22-1726

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARINA SOLIMAN, INDIVIDUALLY AND ON BEHALF OF ALL OTHER SIMILARLY SITUATED
Plaintiff-Appellant,

v.

SUBWAY FRANCHISE ADVERTISING FUND TRUST, LTD.,
Defendant-Appellee.

On Appeal from the United States District Court for the District of Connecticut, No. 3:19-cv-00592
The Honorable Jeffrey A. Meyer, District Court Judge

BRIEF OF THE ELECTRONIC PRIVACY INFORMATION CENTER AND THE NATIONAL CONSUMER LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING EN BANC

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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 neither has a 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 Second, Third, Fourth, Ninth, and Eleventh Circuits to assist the courts in interpreting the autodialer restriction.[2]

EPIC is a public interest organization in Washington, D.C., focused on emerging privacy and technology issues. EPIC often participates as *amicus curiae* to explain the technology at issue in a case. EPIC works with NCLC to ensure strong robocall protections at the FCC, in Congress, and in the courts.[3]

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[1] *Amici* move for leave to file this brief. 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] EPIC, *Digital Library* (2024), https://epic.org/?s=&_topics=robocalls&_content-type=amicus-brief.
[3] EPIC, *Robocalls* (2024), https://epic.org/issues/consumer-privacy/robocalls/.

NCLC is a national research and advocacy organization focusing on justice in consumer transactions, especially for low-income and elderly consumers. NCLC attorneys often appear on behalf of consumers regarding robocalls before the United States Congress, the FCC, and the courts. Chapters 6 and 7 of NCLC's treatise *Federal Deception Law* (4th ed. 2022), updated at *www.nclc.org/library*, are a comprehensive analysis of the TCPA and other laws governing robocalls.

SUMMARY OF THE ARGUMENT

The autodialer restriction protects consumers from automated, mass-dialed calls. These calls are a nuisance and an invasion of privacy. Automated mass dialers that use random or sequential number generators to automate the calling process should still be regulated under the Telephone Consumer Protection Act's (TCPA's) autodialer restriction following *Facebook, Inc., v. Duguid*, 592 U.S. 395 (2021). The panel decision in this case erroneously guts the autodialer restriction.

As Judge Nardacci noted in her dissent, clear Supreme Court precedent dictates that "random or sequential number generator" be given its technical meaning, such that the autodialer definition includes equipment that uses a random or sequential number generator to generate *any kind of number* to store or produce telephone numbers to be called. The majority erroneously rejected the technical meaning of the phrase in favor of its understanding of the phrase's ordinary meaning. But even the panel's analysis of the ordinary meaning is flawed. Neither the plain text nor the history of the autodialer provision support inserting the term "telephone" into the phrase "random or sequential number generator." Judge Nardacci is not alone in her

thinking among those on the federal bench. The *Soliman* panel is now the second federal circuit court panel to split over the interpretation of the autodialer definition post-*Duguid*. *See Brickman v. United States*, 56 F.4th 688, 691 (9th Cir. 2022) (VanDyke, J., concurring).

The public interest in reviewing the panel decision is great. The decision leaves Americans vulnerable to an onslaught of calls that are "inconvenient and costly to consumers." *Soliman v. Subway Franchisee Advert. Fund Tr., LTD.*, No. 22-1726-CV, 2024 WL 2097361, *11 (2d Cir. May 10, 2024) (Nardacci, J., dissenting in part). Reversal would restore and solidify consumer protections. Plaintiff-Appellant's petition for *en banc* review should be granted to overturn the incorrect and harmful panel decision.

ARGUMENT

I. THE PANEL MAJORITY IGNORED CLEAR SUPREME COURT PRECEDENT THAT TECHNICAL TERMS BE GIVEN THEIR TECHNICAL MEANINGS.

The panel majority erred in rejecting the technical meaning of "random or sequential number generator" because it purportedly conflicts with the phrase's ordinary meaning. *Soliman*, 2024 WL 2097361 at *7. As Judge Nardacci noted in her dissent, Supreme Court

precedent requires technical terms in a statute be given their technical meaning. *Id.* at *10 (Nardacci, J., dissenting in part) (citing *Van Buren v. United States,* 593 U.S. 374, 388 (2021)). The phrase "random or sequential number generator" has a "well-recognized technical meaning which is not limited to producing telephone numbers." *Id.*; *see also Brickman*, 56 F.4th at 691 (VanDyke, J., concurring) ("the phrase 'random or sequential number generator' has a known meaning as a computational tool."). As a technical matter, the term "random or sequential number generator" refers to code that generates "all types of different numbers, from telephone numbers to zip codes to a sequence of consecutively ordered numbers." *Brickman*, 56 F.4th at 691 (VanDyke, J., concurring). And, as a technical matter, an autodialer could use a random or sequential number generator to automate the production and storage of telephone numbers to be called without generating the telephone numbers, as the record in this case shows. APX-27.

The Supreme Court has said that technical terms in statutes like the TCPA should be given their technical meanings. In *Van Buren v. United States,* 593 U.S. 374 (2021), the Court held that, when interpreting a term in a statute that "address[es] a . . . technical

subject, a specialized meaning is to be expected." *Id.* at 388 n. 7 (2021). Accordingly, the Court gave the term "access" in the Computer Fraud and Abuse Act its technical rather than common understanding. *Id.* at 387–88. Similarly, in *Duguid*, the Court contrasted the "ordinary" and "technical" understandings of "store . . . using a random or sequential number generator" and indicated that the technical understanding controlled. *Duguid,* 592 U.S. at 406–07. The panel should have followed this precedent to give "random or sequential number generator" its technical meaning.

II. THE PANEL MAJORITY WRONGLY INTERPRETED THE PLAIN TEXT OF THE STATUTE.

The majority was also wrong in its analysis of the plain text of the phrase "random or sequential number generator." There is no grammatical or interpretive reason to insert "telephone" into the phrase. In fact, the history of the autodialer definition weighs strongly against this reading. Inserting the word "telephone" into "random or sequential number generator" also makes "produce," "store," and the prior express consent exception superfluous. *See Soliman*, 2024 WL

2097361 at *10 (Nardacci, J., dissenting in part); *see also Brickman*, 56 F. 4th at 692 (VanDyke, J., concurring).

First, the majority was wrong to find that "telephone numbers to be called," "such numbers," and "random or sequential number generator" were like terms that required "number" to have the same meaning. *Soliman*, 2024 WL 2097361 at *4–5. As Judge Nardacci observed, these phrases are "logically distinct." *Id.* at *10 (Nardacci, J., dissenting in part). "Telephone numbers to be called" and "such numbers" refer to types of numbers, while "random or sequential number generator" refers to a type of number *generator*. They are thus not like terms at all.

Further, the phrases "telephone numbers to be called" and "random or sequential number generator" are distinct because one explicitly includes the term "telephone" and the other does not. The decision to include "telephone" in one phrase and not the other was deliberate. Early versions of the autodialer definition used the term "numbers to be called," not "telephone numbers to be called;" "telephone" was only inserted later. *Compare* H.R. 628, 101st Cong., 1st Sess. (Jan. 24, 1989), *with* H.R. 1304, 102d Cong., 1st Sess. (March 6,

1991). Congress could have added "telephone" to "random or sequential number generator" at the same time. It chose not to. The majority was wrong to override Congress's drafting decision and add the term now.

The phrase "random or sequential number generator" is also grammatically different than the phrase "such numbers." The phrase "such numbers" clearly refers to "telephone numbers to be called" 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 demand an antecedent. Further, "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, "number," to refer to a plural antecedent, "telephone numbers."

The panel decision also renders several key terms and provisions superfluous. As Judge VanDyke in the Ninth Circuit recognized, inserting "telephone" into "random or sequential number generator" makes "store" and "produce" superfluous. *Brickman*, 56 F.4th at 692

(VanDyke, J., concurring). If Congress had intended an autodialer to be equipment that dialed randomly or sequentially generated telephone numbers, it could have written the autodialer definition much more simply as "equipment which has the capacity to (A) generate random or sequential telephone numbers; and (B) dial such numbers." But that is not what Congress wrote. 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). The majority failed to give meaning to all words in the autodialer definition and its decision should be reconsidered.

Reading the term "telephone" into "random or sequential number generator" would also make the prior express consent exception superfluous. Early versions of the TCPA banned use of autodialers altogether. *See, e.g.,* S. 1410, 102d Cong., 1st Sess. (June 27 (legislative day, June 11), 1991). Congress added the consent exception to allow businesses to use autodialers when their customers gave permission. 47 U.S.C. § 227(b)(1)(A). Congress likely included the prior express consent exception to allow responsible callers to take advantage of the cost savings afforded by autodialers. Autodialers reduced the cost of making

calls, even when a "live" person was on the line, 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).

Businesses could not use the consent exception if the autodialer definition were limited to equipment that generated telephone numbers. To take advantage of the consent exception, a business would keep a list of consenting customers and use an autodialer to *call from this list*. Conforming equipment would not first generate a random number, check if the random number was on the consent list, and then dial the number if it was on the list, because generating the random number would be *entirely superfluous* and would defeat the time-saving purpose of using an autodialer. Manually dialing the phone numbers of consenting customers would be faster than waiting for a dialer to cycle through tens, hundreds, or possibly thousands of random numbers before finding one on the consent list. The consent exception thus makes sense only if the autodialer definition includes equipment that allows callers to call from a list of people who have consented to the use of the equipment.

The consent exception also shows that the autodialer restriction protects against nonconsensual mass dialing, not just indiscriminate dialing. If the latter were the only harm the provision protected against, the consent exception would have been superfluous: Congress could have achieved the same effect by banning autodialers except for emergency purposes.

The majority opinion also erroneously gave more weight to a selective reading of the autodialer's legislative history than to the plain text of the statute. The text of a statute controls, not its purported legislative intent. *Milner v. Department of Navy*, 562 U.S. 562, 574 (2011). That is the case even where the plain text meaning might have new and important applications. 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). The majority should not have limited the phrase "random or sequential number generator" when the plain text clearly supports a broader definition.

III. THIS PETITION PRESENTS AN IMPORTANT ISSUE OF PUBLIC INTEREST BECAUSE UNCONSENTED TO MASS DIALING CAUSES WIDESPREAD AND EXTENSIVE HARM.

Mass dialers can use random or sequential number generators to automatically store or produce large quantities of telephone numbers in a short period of time with little human intervention. Mass dialing causes the harms the TCPA is meant to protect against: nuisance and invasion of privacy.[4] Mass dialers are also the kinds of dialers the FCC has historically regulated under the autodialer definition.[5]

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[4] *See,* 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 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:*

The panel decision leaves Americans without recourse for abusive telemarketing and debt collection calls made with automatic mass dialers. Single telemarketing campaigns have involved tens of thousands, or even millions, of nonconsensual, autodialed calls. *See, e.g., Golan v. Veritas Entm't, LLC,* 2017 WL 3923162, at *1 (E.D. Mo. Sept. 7, 2017) (3,242,493 unsolicited autodialed calls); *O'Shea v. American Solar Solution, Inc.*, 2017 WL 2779261, at *1 (S.D. Cal. June 27, 2017) (897,534 calls to 220,007 different cell phones). Some companies will relentlessly call one person over and over. *See, e.g., Covarrubias v. Ocwen Loan Servicing, LLC*, 2018 WL 5914239 at *1

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.")

[5] *See, e.g.,* In Re Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 18 F.C.C. Rcd. 14014, 14092, para. 132 (2003) ("2003 TCPA Order") ("The basic function" of an autodialer is "the *capacity* to dial numbers without human intervention."); 2003 TCPA Order at 14092, para. 133 (2003) ("autodialers can dial thousands of numbers in a short period of time"); In Re Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 30 F.C.C. Rcd. 7961, 7974, n. 58 (2015) (stating that the Commission has "focused on the capacity to dial automatically, not on the kinds of numbers the equipment was presently configured to dial.")

(C.D. Cal. Mar. 7, 2018) (1,401 calls to one person); *Juarez v. Citibank, N.A.*, 2016 WL 4547914, at *1 (N.D. Cal. Sept. 1, 2016) (42 calls over 12 days to wrong number).

Unconsented to mass dialing also causes harm to public trust in the telecommunications system. Consumer Reports found that 70 percent of Americans do not answer calls from unrecognized numbers. Consumer Reports, *What Have You Done in Response to Robocalls?* (Dec. 2018).[6] This had a notable effect on public health during the pandemic, with officials reporting difficulty reaching people for COVID contact tracing. *See, e.g.,* Benjamin Siegel, Dr. Mark Abdelmalek, & Jay Bhatt, *Coronavirus Contact Tracers' Nemesis: People Who Don't Answer Their Phones,* ABC News (May 15, 2020).[7]

The panel decision must be reconsidered to ensure Americans are protected from abusive mass dialing.

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[6] https://www.consumerreports.org/robocalls/why-robocalls-are-even-worse-than-you-thought/.
[7] https://abcnews.go.com/Health/coronavirus-contact-tracers-nemeses-people-answer-phones/story?id=70693586.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge that Plaintiff-Appellant's petition for rehearing *en banc* be granted.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because this brief contains 2588 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font in Century Schoolbook font.

Signature: */s/ Megan Iorio* **Date:** May 31, 2024

CERTIFICATE OF SERVICE

I certify that on May 31, 2024, this brief was e-filed through the CM/ECF System of the U.S. Court of Appeals for the Second Circuit. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Date: May 31, 2024

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