

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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**REPLY BRIEF IN SUPPORT OF  
PETITION FOR WRIT OF CERTIORARI**

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**REPLY BRIEF IN SUPPORT OF  
PETITION FOR WRIT OF CERTIORARI**

**I. The Court Must Resolve the Split in Authority on the Statutory Interpretation of an ATDS**

Concentra considers the issue settled, but courts have diverged in their analysis and are still observing unresolved problems with the statutory definition of an automatic telephone dialing system.

The issue cannot be considered closed because courts across the country independently analyzing *Duguid* and the plain text of the TCPA are still coming to the same conclusion as Plaintiff that the statutory reference to “random or sequential number generator” does not refer only to the generation of telephone numbers. The concurring opinion in *Brickman* itself noted that the statutory interpretation of *Borden* was wrong. *See Brickman v. United States*, 56 F.4th 688, 691 (9th Cir. 2022) (“But I disagree with our precedent 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 Seventh Circuit in *Gadelhak*, the Third Circuit is also directly at odds with the Ninth Circuit on this issue. In *Panzarella v. Navient Solutions, Inc.*, 37 F.4th 867 (3d Cir. 2022), the Third Circuit reaffirmed *Duguid*’s statement that equipment qualifies as an automatic telephone dialing system under the TCPA either based on its capacity to randomly or sequentially produce telephone numbers or randomly or sequentially store them. *Panzarella* held: “[F]or a call to violate section 227(b)(1)(A), that

call must employ either an ATDS's capacity to use a random or sequential number generator to produce telephone numbers to be dialed or its capacity to use a random or sequential number generator to *store* telephone numbers to be dialed. *Id.* at 881 (emphases added). And *Panzarella* flatly rejected *Borden*, stating that, contrary to what *Borden* says, *Duguid* "does not stand for the proposition that a dialing system will constitute an ATDS only if it actually generates random or sequential numbers." 37 F.4th at 875.

Countless district courts have also interpreted *Duguid* contrary to the Ninth Circuit. A recent decision in Colorado recently pointed out that *Duguid* "does not conclusively resolve how that number generator must be used - whether it must be used to generate the phone number itself, or whether it may also be used for indexing and selecting phone numbers." *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) (internal citation omitted). The bifurcation of authority results from whether courts treat *Duguid*'s dicta in footnote 7 as persuasive. *Id.* at \*7 ("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.").

Indeed, courts have recognized that there is still a "live issue as to which there exists substantial disagreement among the federal courts" as to the "proper scope of the TCPA in light of *Facebook*[.]" *McEwen v. Nat'l Rifle Ass'n of Am.*, No. 2:20-cv-00153-LEW, 2022 U.S. Dist. LEXIS 102958, 2022 WL 2073354, at \*3 (D. Me. June 9, 2022), (granting certification of interlocutory appeal). "What the Supreme Court in *Facebook* did not do, however, is

indicate exactly which of the other three readings discussed by the Seventh Circuit, if any, is the correct one.” *Austria v. Alorica, Inc.*, 2021 U.S. Dist. LEXIS 240677, 2021 WL 5968404, at \*6 (C.D. Cal. Dec. 16, 2021) *See also 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 if it randomly dials numbers from a preproduced list”) (citing *Duguid*, 121 S. Ct. at 1172 n.7); *Anthony v. Pro Custom Solar*, No. ED CV20-01968 JAK (KKx), 2022 U.S. Dist. Lexis 231865 (C.D. Cal. Nov. 14, 2022) (“The allegations in the FAC provide sufficient support for the claim that Defendant used a random or sequential number generator in conjunction with its predictive dialer software to store or generate the telephone numbers of putative class members”); *Dawson v. Porch.com*, No. 2:20-CV00604-RSL, 2023 WL 3947831, at \*2 (W.D. Wash. June 11, 2023) (“contrary to the Ninth Circuit’s discussion in *Borden*, 532 F.4th at 1233, neither the statutory text nor the Supreme Court’s *Duguid* decision is wholly supportive of [Borden’s] interpretation of the TCPA...Borden’s holding that an ATDS ‘must generate and dial random or sequential telephone numbers’ may therefore be an overstatement.”); *Smith v. Vision Solar LLC*, No. CV 20-2185, 2023 U.S. Dist. LEXIS 44180, at \*6, 2023 WL 2539017, fn. 2 (E.D. Pa. Mar. 16, 2023) (denying summary judgment where expert testified that defendant’s equipment used a sequential number generator to load a list of phone numbers into memory and “again to call the list as well”); *Daschbach, et al. v. Rocket Mortg., LLC*, No. 22-CV-346-JL, 2023 U.S.

Dist. LEXIS 48139, 2023 WL 2599955 (D.N.H. Mar. 22, 2023) at fn. 34 (“The court also does not view Daschbach’s allegation in paragraph 9 that the autodialing system at issue had ‘the capacity to use a random or sequential number generator in the process of storing numbers from a pre-produced list for texting and calling at a later date’ as inconsistent with the Supreme Court’s holding in *Duguid* that ‘a necessary feature of an autodialer under § 227(a)(1)(A) is the capacity to use a random or sequential number generator to either store or produce phone numbers to be called.’”); *McEwen v. Nat’l Rifle Ass’n of Am.*, No. 2:20-CV-00153-LEW, 2021 WL 5999274 (D. Me. Dec. 20, 2021) at \*4 (“a device that calls phone numbers from a ‘preproduced list’ may still be an ATDS, so long as it ‘use[s] a random [or sequential] number generator to determine the order in which to pick’ the numbers from the list or otherwise stores the list of numbers using a random or sequential number generator...Plaintiff’s allegations, if true, describe just such a device.”) (citing *Duguid*, 121 S. Ct. at 1164, 1172 n.7); *Delgado v. Pro Custom Solar LLC*, NO. 1:21-CV-251-LY, 2021 U.S. Dist. LEXIS 224397, at \*6 (W.D. Tx Nov. 22, 2021) (a system that “has the capacity to dial numbers using a random or sequential number generator...is adequately alleged[.]”); *Callier v. Greensky, Inc.*, No. EP-20-CV-00304-KC, 2021 U.S. Dist. LEXIS 126769, at \*12-13 (W.D. Tex. May 10, 2021) (“[T]hat each agent asked to speak with ‘Armando’ suggests that Defendant did not use a random number generator to produce its call list...However, it is not unreasonable to infer from the pleadings that Defendant relied on a sequential number generator to place its calls.”); *Escano v. RCI LLC*, Civ. No. 22-360 DHU/GJF, 2022 U.S. Dist.

LEXIS 213384, 2022 WL 17251273 (D.N.M. Nov. 28, 2022) (“[I]t is plausible that Defendants used the alleged ATDS...to produce or store Plaintiff’s number in connection with their telemarketing efforts.”).

## **II. The Court Should Not Deny Substantive Review for Technical Reasons**

Concentra argues that the Ninth Circuit’s disposition of this case is not the “appropriate vehicle” to hear the issue. Concentra argues that summary dispositions are “shorthand explanations meant to apprise the parties of the basis for a decision.”

However, merely because summary dispositions are shorter than memorandum opinions does not dictate whether the Court should grant the petition. Concentra’s authorities merely point out that summary dispositions are not normally cited for precedential purposes. That is not the issue here. Of course, Petitioner had no say in the manner in which the Ninth Circuit decided this case. This argument effectively deprives Petitioner of the possibility of lawful review of this petition. It would deprive Petitioner of due process unless the Court treats the petition as challenging the Ninth Circuit’s summary disposition the same as it would if the appeals court adopted the exact reasoning of the lower court. This reasoning is still subject to challenge. *See Morse v. Republican Party of Va.*, 517 U.S. 186, 203 n.21, 116 S. Ct. 1186, 134 L. Ed. 2d 347 (1996) (“A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment.”).

Accordingly, the Court should not base its decision to grant or deny the petition based on that the

appellate Court issued a summary disposition. “A contrary approach would risk effectively immunizing summary dispositions by courts of appeals from our review, since it is rare that their basis for decision is entirely unambiguous.” *Stutson v. United States*, 516 U.S. 193, 196 (1996). And here the basis for the court of appeals’ summary decision is clear: it is *Borden*.

The same issues are in play in the cases underlying the Ninth Circuit’s summary disposition, including *Borden* and *Brickman*, which were both only very recently decided. As Plaintiff has pointed out, there is substantial divergence of opinion on the issue to be reviewed, such that Plaintiff must still be able to have a chance to challenge those cases. Indeed, the Court could decide to take this case simultaneously with *Brickman*.

### **III. Concentra Did Not Use a Customer List, but Instead Obtained Plaintiff’s Information from a Third Party**

Concentra argues that *Duguid* assigns liability where the preproduced list itself was randomly generated as opposed to a legitimate list of customers, but then falls short of meeting its own standard in showing that it dialed from a legitimately compiled list of customers. Concentra tries to imply that it used a properly pre-produced list of customers or people that had voluntarily provided their phone number, but this entirely contradicts the record. Neither Plaintiff, nor his wife ever provided their phone number, or had ever even heard of, Concentra or its parent company. Concentra claims Plaintiff’s wife applied for a job, but that is contradicted by declaration. 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 and his wife had no relationship with Concentra prior to the text message being sent. 2-ER-177. Accordingly, the preproduced list was not a customer list and was not a list of people who voluntarily sought to communicate with Concentra.

Accordingly, many courts holding that an ATDS could not be established did so on circumstances (not present here) where the plaintiff voluntarily provided his or her phone number to the defendant. *See Hufnus v. Donotpay, Inc.*, No. 20-0701, 2021 WL 2585488, at \*1-2 (N.D. Cal. June 24, 2021) ("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[.]"); *In re Portfolio Recovery Assocs., LLC, Tel. Consumer Prot. Act Litig.*, No. 11-md-02295 JAH-BGS, 2021 WL 5203299, at \*2-4 (S.D. Cal. 2021) ("plaintiff was called to collect on a debt he owed."); *Mehl v. Green*, No. 2:21-cv-01861, 2022 WL 4056269 (E.D. Cal. Sep. 2, 2022) ("Several courts have held that ...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."). In

contrast, Plaintiff never provided his phone number. Concentra acquired it from a third-party data aggregator, so it raises the valid concerns courts did not have to face in those cases.

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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