to reach consumer phones.[170] The FCC hopes this technology will "digitally validate[] the handoff of phone calls passing through the complex web of networks, allowing the phone company of the consumer receiving the call to verify that a call is" from the person making it.[171] With SHAKEN/STIR call verification, callers with unverified numbers can be cut off before their

165. Telecommunication companies exhibit the ability to stop unwanted calls by offering it as an additional service to one's phone bill. *See* Chris Morran, *Phone Companies Can Filter Out Robocalls, They Just Aren't Doing It*, CONSUMER REP. (Nov. 17, 2015), https://www.consumerreports.org/consumerist/phone-companies-can-filter-out-robocalls-they-just-arent-doing-it [https://perma.cc/672L-8KL7].

166. *See Rinky Dink, Inc. v. Elec. Merch. Sys.*, No. C13-1347-JCC, 2015 WL 778065, at *4 (W.D. Wash. Feb. 24, 2015) (quoting *Couser v. Pre-paid Legal Servs., Inc.*, 994 F.Supp. 2d 1100, 1104 (S.D. Cal. 2014)) ("The TCPA was intended to 'apply to the person initiating the telephone call or sending the message and . . . not [. . .] to the common carrier . . . that transmits the call or messages and that is not the originator or controller of the content of the call or message.") (emphasis omitted).

167. 1992 FCC Report and Order, *supra* note 102, ¶ 54.

168. *See, e.g.*, *Clark v. Avatar Techs. Phl, Inc.*, No. CIV.A. H-13-2777, 2014 WL 309079 (S.D. Tex. Jan 28, 2014) (granting motion to dismiss on the ground that telecommunication companies are not exposed to liability under the TCPA); *Rinky Dink, Inc.*, 2015 WL 778065 at *4.

169. *TRACED Act*, *supra* note 16, § 4(b).

170. "SHAKEN" technology stands for "Signature-based Handling of Asserted Information Using toKENs," and "STIR" stands for "Secure Telephone Identity Revisited." *See Combating Spoofed Robocalls with Caller ID Authentication*, FED. COMM. COMM'N, https://www.fcc.gov/call-authentication [https://perma.cc/3UJP-ESFM] (last visited Sept. 16, 2022). For a more in-depth explanation of the precise mechanics of SHAKEN/STIR technology, see Teng, *supra* note 115, at 383 (providing an in-depth explanation of how SHAKEN/STIR technology functions).

171. *Combating Spoofed Robocalls with Caller ID Authentication*, *supra* note 170.

nuisance call even reaches a target, which ideally reduces the number of unwanted calls to consumers.[172]

Although the TRACED Act is an excellent step in the right direction and provides great potential for further expansion of consumer protection, it alone is insufficient—especially in the changed landscape of TCPA litigation following *Duguid*. Indeed, while SHAKEN/STIR technology verifies the number displaying on a ringing smartphone is the number that placed the call, it does not necessarily enable recipients to acquire the identity of the caller.[173] Basically, willful TCPA violators can still circumvent SHAKEN/STIR technology by simply using an anonymous phone number untethered to an identity. Motivated by similar consumer protection concerns, many countries require Subscriber Identification Module (SIM) cards to be registered to an individual or a company.[174] Such requirements hold telecommunication companies accountable by requiring adherence to the registration process.[175] More importantly, in tandem with SHAKEN/STIR technology, mandatory SIM card registration would guarantee that the identity of a domestic TCPA violator could be ascertained. While foreign TCPA violators could still deploy a foreign number and avoid mandatory American SIM card registration, SHAKEN/STIR technology would verify the foreign number and display it to the consumers' phone, signaling an unwanted call. By affixing an ascertainable identity to every domestic number issued by an American cellular provider, TCPA violators would no longer be able to hide their identities. And as the mask slips down, so too will the number of willful TCPA violators, which should have a dramatic effect on the number of robocalls.

CONCLUSION

The great majority of American consumers own cellphones they are reluctant to answer when an unknown number of calls. Outside of circumstances like the hiker on Mount Elbert, this fact does not necessarily harm consumers in the traditional sense. Nevertheless, consumer

172. *See* Brian X. Chen, *You Can't Stop Robocalls. You Shouldn't Have To.*, N.Y. TIMES (Apr. 24, 2019), https://www.nytimes.com/2019/04/24/technology/personaltech/stop-robocalls.html [https://perma.cc/WC9G-L7JL].

173. Teng, *supra* note 115, at 384.

174. Kai Imgenberg, *Biometric KYC (Part III)—Registration of Prepaid SIM Cards*, AWARE, https://www.aware.com/blog-biometric-kyc-registration-of-prepaid-sim-cards [https://perma.cc/B9QY-6PPV] (last visited Sept. 30, 2022).

175. GSM ASS'N, THE MANDATORY REGISTRATION OF PREPAID SIM CARDS USERS 7 (2013), https://www.gsma.com/publicpolicy/wp-content/uploads/2013/11/GSMA_White-Paper_Mandatory-Registration-of-Prepaid-SIM-Users_32pgWEBv3.pdf [https://perma.cc/RT38-CPWP] (providing an overview of mandatory SIM card registration around the world).

protection laws should not just provide consumers a remedy for unlawful practices, they should inspire consumer confidence that such violations will not regularly occur. For three decades, telemarketers have outpaced the development of meaningful consumer protections not because there is a lack of demand for such protections, but because Congress has relied on thirty-year-old words to fill the gaps that evolving technologies continue to widen in the TCPA. Considering the deathblow the *Duguid* Court delivered to the plaintiff's bar, now is an appropriate time for Congress to revise the TCPA and usher in a modern era of consumer protection against telemarketing abuse. Without such revision, telemarketing abuse may continue to mutate until an unwanted call interrupting dinner is a negligible and nearly nostalgic privacy concern.

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