



# What Has the U.S. Supreme Court Done? Many Robocalls and Robotexts May Now be Legal after the Court's Decision in *Facebook v. Duguid*

April 2021

On April 1, 2021, in *Facebook v. Duguid*,<sup>1</sup> the U.S. Supreme Court issued its long-awaited interpretation of the definition of “autodialer” under the Telephone Consumer Protection Act (TCPA).<sup>2</sup> Relying almost exclusively on arcane grammatical rules instead of policy considerations, the Court interpreted the definition in a dangerously narrow way that is likely to dramatically increase the number of unwanted automated calls and texts to U.S. cellphones.

The TCPA is the nation’s primary law protecting telephone users from harassing and unwanted calls. The law requires that automated calls (those made with an autodialer or using a prerecorded or artificial voice) can be made only to cellphones **with the express consent of the person called**, unless the calls relate to an emergency. This construct allows cellphone users to choose who can robocall or robotext them. It also means that if we have consented to receive these automated calls, we always have a right to say “Stop,” and the caller must then stop the automated calls.

Lower courts have yet to sort out the implications of the Supreme Court’s decision, but there is no doubt that the robocalling industry will now claim that the automatically-dialed calls and texts it sends out by the millions do not fall within the Supreme Court’s narrow definition and are not illegal. As a result, **now hundreds of millions of calls and texts that were not legal before April 1, 2021, can likely now be made without the consent of the recipient** (see table). And recipients of these automated calls and texts will have no right to make these unwanted calls and texts stop.

The TCPA still requires consent for calls made with a prerecorded or artificial voice to a cellphone. Also, the Supreme Court’s ruling does not affect the part of the TCPA that sets up the [Do Not Call registry](#), which prohibits callers from calling any residential telephone line that is on the nationwide do-not-call list for the purpose of selling goods or services (“telemarketing calls”). However, whether a personal cellphone is considered a “residential line” is often a complicated question, and courts have required individual proof of factors such as whether the user conducts business over the cellphone, whether there is another landline in the home, and whether the business pays for the cellphone.<sup>3</sup>

**Cellphones used primarily by small businesses are particularly vulnerable to automated calls** after the Supreme Court’s ruling. The Do Not Call rule does apply only to residential lines. A provision of the TCPA still protects small businesses’ cell phones from prerecorded calls, but if the Supreme Court’s decision is interpreted as the calling industry seeks they will have no protection against unwanted text messages and live-agent calls.

Automated calls and texts cost callers just fractions of a penny each.<sup>4</sup> Unwanted robocalls have already been plaguing American’s cellphones—there were 46 billion in 2020. If it is construed, as the calling industry hopes, to eviscerate the protection against robodialed calls, the *Duguid* decision will mean that all businesses—not just the rogue callers who were ignoring the TCPA and hoping they would not be caught—will be under the few legal restraints against using robodialing to flood our cellphones with unwanted calls and texts. The April Fool’s day decision by the Supreme Court is unfortunately no joke; it further erodes the value of this nation’s cellphone network.

## Changes in the Legality of Automated Calls and Texts to Cellphones Due to Supreme Court Decision

*(Shaded rows indicate a change that weakens consumer protections)*

Type of Automated Call to Cellphone	Content of Call	Cellphone Used For...	Legal Before <i>Duguid</i> Without Consent?	Legal Now Without Consent?
Autodialer <b>call</b> with live agent or <b>text message</b>	Scam calls; calls from debt collectors; notices from banks, medical providers, & drug stores; surveys; political calls; spam	Any purpose	No*	Yes
Prerecorded or artificial voice	Scam calls; telemarketing; calls from debt collectors; notices from banks, medical providers, & drug stores; surveys; political calls	Any purpose	No*	No*
Text message	Telemarketing	Residential cellphone	No	No
Text message	Telemarketing	Business line, mixed use, or non-residential purposes	No	Yes

\*Except for emergency calls.

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### ENDNOTES

<sup>1</sup> --- S.Ct. ----, U.S., Apr. 01, 2021

<sup>2</sup> 47 U.S.C. § 227.

<sup>3</sup> See, e.g. *Mattson v. New Penn Financial, LLC*, 2020 WL 6270907 (D. Or. Oct. 25, 2020) (fact question where plaintiff’s business paid his cell phone bill but he used the phone primarily for personal purposes); *Owens v. Starion Energy, Inc.*, 2017 WL 2838075, at \*3–4 (D. Conn. June 30, 2017) (suggesting that question is whether the number functions “primarily as a business line”); *Southwell v. Mortgage Investors Corp. of Ohio, Inc.*, 2014 WL 4057166 (W.D. Wash. Aug. 14, 2014) (cellphone is residential number even though plaintiff farmer occasionally used it to sell sheep to friends).

<sup>4</sup> MessageCommunications, [Voice Broadcasting Pricing / Rates](#).