No. 23-42

In The
Supreme Court of the United States

LAWRENCE PASCAL,

Petitioner,

v.

CONCENTRA, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RAYMOND A. CARDOZO
Counsel of Record
rcardozo@reedsmith.com
DAVID J. DE JESUS
ddejesus@reedsmith.com
REED SMITH LLP
101 Second Street, Suite 1800
San Francisco, CA 94105-3659
Telephone: 415 543 8700
Facsimile: 415 391 8269

Counsel for Respondent Concentra, Inc.

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

CORPORATE DISCLOSURE

Respondent Concentra, Inc. is a subsidiary of Select Medical Holdings Corporation (NYSE: SEM), a publicly traded company. Select Medical Holdings Corporation has no parent corporation. T. Rowe Price (NASDAQ: TROW) owns more than 10% of Select Medical Holdings Corporation's stock. Blackrock, Inc. (NYSE: BLK) also owns more than 10% of Select Medical Holdings Corporation's stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Lawrence Pascal seeks review of the Ninth Circuit's unanimous, two-paragraph, unpublished disposition affirming the grant of summary judgment in a class action alleging violations of the Telephone Consumer Protection Act ("TCPA"). Suffice it to say, there is no reason for this Court to review this summary unpublished disposition.

The TCPA prohibits calling or sending texts via an automatic telephone dialing system, or "autodialer" for short. In *Facebook, Inc. v. Duguid*, this Court defined "autodialer" under the TCPA to mean equipment that has the capacity to generate random or sequential telephone numbers for automatic dialing. 141 S. Ct. 1163, 1168 (2021). Based largely on this decision, the Ninth Circuit held in *Borden v. eFinancial, LLC* that an "autodialer" must generate random or sequential *telephone* numbers, and thus, did not apply to equipment used to determine the sequence in which to call telephone numbers already stored in the defendant's database. 53 F.4th 1230 (9th Cir. 2022). Less than a month later, the majority in *Brickman v. United States*, followed *Borden*'s lead in a case involving similar claims. 56 F.4th 688 (9th Cir. 2022). These decisions thus joined a chorus of other courts—including the Eighth Circuit and district courts around the country—reaching the same conclusion.

The Ninth Circuit's unpublished disposition here followed this consistent line of decisions. Here are the

facts in brief. In May 2019, Pascal received a text from respondent Concentra regarding employment opportunities in the physical therapy field. Concentra did not contact Pascal out of the blue. His spouse, a physical therapist, had applied for a job with Concentra's parent company and provided Concentra with her resume and contact information. Concentra texted Pascal thinking the number belonged to his spouse. Concentra used a text-messaging platform called Textedly, which did not generate the phone numbers contacted. Rather, Textedly simply stored and assigned an internal tracking identification number to the phone numbers that *Concentra* obtained, selected, and then provided to Textedly. The internal tracking numbers Textedly assigned were not random either, but were assigned sequentially in the order Concentra uploaded them onto Textedly.

Relying on *Duguid*, the district court granted summary judgment in Concentra's favor largely on the ground that Textedly was not an autodialer because it did not itself randomly generate telephone numbers. The Ninth Circuit affirmed in two paragraphs, citing *Borden* and *Brickman*.

Concentra will not address the merits of Pascal's argument that the Ninth Circuit's unpublished memorandum disposition was wrongly decided—the correctness of the disposition is plain from *Duguid*, *Borden*, *Brickman*, and the host of like-minded cases. Instead, Concentra writes to explain why the disposition does not meet the Court's stringent criteria for certiorari review.

First, the disposition is not the appropriate conduit for review. It is an unpublished, two-paragraph memorandum that relies exclusively on *Borden* and *Brickman* to affirm summary judgment. While there is no reason to grant certiorari in any of these cases, this case is a particularly poor vehicle.

Second, the Ninth Circuit's unpublished disposition did not create a circuit split. As a non-precedential summary disposition, it did not create any circuit precedent at all, much less split from other circuit precedent. Moreover, in the wake of *Duguid*, caselaw consistently holds that (1) to constitute an "autodialer" under the TCPA, a system or platform must use a random or sequential number generator to generate telephone numbers; and (2) a system or platform that generates index numbers and applies them to a group of pre-collected phone numbers does not satisfy that definition. The Ninth Circuit's disposition is consistent with these cases.

Pascal nevertheless attempts to fabricate a conflict by arguing that the disposition conflicts with the Seventh Circuit's opinion in *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458 (7th Cir. 2020), as well as footnote 7 in *Duguid* itself. The argument can be quickly dispatched. *Gadelhak* predated this Court's opinion in *Duguid* and, if anything, squares with the court's disposition here. At bottom, both cases held that a text messaging platform was not an autodialer because it called telephone numbers that the platform user collected into its own database and uploaded to the platform. Likewise, there is no conflict among the circuits

as far as footnote 7 in *Duguid* is concerned. Every circuit court and nearly every district court confronted with the footnote 7 argument has rejected it.

The Court should deny the petition.

REASONS FOR DENYING PETITION

I. This Case Is Not The Proper Vehicle To Review The Question Presented

This Court exercises its discretionary review only in narrow and "compelling" circumstances. Sup. Ct. Rule 10. Chief among them is when a Court of Appeals' decision conflicts with a sister circuit court's decision "on the same important matter." *Id.* This standard reflects the reality that the Court "has traditionally expended its limited time and resources on those cases that present issues of national importance, for which there is some 'compelling' reason for invoking the Court's jurisdiction." Stephen M. Shapiro, Supreme Court Practice § 4.2 (10th ed. 2013).

In the Ninth Circuit, "[u]npublished dispositions and orders are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion." Ninth Cir. R. 36-3. The Ninth Circuit has explained that its own unpublished dispositions merely "provide shorthand explanations meant to apprise the parties of the basis for a decision." *Grimm v. City of Portland*, 971 F.3d 1060, 1067 (9th Cir. 2020). This practice frees the court "to spend the

requisite time drafting precedential opinions in the remaining cases, and limits the confusion and unnecessary conflict that would result from publishing redundant opinions." *Id.* (internal quotations and citation omitted). "The facts of cases resolved through memorandum dispositions, if described—they often are not—are typically opaque, as the parties already know the facts." *Id.* "And the reasoning in the dispositions is rarely developed enough to acknowledge and account for competing considerations, reconcile precedents that could be seen as in tension with each other, or describe limitations to the legal holdings—because, in theory, there are no new legal holdings, just applications of established law to facts." *Id.*; *cf.* Ninth Cir. R. 36-2 (setting forth criteria for when a disposition should be designated as an opinion).

Thus, "[d]esignedly lacking, because of their limited function, the nuance and breadth of precedential opinions, [the Ninth Circuit]'s memorandum dispositions are not only officially nonprecedential but also of little use to district courts or litigants in predicting how this Court—which, again, is in no way bound by such dispositions—will view any novel legal issues in the case on appeal." *Id*.

These same observations make the court's unpublished memorandum decision here inappropriate for review. The court affirmed summary judgment in two paragraphs. The second paragraph contained the sum total of its analysis:

> Pascal's argument that Concentra violated the TCPA when it messaged him using Textedly, an online text-messaging service, is foreclosed by our decision in *Borden v. eFinancial, LLC*, 53 F.4th 1230 (9th Cir. 2022). In *Borden*, we held that a system constitutes an autodialer regulated by the TCPA only if it "generate[s] random or sequential telephone numbers." *Id*. at 1231; *see also Brickman v. United States*, 56 F.4th 688, 690 (9th Cir. 2022). Because Textedly did not store or produce randomly or sequentially generated telephone numbers, Concentra's text message was not sent to Pascal via use of an autodialer in violation of the TCPA.

(Appendix 2a)[1]

The lack of precedential value alone means the disposition logically cannot create a conflict with other

---

[1] Textedly's operational mechanics were undisputed. Textedly did not and could not generate phone numbers; rather, Concentra obtained the phone numbers and uploaded them into the Textedly database. (ER72-73, 103-05, 114-15, 203-05) Without Concentra's upload of the phone numbers, Textedly could not operate. (ER73, 204-05)

Textedly also did not select or control which phone numbers receive a text; rather, Concentra selects the recipients. (ER72-73). When Concentra uploaded phone numbers to Textedly, those numbers were stored in Textedly in the same order as they were uploaded. (ER77-78, 205, 333-34). Textedly assigned identification numbers to the telephone numbers "sequentially as they are uploaded to or entered manually into Textedly, and they are stored in that order." (ER7, 205) The internal tracking number did not impact the use of the platform to send text messages to selected numbers. (ER7). Textedly did not reorganize or rearrange the numbers in any way when text messages were sent. (ER7)

circuit decisions. But more than that, the disposition discussed the bare minimum of facts and did not address any of Pascal's cited authorities—authorities that included the same caselaw Pascal proffers in support of granting certiorari. (*Compare* Appendix 2a *with* Ninth Cir. Docket Entry No. 19, pp. 15-16, 21-25). It hardly provides a springboard for review.

Instead, the court premised its disposition entirely on two published Ninth Circuit opinions, *Borden* and *Brickman*, without discussing either case in any detail. In *Borden*, a Ninth Circuit panel held that to meet the statutory definition under the TCPA, an "autodialer" "must be able to generate random and sequential number phone numbers, not just any number." 53 F.4th at 1233-34. Apparently, the losing party in *Borden* did not seek this Court's review.

In *Brickman*, the majority reviewed *Borden* and "agree[d] with the analysis" of how the TCPA defined "autodialer." 56 F.4th at 690.

Given the uniformity in the published circuit precedent on this issue, there is no basis to grant certiorari even of the published *Borden* or *Brickman* decisions. There is far less reason to review the unpublished disposition in this case.

II. The Court's Disposition Did Not Create A Circuit Split

A. After *Duguid*, Courts Consistently Have Held That To Meet The TCPA's Definition Of An Autodialer, Equipment Must Generate Random Or Sequential *Telephone* Numbers

Pascal claims the disposition created a circuit split on whether a platform must use a random or sequential number generator to create a telephone number in order to satisfy the TCPA's definition of autodialer. He contends that the court's unpublished disposition relied on the Ninth Circuit's published opinion in *Borden*, which in turn misinterpreted this Court's opinion in *Duguid*, thus somehow resulting in a conflict with *Gadelhak v. AT&T Services*—a Seventh Circuit opinion that *predated* the *Duguid* decision. This tortured effort to articulate a circuit split fails in every direction.

As a threshold matter, and as noted, an unpublished disposition does not create any circuit precedent so it cannot and does not generate a circuit split.

Beyond this, the disposition does not discuss the reasoning in either *Borden* or *Brickman*. It does not mention *Duguid* or *Gadelhak* at all, even though Pascal trumpeted those cases in his Ninth Circuit briefing.

In all events, starting with *Duguid*, nothing is uncertain or conflicting in the law. There, the plaintiff received text message alerts from Facebook that someone attempted to access his Facebook account

from an unauthorized browser. 141 S. Ct. at 1168. The plaintiff, however, did not have a Facebook account and did not give the company his phone number.[2] *Id.* The question confronting the Court was whether Facebook had used an autodialer—as defined in the TCPA—"by maintaining a database that stored phone numbers and programming its equipment to send automated text messages to those numbers each time the associated account was accessed by an unrecognized device or web browser." *Id.*

The Court began with the TCPA's definition of an autodialer (also called an "ATDS"), which "is a piece of equipment with the capacity both 'to store or produce telephone numbers to be called, using a random or sequential number generator,' and to dial those numbers." *Id.* at 1167 (quoting 47 U.S.C. § 227(a)(1)). The Court held that "a device must have the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator." *Id.* Facebook's equipment—which stored telephone numbers without using a random sequential number generator—therefore did not qualify as an autodialer. *Id.*

The Court also discussed the design of the TCPA, a statute passed "to address the proliferation of intrusive, nuisance calls to consumers and businesses from telemarketers." *Id.* at 1167 (internal quotation marks

---

[2] Facebook explained that the plaintiff may have received a recycled cell phone number that previously belonged to a Facebook user who chose to receive these kinds of notifications. *Id.* at 1168.

omitted). In particular, the invention of the autodialer "revolutionized telemarketing by allowing companies to dial random or sequential blocks of telephone numbers automatically." *Id.* Congress found this practice to be "uniquely harmful" because it "threatened public safety by 'seizing the telephone lines of public emergency services,'" "could simultaneously tie up all the lines of any business with sequentially numbered phone lines," and "could reach cell phones, pagers, and unlisted numbers, inconveniencing consumers and imposing unwanted fees." *Id.* (citation omitted).

With this purpose in mind, the Court evaluated the statutory text and concluded that the "random or sequential number generator" must in all cases be used to qualify an autodialer, regardless of whether the telephone numbers are being "stored" or "produced." *Id.* at 1169. In other words, the Court held that an autodialer is equipment with the capacity to (1) store telephone numbers using a random or sequential number generator, or (2) produce telephone numbers using a random or sequential number generator, as well as (3) dial those numbers.

The Court explained that this holding was confirmed by the "statutory context." *Id.* at 1171. In particular, the TCPA's "prohibitions target 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.* For that reason, the Court rejected "[e]xpanding the definition of an autodialer to encompass any equipment that merely stores and dials telephone numbers" because such a

holding "would take a chainsaw to these nuanced problems when Congress meant to use a scalpel." *Id.* Indeed, "virtually all modern cell phones, which have the capacity to 'store . . . telephone numbers to be called' and 'dial such numbers,'" would be captured by such a broad definition, subjecting "ordinary cell phone owners in the course of commonplace usage" to TCPA liability. *Id.*

Finally, the Court included in its discussion a footnote recognizing that "as a matter of ordinary parlance, it is odd to say that a piece of equipment 'stores' numbers using a random number 'generator,'" and endeavored to explain why its holding did not render the word "store" superfluous. *Id.* at 1172 n.7. The Court, citing an example from an amicus brief, proposed 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." *Id.* The Court concluded: "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." *Id.* (citation omitted).

In *Borden*, the plaintiff was shopping for insurance quotes and provided his personal information to an insurance company, Progressive, via its website. 53 F.4th at 1232. He declined to purchase insurance but began receiving marketing text messages from another company named eFinancial—messages to which the plaintiff consented to receive by using the website. *Id.* He claimed that eFinancial violated the TCPA by

using a random sequential number generator to (1) "determine the order in which to pick the telephone numbers to be dialed from Defendant's stored list (database)," and (2) "assemble sequential strings of numbers in a field labeled LeadID, which are then stored and assigned to a telephone number and are used when the sequential number generator picks the order[.]" *Id.* In short, a random sequential number generator was not used to generate and dial telephone numbers—rather it was used to select phone numbers that the defendant already had received from potential customers like the plaintiff.

The Ninth Circuit affirmed dismissal at the pleading stage, holding that the equipment did not qualify as an autodialer under the TCPA. *Id.* at 1233. To the court, an autodialer "must generate and dial random or sequential *telephone* numbers under the TCPA's plain text." *Id.* at 1231 (emphasis orig.). By contrast, equipment that "merely generate[d] some random or sequential number . . . (for example, to figure out the order to call a list of phone numbers)"—but did not generate a telephone number—fell outside the statutory definition. *Id.* at 1233. This was because the TCPA's plain language "makes clear that the number in 'number generator' . . . means a *telephone* number". *Id.*

The court also pointed to *Duguid* in support of this interpretation—and in particular, its holding that "a necessary feature of an autodialer . . . is the capacity to use a random or sequential number generator to either store or produce phone numbers to be called"

and that a contrary holding "would capture virtually all modern cell phones, which have the capacity to store telephone numbers to be called and dial such numbers." *Id.* at 1234 (quoting *Duguid*, 141 S. Ct. at 1171). The plaintiff's unduly broad definition of autodialer would regress the law back to "the pre-*Duguid* state in which 'virtually all cell phones were at risk of violating the TCPA'" because they stored telephone numbers "that had not been randomly or sequentially generated in the first instance." *Id.* at 1234. The plaintiff's definition of autodialer also clashed with the policies driving the TCPA. This was because equipment that used a random or sequential number generator "to select from a pool of customer-provided phone numbers" would not threaten public safety by tying up emergency phone lines because those emergency phone numbers "presumably would not be in these customer-provided lists." *Id.*

Two other circuits examining *Duguid* share this core view that in order to qualify as an autodialer, a system or platform must use a random or sequential number generator to create telephone numbers. *See Panzarella v. Navient Sols., Inc.*, 37 F.4th 867, 978 (3d Cir. 2022) ("Therefore, to use an ATDS as an autodialer, one must *use* its defining feature—its ability to produce or store telephone numbers through random-or sequential-number generation."); *Beal v. Outfield Brew House, LLC*, 29 F.4th 391 (8th Cir. 2022) ("Because Txt Live does not generate phone numbers to be called, it does not 'produce telephone numbers to be called' for purposes of" the TCPA).

In *Beal*, the Eighth Circuit confronted whether autodialer included a platform "used to maintain a database that stores. . . . phone numbers" manually entered into the database by the user but was "not capable of randomly or sequentially generating phone numbers." *Id.* at 393. It concluded that the platform's "random selection of phone numbers from an existing list of contacts" in the database did not constitute an autodialer under the TCPA "[b]ecause [the platform] does not generate phone numbers to be called." *Id.* at 394.

Relying also on *Duguid*'s discussion of the types of equipment the TCPA targeted, the court stated that *Duguid* "was not concerned with how an automatic texting system may organize and select phone numbers . . . [but] was instead concerned with . . . unique equipment capable of randomly dialing emergency lines and tying up sequentially numbered business lines." *Beal*, 29 F.4th at 396. But "this concern reaches a vanishing point with a system that is only designed to text potential customers who have voluntarily given a business their phone numbers." *Id.*

Most notably, the Eighth Circuit drew confidence from the pattern of this Court's grants and denials of certiorari in the wake of *Duguid*, which further supported the notion that "autodialer" did not encompass platforms dialing from a group of pre-collected phone numbers: "While a denial of certiorari normally carries no implication or inference [citation], it does not escape our notice that in the wake of *Facebook*, the Court granted certiorari and remanded cases that held

systems that dialed from a group of pre-collected phone numbers were Autodialers." *Id.* at 396 n.3 (internal quotations omitted) (citing *La Boom Disco v. Duran*, 141 S. Ct. 2509, 209 L. Ed. 2d 543 (2021); *Pa. Higher Educ. Assistance Agency v. Allan*, 141 S. Ct. 2509, 209 L. Ed. 2d 544 (2021)). This indicated to the court "a reasonable probability that the [respective] Court[s] of Appeals would reject a legal premise on which [they] relied[.]" *Id.* (internal quotations and citations omitted).[3] Likewise, the court further observed, "the Court denied certiorari to cases that held systems that dialed from a group of pre-collected numbers were not Autodialers." *Id.* (citing *Gadelhak v. AT&T Servs., Inc.*, 141 S. Ct. 2552, 209 L. Ed. 2d 568 (2021); *Glasser v. Hilton Grand Vacations Co.*, 141 S. Ct. 2510, 209 L. Ed. 2d 546 (2021)).

Numerous district court decisions are in accord. *See*, *e.g.*, *Soliman v. Subway Franchisee Advert. Fund Trust, Ltd.*, No. 3:19-cv-592 (JAM), 2022 U.S. Dist. LEXIS 126468, at *4 (D. Conn. July 18, 2022) ("[W]hen the Act refers to a 'random or sequential number generator,' it means a generator of random or sequential *telephone* numbers—not a generator of random or sequential *index* numbers"); *DeMesa v. Treasure Island, LLC*, No. 2:18-cv-02007-JAD-NJK, 2022 U.S. Dist. LEXIS 98511, at *4 (D. Nev. June 1, 2022) (holding that "a system [that] assigns an identifying sequentially

---

[3] *Beal* was prescient in this regard. The Sixth Circuit in *Allan* vacated its previous opinion and remanded for further consideration in light of *Duguid*. *See Allan v. Pa. Higher Educ. Assistance Agency*, 2021 U.S. App. LEXIS 19101 (6th Cir. June 25, 2021).

generated number to a prepopulated list of existing phone numbers and then calls them" cannot be an ATDS); *Eggleston v. Reward Zone USA, LLC*, No. 2:20-cv-01027-SVW-KS, 2022 U.S. Dist. LEXIS 20928, at *10 (C.D. Cal. Jan. 28, 2022) (holding that "equipment is only an autodialer if it uses a number generator to generate the phone numbers themselves—not if the number generator is used merely to index the phone numbers"); *LaGuardia v. Designer Brands Inc.*, No. 2:20-cv-2311, 2021 U.S. Dist. LEXIS 170704, at *18-19 (S.D. Ohio Sept. 9, 2021) (rejecting the footnote 7 argument and holding that "[t]he ATDS definition addresses the ability to randomly or sequentially store or generate phone numbers," not "sequential identification number[s]"); *Tehrani v. Joie De Vivre Hospitality, LLC*, No. 19-cv-08168-EMC, 2021 U.S. Dist. LEXIS 165392, at *9-10 (N.D. Cal. Aug. 31, 2021) (rejecting the footnote 7 argument and holding there is no ATDS where the system "generates an *index number* using . . . a sequential number generator . . . , *assigns the generated numbers to phone numbers from the list*, and stores the information").

The upshot is that in *Duguid*'s wake, caselaw consistently has held that (1) to constitute an "autodialer" under the TCPA, a system or platform must use a random or sequential number generator to generate telephone numbers; and (2) a system or platform that merely generated index numbers and applied them to a group of pre-collected phone numbers did not satisfy that definition.

So, in addition to the fact that the unpublished disposition here is not the correct vehicle for review and cannot, by definition, create a circuit split, even the published cases that the unpublished disposition followed do not directly or indirectly create a circuit split. To the contrary, the disposition fell right in line with *Duguid* and caselaw from around the country that followed it. There is nothing for this Court to resolve in this case or any other. The petition is wrong to contend otherwise and should be denied.

B. Neither *Gadelhak* Nor Footnote 7 In *Duguid* Necessitates This Court's Intervention

Pascal turns a blind eye to the myriad cases that follow *Duguid* and reject his statutory interpretation—even though Concentra's briefing in the Ninth Circuit discussed them at length. Instead, Pascal tries to gin up a conflict by pointing to the Seventh Circuit's pre-*Duguid* opinion in *Gadelhak*, as well as to a passage in footnote 7 of *Duguid*, which he claims are at odds with the court's memorandum disposition here. These arguments provide no basis for certiorari review.

To begin with, *Gadelhak* does not support Pascal's statutory interpretation or the need for this Court's review. In that case, the plaintiff had interacted with AT&T's customer service department and received text messages from AT&T with surveys about his experience. 950 F.3d at 460. To send these texts, AT&T used a platform that "exclusively dial[ed] numbers

stored in a customer database" but did not produce or store those numbers using a random or sequential number generator. *Id.* The question there was whether AT&T's platform constituted an autodialer under the TCPA. *Id.*

Gadelhak found the answer in the statutory language. It held that "the phrase 'using a random or sequential number generator' . . . modif[ies] both *store* and *produce*, which . . . mean[s] that a device must be capable of performing at least one of those functions using a random or sequential number generator to qualify" as an autodialer. *Id.* at 463. Because the system at issue there "pulls and dials numbers from an existing database of customers rather than randomly generating them," the court held the system was not an autodialer. *Id.* at 461.

Gadelhak, of course, was decided before *Duguid* and did not confront the kind of platform that Concentra used here. As discussed *ante* at footnote 1, Textedly generated an internal tracking number for phone numbers that Concentra obtained and uploaded onto the platform; the platform in *Gadelhak* evidently did not generate any internal numbers but simply texted the phone numbers that AT&T provided. However, the two platforms *are* similar insofar as they do not themselves generate the telephone numbers, and instead are dependent on telephone numbers that the platform user collects and provides to the platform. So, while *Gadelhak* did not pass on the precise scenario presented in Pascal's case, *Gadelhak* supports the Ninth Circuit's disposition: in both cases, a platform that dialed

numbers from existing databases rather than generating those numbers was not an autodialer. *See Beal*, 29 F.4th at 396 n.3 (noting that *Gadelhak* involved a system "that dialed from a group of pre-collected numbers"). Either way, *Gadelhak* does not clash with the memorandum disposition here.

Pascal's argument based on footnote 7 of *Duguid* fares no better. Pascal argues the Court "approved of the possibility" that "storage of telephone numbers using a sequential number generator can have significance independent of telephone number production or generation." (Pet. 20)[4] Thus, according to Pascal, the Court actually endorsed "an interpretation of autodialer that includes the storage of telephone numbers using non-phone number sequential or random

---

[4] Footnote 7 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. 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 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.

Duguid, 141 S. Ct. at 1171-72 & n.7 (citations omitted).

number generation"—i.e., the kind of system that Concentra used here. (*Id.*)

This argument repeatedly has been raised—and roundly rejected. In *Borden*, the plaintiff similarly argued that footnote 7 supported his view that an autodialer need not generate telephone numbers, because it stated that "an autodialer might use a random number generator to determine the order in which to pick phone numbers from a preproduced list." 53 F.4th at 1235. Disagreeing, the Ninth Circuit criticized the plaintiff's "myopic focus on a single sentence in a footnote" as "an acontextual reading of a snippet divorced from the context of the footnote and the entire opinion." *Id.* The "broader context" of the opinion included the Supreme Court's own express recognition that the issue before it "was whether an autodialer must have the capacity to generate random or sequential *phone* numbers." *Id.* (emphasis orig., internal quotations omitted).

"In reality," *Borden* continued, "Footnote 7 merely addressed how an autodialer could both 'store' and 'produce' telephone numbers without rendering those two terms superfluous." *Id.* But "[n]othing in the opinion suggests that the [Supreme] Court intended to define an autodialer to include the generation of *any* random or sequential number." *Id.* at 1236 (emphasis added). To the contrary, a review of the amicus briefs the Court cited in footnote 7 revealed that the Court "'just like the drafters of the TCPA,' used the common shorthand 'numbers' to mean 'telephone numbers.'" *Id.* at 1236.

The Eighth Circuit in *Beal* also rejected the footnote 7 argument. 29 F.4th at 396-97. As *Beal* explained, the footnote was not an indication that "autodialer" encompasses "systems that randomly select from non-random phone numbers." *Id.* at 396. "The hypothetical system considered by the [Supreme] Court was a system in which numbers were sequentially generated before being stored and later randomly selected." *Id.* (citations omitted). Moreover, the Eighth Circuit observed, this Court "was not suggesting, as Appellants argue, that the term 'produce' includes randomly selecting from a database of non-randomly collected phone numbers." *Id.* Such a reading "would conflict with the Court's overall conclusion that a system which merely stores and dials phone numbers is not an Autodialer." *Id.*

On this point, too, numerous district courts are in accord. *See*, *e.g.*, *Nealy v. Webbank*, 2022 U.S. Dist. LEXIS 239832, at *27-30 (N.D.N.Y. Sept. 6, 2022) (rejecting footnote 7 argument); *Mina v. Red Robin Int'l, Inc.*, No. 20-cv-00612-RM-NYM, 2022 U.S. Dist. LEXIS 104423, at *16-19 (D. Colo. June 10, 2022) (collecting cases rejecting the footnote 7 argument); *Cole v. Sierra Pac. Mortg. Co.*, No. 18-cv-01692-JCS, 2021 U.S. Dist. LEXIS 239792, at *8-9 (N.D. Cal. Dec. 15, 2021) (joining the "growing consensus" rejecting the footnote 7 argument); *LaGuardia*, 2021 U.S. Dist. LEXIS 170704, at *20 (following the "clear majority of courts" rejecting the footnote 7 argument, which relies on "dicta" that "addresses a hypothetical in an *amicus* brief"); *Tehrani*, 2021 U.S. Dist. LEXIS 165392, at *9-10, *18-20

(collecting cases and rejecting the footnote 7 argument); *Barry v. Ally Fin., Inc.*, No. 20-12378, 2021 U.S. Dist. LEXIS 129573, at *17-19 (E.D. Mich. July 13, 2021) (footnote 7 argument "takes footnote 7 out of context" and "conflicts with the Court's clear holding" in *Duguid*); *Timms v. USAA Fed. Sav. Bank*, 543 F. Supp. 3d 294, 300-01 (D.S.C. 2021) (rejecting footnote 7 argument).[5]

Pascal's footnote 7 argument provides no basis for this Court's review. Two circuits have rejected the argument and, with the district courts trending in that same direction, there is unlikely to be a meaningful divide on this point. The petition should be denied for this reason, too.

CONCLUSION

The Ninth Circuit's unpublished disposition provides no basis for certiorari review. Not only is it an inappropriate procedural conduit for this Court to examine the question presented, but its holding is wholly consistent with this Court's decision in *Duguid* and

[5] Pascal's supplemental brief identifies a Colorado district court's recent decision in *Scherrer v. FPT Operating Co.*, 2023 U.S. Dist. LEXIS 125390 (D. Colo. July 20, 2023), as supporting his footnote 7 argument. But a district court decision that swims against the prevailing tide does not create conflict worthy of this Court's resolution—especially when the decision does not even reflect the prevailing interpretation of footnote 7 in its own jurisdiction. *See Mina*, 2022 U.S. Dist. LEXIS 104423, at *17-18 (rejecting footnote 7 argument "because it ignores the context of the Supreme Court's statement").

caselaw from various circuits that have followed. The Court should deny the petition.

Dated: August 14, 2023

Respectfully submitted,

RAYMOND A. CARDOZO
Counsel of Record
rcardozo@reedsmith.com
DAVID J. DE JESUS
ddejesus@reedsmith.com
REED SMITH LLP
101 Second Street, Suite 1800
San Francisco, CA 94105-3659
Telephone: 415 543 8700
Facsimile: 415 391 8269

Counsel for Respondent Concentra, Inc.