No. 21-35746

IN THE

United States Court of Appeals for the Ninth Circuit

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

v.

EFINANCIAL, LLC,
Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Washington
No. 2:19-cv-01430
The Honorable James L. Robart, District Court Judge

BRIEF *AMICUS CURIAE* OF ACA INTERNATIONAL IN SUPPORT OF DEFENDANT-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae is the Association of Credit and Collection Professionals International (ACA International). Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), undersigned counsel certifies that *amicus curiae* is a nonprofit trade association, and that it has no parent corporation and no publicly held corporation owns 10% or more of *amicus curiae*'s stock.

/s/ Jessica Ellsworth
Jessica Ellsworth

Dated: February 9, 2022

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BRIEF *AMICUS CURIAE* OF ACA INTERNATIONAL IN SUPPORT OF DEFENDANT-APPELLEE

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Founded in 1939, ACA International (ACA) has long been the largest trade association representing the debt-collection and broader accounts-receivable management (ARM) industry. With members located in every state, ACA brings

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[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund preparation or submission of this brief. No person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

together nearly 2,300 member organizations as well as their nearly 124,000 employees, including third-party collection agencies, asset buyers, attorneys, creditors, and vendor-affiliates. In the Ninth Circuit alone, ACA's 365 members employ more than 8,700 people.

The ACA-member workforce is incredibly diverse, with racial and ethnic minorities accounting for approximately 40% and women making up nearly 70% of employees. Moreover, 32% of ACA's member companies are women-owned.

And ACA members make a meaningful economic impact. In 2018, debt-collection agencies and their employees directly contributed more than $1.1 billion in federal tax and some $109.5 million in state and local taxes. That same year, third-party debt collectors donated $108.3 million in charitable contributions.

ACA's members include sole proprietorships, partnerships, and corporations ranging from small businesses to large firms. These members include the very smallest "mom and pop" businesses operating in a limited geographic area, as well as the very largest of multinational corporations operating in every state. But the majority of ACA's company members have always been small businesses; today, some 85% of ACA member companies have fewer than 50 employees.

ACA members are not only small businesses themselves, but they provide an essential service for their small-business clients as well. In 2019, the debt collection industry—with ACA members at the forefront—returned $90 billion in delinquent

payments to small businesses and other creditors. These financial recoveries have a meaningful effect in sustaining America's economy and in helping to maintain the overall health of the consumer credit ecosystem that underpins modern American macroeconomics. *See e.g.*, Julia Fonseca, Katherine Strair & Basit Zafar, *Access to Credit and Financial Health: Evaluating the Impact of Debt Collection*, Fed. Reserve Bank of N.Y., Staff Rep. No. 814 (May 2017).[2]

ACA participates as *amicus curiae* in litigation matters affecting its members, including in cases—like this one—brought under the Telephone Consumer Protection Act (TCPA). ACA submits this brief to articulate why the definition of "random or sequential number generator" that Borden proffered below cannot be squared with the text or history of the TCPA. In addition, ACA submits this brief to clarify the scope of the Supreme Court's unanimous ruling in *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021), in which ACA participated as an amicus along with a coalition of other *amici*.

Interpreting the TCPA's definition of "automatic telephone dialing system" (ATDS or autodialer), *Duguid* held that for equipment to qualify as an ATDS under the TCPA, it "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

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[2] *Available at* https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr814.pdf.

sequential number generator." *Id.* at 1167. Notwithstanding this decision, ACA members continue to defend—well past the pleadings stage—unmeritorious TCPA lawsuits, like this one, that do not involve the type of equipment *Duguid* described as properly subject to the TCPA.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress passed the TCPA in 1991 in response to rising concerns about the risks of "[u]nrestricted telemarketing" on privacy and public safety. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, ¶ 5, 105 Stat. 2394, 2394 (codified at 47 U.S.C. § 227 note) ("Congressional Findings"). The TCPA drew particular aim at the "automatic telephone dialing system," 47 U.S.C. § 227(b)(1)(A), (D), which had "revolutionized telemarketing by allowing companies to dial random or sequential blocks of *telephone numbers* automatically." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1167 (2021) (emphasis added).

The result: a "proliferation of intrusive, nuisance calls" to consumers, businesses, hospitals, emergency lines—wherever happenstance might lead. *Id.* at 1167–68 (quoting Congressional Findings § 2, ¶ 6). Congress found "uniquely harmful" this new technology's "capacity to generate [and dial] random or sequential *phone numbers*." *Id.* at 1167, 1168–69 (emphasis added). Indeed, two out of the four practices the TCPA outlawed involved the use of autodialers. *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 373 (2012).

As the Supreme Court recently noted, and as the TCPA's legislative history confirms, Congress remedied this unique harm with a "scalpel," not a "chainsaw." *Duguid*, 141 S. Ct. at 1171. Autodialers—equipment that indiscriminately *create* blocks of telephone numbers out of thin air—tied up emergency phone lines, intruded into hospital rooms, and made repeated calls to homes across the country. Congress targeted this problem at its source, curbing the use of "random or sequential number generator[s]." 47 U.S.C. § 227(a)(1)(A). At the time of enactment, courts and the Federal Communications Commission (FCC)—the federal agency explicitly charged with interpreting the TCPA—understood that the phrase "random or sequential number generator" referred to the generation of *telephone* numbers—not ordinal numbers or credit card numbers or lottery numbers or any other kind of numbers. *See, e.g.*, *In re Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC Rcd. 8752, 8776 (1992) ("The prohibitions of § 227(b)(1) clearly do not apply . . . . [where] *the numbers called* are not generated in a random or sequential fashion." (emphasis added)).

Neither Borden nor his *amicus* can point to evidence from the legislative or regulatory history that, in 1991, "random or sequential number generator" referred to anything other than the generation of random or sequential blocks of *telephone* numbers. *See* Opening Br. 18–34; Br. of Electronic Privacy Information Center as *Amicus Curiae* in Supp. of Plaintiff-Appellant ("EPIC Br.") 9–15.

The text of the TCPA, *see* 47 U.S.C. § 227(a)(1), reflects Congress' intent to proscribe equipment that randomly or sequentially generates telephone numbers. To wit, the TCPA's definition of "automatic telephone dialing system" uses the word "number" three times: "telephone numbers," "number generator," and "such numbers." *Id.* The first usage—"telephone number[ ]"—is unambiguous on its face. And no party disputes that the third usage—"such numbers"—refers back to "telephone numbers." *See* Opening Br. 14–15; EPIC Br. 6. Yet, Borden presses the argument that Congress intended the word "number" in the phrase "random or sequential number generator" to mean something other than telephone numbers. But the TCPA resides in Title II of the Communications Act, a statute that governs the nation's telephone system and the administration of *telephone numbers*, among other things. Elsewhere, the TCPA repeatedly uses "numbers" and "telephone numbers" interchangeably. Nowhere, however, does the TCPA use "numbers" in the way Borden suggests.[3]

[3] The TCPA uses the word "number" or "numbers" 29 times outside of the definition of ATDS in 47 U.S.C. § 227(a)(1). The only instance in which the term "number" is not immediately clear from the adjacent words—*e.g.*, "telephone number" or "facsimile machine number" or "such number" referring back to a proximate reference to telephone or facsimile number—appears in 47 U.S.C. § 227(c)(3)(K), in which Congress referred to the "protection of the privacy rights of persons whose numbers are included in such database" when authorizing the creation of the national Do-Not-Call registry. In that instance, as here, the broader context of the TCPA makes clear that Congress intended the term "number" to mean "telephone number."

The Court's decision in *Duguid*, meanwhile, reflects the understanding that "numbers" and "telephone numbers" are coterminous. *Duguid* is filled with examples where the Court uses the two terms interchangeably. The decision would make little sense if "number" referred to any machine-generated integer. Nor does Borden's attempt to seek refuge in footnote 7 of *Duguid* salvage his interpretation. *Contra* Opening Br. 24–30. Quoting footnote 7 out of context, Borden argues that eFinancial's technology "determine[s] the order in which to pick phone numbers from a preproduced list." Opening Br. 16, 23 n.3 (quoting *Duguid*, 141 S. Ct. at 1172 n.7). But Borden ignores that the "preproduced list" mentioned in footnote 7 referred to blocks of telephone numbers that were *themselves* randomly and sequentially generated, *not* specific telephone numbers obtained directly from the recipients. As the District Court explained, Borden's legal theory, which "relies on a selective reading of one line within footnote 7," finds no purchase in the Supreme Court's aside. ER 14.

Legislative intent, statutory text, and Supreme Court precedent all point in a single direction: an "automatic telephone dialing system" refers exclusively to equipment that invents random or sequential blocks of telephone numbers. Borden admits that he gave his number to eFinancial. As a result of giving his number to eFinancial, he did not—and could not—plausibly allege that eFinancial called him using equipment that randomly or sequentially generated that telephone number. No

additional allegations or discovery can cure the legal defect that Borden's concession created. Thus, the District Court therefore correctly dismissed Borden's lawsuit with prejudice. ER 15–16; *see also Brickman v. Facebook, Inc.*, No. 16-cv-00751, 2021 WL 4198512, at *2–3 (N.D. Cal. Sept. 15, 2021) (collecting cases that reached the same result).

The Federal Rules of Civil Procedure do not require courts to credit internally contradictory theories of relief like Borden's. *Id.* at *2 (denying leave to amend because allegations that defendant "pulled [telephone numbers] from an existing list" would not cure deficiencies in TCPA claim). Nor does the TCPA. In enacting the TCPA, Congress recognized that legitimate telephonic outreach was an integral piece of our national economy. Congressional Findings § 2, ¶ 4 (finding that telephone outreach in 1990 generated $435,000,000,000 in sales to the U.S. economy). And in resolving a deep circuit split regarding the meaning of "automatic telephone dialing system," *Duguid* promised to curb the excesses of TCPA litigation and restore Congress' original design. Borden's read of the statute would upend this balance, restore precedent that *Duguid* expressly overruled, undermine the interests of judicial economy, and place legitimate callers at risk of protracted discovery every time they make long-accepted telephonic outreach. This Court should affirm.

ARGUMENT

I. AN ATDS MUST BE ABLE TO GENERATE RANDOM OR SEQUENTIAL BLOCKS OF TELEPHONE NUMBERS.

A. The TCPA's History Indicates that "Random or Sequential Number Generator" Refers to Indiscriminate Telephone Number Generation.

To state a claim under 47 U.S.C. § 227(b)(1)(A), a TCPA plaintiff must plausibly allege that "(1) the defendant called a cellular telephone number; (2) using an [autodialer]; (3) without the recipient's prior express consent." *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012). Identifying an autodialer, then, requires plaintiffs to point to "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).

Borden's failure to identify equipment with the capacity to randomly or sequentially generate *telephone* numbers required dismissal because, as the District Court found, "random or sequential number generator" refers to equipment that generates *telephone* numbers. ER 11–14. Borden's argument to the contrary—that a "random or sequential number generator" may generate *any* number, *see* Opening Br. 18–36; EPIC Br. 5–21—is inconsistent with contemporaneous understandings of the TCPA's intent.

First, the TCPA's legislative history reveals that "random or sequential number generator" referred to indiscriminate *telephone*-number generation. *See,*

e.g., 137 Cong. Rec. 30,818 (1991) ("Due to advances in autodialer technology, machines can be programmed to deliver a prerecorded message to thousands of sequential *phone* numbers" (emphasis added)); H.R. Rep. No. 101-633, at 2–3 (1990). The feature of autodialers that most caused concern was the ability to generate blocks of telephone numbers *en masse* from thin air. A Senate Report recognized that, because of an autodialer's random or sequential number generation, consumers may not evade telemarketers by simply unlisting their telephone numbers. S. Rep. No. 102-178, at 1–2 (1991). This observation makes sense only if the number generated is a telephone number. Indeed, neither the House nor the Senate Report referred to any other type of "number" that—if randomly or sequentially generated—would give rise to the harms the TCPA sought to remedy.

Second, the FCC's earliest references to random or sequential number generators treated "number" and "telephone number" interchangeably. For example, the FCC noted that functions like "speed dialing," "call forwarding," or "public delayed message services" fell outside the TCPA's prohibitions "because *the numbers called* are not generated in a random or sequential fashion." *In re Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC Rcd. 8752, 8776 (1992) (emphasis added). Later, the agency noted that the TCPA "requires that *calls dialed to numbers* generated randomly or in sequence (autodialed)," then "delivered by artificial or prerecorded voice message must identify the caller." *In*

re Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 10 FCC Rcd. 12,391, 12,400 (1995) (emphasis added). And because "debt collection calls [were] not directed to randomly or sequentially generated *telephone numbers*," they did not require identification. *Id.* (emphasis added and internal quotation marks omitted).

The FCC's early TCPA rulings followed a broader trend of using "number" and "telephone number" interchangeably. *Id.* at 12,398 (referring to "newly assigned number[s]" and " 'dead' numbers"); 7 FCC Rcd. at 8759 (referring to "unpublished or unlisted numbers"), 8761 (rejecting the use of a special telephone number prefix for telemarketers because the North American Numbering Plan "may lack sufficient numbers to set aside"). This, too, confirms that, when the TCPA was passed, the prevailing view was that "number" referred to a "telephone number."

Finally, the earliest cases discussing random and sequential number generators understood "number" to refer to "telephone number." In *Satterfield v. Simon & Schuster*—thought to be the first case construing "automatic telephone dialing system"—the district court granted defendants summary judgment because the equipment at issue did not "store, produce or call randomly or sequentially generated *telephone* numbers." No. C 06-2893 CW, 2007 WL 1839807, at *6 (N.D. Cal. June 26, 2007) (emphasis added), *rev'd and remanded*, 569 F.3d 946 (9th Cir. 2009). This Court later held that issues of fact precluded summary judgment, but it did not question the district court's premise: To qualify as an ATDS, a system must

be "capable of generating random or sequential *telephone* numbers." *Satterfield v. Simon & Schuster*, 569 F.3d 946, 951 (9th Cir. 2009) (emphasis added).

Courts followed suit by confirming the understanding that " 'random number generation' means random sequences of 10 digits, and 'sequential number generation' means (for example) (111) 111-1111, (111) 111-1112, and so on"—*i.e.*, telephone numbers. *Griffith v. Consumer Portfolio Serv., Inc.*, 838 F. Supp. 2d 723, 725 (N.D. Ill. Aug. 16, 2011); *see also, e.g.*, *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 119–121 (3d Cir. 2018); *Gragg v. Orange Cab Co.*, 995 F. Supp. 2d 1189, 1193 (W.D. Wash. 2014).

Tellingly, Borden and EPIC do not deeply engage with the TCPA's history or purpose. Nor could they, because neither the history nor the purpose supports Borden's spin on "random or sequential number generator." Indeed, if this Court interprets ATDS as broadly as Borden would like, then the TCPA could be read to cover virtually any software-based phone system. *See* EPIC Br. at 9–15 (noting that mathematical number manipulation is a foundational and common element of computer code). Little would remain of the legitimate outreach that the TCPA claimed to preserve. Congressional Findings § 2, ¶¶ 4, 9.

B. The TCPA's Text Indicates that an ATDS Must Generate Telephone Numbers.

The TCPA's text tracks its legislative history: dialing equipment cannot qualify as an autodialer unless it generates random or sequential blocks of *telephone*

numbers to be called. An "automatic telephone dialing system" only includes equipment with the capacity to (1) "store or produce telephone numbers to be called, using a random or sequential number generator," and (2) "dial such numbers." 47 U.S.C. § 227(a)(1).

That autodialer definition uses the word "number" three times: "telephone numbers," "number generator," and "such numbers." *Id.* Both Borden and EPIC agree that the first and third uses of "number[ ]" refer to telephone numbers. Opening Br. 14–15; EPIC Br. 6. It makes little sense to treat the second use of "number"—sandwiched between two clear references to "telephone numbers"—as departing from this otherwise uniform meaning. A word is interpreted in the context of the company it keeps, *see Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995), and Borden presents no good reason to depart from this sound interpretive principle.

Other parts of the TCPA confirm that Congress did not need to ritualistically insert "telephone" before every use of "number" to convey its intent to speak of *telephone numbers*. For example, § 227(c)(3) alternates between "telephone number" and "number" without any perceptible basis for distinction. *Compare* 47 U.S.C. § 227(c)(3)(F), (G) (referring to "the telephone number of any subscriber included in [the Do-Not-Call] database"), *with id.* § 227(c)(3)(K) (referring to "persons whose numbers are included in [the Do-Not-Call] database"). Later in the statute, Congress defined "caller identification service" as "any service or device

designed to provide the user . . . with the telephone number of . . . a call made using voice service or a text message sent using a text messaging service" and clarifies that this definition "includes automatic number identification services." 47 U.S.C. § 227(e)(8)(B). Using Borden's rules of interpretation, however, a service that identifies any type of number could then qualify as a "caller identification service" under the TCPA—a result that would not make sense in light of the glaring contextual clues that "number" refers to telephone numbers in this provision.

Elsewhere, the TCPA refers to two types of numbers: telephone numbers and facsimile numbers. At times throughout the statute, Congress begins a provision by referring to a "telephone number" or "facsimile number" and then uses "number" as shorthand for the remainder of the provision. *See, e.g.*, *id.* § 227(b)(1)(C)(ii), (e)(8)(B). A statute's failure to be consistently verbose does not defeat its plain meaning. *New Hampshire Lottery Comm'n v. Rosen*, 986 F.3d 38, 57 (1st Cir. 2021) (finding it "obvious" that standalone use of "transmission" was "shorthand" for earlier reference to "transmission in interstate or foreign commerce").

The "language and design of the statute as a whole" also show that "number generator" must refer to telephone numbers. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). The TCPA is housed within Title II of the Communications Act—the core federal framework governing the telephone system and the provision of telephone numbers. *See, e.g.*, 47 U.S.C. § 251 (establishing rules for telephone

"numbering administration" and "number portability"). That broader context also illustrates the types of "numbers" Congress sought to regulate.

On the other hand, Borden's proposed reading—that "number," standing alone, can refer to any type of integer, Opening Br. 24–36—finds no support in the statute as a whole. Borden cannot identify a single place where the TCPA uses "number" in the way he proposes. Indeed, adopting Borden's ascription for every stand-alone use of "number" would inject needless ambiguity into other TCPA provisions that require reading with some measure of common sense. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) (explaining that statutory interpretation considers "the entire text, in view of its structure and of the physical and logical relation of its many parts."); *accord K Mart Corp.*, 486 U.S. at 291; *Conlan v. U.S. Dep't of Labor*, 76 F.3d 271, 274 (9th Cir. 1996). Throughout TCPA, Congress deployed "number" as a natural shorthand for "telephone number" and "facsimile number." *See supra* pp. 13–14. Thus, Borden's strained interpretation does not only implicate the example of shorthand that appears in § 227(a)(1)(A), but every use of "number" as shorthand that occurs within the statute.

Amicus curiae, EPIC, says reading the TCPA's "prior express consent" requirement would be superfluous if "random or sequential number generator" referred to telephone numbers. EPIC Br. 6–9. Not so. The statute requires "prior

express consent" for prerecorded or artificial calls, even if they are not autodialed. 47 U.S.C. § 227(b)(1)(A). More fundamentally, "automatic telephone dialing system" and "prior express consent" are two different inquiries. *Id.* Consent is a contextual inquiry that looks to the specific interaction between the caller and the recipient. Identifying an autodialer, meanwhile, focuses on the equipment's technological capabilities. To be sure, if a caller dials a number that an individual has voluntarily provided—as Borden did here—those facts can show both consent *and* that the caller did not dial from a random or sequential block of numbers generated out of thin air, *i.e.*, absence of an ATDS. But that does not imply superfluity, for Congress may have employed a belt and suspenders approach to tackle the same fundamental harm. *Cf. United States v. Carona*, 660 F.3d 360, 369 (9th Cir. 2011) (acknowledging that "statutes often contain overlapping provisions" to "make sure that every possibility is covered").

While Borden asks this Court to rewrite the TCPA to encompass modern dialing equipment, Opening Br. 32–34, *Duguid* considered and rejected such an argument. 141 S. Ct. at 1173. And *Duguid* is not alone in that respect. When the FCC expansively interpreted the word "capacity" in the autodialer provision to carry an "eye-popping sweep," the D.C. Circuit rejected that interpretation as "utterly unreasonable in the breadth of its regulatory inclusion." *ACA Int'l v. FCC*, 885 F.3d 687, 697, 699 (D.C. Cir. 2018) (brackets and citation omitted). *Duguid* and *ACA*

International both enshrine the principle that courts may not simply presume Congress "intended the term '[ATDS]' to maintain its applicability to modern phone equipment in perpetuity." *ACA Int'l*, 885 F.3d at 699; *see also Duguid*, 141 S. Ct. at 1173 (noting that the "senescen[ce]" of the TCPA does not permit result-oriented statutory interpretation).

It may be that the tool that Congress created to solve a 20th Century harm cannot remedy Borden's 21st Century grievance. *Duguid*, 141 S. Ct. at 1173. And random or sequential number generators may have become "senescent" technology in the thirty years since Congress enacted the TCPA. But that provides "no justification for eschewing the best reading of § 227(a)(1)(A)." *Id.* If anything, it merely means that Borden's "quarrel is with Congress." *Id*.

C. *Duguid* Understood "Random or Sequential Number Generator" as Referring to Telephone Number Generation.

The Court's decision in *Duguid* is replete with clues that "random or sequential number generator" cannot refer to anything but telephone numbers. Consider the Court's description of the question presented: "whether an autodialer must have the capacity to generate random or sequential *phone numbers*." *Id*. at 1168 (emphasis added). And like the TCPA itself, the Court repeatedly used "number" and "telephone number" interchangeably. *See, e.g.*, *id.* ("[Duguid] did not claim Facebook sent text messages to numbers that were randomly or sequentially

generated"). The language of *Duguid* itself underscores that "number" functions as shorthand for "telephone number" under the ordinary rules of the English language.

But other facets of *Duguid* doom Borden's interpretation, too. If Borden's argument were correct, for example, then the autodialer provision would encompass any equipment that automatically dials telephone numbers in some order from a stored list. Opening Br. 24–36. Such an outcome would be indistinguishable from this Court's holding in *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018) (upholding TCPA claim where equipment allegedly dialed numbers automatically in order from a stored list of phone numbers). But *Duguid* abrogated the core holding in *Marks*. *See Duguid*, 141 S. Ct. at 1168–69; Answering Br. of eFinancial, LLC 13–14 & n.5. Separately, if Borden's argument were correct, then the absence of "human intervention" would tend to prove the existence of an autodialer. *See* Opening Br. 32–33 & n.6; EPIC Br. 16–17. Yet, *Duguid* made clear that plaintiffs cannot allege an autodialer based on the equipment's ability to dial without "human intervention." 141 S. Ct. at 1171 n.6.

Seeking refuge in footnote 7 of *Duguid*, Borden suggests that the TCPA covers equipment that generates *some number*—even if it is not a *telephone number*—that might determine the order in which the call is made. Opening Br. 24–25; EPIC Br. 12. Just like dozens of courts across the country that have considered this very issue, the District Court correctly found that Borden's argument "relies on

a selective reading of one line within footnote 7 and ignores the greater context" of both the footnote and the opinion. ER 14; *see also Meier v. Allied Interstate LLC*, No. 20-55286, 2022 WL 171933, at *1 (9th Cir. Jan. 19, 2022) (unpublished) (rejecting an equally "expansive" interpretation of footnote 7).

Footnote 7 responded to Duguid's argument that the rule against surplusage prevented the phrase "using a random or sequential number generator" from modifying the word "store." In Duguid's view, if a device had the capacity to store telephone numbers to be called using a random or sequential number generator, it necessarily produced those numbers too. *Duguid*, 141 S. Ct. at 1171–72 & n.7. The Professional Association for Customer Engagement ("PACE") filed an amicus brief rebutting this point. *See generally* ER 18–122. In it, PACE described "a method of blending random and sequential number generator technologies to dial telephone numbers within a defined number range." ER 39. Stated differently, PACE simply identified technology that Duguid denied: an ATDS with the capacity to "produce" telephone numbers to be called without immediately calling the telephone number produced. *See id.* With this technology—available and in use when the TCPA was enacted—a dialer could: (1) generate a block of telephone numbers using a combination of pseudorandomization and sequentialization; (2) "store" that block of phone numbers in an array for later calling; and (3) randomly "produce" one number from the sequential block of telephone numbers for dialing. *See* ER 39, 41–43.

Thus, when footnote 7 described an autodialer that uses "a random number generator to determine the order in which to pick phone numbers from a preproduced list," it contemplated a block of telephone numbers that had already been randomly or sequentially generated. *Duguid*, 141 S. Ct. at 1172 n.7 (citing Br. for PACE et al. as *Amici Curiae* 19); *see also* ER 40 ("The '028 Patent shows . . . an array . . . of telephone numbers that are sequentially generated and stored. A telephone number in the array is identified . . . and then produced for creating sequential records . . . which are then dialed or stored . . . ."), 41 (explaining how '028 Patent technology dials numbers from a sequential block of telephone numbers generated by a machine). According to Borden's own allegations, eFinancial's equipment does nothing of the sort. *See, e.g.*, ER 204–207. Rather, eFinancial had Borden's phone number because Borden provided it. In short, the claims and technology at issue here fall far afield of the technology referenced in footnote 7.

As a practical matter, footnote 7 would comprise a loophole outsizing *Duguid*'s rule if given the meaning that Borden suggests. In text and structure, *Duguid* was undoubtedly premised upon the Court's understanding that "random or sequential generator" referred to telephone-number generation. *Supra* pp. 9–12. If footnote 7 contemplated liability for any automatic dialing of telephone numbers on stored lists, then *Duguid* would abrogate *Marks* in word only.

II. THE DISTRICT COURT CORRECTLY DISMISSED THE CASE WITH PREJUDICE.

Borden did not and cannot allege that eFinancial randomly or sequentially generated his telephone number. Borden admits that he gave away his telephone number to Progressive, through a website that indicated Borden's information would be shared with eFinancial. Opening Br. 7–10; ER 5–6 (citing Am. Compl. ¶¶ 21–22, Ex. 1; SAC ¶¶ 23–24, Ex. 1 ("ABOUT form")). That concession is dispositive: *if* Borden provided his telephone number, and *if* eFinancial stored and dialed that number from its database, *then* that number could not have been part of a random or sequential block of telephone numbers that eFinancial had otherwise generated. And without plausibly alleging an ATDS, Borden failed to state a claim under § 227(b)(1)(A). The District Court rightly dismissed the Second Amended Complaint with prejudice. Fed. R. Civ. P. 12(b)(6); *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (affirming dismissal with prejudice claims that could not be cured by amendment).

This case is a poster child for dismissal under Rule 12(b)(6)—one where plaintiff's own factual admissions starkly contradict a cognizable legal theory. Today's conception of Rule 8's pleading standard arose from the courts' recognition that uncontrolled litigation led to ballooning costs, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558–559 (2007), largely in the discovery process, *id.* at 559. Indeed, at the turn of the century, reports indicated that discovery accounted for "as much as

90% of the litigation costs in the cases where discovery is actively employed." Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 340, 354, 357 (2000). And courts were far from confident that a claim could, "if groundless, be weeded out early in the discovery process" or that "the problem of discovery abuse [could] be solved by careful scrutiny of the evidence at . . . summary judgment." *Twombly*, 550 U.S. at 559 (internal quotation marks omitted). These doubts led to *Iqbal*'s sound conclusion: Pleadings that lack a plausible claim for relief "do[] not unlock the doors of discovery." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Despite *Duguid*'s command, TCPA plaintiffs still sometimes survive Rule 12(b)(6) motions without plausibly stating a claim for relief, even though their autodialer theories ultimately fail on the merits. *See, e.g.*, *LaGuardia v. Designer Brands Inc.*, No. 2:20-cv-2311, 2021 WL 4125471, at *7–8 (S.D. Ohio Sept. 9, 2021) (rejecting plaintiff's footnote 7 argument at summary judgment). By reimagining the TCPA's definition of "automatic telephone dialing system," plaintiffs proceed to discovery without ever identifying equipment that can randomly or sequentially generate telephone numbers. That was the case in *Duguid*. Br. of Respondent Noah Duguid at 8–10, *Duguid*, 141 S. Ct. 1163 (No. 19-511) (arguing that he need not allege use of a random or sequential number generator). And it is

again the case here. *See generally* Opening Br. 18–34. In this way, Borden's theory is not so much new as it is a refining of a well-worn strategy of evading what Rule 8(a) requires.

ACA's members have born the cost of this strategy. ACA members report burdens similar to those described by the United States Chamber of Commerce in its December 2021 survey of pre- and post-*Duguid* TCPA litigation. U.S. Chamber of Com. Inst. for Legal Reform, *Turning the TCPA Tide: The Effects of* Duguid (Dec. 2021).[4] In the decade before *Duguid*, uncertainty surrounding the ATDS definition led to TCPA verdicts exceeding $200 million and settlements that regularly exceeded seven figures. *Id.* at 2. And although the number of new TCPA cases meaningfully dropped following *Duguid*, *id.* at 4, companies continue to face a significant amount of TCPA exposure, *id.* at 4, 7–8.

This exposure renders ACA members particularly vulnerable because some courts have improvidently taken the view that the clarity *Duguid* provides does not bear on a case until the summary-judgment stage—after ACA members have already been subject to protracted and unwarranted discovery. *See id.* at 12. Litigation defense counsel and agency owners who have been involved in these cases report that discovery costs increase the cost of litigation two- to three-fold—and, in some

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[4] *Available at* https://instituteforlegalreform.com/wp-content/uploads/2021/12/1323_ILR_TCPA_Report_FINAL_Pages.pdf.

cases, even more—when courts permit plaintiffs' speculative claims to proceed through discovery. Anecdotal evidence from debt-collection agency owners indicate that a Rule 12 disposition typically costs between $7,500 and $15,000, depending on the complexity of the complaint, while a Rule 56 disposition following limited discovery only on the ATDS issue costs between $25,000 and $50,000, and a Rule 56 disposition following plenary discovery costs between $50,000 and $100,000 depending on whether and how experts have been engaged. Several TCPA litigation-defense attorneys with long industry experience have corroborated these fee ranges. When courts allow plaintiffs' speculative pleadings to unlock the doors of discovery, these economic pressures induce settlements on TCPA claims that would fail as matter of law. This, in turn, creates perverse economic incentives for TCPA plaintiffs, particularly in large class actions like this one, where the financial exposure posed by discovery is so great.

Put simply, *Duguid* bars TCPA plaintiffs from side-stepping the "random or sequential number generator" requirement via the theory that *Marks* previously had blessed. The inability to plausibly allege randomly or sequentially generated telephone numbers forecloses an ATDS claim at the pleadings stage.

This case defies not only plausibility, but possibility: a telephone number provided voluntarily cannot have been generated from thin air using a random or sequential number generator. An admission that the caller dialed a number provided

by the plaintiff should thus be fatal. The District Court correctly found as much below. There is nothing more Borden could allege—and nothing that further discovery could uncover—that would cure the defect in his complaint.

It is well-established that when a complaint's allegations, however true, cannot raise a claim of entitlement to relief, "this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court." *Twombly*, 550 U.S. at 558 (quoting 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1216, at 233–234 (3d ed. 2004)). So, following *Duguid*, ACA's members expected to see far fewer discovery wars on claims that fell shy of plausibly stating a claim. But as this case illustrates, plaintiffs continue to construct novel theories to attempt to avoid the requirement to identify a true ATDS. This Court should bring the latest attempt to a halt.

* * *

As Congress recognized when passing the TCPA, telephonic communications represent a legitimate and commercially necessary practice. ACA's members, which educate borrowers on repayment plans and collect on debts owed to government entities, medical providers, lenders, and small businesses alike, rely on cost-effective telecommunications to reach consumers who have lost touch with their creditors or need options for resolving legitimate debts. Borden's theory, if accepted, would jeopardize these practices, exposing good-faith callers to millions of dollars in

liability or discovery expenses. In the end, that road leads to an increased cost of credit for all consumers. This case presents an opportunity to end the TCPA litigation crisis in the district courts that somehow persists even after *Duguid*. The Court should take it.

CONCLUSION

For the foregoing reasons, and those offered in Appellee's brief, this Court should affirm the District Court's order and opinion.

February 9, 2022

Respectfully submitted,

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/s/ Jessica L. Ellsworth
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I certify that on February 9, 2022, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

/s/ Jessica L. Ellsworth
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