

February 2, 2022

United States Court of Appeals
21400 United States Courthouse
601 Market Street
Philadelphia, PA 19106

Re: *Elizabeth Panzarella, et al. v. Navient Solutions, Inc.*, No. 20-2371

Amici the Electronic Privacy Information Center and the National Consumer Law Center submit this letter brief in support of Plaintiffs-Appellants' position that the sole holding of *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021), is that the phrase "using a random or sequential number generator" modifies both "store" and "produce" and not just "produce." *Amici* also urge the Court to explicitly reserve the question of whether an ATDS must generate random or sequential *telephone* numbers. This question was not before the Supreme Court in *Duguid*, it was not before this Circuit in *Dominguez v. Yahoo*, 894 F.3d 116 (3d Cir. 2018), nor is it before this Court in this case. Resolving this question would require extensive briefing on the interpretation of statutory terms not at issue in this case and should be reserved for a case where the interpretation of these terms is actually at issue.

I. The Supreme Court in *Duguid* did not hold that an ATDS must generate random or sequential telephone numbers.

Amici agree with Plaintiffs-Appellants that the sole holding in *Duguid* is that the phrase "using a random or sequential number generator" modifies both "store" and "produce." The Supreme Court did not hold that a system must generate random or sequential *telephone* numbers to meet the ATDS definition. Such a holding would have required the Supreme Court to decide the meaning of the phrase "random or sequential number generator"—a question that was not at issue and was not briefed.

Two interpretations of the ATDS definition were at issue in *Duguid*. First was the interpretation favored by Facebook and adopted by the Third, Seventh, and Eleventh Circuits that required an ATDS to have the "capacity" to "us[e] a random or sequential number generator" to either produce or store telephone numbers to be called. *Duguid*, 141 S. Ct. at 1169. Second was the interpretation favored by *Duguid*

and adopted by the Second, Sixth, and Ninth Circuits, which found that it was sufficient that a dialer “store . . . telephone numbers to be called” and “dial such numbers.” *Id.*

The key difference in the two interpretations was whether “using a random or sequential number generator” modified both “store” and “produce” or just “produce.” *Id.* The meaning of “random or sequential number generator” was not at issue because Duguid and the plaintiffs in the other circuit court cases argued that an ATDS need not use a number generator at all. Because the term was not essential to plaintiffs’ interpretation, plaintiffs never had an interest or opportunity to brief an alternate meaning.

The Supreme Court found that “the most natural construction” of the ATDS definition required that the phrase “using a random or sequential number generator” modify both “store” and “produce.” *Id.* at 1169. As a result, the Court declared that “whether storing or producing numbers to be called, the equipment in question must use a random or sequential number generator.” *Id.* at 1170.¹ The Court’s analysis was based on the syntax of the clause, not the meaning of the phrase “random or sequential number generator.” *Id.* at 1169–70. All other considerations merely “confirm[ed]” the syntactic analysis. *Id.* at 1171.

Part of the Court’s analysis was also not consistent with any assumption that the “random or sequential number generator” must generate *telephone* numbers. In response to plaintiff’s surplusage argument, the Court explained, in a footnote, that “an autodialer might use a random number generator to determine the order in which

¹ The Supreme Court repeatedly framed its holding without referring to telephone number generation. *Duguid*, 141 S. Ct. at 1167 (“To qualify as an ‘automatic telephone dialing system,’ a device 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”); 1169 (“We conclude that the clause modifies both, specifying how the equipment must either “store” or “produce” telephone numbers. Because Facebook’s notification system neither stores nor produces numbers “using a random or sequential number generator,” it is not an autodialer.”); 1171 (“the autodialer definition excludes equipment that does not ‘us[e] a random or sequential number generator’”); 1173 (“This Court must interpret what Congress wrote, which is that ‘using a random or sequential number generator’ modifies both ‘store’ and ‘produce.’”); 1173 (“We hold that a necessary feature of an autodialer under § 227(a)(1)(A) is the capacity to use a random or sequential number generator to either store or produce phone numbers to be called.”)

to pick phone numbers from a preproduced list. It would then store those numbers to be dialed at a later time.” *Id.* at n. 7. Such a random number generator would not generate telephone numbers; instead, it would generate what are called index numbers, which correspond to the positions of telephone numbers in an ordered list. This footnote shows, at the very least, that the Supreme Court did not commit to any specific definition of “random or sequential number generator.”

Since *Duguid*, some plaintiffs have argued that “random or sequential number generator” should be interpreted according to the plain meaning of the phrase and the technical understanding of number generators. The argument, briefly, is that “random or sequential number generator” refers to a number generator that can generate any type of number, not just telephone numbers. When a dialer has, for example, an automated call queue that uses number generators to produce (i.e., select) or store telephone numbers “to be called,” the dialer meets the statutory definition of an ATDS. This interpretation of the ATDS definition is markedly different than the interpretation offered by the plaintiffs in *Duguid* and its predecessors because it (1) conforms to the Supreme Court’s construction of the ATDS definition—that is, it requires that a number generator be used to either store or produce telephone numbers to be called; (2) would not include dialers that “merely store[] and dial[] telephone numbers,” such as cellphones or the auto-trigger dialing system at issue in *Duguid*; and (3) does not rely on a nebulous concept like “automatically” or “without human intervention,” but is an issue of fact that can be resolved by examining the dialer’s code to determine if it uses number generators to store or produce telephone numbers to be called.

II. This Court should explicitly leave open the question of whether an ATDS must generate random or sequential telephone numbers or whether it can generate other types of numbers because the question is not at issue in this case.

The meaning of “random or sequential number generator” is a question of first impression that this Court should not decide without full briefing from adverse parties. Plaintiffs-Appellants argue that Navient’s dialing equipment had the capacity to generate random or sequential *telephone* numbers. Pl.-Appellants’ Br. at 12. Thus, neither the parties nor *amici* have had the interest or opportunity to fully brief the number generator issue and resolving the issue would have no bearing on the Plaintiffs-Appellants’ claims.

Cases that place the meaning of “random or sequential number generator” at issue are currently pending in lower courts, so there will be an opportunity to address

it in due course with adequate briefing. To avoid prejudicing outcomes in other cases where the meaning of “random or sequential number generator” is actually a live issue, this Court should avoid addressing the issue by describing *Duguid*’s holding as outlined above. At the very least, the Court should explicitly state that, in this case, it assumes, without deciding, that “random or sequential number generator” refers to a telephone number generator. *See, e.g., Duguid*, 141 S. Ct. at 1168 n. 2 (stating that the Court assumed, without deciding, that the TCPA covers text messages because “neither party dispute[d]” the interpretation).

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