No. _____

In the Supreme Court of the United States

COLIN R. BRICKMAN, INDIVIDUALLY AND ON BEHALF OF A CLASS OF SIMILARLY SITUATED INDIVIDUALS,

Applicant,

v.

UNITED STATES OF AMERICA; AND META PLATFORMS, INC.,

Respondents.

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR WRIT OF CERTIORARI

To the Honorable Elena Kagan, as Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Petitioner, Colin Brickman, pursuant to Rule 13.5, Rules of the Supreme Court, respectfully seeks a thirty (30) day extension of time within which to file his petition for a writ of certiorari in this Court. Petitioner is filing this application for an extension of time more than ten (10) days prior to the scheduled filing date for his petition for a writ of certiorari. The pertinent dates are as follows:

a. **December 21, 2022**: The Ninth Circuit Court of Appeals issued its written opinion, *Brickman v. United States*, No. 21-16785, 56 F.4th 688 (9th Cir. 2022), affirming the District Court's denial of Petitioner's motion for leave to file a

proposed second amended complaint. The District Court's order and the Ninth Circuit's order both involve a fundamental misinterpretation of this Court's holding in *Facebook, Inc. v. Duguid*, 141 S.Ct. 1163 (2021). A copy of the opinion is attached hereto as Exhibit A.

b. **February 3, 2023**: Petitioner filed a petition for rehearing or rehearing en banc pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure.

c. **February 28, 2023:** Issuance of written order by the Ninth Circuit Court of Appeals denying rehearing and rehearing en banc. A copy of the order is attached hereto as Exhibit B.

d. **May 30, 2023**: Current deadline for Petitioner to file his petition for a writ of certiorari.[1]

e. **June 29, 2023**: Deadline for Petitioner to file his petition for a writ of certiorari, if this request for an extension is granted.

Background

In *Facebook, Inc. v. Duguid*, the Supreme Court addressed the definition of an Automatic Telephone Dialing System ("ATDS") as defined under the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq*. ("TCPA"), and the related meaning

[1] Petitioner's deadline to file his petition for a writ of certiorari is May 29, 2023 which is Memorial Day – a federal legal holiday listed in 5 U.S.C. § 6103. Pursuant to Rule 30, this deadline is automatically extended to "the end of the next day that is not a Saturday, Sunday, federal legal holiday, or day on which the Court building is closed" which is Tuesday, May 30, 2023.

of a key ATDS component required by the statute: a random or sequential number generator ("RSNG"). 141 S.Ct. 1163 (2021). Specifically, the Supreme Court confronted the body of (erroneous) caselaw which held that the RSNG must actually generate the telephone numbers to be called. The *Duguid* Court confirmed the TCPA's scope is not limited to calls made to telephone numbers originally created by the RSNG but also covers telemarketing calls made using numbers stored from lists and databases: "It is true that, as a matter of ordinary parlance, it is odd to say that a piece of equipment 'stores' numbers using a random number 'generator.' But it is less odd as a technical matter . . . 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. . . ." *Id.* at 1171–72. "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." *Id.* at 1172 n. 7.

The instant case brought by Petitioner concerns a dialer system wholly different from the one that sent login notification texts in *Duguid*. The system here sends traditional, mass-blast marketing text messages to hundreds of thousands of users with an autodialer. Petitioner and the putative class are members of Meta's social networking site, Facebook. Meta sent unsolicited text messages containing birthday announcements ("Birthday Announcement Texts") to the cellular telephones of Petitioner and the putative class members through an ATDS which used a RSNG to store the numbers being robocalled. Petitioner and the class members did not

consent to the receipt of these Birthday Announcement Texts, which Meta sent in violation of the TCPA. This autodialer—unlike the system that sent individualized text messages in *Duguid* (which was not alleged to use a RSNG at all)—uses a RSNG to store the numbers to be called and then calls those numbers automatically using an autodialer.

After this Court's order in *Duguid*, Petitioner moved the District Court for leave to amend his First Amended Complaint and attached his proposed Second Amended Complaint ("SAC") and a supporting declaration by an expert in autodialing systems and telephonic technology. The expert confirmed the factual accuracy of the SAC's allegations regarding autodialer technology, and further confirmed that, within a reasonable degree of engineering certainty and more likely than not, the system used by Meta to send the Birthday Announcement Texts was an ATDS. The expert, and the SAC, explained how Meta's system sends blast text messages to thousands of persons (rather than individually contacting specific individuals as in *Duguid*) using an autodialer which employed a RSNG to store the numbers to be called.

The District Court denied Mr. Brickman's motion for leave as futile and dismissed the case with prejudice. The District Court's flawed reasoning in denying Mr. Brickman's motion for leave was clear: per the District Court (wrongly), *Duguid* requires that the number to be called must be ***both*** stored ***and*** produced using a random or sequential number generator.

Despite this Court's holding in *Duguid*, courts (including the Ninth Circuit) continue to struggle with the technical meaning of a RSNG and, by extension, the definition of an ATDS. In *Borden v. eFinancial, LLC*, 53 F.4th 1230 (9th Cir. 2022), the Ninth Circuit held that an ATDS must use a RSNG to generate the telephone numbers to be called, thereby ruling that the TCPA does not cover mass robocalling to telephone numbers from marketing lists and databases. More specifically, *Borden* ignored the disjunctive nature ("store or produce") of the TCPA's autodialer definition by eliminating the "storage" prong of the statute and determining that an autodialer must use a RSNG to "randomly or sequentially generate *telephone* numbers[.]" *Id.* at 1232 (emphasis original). This contradicts *Duguid's* holding that "an autodialer might use a random number generator to determine the order in which to pick phone numbers from a *preproduced list.*" *Duguid*, 141 S.Ct. at 1172 n.7 (emphasis added).

In the present matter, the Ninth Circuit affirmed the District Court's dismissal of this action and found that it was bound by the faulty reasoning in *Borden* under the law of the circuit doctrine. *Brickman*, 56 F.4th at 691 (quoting *United States v. McAdory*, 935 F.3d 838, 843 (9th Cir. 2019)).

However, Judge Van Dyke penned a multi-page concurring opinion in this case stating that *Borden* "wrongly concludes that the word 'number' means the same thing in all instances where it appears in the TCPA's definition of an autodialer." *Brickman v. United States*, 56 F.4th 688, 691 (9th Cir. 2022) (Van Dyke, J., concurring). This concurring opinion not only identifies the analytical failings of *Borden* from a textualist perspective, but it shows *Borden* got it wrong on the technology of

autodialers. *Borden* fails to recognize that a RSNG is an actual technical and computational device. In so doing, *Borden's* flawed analysis turns on its mistaken presumption that a RSNG must generate a telephone number without acknowledging that a RSNG is capable of storing numbers that it did not generate. As Judge Van Dyke lamented, "[t]he fundamental interpretive assumption underlying the *Borden* decision is just wrong." *Brickman*, 56 F.4th at 692.

Further, as the concurring opinion correctly notes, *Borden* wrongly concluded that giving meaning to the storage prong of the TCPA would turn every cellular telephone into an autodialer. Modern day smart phones—which "merely store[] and dial telephone numbers," *Duguid*, 141 S.Ct. at 1171, do not fall within this definition. RSNG equipment is what allows autodialers to process large quantities of "telephone numbers to be called" in a short period of time without human intervention – something modern cell phones cannot do on their own. The purpose of the TCPA wasn't to exercise legislative control over every cell phone, but to stop nuisance calls from the burgeoning consumer data market which were resulting in *targeted* telemarketing calls made from preproduced lists to cellular telephones. *Brickman*, 56 F.4th at 693 (Van Dyke, J., concurring).

Reasons For Granting An Extension Of Time.

The time to file a petition for a writ of certiorari should be extended for 30 days for the following reasons:

1. Lead counsel for Petitioner, Patrick J. Perotti, has numerous litigation deadlines in the weeks leading up to and immediately following the current May 30,

2023 deadline. Respectfully, the undersigned has at least four particular obligations leading up to and immediately after the current brief due date:

a. ***In Re: East Palestine Train Derailment*, Case No. 4:23-cv-00242 (N.D. Ohio).** The first is the East Palestine Norfolk Southern train derailment matter pending before the Honorable Benita Y. Pearson, Northern District of Ohio (Youngstown). The undersigned is working on that lawsuit, and representing the interests of a client with a large agricultural operation, with farming, animal husbandry, and animal kennels which has experienced substantial damages as a result of the massive derailment and release of poisonous vinyl chloride and other chemicals into the air, water and soil affecting three different states: Ohio, Pennsylvania and West Virginia. Motion practice, legal research, briefing and related matters are the focus of the undersigned's work there, where the pending action has consolidated more than 20 lawsuits.

b. The second is a national class case being prepared for filing dealing with pharmaceutical kickbacks and overcharges of a drug approved for a limited use, but being illegally marketed and prescribed off label to thousands of consumers. This matter follows up on prosecutions by the United States of the pharmaceutical company, pharmaceutical sales representatives, and various physicians resulting in millions of dollars in fines and penalties.

c. ***Papp v. Cuyahoga County, Ohio*, Case No. 20-cv934156**. The third is litigation dealing with a large-scale pending civil rights and employment discrimination action involving sexual harassment of hundreds of female corrections officers at a large prison facility serving northeast Ohio and handling thousands of inmates during the class period. During the relevant period multiple deaths occurred in the facility, and during the same time the lack of management and supervision created an environment where women at the facility were assaulted, subject to criminal indecent exposure, as well as regular and repeated events of threats of rape and masturbation by the male inmates. The case is currently in the midst of a lengthy deposition process, including class member statement confirmation for the upcoming class certification hearing.

d. The fourth matter involves five separate employment cases docketed in state and federal court brought by five executives against a national manufacturing company.[2] These cases present issues of national origin discrimination, as well as status determination of employee or independent contractor, following-up this Court's recent decision in *Helix Energy Solutions Group, Inc. v. Hewitt*, 143 S.Ct. 677 (2023).

[2] *Updegraph v. The Kirby Co., et al*, Cuyahoga County, Ohio, Case No.: 19-cv-919912; *Emmert v. The Kirby Co., et al*, Cuyahoga County, Ohio, Case No.: 20-cv-940157; *Lerch v. The Kirby Co., et al*, Cuyahoga County, Ohio, Case No.: 21-cv-56839; *Licata v. The Kirby Co.,* et al, Cuyahoga County, Ohio Case No.: 21-cv-946124 and *Sharqawi v. The Kirby Co,. et al*, N.D. of Ohio, Case No. 1:20-cv-00271.

> Multiple depositions are scheduled in this case, being conducted or defended by the undersigned in the next several weeks, involving witnesses around the country.

2. This case presents issues of importance to consumers nationwide who face continuous and seemingly unimpeded daily robocalls to their cellphones. This Court has previously recognized the scourge of robocalls plaguing consumers in this country: "Americans passionately disagree about many things. But they are largely united in their disdain for robocalls. The Federal Government receives a staggering number of complaints about robocalls—3.7 million complaints in 2019 alone." *Barr v. American Assoc. of Political Consultants, Inc.*, 140 S.Ct. 2335, 2343 (2020). As *Barr* recognized, Congress responded to "a torrent of vociferous consumer complaints about intrusive robocalls" by passing the TCPA which "prohibited almost all robocalls to cell phones." *Id.* at 2344.

However, in the wake of this Court's holding in *Duguid* courts (including the Ninth Circuit) continue to struggle with the technical meaning of a RSNG and, by extension, the definition of an ATDS. Indeed, within less than three months, the Ninth Circuit has two published opinions in direct conflict on the TCPA. *See Borden*, 53 F.4th at 1234 (holding "[i]n sum, the text and context of the [TCPA] make clear that an autodialer must be able to generate and dial random or sequential number phone numbers, not just any number."); *Brickman*, 56 F.4th at 691 (Van Dyke, concurring) ("I disagree with [*Borden*] because it wrongly concludes that the word

'number' means the same thing in all instances where it appears in the TCPA's definition of an autodialer.")

In addition to the internal disagreement within the Ninth Circuit on the TCPA, *Borden*'s flawed holding also creates a split with the Third Circuit, which recently and oppositely held the TCPA and *Duguid* do ***not*** require the equipment to create the called telephone numbers. *Panzarella v. Navient Solutions, Inc.*, 37 F.4th 867, 875 (3rd Cir. 2022) ("*Duguid* does not stand for the proposition that a dialing system will constitute an ATDS only if it actually generates random or sequential numbers.")

The judges within the Ninth Circuit, and throughout the country, are in direct conflict on the operation of the TCPA. This conflict is substantive and material. It directly affects whether TCPA protections provided to consumers should not apply to millions of people whose cellphones are called and texted by telemarketers using autodialers and preproduced marketing lists and databases. Further, this growing division among the circuit courts demonstrates that a significant prospect exists that this Court will grant certiorari and reverse the Ninth Circuit in line with its prior holding in *Duguid*.

3. An extension will not cause prejudice to Respondent, as this Court would likely hear oral argument and issue its opinion in the next term regardless of whether an extension is granted. Further, the undersigned has conferred with opposing counsel, Andrew Clubok, who has confirmed that Respondent, Meta Platforms, Inc., has no objection to this motion.

Conclusion

For the foregoing reasons, Petitioner respectfully requests that the time to file his petition for a writ of certiorari in this matter be extended by 30 days, up to and including June 29, 2023.

Respectfully submitted,

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