No. 22-55517

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUCINE TRIM,

INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED

Plaintiff-Appellant,

v.

REWARD ZONE USA LLC,

Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California
No. 2:20-cv-01027
The Honorable Stephen V. Wilson, 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

/s/ Alan Butler
Alan Butler
Megan Iorio
Christopher Frascella
Thomas McBrien
ELECTRONIC PRIVACY INFORMATION CENTER
1519 New Hampshire Ave. NW
Washington, DC 20036
(202) 483-1140
butler@epic.org

Attorneys for *Amici Curiae*
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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 conference state that they have no parent corporation and that no publicly held corporation owns 10% or more of its 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, Fourth, Ninth, and Eleventh Circuits to assist the courts in interpreting the autodialer restriction.

EPIC is a public interest research center in Washington, D.C., that focuses public attention on emerging privacy and technology issues. EPIC often participates as *amicus curiae* to explain the technology at issue in a case. *See, e.g.*, Br. for EPIC et al. as *Amicus Curiae* Supporting Appellant, *United States v. Wilson*, 13 F.4th 961 (9th Cir. 2021) (No. 18-50440); Br. for EPIC at al. as *Amici Curiae*

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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.

Supporting Petitioner, *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402).

EPIC also routinely files amicus briefs in Telephone Consumer Protection Act cases. *See e.g., Br. for EPIC & NCLC as Amici Curiae in Support of Plaintiff-Appellant and Reversal, Guthrie v. PHH Mortgage Corp., No. 22-1248 (4th Cir. filed May 10, 2022); 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 Amicus Curiae Supporting Plaintiff-Appellant, Borden v. eFinancial, LLC, No 21-35746 (9th Cir. filed Dec. 10, 2021);* Br. for EPIC & NCLC as *Amici Curiae* Supporting Plaintiffs-Appellants, *McCurley v. Royal Seas Cruises, Inc.*, No. 21-55099 (9th Cir. filed Aug. 9, 2021); Br. for NCLC & EPIC as *Amici Curiae* Supporting Appellant, *Lindenbaum v. Realgy, LLC*, No. 20-4252 (6th Cir. filed Feb. 1, 2021); Br. for EPIC et al. as *Amici Curiae* Supporting Respondent, *Facebook, Inc., v. Duguid*, 141 S. Ct. 1163 (2020) (No. 19-511); Br. for EPIC et al. as *Amici Curiae* Supporting Petitioner, *Barr v. Am. Ass'n of Political Consultants, Inc.,* 140 S. Ct. 2335 (2020) (No. 19-631).

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 whether a system alleged to automatically select stored telephone numbers to be called using a

random or sequential process can fall within the "automatic telephone dialing system" ("autodialer") definition under the Telephone Consumer Protection Act ("TCPA") at the pleading stage.

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." *Facebook, Inc., v. Duguid*, 141 S. Ct. 1163, 1169 (2020). 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. The Court in *Duguid* notably did not hold that an autodialer must generate random or sequential *telephone numbers*; the Court's holding and analysis focused on the syntax of the clause, not on the meaning of the phrase "random or sequential number generator." *Id.* at 1169–70.

Some TCPA defendants have contorted *Duguid*'s narrow holding into something far different, arguing that *Duguid* requires that "random or sequential number generator" be read as "random or sequential *telephone* number generator." But the Supreme Court never ruled on the interpretation of the phrase "random or sequential number

generator," nor was the question properly briefed. This Court is now presented with that question as a matter of first impression.[2]

The term "random or sequential number generator" in the TCPA should be interpreted consistently with the use of those terms in the fields of computer science and engineering. There is no basis to read the term "telephone number" into that definition. Random number generators and sequential number generators are algorithms frequently used in the programming and configuration of automated devices. These algorithms are used in a wide variety of contexts to facilitate automation of computing and processing; they are 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

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[2] The Court has not announced its opinion in *Borden v. eFinancial, LLC*, C19-1430JLR, 2021 WL 3602479 (W.D. Wash. Aug. 13, 2021), *appeal docketed*, No. 21-35746 (9th Cir. 2021).

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 the term "random or sequential number generator" its plain, technical meaning does not sweep in the kinds of devices and functions that the Supreme Court was concerned about in *Duguid*: ordinary smartphones, speed dial features, and autoresponders. Nor does this interpretation sweep as broadly as the definition this Court adopted in *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1053 (9th Cir. 2018), which applied the ATDS provisions of the TCPA to dialers that merely store telephone numbers and dial them, such as electronic directories. 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 can dial numbers automatically, in random or sequential order, from a stored list or queue.

ARGUMENT

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

When Congress chose to use the phrase "random or sequential number generator" in the TCPA, it adopted technical language that should be interpreted based on its plain meaning in a technical context. The text of a statute controls, not its purported legislative intent, even where the plain text meaning might have new and important applications. As such, this court need not entertain appeals to legislative intent by proponents of a more limited interpretation where those interpretations go against the plain meaning of "random or sequential number generator." The Supreme Court has made it clear that it is the text, not the intent, of a statute that controls where they are in conflict. *Milner v. Department of Navy*, 562 U.S. 562, 574 (2011).

But both the text and the legislative history of the TCPA support the broader, plain meaning interpretation of "random or sequential number generator." Congress knew that the term "random or sequential number generator" was not commonly or technically understood to be limited to *telephone* number generators. Indeed, a representative from

the National Retail Merchants Association urged a House committee to narrow the scope of the term "sequential number generator" in the TCPA, warning that it "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 ultimately chose not to narrow the scope of the term, which indicates that Congress was comfortable with the broader interpretation.

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. 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 read the word "telephone" into the phrase, nor any reason to believe that "number" refers to "telephone numbers to be called." That is especially true because reading the word "telephone" into "random or sequential number generator" would make the prior express consent exception of the autodialer restriction practically unusable—a surplusage that Congress did not intend.

Congress well knew what words to use when it wanted to refer specifically to telephone numbers in the TCPA. The phrase "telephone numbers to be called" in 47 U.S.C. § 227(a)(1)(A) is one such 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. "[T]elephone numbers to be called" and "such numbers" are both plural, while "number" in "random or sequential number generator" is singular. In sum, nothing about the phrase "random or sequential number generator" demands a reference for "number" or added words to provide meaning.

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

calls. The caller would then call from the list of telephone numbers that have consented to autodialed calls and not from lists of generated phone numbers. The provision thus envisions a scenario in which callers deploy autodialers that use a random or sequential number generator to select numbers to be dialed from a list of consenting called parties. If Congress only meant to prohibit autodialers that create telephone numbers from nothing, there would be no need for this express consent exception.

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, such as when the caller had permission to use the device. Congress likely did this to allow responsible callers to take advantage of the cost savings afforded by autodialers. Autodialers reduced the cost of making calls, even using a "live" person to speak with the customer, because they "reduce[d] the amount of time that each person [had to] spend dialing numbers and waiting for the call to be answered." S. Rep. No. 102–177, 3 (1991). At the time the TCPA was passed, "major American corporations" were using autodialers to "call[] consumers at a rate of 5 to 7 million times

per month."[3] If the autodialer restriction only protected against indiscriminate dialing, the consent exception would have been superfluous: Congress could have achieved the same effect by banning autodialers except for emergency purposes. The goal of statutory interpretation is to give effect to every word in a statute, not just some. *Corley v. United States*, 556 U.S. 303, 314 (2009) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . ."). Congress intended the prior express consent exception to be actionable, and courts should ensure that it is.

B. "Random number generator" 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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[3] S. 1462, The Automated Telephone Consumer Protection Act of 1991, S. 1410 The Telephone Advertising Consumer Protection Act, and S. 857, Equally Billing for Long Distance Charges: Hearing Before the Subcomm. on Commc'ns of the S. Comm. on Commerce, Sci., and Transp., 102d Cong. 16 (1991) .

numbers, usually within some pre-defined range.[4] A sequence of die rolls is a paradigmatic example of random number generation within the range 1 to 6.[5]

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

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

[5] Other games of chance similarly use a random number generator to *produce* outputs from a pre-determined list of options, such as a roulette wheel or a lottery, see, e.g., *Konami Gaming, Inc. v. High 5 Games, LLC*, 214CV01483RFBNJK, 2018 WL 1020120, at *5, 7 (D. Nev. Feb. 22, 2018), aff'd, 756 Fed. Appx. 994 (Fed. Cir. 2019)(unpublished) ("random number generators are widely well known in the art and utilized in a majority of games of chance to generate random outcomes"; explaining how the randomly selected number might correspond to a reel stop position on the virtual roulette wheel); *Tennessee Educ. Lottery Corp. v. Smartplay Intern., Inc.,* 3:08-1058, 2010 WL 4659216, at *6 (M.D. Tenn. Nov. 9, 2010) (describing how vendor's Random Number Generator would replace a mechanical ball with an automated drawing to accomplish the same task of producing—by which they mean "selecting"—the winning numbers).

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

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 an 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 methods for generating cryptographically random and pseudorandom numbers. For example, Python, a very popular scripting language, has the random library, which includes methods for choosing pseudorandom integers and decimal numbers within nearly any desired range.[8] The random library even includes a method, random.choice(list), for choosing a

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[7] *See* Nat'l Institute of Sci. & Tech., *supra* note 5.

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

random element from a list of objects.[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, designated 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 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

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[9] *Id.*
[10] Google for Education, *Python Lists* (2021), https://developers.google.com/edu/python/lists.
[11] *Id.*

list of phone numbers in *Duguid*.[12] 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.[13]

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[12] In *Duguid*, the Supreme Court repeatedly framed the question as whether the equipment must generate random or sequential numbers, not random or sequential *telephone* numbers. *See* 141 S. Ct. at 1167 ("To qualify as an 'automatic telephone dialing system,' a device must have the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator"); 1169 ("We conclude that the clause modifies both, specifying how the equipment must either "store" or "produce" telephone numbers. Because Facebook's notification system neither stores nor produces numbers "using a random or sequential number generator," it is not an autodialer."); 1171 ("the autodialer definition excludes equipment that does not 'us[e] a random or sequential number generator'"). Only in one instance did it refer to the question as involving generation of random or sequential *telephone* numbers, in a preliminary section that characterized the conflict among the Circuits. *See id.* at 1168 ("We granted certiorari to resolve a conflict among the Courts of Appeals regarding whether an autodialer must have the capacity to generate random or sequential phone numbers"). The Supreme Court resolved the case, however, by holding merely that, whether storing or producing numbers to be called, the equipment must use a random or sequential number generator, without addressing the question whether the numbers generated must be telephone numbers. *See id.* at 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.").

C. "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.[14] 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

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[13] The Third Circuit recently considered the definition of an ATDS post-*Duguid* in *Panzarella v. Navient*. *See Panzarella v. Navient Sols., Inc.*, 37 F.4th 867, 870 (3d Cir. 2022). However, it was bound by its prior holding in *Dominguez*, *id.* at 875 n 9 (3d Cir. 2022) (citing to *Dominguez on Behalf of Himself v. Yahoo, Inc.*, 894 F.3d 116, 117 (3d Cir. 2018), which defined an ATDS as generating random or sequential *telephone* numbers. The Ninth Circuit is not similarly bound.

[14] *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.

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."[15]

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.[16] Many loops use sequential number generators: they require an initial value; an increment, which is usually +1 (written ++ in most programming languages); and (sometimes) an end value, which represents the number of times the loop should run.[17] An example of a simple loop in C++ is

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[15] SQL Tutorial, *SQL Auto Increment* (2021), https://www.sqltutorial.org/sql-auto-increment/.
[16] Mozilla, *Loops and Iteration* (2021), https://developer.mozilla.org/en-US/docs/Web/JavaScript/Guide/Loops_and_iteration.
[17] Some loops run until an event occurs instead of until an end value is reached, for example, some while loops. *Id.* Infinite loops are also possible, although they are often infinite due to an error.

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

The first expression in the parentheses, int i = 0, defines the initial value; 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).[18] The code within the curly brackets is executed each time the loop is run.

Step by step, this is how the program works. The program begins with i = 0 and executes 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 sequential integers 0, 1, 2, 3, 4, 5 and used those integers to execute the code in brackets.

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

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 sequence of 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 numbers to be dialed using a sequential number generator but does not generate or produce sequential telephone numbers.

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

As outlined in the previous section, random and sequential number generators can be used to automate bulk tasks. These number generators make it possible for 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 under the TCPA.[19] There are no

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[19] 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 (1991), at 10 ("The Committee record indicates that [automatic dialing] systems are used to make millions of calls

potential overbreadth concerns with reading the terms "random or sequential number generator" according to their plain meaning in the technical context. Most common dialing devices, like cell phones, do not queue multiple "telephone numbers to be called," and thus do not use a random or sequential number generator to produce the telephone numbers to be called. But in order to avoid any overbroad interpretation that would sweep in common dialing devices, it is necessary to give

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every day. Each system has the capacity to automatically dial as many as 1,000 phones per day."); S. Rep. No. 102-178 (1991), at 2 ("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.")

"telephone numbers to be called" its natural and precise meaning under the TCPA.

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). TCPA defendants often leave the phrase "telephone numbers to be called" uninterpreted or erroneously shorten it to "telephone numbers." But the phrase is an important limitation on the autodialer definition, and every word should be given meaning. "[T]elephone 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; they call many numbers, 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 automated list-based dialing feature that separates campaign autodialers from common dialing devices.

B. Automated list-based dialers can use random or sequential number generators to produce and store telephone numbers to be called.

Dialers like the one at issue in this case, which enable a caller to automate a calling campaign, typically entail the same basic steps: the caller loads a list of telephone numbers to be dialed; the dialer arranges the telephone numbers into a queue; and the dialer iterates through the queue of telephone numbers in some order and produces them to be dialed. Determining whether a specific dialer uses a random or sequential number generator at one of these steps requires examining the dialer's software code. It is most likely that an automated list-based dialer would use a random or sequential number generator when selecting numbers as it iterates through the campaign list. However, there are several different ways that an automated list-based dialer could use a random or sequential number generator to produce the telephone numbers to be called.

For example, while the act of loading the campaign list into the dialer does not necessarily use a random or sequential number generator, when the dialer arranges the list of numbers to be called into a queue, it could use a random or sequential number generator to order

or reorder the numbers. The 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 determine 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 (i.e. recall from storage) 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 a more complicated process, involving a random or sequential number

generator combined with an algorithm, to set the order of telephone numbers to be dialed.

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 it is necessary for the dialer to take blocks of telephone numbers and store them in an ordered data structure in temporary memory. The dialer will then most likely use a sequential number generator to iterate through and "produce" each telephone number to be dialed. This use of a sequential number generator is what makes an automatic telephone dialing system "automatic"—the computer automatically chooses the next telephone number to call from the queue using a sequential number generator.

C. Finding that automated list-based dialers meet the autodialer definition would not raise the overbreadth concerns voiced by the *Duguid* court.

The Supreme Court in *Duguid* expressed concern that if smartphones and other common calling devices and phone features could fall within the TCPA's autodialer definition, then many more calls would create potential liability under the TCPA. *See* 141 S. Ct. at 1171. The Court was also concerned that the interpretation adopted by the

lower court would have required reading in atextual limits, such as "dial automatically" and "without human intervention," into the autodialer definition to avoid that overbreadth problem.

But unlike the autodialer interpretation that was overturned by the Court in *Duguid*, the interpretation based on the plain meaning of "using a random or sequential number generator" would not overly broaden the statute or require atextual limitations. That interpretation would also be easy to apply because it is straightforward to determine whether a device or piece of software uses a random or sequential number generator as part of the automated calling process.

Common dialing devices such as smartphones, speed dialer functions, autoresponders, the autotrigger dialing system used by Facebook in the *Duguid* case,[20] and other dialers that "merely store[] and dial telephone numbers," 141 S. Ct. at 1171, are easily distinguishable from the automated list-based dialer at issue in this

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[20] 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.

case. The smartphones and other common calling devices do not use random or sequential number generators in a way that fits into the TCPA autodialer definition.

First, these common devices only produce or store one telephone number to be called at a time, whereas a TCPA autodialer must produce "telephone numbers," plural, "to be called." 47 U.S.C. § 227(a)(1)(A). Second, these common calling devices do not use a number generator to produce the telephone number to be called; the telephone number is entered by the dialer's user at the time of the call or triggered by some other external event or function. Finally, these common devices have no need to randomize or iterate through a long list of numbers, so there would be no reason to use random or sequential number generators to store or produce the telephone number to be called.

Use of random or sequential number generators to automate the calling process for multiple telephone numbers at a massive scale is what sets autodialers apart from other dialers. Prohibiting such dialers is consistent with the structure and text of the TCPA because these dialers can be easily and cheaply used to make hundreds of thousands of calls in rapid succession; that is not true of common calling devices

like smartphones. 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.

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/s/ Alan Butler
Alan Butler
Megan Iorio
Christopher Frascella
Tom McBrien
ELECTRONIC PRIVACY INFORMATION CENTER
1519 New Hampshire Ave. NW
Washington, DC 20036
(202) 483-1140

Attorneys for Amici Curiae Electronic Privacy Information Center & National Consumer Law Center