

No. 21-35746

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID BORDEN,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY
SITUATED

Plaintiff-Appellant,

v.

EFINANCIAL, LLC,

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Washington

No. 2:19-cv-01430

The Honorable James L. Robart, District Court Judge

**BRIEF OF THE ELECTRONIC PRIVACY INFORMATION
CENTER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-
APPELLANT AND REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *Amicus Curiae* the Electronic Privacy Information Center states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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INTEREST OF THE *AMICUS CURIAE*

The Electronic Privacy Information Center (“EPIC”) is a public interest research center in Washington, D.C., that focuses public attention on emerging privacy and civil liberties issues.¹ EPIC often participates as *amicus curiae* to explain the technology at issue in a case. *See, e.g.*, Br. for EPIC et al. as *Amicus Curiae* Supporting Appellant, *United States v. Wilson*, 13 F.4th 961 (9th Cir. 2021) (No. 18-50440); Br. for EPIC et al. as *Amici Curiae* Supporting Petitioner, *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402).

EPIC also routinely files amicus briefs in Telephone Consumer Protection Act cases. *See* Br. for EPIC & NCLC as *Amici Curiae* Supporting Plaintiffs-Appellants, *McCurley v. Royal Seas Cruises, Inc.*, No. 21-55099 (9th Cir. filed Aug. 9, 2021); Br. for NCLC & EPIC as *Amici Curiae* Supporting Appellant, *Lindenbaum v. Realgy, LLC*, No.

¹ The parties consent to the filing of this *amicus curiae* brief. In accordance with Rule 29, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

20-4252 (6th Cir. filed Feb. 1, 2021); Br. for EPIC et al. as *Amici Curiae* Supporting Respondent, *Facebook, Inc., v. Duguid*, 141 S. Ct. 1163 (2020) (No. 19-511); Br. for EPIC et al. as *Amici Curiae* Supporting Petitioner, *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020) (No. 19-631); Br. for EPIC & NCLC as *Amici Curiae* Supporting Appellant, *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458 (7th Cir. 2020) (No. 19-1738); Br. for EPIC as *Amicus Curiae* Supporting Appellee, *Gallion v. United States*, 772 Fed. App'x 604 (9th Cir. 2019) (No. 18-55667); Br. for EPIC et al. as *Amici Curiae* in Support of Respondents, *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (No. 15-1221).

SUMMARY OF THE ARGUMENT

In *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021), the U.S. Supreme Court considered whether an “automatic telephone dialing system” or autodialer under the Telephone Consumer Protection Act (“TCPA”) must use a random or sequential number generator to either store or produce telephone numbers to be called. After a close analysis of the statutory text, the Court decided that the phrase “using a random or sequential number generator” applied to both “store” and “produce.” This Circuit’s decisions in *Duguid v. Facebook, Inc.*, 926 F.3d 1146 (9th Cir. 2019), and *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018), were abrogated because they did not require that an autodialer use a random or sequential number generator. Anyone seeking to bring an autodialer claim now must allege that the calling equipment used a random or sequential number generator to either store or produce telephone numbers to be called. That is the extent of the Supreme Court’s holding in *Duguid*.

Some TCPA defendants have contorted *Duguid*’s narrow holding into something far different, arguing that *Duguid* requires that “random or sequential number generator” be read as “random or

sequential *telephone* number generator.” But the Supreme Court never ruled on the interpretation of the phrase “random or sequential number generator,” nor was the question properly briefed. This Court must now decide the answer to this question as a matter of first impression.

The plain text of the statute, as well as the common technical understanding of the terms, strongly support Plaintiff’s view that any equipment that uses a random or sequential number generator to generate *any* number in the process of storing or producing telephone numbers to be called is an autodialer. The phrase “random or sequential number generator” does not refer to generation of any specific type of number. Random number generators and sequential number generators are used in a wide variety of contexts beyond telephone number generation and are simply pieces of code that generate random or sequential numbers.

Random and sequential number generators are what make it possible for mass dialers to automatically call large quantities of telephone numbers in a short amount of time with little human intervention. Random and sequential number generators are used to automate data access and execute the same code over and over—a

necessary feature of a dialer that automatically queues and dials more than one telephone number at a time. The requirement that the dialer use a random or sequential number generator also creates an important limit on the autodialer definition. This interpretation does not sweep in the kinds of dialers that the Supreme Court was concerned about in *Duguid*: speed dialers, autoresponders, and dialers that merely store telephone numbers and dial them. Nor does this interpretation sweep as broadly as the definition this Court adopted in *Marks*. Not all equipment that “dials automatically” falls under this definition—only dialers that use random or sequential number generators to automate storing and producing are subject to the autodialer restriction.

ARGUMENT

I. RANDOM AND SEQUENTIAL NUMBER GENERATORS ARE PROCESSES THAT OUTPUT ANY TYPE OF NUMBER.

Under both the plain meaning and the common technical understanding of the terms, random and sequential number generators are processes that generate *any* type of number.

A. The plain text supports a broad interpretation of “random or sequential number generator.”

First, the text. The phrase under consideration is “random or sequential number generator” not “random or sequential *telephone* number generator.” There is no reason to insert the word “telephone” into the phrase, nor any reason to believe that “number” refers to “telephone numbers to be called.” Inserting the word “telephone” into “random or sequential number generator” would also make the prior express consent exception of the autodialer restriction practically unusable—a result that Congress surely did not intend.

Congress used specific language in the autodialer definition when it wished to refer to telephone numbers. The phrase “telephone numbers to be called” is one example: the phrase explicitly includes the term “telephone,” while the phrase “random or sequential number generator” does not. The phrase “such numbers” in “to dial such numbers” does refer to “telephone numbers to be called” but that is because the term “such” requires an antecedent to give “numbers” meaning—and that antecedent is “telephone numbers to be called.” The term “number” in “random or sequential number generator” does not require an antecedent, nor are there any other referential terms in

“random or sequential number generator” that must be filled in with an antecedent. Note also that “telephone numbers to be called” and “such numbers” are both plural, while “number” in “random or sequential number generator” is singular. In sum, nothing about the phrase “random or sequential number generator” demands a reference for “number” or added words to provide meaning.

Inserting “telephone” into “random or sequential number generator” would also make the prior express consent exception superfluous. The TCPA makes it “unlawful . . . to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system” to several different types of telephone lines, including emergency lines, hospital patient lines, and cell phone and pager lines. 47 U.S.C. § 227(b)(1)(A). Prior express consent requires that a caller obtain permission *before* using an autodialer to call the telephone number. In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 F.C.C. Rcd. 8752, 8769 (1992). In practice, obtaining prior express consent requires a caller to keep records of the telephone numbers that have consented to autodialed

calls. The caller would then call from the list of telephone numbers that have consented to autodialed calls and not from lists of generated phone numbers. The provision thus envisions a scenario where callers are not using autodialers to indiscriminately dial randomly or sequentially generated telephone numbers but instead calling telephone numbers which were previously identified as consenting to autodialer use.

Inclusion of the prior express consent exception also shows that Congress did not intend to ban autodialers altogether, but instead chose to allow autodialer use in certain circumstances when the caller had permission to use the device. Congress likely did this to allow responsible callers to take advantage of the cost savings afforded by autodialers. Autodialers reduced the cost of making calls, even using a “live” person to speak with the customer, because they “reduce[d] the amount of time that each person [had to] spend dialing numbers and waiting for the call to be answered.” S. Rep. No. 102–177, 3 (1991). At the time the TCPA was passed, “major American corporations” were using autodialers to “call[] consumers at a rate of 5 to 7 million times

per month.”² If the autodialer restriction only protected against indiscriminate dialing, the consent exception would have been superfluous: Congress could have achieved the same effect by banning autodialers except for emergency purposes. The goal of statutory interpretation is to give effect to every word in a statute, not just some. *Corley v. United States*, 556 U.S. 303, 314 (2009) (“A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . .”) Congress intended the prior express consent exception to be actionable, and courts should ensure that it is.

B. “Random number generator” is a broad term for a computational process that outputs any type of random number.

The common technical understanding of a random number generator is also not specific to telephone numbers. A random number generator is a process that generates an unpredictable series of

² S. 1462, The Automated Telephone Consumer Protection Act of 1991, S. 1410 The Telephone Advertising Consumer Protection Act, and S. 857, Equally Billing for Long Distance Charges: Hearing Before the Subcomm. on Commc’ns of the S. Comm. on Commerce, Sci., and Transp., 102d Cong. 16 (1991).

numbers, usually within some pre-defined range.³ A sequence of die rolls is a paradigmatic example of random number generation within the range 1 to 6.

Truly random number generators that replicate natural or mechanical randomness are used in cryptographic applications.⁴ But most programs do not need such sophisticated (and slow) algorithms to generate random numbers, so most software-implemented random number generators are actually pseudorandom or deterministic number generators. Pseudorandom number generators produce a sequence of numbers within a range using a long number, called a seed, as input into an algorithm.⁵ If someone knows the seed and the algorithm, they can determine the sequence of random numbers, which is why

³ Nat'l Institute of Sci. & Tech., *Computer Security Resource Center Glossary: Random Number Generator (RNG)*, https://csrc.nist.gov/glossary/term/random_number_generator.

⁴ See, e.g., Oracle, *Class SecureRandom* (2021), <https://docs.oracle.com/javase/8/docs/api/java/security/SecureRandom.html>; Python, *secrets—Generate Secure Random Numbers For Managing Secrets* (2021), <https://docs.python.org/3/library/secrets.html#module-secrets>.

⁵ See Nat'l Institute of Sci. & Tech., *supra* note 3.

pseudorandom number generators are unsuitable for cryptographic purposes.

Most programming languages include built-in methods for generating cryptographically random and pseudorandom numbers. For example, Python, a very popular scripting language, has the `random` library, which includes methods for choosing pseudorandom integers and decimal numbers within nearly any desired range.⁶ The `random` library even includes a method, `random.choice(list)`, for choosing a random element from a list of objects.⁷ A Python list—which, in other programming languages, is sometimes called an array—stores things like numbers and alphanumeric strings in a certain order.⁸

⁶ Python, *random—Generate Pseudo-Random Numbers* (2021), <https://docs.python.org/3/library/random.html>. Python’s built-in cryptographically random number generator has a similar function for choosing a random element in a list. Python, *secrets—Generate Secure Random Numbers for Managing Secrets* (2021), <https://docs.python.org/3/library/secrets.html#module-secrets>.

⁷ *Id.*

⁸ Google for Education, *Python Lists* (2021), <https://developers.google.com/edu/python/lists>.

A programmer could use `random.choice (telephone_numbers)` to generate random telephone numbers to call from a preproduced list of telephone numbers, `telephone_numbers`.⁹ Under the hood, every time `random.choice (telephone_numbers)` is executed, it generates a random number associated with the position of a telephone number in the list, called the telephone number's index number. The generator then produces the telephone number associated with that index number, which can then be stored in the new order or immediately dialed—exactly as described by the Supreme Court in its example of a random number generator used to determine the order in which to dial from a list of phone numbers in *Duguid*. 141 S. Ct. at 1172 n.7. This would be an example of an autodialer that uses a random number generator but does not dial randomly generated telephone numbers.

⁹ *Id.*

C. “Sequential number generator” is a broad term for a computational process that outputs a sequence of numbers with specified initial and increment values.

Sequential number generators are processes that generally have the following characteristics: (1) an initial value (e.g., 1); (2) an increment (usually +1); and, often but not necessarily, (3) an end value, or the last value to be generated.¹⁰ For example, a sequential number generator that has an initial value of 1, an increment of +1, and an end value of 5, would generate the sequence of positive integers 1, 2, 3, 4, 5.

One common use of sequential number generators is to store new records in a database. Most databases have a built-in sequential number generator called an autoincrement function that automatically produces an identification number for each new record added to the database by adding one (or another number) to the identification number of the last record created. Documentation for various

¹⁰ See, e.g., ReformatText, *Sequential Number Generator* (2020), <https://www.reformattext.com/sequential-number-generator.htm>. Some sequential number generators do not have explicit end values, such as the autoincrement functions built into databases described in this section, but in practice, there will be a limit on the size of the number output.

implementations of SQL, a popular language for programming databases, explains that the autoincrement function outputs numbers that are “sequential integers which are automatically generated.”¹¹

Another common use of sequential number generators is to automatically perform the same task a certain number of times. This process is called looping or iteration and it uses a sequential number generator.¹² Loops have all of the characteristics of a sequential number generator: they require an initial value; an increment, which is usually +1 (written ++ in most programming languages); and (sometimes) an end value, which represents the number of times the loop should run.¹³

An example of a simple loop in C++ is

```
for (int i = 0; i <= 5; i++) {  
    code to be executed;  
}
```

¹¹ SQL Tutorial, *SQL Auto Increment* (2021), <https://www.sqltutorial.org/sql-auto-increment/>.

¹² Mozilla, *Loops and Iteration* (2021), [https://developer.mozilla.org/en-US/docs/Web/JavaScript/Guide/Loops and iteration](https://developer.mozilla.org/en-US/docs/Web/JavaScript/Guide/Loops_and_iteration).

¹³ Some loops run until an event occurs instead of until an end value is reached, for example, some while loops. *Id.* Infinite loops are also possible, although they are often infinite due to an error.

The first expression, `int i = 0`, defines the initial value; the second, the end value; and the third, the increment.¹⁴

A common use of iteration is to access, or produce, each element in an array automatically. The sequential number generator produces the index number of each element in the array, i.e., 0, 1, 2, 3, etc., and then produces the element associated with that index number. The result is to produce each element in the array in the order in which it is stored in the array. The following simple C++ code would produce the first six telephone numbers in the array `telNums` by generating the sequence of numbers 0, 1, 2, 3, 4, 5:

```
for (int i = 0; i <= 5; i++) {  
    cout << telNums[i];  
}
```

A dialer that automatically calls through a list of numbers would almost certainly use this type of sequential number generator to produce the telephone numbers from storage.

¹⁴ W3 Schools, *C++ For Loop* (2021), https://www.w3schools.com/cpp/cpp_for_loop.asp.

II. USE OF RANDOM OR SEQUENTIAL NUMBER GENERATORS DIFFERENTIATES AUTODIALERS FROM OTHER TYPES OF DIALERS.

As outlined in the previous section, random and sequential number generators can be used to automate bulk tasks. These number generators make it possible for autodialers to automatically store or produce large quantities of telephone numbers in a short period of time with little human intervention. Other types of dialers that do not queue multiple “telephone numbers to be called” do not use random or sequential number generators as required in the autodialer definition.

Dialers that use random or sequential number generators to automatically store or produce telephone numbers to be called have one thing in common: they don’t simply call one phone number at a time, but many in quick succession. That is the point of using the number generators: to have the computer queue the telephone numbers that have been designated for calling and access them from memory automatically, without the need for a human to choose the next number to call. These lists of “telephone numbers to be called” are commonly referred to as a campaign. It is this campaign calling feature that

separates autodialers from other dialers—and all of it is rooted in the text of the autodialer definition.

The TCPA restricts use of equipment that stores or produces “telephone numbers to be called” using a random or sequential number generator. The phrase “telephone numbers to be called” is often left uninterpreted or erroneously shortened to “telephone numbers.” But the whole phrase should be given meaning: “telephone numbers to be called” are not all telephone numbers in a dialer’s contact database, but only those that have been designated, or selected, for calling.

Other phrases with similar structures (noun + passive infinitive) are commonly understood in the same manner. For example, “windows to be replaced” are not all of the windows in a building or even all of the windows that may, one day, be replaced, but only those that have been designated for replacement. Similarly, “bikes to be repaired” are not all of the bikes in a bike shop but only those designated for imminent repair; “spices to be used” are not all spices a person has in their spice cabinet but only those that have been selected for use in a dish; “customers to be served” are not all of a business’s customers, but only those that are queued and awaiting service; and “dishes to be washed”

are not all dishes that a person owns but only those in the sink or dishwasher waiting to be washed, hopefully soon.

Dialers that have a campaign calling function work in various ways, but they all follow the same basic steps: (1) telephone numbers are selected for calling; (2) the telephone numbers are ordered in some way; and (3) the dialer calls through the list of telephone numbers.

The first step—selecting the telephone numbers to be called—may use a random or sequential number generator. A dialer could use a random number generator to choose random phone numbers from a database to call. The dialer could also select the telephone numbers to be called based on their sequentially generated IDs, which would involve a sequential number generator generating each customer record's ID number.

An autodialer may also use a random or sequential number generator to designate the order in which to call the telephone numbers. For example, an online text blaster may use a sequential number generator to store telephone numbers to be called from an uploaded CSV file. *See, e.g.,* Plaintiff's Memorandum of Points & Authorities in Opposition to Defendant's Motion to Dismiss, *Stewart v. Network*

Capital Funding Corp., No. 2:21-cv-00368 (C.D. Cal. filed Sep. 3, 2021), at 7 (referencing code that uses a sequential number generator to store telephone numbers to be called). Many modern dialers use more complex algorithms for ordering telephone numbers to be called, which may or may not use random or sequential number generators.

An autodialer is most likely to use a random or sequential number generator when it calls through the designated telephone numbers. This is because, at some point, the dialer will take blocks of numbers and store them in an ordered data structure, like an array, because it is faster to access than a database. The dialer will then almost certainly use a sequential number generator to iterate through and produce each telephone number prior to dialing. This use of a sequential number generator is what makes an automatic telephone dialing system “automatic”—the computer automatically chooses the next telephone number to call from the queue using a sequential number generator.

Meanwhile, dialers that the Supreme Court identified as non-autodialers in *Duguid* would not use random or sequential number generators to produce or store telephone numbers to be called: speed dialers, autoresponders, the autotrigger system that Facebook used to

send texts in response to login attempts,¹⁵ and other dialers that “merely store[] and dial telephone numbers.” 141 S. Ct. at 1171. First, “telephone numbers to be called” is plural, not singular, and these dialers only designate one telephone number, not multiple telephone numbers, to call at a time. Second, there is no need to iterate over a single telephone number to call, and so these dialers would not use sequential number generators to store or produce the telephone number to be called. Finally, the telephone number to be called is not randomly chosen but selected by an event or the dialer’s user.

Use of random or sequential number generators to automate the calling process for multiple telephone numbers is what sets autodialers apart from other dialers. This broad interpretation of random or sequential number generator more accurately captures the harms Congress sought to prevent with the autodialer restriction than mere random or sequential telephone number generation. Generating a block

¹⁵ The Supreme Court did not actually hold that Facebook’s autotrigger system was not an autodialer, only that Duguid did not properly allege that it was an autodialer because he failed to allege that the system used a random or sequential number generator.

of sequential telephone numbers and dialing it at a leisurely pace does not tie up multiple business lines simultaneously, *see Duguid*, 141 S. Ct. at 1171 (citing 47 U.S.C. § 227(b)(1)(D)); only calling the numbers in quick succession does. The plain text of the statute and the common technical understandings of random and sequential number generators require adoption of Plaintiff's interpretation of the autodialer definition.

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges the Court to reverse the district court's order granting Defendant's motion to dismiss.

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CERTIFICATE OF COMPLIANCE

I am the attorney or self-represented party.

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