

## Rage Against the Machine: Reducing Robocall Abuse to Protect At-Risk Consumers

Nicole Egan

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# Rage Against the Machine: Reducing Robocall Abuse to Protect At-Risk Consumers

Nicole Egan\*†

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## ABSTRACT

For most people, robocalls are nothing more than an annoying side-effect of owning a cell phone today. But a successful robocall scheme is still capable of wreaking financial and psychological havoc on its victims. Senior citizens and cognitively impaired individuals are often targeted by fraudulent phone calls or texts because they may have trouble understanding how to identify and protect themselves from robocall abuse. This Note proposes a collaborative solution to this problem by calling on the judiciary and legislatures to minimize the amount of robocalls received by American telephone consumers. By adopting a broader understanding of the law and enacting stricter regulatory measures concerning automated calls and text messages, this Note theorizes that the unfair impact of robocalls on these targeted communities would decrease. After all, robocalls are a favorite tool used to illegally defraud unwitting recipients, many of whom are elderly or cognitively harmed. Rather than tasking telephone consumers with protecting themselves from phone fraud, the government should take responsibility and stop robocallers from evading the law in the first place.

## AUTHOR'S NOTE

\*B.S. Suffolk University; J.D. Candidate, 2023, University of Massachusetts School of Law. Thank you to the *UMass Law Review* for editing this piece, Professor Jeremiah Ho for his feedback on earlier drafts, and the attorneys I've worked with over the course of my career for their encouragement and advice. Thank you to my supportive friends and family for alleviating the stress of being a paralegal by day and law student by night, especially my friends at UMass Law for the laughs and companionship, and Jeremy Lee for giving me the idea to write about this topic. Finally, a very special thanks to Ryan Lee for making sure that my mug is always full of coffee and that my heart is always full of love.

† For Cassie.

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## INTRODUCTION

At a time when the nation is unequivocally divided, there is at least one thing that most Americans agree on—putting an end to those incessant, unwanted automated phone calls, i.e. “robocalls.” Robocalls have evolved into the new “scourge of modern civilization” over the past decade, and while some Americans are tech-savvy enough to block or ignore them, many people are not able to protect themselves in this way.<sup>1</sup> Thus, certain vulnerable populations are unfairly targeted by nefarious callers, and are therefore more likely to become victims of fraudulent phone schemes.<sup>2</sup> So the next time you forward “Unknown Caller” straight to voicemail, you may find yourself wondering: *how is this still legal?*

The short answer is: it isn’t legal.<sup>3</sup> In fact, a federal statute generally bars the use of automatic dialing equipment to send unsolicited calls or text messages.<sup>4</sup> However, this 1990s era law is riddled with legal loopholes and its application is due for an upgrade.<sup>5</sup> The law, called the Telephone Consumer Protection Act (TCPA), was originally enacted in 1991 to stop telemarketers from placing bothersome calls to residential landlines.<sup>6</sup> Since then, however, the courts have interpreted the statute so narrowly that its effect has diminished considerably.<sup>7</sup> In fairness, not all robocalls are bad. For example, schools use them to notify students about closures, health care offices use them to confirm appointments, and local governments use them to notify residents of public

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<sup>1</sup> Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (codified as amended at 42 U.S.C. § 227) (explaining how consumers are infuriated by the proliferation of unwanted, invasive telemarketing calls they receive at home); see discussion *infra* Part II (detailing how consumers are infuriated by the proliferation of unwanted, invasive telemarketing calls they receive at home).

<sup>2</sup> See JOSEPH J. SIMONS ET AL., FED. TRADE COMM’N, PROTECTING OLDER CONSUMERS 2 (2020), [https://www.ftc.gov/system/files/documents/reports/protecting-older-consumers-2019-2020-report-federal-trade-commission/p144400\\_protecting\\_older\\_adults\\_report\\_2020.pdf](https://www.ftc.gov/system/files/documents/reports/protecting-older-consumers-2019-2020-report-federal-trade-commission/p144400_protecting_older_adults_report_2020.pdf) [<https://perma.cc/V8U3-M9EM>].

<sup>3</sup> See 47 U.S.C. § 227.

<sup>4</sup> *Id.*

<sup>5</sup> See Laura A. Mazzuchetti et al., *Supreme Court Defines ATDS Under the TCPA*, KELLEYDRYE (Apr. 2, 2021), <https://www.adlawaccess.com/2021/04/articles/supreme-court-ruled-that-the-definition-of-an-automatic-telephone-dialing-system-under-the-tcpa-is-limited-by-the-plain-grammar-of-the-statute-itself> [<https://perma.cc/DK3V-NPDK>] (describing the impact of narrowly-tailored TCPA decisions).

<sup>6</sup> See discussion *infra* Part II.

<sup>7</sup> See, e.g., *Hoover v. Monarch Recovery Mgmt.*, 888 F. Supp. 2d 589, 605 (E.D. Pa. 2012) (holding that debt collector’s calls to consumer were exempt from the TCPA).

emergencies.<sup>8</sup> However, the narrow rulings of the courts regarding the scope of the TCPA have impliedly authorized many types of automated calls to continue, regardless of how much the person on the receiving end wants them to stop.

That is not to say that the U.S. has done *nothing* to try and stop the onslaught of robocalls. Guidance from the Federal Communications Commission (FCC), for example, encourages consumers to install spam blocker apps on their phones, ignore calls from unknown numbers, report spam calls for tracking in their internal database, and add their numbers to the National Do Not Call Registry.<sup>9</sup> Recently, the FCC also enacted the nation's most severe robocall crackdown measure to date: the "STIR/SHAKEN framework." (And no, despite its acronym, the FCC is not encouraging consumers to simply drink robocall pain away.)<sup>10</sup> This mandate requires phone companies to reduce the likelihood of robocallers successfully "spoofing" a recognizable number, such as when a call appears to originate from a consumer's local area code, or from an official government agency—frequently the Internal Revenue Service or the Social Security Administration, for example.<sup>11</sup> Nevertheless, even with STIR/SHAKEN in place, the robocall assault continues, and Americans are left to deal not only with the devastating financial effects of the government's failure to act, but also with the crushing physical and emotional consequences of robocall abuse.<sup>12</sup>

This Note discusses potential solutions to this problem. The Supreme Court and government agencies both need to play a role in minimizing the number of robocalls received by American telephone

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<sup>8</sup> See, e.g., *Latner v. Mount Sinai Health Sys., Inc.*, 879 F.3d 52, 54-55 (2nd Cir. 2018) (holding flu shot reminder texts did not violate the TCPA); *Blackboard, Inc.*, 31 F.C.C. Rcd. 9054 (2016), [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-16-88A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-88A1.pdf) [<https://perma.cc/8D4X-6Q8S>] (confirming that schools may lawfully make robocalls and send automated texts to student family wireless phones pursuant to "emergency purpose" exception without violating the TCPA).

<sup>9</sup> *Stop Unwanted Robocalls and Texts*, FED. COMM'N. COMM'N. (Nov. 12, 2020), [https://www.fcc.gov/sites/default/files/stop\\_unwanted\\_robocalls\\_and\\_texts.pdf](https://www.fcc.gov/sites/default/files/stop_unwanted_robocalls_and_texts.pdf) [<https://perma.cc/MUE4-KTVA>] [hereinafter *Unwanted Robocalls*].

<sup>10</sup> See *Combating Spoofed Robocalls with Caller ID Authentication*, FED. COMM'N. COMM'N. <https://www.fcc.gov/call-authentication> [<https://perma.cc/H5XW-JZ3T>] [hereinafter *Combating Spoofed Robocalls*]; see also *infra* Part III-C.

<sup>11</sup> See *Combating Spoofed Robocalls*, *supra* note 10.

<sup>12</sup> *Id.* (explaining how caller ID authentication will make Americans feel more comfortable trusting that the information they receive from caller ID is accurate); see also *FCC Data Spotlight: Top Five Unwanted Call Complaints*, FED. COMM'N. COMM'N. (Mar. 4, 2021), <https://www.fcc.gov/fcc-data-spotlighttop-five-unwanted-call-complaints> [<https://perma.cc/UR7H-ZVfy>] (explaining the increasing prevalence of robocall complaints) [hereinafter *FCC Data Spotlight*].

consumers. Reducing the number of robocalls will decrease the amount of people who fall victim to robocall fraud schemes. Part I provides background for the assertion that elderly and cognitively impaired populations are more likely to become victims of robocall fraud. Part II discusses the evolution of the TCPA and why it fails to meet its objective. It also proposes ideas for applying the law to accomplish its intended goal: protecting consumers from harassing phone calls. Part III reviews agency-led robocall regulations and highlights the changes that should be made to increase their effectiveness. Part IV suggests alternative solutions. More specifically, the United States should adopt solutions from other countries, by imposing stricter identification requirements and restricting the sale of personal information by data brokers, including phone numbers. This Note concludes by reemphasizing the importance of a corroborated effort to mitigate robocalls. Robocalls are not just a nuisance; they are a weapon that scammers use to target vulnerable communities.

## I. THE TARGETED COMMUNITY

When landlines were a permanent fixture in most homes, it was actually considered bad etiquette to ignore a ringing telephone.<sup>13</sup> However, in recent years, people have widely stopped answering their phones.<sup>14</sup> Sometimes, this is because the recipient fears a scam call is waiting for them on the other end.<sup>15</sup> Other times, the recipient may simply be following guidelines to avoid calls from unknown numbers, or prefer using a different method of communication.<sup>16</sup> Either way, the correlation between an increased rate of robocalls and a decreased rate of answered calls is hard to ignore.<sup>17</sup> And frankly, it is no wonder people don't want to pick up their phones.

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<sup>13</sup> Alexis C. Madrigal, *Why No One Answers Their Phone Anymore*, THE ATLANTIC (May 31, 2018), <https://www.theatlantic.com/technology/archive/2018/05/ring-ring-ring-ring/561545> [<https://perma.cc/ZPX3-RKLLK>].

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*; see also Debra Dolan, *Lost Hiker Ignores Rescue Calls Because They 'Didn't Recognize the Number'*, WHSV (Oct. 26, 2021, 11:31 AM), <https://www.wHSV.com/2021/10/26/lost-hiker-ignores-rescue-calls-because-they-didnt-recognize-number> [<https://perma.cc/998K-AH6W>] (telling the story of a lost hiker who ignored his rescuers' calls thinking they were spam and eventually emerged unharmed, but after his ordeal, his rescuers implored the public to "please answer the phone; it may be a search and rescue team trying to confirm you're safe . . .").

<sup>16</sup> Madrigal, *supra* note 13.

<sup>17</sup> *Id.*

Robocalls are not only a nuisance and an invasion of privacy, but they also present a real danger to their most susceptible victims.<sup>18</sup> According to research studies, people who are sixty-five years or older are 34% more likely to lose money in a scam than someone in their forties.<sup>19</sup> But the gap is probably much wider than that: according to one estimate, only one in forty-four fraud victims actually report what happened to them because they are either embarrassed or fearful of losing control of their financial freedom.<sup>20</sup> Even in the unlikely event that a robocall fraud victim *does* decide to take legal action against their offender, it is doubtful they can successfully assert an actionable claim for fraud.

Fraud is a broad cause of action encompassing many types of deceitful activity, including the use of a phone to intentionally defraud someone.<sup>21</sup> Usually, to succeed in a fraud action, it must be proven that the defendant purposefully misrepresented facts in order to intentionally deceive the victim and the victim must be shown to have detrimentally relied on those misrepresentations.<sup>22</sup> In the vast majority of robocall fraud schemes, however, the injured party does not know who to sue because robocallers shield their identities and change their numbers often to avoid being traced.<sup>23</sup> Consequently, robocall fraud victims often have no recourse available to recover their losses, unless they are somehow able to track down their perpetrator.<sup>24</sup> Therefore, the United States must be proactive in exploring preventive measures designed to reduce the number of fraudulent phone scams. In other words, if the

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<sup>18</sup> See, e.g., Misty Carter, *Top 10 Scams Targeting Seniors*, ASS'N. OF CERTIFIED FRAUD EXAMINERS INSIGHTS, <https://www.acfeinsights.com/acfe-insights/2018/2/23/the-top-10-scams-targeting-seniors> [<https://perma.cc/QYC4-GMAM>]; Kelley Holland, *These Scammers Are Targeting Your Elderly Parents*, CNBC (Feb. 17, 2015, 4:38 PM), <https://www.cnbc.com/2015/02/17/these-scammers-are-targeting-your-elderly-parents.html> [<https://perma.cc/XG7H-DDFA>].

<sup>19</sup> Holland, *supra* note 18.

<sup>20</sup> *Id.*

<sup>21</sup> Mark Theoharis, *Laws on Fraud*, CRIM. DEF. LAW., <https://www.criminaldefenselawyer.com/crime-penalties/federal/Fraud.htm> [<https://perma.cc/7K4A-PEKH>] (describing typical criminal and civil fraud claims, including wire fraud, which occurs whenever a person uses a telephone and other electronic communication devices to carry out an act of fraud).

<sup>22</sup> RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 9 (AM. LAW INST. 2020) (“One who fraudulently makes a material misrepresentation of fact, opinion, intention, or law, for the purpose of inducing another to act or refrain from acting, is subject to liability for economic loss caused by the other’s justifiable reliance on the misrepresentation.”).

<sup>23</sup> Simon van Zuylen-Wood, *How Robo-Callers Outwitted the Government and Completely Wrecked the Do Not Call List*, WASH. POST (Jan. 11, 2018), [https://www.washingtonpost.com/lifestyle/magazine/how-robo-call-moguls-outwitted-the-government-and-completely-wrecked-the-do-not-call-list/2018/01/09/52c769b6-df7a-11e7-bbd0-9dfb2e37492a\\_story.html](https://www.washingtonpost.com/lifestyle/magazine/how-robo-call-moguls-outwitted-the-government-and-completely-wrecked-the-do-not-call-list/2018/01/09/52c769b6-df7a-11e7-bbd0-9dfb2e37492a_story.html) [<https://perma.cc/9KVX-L2KJ>].

<sup>24</sup> *Id.*

number of robocalls received by telephone consumers can be decreased on the front end by legislative or other means, then the amount of people who succumb to fraudulent robocalls would also decrease.

Studies also show that people with cognitive impairments (like Alzheimer's, dementia, or Traumatic Brain Injuries (TBIs)) are more likely to become victims of financial fraud.<sup>25</sup> In fact, "scam susceptibility" is one of the earliest signs that an individual is experiencing a decline in their cognitive awareness, and may even be an early indicator of dementia.<sup>26</sup> Thus, the most common robocall fraud target is a cognitively impaired, elderly person.<sup>27</sup> So to members of this distinct group, robocalls are so much more than just a mundane source of irritation that cannot be easily blocked or ignored.

Consider, for example, what Marjorie Jones endured.<sup>28</sup> Jones was eighty-two years old when she took her own life after losing the entirety of her savings to phone scammers masquerading as representatives from government agencies.<sup>29</sup> During a congressional hearing regarding the mortifying consequences of inadequate robocall regulation, Jones's granddaughter testified that her grandmother "had taken out a reverse mortgage on her home and . . . died with \$69 in her bank account."<sup>30</sup> Jones's story is truly heartbreaking, and her courageous granddaughter shared it hoping to prevent this from happening to anyone else.<sup>31</sup> Sadly, the Jones family are not the only ones forced to grapple with this particularly cruel form of grief.

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<sup>25</sup> *Scam Susceptibility May Signal Risk for Cognitive Decline*, NAT'L INST. ON AGING (Jun. 6, 2019), <https://www.nia.nih.gov/news/scam-susceptibility-may-signal-risk-cognitive-decline> [<https://perma.cc/5Q53-YKAG>]. Unlike Alzheimer's or dementia, however, age is not a factor when it comes to TBIs. TBIs can occur at any age, and at least 1.5 million individuals are affected by TBIs each year in the United States. Some TBI sufferers experience cognitive impairments as a result of their injury, implying that people with TBIs are also at risk, regardless of age. See Hal S. Wortzel & David B. Arciniegas, *Treatment of Post-Traumatic Cognitive Impairments*, 14 CURRENT TREATMENT OPTIONS NEUROLOGY 493, 494 (2012).

<sup>26</sup> NAT'L INST. ON AGING, *supra* note 25.

<sup>27</sup> *See id.*

<sup>28</sup> Steve Price, *Stop the Calls: Robocallers Trick Grandmother Out of Life Savings*, CBS8 (May 12, 2021, 11:33 PM), <https://www.cbs8.com/article/news/investigations/robocalls/robocalls-featured/stop-the-calls-robocallers-trick-grandmother-out-of-life-savings/509-5c84adac-729e-4b2a-ac54-0be16e1e475a> [<https://perma.cc/V59D-SMSR>].

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

Another tragic case is that of Albert Poland, Jr.<sup>32</sup> Poland was a senior citizen with Alzheimer's and dementia.<sup>33</sup> In the months prior to his death, Poland was receiving up to fifty spam calls a day.<sup>34</sup> Even in his suicide note, Poland cautioned his wife “not to spend much on his funeral” because he was expecting to receive a \$2 million payout the next day.<sup>35</sup> Of course, the money never came, and the people who robbed Poland and his wife of sixty-two years of all their money have not been held accountable to this day.<sup>36</sup> This is an awful but not uncommon result: many robocall scammers, just like those who deceived Mr. Poland, are never found, and collectively get away with stealing billions of dollars from Americans every year.<sup>37</sup>

Unsurprisingly, robocall-related complaints took the number one spot on the FCC's 2020 consumer complaint list.<sup>38</sup> During that same year, over forty-five billion robocalls were made nationwide,<sup>39</sup> resulting in Americans losing almost \$30 billion to phone scammers.<sup>40</sup> Despite the massive cost and potentially life-altering consequences of relentless robocall abuse—and the government's admission that older adults are “[u]nfortunately . . . targeted or disproportionately affected” by robocall scams—the U.S. still has not figured out how to adequately regulate them.<sup>41</sup> In 2021, consumers reported receiving over fifty billion robocalls—exceeding the prior year's figure by over four billion.<sup>42</sup> And at least one-third of those calls are estimated to be scams.<sup>43</sup>

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<sup>32</sup> Wayne Drash, *Driven to Death by Phone Scammers*, CNN (Oct. 7, 2015, 9:31 PM), <https://www.cnn.com/2015/10/07/us/jamaica-lottery-scam-suicide/index.html> [<https://perma.cc/8QD3-XBBE>].

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Megan Leonhardt, *Americans Lost \$29.8 Billion to Phone Scams Alone Over the Past Year*, CNBC (Jun. 29, 2021, 9:00 AM), <https://www.cnbc.com/2021/06/29/americans-lost-billions-of-dollars-to-phone-scams-over-the-past-year.html> [<https://perma.cc/K9BN-3A4D>].

<sup>38</sup> *FCC Data Spotlight*, *supra* note 12.

<sup>39</sup> *Historical Robocalls by Time*, YOUMAIL ROBOCALL INDEX, <https://robocallindex.com/history/time> [<https://perma.cc/5XCD-WGKE>].

<sup>40</sup> Leonhardt, *supra* note 37.

<sup>41</sup> SIMONS ET AL., *supra* note 2.

<sup>42</sup> YOUMAIL ROBOCALL INDEX, *supra* note 39.

<sup>43</sup> *U.S. Phones Were Hit by More than 50 Billion Robocalls in 2021, Says YouMail Robocall Index*, PR NEWSWIRE (Jan. 6, 2022), <https://www.prnewswire.com/news-releases/us-phones-were-hit-by-more-than-50-billion-robocalls-in-2021-says-youmail-robocall-index-301455319.html> [<https://perma.cc/P3E3-UT4F>].

## II. THE TELEPHONE CONSUMER PROTECTION ACT

### A. The Evolution of the TCPA

Congress originally proposed the TCPA as a way to ban telemarketing calls, which, at the time, were referred to as “the scourge of modern civilization.”<sup>44</sup> As the authors of the proposed bill fervently explained, “owning a telephone does not give the world the right and privilege to assault the consumer with machine-generated telephone calls.”<sup>45</sup> Referring to the increased volume of sales calls as a “nuisance and an invasion of . . . privacy,” the proposed bill sought to address the high amount of FCC complaints about them.<sup>46</sup> As a result, Congress announced that banning automated calls by statute was the “only effective means of protecting telephone consumers,” and the proposed bill swiftly became law in 1991.<sup>47</sup>

On its face, the TCPA is fairly straightforward. The statute is not cluttered with unnecessary legalese or ambiguous language; actually, it reads quite clearly and succinctly.<sup>48</sup> The pertinent part of the statute reads as follows: “It shall be unlawful for any person within the United States . . . 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 prerecorded voice . . . .”<sup>49</sup> Thus, the law should make it illegal to do exactly what it plainly says is unlawful: in other words, to place automated calls to American residents without their consent.<sup>50</sup> Over time, the statute has been interpreted to prohibit the automatic sending of unsolicited text messages as well.<sup>51</sup> But in application, the statute is not as straightforward as it appears. As the old saying goes, “the devil is in the details,” and in the TCPA, he is hiding out in the definition of an “automatic telephone dialing system” (ATDS).

In the thirty years since the TCPA went into effect, technological advances have made it possible for people to place calls not only from

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<sup>44</sup> 137 CONG. REC. S9840-02 (1991) (statement of Sen. Hollings).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(12), 105 Stat. 2394, 2394-95.

<sup>48</sup> *See id.* (codified at 47 U.S.C. § 227).

<sup>49</sup> 47 U.S.C. § 227 (b)(1).

<sup>50</sup> *See id.*

<sup>51</sup> *Kramer v. Autobytel, Inc.*, 759 F. Supp. 2d 1165, 1170 (N.D. Cal. 2010) (explaining that an automatic telephone dialing system “encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls . . .”).

telephones, but from watches, cars, and even refrigerators.<sup>52</sup> So then, what exactly is an ATDS? The concept is best understood by way of example. When using CarPlay® to ask Siri® to compose and send a text on your behalf, are you not using a robot to automatically send a text for you?<sup>53</sup> What if Siri sends it to the wrong number? Did the unintended recipient consent? Did *you* violate the TCPA? Well, hopefully not. But now you understand the Supreme Court's dilemma in applying a thirty-year-old law to a modern-day problem.

### B. The ATDS Dilemma in *Duguid*

In TCPA cases, the question before courts is often whether the calls or texts at issue were made using an ATDS.<sup>54</sup> The Supreme Court's most recent interpretation of what exactly constitutes an ATDS under the TCPA came in *Facebook, Inc. v. Duguid*. In this case, the plaintiff sued Facebook after repeatedly receiving automatic two-factor authentication texts from the company.<sup>55</sup> These messages alerted Mr. Duguid that somebody was attempting to access his Facebook account from an unknown browser and included a code that he could use to successfully log back into his account.<sup>56</sup> The problem was that Mr. Duguid *never* had a Facebook account. He was not the person trying to log in, nor was he the person who gave Facebook his number, nor was he the person repeatedly requesting the code.<sup>57</sup> Unable to stop the flurry of robotexts, Mr. Duguid filed suit, arguing that the repetitive texts

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<sup>52</sup> See, e.g., *Family Hub*, SAMSUNG, <https://www.samsung.com/us/explore/family-hub-refrigerator/overview/> [<https://perma.cc/WB8H-T94M>] (detailing a Samsung refrigerator with a variety of communication options).

<sup>53</sup> CarPlay® is a way to use iPhone® while driving. See *CarPlay*, APPLE, <https://www.apple.com/ios/carplay/> [<https://perma.cc/ZD9F-8GKK>]. Siri® is a virtual assistant. See *Siri*, APPLE, <https://www.apple.com/siri/> [<https://perma.cc/723C-2PHY>]. All trademarks referenced are registered to their respective owners.

<sup>54</sup> See, e.g., *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1167 (2021). There are a number of cases which dealt with the definition of an ATDS. See *Gadelhak v. AT&T Servs, Inc.*, 950 F.3d 458, 460 (7th Cir. 2020); *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1043 (9th Cir. 2018); *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 117-18 (3rd Cir. 2018).

<sup>55</sup> *Facebook*, 141 S. Ct. at 1168; see also Linda Rosencrance et al., *Two-Factor Authentication (2FA)*, TECHTARGET (Jul. 2021), <https://searchsecurity.techtargget.com/definition/two-factor-authentication> [<https://perma.cc/DH6L-73WZ>] (“Two-factor authentication adds an additional layer of security to the authentication process by making it harder for attackers to gain access to a person’s devices or online accounts because, even if the victim’s password is hacked, a password alone is not enough to pass the authentication check.”).

<sup>56</sup> *Facebook*, 141 S. Ct. at 1168.

<sup>57</sup> *Id.*

violated the TCPA because they were being sent to him automatically without his consent.<sup>58</sup> The Court disagreed.<sup>59</sup>

In reaching its decision, the Supreme Court relied on binding precedent when it determined that the social networking site’s login notification system—which automatically sends messages when users attempt to access their accounts from an untrusted browser—did not meet the definition of an ATDS within the meaning of the TCPA.<sup>60</sup> The Court reasoned that an ATDS “must have the capacity either to store a telephone number *using a random or sequential generator* or to produce a telephone number *using a random or sequential number generator*.”<sup>61</sup> By way of explanation, even though Mr. Duguid did not give Facebook his number, *somebody* did and did so willingly. Thus, the Court held that because a user willingly gave Facebook the plaintiff’s phone number when they agreed to their two-step security feature, Facebook’s system did not *randomly generate* the number; the system merely retrieved it from a stored database.<sup>62</sup>

In deciding that Facebook’s system was not restricted under the language of the TCPA, the Court limited the scope of what may actually be considered an ATDS, and potentially provided yet another work-around for scammers to exploit.<sup>63</sup> However, regardless of the Court’s application of precedent and logical reasoning in making its conclusion, the ruling in *Facebook* was wrong.<sup>64</sup> Mr. Duguid maintained that he never had a Facebook account, and never gave the company his phone number.<sup>65</sup> He also tried to deactivate the login notification feature to no avail; because he did not have a Facebook account, he could not access the user settings to turn them off.<sup>66</sup> When Mr. Duguid replied with “off”

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 1172.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 1167 (emphasis added).

<sup>62</sup> *Id.* at 1172.

<sup>63</sup> See generally *Facebook*, 141 S. Ct. 1163. See also Palash Basu et al., *Dial Away? The Future of the TCPA After Facebook v. Duguid*, 33 INTELL. PROP. & TECH. L.J. 15, 16 (2021) (speculating that the *Facebook* decision “potentially freed businesses from obtaining prior consent for all calls and texts if they are not using an autodialer under the Supreme Court’s narrower definition” and “might unleash a flurry of undesired telemarketing calls . . .”).

<sup>64</sup> See generally 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/6XA7-YN56>] (describing even with some benefits to consumers there are still situations in which robocallers can get around the autodialer ruling in this case).

<sup>65</sup> *Duguid v. Facebook, Inc.*, No. 15-cv-00985-JST, 2017 WL 635117, at \*2 (N.D. Cal. Feb. 16, 2017); see also discussion on data brokers *infra* Part IV-B.

<sup>66</sup> *Duguid*, 2017 WL 635117, at \*2.

to Facebook’s texts, Facebook automatically replied with a message stating, “Facebook texts are now off. Reply on to turn back on.”<sup>67</sup> Still, Facebook continued to send automatic notifications.

If Mr. Duguid had not changed his phone number by this point, he would likely still be receiving alerts that someone is trying to access his nonexistent Facebook account.<sup>68</sup> This is an unacceptable solution to an ongoing problem.<sup>69</sup> Clearly, the TCPA did not protect Mr. Duguid, a telephone consumer, from receiving automatic texts that he obviously did not want to receive. No one should be expected to take such drastic measures to stop unsolicited communications, only to be invalidated by the Supreme Court in the end.<sup>70</sup> The outcome is therefore misguided and should not have been satisfactory to the Court.<sup>71</sup>

More importantly, however, the *Facebook* decision highlighted the biggest problem inherent in all modern TCPA cases.<sup>72</sup> The courts have become so distracted by overly specific ATDS criterion that they have “missed the forest for the trees” so to speak.<sup>73</sup> In other words, to borrow the logic from this adage, the Supreme Court’s overly-technical definition of an ATDS distracts the TCPA from doing the very thing it was enacted to do, protect people from receiving unwanted calls.<sup>74</sup>

### C. Revisiting the TCPA’s Purpose in *Duran*

Although federal district court opinions are not binding upon the Supreme Court, their decisions provide persuasive arguments for adopting a broader understanding of the scope of the TCPA.<sup>75</sup> For

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<sup>67</sup> *Id.*

<sup>68</sup> *See generally* Gersh & Elan, *supra* note 64.

<sup>69</sup> *See generally* Elisabeth Buchwald, *Robocalls Are Biting the Dust, but Get Ready for a Lot More Spam Texts*, MARKETWATCH (Sept. 25, 2021, 12:51 PM), <https://www.marketwatch.com/story/robocalls-are-biting-the-dust-thanks-to-new-technology-but-get-ready-for-a-lot-more-spam-texts-11632343541> [<https://perma.cc/B9QX-YEH2>] (explaining how robocalls are still prevalent despite the recent decline in robocalls).

<sup>70</sup> *See Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1173 (2021).

<sup>71</sup> *See generally id.*; Gersh & Elan, *supra* note 64; Buchwald, *supra* note 69.

<sup>72</sup> *See generally* Basu et al., *supra* note 63.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *See, e.g.*, *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (reversing the previously upheld constitutionality of the “separate but equal” doctrine); *United States v. Darby*, 312 U.S. 100 (1941) (reversing previous rulings regarding the constitutionality of President Roosevelt’s New Deal); *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (overturning a ninety-six-year-old precedent regarding standing for federal court cases); *see also* David Schultz, *The Supreme Court Has Overturned Precedent Dozens of Times in the Past 60 Years, Including When it Struck Down Legal Segregation*, YAHOO (Sept. 20, 2021), <https://www.yahoo.com/video/supreme-court-overturned-precedent-dozens-123028026.html> [<https://perma.cc/WK9N-UF9B>] (“The Supreme Court rarely overturns its past

instance, in *Duran v. La Boom Disco, Inc.*, a nightclub operator was accused of violating the TCPA by sending hundreds of unsolicited, automated text messages to the plaintiff.<sup>76</sup> Although the nightclub admitted that it inundated the plaintiff with hundreds of robotexts over the course of a year and a half, the club nonetheless asserted that their messages were lawful because they had not been sent by an ATDS.<sup>77</sup> After the District Court for the Eastern District of New York agreed with the nightclub's position, the case was appealed to the Second Circuit for review.<sup>78</sup>

To the district court, the nightclub's argument was a good one.<sup>79</sup> Like Facebook, the nightclub's system merely stored numbers in a database that would automatically send messages to people who previously volunteered a phone number.<sup>80</sup> The Second Circuit, however, was not persuaded by the nightclub's classic "but it's not an ATDS" argument.<sup>81</sup> Instead of dredging through prior TCPA cases for ATDS definitions, like the Supreme Court did in *Facebook*, the Second Circuit looked to Congress's original intent for guidance on how to decide the case.<sup>82</sup>

The *Duran* Court explained that the TCPA's prohibitions must "maintain their general deterrent effect on telemarketers."<sup>83</sup> Thus, "to effectuate Congress's intent in passing the [TCPA] as enacted," the court held that an ATDS was not necessarily *required* to randomly generate phone numbers.<sup>84</sup> Further, the court found that the nightclub's system for storing and sending texts was automatic, and therefore *exactly* the type of ATDS that Congress intended to restrict under the TCPA.<sup>85</sup> Accordingly, the nightclub owner's text messages violated the statute, and the Second Circuit ruled in the plaintiff's favor.<sup>86</sup> However, while on a petition for writ of certiorari to the Supreme Court, the

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decisions or precedents. . . . The court has reversed its own constitutional precedents only 145 times - barely one-half of one percent.").

<sup>76</sup> *Duran v. La Boom Disco, Inc.*, 955 F.3d 279, 281 (2nd Cir. 2020).

<sup>77</sup> *Id.* at 281-82.

<sup>78</sup> *Id.* at 282.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 281-82.

<sup>81</sup> *Id.* at 290.

<sup>82</sup> *Id.* at 285-87.

<sup>83</sup> *Id.* at 286.

<sup>84</sup> *Id.* at 287.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 290.

Second Circuit's judgment was vacated in light of the *Facebook* holding.<sup>87</sup>

Nevertheless, if a lower court can apply the TCPA in a broader sense, then the Supreme Court can, too.<sup>88</sup> At some point, the Supreme Court started focusing on the wrong thing—the definition of an ATDS—when it should have been focusing on “protecting telephone consumers from this nuisance and privacy invasion,” just as Congress did when they passed the law in the first place.<sup>89</sup> To achieve the TCPA's original objective, the Court should broaden the scope of what is illegal under the statute by expanding the definition of an ATDS. The Court should also welcome any opportunity to correctly apply a broader understanding of the TCPA to future cases, which would be supported by Congress's original intent, by other federal TCPA decisions, and by fed up Americans craving peace from never-ending robocallers.<sup>90</sup> Still, the Court has an even better reason to expand upon the purpose of the TCPA—at-risk consumers.

When Congress first enacted the TCPA, the negative effect of machine-generated calls on the elderly or cognitively impaired was not a consideration for the basis for the legislation. Today, the TCPA could be expanded to protect at-risk consumers in a way that was not even contemplated by Congress in the 1990s. If the Supreme Court were to start analyzing the TCPA as the Second Circuit did in *Duran*, then the law could prohibit a wider variety of robocalls or texts, which would minimize the number of ATDS loopholes available to scammers, and perhaps even cause consumers to feel sufficiently protected by the statute. There is no morally justifiable reason for the Court to focus on the narrow definition of an ATDS.<sup>91</sup> Expanding upon the definition can lessen the likelihood of people falling for robocall fraud, and even potentially prevent the next Marjorie Jones or Albert Poland, Jr. tragedy from occurring.<sup>92</sup>

The Court has, on occasion, departed from *stare decisis* and overruled its prior decisions before.<sup>93</sup> But a reversal from the Supreme

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<sup>87</sup> *La Boom Disco, Inc. v. Duran*, 141 S. Ct. 2509 (2021) (Mem.), *overruled by Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021).

<sup>88</sup> *See* cases cited *supra* note 75; *see also* Schultz, *supra* note 75 (“[J]ustices have become more willing to reject precedents they think were badly reasoned, simply wrong, or inconsistent with their own senses of the constitutional framers’ intentions.”).

<sup>89</sup> *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(12), 105 Stat. 2394, 2394-95.

<sup>90</sup> *See, e.g., Duran v. La Boom Disco, Inc.*, 955 F.3d 279 (2nd Cir. 2020).

<sup>91</sup> *See* discussion *supra* Part I.

<sup>92</sup> *Id.*

<sup>93</sup> *See* cases cited *supra* note 75.

Court is unlikely to occur any time soon, if at all, because such reversals are extremely rare.<sup>94</sup> In the meantime, legislatures around the country have turned to different branches of government to enforce the TCPA.<sup>95</sup> Specifically, agencies like the Federal Trade Commission (FTC) and the FCC have been tasked with preventing robocall abuse in recent years.<sup>96</sup>

### III. GOVERNMENT GUIDELINES AND REGULATIONS REGARDING AUTO DIALERS

#### A. The National Do Not Call Registry

Cell phones were invented in the 1970s, but evolved into the everyday necessities they are today in the early 2000s.<sup>97</sup> As cell phones grew in popularity, spam calls did as well.<sup>98</sup> The FTC created the National Do Not Call Registry (Registry) in 2003 to enforce compliance with the TCPA.<sup>99</sup> By voluntarily adding their number to the Registry, a consumer was guaranteed that they would not be contacted by telemarketers.<sup>100</sup> Then-President George W. Bush applauded the FTC's action, remarking that "When Americans are sitting down for dinner, or a parent is reading to his or her child . . . the last thing they need is a call from a stranger with a sales pitch."<sup>101</sup> People were elated, and millions rushed to add their numbers to the Registry.<sup>102</sup> Telemarketers were sufficiently kept at bay, and Americans were generally pleased with the government's solution.<sup>103</sup> Only a few years later, however, the Registry would prove futile at protecting consumers from the emergence of the telemarketer's evil successor: the robocall.<sup>104</sup>

The Registry is not effective at minimizing the number of robocalls that Americans receive.<sup>105</sup> This is because telemarketing calls were originally made by living people who manually dialed phone numbers

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<sup>94</sup> See cases cited *supra* note 75.

<sup>95</sup> See SIMONS ET AL., *supra* note 2; *Unwanted Robocalls*, *supra* note 9.

<sup>96</sup> See sources cited *supra* note 95.

<sup>97</sup> Alexander Trowbridge, *Evolution of the Phone: From the First Call to the Next Frontier*, CBS NEWS (Dec. 16, 2014, 5:00 AM), <https://www.cbsnews.com/news/evolution-of-the-phone-from-the-first-call-to-the-next-frontier/> [<https://perma.cc/7729-BGZW>].

<sup>98</sup> See generally *id.*; Madrigal, *supra* note 13 (describing the year-over-year increase in robocalls as "staggering" from 2015-2018).

<sup>99</sup> van Zuylen-Wood, *supra* note 23.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

hoping that someone would answer and listen to their pitch.<sup>106</sup> However, after the creation of the Registry, a telemarketer was subject to punishment for violating the TCPA if they made a call to a number on the “Do Not Call” list.<sup>107</sup> So, for a while, the Registry was effective at deterring telemarketers from placing calls to listed numbers because telemarketing companies wanted to avoid penalties for breaking the law. But the robocallers of today are very different from the human telemarketers of the early 2000s. Although there may be a person causing an automatic system to make robocalls, identifying that person is extraordinarily difficult because their identity and location are shielded by modern autodialing technology.<sup>108</sup>

In 2020, the FTC collected over 3.9 million complaints from people whose numbers are listed on the Registry but received unwanted calls anyway.<sup>109</sup> Even government officials admit they’ve disconnected their landline phones because the Registry does not work.<sup>110</sup> Thus, the Registry could not keep up with the late 2000s robocall revolution, and the government was forced to explore other options on how to curb them.<sup>111</sup>

### **B. Modern FCC Robocall Prevention Guidelines**

After the FTC’s Registry failed, the FCC was tasked with distributing guidelines designed to help people protect themselves from robocalls.<sup>112</sup> The FCC guidelines encourage consumers to, *inter alia*, ignore calls from unknown numbers, download apps to block unwanted calls, talk to their phone carriers about spam blocking options, and add their numbers to the Registry.<sup>113</sup> These measures have been somewhat useful; spam call blocking apps, like RoboKiller®, TrueCaller®, and YouMail®, for example, are effective at blocking unknown callers from successfully getting through to the recipient.<sup>114</sup> However, although some of the FCC’s guidelines may be helpful, a great deal of their

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *National Do Not Call Registry Data Book for Fiscal Year 2020*, FED. TRADE COMM’N (Oct. 2020), <https://www.ftc.gov/reports/national-do-not-call-registry-data-book-fiscal-year-2020> [<https://perma.cc/2U3Y-KLMQ>].

<sup>110</sup> *See* van Zuylen-Wood, *supra* note 23.

<sup>111</sup> *Id.*

<sup>112</sup> *See Unwanted Robocalls*, *supra* note 9.

<sup>113</sup> *Id.*

<sup>114</sup> *See* Lance Whitney, *How to Block Robocalls and Spam Calls*, PCMAG (Dec. 17, 2021), <https://www.pcmag.com/how-to/how-to-block-robocalls-and-spam-calls> [<https://perma.cc/7MT4-3LR3>].

guidance is difficult to follow, and for most Americans, their advice is downright confusing.

Firstly, the FCC's advice encouraging people to add their numbers to the national "Do Not Call" Registry is not helpful. The Registry does not stop people from receiving robocalls.<sup>115</sup> Secondly, senior citizens and people with cognitive disabilities are less likely to comprehend the FCC's guidelines.<sup>116</sup> Many seniors, who were not raised with today's complex communication technologies, do not understand how to install spam blocking apps on their phones and may require further clarification or assistance from others to do this.<sup>117</sup> Even if people are successful at downloading robocall blocker apps, they may find that the apps work *too* well—they also block calls that people *should* be answering, like calls from coworkers, schools, and legitimate businesses.<sup>118</sup> Lastly, FCC guidance that encourages people to ignore or block calls from unknown numbers starkly contradicts simultaneous guidance from other agencies that instruct people to do the complete opposite.<sup>119</sup> The conflicting guidance has become apparent over the course of the COVID-19 pandemic.<sup>120</sup>

During the past two years, state health departments have pleaded with the public to answer their phones.<sup>121</sup> COVID-19 contact tracers frequently make unsolicited calls to inform people of positive cases, track close contacts, gather data regarding symptoms, and encourage vaccinations.<sup>122</sup> These calls are being made for the purpose of preventing the virus from spreading, and in furtherance of public safety, which includes protecting high risk populations from contracting it.<sup>123</sup> But the efforts of contact tracers are often made in vain because people are doing exactly what the FCC told them to do: not answer calls from

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<sup>115</sup> See discussion *supra* Part III-A.

<sup>116</sup> See discussion *supra* Part I and sources cited *supra* notes 18, 25.

<sup>117</sup> See discussion *supra* Part I and sources cited *supra* notes 18, 25.

<sup>118</sup> See generally *Why Are My Business Calls Being Blocked or Flagged as Spam?*, CALLER ID REPUTATION (Feb. 3, 2021), <https://calleridreputation.com/blog/why-are-my-business-calls-being-blocked-or-flagged-as-spam> [https://perma.cc/4PPA-WA7F].

<sup>119</sup> See generally Benjamin Siegel et al., *Coronavirus Contact Tracers' Nemeses: People Who Don't Answer Their Phones*, ABC NEWS (May 15, 2020, 4:00 AM), <https://abcnews.go.com/Health/coronavirus-contact-tracers-nemeses-people-answer-phones/story?id=70693586> [https://perma.cc/XJR8-N2J9] (urging individuals to answer phone calls from local boards of health).

<sup>120</sup> *Id.* (discussing the challenges public health officials have had getting people to answer calls in part because of "robocall fatigue").

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

unknown numbers and exercise caution when answering calls appearing to be from government officials.<sup>124</sup>

How can consumers be expected to answer calls from the Department of Health, but exercise caution when answering calls from other agencies because the number might be spoofed?<sup>125</sup> How can people know for sure that a state health department call is legitimate?<sup>126</sup> Accordingly, this advice creates confusion among consumers—especially among the elderly—many of whom are already overwhelmed with the responsibility of protecting themselves from a deadly virus, let alone scam laden robocalls.<sup>127</sup> Therefore, the FCC must either amend or update their guidance to clarify how exactly their contradictory advice can be reconciled in the age of COVID-19.<sup>128</sup>

Furthermore, while the FCC’s actions to prevent robocalls are sometimes worthwhile, they are simply not enough to curb the high volume of robocalls that Americans receive every day. That is not to say that the FCC should abandon all of their initiatives; their guidance is not completely wrong, but it must be expanded upon.<sup>129</sup> For example, the FCC should encourage people to talk to their elderly friends and family about the dangers of phone scams and ask whether they need help installing robocall blockers on their phones.<sup>130</sup> Moreover, if seniors or disabled people do not have the capability to adequately protect themselves in this way, then the FCC should provide comprehensive assistance or other means to ensure these targeted groups understand the risks of answering calls from unknown numbers.<sup>131</sup> Often, these tasks

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<sup>124</sup> Compare *id.* (discussing the frustrations that public health officials have had contacting consumers), with *Unwanted Robocalls*, *supra* note 9 (discussing FCC strategies to stop robocalls including not answering both calls from unknown numbers and personal questions).

<sup>125</sup> See generally *Unwanted Robocalls*, *supra* note 9.

<sup>126</sup> *Id.* (suggesting consumers hang up after receiving calls purportedly from a government agency before finding contact information for the agency and calling it to confirm the previous caller’s identity).

<sup>127</sup> *Id.*; see also Drash, *supra* note 32; Siegal et al., *supra* note 119.

<sup>128</sup> See Megan Brown et al., *Scotus Provides TCPA Clarity by Rejecting Expansive Autodialer Definition*, JDSUPRA (April 6, 2021), <https://www.jdsupra.com/legalnews/scotus-provides-tcpa-clarity-by-7946751/> [<https://perma.cc/29M2-GBY9>] (arguing that many issues still exist related to the TCPA despite the *Facebook* decision).

<sup>129</sup> See generally *Combating Spoofed Robocalls*, *supra* note 10.

<sup>130</sup> See *Unwanted Robocalls*, *supra* note 9 (listing consumer tips to stop unwanted calls although the FCC’s advice to educate targeted populations is notably missing); see also *Coronavirus Scams Targeting Older Americans*, FED. COMM’N. COMM. (Feb. 2, 2021), <https://www.fcc.gov/coronavirus-scams-targeting-older-americans> [<https://perma.cc/B8H5-JMXU>] (acknowledging that older Americans should be aware of robocall-related scams, but not directly encouraging people to talk to their at-risk relatives).

<sup>131</sup> See generally FED. COMM’N. COMM’N, *supra* note 130.

fall on caregivers who do not have the means to access their patients' devices or are not authorized to communicate with phone carriers or purchase apps on behalf of their patients or loved ones.<sup>132</sup> Fortunately, the FCC has recently enacted an additional measure designed to decrease the number of robocalls that people receive, called the STIR/SHAKEN framework.<sup>133</sup> The 2021 mandate does not put the burden on the consumer—rather, it requires telephone carriers to take initiative in the fight against robocalls.<sup>134</sup>

### C. The STIR/SHAKEN Framework

The Secure Telephone Identity Revisited (STIR) and Signature-based Handling of Asserted Information Using toKENs (SHAKEN) framework (STIR/SHAKEN) requires phone carriers to authenticate the identification of a caller before the call even reaches the consumer's phone.<sup>135</sup> The new FCC requirement “erodes the ability of callers to illegally spoof a caller ID,” a favorite tool of robocallers, which masks the caller's true identity and tricks people into answering a call.<sup>136</sup> According to the FCC, if a call does not originate from a STIR/SHAKEN compliant provider, then the call will be blocked.<sup>137</sup>

The framework operates by requiring carriers to attest to the legitimacy of a caller's identity, or risk having calls originating from their networks be terminated or blocked for failure to comply, which would negatively impact the phone company's business.<sup>138</sup> After STIR/SHAKEN went into effect in June 2021, the number of robocalls received that summer dropped by 29% when compared to June-August 2020, and STIR/SHAKEN is credited with causing the decline.<sup>139</sup> Unfortunately, although it appeared that STIR/SHAKEN was off to a

<sup>132</sup> See generally Leslie Kernisan, *10 Things to Know About HIPAA & Access to a Relative's Health Information*, BETTER HEALTH WHILE AGING, <https://betterhealthwhileaging.net/hipaa-basics-and-faqs-for-family-caregivers> [<https://perma.cc/LQ23-N34L>] (“The decision to override an older person's decision or preferences is a serious one, and should only be considered under special circumstances.”).

<sup>133</sup> See *Combating Spoofed Robocalls*, *supra* note 10.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *STIR/SHAKEN: The Call Authentication Framework*, NUMERACLE, <https://www.numeracle.com/resources/stir-shaken-center> [<https://perma.cc/GSY4-K773>].

<sup>138</sup> See FED. COMM'N COMM'N, FCC-CIRC2003-01, REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING (2020) [hereinafter FCC REPORT AND ORDER]; see also *id.*

<sup>139</sup> William Pitts, *Scam Robocalls Drop 30% with New FCC Mandate*, 12News (Oct. 11, 2021, 5:35 PM), <https://www.12news.com/article/news/investigations/robocalls/scam-robocalls-drop-30-with-new-fcc-mandate/75-db058d1e-fbdf-4a89-98d9-9a35d435d4be> [<https://perma.cc/P5FJ-QFK9>].

promising start, the regulation ultimately has not provided an adequate solution for protecting the targeted community.<sup>140</sup>

The FCC asserted that STIR/SHAKEN would “protect American consumers from fraudulent robocall schemes,” but Americans received more than four billion additional robocalls in 2021 when compared to 2020—even with STIR/SHAKEN in place.<sup>141</sup> But to be fair, STIR/SHAKEN has not yet been fully implemented because the FCC granted extensions to carriers who did not execute the new framework by the June deadline.<sup>142</sup> Thus, the effectiveness of the mandate is uncertain at this time, and more data is needed in order to determine how successful STIR/SHAKEN actually is at reducing robocalls. Even so, the STIR/SHAKEN framework is focused on preventing robocalls only—not automated text messages, which are also prohibited by the TCPA.<sup>143</sup>

Consumer complaints regarding robotexts increased by almost 146% in 2020 compared to the previous year.<sup>144</sup> In response to the growing number of complaints, the FCC recently acknowledged that more needs to be done to stop unwanted texts.<sup>145</sup> In a press release dated October 18, 2021, Acting Chairwoman Rosenworcel explained “[i]t’s time we take steps to confront this latest wave of fraud . . .” and promised to explore a STIR/SHAKEN-esque authentication solution for text messages.<sup>146</sup> But because STIR/SHAKEN has proved ineffective at considerably reducing robocalls to date, it is unclear how a similar system would operate to reduce robotexts.<sup>147</sup>

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<sup>140</sup> *Id.*

<sup>141</sup> YOUMAIL ROBOCALL INDEX, *supra* note 39; FCC REPORT AND ORDER, *supra* note 138, at 12; *see also Unwanted Robocalls*, *supra* note 9.

<sup>142</sup> U.S. PIRG EDUC. FUND, MAKE THE RINGING STOP: THE FCC IS FINALLY FIGHTING BACK AGAINST ROBOCALLS 9 (Sept. 22, 2021), <https://uspirg.org/sites/pirg/files/reports/PIRG%20ROBOCALLS%20REPORT%20Embargoed%20til%209-22%205AM%20ET%20copy.pdf> [<https://perma.cc/WEH3-G2J9>]; *see also* FCC REPORT AND ORDER, *supra* note 138, at 3.

<sup>143</sup> Buchwald, *supra* note 69.

<sup>144</sup> Becky Sullivan, *Complaints About Spam Texts Were Up 146% Last Year. Now, the FCC Wants to Take Action*, NPR (Oct. 19, 2021, 12:48 PM), <https://www.npr.org/2021/10/19/1047303425/complaints-about-spam-texts-fcc-robocalls> [<https://perma.cc/SUFW-GHYE>].

<sup>145</sup> *See* Press Release, Fed. Comm’n Comm’n, Acting FCC Chair Rosenworcel Proposes Rules to Combat Rise of Robotexts (Oct. 18, 2021), <https://docs.fcc.gov/public/attachments/DOC-376657A1.pdf> [<https://perma.cc/RZE5-X3SG>].

<sup>146</sup> *Id.*

<sup>147</sup> YOUMAIL ROBOCALL INDEX, *supra* note 39; *see also* U.S. PIRG EDUC. FUND, *supra* note 142 (comparing the impact of full and partial implementation of STIR/SHAKEN as well as other options that phone companies may try and stating that perhaps there is no solution).

Regardless, STIR/SHAKEN is undoubtedly a step in the right direction. The mandate shows that the United States government takes the threat of robocalls seriously and is currently and actively working on exploring solutions to the problem.<sup>148</sup> Yet, even if it is shown that STIR/SHAKEN *does* reduce the number of robocalls, the reduction may only be slight; in the meantime, Americans continue to receive billions of robocalls and texts every year with the new mandate in place.<sup>149</sup> Therefore, more must be done in order to stop unwanted calls and text messages and protect telephone consumers. The United States may benefit from adopting similar solutions from other countries in order to curb fraudulent robocall schemes.

#### IV. ALTERNATIVE SOLUTIONS

##### A. Expand Identification Requirements Under STIR/SHAKEN

Many countries mandate a phone number user registration. China, Japan, Brazil, Australia, and Germany—to name a few—require that phone numbers be assigned to a person’s legally given name.<sup>150</sup> In 2013, for example, China began requiring that all SIM cards be registered to a user’s legally given name, as proven by the user’s legal identification documents.<sup>151</sup> Three years later, the Chinese government credited the SIM card registration requirement with leading to the shutdown of over half a million unregistered service lines and the removal of almost 2,000 number spoofing technologies.<sup>152</sup> With regulations like these in mind, the United States should consider adopting stricter identification requirements similar to China’s in order to decrease robocalls and increase consumer protection.<sup>153</sup> Still, Americans probably won’t be handing over their driver’s licenses, passports, or birth certificates, just to upgrade their phones any time soon.

In the United States, there is little support for mandated phone user registration based on proof of legal identification.<sup>154</sup> Generally, opponents of mandatory identification registration are concerned that such a mandate denies access to essential communication equipment for

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<sup>148</sup> See FCC REPORT AND ORDER, *supra* note 138.

<sup>149</sup> YOUMAIL ROBOCALL INDEX *supra* note 39; see also discussion *supra* Part I.

<sup>150</sup> Katherine Teng, *Unmasking the Villain: Exposing Scammers’ Identities to Defeat Harmful Calls*, 14 BROOK. J. CORP. FIN. & COM. L. 367, 385 (2020).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> See generally *id.*

<sup>154</sup> *Id.* at 386.

people who cannot provide legally sufficient proof of identification.<sup>155</sup> One may look to the current movement in favor of mandatory voter identification laws to demonstrate Americans' reluctance to be subjected to identification registration requirements.<sup>156</sup>

In America, citizens are not always required to present proof of citizenship in order to vote in elections.<sup>157</sup> The policy behind this rule is that some citizens would be prevented from exercising one of their most fundamental rights simply because they did not possess legal proof of identification.<sup>158</sup> This issue made headlines recently because of widespread claims of voter fraud following the 2020 presidential election.<sup>159</sup> Proponents of mandatory voter identification laws argue that requiring identification to vote may lessen instances of voter fraud.<sup>160</sup> However, opponents of mandated voter identification requirements claim that citizens' right to vote would be hindered because they may not have proof of identification, and that the restriction would essentially be a form of voter suppression.<sup>161</sup>

Hence, if Americans are hesitant to obtain identification to vote, then they are probably not going to willingly accept a mandatory identification requirement just to buy a SIM card.<sup>162</sup> If STIR/SHAKEN proves ineffective at restraining them, then the nation may find that a stricter identification regime to reduce robocalls would outweigh the concerns.<sup>163</sup> Accordingly, America should consider executing stricter identification requirements to prevent instances of robocall fraud.<sup>164</sup>

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<sup>155</sup> *Id.*

<sup>156</sup> Sari Horwitz, *Getting a Photo ID so You Can Vote Is Easy. Unless You're Poor, Black, Latino or Elderly*, WASH. POST (May 23, 2016), [https://www.washingtonpost.com/politics/courts\\_law/getting-a-photo-id-so-you-can-vote-is-easy-unless-youre-poor-black-latino-or-elderly/2016/05/23/8d5474ec-20f0-11e6-8690-f14ca9de2972\\_story.html](https://www.washingtonpost.com/politics/courts_law/getting-a-photo-id-so-you-can-vote-is-easy-unless-youre-poor-black-latino-or-elderly/2016/05/23/8d5474ec-20f0-11e6-8690-f14ca9de2972_story.html) [<https://perma.cc/LMQ2-CSJ4>].

<sup>157</sup> *Id.*

<sup>158</sup> *See generally id.*

<sup>159</sup> Joseph Tanfani & Simon Lewis, *As Trump Pushes Baseless Fraud Claims, Republicans Pledge Tougher Voting Rules*, REUTERS, (Dec. 21, 2020, 7:06 AM), <https://www.reuters.com/article/us-usa-election-voting-rules-insight/as-trump-pushes-baseless-fraud-claims-republicans-pledge-tougher-voting-rules-idUSKBN28V1DN> [<https://perma.cc/R2XE-WGE9>].

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *See* Teng, *supra* note 150, at 186 (explaining that Americans are concerned with phone number registration harming disadvantaged groups of the population); *see also* Horwitz, *supra* note 156 (detailing opposition to identification requirements).

<sup>163</sup> *See* Teng, *supra* note 150, at 185-86 (arguing that mandated phone number registration protects citizens both as individuals and as communities despite its disadvantages).

<sup>164</sup> *Id.*

## B. Ban the Sale of Personal Data

There is an issue in the *Facebook v. Duguid* case that was left out from the previous discussion: how exactly did Facebook get Mr. Duguid's number?<sup>165</sup> The Supreme Court found that because "a user" gave Facebook his number, Mr. Duguid had implicitly consented to be contacted by them.<sup>166</sup> But Mr. Duguid steadfastly maintained that he did not give Facebook his number or consent to their two-step security function.<sup>167</sup> So who did?

Though not addressed in the case, it's possible that Mr. Duguid's personal phone number was picked up by a "data broker."<sup>168</sup> Data brokers make huge profits from selling phone numbers and other personal information to a variety of companies.<sup>169</sup> People unwittingly give companies permission to sell data all the time by agreeing to a buried clause in a website's terms and conditions.<sup>170</sup> The terms are usually in print so small that no one ever reads them, if they can even find them.<sup>171</sup> Also, many sites require the user to allow them to collect computer "cookies" that track the user's internet itineraries to access the site; if the user does not agree to the collection of cookies, they cannot enter the site.<sup>172</sup> The data is then collected and sold to a whole host of companies—including Facebook—for the purpose of tracking personal information, generating targeted ads, and producing more revenue via advertising.<sup>173</sup> Often, people are not aware that their personal data is being bought and sold by companies, but those who are in the know understandably desire more privacy over their personal information.

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<sup>165</sup> See *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021).

<sup>166</sup> *Id.* at 1167.

<sup>167</sup> *Id.* at 1168.

<sup>168</sup> James Rosen, *Government Must Do More to Stop Robocall Onslaught*, PITTSBURGH POST-GAZETTE (Aug. 21, 2021), <https://www.post-gazette.com/opinion/insight/2021/08/29/Government-must-do-more-to-stop-robocall-onslaught-ames-Rosen/stories/202108290205> [<https://perma.cc/QCC3-N83G>] (asserting that putting data brokers out of business is one solution to the ongoing robocalling problem).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> Kurt Wagner, *This is How Facebook Uses Your Data for Ad Targeting*, VOX (Apr. 11, 2018), <https://www.vox.com/2018/4/11/17177842/facebook-advertising-ads-explained-mark-zuckerberg#:~:text=The%20simplest%20explanation%20for%20this,to%20enjoy%20or%20click%20on> [<https://perma.cc/V8PL-TW38>]; see also Julia Angwin et al., *Facebook Is Quietly Buying Information From Data Brokers About Its Users' Offline Lives*, BUSINESS INSIDER (Dec. 30, 2016, 8:56 AM), <https://www.businessinsider.com/facebook-data-brokers-2016-12> [<https://perma.cc/HF52-GKWE>] (explaining how Facebook uses algorithms to determine which advertisements should be targeted to certain users based on their lifestyles and interests).

The data privacy movement is nothing new; Europe enacted the restrictive General Data Protection Regulation (GDPR) in 2018, effectively making it illegal to share the personal data of anyone without their *express* permission.<sup>174</sup> The United States should consider adopting similar data privacy regulations to potentially decrease robocall abuse.

By outlawing the sale of phone numbers and personal information without the express permission of the owner, robocallers would have less access to personal phone numbers.<sup>175</sup> People generally feel more comfortable sharing personal data with GDPR in place because they have more control over how their information is used. For example, residents of countries that follow GDPR may choose to opt out of sharing their personal information with third-parties like data brokers. This means that some people are less inclined to agree to share personal information, like their phone number, because they have the option not to.<sup>176</sup> Therefore, theoretically it is less likely that a phone number will end up in a stored database, like Facebook's two-step security system, in countries that follow the GDPR.

That being said, the number of robocalls placed in Europe continues to increase, regardless of the GDPR framework.<sup>177</sup> Presumably, similar to the ATDS dilemma in the United States, robocalling technology evolves at a quicker pace than the restrictions placed upon them on the global scale as well.<sup>178</sup> However, if the United States had a similar framework in place, perhaps Mr. Duguid's number would never have been accessible to Facebook's notification system, which did not randomly generate his phone number, but merely stored it. If American consumers had more protections like GDPR over their personal data, maybe Facebook would not have had Mr. Duguid's phone number stored in their database.

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<sup>174</sup> See generally Commission Regulation 2016/679, 2016 O.J. (L 119/1) (EU) [hereinafter GDPR].

<sup>175</sup> See Rosen, *supra* note 168.

<sup>176</sup> See Rob Sobers, *A Year in the Life of the GDPR: Must-Know Stats and Takeaways*, VARONIS (Jun. 17, 2020), <https://www.varonis.com/blog/gdpr-effect-review> [<https://perma.cc/KW95-GL2G>] (detailing the mixed feelings that many consumers have about the GDPR).

<sup>177</sup> See *The Curse of the Robocalls Around the World*, NEURAL TECHNOLOGIES, <https://www.neuralt.com/the-curse-of-robocalls-around-the-world/> [<https://perma.cc/EG6Q-XSAG>] (detailing a 2018 study that revealed the prevalence of robocalls around the globe).

<sup>178</sup> See generally Zuylen-Wood, *supra* note 23 (asserting that robocallers determined how to work around the barriers set by the National Do Not Call Registry).

## CONCLUSION

Even though most Americans support putting an end to all robocalls, it doesn't look as if they're going away any time soon. But this could change. The country, as a whole, can rage against the machine. A collaborative approach could put an end to this nightmare faced by so many Americans. By calling on the Supreme Court to broaden the scope of the TCPA, tasking agencies with clarifying and expanding upon their guidance, strengthening STIR/SHAKEN authentication requirements, and placing restrictions on data brokers, the number of robocalls received by American consumers could significantly decrease. Above all, if the United States can successfully regulate robocallers, then senior citizens or people living with cognitive impairments are less likely to be scammed and victimized by robocall fraudsters. For the first time since the dawn of robocallers, people may actually feel sufficiently protected from them. And just maybe, people will want to answer their phones again.