Nardacci, District Judge, concurring in part and dissenting in part:

I agree with the majority that a text message without an audio component does not constitute an "artificial or prerecorded voice" under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227(b)(1)(A). However, I respectfully dissent with respect to the majority's opinion that defendant-appellee's short message script ("SMS") technology does not constitute an automatic telephone dialing system ("ATDS" or "autodialer") under the principles of statutory interpretation and the Supreme Court's decision in *Facebook, Inc. v. Duguid*, 592 U.S. 395 (2021). There are five reasons for my different interpretation.

First, although I agree with the majority that the interpretation of a statute must begin with the text of the statute, I disagree with their interpretation of the plain language of this statute. The TCPA defines an ATDS as equipment that "has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). The majority reads the word "telephone" into the phrase "random or sequential number generator" where it does not exist in the text to find that it means "random or sequential *telephone* number generator." The majority reasons that this is the correct interpretation because the phrases

"telephone numbers to be called" and "such numbers" are also included in the definition. The majority's reading of the statutory language overlooks the fact that the clause "random or sequential number generator" is logically distinct from "telephone numbers," as indicated by the use of a comma in the definition. Additionally, "random or sequential number generator" has a well-recognized technical meaning which is not limited to producing telephone numbers. *See Van Buren v. United States*, 593 U.S. 374, 388 (2021) (technical terms in a statute should be interpreted based on their technical meaning). As Judge VanDyke explained in his concurring opinion in *Brickman v. United States*, 56 F.4th 688 (9th Cir. 2022), "'random or sequential number generator' has a known meaning as a computational tool" that "can produce anything from single digit numbers to zip codes to telephone numbers." *Id.* at 691 (VanDyke, J., concurring); *see also id.* at 691-92 ("[A] random (or sequential) number generator is a term of art referring to a particular type of computation tool that can be used to generate all types of different numbers, from telephone numbers to zip codes to a sequence of consecutively ordered numbers."); Brief of the Electronic Privacy Information Center ("EPIC") et al. as *Amici Curiae* in Support of Plaintiff-Appellant and Reversal at 5–8.

Second, the majority's reading of "random or sequential number generator" is implausible because it renders the word "store" as used in the definition, "to store or produce telephone numbers to be called," superfluous. *See Brickman*, 56 F.4th at 692 (VanDyke, J., concurring) (noting that "redefining an autodialer as equipment that can 'store . . . telephone numbers to be called, [which are produced] using a random or sequential [telephone] number generator' . . . renders 'store' superfluous [in 47 U.S.C. § 227(a)(1)(A)] since the definition already covers telephone numbers that are 'produced . . . using a random or sequential number generator'").

Third, the majority's reading of an ATDS as "equipment . . . using a random or sequential *telephone* number generator," would render the prior express consent exception in the TCPA, 47 U.S.C. § 227(b)(1)(A), superfluous. "Prior express consent" requires a caller to obtain permission before using an autodialer to call a telephone number. *See* In re Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 7 FCC Rcd. 8752, 8769 (1992). The "prior express consent" exception envisions that a "random or sequential number generator" is used to select numbers to be dialed from a list of telephone numbers of consenting parties. If Congress intended to prohibit as an ATDS

only equipment that generates telephone numbers, then equipment that dials telephone numbers from a stored or pre-existing list of telephone numbers would not be an ATDS and there would be no need for the prior express consent exception. *See* Brief of EPIC as *Amici Curiae* at 11–13.

Fourth, the holding from *Duguid* supports the conclusion that a "random or sequential number generator" can include use with a stored or pre-existing list of telephone numbers. The *Duguid* Court held that to qualify as an ATDS, a device must have the capacity to either "store" *or* "produce" telephone numbers "using a random or sequential number generator." *See* 592 U.S. at 402. The Supreme Court confirmed that "using a random or sequential number generator" modifies *both* words. *Id.* at 402-03. However, the *Duguid* Court did not consider what it means for a "random or sequential number generator" to store or produce telephone numbers. *Id*. at 402-04; *see also Eggleston v. Reward Zone USA LLC*, No. 2:20-CV-01027-SVW-KS, 2022 WL 886094, at *3 (C.D. Cal. Jan. 28, 2022) ("*Duguid* establishes that an [ATDS] must 'use a random or sequential number generator to either store or produce phone numbers,' but it did not specify what it means to 'store or produce' the phone numbers.").

Footnote 7 of *Duguid* supports reading a "random or sequential number

generator" to include equipment that can dial telephone numbers from a stored or pre-existing list of numbers. In footnote 7, the Supreme Court referenced the possibility that "an autodialer might use a random number generator to determine the order in which to pick phone numbers from a preproduced list. It would then store those numbers to be dialed at a later time." 592 U.S. at 407 n.7. I agree with those district courts that have read this footnote to support the conclusion that an ATDS includes equipment that stores and dials telephone numbers from a pre-existing list, and that an ATDS is not limited to equipment that generates *telephone* numbers. *See, e.g.*, *Scherrer v. FPT Operating Co.*, No. 19-cv-03703 (SKC), 2023 WL 4660089, at *3 (D. Colo. July 20, 2023) (collecting cases discussing footnote 7 of *Duguid* and finding that "an ATDS is not limited to a telephone-number generator"); *see also United States v. Bell*, 524 F.2d 202, 206 (2d Cir. 1975) (Supreme Court dicta "must be given considerable weight").

Finally, interpreting "random or sequential number generator" according to the plain language of the statute and its technical meaning is consistent with the purposes of the TCPA. *Duguid* explained that Congress was concerned with the harmful effects of autodialers, including harm to individual consumers. *See* 592 U.S. at 400 ("Autodialers could reach cell phones, pagers, and unlisted

numbers, inconveniencing consumers and imposing unwanted fees."). Although it had a particular concern with preventing the telephone lines of public emergency services and businesses from being tied up, more generally Congress sought to prohibit the use of autodialers because unwanted telephone calls can be both inconvenient and costly to consumers. Moreover, prohibiting the use of the SMS technology at issue in this case does not create the same concerns as prohibiting common dialing devices, such as cell phones or the autotrigger dialing system used by Facebook in *Duguid*, which "merely store[d] and dial[ed] telephone numbers." 592 U.S. at 405; *see Scherrer*, 2023 WL 4660089, at *5 (noting that "the Supreme Court's concern about whether modern cell phones would be included in the definition of an ATDS is understandable" in the context of the *Duguid* plaintiff's argument that equipment that can store and dial telephone numbers even if it does not use a "random or sequential number generator" can qualify as an ATDS).

For these reasons, I respectfully dissent from Part II of the Majority Opinion.