

Businesses, Trade Associations, and Public Policy Groups Flood Supreme Court with Amicus Briefs Supporting Narrow Reading of ATDS Definition

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Late last week, numerous trade associations and public policy institutions filed amicus briefs supporting the narrow interpretation of the ATDS definition for which Facebook and the United States had advocated in briefs filed the week before. The case, *Facebook, Inc. v. Duguid*, arises from an automated security-alert text message to an individual who had never consented to receive such messages. See [Facebook Brief](#) at 15. The amicus briefs seek to help the Supreme Court resolve the growing circuit split over what constitutes an ATDS.

The following amici (and others joining with them) filed briefs in support of Facebook: Lyft, Quicken Loans, Home Depot, Salesforce.com, Aetna, Midland Credit Management, Credit Union National Association, Portfolio Recovery Associates, the Retail Litigation Center, the Life Insurance Direct Marketing Association, the Washington Legal Foundation, the Professional Association for Customer Engagement, and the U.S. Chamber of Commerce. The briefs (and previous filings in the case) can be found [here](#).

A number of these amicus briefs stress the text-based argument previously made by Facebook—that, under traditional principles of statutory construction, the phrase “using a random or sequential number generator” applies to both “store” and “produce” in the ATDS definition. See *Facebook Brief* at 18. The brief filed by the Washington Legal Foundation cautions the Court against straying from the TCPA’s plain language in order to turn the statute into an evolving prohibition on new methods of communication:

The bigger point is about how to read statutes. The opinion below paints the TCPA as something of a relic—a law passed in the age of fax machines and dial-up internet that has weathered the digital revolution with few amendments But no special rules of interpretation apply to statutes that regulate technology. There is no ‘fear of obsolescence’ exception or ‘overriding purpose’ proviso[,] . . . not when the issue is what qualifies as an ‘autodialer.’

[Washington Legal Foundation Brief](#) at 11–12 (some internal quotations omitted).

Several of these amicus briefs also highlight unfavorable consequences that would undoubtedly arise for consumers and businesses if a broad definition of ATDS is adopted. For example, the U.S. Chamber of Commerce explained that the decision below presents businesses “with a series of unsavory options”:

They can refrain from calling or texting, thereby frustrating customers and missing opportunities. They can limit their contacts to landline numbers, but risk alienating their wireless-only customers and aggravating those who prefer to be contacted by cell phone Or they could try to develop new equipment that avoids storing and automatically dialing numbers—but they would struggle mightily to do so in an era in which smartphones trigger liability and technology constantly evolves. In other words, Marks [*v. Crunch San Diego, LLC*] forces businesses to forego meaningful communications with consumers or face devastating liability.

[U.S. Chamber of Commerce Brief](#) at 26. The Retail Litigation Center also explained how an elastic reading of the ATDS definition would hamper legitimate and desired communications between customers and businesses:

[The Ninth Circuit’s] interpretation untethers the TCPA from the kind of indiscriminate robocalling technology it was intended to regulate. As a result, businesses must use more expensive and slower methods to convey basic information to their customers. Some conscientious retailers and restaurants trying to follow the law—particularly small and risk-averse businesses—may cease sending communications that the vast majority of their customers desire rather than risk facing abusive TCPA class action lawsuits. Indeed, some already have.

[Retail Litigation Center Brief](#) at 6.

Duguid has yet to be scheduled for oral argument. We will continue to monitor this matter and will report on new filings as they are made.

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