

No. 23-42

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**In the Supreme Court of the United States**

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LAWRENCE PASCAL,

Petitioner,

v.

CONCENTRA, INC.,

Respondent.

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On Petition for Writ of Certiorari to the  
United States Court of Appeals  
For the Ninth Circuit

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**SUPPLEMENTAL BRIEFING OF PETITIONER**

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## SUPPLEMENTAL BRIEFING

### **I. New Authority Supports Petitioner's Interpretation that Random or Sequential Number Generator Is Not Limited To Generation of Telephone Numbers**

New authority from the District of Colorado persuasively supports Petitioner's argument that the term "random or sequential number generator," as used in the definition of an automatic telephone dialing system (ATDS) under the TCPA, 47 U.S.C. § 227(a)(1), should not be limited to the generation of telephone numbers only. *See Scherrer v. FPT Operating Co., LLC*, No. 19-cv-03703-SKC, 2023 U.S. Dist. LEXIS 125390, 2023 WL 4660089 (D. Colo. July 20, 2023) (Crews, J.).

The opinion engages in a thorough analysis of the plain text of the definition of an ATDS in the TCPA, as well as guidance from the Supreme Court in the governing case on the issue, *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021). The holding of the lower courts here results from a misreading of *Duguid*, where the Supreme Court actually:

reject[ed] Duguid's argument that the patent cited by the *Amici Curiae* brief (and thus by the Supreme Court), which would "produce" numbers using one number generator and then "store" them using a second number generator, rendered "store" superfluous under 47 U.S.C. § 227(a)(1). *Id.* at 1172 n.7.

Critically [\*7] here, in rejecting that argument, the Supreme Court noted, “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.

The Supreme Court’s statements in Footnote 7 are dicta. But this Court affords it considerable weight based on its recency and due to the dearth of controlling precedent on point. The Supreme Court’s own words demonstrate it had more in mind in terms of what may constitute an autodialer beyond the single patented device discussed in the *Amici Curiae* brief... To be sure, other courts have found this dicta persuasive. *See Macdonald v. Brian Gubernick PLLC*, CV-20-00138-PHX-SMB, 2021 U.S. Dist. LEXIS 216788, 2021 WL 5203107, at \*2 (D. Ariz. Nov. 9, 2021) (“a footnote of the opinion recognized that a device may still constitute an autodialer under the TCPA [\*8] if it randomly dials numbers from a preproduced list” (citing *Duguid*, 121 S. Ct. at 1172 n.7))...

Further, the *Duguid* Court noted that “even if the storing and producing functions often merge, Congress may have ‘employed a belt and suspenders approach’ in writing the statute.” *Duguid*, 141 S. Ct. at 1172 n.7 (emphasis added) (citation omitted). “Often” is not “always,” further suggesting the Supreme Court anticipated instances in which a random or sequential number generator would be used to

store telephone numbers and generate the calling order but without generating the numbers themselves. *See id.* Indeed, to store telephone numbers using a random or sequential number generator loses meaning if the TCPA is read only to apply when the list of telephone numbers is itself generated using another random or sequential number generator. *See Duguid*, 141 S.

*Scherrer*, U.S. Dist. LEXIS 125390, 2023 WL 4660089, at \*\*5-7, 9-10 .

Here, the Circuit Court erroneously concluded that the definition of an ATDS has an unstated additional limitation that the numbers generated randomly or sequentially by the ATDS must be the telephone numbers to be dialed.

Accordingly, the Court should grant the petition.

## **II. PETITIONER’S CASE WAS DISMISSED RELYING ON CASES WHERE DEFENDANTS DIALED A CUSTOMER LIST, BUT CONCENTRA DID NOT USE A CUSTOMER LIST**

Judge Crews wisely recognizes Petitioner’s concern that many of the authorities holding an autodialer could not be established are distinguishable on factual grounds because, for example, the plaintiffs in those cases provided their telephone numbers to the defendants or were specifically targeted by them. (citing *e.g.*, *Hufnus v. Donotpay, Inc.*, No. 20-0701, 2021 WL 2585488, at \*1 (N.D. Cal. June 24, 2021) (“But the platform only contacts phone numbers

specifically provided by consumers during DoNotPay's registration process, and not phone numbers identified in a random or sequential fashion."); *Barry v. Ally Fin., Inc.*, 20-12378, 2021 U.S. Dist. LEXIS 129573, 2021 WL 2936636, at \*4 (E.D. Mich. July 13, 2021) (dismissing case where the defendant made calls "targeted at specific individuals in connection with specific accounts held by [d]efendant"); *Borden v. Efinancial, LLC*, C19-1430JLR, 2021 U.S. Dist. LEXIS 153086, 2021 WL 3602479, \*5 (W.D. Wash. Aug. 13, 2021) ("[Defendant's] use of its system to send advertisement text messages to consumers who entered their phone numbers into a form on its website simply does not implicate the problems caused by autodialing of random or sequential blocks of numbers that Congress sought to address when it passed the TCPA.").

Judge Crews reviewed these "persuasive authorities [drawing a line at customer lists] but is not persuaded by them."

For the same reason, here, the Court should grant the petition recognizing the TCPA does not draw the line at texting customer lists and Concentra did not text a customer list. Concentra acquired a list of phone numbers of licensed physical therapists from third parties who scraped public databases and erroneously attributed Plaintiff's phone number to a California physical therapist. 1-ER-6–7. Plaintiff had no relationship with Concentra prior to the text message being sent. 2-ER-177.

Accordingly, here, the preproduced list was not a customer list and was not a list of people who voluntarily sought to communicate with Concentra.

Plaintiff was contacted haphazardly and erroneously, which sharply contrasts with cases involving legitimately compiled preproduced lists of customers or other persons who voluntarily interacted with Concentra where “[n]one of these concerns are present[.]” *Austria v. Alorica, Inc.*, No. 2:20-cv-05019-ODW (PVCx), 2021 WL 5968404, at \*1 (C.D. Cal. Dec. 16, 2021); *Hufnus*, 2021 WL 2585488, at \*1-2 (“the ‘preproduced list’ ...was created by consumers providing their numbers while signing up for [defendant’s] services...” which “differentiat[es]” it from a “‘preproduced list’ that was itself created through a random of sequential number generator[.]”); *Mehl v. Green*, No. 2:21-cv-01861, 2022 WL 4056269 (E.D. Cal. Sep. 2, 2022) (“[When a plaintiff provides their number...a TCPA claim does not lie[.]”); *Allison v. Wells Fargo*, No. 22-cv-0510-BAS-AHG, 2022 WL 10756885 (S. D. Cal. Oct. 17, 2022) (“[P]laintiff’s connection to the defendant as a debtor heavily weighed against the plausibility of the defendant using an ATDS.”); *Franco v. Alorica, Inc.*, No. 2:20-CV-05035-DOC-(KESx), 2021 U.S. Dist. LEXIS 164438, 2021 WL 3812872, at \*3 (C.D. Cal. July 27, 2021) (“Plaintiff had a pre-existing relationship with Defendant: Plaintiff allegedly owed a debt, and Defendant was calling to collect.”).

The lower courts failed to consider the concern that the TCPA does not draw the line at customer lists, which has been noted by numerous district courts. Accordingly, the Court should grant the petition.

### III. CONTRARY TO DISTRICT COURT'S ANALYSIS, THE LEGISLATIVE HISTORY SUPPORTS PETITIONER

Although the district court raised the concern in the legislative history of tying up emergency phone numbers by dialing phone numbers that were themselves randomly generated, the district court's opinion does not resolve the concern. The district court entirely overlooked the possibility that someone could upload a preproduced list of emergency phone numbers and escape liability because the phone numbers themselves were not randomly or sequentially generated. *See* App B., at 19-20a.

Although it was not necessary to reach the legislative history be reached, if it is examined, it weighs in favor of Petitioner, not Respondent. The line drawn by the lower court is overinclusive and underinclusive. If “someone could curate a list of only emergency services telephone numbers, and then store those telephone numbers, utilizing a random or sequential number generator to determine the calling order... that person would not have utilized an ATDS, according to Defendant's theory. Such a result, however, would tie up emergency telephone numbers, which is exactly what Congress was trying to combat with the TCPA.” *Scherrer*, U.S. Dist. LEXIS 125390, 2023 WL 4660089, at \*12 (citing *Duguid*, 141 S. Ct. at 1167-68).

The lower courts improperly dismissed the concern about tying up emergency phone numbers, because someone could upload a list of emergency phone numbers and yet would not be liable, despite doing exactly what Congress was trying to combat.

Accordingly, the Court should grant the petition.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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