No. 22-1248

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MARK ANTHONY GUTHRIE,
Plaintiff-Appellant,

v.

PHH MORTGAGE CORPORATION,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of North Carolina
No. 7:20-cv-43
The Honorable Terrence W. Boyle, District Court Judge

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

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CORPORATE DISCLOSURE STATEMENT

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 corporation and that no publicly held corporation owns 10% or more of their stock.

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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] Since the Supreme Court's decision in *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021), EPIC and NCLC have filed *amicus* briefs in the Third, Ninth, and Eleventh Circuits to assist the courts in interpreting the autodialer restriction.

EPIC is a public interest research center in Washington, D.C., focused on emerging privacy and technology issues. EPIC often participates as *amicus curiae* to explain the technology in a case. EPIC has filed *amicus* briefs in many Telephone Consumer Protection Act ("TCPA") cases.[2]

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[1] 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.

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

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*, Chapters 6 and 7 (4th ed. 2022), updated at *www.nclc.org/library*.

SUMMARY OF THE ARGUMENT

This brief is limited to the question of what a plaintiff must prove to show that a defendant used an "automatic telephone dialing system" ("autodialer") to dial their telephone number in violation of the Telephone Consumer Protection Act ("TCPA"). The district court in this case stated, without analysis, that a plaintiff must show that a call was the result of "random contact"—that is, that the telephone number was randomly generated. *Guthrie v. PHH Mortg. Corp.*, No. 7:20-CV-43, 2022 WL 706923, at *10 (E.D.N.C. Mar. 4, 2022). But neither the text of the statute nor prior precedent requires that an autodialer use a random or sequential number generator to create telephone numbers out of thin air. As long as a dialer uses a random or sequential number generator in *some* way to produce or store telephone numbers to be called, it is an autodialer. Dialers commonly referred to as "autodialers" most likely use number generators, but plaintiffs must have access to the dialer's code through discovery to prove the existence of the number generator and its use.

This Court may not need to fully answer this question in this case, and *amici* urge the Court to avoid a broad pronouncement on the issue

until it is squarely presented to the Court. But to the extent that the Court determines that it must decide this question, *amici* urge the Court to carefully consider the text of the statute and the technical understanding of the statutory terms.

The TCPA defines an 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." The prior decisions of the Third, Seventh, and Eleventh 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 limited to a specific type of generator: one that generates telephone numbers out of thin air. But the Supreme Court never ruled on what a "random or sequential number generator" is. That question was not before the Court, it was not at issue between the parties, and it was not briefed. If and when this Court reaches this question, it must decide the answer as a matter of first impression.

A "random or sequential number generator" does not now, nor did it ever mean, something that can only generate telephone numbers. Random number generators and sequential number generators are general categories of algorithms. They are used in a wide variety of contexts beyond telephone number generation and are simply pieces of code that generate random or sequential numbers *of any kind*.

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.

Giving "random or sequential number generator" its plain, technical meaning 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. Dialers commonly referred to as "autodialers" are distinguishable from the one in *Duguid* precisely because they likely use a random or sequential number generator to

store telephone numbers in a queue and/or to produce the telephone numbers to be called from the queue.

ARGUMENT

I. THE SUPREME COURT IN *DUGUID* DID NOT HOLD THAT AN AUTODIALER MUST GENERATE RANDOM OR SEQUENTIAL TELEPHONE NUMBERS.

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 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.

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." *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.[3] The Court's holding and primary analysis were 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.

Moreover, part of the Court's reasoning in *Duguid* is inconsistent with any assumption that the "random or sequential number generator"

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[3] 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.")

must generate *telephone* numbers. In response to plaintiff's argument that a number generator cannot be used to store information, 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 did use a *telephone* number generator, not simply a number generator. How the telephone numbers were *produced*, though, is irrelevant to the question of whether a number generator was used to *store* the telephone numbers–the only question that the Court was addressing in this passage. 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 to store telephone numbers to be called was a use of a number generator that fell within the autodialer definition.

Nevertheless, the arguments presented in the rest of this brief do not hinge on a specific interpretation of *Duguid* footnote 7. The arguments that follow are based on a plain, 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-suspenders" approach to drafting.

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 "produce" and "store" 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" and "produce" 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.

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," most of the words in subsection (A) would be superfluous—particularly "store" and "produce." This would rewrite the statute, not interpret the words Congress wrote.

The best illustration is to look at the way courts and parties construct the autodialer definition when they interpret "random or sequential number generator" to mean "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?

"Store" and "produce" do meaningful work when one recognizes that there are more uses for a random or sequential number generator than simply creating telephone numbers out of thin air. When a random or sequential telephone number is used to generate index numbers, as in the footnote 7 example, the terms "generator," "store," "produce," and "dial" each refer to different computational processes. Think of a computer's storage as containing many different numbered boxes. The box numbers are called "index numbers." The generator creates the random or sequential index numbers, which are then used to conduct further computational processes—namely, to store or produce the telephone numbers to be called. "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.[4] 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. "Dial" means to enter the digits of the telephone number to connect the call.

The text of the statute thus strongly cuts against limiting the phrase "random or sequential number generator" to generators that create telephone numbers out of thin air.

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 not limited to telephone number generation. Random and sequential number generators are functions that output any type of number, not just telephone numbers.

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[4] *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").

Proponents of the more limited interpretation of "random or sequential number generator" must appeal to legislative intent, not the ordinary meaning of "random or sequential number generator," 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). In fact, Congress knew that a "random or sequential number generator" was not limited to a telephone number generator. A representative from the National Retail Merchants Association told a House committee that the term "sequential number generator" "could be interpreted to cover machines that are programmed to dial, on a sequential basis, designated groups of customers (e.g., all numbers on a "prescreened" list)." *Telemarketing Practices: Hearing Before the Subcomm. on Telecomms. & Fin. of the H. Comm. on Energy & Commerce on H.R. 628, H.R. 2131, & H.R. 2184*, Ser. No. 101-43, at 110 (1989) (statement of Tracy Mullen, Senior Vice President, Government Affairs, National Retail Merchants Association). The committee did not act on his advice to narrow the scope of the term, which indicates that the committee was comfortable with the broad definition the term.

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, technical meaning clearly supports a broader definition.

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 numbers, usually within some pre-defined range.[5] A sequence of die rolls is a paradigmatic example of random number generation within the range 1 to 6.

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

Truly random number generators that replicate natural or mechanical randomness are used in cryptographic applications.[6] 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.[7] If someone knows the seed and the algorithm, they can determine the sequence of random numbers, which is why 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`

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[6] *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.

[7] *See* Nat'l Institute of Sci. & Tech., *supra* note 3.

library, which includes functions for choosing pseudorandom integers and decimal numbers within nearly any desired range.[8] The random library even includes a function, `random.choice(list)`, for choosing a random element from a list of items.[9] A Python list—which, in other programming languages, is sometimes called an array—stores things like numbers and alphanumeric strings in a certain order.[10]

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.[11] 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

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[8] 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.

[9] *Id.*

[10] Google for Education, *Python Lists* (2022), https://developers.google.com/edu/python/lists.

[11] *Id.*

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 to produce or store telephone numbers but does not dial randomly generated telephone numbers.

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.[12] For example, a sequential number

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[12] *See, e.g.,* ReformatText, *Sequential Number Generator* (2020), https://www.reformattext.com/sequential-number-generator.htm. Some sequential number generators such as the autoincrement functions

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 implementations of SQL, a popular language for programming databases, explains that the autoincrement function outputs numbers that are "sequential integers which are automatically generated."[13]

Another common use of sequential number generators is to automatically perform the same task a certain number of times, a

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described in this section, do not have explicit end values, but in practice, there will be a limit on the size of the number output.

[13] SQL Tutorial, *SQL Auto Increment* (2022), https://www.sqltutorial.org/sql-auto-increment/.

process called looping or iteration.[14] 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.[15] An example of a simple loop in C++ is

```
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). [16] The code within the curly brackets is executed each time the loop is run.

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[14] Mozilla, *Loops and Iteration* (2022), https://developer.mozilla.org/en-US/docs/Web/JavaScript/Guide/Loops_and_iteration.

[15] 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.

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

Step by step, this is how the program works: The program begins with `i = 0` and runs through the code once. When the program reaches the last line of code, it loops back up to the top, `i` is increased to `1`, and the code is executed again. The program loops back to the top and continues to execute the code until `i` is incremented to 6. At that point, the end condition that `i` is greater than 5 is met, and the loop ends. During this process, the program will have generated the integers 0, 1, 2, 3, 4, 5 and used those integers to execute the code in brackets.

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];
}
```

This program begins with `i = 0` and then produces the telephone number in `telNums` at index `0`, which is the first telephone number in the array. The program then loops back to the top, the number generator increments `i` to `1`, and then produces the telephone number at index `1`, which is the second telephone number in the array. The program continues to loop through, generating sequential values of `i` and producing the corresponding telephone numbers in `telNums`, until `i = 6`, at which point the program stops.

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. The dialer would be an example of a dialer that produces telephone number with a sequential number generator but does not generate sequential telephone numbers.

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 dialers that are commonly referred to as "autodialers" to automatically store or produce large quantities of "telephone numbers to be called" in a short period of time with little human intervention. This type of mass dialing was precisely the type of activity Congress sought to regulate.[17] There are no potential

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[17] There is repeated reference in the legislative history to an autodialer's capacity to dial an overwhelming number of phones. *E.g.*, H.R. Rep. No. 102-317, at 10 (1991) ("The Committee record indicates that [automatic dialing] systems are used to make millions of calls every day. Each system has the capacity to automatically dial as many as 1,000 phones per day."); S. Rep. No. 102-178, at 2 (1991) ("Certain data indicate that [automatic dialer recorded message players (ADRMPs) or automatic dialing and announcing devices (ADADs)] are used by more than 180,000 solicitors to call more than 7 million Americans every day. Each ADRMP has the capacity to dial as many of 1,000 telephone numbers each day."); *Telemarketing/Privacy Issues: Hearing Before the Subcomm. on Telecomms. & Fin. of the H. Comm. on Energy & Commerce on H.R. 1304 & H.R. 1305*, Ser. No. 102-9, at 3 (1991) (Rep. Rinaldo) ("Autodialers typically call homes and play recorded advertising messages to as many as 1,000 telephone numbers per day."); *Id.* at 29 (Rep. Unsoeld) ("They must dispose of their machines that intrude upon 7 million Americans each day, and they must employ human beings who will make fewer privacy-invading calls."); *S. 1462, The Automated Tel. Consumer Prot. Act of 1991: Hearing Before the Subcomm. on Commc'ns of the S. Comm. on Commerce, Sci., & Transp.*, S. Hrg. 102-960, at 1 (1991) (Sen. Inouye) ("A single autodialing machine is capable of calling over 1,000 persons each day.")

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 under the TCPA. But first it is necessary to give "telephone numbers to be called" its precise meaning.

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 phrase is an important limitation on the autodialer definition and every word 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. 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,[18] 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, in all of these examples, the telephone number to be called is not chosen by a number generator 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

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[18] 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.

dialers would not use sequential number generators to store or produce the telephone number to be called.

Some have argued that random or sequential number generators are so common in computing that almost any computer-based dialer would qualify as an autodialer under the proposed definition. This argument fails because the autodialer definition does not simply require use of a random or sequential number generator but use of such a number generator to either *store* or *produce* telephone numbers to be called; any use of a random or sequential number generator will not make a dialer an autodialer. For example, old pulse dial phones that use counters to time dial pulses are not autodialers. These phones dial the digits of a telephone number as they are input by the human user and use a counter to ensure that the dial pulses do not overlap and that the dialing does not time out. Even if these counters qualify as sequential number generators—a point not conceded here—the counters are not used to *store* or *produce* telephone numbers—they are used to time the *dialing* of a single telephone number. No one argues that "using a random or sequential number generator" applies to "to dial such numbers." It does not. And so use of a sequential number

generator to dial a telephone number does not meet the statutory definition of an autodialer—and neither do pulse dial phones.

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 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 grant of summary judgment in favor of Defendant on the TCPA claim.

Date: May 10, 2022

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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