No. _____

In the
# Supreme Court of the United States

LUCINE TRIM, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

*Petitioner,*

v.

REWARD ZONE USA LLC; AND DOES 1-10 INCLUSIVE,

*Respondents.*

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

## PETITION FOR WRIT OF CERTIORARI


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## Questions Presented

The question presented is:

Does the plain language of the Telephone Consumer Protection Act's ("TCPA") definition of an Automatic Telephone Dialing System ("ATDS") at 47 U.S.C. § 227(a)(1), and this Court's holding in *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021), require a plaintiff to allege that telephone dialing equipment uses a number generator to generate the telephone numbers themselves, or does it merely require the use of a random or sequential number generator to store or produce telephone numbers to be called?

## Parties to the Proceeding

All parties to the proceedings in the District Court and the Ninth Circuit are contained in the Caption of this Petition.

## Related Proceedings

There are no proceedings in state or federal courts that are directly related to this case.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Lucine Trim respectfully petitions this Court for a writ of certiorari to review the judgment of the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals is unpublished but is available at 2023 WL 5043724. The opinion of the district court is also unpublished but is available at 2022 WL 886094.

## JURISDICTION

The judgment of the court of appeals was entered on August 8, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

This case involves the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.*, (hereinafter "TCPA") which is reprinted in full in the appendix as Appendix E, due to its length. The sections on which the lower courts based their opinions read:

> (a) Definitions
>
> As used in this section—
>
> (1) The term "automatic telephone dialing system" means 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.[1]

## STATEMENT OF THE CASE

### Legal Background

Speak with any technical expert, and they will agree that an ATDS is a piece of software, and that a "random number generator" and a "sequential number generator" are common coding tools used by software engineers to program software. But speak with a TCPA lawyer, and you will receive complicated answers about syntax, grammar, and statutory construction. This case involves calls which were placed by a software tool programmed using a sequential number generator to

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[1] Hereinafter, an "automatic telephone dialing system" as defined by 47 U.S.C. § 277(a)(1), shall be referred to as an "ATDS."

store telephone numbers, and subsequently produce those telephone numbers from storage to be called by the dialing application. The sequential number generator programming code allegedly used by the system in question is in the record. However, the Ninth Circuit ignored these facts and held such a system was not an ATDS, because an ATDS must self-generate the list of telephone numbers it dials. In doing so, the Ninth Circuit created a new piece of technology – the so-called "random or sequential *telephone* number generator." Such a ruling ignored the plain language of the statute, and this Court's directive in *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021). Moreover, an ATDS which self-generates the list of telephone numbers it dials has never existed nor been used in any of the robocalls Americans find so detestable.[2] Clarification and refinement of the legal test is needed.

Congress enacted the TCPA in 1991 to address a growing concern with the number of automated telemarketing calls consumers were receiving. The TCPA outlawed, among other things, non-consensual telemarketing calls placed using autodialers, defined as telephone equipment that utilized a random or sequential

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[2] It would also be pointless to draw such a legal distinction. A would-be privacy invader could simply self-generate a list of telephone numbers using a separate program, or take every telephone number in existence, load the data into a dialing platform, and then claim that the platform did not self-generate the telephone numbers and was therefore not an ATDS. It is a nonsensical distinction that invalidates the statute in its entirety, both from a textualist standpoint, as well as a policy standpoint.

number generator—programming tools used by software engineers to automate certain functions that would otherwise have to be manually performed by human hand.

For years following the TCPA's enactment, courts and regulators—confused by the technological aspects of automated telemarketing calls—have struggled to interpret the TCPA's definition of an ATDS codified at 47 U.S.C. § 227(a)(1)(A). Particularly vexing for courts is what Congress meant by defining an ATDS as equipment that has the capacity "to store or produce telephone numbers to be called, using a random or sequential number generator." *Id.* Initially, courts incorrectly applied the TCPA too broadly, even to calls placed without using a random or sequential number generator creating the slippery slope that ultimately resulted in the invalidation of the 2015 FCC Ruling interpreting ATDS by the D.C. Circuit. *ACA International v. Federal Communications Commission*, 885 F.3d 687, 703 (D.C. Cir. 2018).

From a common law standpoint, this culminated in *Marks v. Crunch San Diego, LLC*, where the Ninth Circuit overbroadly held that telephone equipment which could store telephone numbers and automatically dial them, without employing a random or sequential number generator, was an ATDS under the statute. 904 F.3d 1041, 1053 (9th Cir. 2018). The Ninth Circuit reached this holding by concluding that the phrase "using a random or sequential number generator" only modified the verb "produce" in the statute, because it was illogical to say that a number generator could store telephone numbers. *Id.* at 1050.

Several other circuits adopted the Ninth Circuit's reasoning, concluding that a number generator was incapable of storing telephone numbers.[3] *See Duran v. La Boom Disco, Inc.*, 955 F.3d 279 (2d Cir. 2020); *Allan v. Pa. Higher Educ. Assistance Agency*, 968 F.3d 567 (6th Cir. 2020). Thus, any equipment that had the capacity to store telephone numbers was an ATDS, regardless of that equipment's use of number generators. This flawed reasoning stemmed from a fundamental misunderstanding of the use of number generators, the result being to excise critical language from the statute.

This Court corrected the error in *Facebook, Inc. v. Duguid*. Rejecting *Marks*'s interpretation of the statute, this Court held that the phrase "using a random or sequential number generator" modified both "store" and "produce" in 47 U.S.C. § 227(a)(1)(A). 141 S. Ct. at 1167. This Court further attempted to clarify the technological confusion that had caused these erroneous rulings in the lower courts, stating:

> 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 less odd as a technical matter . . . as early as 1988, the U.S. Patent and Trademark Office issued

[3] The problem with these holdings is that they are untrue. In programming terminology, the tool is referred to as a "parser" and in the case of the system alleged to have called Petitioner, a sequential number generator was used to parse the list of consumer telephone numbers, and store them in a database, to later be produced from the database and dialed using another number generator.

> patents for devices that used a random number generator to store numbers to be called later . . . 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 (internal citations and quotations omitted). Thus, as this Court explained in *Facebook*, equipment qualifies as an ATDS only if it uses some form of number generation in its programming code to either store or produce the telephone numbers to be called. *Id.* at 1167. In fact, the very code that is in the record of Petitioner's third amended complaint as allegedly used to place calls to her telephone without prior express consent, does exactly what this Court described in footnote seven of *Facebook*.

Despite this clarification, and the plain language of the statute, federal courts have continued to struggle with interpreting the definition of an ATDS. In the years following this Court's decision in *Facebook*, two Circuits have addressed the issue. These opinions offer conflicting accounts of *Facebook*'s interpretation of the definition of an ATDS, and have created even more confusion and uncertainty among district courts across the country.

The Third Circuit, in *Panzarella v. Navient Solutions, Inc.*, stated that "*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 867, 875 (3d Cir. 2022). Confusingly, the Third Circuit went on to comment in dicta, citing to

its prior opinion in *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3d Cir. 2018), that the defining feature of an ATDS is its ability to generate telephone numbers on its own. *See Panzarella*, 37 F.4th at 881. Seemingly contradicting itself, the Third Circuit then declared that an ATDS is equipment that has the "capacity to use a random or sequential number generator to produce telephone numbers to be dialed or . . . to use a random or sequential number generator to store telephone numbers to be dialed." *Id.*

District courts in the Third Circuit have been left to unravel the court's holding in *Panzarella*, resulting in conflicting interpretations of the definition of an ATDS, and inconsistent outcomes. *Compare Perrong v. Bradford*, No. 2:23-cv-00510-JDW, 2023 WL 6119281, at *3–4 (E.D. Pa. Sept. 18, 2023) (granting a motion to dismiss holding that an ATDS must randomly or sequentially generate the telephone numbers called); with *Smith v. Vision Solar LLC*, No. 20-2185, 2023 WL 2539017, at *2 (E.D. Pa. Mar. 16, 2023) (finding a genuine issue of material fact existed because plaintiff's expert testified that the equipment at issue used a number generator to pull/produce numbers from a prepopulated list).

Five months after the Third Circuit issued its opinion in *Panzarella*, the Ninth Circuit directly addressed the issue in *Borden v. eFinancial, LLC*, 53 F.4th 1230 (9th Cir. 2022). In *Borden*, the plaintiff alleged that the defendant's equipment used a number generator to determine the order in which telephone calls would be automatically placed. *Id.* at 1234.[4] The Ninth Circuit

[4] Borden was describing a parser - programming code that relies on number generators to assist in categorizing and

affirmed a dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6), holding that "[t]he TCPA requires that an autodialer randomly or sequentially generate *telephone* numbers, not just any numbers." *Id.* at 1233 (emphasis in original). The Ninth Circuit cited to *Facebook* as support for its holding, and ultimately affirmed the district court's dismissal because the plaintiff had not alleged that the defendant's equipment generated telephone numbers on its own. *See Id.* at 1231, 1234.

*Borden* has only thrown fuel on the fire of confusion in district courts across the country. What qualifies as an ATDS differs significantly from district to district. *Compare DeMesa v. Treasure Island, LLC*, No. 218CV02007JADNJK, 2022 WL 1813858, at *2 (D. Nev. June 1, 2022) (a plaintiff is required to allege that equipment generated the telephone number itself to be an ATDS); *Franklin v. Hollis Cobb Assocs., Inc.*, No. 1:21-cv-02075-SDG, 2022 WL 4587849, at *3 (N.D. Ga. Sept. 29, 2022) (equipment was held not to be an ATDS because it did not generate telephone numbers on its own); and *Cross v. State Farm Mut. Auto. Ins. Co.*, No. 1:20-cv-01047, 2022 WL 193016, at *8 (W.D. Ark. Jan. 20, 2022) (equipment that produces a set of telephone numbers

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storing data, such as telephone numbers, in a database for future access. However, Borden had not reviewed nor was familiar with the programming source code for the dialer, as Trim has done, and therefore failed to present actual evidence of the use of a random or sequential number generator. This failure to adequately explain the technology led to the Ninth Circuit's self-proclaimed "confusion sandwich."

from a preexisting list is not an ATDS); *with Daschbach v. Rocket Mortg., LLC*, No. 22-cv-346JL, 2023 WL 2599955, at *11 n.34 (D.N.H. Mar. 22, 2023) (using a number generator to store numbers from a pre-produced list is consistent with *Facebook*); and *McEwen v. Nat'l Rifle Ass'n of Am.*, No. 2:20-cv-00153-LEW, 2021 WL 5999274, at *4 (D. Me. Dec. 20, 2021) (a device that calls numbers from a preproduced list may be an ATDS under *Facebook*).

At least one district court in the Ninth Circuit has gone so far as to question whether the Ninth Circuit's interpretation of *Facebook* and 47 U.S.C. § 227(a)(1)(A) is accurate. *See Dawson v. Porch.com*, No. 2:20-cv-00604-RSL, 2023 WL 3947831, at *2 (W.D. Wash. June 11, 2023) ("*Borden*'s holding that an ATDS 'must generate and dial random or sequential telephone numbers' may therefore be an overstatement."). Judge Vandyke, in a scathing Ninth Circuit concurrence, agreed stating "[t]he fundamental interpretative assumption underlying the *Borden* decision is just wrong." *Brickman v. United States*, 56 F.4th 688, 691–693 (9th Cir. 2022) (Vandyke, J., concurring).

Nevertheless, as Judge Vandyke recognized, *Borden* is controlling law in the Ninth Circuit. *Id.* at 691. The damage has been done—*Borden* has already foreclosed many TCPA cases. *See, e.g., id.* at 690–691; *Dawson*, 2023 WL 3947831, at *2; *Davis v. Rockloans Marketplace, LLC*, No. 23cv0134 DMS, 2023 WL 6378067, at *2 (S.D. Cal. Sept. 28, 2023); *Weisbein v. Allergan, Inc.*, No. 8:20-cv-00801-SSS-ADSx, 2022 WL 18213531, at *2–3 (C.D. Cal. Dec. 2, 2022).

The flawed reasoning of the Third and Ninth Circuits ultimately stems from a fundamental misunderstanding of the inclusion of number generators as a required element of an ATDS. Simply put, a "random or sequential number generator" as statutory text refers to two distinct possible pieces of software code – a random number generator, or a sequential number generator. Once these terms are understood as existing tools, instead of a string of four separate independent words, courts can better define the plain language with the assistance of technical dictionaries and the plain meaning of the statute becomes clear. As an illustration, one can imagine a statute concerning automobiles including the term "manual transmission" in the plain language of the text. It would be perplexing for a court to view the words "manual" and "transmission" as separate terms, consult dictionaries and grammarians, and conclude that the statute concerned the sending of parcel mail via carrier pigeon. Auto mechanics and legislatures would be confounded by such a ruling.

In large part, the coincidental codification of existing technology (the random or sequential number generator) including the word "number" in close proximity to a wholly unrelated use of the term "telephone number" in 47 U.S.C. § 227(a)(1) has led to extraordinary confusion of courts and to the invention of the so-called "random or sequential *telephone* number generator." However, when the concept of a "number generator" is decoupled from the separate notion of a "telephone number" and these concepts are understood as two different things, with a "number generator" being an existing and widely used tool of software engineers (like a manual transmission is understood by auto

enthusiasts), the confusion subsides, and the errors of courts become clear. Only the Supreme Court can disentangle this web.

**Case History**

On January 31, 2020, Trim filed her class action Complaint for violations of the TCPA in the United States District Court for the Central District of California. D. Ct. Dkt. 1. Trim filed First and Second Amended Complaints on April 20, 2020, and June 9, 2020, respectively. D. Ct. Dkt. 14; D. Ct. Dkt. 19. Then, on September 16, 2020, the District Court stayed the case pending this Court's decision in *Facebook*. D. Ct. Dkt. 26.

Following this Court's decision in *Facebook*, the District Court lifted the stay and granted Trim leave to file a third amended complaint on November 15, 2021. D. Ct. Dkt. 32. Trim's Third Amended Complaint was filed the same day. Pet. App. 59.

Trim's allegations in her Third Amended Complaint[5] were that she received solicitation text messages that were blasted out *en masse* using an SMS blaster, which is a traditional campaign-based dialing platform capable of automatically sending thousands of text messages to thousands of people through preprogrammed campaigns, which rely on random or sequential number generators to operate. *Id.* at 64–67. Trim alleged that Reward Zone obtained consumer contact information through improper means, without consent of consumers, and thereafter blasted out

[5] Trim's Third Amended Complaint is reprinted in the Appendix as Appendix F. It is Document number 33 on the District Court's Docket.

thousands of intrusive messages to these consumers' cellular telephones without consent. *Id.*

Trim alleged that the SMS blaster was programmed with source code that utilized a sequential number generator to both store and produce the telephone numbers that the system called. *Id.* at 65–67. Trim included source code from an SMS blaster and predictive dialer that operated identically to the system used by Reward Zone, to illustrate how the number generator was used to assist in the storage of telephone numbers, the production of telephone numbers, and the dialing of telephone numbers. *Id.* Trim's inclusion of source code which contains a sequential number generator demystifies how an ATDS functions and illustrates what the statutory text describes. This Court required litigants post-*Facebook* to point to the random or sequential number generator. That is exactly what Trim did.

Reward Zone filed its Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) on December 1, 2021. D. Ct. Dkt. 34. Reward Zone's primary argument regarding Trim's ATDS allegations was that Trim failed to allege that it had used an ATDS because she did not allege that Reward Zone's dialing equipment randomly or sequentially generated the telephone numbers themselves. *Id.* at 25–26. After full briefing, the District Court granted Reward Zone's motion to dismiss on January 28, 2022. Pet. App. 3.

Judge Wilson's written order acknowledged that this Court did not directly answer the issue before him in *Facebook*. *Id.* at 8. However, Judge Wilson, relying on an opinion from the Central District of California,

nonetheless concluded that equipment qualifies as an ATDS only if it randomly or sequentially generates telephone numbers. *Id.* at 9–11.

Trim appealed on May 20, 2022. D. Ct. Dkt. 53. While Trim's appeal was pending, the Ninth Circuit issued its opinion in *Borden*. Following its issuance of the *Borden* opinion, the Ninth Circuit affirmed Judge Wilson's ruling in a two-page memorandum opinion on August 8, 2023. Pet. App. 1. The Ninth Circuit rejected Trim's appeal, simply stating that its decision in *Borden* under the Law of the Circuit doctrine foreclosed her arguments. *Id.* at 2. No legal or factual analysis took place despite Trim's allegation of specific sequential number generator source code that was programmed into the dialing platform to store and produce her telephone number to be called by Reward Zone without her consent.

## REASON FOR GRANTING THE WRIT

After this Court's opinion in *Facebook*, a plethora of courts have attempted to interpret the definition of an ATDS in the context of *Facebook*'s holding. The result has been nothing short of a mess. Across the country, courts have come to different conclusions from interpreting the same law. Many of those conclusions would eviscerate the TCPA's autodialer provisions, rendering them inapt because there is no such thing as a "random or sequential *telephone* number generator." Such holdings by courts ignore the unambiguous technical meaning of the plain language Congress employed in drafting the TCPA. Many of those conclusions—including the Ninth Circuit's *Borden*

opinion—are contrary to *Facebook*. This Court should grant certiorari to resolve these issues.

Trim's case presents the perfect opportunity to do so. The judgment below comes from a motion to dismiss, and thus involves no factual findings, no disputes of fact, no procedural issues, and no jurisdictional issues. The questions presented are purely legal questions of statutory interpretation. Moreover, Trim provides detailed factual allegations in her complaint about how the autodialer software was programmed with number generators, including the very computer code which gives rise to her allegations that a sequential number generator was used to store and produce telephone numbers to be called. Such a rich and detailed record creates an ideal backdrop for this Court to answer contested questions about the definition of an ATDS once and for all and put an end to a question that has plagued courts, attorneys, regulators, companies and consumers for decades.

## I. Differing Interpretations of 47 U.S.C. § 227(a)(1)(A) by Circuit Courts of Appeals and District Courts Have Created a Confusing Split of Authority

The varying interpretations of 47 U.S.C. § 227(a)(1)(A) have confused judges, muddied the legal standards, and created chaos for plaintiffs and defendants alike. As the law currently stands, whether the allegations in Trim's Third Amended Complaint are sufficient to survive a motion to dismiss depends purely on the Circuit in which she files her case, and the judge assigned to her case. In the Eastern District of

Pennsylvania, for example, Judge Baylson issued multiple rulings in *Smith v. Vision Solar LLC*, No. 20-2185, 2023 WL 2539017 (E.D. Pa. Mar. 16, 2023)[6] which suggest that he would have ruled in Trim's favor on this issue.

*Smith* concerned automated telemarketing calls allegedly made in violation of the TCPA's ATDS provisions, just like Trim's case. *See id.* at *1. The *Smith* plaintiffs' first amended complaint contained only a bare assertion that the defendant had used an ATDS to place the telemarketing calls at issue. *Smith v. Vision Solar LLC*, No. 20-2185, 2020 WL 5632653, at *3 (E.D. Pa. Sept. 21, 2020) (granting defendant's motion to dismiss). As a result, Judge Baylson dismissed the complaint and permitted Plaintiffs to file a further amendment to address the deficiencies. *Id.* at *4.

The plaintiffs' second amended complaint contained allegations simply that the plaintiffs "observed a noticeable pause and delay before the agent representative came on the line. . ." *Smith v. Vision Solar LLC*, No. 20-2185, 2020 WL 7230975, at *1 (E.D. Pa. Dec. 8, 2020) (internal quotations omitted) (denying defendant's motion to dismiss). The second amended complaint contained no allegations that the defendant's equipment used a number generator, no allegations about the functionality of the defendant's equipment, and no allegations that defendant's equipment generated telephone numbers itself.[7] *See id.* The defendant, thus,

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[6] *Smith* was also litigated by the Law Offices of Todd M. Friedman, P.C., counsel for Petitioner.

[7] It should be pointed out, however, that a pause at the beginning of a call signifies use of a predictive dialer, and

moved to dismiss arguing that the plaintiffs had failed to allege facts sufficient to show that it had utilized an ATDS in placing telemarketing calls. *Id.* at *4. Judge Baylson denied the defendant's motion holding that these simple allegations were sufficient "[f]or Rule 12 purposes". *Id.*

In comparison, Trim has alleged—in great detail—how the equipment Reward Zone utilized functioned. Trim's third amended complaint alleges:

> The texting platform [used by Reward Zone] uses an algorithm whereby a random or sequential dialing formula, selects which number to dial from the stored list of numbers, and sequences those numbers in order to automatically dial the numbers and send ou[t] text messages en masse. Thus, a random or sequential number generator is used both to store the numbers, and to produce the stored numbers from the list, via the campaign, to the dialing platform itself.

Pet. App. 65. The third amended complaint goes on to analyze the source code of autodailers alleged to function the same as Reward Zone's, concluding:

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predictive dialers almost universally use random or sequential number generators to assist in the storage and production of telephone numbers during dialing campaigns. Evidence obtained in discovery in the case later revealed that a predictive dialer was being used, so these allegations proved accurate upon investigation.

> These lines of code . . . represent an operator token that generates sequential numbers as part of a loop. This loop is used to select which number from the CSV file[] will be dialed, and produce that number to the dialer using a CSV parser . . . The program cannot function, and therefore cannot dial any phone numbers at all, without this sequential number generator.

*Id.* at ¶ 65–66. If Judge Baylson concluded that the *Smith* plaintiffs' allegations—which contained no allegations about how the defendant's equipment used number generators—were sufficient to survive the pleadings stage, he certainly would have been inclined to conclude that Trim's extensive allegations were as well.

Judge Baylson was again confronted with this issue at the class certification stage, where he asked the parties for supplemental briefing specifically addressing the issue of whether the equipment utilized by defendant was an ATDS. *Smith*, 2023 WL 2539017, at *2. The plaintiffs put on evidence that the equipment had the capacity to use a random or sequential number generator to "load the list [of telephone numbers] into . . . memory," and to "call the list [of telephone numbers] as well." *Id.* at *2 n.2. Thus, the defendant's equipment did not generate telephone numbers itself, but instead utilized number generators to store a preproduced list of telephone numbers in memory and then call up those telephone numbers to be dialed. *See id.* The defendant put on evidence to the contrary, suggesting that its equipment did not utilize number generators at all. *Id.*

Judge Baylson concluded that a genuine issue of material fact existed as to whether the defendant had used an ATDS. *Id.* at *2. More specifically, the disputed issue was whether the equipment utilized by the defendant relied upon number generators as described above. *Id.* Importantly, Judge Baylson's conclusion was based on the fact that an ATDS uses a number generator to produce or store telephone numbers—not just to generate the telephone numbers themselves. *See id.*

The evidence presented by the *Smith* plaintiffs mirrors the allegations in Trim's third amended complaint. Judge Baylson's ruling suggests that this evidence is sufficient for a jury to determine whether an ATDS was used. Certainly, he would deem Trim's allegations sufficient to survive a Rule 12(b)(6) motion.

Judge Baylson is not an outlier. Dozens of judges have penned orders concluding that an ATDS does not have to self-generate the list of telephone numbers it dials. *See, e.g., Montanez v. Future Vision Brain Bank, LLC*, 536 F.Supp.3d 828, 837–838 (D. Colo. 2021) (allegations that equipment uses a sequential number generator to dial numbers in a sequential order are sufficient to survive a motion to dismiss); *Atkinson v. Pro Custom Solar LCC*, No. SA-21-cv-178-OLG, 2021 WL 2669558, at *1 (W.D. Tex. June 16, 2021) (allegations survive pleadings where plaintiff alleges the use of a random or sequential number generator to determine dial sequence); *MacDonald v. Brian Gubernikc PLLC*, No. CV-20-00138-PHX-SMB, 2021 WL 5203107, at *2 (D. Az. Nov. 9, 2021) (same); *Daschbach v. Rocket Mortg., LLC*, No. 22-cv-346-JL, 2023 WL 2599955, at *11 n.34 (D.N.H. Mar. 22, 2023); *McEwen v. Nat'l Rifle Ass'n of Am.,* No. 2:20-cv-00153-LEW, 2021 WL 5999274, at *4 (D. Me. Dec.

20, 2021); *Timms v. USAA Federal Savings Bank*, 543 F.Supp.3d 294, 299–302 (D.S.C. 2021) (evidence that equipment uses a random or sequential number generator to determine the order in which calls are placed may be sufficient to survive a motion for summary judgment); *Bank v. Digital Media Solutions, Inc.* Case No. 22-cv-293, 2023 WL 1766210 (E.D.N.Y. Feb. 3, 2023) (rejecting the concept of a random telephone number generator, and declining to adopt a standard for ATDS which requires telephone number generation); *Salaiz v. Beyond Finance*, 2023 WL 6053742 (W.D. Tex. Sept. 18, 2023) (denying a motion to dismiss based on ATDS allegations and noting that beeps, dead air time, generic messages, and spoofed telephone numbers can give rise to an ATDS inference, which implies that predictive dialers and SMS blasters, like the one Petitioner was called by and which do almost universally use random or sequential number generators in their programming code, are an ATDS).[8]

Had Trim's third amended complaint been before any of these judges in these courts, it likely would have survived a motion to dismiss, and been permitted in some instances to proceed to trial. But Trim—through no fault of her own—had the misfortune of bringing her claims in the Ninth Circuit, where *Borden*'s interpretation that an

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[8] In *Salaiz* the Court arrives at the correct conclusion, without articulating the connection between observable phenomena such as beep tones, dead air time and abandoned calls and how such phenomena indicate that the call is being placed by a computer system that is relying on random or sequential number generators to store and/or produce telephone numbers to be called.

ATDS must self-generate telephone numbers controls. In fairness, several other courts likely would have dismissed Trim's third amended complaint as well. *See, e.g., DeMesa v. Treasure Island, LLC*, No. 218CV02007JADNJK, 2023 WL 1813858, at *2 (D. Nev. June 1, 2022) (plaintiff must allege that the equipment generated the telephone number that was called to survive a motion to dismiss); *Franklin v. Hollis cobb Assocs., Inc.,* No. 1:21-cv-02075-SDG, 2022 WL 4587849, at *3 (N.D. Ga. Sept. 29, 2022) (same); *Cross v. State Farm Mut. Auto. Ins. Co.*, No. 1:20-cv-01047, 2022 WL 193016, at *8 (W.D. Ark. Jan. 20, 2022); *Davis v. Rockloand Marketplace, LLC*, No. 23cv0134 DMS (BLM), 2023 WL 6378067, at *2 (S.D. Cal. Sept. 28, 2023). This further highlights an emerging split.

Trim's case illustrates how the lower courts are starkly divided. Cases with similar facts reach different outcomes solely because of the court that is hearing the case. Most circuits have yet to address this question, leaving district courts across the country to grapple with this issue themselves and resulting in conflicting rulings and uncertainty for litigants. The TCPA is not being applied consistently or uniformly. This Court can and should resolve the issue. Trim's case is the ideal vehicle to do so, because unlike almost all other litigants, she can point to the sequential number generator that gives rise to her allegations. This Court should grant Trim's Petition.

## II. The Definition of an ATDS is an Important Developing Question of Law that This Court Has Not Fully Addressed

As this Court recognized in *Barr v. American Association of Political Consultants, Inc.*, 140 S.Ct. 2335 (2020), "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." *Id.* at 2343.

The TCPA is such an important, and oft-litigated statute, that this Court for the first time ever in *Barr*, severed an unconstitutional provision of a statute that otherwise would have been struck down on First Amendment grounds. This Court followed up by issuing *Facebook* the following year, defining an ATDS under the TCPA. Since *Facebook*, there have been three Circuit-level opinions further defining ATDS. More will come.[9] This is inevitable, because Americans continue to be bombarded by robodialers, and litigation will continue until the issues in this case are put to rest.

How an ATDS is defined is a question that has seen a great deal of interpretation and litigation in the thirty years of the statute. There are four FCC Orders defining the statute. The Ninth Circuit alone has issued four decisions on the question in the past four years. Other Circuits have weighed in. The D.C. Circuit addressed

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[9] Counsel for Petitioner are litigating one such case before the Second Circuit. *Soliman v. Subway Franchise Advertising Fund Trust, Ltd.* Case No. 22-1726.

the issue as well. In referring to whether an ATDS must self-generate telephone numbers, the D.C. Circuit observed that "[t]he choice between the interpretations is not without practical significance." *ACA International v. Federal Communications Commission*, 885 F.3d 687, 703 (D.C. Cir. 2018). That practical significance is straightforward—there is no such thing as an ATDS if the Ninth Circuit's holding in *Borden* is correct. On the other hand, if Petitioner's view is correct, only the most invasive types of telephone calls—calls which are blasted out thousands at a time by unmanned computers with no person on the other end of the line, i.e. predictive dialer and SMS blasted communications, would qualify as an ATDS. And even amongst these calls, only those made without consent are unlawful. Virtually every American has received such telephone calls. Most receive them daily. With so much litigation, involving so many companies, the FCC, and affecting every American's privacy rights, the definition of ATDS is clearly a question of great legal significance.

The implications of the Ninth Circuit's definition of an ATDS in *Borden* are wide sweeping. *Borden* effectively writes the ATDS provisions out of the TCPA. This is because neither autodialers today, nor in 1991, use number generators to self-generate the lists of telephone numbers they dial. Statutory history shows us that the major target of the ATDS language was predictive dialers, which operate identically to the system used to dial Trim, and which use number generators to automatically dial lists of telephone numbers using campaigns. The so-called "random or sequential *telephone* number generator" system has not been used since the 1960s—decades before the TCPA was enacted.

The deluge of robocalls received by consumers every year will only increase under *Borden*'s formulation of an ATDS.[10] More importantly, Americans will be left with no legal recourse for the violation of their privacy rights because no autodialer in use today would qualify as an ATDS under *Borden*. Such a result cannot possibly be what Congress intended for the TCPA.

Billions of automated campaign-based telemarketing calls and text messages are placed every year. Autodialing technology enables companies to place thousands of calls with the click of a single button. Congress sought to regulate this technology with the TCPA, but the extent to which that technology informs our understanding of the TCPA is unclear. However, random and sequential number generators are well-understood tools used by computer programmers. The words "random or sequential number generator" have a specific, technical meaning. Whether Congress intended to adopt that technical meaning when it used those words in the TCPA is an extremely important question that this

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[10] For illustration, we have all received a call from a foreign call center which we pick up, say hello, hear nobody on the other end, and then hear a "bloop" sound effect before being greeted by a live human being. That is a predictive dialer, and the system uses number generators to send out those calls so that they can call more people with fewer agents. The FCC has regulated such systems for years, including the percentage of abandoned calls permitted. Those regulations are all invalid if predictive dialers are not an ATDS, which they would not be under *Borden*. This is strange because most Americans think of the call just described as a robocall.

Court has not answered. Moreover, if the answer to that question is "yes," then *Borden* was wrongly decided.

Deciding this issue will determine the extent to which telemarketers will continue to be regulated by the TCPA and will directly affect the number of robocalls that consumers receive every year. It will also determine the fate of one of—if not the—most litigated consumer protection law in the federal courts, vastly reducing the amount of litigation and discourse no matter the outcome.

The definition of an ATDS adopted by *Borden* would constitute an upheaval of decades of jurisprudence and regulation. The FCC has applied the TCPA's ATDS provisions to predictive dialers—which mass-dial telephone numbers from stored lists using number generators—nearly since the TCPA's inception. *See* 7 FCC Rcd. 8752, 8776 (1992). Under *Borden*, the FCC can no longer do so. Telemarketers, consumers, government regulators, and the federal courts will all benefit from a consistent standard. This Court should grant Trim's petition and provide the answer to this extraordinarily important question.

## III. *Borden*'s Holding Conflicts with This Court's Decision in *Facebook*, As Well As the Plain Text of the TCPA and Its Legislative History

In *Facebook*, this Court refined the definition of an ATDS, reigning in courts that had applied the TCPA too broadly. *Facebook* did three things. First, *Facebook* struck down the Ninth Circuit's decision in *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018), which required only that an ATDS have the capacity to store and automatically dial telephone numbers,

effectively eliminating the requirement of random or sequential number generators. *See Facebook*, 141 S. Ct. at 1170. Second, *Facebook* made it clear that an ATDS must have the capacity to either store or produce telephone numbers to be called, using a random or sequential number generator. *Id.* at 1173 (emphasis added). And third, *Facebook* explained how a system might store telephone numbers using a number generator. *Id.* at 1172 n. 7:

> [A]s 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 . . . 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.* (emphasis added). This is exactly what Trim alleged in her third amended complaint—that Reward Zone's autodialer platform used a sequential number generator to store telephone numbers, and then used a random or sequential number generator to produce telephone numbers from that stored list and determine the order in which they would be dialed. *See* Pet. App. 65. The district court nonetheless dismissed her complaint. Pet. App. 3.

The Ninth Circuit summarily dismissed Trim's appeal without any analysis, concluding that *Borden* foreclosed her arguments. Pet. App. 2. But *Borden*'s holding—that an ATDS must randomly or sequentially generate telephone numbers—is plainly contrary to this Court's holding in *Facebook*. *Borden*'s telephone number

generation requirement ignores the storage aspect of *Facebook*, excising half of this Court's disjunctive test derived from the plain language of the statute. The test for an ATDS is whether the equipment can store or produce telephone numbers using a number generator. *Borden* limits the definition further only to equipment that can create telephone numbers using a number generator.

In fact, a system that operates exactly as described by Justice Sotomayor in *Facebook's* footnote seven would not be an ATDS under *Borden*. The system described in footnote seven uses a number generator to determine the order in which to dial telephone numbers from a preexisting list. *Borden* would hold that this system is not an ATDS—despite this Court holding that it is—because such a system does not create telephone numbers itself using a random or sequential *telephone* number generator. *Borden*—and the Ninth Circuits reliance on it in denying Trim's appeal—simply cannot be squared with *Facebook*.

Judges within the Ninth Circuit have recognized this inconsistency. Judge Vandyke, in a concurring opinion issued only weeks after *Borden*, stated "[i]nstead of following the logic of *Duguid*, our court in *Borden* strays from *Duguid*'s rationale by effectively waving away footnote 7 as ancillary rather than crucial to *Duguid*'s analysis." *Brickman v. United States*, 56 F.4th 688, 692 (9th Cir. 2022) (Vandyke, J., concurring). Judge Vandyke was bound to follow *Borden*, but vehemently disagreed with it as inconsistent with this Court's precedent. *Id.* ("the *Borden* decision is just wrong."). Judge Lasnik in the Western District of Washington similarly stated:

> contrary to the Ninth Circuit's discussion in *Borden*, neither the statutory text nor the Supreme Court's *Duguid* decision is wholly supportive of [its] interpretation of the TCPA. The statute defines an ATDS as equipment which uses a random or sequential number generator to store or produce telephone numbers. Production of a telephone number is not, therefore, the sine qua non of an ATDS: storage of telephone numbers using a random or sequential number generator would also suffice. *Duguid* acknowledges 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 goes on to explain that patents for such devices have been granted since 1988. 141 S. Ct. at 1171-72. The Supreme Court suggested in a footnote that "an autodialer might use a random number generator to determine the order in which to pick phone numbers from a preproduced list" and "then store those numbers to be dialed at a later time." Id. at 1172 n.7. Borden's holding that an ATDS "must generate and dial random or sequential telephone numbers" may therefore be an overstatement.

*Dawson*, 2023 WL 3947831, at *2. It is rare to see a district court being so openly critical of a Circuit Court's binding decision, but this is not so unexpected given that *Borden* is inconsistent with this Court's precedent.

Nor can *Borden* be squared with the plain language of the statute. The TCPA defines an ATDS as "equipment that has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator . . ." 47 U.S.C. 227(a)(1). For *Borden* to be consistent with this statutory provision the statute would have to be modified such that the definition of an ATDS was "equipment that has the capacity—(A) to create telephone numbers to be called, using a random or sequential telephone number generator . . ." The statute simply does not say this. Neither does this Court's *Facebook* decision.

*Borden* can best be described as a complete misunderstanding of the technology used for mass telemarketing. Technical terms in statutes should be given their technical meaning. *Van Buren v. United States*, 141 S. Ct. 1648, 1657 (2021). The Ninth Circuit did not do that in *Borden*. Random and sequential number generators are well-understood tools utilized by software engineers. The TCPA should be read consistent with the technical application of those tools. Instead, *Borden* disregards the technical meaning of the words and interprets the TCPA as requiring a random or sequential *telephone* number generator—something that does not exist.

Judge Vandyke's concurrence recognized this, stating:

> *Borden*'s analysis overlooks that the phrase 'random or sequential number generator' has a known meaning as a computation tool . . . a random (or sequential) number generator is a term of art referring to a

> particular type of computation tool that can be used to generate all types of different numbers.

*Brickman,* 56 F.4th at 691 (9th Cir.) (Vandyke, J., concurring).

Congress was aware of this technical meaning when it enacted the TCPA. In fact, it was told what the words it used meant. *See Telemarketing Practices: Hearing Before the Subcomm. On Telecomms. & Fin. Of the H. Comm. On Energy & Commerce on H.R. 628, H.R. 2131, & H.R. 2184*, 101st Cong. 111 (1991) (statement of Tracy Mullen, Senior Vice President, Government Affairs, National Retail Merchants Association) (The use of the term "sequential number generator . . . could be interpreted to cover machines that are programmed to dial, on a sequential basis, designated groups of customers (e.g., all numbers on a 'prescreened' list)"). Clearly, Congress intended the words it used in the TCPA to take on the technical meaning they have.

The FCC similarly recognized Congress's intent to regulate autodialers that did not generate the telephone numbers themselves. In its 2003 order regarding predictive dialers, the FCC stated:

> [t]he legislative history . . . suggests that through the TCPA, Congress was attempting to alleviate a particular problem—an increased number of automated and prerecorded calls to certain categories of numbers . . . Therefore to exclude from these restrictions equipment that use predictive dialing software from the definition of [an ATDS] simply because it

> relies on a given set of [telephone] numbers would lead to an unintended result.

18 FCC Rcd. 14014, 14091–14132 (2003) (emphasis added). *Borden*'s holding is directly to the contrary.[11]

The Ninth Circuit, and courts around the country, have eviscerated the TCPA's autodialer provisions by limiting its application to technology that hasn't been used since well before the TCPA was enacted. This is plainly contrary to this Court's ruling in *Facebook*, the plain text of the TCPA, congressional intent, and common sense. The only way to correct these errors is for this Court to intervene and provide guidance. This Court should grant certiorari.

## CONCLUSION

Trim's case presents a unique opportunity for this Court to answer a question of statutory interpretation that has divided the lower courts and risks rendering one of this country's most significant consumer privacy laws obsolete. Trim has alleged, in extreme detail, how the

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[11] Respected defense-side attorney Eric Troutman agrees that *Borden* was wrongly decided. Mr. Troutman, who is known as the Czar of the TCPA operates a premier legal blog on all matters TCPA related - www.tcpaworld.com. TCPW World is the closest thing the legal community has to a legal treatise on the statute.

*See* https://tcpaworld.com/2022/11/18/tcpaworld-after-dark-why-the-ninth-circuits-borden-ruling-might-be-the-biggest-tcpa-trap-of-all-time/.

autodailer at issue here utilized number generators to store and produce telephone numbers to be called, exactly what this Court held to be the standard just two years ago. Despite that, the courts below—relying on an erroneous interpretation of the TCPA—held that she has not pled facts sufficient to state a claim. Trim's allegations present the ideal factual backdrop, mirroring Justice Sotomayor's example in *Facebook*, for this Court to answer this straightforward question of law and put this oft-litigated issue to rest.

Trim respectfully requests that this Court grant her petition for a writ of certiorari.

Respectfully submitted,

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