No. 21-14045

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

COY EVANS, ET AL.,

Plaintiffs-Appellants,

v.

OCWEN LOAN SERVICING, LLC,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida
No. 9:18-cv-81394
The Honorable Robin L. Rosenberg, District Court Judge

BRIEF OF THE ELECTRONIC PRIVACY INFORMATION CENTER AND THE NATIONAL CONSUMER LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

<div align="right">

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February 10, 2022

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CERTIFICATE OF INTERESTED PERSONS & CORPORATE DISCLOSURE STATEMENT

The following persons have an interest in the outcome of this case:

1. Adams, Jeffrey, *Appellant*

2. Adams, Joseph M., *Counsel for Appellants*

3. Beach, Jason M.*, Counsel for Appellee*

4. Brown, Bernard, *Appellant*

5. Dudley, Albert, *Appellant*

6. Electronic Privacy Information Center, *Amicus Curiae*

7. Evans, Coy, *Appellant*

8. Frascella, Christopher, *Counsel for Amici Curiae EPIC & NCLC*

9. Giello, Michael, *Appellant*

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12. Jupin, Katherine, *Appellant*

13. Jupin, Victoria, *Appellant*

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20. Neba, George, *Appellant*

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23. Oudyk, Timothy, *Appellant*

24. Pearson, Wendy, *Appellant*

25. Picuri, Debra, *Appellant*

26. Robinson, Stanley, *Appellant*

27. Rosenberg, Hon. Robin L., *U.S. District Court Judge*

28. Scioli, Haylie, *Appellant*

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30. Sweeney, James, *Appellant*

31. Zehner, Dawn, *Appellant*

Pursuant to Fed. R. App. P. 26.1, *Amici Curiae* the Electronic Privacy Information Center and the National Consumer Law Center state that they have no parent corporations and that no publicly held corporation owns 10% or more of their stock.

Date: February 10, 2022   /s/ Megan Iorio
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INTEREST OF THE *AMICI CURIAE*

The Electronic Privacy Information Center ("EPIC") and the National Consumer Law Center ("NCLC") are two of the leading non-profit advocates for consumer robocall protections.[1] EPIC and NCLC regularly participate in judicial, regulatory, and legislative proceedings to protect consumers from illegal calls.

Since the Supreme Court's decision in *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021), EPIC and NCLC have educated attorneys and other stakeholders on how to protect consumers from harms caused by autodialers. EPIC and NCLC also recently filed *amicus* briefs in cases before the Third and Ninth Circuits to assist the courts in interpreting the autodialer restriction post-*Duguid*. Br. for EPIC & NCLC as *Amici Curiae* Supporting Plaintiffs-Appellants, *Panzarella v. Navient Solutions, Inc.*, No. 20-2371 (3d Cir. filed Feb. 2, 2022); Br. for EPIC as

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[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.

Amicus Curiae Supporting Plaintiff-Appellant, *Borden v. eFinancial, LLC*, No. 21-35746 (9th Cir. filed Dec. 10, 2021).

EPIC is a public interest research center in Washington, D.C., that focuses public attention on emerging privacy and civil liberties issues. EPIC often participates as *amicus curiae* to explain the technology at issue in a case.[2] EPIC has done extensive work to protect consumers against illegal calls.[3] EPIC has filed many *amicus* briefs in Telephone Consumer Protection Act ("TCPA") cases.[4]

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[2] *See, e.g.*, Br. for EPIC as *Amicus Curiae* Supporting Appellant, *United States v. Wilson*, 13 F.4th 961 (9th Cir. 2021) (No. 18-50440); Br. for EPIC at al. as *Amici Curiae* Supporting Petitioner, *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402).

[3] *See* EPIC, *Robocalls*, https://epic.org/issues/consumer-privacy/robocalls/.

[4] *See, e.g.,* 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*, 13 F.4th 524 (6th Cir. 2021), *petition for cert. docketed*, 21-866 (Dec. 10, 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).

NCLC is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low-income and elderly consumers. Attorneys for NCLC have advocated extensively on behalf of consumers to protect their interests related to robocalls before the United States Congress, the Federal Communications Commission ("FCC"), and the federal courts. These activities have included testifying in numerous hearings before various congressional committees regarding how to control invasive and persistent robocalls, many filings and appearances before the FCC urging strong interpretations of the TCPA, and the filing of a number of *amicus* briefs before the federal courts of appeals and the Supreme Court representing the interests of consumers regarding the TCPA, as well as publishing and regularly updating a comprehensive analysis on the laws governing robocalls in National Consumer Law Center, *Federal Deception Law*, Chapter 6 (3d ed. 2017), updated at *www.nclc.org/library*.

STATEMENT OF ISSUES

Amici adopt the Appellants' statement of issues.

SUMMARY OF THE ARGUMENT

The Telephone Consumer Protection Act ("TCPA") defines an "automatic telephone dialing system" ("autodialer") as "equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). In *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021), the U.S. Supreme Court was asked to consider a matter of syntax: did the term "random or sequential number generator" modify both "store" and "produce" or did it only modify "produce"?

After a close analysis of the statutory text, the Court decided that the phrase "using a random or sequential number generator" modified both "store" and "produce." The prior decisions of the Second, Sixth, and Ninth Circuits were abrogated because they held that "random or sequential number generator" modified only "produce," and the prior decisions of this Circuit, along with the Third and Seventh Circuits, were upheld because they held that "random or sequential number generator" modified both "store" and "produce." Anyone seeking to bring an autodialer claim now must allege that the calling equipment had the

capacity to use 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." That question was not before the Court, it was not at issue between the parties, and it was not 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 the view that 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.

This interpretation does not sweep in the kinds of dialers that the Supreme Court was concerned about in *Duguid*: ordinary smartphones, speed dialers, autoresponders, and dialers that merely store telephone numbers and dial them. Not all equipment that "dials automatically" or "without human intervention" falls under this definition, either. Auto-trigger dialers like the one Facebook used to send login messages in *Duguid* do not use random or sequential number generators to store or produce telephone numbers to be called. Only dialers that use random or sequential number generators to produce or store telephone number to be called are autodialers under the TCPA.

ARGUMENT

I. THE SUPREME COURT IN *DUGUID* DID NOT HOLD THAT AN AUTODIALER 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 dialer must generate random or sequential *telephone* numbers to meet the autodialer 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 autodialer 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 autodialer 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, including *Glasser v. Hilton Grand Vacations Co., LLC*, 948 F.3d 1301 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 2510 (2021), argued that an autodialer 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.[5]

The Supreme Court found that "the most natural construction" of the autodialer definition required that the phrase "using a random or sequential number generator" modify both "store" and "produce."

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[5] Similarly, because the meaning of "random or sequential number generator" was not at issue between the parties in *Glasser*, any reasoning in the decision about the meaning of the phrase is dicta.

Duguid, 141 S. Ct. 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. Indeed, the Supreme Court repeatedly framed the question

presented and its holding without reference to telephone number

generation.[6] The Court's holding and primary analysis were based on

the syntax of the clause, not the meaning of the phrase "random or

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[6] The Court framed the question presented as having to do with
telephone number generation only once. *Duguid*, 141 S. Ct. at 1168. In
every other place where the Court stated the question presented or its
holding, the Court did so without reference to telephone number
generation. *Id*. 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.")

sequential number generator." *Id.* at 1169–70. All other considerations merely "confirm[ed]" the syntactic analysis. *Id*. at 1171.

Moreover, part of the Court's reasoning in *Duguid* is inconsistent 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 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."

Some have argued that the example the Court cited in footnote 7 involved storage of telephone numbers that had been previously produced by a telephone number generator and so the equipment used a *telephone* number generator, not simply a number generator. How the telephone numbers were *produced*, though, is irrelevant to the question

of whether the number generator used to *store* the telephone numbers generated random *telephone* numbers. The autodialer definition only requires use of a number generator to store *or* produce telephone numbers to be called. It does not require the telephone number to be produced *and* stored by a number generator. Any use of a number generator to store *or* produce telephone numbers to be called is sufficient to meet the autodialer definition. In footnote 7, the Court understood that using a random number generator to generate index numbers that were then used to store telephone numbers to be called was a use of a number generator that fell within the autodialer definition. That is good indication that, at the very least, the Court did not reject interpreting "random or sequential number generator" as referring to any type of number generation.

Nevertheless, a specific interpretation of *Duguid* footnote 7 is not integral to the argument presented in the rest of this brief. The arguments that follow are based on the plain meaning of the statute, the context of the statutory terms, and a technical understanding of number generators and mass automatic dialing machines—not footnote 7.

II. THE PLAIN TEXT DOES NOT LIMIT "RANDOM OR SEQUENTIAL NUMBER GENERATOR" TO TELEPHONE NUMBER GENERATORS.

The autodialer definition's plain text does not limit the type of numbers that a "random or sequential number generator" can generate. Finding otherwise would not only conflict with the plain language of the statute, but would also create surplusage that cannot be explained by Congress taking a "belt-and-suspender" approach to drafting.

Proponents of the more limited interpretation of "random or sequential number generator" must appeal to legislative intent, not the statutory text, to make their case. But when the statutory text is unambiguous, the text, not the legislative intent, controls. *Milner v. Department of Navy*, 562 U.S. 562, 574 (2011). Even if Congress only intended to regulate dialers that generate random or sequential telephone numbers—which it did not—that does not mean that the term "random or sequential number generator" was ever commonly or technically understood to be limited to *telephone* number generators. Exactly the opposite is true. The Supreme Court has "long rejected" attempts to "decline to enforce the plain terms of the law" when a "new application emerges that is both unexpected and important." *Bostock v.*

Clayton Cty., 140 S. Ct. 1731, 1750 (2020). This Court should not limit the phrase "random or sequential number generator" when the plain text clearly supports a broader definition.

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."

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. It would be odd for a singular term to refer to a plural antecedent. In sum, nothing about the phrase "random or sequential number generator" demands a reference for "number" or added words to provide meaning.

B.   **Inserting "telephone" into "random or sequential number generator" makes numerous terms and provisions in the autodialer prohibition superfluous.**

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 . . ."). Inserting "telephone" into "random or sequential number generator" makes "store," "produce," and the prior express consent provision superfluous. A belt-and-suspenders approach cannot explain so much surplusage, especially when there is no surplusage if "random or sequential number generator" is given its plain meaning.

Giving the term its plain meaning is thus the superior interpretive choice.

1. "Produce" and "store" in the autodialer definition would be superfluous.

Recall that the autodialer definition reads "equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). If "random or sequential number generator" were read as "random or sequential *telephone* number generator," as Defendant has argued, most of the words in subsection (A) would be superfluous—particularly "store" and "produce." The result is a rewriting of the statute, not an interpretation of the words Congress wrote.

The best illustration is to look at the way courts and parties construct the autodialer definition when "random or sequential number generator" means "random or sequential *telephone* number generator:" they often fail to use the words "store" and "produce" precisely because these words are unnecessary when "random or sequential number generator" means "random or sequential *telephone* number generator." *See, e.g., Evans v. Ocwen Loan Servicing, LLC*, 2021 U.S. Dist. LEXIS

203427, *4 (S.D. Fla. Oct. 21, 2021) (interpreting *Duguid* as finding that "a machine that utilizes a random or sequential number generator and places a call using the same can qualify as an autodialer.")

If this is what Congress intended, it could have written the autodialer definition much more simply as "equipment which has the capacity to (A) randomly or sequentially generate telephone numbers; and (B) to dial such numbers." But that is not what Congress wrote. Why would Congress include the terms "store" and "produce" if it did not intend for them to do some work in the autodialer definition?

There was no loophole that Congress could have been protecting against by adding "store" and "produce" if it meant for "random or sequential number generator" to be limited to only telephone number generation. Even reading "store" to mean "to dial later" and "produce" to mean "to dial now" would not help give the first clause of subsection (A) meaning. Once the telephone numbers are generated, they have to either be dialed later or dialed now—that is, in fact, what subsection (B) requires, "to dial such numbers." There was no danger that the autodialer definition would be interpreted as requiring the numbers to

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be dialed immediately if "store" and "produce" were eliminated, because no statutory term gives that implication.

When "random or sequential number generator" is given its plain meaning, "store" and "produce" can have distinct meanings both from each other and from the other statutory terms—and each of these terms does meaningful work. The terms "generator," "store," "produce," and "dial" each refer to different computational processes. The generator creates the random or sequential numbers, which are then used to conduct further computational processes—namely, to store and produce. Think of a computer's storage as containing many different numbered boxes. "Store" is when a dialer places a telephone number into a box and "produce" is when the dialer takes the telephone number out of the box.[7] To store or produce telephone numbers to be called using a number generator means to place the telephone numbers into boxes or to take them out using a number generator to generate the box number.

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[7] *See* Dictionary.com, *Produce* (2022), https://www.dictionary.com/browse/produce (including definitions such as "to provide, furnish, or supply; yield; to bring forward; present to view or notice; exhibit").

"Dial" means to enter the digits of the telephone number to connect the call. But simply using a number generator to enter the digits of the telephone number or to place the call would *not* make a dialer an autodialer because the autodialer definition requires use of a "random or sequential number generator" to store or produce—not to dial. This illustrates an important distinction between the interpretation offered in this brief and that offered by Duguid and other plaintiffs before him: dialers that dial "automatically" are not autodialers under the present interpretation unless they also use number generators to put telephone numbers into storage or to take them out.

2. The prior express consent exception would be superfluous.

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, cell phones, and pagers. 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 when 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."[8]

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. Indeed, the original versions of the TCPA bills did ban autodialers altogether.[9] Congress amended the bills to allow callers to use autodialers after obtaining the consent of the called party.[10] A House co-sponsor of the TCPA certainly thought that the consent exception in the final version of the bill applied to the autodialer

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[8] 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).

[9] 137 Cong. Rec. 30817 (1991) (S. 1410 § 3(b)), available at https://www.govinfo.gov/content/pkg/GPO-CRECB-1991- pt21/pdf/GPO-CRECB-1991-pt21-2-2.pdf; *Id.* at 30820 (S. 1462, § 2(b)).

[10] *Id.* at 30818 (1991) (S. 1410 § 3(b)); *Id.* at § 30823 (S. 1462, § 2(b)(1)(A)).

restriction, explaining that the bill "would prohibit autodialed calls to anyone that has not given the caller express consent."[11] Clearly, Congress intended the consent exception to have effect or it would not have amended the bill to add it.

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

The common technical understanding of "random or sequential number generator" is also not limited to telephone number generation. Random and sequential number generators are functions that output any type of number, not just telephone numbers.

A. "Random number generator" refers to a computational process that outputs any type of random number.

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

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[11] 137 Cong. Rec. H11307, 11311 (Nov. 26, 1991) (statement of Mr. Rinaldo).

numbers, usually within some pre-defined range.[12] 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.[13] 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.[14] If someone knows the seed and the algorithm, they

can determine the sequence of random numbers, which is why

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[12] Nat'l Institute of Sci. & Tech., *Computer Security Resource Center Glossary: Random Number Generator (RNG)*, https://csrc.nist.gov/glossary/term/random_number_generator.
[13] *See, e.g.,* Oracle, *Class SecureRandom* (2022), https://docs.oracle.com/javase/8/docs/api/java/security/SecureRandom.html; Python, *secrets—Generate Secure Random Numbers For Managing Secrets* (2022), https://docs.python.org/3/library/secrets.html#module-secrets.
[14] *See* Nat'l Institute of Sci. & Tech., *supra* note 3.

pseudorandom number generators are unsuitable for cryptographic

purposes.

Most programming languages include built-in functions for

generating cryptographically random and pseudorandom numbers. For

example, Python, a very popular scripting language, has the `random`

library, which includes functions for choosing pseudorandom integers

and decimal numbers within nearly any desired range.[15] The random

library even includes a function, `random.choice(list)`, for choosing

a random element from a list of items.[16] A Python list—which, in other

programming languages, is sometimes called an array—stores things

like numbers and alphanumeric strings in a certain order.[17]

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[15] Python, *random—Generate Pseudo-Random Numbers* (2022), 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* (2022), https://docs.python.org/3/library/secrets.html#module-secrets.
[16] *Id.*
[17] Google for Education, *Python Lists* (2022), https://developers.google.com/edu/python/lists.

If a programmer had a preproduced list of telephone numbers, `telephone_numbers`, they could use the script `random.choice(telephone_numbers)` to generate random telephone numbers to call from the preproduced list.[18] 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.

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[18] *Id.*

**B.	"Sequential number generator" refers to 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.[19] 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

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[19] *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."[20]

Another common use of sequential number generators is to automatically perform the same task a certain number of times, a process called looping or iteration.[21] Many loops use sequential number generators: they require an initial value; an increment, which is usually +1 (written ++ in most programming languages); and an end value, which represents the number of times the loop should run.[22] An example of a simple loop in C++ is

[20] SQL Tutorial, *SQL Auto Increment* (2022), https://www.sqltutorial.org/sql-auto-increment/.
[21] Mozilla, *Loops and Iteration* (2022), https://developer.mozilla.org/en-US/docs/Web/JavaScript/Guide/Loops_and_iteration.
[22] Some loops run until an event occurs instead of until an end value is reached, for example, some while loops. *Id.* These loops usually do not use sequential number generators. Infinite loops are also possible, although they are often infinite due to an error.

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

The first expression in the parentheses, `int i = 0`, defines the initial value of `i` to be 0; the second defines the end value (stop the loop when `i` is greater than 5); and the third, the increment (increase `i` by one each time the loop is run). [23] The code within the curly brackets is executed each time the loop is run.

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:

_____

[23] W3 Schools, *C++ For Loop* (2022), https://www.w3schools.com/cpp/cpp_for_loop.asp.

```
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.

IV.   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 to be called" in a short

period of time with little human intervention. There are no potential

overbreadth concerns because dialers that do not queue multiple

"telephone numbers to be called" do not use random or sequential

number generators as required by the autodialer definition and thus are

not autodialers.

A. "Telephone numbers to be called" refers to telephone numbers in a calling campaign that have been specifically chosen for imminent calling.

The TCPA restricts use of equipment that stores or produces "telephone numbers to be called" using a random or sequential number generator. 47 U.S.C. § 227(a)(1)(A). 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 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, often 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.

B. Dialers with campaign calling functions can use random or sequential number generators to produce and store telephone numbers to be called.

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

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Determining whether a specific dialer uses a random or sequential

number generator at one of these steps requires examining the dialer's

code.

The first step of a typical campaign dialer—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 (i.e., produce) random phone numbers from a database to call.

The dialer could also select (i.e., produce) the telephone numbers to be

called based on their sequentially generated IDs. The dialer would use a

loop with a sequential number generator to generate each customer

record ID number in ascending order.

An autodialer may also use a random or sequential number

generator to designate the order in which to call the telephone numbers.

The number generators at this step can be used to either store the

telephone numbers in a particular order, produce them from memory in

a particular order, or both. For example, an online text blaster may use

a sequential number generator to store telephone numbers to be called

from an uploaded spreadsheet 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 predictive dialers use more complex algorithms for ordering telephone numbers to be called, which may use random or sequential number generators.

An autodialer is most likely to use a random or sequential number generator when it moves through the queue of designated telephone numbers. This is because, at some point, the dialer will take blocks of numbers and store them in an ordered data structure in temporary memory, 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 most automatic telephone dialing systems "automatic"—the computer automatically chooses the next telephone number to call from the queue using a sequential number generator.

C.   There are no overbreadth concerns with this interpretation.

The Supreme Court rejected Duguid's interpretation of the autodialer definition on syntactic grounds, but in doing so, the Court

expressed concerns about an autodialer definition that swept as broadly as the Ninth Circuit's. Part of the concern was that the terms "dial automatically" and "without human intervention" were not in the statutory text and were too nebulous—the Court could not see where to draw the line, and refused to engage in the endeavor. *Duguid*, 141 S. Ct. at 1171 n. 6. Another concern of the Court was that certain common dialing equipment might get swept into the autodialer restriction. The definition proposed in this brief has neither problem: it relies only on words found in the statutory text; whether a dialer meets the autodialer definition is a matter of fact that can be proved by looking at the dialer's code, as outlined above; and common dialing equipment does not use number generators to store or produce telephone numbers to be called.

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: ordinary smartphones, speed dialers, autoresponders, the autotrigger system that Facebook

used to send texts in response to login attempts,[24] 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 produce or store one telephone number, not multiple telephone numbers, to call at a time. Second, the telephone number to be called is not randomly chosen but selected by an event or the dialer's user. Finally, there is no need to order or 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.

Even if a common dialer were to be swept into the autodialer definition, the prior express consent exception would almost always apply to allow use of the dialer. Ordinary people contacting friends and family under ordinary conditions are not required to obtain written consent from the called party to use an autodialer—simple consent, as obtained when a person gives another person their phone number, is

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[24] 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.

sufficient. It is telling that, in the many years that the FCC and the courts interpreted the autodialer definition to be even broader than the interpretation in this brief, no one—to *amici*'s knowledge—was ever dragged into court or fined for autodialing an acquaintance about a matter of ordinary life.

Use of random or sequential number generators to automate the calling process for multiple telephone numbers is what sets autodialers apart from other dialers. The plain text of the statute and the common technical understandings of random and sequential number generators require rejection of the District Court's interpretation of the autodialer definition.

CONCLUSION

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

Date: February 10, 2022   <u>/s/ Megan Iorio</u>
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CERTIFICATE OF COMPLIANCE

I am the attorney or self-represented party.

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 6499 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font in Century Schoolbook font.

Signature: */s/ Megan Iorio*   **Date:** February 10, 2022

CERTIFICATE OF SERVICE

I certify that on February 10, 2022, this brief was e-filed through the CM/ECF System of the U.S. Court of Appeals for the Eleventh Circuit. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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