No. 21-16785

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COLIN BRICKMAN,
individually and on behalf of a class of similarly situated individuals,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Intervenor-Appellee.

FACEBOOK, INC.,

Defendant-Appellee.

On Appeal from the U.S. District Court for the Northern District of
California, No. 3:16-cv-00751 (Hon. William H. Orrick)

BRIEF OF THE CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA AS *AMICUS CURIAE*
IN SUPPORT OF DEFENDANT-APPELLEE
FACEBOOK, INC. AND AFFIRMANCE

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

In *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021), a unanimous Supreme Court rejected this Court's prior reading of the Telephone Consumer Protection Act, which had threatened to impose liability on the Chamber's members for communications that are helpful to, and

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[1] No counsel for a party authored this brief in whole or in part, and no party, party's counsel, or person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this brief.

desired by, consumers—and therefore would have deprived consumers of these valuable communications.

In this appeal, Brickman offers a strained interpretation of the TCPA and of *Duguid* that would effectively revive this Court's prior overbroad reading and render the Supreme Court's decision a nullity. The district court, like most other courts across the country faced with this argument, correctly rejected it as contrary to the Supreme Court's binding interpretation of the statutory text. The Chamber has a strong interest in affirmance of the judgment below.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case is one of many in which the TCPA plaintiffs' bar is seeking to circumvent the Supreme Court's unanimous holding in *Duguid*. That decision rejected rulings by this Court and some other circuits that had too broadly construed the TCPA's definition of an "automatic telephone dialing system [(ATDS)]," or autodialer, to encompass any equipment with the "capacity" to "store[] numbers and dial[] them automatically." *Marks v. Crunch San Diego*, 904 F.3d 1041, 1053 (9th Cir. 2018). That overbroad reading captured nearly every modern calling device, including "virtually all modern cell phones." *Duguid*, 141 S. Ct. at 1171; *cf. ACA Int'l v. FCC*, 885 F.3d 687, 697 (D.C. Cir. 2018) ("If every smartphone qualifies as an ATDS, the statute's restrictions on autodialer calls assume an eye-popping sweep.").

The Supreme Court made clear that the autodialer definition and associated restrictions targeted a specific, "uniquely harmful" practice, common in 1991 when the TCPA was enacted, of "dial[ing] *random or sequential blocks* of telephone numbers automatically." *Duguid*, 141 S. Ct. at 1167 (emphasis added). Against that contextual backdrop and based on the plain language and grammar of the statutory text, the

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Court resolved the conflict among the courts of appeals "regarding whether an autodialer must have the capacity to generate random or sequential phone numbers" in favor of those courts that have answered that question "yes." *Id.* at 1168.

Undaunted, the TCPA plaintiffs' bar has continued after *Duguid* to bring putative class actions under the statute seeking exorbitant statutory damages. Like many TCPA plaintiffs since *Duguid*, Brickman makes an argument that relies heavily on a single sentence within a single footnote in *Duguid*—footnote 7. As a recent report released by the Chamber's Institute for Legal Reform explains, that footnote "has become the battleground in much of the post-*Duguid* TCPA litigation." U.S. Chamber Inst. for Legal Reform, *Turning the TCPA Tide: The Effects of* Duguid 13 (Dec. 2021), https://instituteforlegalreform.com/wp-content/uploads/2021/12/1323_ ILR_TCPA_Report_FINAL_Pages.pdf. TCPA plaintiffs have argued that footnote 7 supports the theory that if a device is capable of randomly or sequentially generating *any* number—such as an internal index number or other non-telephone number—in connection with placing telephone numbers drawn from a preexisting list into a random

or sequential *order*, that commonplace capability of computer software transforms the device into an autodialer.

This theory would effectively restore the broad definition that the Supreme Court expressly and conclusively rejected in *Duguid*. "[C]ourts across the board," including a panel of this Court and the district court below, "have generally declined to accept such a theory—and correctly so." *Turning the TCPA Tide, supra*, at 13; *see, e.g.*, *Meier v. Allied Interstate LLC*, 2022 WL 171933, at *1 (9th Cir. Jan. 19, 2022) (unpublished) (rejecting similar arguments); *Beal v. Outfield Brew House, LLC*, 29 F.4th 391, 394-97 (8th Cir. 2022) (same).

For good reason: the theory is contrary to the text of the statute, ordinary principles of grammar, and the Supreme Court's decision in *Duguid*. Brickman's definition of an autodialer also fails because it would sweep in nearly all modern computing devices, including smartphones. Yet the *Duguid* Court expressly rejected an interpretation of the ATDS definition that "would capture virtually all modern cell phones." 141 S. Ct. at 1171. As the D.C. Circuit similarly put it, "[i]t cannot be the case that every uninvited communication from a smartphone infringes federal law, and that nearly every American is a

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TCPA-violator-in-waiting, if not a violator-in-fact." *ACA Int'l*, 885 F.3d at 698.

Moreover, the Supreme Court did not include in footnote 7 of *Duguid* a rationale that tacitly conflicts with the rest of the Supreme Court's opinion. Instead, it discussed a situation in which equipment could store randomly or sequentially generated *telephone numbers* to be dialed later—undermining, rather than supporting, Brickman's theory that random or sequential ordering of telephone numbers taken from a preexisting list suffices. And even assuming random or sequential generation of non-telephone numbers could suffice in some contexts, Brickman's claim still fails because he has not plausibly alleged the use of a random or sequential number generator to produce his telephone number or to store his telephone number.

There are also no policy reasons to adopt Brickman's misplaced reading of the statute. *Duguid* has not resulted in a new surge of unwanted robocalls. The TCPA's restrictions on using prerecorded or artificial voice calls and on placing calls to numbers on the national or company-specific do-not-call registries remain in full force. And in all events any policy objections are properly directed to Congress, "which

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did not define an autodialer as malleably as [Brickman] would have liked." *Duguid*, 141 S. Ct. at 1173.

Finally, Brickman gives short shrift to the adverse consequences that would result from his overbroad reading of the TCPA's autodialer definition. Not only would it sweep in smartphones and other modern computing devices, but it also threatens to suppress legitimate and desirable business communications, harming businesses and their customers alike.

The judgment of the district court should be affirmed.

ARGUMENT

I. The TCPA Requires An Autodialer To Store Or Produce Randomly Or Sequentially Generated Telephone Numbers.

Under Brickman's theory, a device need not use a random or sequential number generator to generate *telephone numbers* to qualify as an autodialer. Instead, in his view, any system that dials from a set list of phone numbers will qualify as an autodialer so long as the system is capable of putting the telephone numbers in some order, either random or sequential, in the process of storing or dialing those telephone numbers. Because software is capable of generating either random or sequential numbers when storing telephone numbers from a

pre-established list, and because those telephone numbers will necessarily be stored in either a random or sequential order, that interpretation will extend the autodialer label expansively—including to every modern cellphone. It therefore cannot be squared with the text and context of the TCPA, as interpreted by the Supreme Court in *Duguid*.

A. **The statutory text and history, as interpreted by the Supreme Court in *Duguid*, require an autodialer to generate random or sequential *phone* numbers.**

"We begin with the text." *Duguid*, 141 S. Ct. at 1169; *see also Ross v. Blake*, 578 U.S. 632, 638 (2016) ("Statutory interpretation . . . begins with the text."). The critical language is the TCPA's definition of an ATDS, which covers

equipment which has the capacity—

(A) to store or produce *telephone numbers to be called, using a random or sequential number generator*; and

(B) to dial *such numbers.*

47 U.S.C. § 227(a)(1) (emphases added).

A plain reading of this language makes clear that the types of numbers that an autodialer's "random or sequential number generator" must have the capacity to generate are "telephone numbers."

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Specifically, two linked verbs ("store *or* produce") share a common object ("telephone numbers to be called"), and a dependent modifier ("using a random or sequential number generator") that is set off by a comma. The phrase "to store or produce telephone numbers to be called" is dependent on the clause "using a random or sequential number generator," and the term "using a random or sequential number generator" thus modifies the phrase "telephone numbers to be called" (and, by extension, both verbs in the statute, to store and to produce).

These principles of grammar are well established rules of statutory interpretation. The Supreme Court has explained that, when interpreting modifiers set off by commas, "the most natural way to view the modifier is as applying to the entire preceding clause." *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1077 (2018); *accord Duguid*, 141 S. Ct. at 1169.

Moreover, the ATDS definition employs the term "number" or "numbers" three times, and, when those three phrases are read together, there is little doubt that each time, the definition is referring to telephone numbers. The first phrase expressly discusses "*telephone* numbers to be called." 47 U.S.C. § 227(a)(1)(A) (emphasis added). The

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third phrase refers back to the first, explaining that the equipment must have capacity "to dial *such* numbers"—necessarily meaning telephone numbers. *Id.* § 227(a)(1)(B) (emphasis added). It would be illogical for Congress to have referred to a different type of number when it used the phrase "random or sequential number generator" in between the statutory definition's two express references to telephone numbers—particularly because the phrase "using a random or sequential number generator" modifies the preceding clause referring to "telephone numbers." *Cf. Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 n.4 (2009) ("'[I]dentical words and phrases within the same statute should normally be given the same meaning.'") (quoting *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007)).

Under the plain text of the statutory definition of an ATDS, therefore, such a system must have the capacity to either (i) produce telephone numbers randomly or sequentially on its own, and then dial them; or (ii) store telephone numbers that have been generated randomly or sequentially and then dial those numbers later.

Several aspects of the *Duguid* Court's opinion support that interpretation. To begin with, the Court stated that it granted review

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to resolve a conflict among "the Courts of Appeals regarding whether an autodialer must have the capacity to generate random or sequential *phone* numbers." *Id.* at 1168 (emphasis added). And the Court resolved that conflict by rejecting the decisions of circuits holding that equipment that dials phone numbers from a set list qualifies as an autodialer under the TCPA. *See id.* at 1168 n.4.[2]

The *Duguid* Court's discussion of the "statutory context" confirms that interpretation of its holding. 141 S. Ct. at 1171. The Court explained that at the time of the TCPA's enactment in 1991, autodialers had "revolutionized telemarketing by allowing companies to dial random or sequential *blocks of telephone numbers* automatically." *Id.* at 1167 (emphasis added). This type of then-emerging technology was "uniquely harmful": "It threatened public safety by 'seizing the telephone lines of public emergency services, dangerously preventing those lines from being utilized to receive calls from those needing emergency services.'" *Id.* (quoting H.R. Rep. No. 102-317, p.24 (1991)).

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[2] The *Duguid* Court assumed without deciding that text messages qualify as "calls" under the TCPA. 141 S. Ct. at 1168 n.2. In light of this Court's precedent holding that the TCPA's prohibitions extend to text messages, *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953 (9th Cir. 2009), we make a similar assumption solely for purposes of this case.

And it similarly could "simultaneously tie up all the lines of any business with sequentially numbered phone lines." *Id.*

Faced with these "nuanced problems," Congress chose to use a "scalpel" rather than a "chainsaw." *Id.* at 1171. It enacted prohibitions "target[ing] a unique type of telemarketing equipment that risks dialing emergency lines randomly or tying up all the sequentially numbered lines at a single entity." *Id.* In other words, "Congress expressly found that the use of random or sequential number generator technology caused unique problems for business, emergency, and cellular lines," and "the autodialer definition Congress employed includes only devices that use such technology." *Id.* at 1172.

The Supreme Court thus recognized that Congress was addressing risks associated with using a "random or sequential number generator" to *generate* the *telephone numbers* being dialed. The risk of randomly dialing an "emergency line[]"—meaning an emergency phone number—arises only if a random number generator is used to create the telephone number that is being dialed. Similarly, the risk of "tying up all the sequentially numbered lines at a single entity" occurs only when "blocks of telephone numbers" are sequentially generated.

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Neither of these risks exist when, as here, equipment dials phone numbers from a preset list of numbers provided by customers or users. The *Duguid* Court's discussion of the harms posed by autodialers makes sense only if the autodialer definition is limited to equipment capable of sequential or random generation of telephone numbers. Brickman's definition would extend much more broadly—creating the statutory "chainsaw" that the Supreme Court expressly rejected. And Congress's concern, as described in *Duguid*, "reaches a vanishing point with a system that is only designed to text customers who have voluntarily given a business their phone numbers." *Beal*, 29 F.4th at 396.

For all of the above reasons, it is not surprising that a panel of this Court—albeit in an unpublished opinion—recently rejected the same "expansive interpretation" of an autodialer that Brickman advances here. *Meier*, 2022 WL 171933, at *1. The *Meier* panel reached the same result as "a clear majority of courts" across the country that, like the district court here, have rejected Brickman's position. *Tehrani v. Joie de Vivre Hospitality, LLC*, 2021 WL 3886043, at *6-7 (N.D. Cal. Aug. 31, 2021) (Chen, J.) (collecting cases). The Eighth Circuit recently

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joined that "clear majority" in the only published decision by a court of appeals to address the issue. *See Beal*, 29 F.4th at 394-97.[3]

B. The contrary interpretation advanced by Brickman would sweep in ordinary smartphones.

Another powerful reason why Brickman's reading of the autodialer definition is wrong is that it gives the statute exactly the "eye-popping" sweep that the Supreme Court found impermissible in *Duguid* and the D.C. Circuit rejected in *ACA International*, 885 F.3d at 697. That is because Brickman's reading would "classify[] almost all modern cell phones as autodialers." *Duguid*, 141 S. Ct. at 1171.

Brickman's single paragraph attempting to resist this conclusion (*see* Op. Br. 28-29) is unpersuasive. Brickman is incorrect in asserting that using a random or sequential number generator to generate some *other* type of number in the process of storing telephone numbers imposes a meaningful limitation on the devices covered by his interpretation, because virtually all modern computers—including smartphones—are capable of generating random or sequential numbers

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[3] The parties and the court in *Beal* focused on the verb "produce," rather than the verb "store" that Brickman focuses on in this case. *See id.* But the *Beal* court's bottom-line conclusion that a random or sequential number generator must be used to "generate *phone* numbers," *id.* at 394, 396 (emphasis added), applies equally here.

in some fashion. *See id.* at 15 (asserting that a software "algorithm" qualifies as a random or sequential number generator); *see also*, *e.g.*, Ankur Ingale, *Random Number Generation In Various Programming Languages*, Medium (Aug. 7, 2018), https://bit.ly/3ozA7sR (describing random number functions in multiple common programming languages); *SQL Auto Increment*, SQL Tutorial, https://bit.ly/3uAHWCE (describing how to generate a sequential list of numbers in SQL, a common programming language for managing databases). For example, some programming languages assign to each element in an array (*i.e.*, a list), a sequential index number that corresponds to the location of the item in that list. *See* Patrick Rogers, *Array Index*, Dictionary of Algorithms and Data Structures (Nov. 16, 2016), https://www.nist.gov/dads/HTML/arrayindex.html.

The upshot of Brickman's reading of the statute is that *any* equipment that can automatically call or send text messages to multiple numbers from a list of stored telephone numbers qualifies as an ATDS. (After all, as the D.C. Circuit has explained, "[a]nytime phone numbers are dialed from a set list, the database of numbers must be called in

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some order—either in a random or some other sequence." *ACA Int'l*, 885 F.3d at 702.)

Brickman further ignores that all smartphones have the capacity to dial numbers from a list generated in Microsoft Excel or similar spreadsheet software. Indeed, app versions of Microsoft Excel have long been available for iPhones and Android smartphones.

As the D.C. Circuit explained, "[i]f a device's capacity includes functions that could be added through app downloads and software additions, and if smartphone apps can introduce ATDS functionality into the device, it follows that all smartphones . . . meet the statutory definition of an autodialer." *ACA Int'l*, 885 F.3d at 697. To avoid that overbroad interpretation, an autodialer may not be defined in such a way that "the downloading of an app onto *any smartphone*" would qualify. *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 120 n.23 (3d Cir. 2018) (citing *ACA Int'l*, 885 F.3d at 696-68). But that is the consequence of the autodialer definition advocated by Brickman.

Even without downloading any applications, a smartphone falls under Brickman's definition of an autodialer when it is used for group texting, in which a single text message is sent to a list of multiple

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telephone numbers. An ordinary smartphone user need only set up a list of recipients, generate a message, and press "send"—or press nothing at all, if using Siri or comparable voice activated software, *see Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1309 (11th Cir. 2020) (Sutton, J., sitting by designation)—and the phone will send the message to all of the numbers on the list. The phone must send the text to the phone numbers on the list in some order—either randomly or sequentially—determined by numbers generated by the software on the smartphone (such as the operating systems for iPhones and Android devices).

In short, as a panel of this Court has recognized, Brickman's interpretation of the ATDS definition would yield the untenable result that "virtually any system that stores a pre-produced list of telephone numbers would qualify as an ATDS"—"precisely the outcome the Supreme Court rejected in *Duguid*." *Meier*, 2022 WL 171933, at *1.

C. Footnote 7 in *Duguid* does not support the contrary interpretation advanced by Brickman.

Brickman rests much of his argument on footnote 7 in *Duguid*. *See* Op. Br. 11-12, 15, 26, 27. But as courts across the country have recognized, that "reading of footnote 7 conflicts with *Duguid*'s holding

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and rationale." *Hufnus v. DoNotPay, Inc.*, 2021 WL 2585488, at *1

(N.D. Cal. June 24, 2021) (Chhabria, J.); *accord Beal*, 29 F.4th at 396-

97; *Tehrani*, 2021 WL 3886043, at *6.

Footnote 7 addressed Duguid's contention that the word "store" in

the definition of an autodialer would be superfluous if the Court

adopted Facebook's interpretation. The Court explained in the body of

its opinion that Duguid was wrong "as a technical matter," because, "as

early as 1988, the U. S. Patent and Trademark Office issued patents for

devices that used a random number generator to store numbers to be

called later (as opposed to using a number generator for immediate

dialing)." 141 S. Ct. at 1172 (citing Br. for Professional Association for

Consumer Engagement et al. as *Amici Curiae* ("PACE *Duguid* Br.") 15-

21). Footnote 7 follows that sentence, and it reads in full:

> Duguid argues that such a device would necessarily
> "produce" numbers using the same generator technology,
> meaning "store or" in § 227(a)(1)(A) is superfluous. "It is no
> superfluity," however, for Congress to include both functions
> in the autodialer definition so as to clarify the domain of
> prohibited devices. *BFP v. Resolution Trust Corporation*, 511
> U.S. 531, 544, n.7, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994).
> For instance, 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. See Brief for
> Professional Association for Customer Engagement [PACE]

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et al. as *Amici Curiae* 19. In any event, even if the storing and producing functions often merge, Congress may have "employed a belt and suspenders approach" in writing the statute. *Atlantic Richfield Co.* v. *Christian*, 590 U. S. ——, –——, n.5, 140 S.Ct. 1335, 1350, n. 5, 206 L.Ed.2d 516 (2020).

141 S. Ct. at 1172 n.7.

In other words, the text preceding footnote 7 and the footnote suggest that Congress employed a "belt and suspenders approach" to ensure that it would cover not only equipment capable of "produc[ing]" random or sequential telephone numbers for immediate dialing, but also equipment that could "store" random or sequential telephone numbers for dialing later.

Brickman quotes, without context, the sentence beginning "For instance" (Op. Br. 11-12), but he ignores the purpose of the footnote—to illustrate how as a technical matter a random number generator could store a randomly or sequentially generated *telephone number* for dialing later. The PACE *amicus* brief cited by the Court makes that clear, describing a patent in which a random number generator could be used to store generated phone numbers in a file for later dialing, as opposed to dialing those numbers immediately. PACE *Duguid* Br. 19. In other words, the "preproduced list" of phone numbers discussed in footnote 7

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was *itself* composed of randomly or sequentially generated phone numbers. The Eighth Circuit has recognized as much, observing that "[t]he hypothetical system considered by the Court [in *Duguid*] was a system in which numbers were sequentially generated before being stored and randomly selected." *Beal*, 29 F.4th at 396.

PACE itself has confirmed that Brickman is misreading footnote 7. In *Hufnus v. DoNotPay*—one of the earliest post-*Duguid* cases addressing the argument Brickman raises here—PACE submitted an *amicus* brief detailing the patent that it discussed in its Supreme Court brief and explaining that the Supreme Court brief "was directly focused on the issue of showing how number generators could store a number." *Amicus Brief of PACE* at 9-13, *Hufnus v. DoNotPay, Inc.*, No. 3:20-cv-8701, Dkt. No. 35 (N.D. Cal. May 28, 2021). As that brief explains, the only reasonable reading of *Duguid* "is that the Court construed a 'random or sequential number generator' as generating *telephone* numbers being dialed, not merely any number." *Id.* at 9.[4]

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[4] PACE has also submitted an *amicus* brief making the same points in a related case pending before this Court. *See* Dkt. No. 28-2, at 5-21, *Borden v. eFinancial, LLC*, No. 21-35746 (9th Cir. filed Feb. 9, 2022).

The court in *Hufnus* relied on this explanation in rejecting the argument that the ability to generate *any* random number—as opposed to phone numbers—would allow a device to qualify as an autodialer. As Judge Chhabria explained, PACE's Supreme Court *amicus* brief "makes clear that the 'preproduced list' of phone numbers referenced in the footnote was itself created through a random or sequential number generator, differentiating it from the 'preproduced list' of phone numbers used by DoNotPay, which was created by consumers providing their numbers while signing up for DoNotPay's services." 2021 WL 2585488, at *1; *accord Tehrani*, 2021 WL 3886043, at *5-6. The same distinction applies here, and leads to the same result. *See also Meier*, 2022 WL 171933, at *1 (holding that footnote 7 "does not require us to adopt Meier's expansive interpretation" of an autodialer).

II. In The Alternative, The TCPA Requires An Autodialer To *Use* A Random Or Sequential Number *Generator* To Produce Or Store The Telephone Numbers To Be Called.

As Meta explains (Br. 27-32, 33-35), Brickman's claims also fail for the reason that he does not plausibly allege that a random or sequential number generator was *used* to produce his telephone number or to store his telephone number for dialing. Even assuming that, under the

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TCPA, a device can qualify as a random or sequential number generator if it generates some other kind of number besides a telephone number, Brickman still must plausibly allege that Meta "us[ed]" the number generator to "produce" "telephone numbers to be called," or to "store" "telephone numbers to be called." 47 U.S.C. § 227(a)(1)(A).

Because it is undisputed that Brickman provided his telephone number to Meta, Meta did not "produce" his telephone number at all, much less using a random or sequential number generator.

That leaves Brickman with "store"—the term on which he relies exclusively in his brief. As the *Duguid* Court observed, pointing to the patent discussed in PACE's Supreme Court *amicus* brief, as a "technical matter" it is conceivable for a device "to use a random number generator to store numbers to be called later (as opposed to using a number generator for immediate dialing)." 141 S. Ct. at 1172. But as that technical patent example confirms, the *use* of a random or sequential number *generator* to store telephone numbers to be called necessarily refers to activity far more narrow in scope than the ability, common to virtually all modern computing devices, simply to store a list of numbers in some *order* for later dialing. *See ACA Int'l*, 885 F.3d at 702;

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pages 14-17, *supra*; *see also ACA Int'l*, 885 F.3d at 699 ("Congress need not be presumed to have intended the term [ATDS] to maintain its applicability to modern phone equipment in perpetuity, regardless of technological advances that may render the term increasingly inapplicable over time."). Otherwise, any device that stores and dials telephone numbers (including an ordinary cell phone) is an ATDS— precisely the outcome that the Supreme Court rejected in *Duguid*, 141 S. Ct. at 1171-72. *See also Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 464 (7th Cir. 2020) (contrasting a device that "dials numbers only from a customer database" with a device that can "store or . . . produce telephone numbers using a number generator").

Yet Brickman does not plausibly allege that a random or sequential number generator was used to store his telephone number itself—as in the patent example cited by the *Duguid* Court. *See* Ans. Br. 33-35. Instead, he merely asserts that legal conclusion in terms that parrot the statutory text—an assertion made no less conclusory by dressing it up in the garb of expert testimony. *See id.* at 34-35. For this reason too, Brickman does not plausibly allege the use of an ATDS.

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III. There Are No Policy Reasons To Adopt Brickman's Interpretation.

It is more than enough that the TCPA's text and structure and the unanimous opinion in *Duguid* are all arrayed against Brickman. But policy offers him no assistance either.

For example, the Supreme Court considered and was unpersuaded by Duguid's protest "that accepting Facebook's interpretation will 'unleash' a 'torrent of robocalls.'" *Duguid*, 141 S. Ct. at 1172. As the Court explained, "Duguid's quarrel is with Congress, which did not define an autodialer as malleably as he would have liked." *Id.*; *see also Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 214-15 (1962) ("The question of what change, if any, should be made in the existing law is one of legislative policy properly within the exclusive domain of Congress—it is a question for law makers, not law interpreters. Our task is the more limited one of interpreting the law as it now stands.").

Moreover, the Court explained, such policy arguments "greatly overstate[] the effect" of rejecting a strained interpretation of the statute's autodialer definition. *Duguid*, 141 S. Ct. at 1172. "[T]he statute separately prohibits calls using 'an artificial or prerecorded voice' to various types of phone lines, including home phones and cell

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phones, unless an exception applies." *Id.* And the TCPA further prohibits placing telemarketing calls to individuals on the National Do-Not-Call Registry as well as internal do-not-call lists. *See* 47 U.S.C. § 227(c); 47 C.F.R. § 64.1200(c); 47 C.F.R. § 64.1200(d). Indeed, telemarketers remain subject to the do-not-call regulations no matter what dialing technology they employ, and the National Do-Not-Call Registry contains over 244 million phone numbers. *See* Federal Trade Comm'n, *National Do Not Call Registry Data Book for Fiscal Year 2021* (Nov. 2021), https://www.ftc.gov/reports/national-do-not-call-registry-data-book-fiscal-year-2021.

Likely for these reasons, "*Duguid* has not led to an uptick in robocalls." *Turning the TCPA Tide, supra,* at 2 & n.2.

Finally, Brickman gives short shrift to the historical context demonstrating that Congress intended the autodialer provision of the TCPA to have narrow reach. When Congress enacted the TCPA in 1991—over three decades ago—the primary method of communication was the *landline,* not cellular telephones. In a country of 253 million people, there were approximately 7 million cellular subscribers. *See In re Implementation of Section 6002(B) of the Omnibus Budget*

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Reconciliation Act of 1993, Annual Report & Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, 10 FCC Rcd. 8844, 8874 tbl.1 (1995). Even then, those subscribers rarely used wireless devices as their chief means of communication, because a 60-minutes-a-month plan cost $63 a month. *See id.* at 8880, tbls. 3-4; *see also* National Public Radio, *The First Text Message Celebrates 25 Years* (Dec. 4, 2017), https://www.npr.org/2017/12/04/568393428/the-first-text-messages-celebrates-25-years (noting that the first text message was sent in December 1992—that is, after the TCPA's enactment).

If, as Brickman suggests (Op. Br. 14), a broad autodialer definition was essential to protect the privacy of everyday consumers, Congress no doubt would have made sure the protections extended to the telephones that were most likely to ring—those attached to individuals' residential landlines.

But Congress did not do that. It restricted the autodialer prohibition more narrowly—to calls made without consent to an "emergency telephone line," to telephone lines of healthcare facilities, or to telephone numbers "assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier

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service, or any service for which the called party is charged for the call," or "in such a way that two or more telephone lines of a multi-line business are engaged simultaneously." 47 U.S.C. § 227(b)(1)(A), (D).

The TCPA contains a separate provision that specifically applies to *all* residential lines; and that provision does not contain *any* limitations on the use of an autodialer. 47 U.S.C. § 227(b)(1)(B). Brickman's arguments, then, assume that the same Congress that left virtually all landlines open to receiving calls from autodialers nonetheless wanted to impose sweeping prohibitions on automatic calls to cell phones—as if Congress somehow knew cell phones would one day supplant landlines (or that then non-existent text messages would become ubiquitous).

Instead, as the *Duguid* Court explained, Congress took a "scalpel" to the "nuanced problems" presented by the use of equipment that generated telephone numbers randomly or sequentially, preventing the "unique harms" posed by random or block dialing while still allowing for targeted dialing to consumers. 141 S. Ct. at 1167, 1171, 1172.

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IV. Brickman's Interpretation Of The TCPA Would Undermine Countless Legitimate Communications.

The harms that would result from accepting Brickman's overbroad reading of the autodialer definition extend beyond subjecting ordinary smartphone users to the risk of TCPA liability. *See Duguid*, 141 S. Ct. at 1171-72; pages 14-17, *supra*. By restricting nearly every piece of equipment that has the capacity to dial multiple numbers from a set list, Brickman's interpretation of the statute would make it nearly impossible for businesses and other organizations to provide vital, time-sensitive, desired communications to their customers and other consumers.

For example, prior to *Duguid*, three large banks refrained from sending time-sensitive automated calls and texts to *tens of millions* of customers notifying them of a potential data breach because of possible liability under the TCPA. Letter from Jonathan Thessin to Marlene Dortch, Secretary, FCC, *Ex Parte* Presentation, CG Dkt. Nos. 02-278, 18-152 (Nov. 4, 2019), https://ecfsapi.fcc.gov/file/1104045326296/ Letter_to_FCC_Bank_Data_Calls_Not_Placed_2019_11_04_final.pdf. Insurance companies also want to reach out to clients before a policy lapses, not after; to make sure clients have the coverage they need

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before an impending storm; or to ask whether clients need any help after the storm has passed.

The present global pandemic has underscored the need for businesses to make timely communications with their customers. In the midst of financial uncertainty, lenders need to contact borrowers about opportunities for payment deferrals, fee waivers, loan modifications, and other payment relief options. Adapting to new protocols, pharmacies and grocery stores may wish to advise customers about special shopping hours for healthcare professionals and seniors. Financial institutions seek to remind account holders about the availability of online and mobile banking, which is particularly important for customers who have not used these platforms in the past. But if equipment that dials numbers from a database of customers' telephone numbers is an autodialer, then the threat of massive TCPA liability stands in the way.

Experience under overbroad interpretations of an autodialer prior to *Duguid* underscores that this threat is all too real. Between 2014 and 2017, roughly 5,000 TCPA cases were filed in state and federal court. *See* U.S. Chamber Inst. for Legal Reform, *TCPA Litigation*

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Sprawl 2 (Aug. 2017), bit.ly/2WpfFMa. By the end of October 2018, nearly 3,000 TCPA lawsuits had been filed just in that year. *See* TCPALand, *Happy Halloween TCPALand! More Ghoulish TCPA Statistics To Freak You Out* (Nov. 1, 2018), bit.ly/322ex2o. *Marks* made things even worse, resulting in over 2,000 lawsuits in the first half of 2020 alone. *See* WebRecon LLC, *WebRecon Stats for June 2020: An Interesting Dichotomy* (July 20, 2020), bit.ly/3gqOtWA.

Faced with massive uncapped per-call statutory damages and the prospect of burdensome discovery, many TCPA defendants engaged in legitimate communications with their customers nonetheless have had to settle rather than fight—and at substantial amounts. *See TCPA Litigation Sprawl, supra*, at 9-10 (detailing TCPA settlements in excess of $10 million). Defending or settling these lawsuits designed to extract lucrative settlements has required businesses to expend enormous resources. But the harmful consequences of this increase in costs have not been limited to businesses. Rather, the vast majority of the expenses likely have been passed along to innocent customers and employees in the form of higher prices and lower wages and benefits. And businesses likely have forgone meaningful communications with

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consumers for fear of devastating liability. The invitation by Brickman

to return to this state of affairs should be rejected.

CONCLUSION

The judgment of the district court should be affirmed.

Dated: April 18, 2022   Respectfully submitted,

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