22-1726

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

MARINA SOLIMAN, INDIVIDUALLY AND ON BEHALF OF ALL
OTHERS 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 AND
REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amici curiae* the Electronic Privacy Information Center and the National Consumer Law 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).

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

In *Facebook v. Duguid*, the Supreme Court found that "the most natural construction" of the TCPA's autodialer definition required that the phrase "using a random or sequential number generator" modify both "store" and "produce." 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. Thus, under *Duguid,* as long as a dialer uses a random or sequential number generator in *some* way to produce or store telephone numbers to be called, it is an autodialer. Dialers commonly referred to as "autodialers" most likely use random or sequential number generators to produce or store telephone numbers to be called, but plaintiffs must have access to discovery to prove the existence and use of the number generators.

The terms "random number generator" and "sequential number generator" have well-established understandings in the fields of computer science and engineering. 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 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. Not all

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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 used the phrase "random or sequential number generator," it adopted technical language that should be given its technical meaning. In choosing to give the term "access" in the Computer Fraud and Abuse Act its technical rather than common understanding in *Van Buren v. United States,* the Supreme Court held that, when interpreting a term in a statute that "address[es] a . . . technical subject, a specialized meaning is to be expected." 141 S. Ct. 1648, 1658 (2021). Similarly, in *Duguid,* the Court contrasted the

"ordinary" and "technical" understandings of "store . . . using a random or sequential number generator" and indicated that it was the technical understanding that controlled. *Duguid,* 141 S. Ct. 1163, 1171–72. As Judge VanDyke on the Ninth Circuit wrote, "the phrase 'random or sequential number generator' has a known meaning as a computation tool, and there is no reason to ignore or modify that meaning just because the phrase is used in relation to a particular application." *Brickman v. United States*, No. 21-16785, 2022 WL 17826875, at *3 (9th Cir. Dec. 21, 2022) (VanDyke, J., concurring). This Court should follow VanDyke's reasoning and hold that a "random or sequential number generator" can generate *any* kind of number, not just telephone numbers.

TCPA defendants that argue that "telephone" should be inserted into the phrase "random or sequential number generator" must rely on legislative history for their interpretation. But 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

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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.

Even if this Court were to consider the legislative history of the

TCPA in determining the meaning of "random or sequential number

generator," it is clear that Congress knew that the term "random or

sequential number generator" was not commonly or technically

understood to be limited to *telephone* number generators. 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.

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 "produce" and "store" superfluous and make the prior express consent exception of the autodialer restriction unusable in practice.

Congress used specific language to refer to telephone numbers in the autodialer definition. 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. In fact, during the drafting process, Congress deliberately inserted "telephone" into the phrase "telephone numbers to be called" and not into "random or sequential number

generator." Early versions of the autodialer restriction referred simply to "numbers to be called" and "telephone" was only inserted later. *Compare* H.R. 2131, 101st Cong., 1st Sess. (April 26, 1989), H.R. 628, 101st Cong., 1st Sess. (Jan. 24, 1989), H.R. 4701, 100th Cong., 2d Sess. (May 26, 1988), H.R. 2921, 101st Cong., 1st Sess. (July 18, 1989) *with* H.R. 1304, 102d Cong., 1st Sess. (March 6, 1991), S. 1410, 102d Cong., 1st Sess. (June 27 (legislative day, June 11), 1991). That Congress chose not to insert "telephone" into "random or sequential number generator" at the same time is a strong indication that courts should refrain from adding the term now.

Further, the term "number" in "random or sequential number generator" does not refer to "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. By contrast, the phrase "such numbers" in "to dial such numbers" 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." Further, "telephone numbers to be

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called" and "such numbers" are both plural, while "number" in "random or sequential number generator" is singular. It would be odd for a singular term to refer to a plural antecedent. In sum, nothing about the phrase "random or sequential number generator" demands a reference for "number" or added words to provide meaning and this Court should not supply such unnecessary and atextual additions.

Inserting "telephone" into "random or sequential number generator" also makes "store" and "produce" superfluous. Judge VanDyke recognized this issue and wrote that it was one of the key reasons to reject Defendant's argument. *Brickman*, 2022 WL 17826875, at *3 (VanDyke, J., concurring). If Congress had intended for 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) randomly or sequentially generate telephone numbers; and (B) to dial such numbers." But that is not what Congress wrote. Why would Congress include the terms "store" and "produce" if it did not intend for them to do some work in the autodialer definition?

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* H.R. 1304, 102d Cong., 1st Sess. (March 6, 1991); S. 1410, 102d Cong., 1st Sess. (June 27 (legislative day, June 11), 1991); S. 1462, 102d Cong., 1st Sess. (July 11 (legislative day, July 8), 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). Thus, an autodialer must be equipment that allows callers to call people who have consented to the use of the equipment—and cannot be limited to equipment that dials people at random.

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, as earlier drafts of the law did, 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."[2] 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 . . ."). Defendants' interpretation renders several key terms

and provisions superfluous and consequently should be rejected.

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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[2] 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.[3] A sequence of die rolls is a paradigmatic example of random number generation within the range 1 to 6.

Truly random number generators that replicate natural or mechanical randomness are used in cryptographic applications.[4] But most programs do not need such sophisticated (and slow) algorithms to generate random numbers, so most software-implemented random number generators are actually pseudorandom or deterministic number generators. Pseudorandom number generators produce a sequence of numbers within a range using a long number, called a seed, as an input into an algorithm.[5] If someone knows the seed and the algorithm, they can determine the sequence of random numbers, which is why

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

[4] *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.

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

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.[6] The random library even includes a method, `random.choice(list)`, for choosing a random element from a list of objects.[7] A Python list—which, in other programming languages, is sometimes called an array—stores things like numbers and alphanumeric strings in a certain order.[8] An object's place in an array is designated by its "index number." The first three objects in an array will have index numbers 0, 1, and 2, with each

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[6] 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.
[7] *Id.*
[8] Google for Education, *Python Lists* (2021), https://developers.google.com/edu/python/lists.

subsequent object having an index number one positive integer above the last.

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.[9] 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—the telephone number's index number. The generator then produces the telephone number associated with that index number, which can then be stored in the new order or immediately dialed— exactly as described by the Supreme Court in its example of a random number generator used to determine the order in which to dial from a list of phone numbers in *Duguid*. 141 S. Ct. at 1172 n.7. This would be an example of an autodialer that uses a random number generator but does not dial randomly created telephone numbers.

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[9] *Id.*

In cases involving other applications of random number generators, courts have recognized that the term has an established technical meaning that includes outputting selections from a pre-determined lists. For example, in one case, a court observed that "random number generators are widely well known in the art and utilized in a majority of games of chance to generate random outcomes" while explaining how a randomly selected number might correspond to a reel stop position on a virtual roulette wheel. *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). In another case, a court described how a vendor's random number generator would replace a mechanical ball with an automated drawing to produce—by which the court meant "selecting"—the winning numbers. *Tennessee Educ. Lottery Corp. v. Smartplay Intern., Inc.,* 3:08-1058, 2010 WL 4659216, at *6 (M.D. Tenn. Nov. 9, 2010).

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.[10] For example, a sequential number generator that has an initial value of 1, an increment of +1, and an end value of 5, would generate the sequence of positive integers 1, 2, 3, 4, 5.

One common use of sequential number generators is to store new records in a database. Most databases have a built-in sequential number generator called an autoincrement function that automatically produces an identification number for each new record added to the database by adding one (or another number) to the identification number of the last record created. Documentation for various

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[10] *See, e.g.,* ReformatText, *Sequential Number Generator* (2020), https://www.reformattext.com/sequential-number-generator.htm. Some sequential number generators do not have explicit end values, such as the autoincrement functions built into databases described in this section, but in practice, there will be a limit on the size of the number output.

implementations of SQL, a popular language for programming databases, explains that the autoincrement function outputs numbers that are "sequential integers which are automatically generated."[11]

Another common use of sequential number generators is to automatically perform the same task a several times, a process called looping or iteration.[12] 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.[13] An example of a simple loop in C++ is

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

The first expression in the parentheses, int i = 0, defines the initial value; the second defines the end value (stop the loop when i is greater

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[11] SQL Tutorial, *SQL Auto Increment* (2021), https://www.sqltutorial.org/sql-auto-increment/.
[12] Mozilla, *Loops and Iteration* (2021), https://developer.mozilla.org/en-US/docs/Web/JavaScript/Guide/Loops_and_iteration.
[13] 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.

than 5); and the third, the increment (increase i by one each time the loop is run).[14] 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.

A common use of iteration is to output 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

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

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 create sequential telephone

numbers.

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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.[15] There are no

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[15] 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 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

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 to avoid an overbroad interpretation that would sweep in common dialing devices, it is necessary to give "telephone numbers to be called" its natural and precise meaning.

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

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

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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.")

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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 generator: 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 campaign 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 selects telephone numbers to be called, either by loading a list of numbers or selecting the numbers from an existing database; the dialer arranges the telephone numbers into a queue; and the dialer iterates through the queue of telephone numbers 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

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how the system works. One way of doing this is to look at the dialer's software code. It is most likely that an automated list-based dialer would use a random or sequential number generator when producing 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 or store the telephone numbers to be called.

For example, a dialer could use a random or sequential number generator to choose which telephone numbers will be added to the calling campaign. The dialer could use a random number generator to choose random phone numbers from a database to call. The dialer could also select the telephone numbers to be called based on their sequentially generated IDs, such as all telephone numbers with IDs between 1000 and 2000. 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 from an uploaded spreadsheet file in a particular order and then immediately dial them in that order. *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 immediately). Many predictive dialers use a more complicated process to determine call order, which may include use of a random or sequential number generator in addition to other algorithmic elements.

An autodialer is most likely to use a random or sequential number generator to move through the queue of designated telephone numbers. The dialer will take blocks of telephone numbers and store them in an ordered data structure in temporary memory before dialing. The dialer will then use a sequential number generator to iterate through the ordered data structure and "produce" each telephone number to be

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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 fell within the TCPA's autodialer definition, liability under the TCPA would be overbroad. 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. *Duguid*, 141 S. Ct. at 1171 n. 6.

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. The interpretation would also be easy to apply because it is straightforward to determine

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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,[16] 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

case. The smartphones and other common calling devices do not use

random or sequential number generators in the way required by the

TCPA.

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 number generators to

choose the telephone number to be called; the telephone number is

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[16] 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.

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entered by the dialer's user at the time of the call or triggered by some other external event or function. Finally, and most importantly, these common devices do not randomize or iterate through a long list of numbers, so there is no reason to use random or sequential number generators to store or produce the telephone number to be called.

The requirement that a dialer use a random or sequential number generator to *produce* or *store* telephone numbers to be called is an important limitation on the autodialer definition that helps prevent overbreadth. In every case, courts should ask whether a purported random or sequential number generator is being used to *store* or *produce* the telephone numbers to be called. Old pulse dial phones, for instance, are not autodialers under the TCPA. To the extent that these phones use sequential number generators at all, they use them to *dial* telephone numbers, not *produce* or *store* them. Pulse dial phones use counters to ensure that there is a certain amount of time between the transmission of each digit of a telephone number during the dialing process. Since "using a random or sequential number generator" does not apply to "to dial such numbers," old pulse dial phones are not autodialers.

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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CERTIFICATE OF COMPLIANCE

I am the attorney or self-represented party.

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(4) because this brief contains 5847 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and

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Signature: */s/ Megan Iorio*   **Date:** January 3, 2023

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I certify that on January 3, 2023, 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.

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