No. 21-16785

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COLIN R. BRICKMAN, individually and on behalf of a class of similarly situated individuals,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Intervenor-Appellee,

META PLATFORMS, INC.,

Defendant-Appellee,

On Appeal from the United States District Court
for the Northern District of California,
Hon. William H. Orrick, U.S.D.J.

BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING EN BANC

Scott L. Nelson
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Amicus Curiae

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Public Citizen, Inc. is a nonprofit, non-stock corporation. It has no parent corporation, and no publicly traded corporation has an ownership interest in it.

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen is a nonprofit consumer-advocacy organization with a longstanding interest in maintaining the protections that the Telephone Consumer Protection Act (TCPA) provides consumers against unwanted intrusions from telemarketers who use robocalling technology to besiege cell phones and home phones. Public Citizen has submitted comments to the Federal Communications Commission (FCC) on proposals and petitions under consideration by the FCC concerning the TCPA, and it has requested that the FCC issue clarifications and rules addressing consent requirements for receiving prerecorded calls and automated texts under the TCPA and the 2019 Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act. In addition, Public Citizen submitted an amicus brief defending the TCPA's constitutionality and arguing in the alternative for the severance remedy ultimately adopted by the Supreme Court in *Barr v. American Ass'n of Political Consultants*, 140 S. Ct. 2335 (2020). Public Citizen submits this

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[1] Public Citizen has moved for leave to file this brief. No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund preparation or submission of this brief. No person or entity other than amicus made a monetary contribution to preparation or submission of this brief.

amicus brief because it believes that its familiarity with the statutory language may be of assistance to this Court in understanding why the panel's analysis in *Borden v. eFinancial, LLC*, 53 F.4th 1230 (9th Cir. 2022)—which is also at issue here—merits en banc consideration in this case.

INTRODUCTION

As Judge VanDyke's concurrence in this case explains, *Borden*'s analysis cannot be reconciled with the statute's text or the "interpretive rationale" of *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021). Slip op. 10 (VanDyke, J., concurring). That error merits en banc review because, absent correction by the en banc court, it will prevent district courts in this Circuit from entertaining large numbers of meritorious TCPA claims involving the use of autodialers that, in the statute's terms, have the capacity of "using a random or sequential number generator" to "*store or produce* telephone numbers to be called," 47 U.S.C. § 227(a)(1)(A) (emphasis added), but that do not necessarily use the required random or sequential number generator to *generate* the telephone numbers to be called.

ARGUMENT

This Court should grant en banc review to correct the deeply flawed interpretation of the TCPA adopted in *Borden v. eFinancial* and applied by the panel here.

The TCPA codifies the "disdain for robocalls" shared by the American public and their elected representatives, *Barr*, 140 S. Ct. at 2343, by making it illegal to place a call to a cell phone using an "automated telephone dialing system" (commonly referred to as an autodialer) without the recipient's consent. 47 U.S.C. § 227(b)(1)(A)(iii). The law defines an autodialer as "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." *Id.* § 227(a)(1). As the Supreme Court explained in *Duguid*, "Congress defined an autodialer in terms of what it must do ('store or produce telephone numbers to be called') and how it must do it ('using a random or sequential number generator')." 141 S. Ct. at 1169.

The plaintiff in this case alleged that Meta placed calls using equipment that did what an autodialer must do (store telephone numbers to be called) the way an autodialer must do it (using a random or sequential number generator). Following this Court's precedential

opinion in *Borden*, however, the panel held that the plaintiff failed to state a claim because he alleged that Meta's equipment used a random or sequential number generator to determine the order in which telephone numbers were stored and dialed, not to *generate* the numbers to be dialed. *See* slip op. 6 (citing *Borden*, 53 F.4th at 1231, 1232). According to the panel, "Meta did not violate the TCPA because it did not use a TCPA-defined autodialer that randomly or sequentially generated the telephone numbers in question." *Id*.

The text of the TCPA, however, does not state that an autodialer must be able to *generate telephone numbers* randomly or sequentially; it states that it must use a random or sequential number generator to *store or produce* telephone numbers to be called. *Borden*'s erroneous holding, followed by the panel in this case, that the statutory autodialer definition encompasses only devices that use a random or sequential number generator to *generate* telephone numbers to be called, *see Borden*, 53 F.4th at 1231, deviates from the principles of statutory construction applied by the Supreme Court in *Duguid* in a number of critical respects.

A. *Borden* contradicts *Duguid*'s plain-language construction of the autodialer definition.

The fundamental teaching of *Duguid* is that the TCPA's autodialer definition must be construed as its plain language requires. *Duguid* overturned this Court's holding in *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1053 (9th Cir. 2018), that the phrase "using a random or sequential number generator" modifies only the statutory term "produce." Under the *Marks* view, the definition would encompass (i) devices capable of using a random or sequential number generator to produce numbers to be called, as well as (ii) devices capable of storing telephone numbers to be called, regardless of whether they use a random or sequential number generator.

Stressing the primacy of the statutory text, 141 S. Ct. at 1169, the Supreme Court rejected *Marks*'s reading of the statute. The Court held that the "most natural" and "ordinary" reading of the text, *id.* at 1169, 1172, supported by "conventional rules of grammar" and canons of statutory construction incorporating them, *id.* at 1168, as well as the statute's punctuation, *id.* at 1170, is that "Congress's definition of an autodialer requires that in all cases, whether storing or producing numbers to be called, the equipment in question must use a random or

sequential number generator," *id*. That is, "[t]o qualify as an 'automatic telephone dialing system,' 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*. at 1167 (emphasis added).

The respect *Duguid* demands for the "clear commands of § 227(a)(1)(A)'s text," *id*. at 1171, dictates rejection of *Borden*'s requirement that an autodialer "must generate … random or sequential *telephone* numbers under the TCPA's plain text," *Borden*, 53 F.4th at 1231. Rather, as *Duguid* held, the plain text requires in the disjunctive that a device must *either* be able to "store" a telephone number using a random or sequential number generator, *or* be able to "produce" a telephone number using such a generator.

To "produce" a telephone number includes generating it as well as bringing it forth;[2] but to *store* a telephone number and to *generate* it are two different things. The relevant meaning of "store" is "to record

[2] *Webster's Third New International Dictionary* (2017) gives "to bring forward" or "bring forth" as the primary meanings of "produce," but includes "to cause to have existence" as an additional definition; and the *Webster's* definition of "generate" likewise includes the latter sense of "produce."

(information) in an electronic device (as a computer) from which the data can be obtained as needed."[3] Requiring that a piece of technology must be used to store information does not in any way imply that that same technology must be used to create the information stored. A device that uses a random or sequential number generator to store a list of telephone numbers to be dialed in a particular order meets the literal terms of the statutory definition, as construed by the Supreme Court in *Duguid*, without regard to how the telephone numbers were originally generated. By the same token, a device that uses a random or sequential number generator to produce (that is, bring forth) telephone numbers from storage so that they may be dialed in a particular order also meets the statutory definition, regardless of whether a random or sequential number generator was used to generate the telephone numbers.

Borden's holding that the definition requires that the random or sequential number generator be used to *generate telephone numbers*, as opposed to storing them or producing them from storage, rewrites the words of the statute: It posits that what Congress actually meant was that an autodialer must be able to store or produce telephone numbers to

[3] *Webster's Third New International Dictionary* (2017).

be called "using a random or sequential *telephone* number generator," or that it must have the capacity to "*generate* telephone numbers to be dialed using a random or sequential number generator." But a statutory interpretation that depends on adding a word to a statute, or substituting a word for the words Congress chose, is not a faithful construction of the text. Courts are not free to "read an absent word into the statute." *Lamie v. U.S. Trustee*, 540 U.S. 526, 538 (2004). An interpretation that "impermissibly read[s] [an] extra word into the statute" or replaces statutory text with different words "goes against the plain text of the statute." *Adir Int'l, LLC v. Starr Indem. & Liab. Co.*, 994 F.3d 1032, 1042 (9th Cir. 2021) (citing *Lamie*); *see also Disney Ents., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 858 (9th Cir. 2017) (quoting *Lamie* in rejecting a construction that "would have us read an absent word into the statute"); *First Amend. Coal. v. U.S. Dep't of Justice*, 878 F.3d 1119, 1138 (9th Cir. 2017) (Berzon, J., concurring in the judgment) (quoting *Lamie* for the proposition that "we may not[] 'read an absent word' (or provision) into the statute"). *Borden*'s rewrite of the autodialer definition to require random or sequential generation of the telephone numbers to be called violates the fundamental principle that "a legislature says in a statute

what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992).

B. *Borden* trivializes key passages in *Duguid*.

Borden also disregards *Duguid*'s teachings in a more specific way: It renders the statute's disjunctive reference to devices that can "store *or* produce telephone numbers to be called" superfluous and at the same time discounts as meaningless *Duguid*'s explanation of why the construction that the Supreme Court adopted there did *not* have that consequence.

Duguid explicitly recognizes that, under the statute, a device qualifies as an autodialer *either* by using a random or sequential number generator to *store* telephone numbers *or* by using it to *produce* them. 141 S. Ct. at 1167. *Borden*, however, adopts an interpretation of the statute under which a device qualifies as an autodialer only if it has the capacity to *produce* telephone numbers in a very specific way: by using a random or sequential number generator to *generate* those telephone numbers. *Borden*, 53 F.4th at 1231. Under that reading of the statute, the words "store or" serve no function: *Only* devices that can produce telephone numbers by generating them randomly or sequentially are covered by the

definition, and they are covered regardless of whether they store those numbers. That reading cannot be reconciled with *Duguid*'s disjunctive reading of the statute's "store" and "produce" criteria. It also runs directly counter to the principle that courts should not "adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) (citations omitted).

Moreover, *Borden*'s holding makes nonsense of *Duguid*'s specific discussion of superfluousness. In the Supreme Court, the *Duguid* plaintiff argued that adherence to this Court's holding in *Marks* was necessary to avoid rendering the words "store or" superfluous because any device that could store numbers using a random or sequential number generator would necessarily also have used the generator to produce the numbers (in the sense of generating them). The Court disagreed: Although the Court acknowledged the possibility that "the storing and producing functions" may "often merge," it pointed out 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." 141 S. Ct. at 1172

n.7. Tellingly, the exact kind of device that the Supreme Court described to demonstrate that its reading would not render the words "store or" superfluous would fall outside the statute's coverage under *Borden*'s reading, which explicitly excludes from the definition of autodialer any device that uses a random or sequential number generator only to store telephone numbers without first using it to generate them.

Borden's explanation for discounting this passage in *Duguid*—that it is not a "holding" but only a "snippet" in a "footnote" taken "out of context," 53 F.4th at 1235—does not hold up to scrutiny. Indeed, *Borden* acknowledges that the "context" for the footnote is that it "addresse[s] how an autodialer could both 'store' and 'produce' telephone numbers without rendering those two terms superfluous," and "illuminate[s] the space between the concepts of 'store' and 'produce.'" *Id. at* 1236. That explanation itself reveals that the footnote, read in context, is incompatible with *Borden*'s holding, which *eliminates* the space between "store" and "produce" and renders those two terms superfluous. And nothing in *Borden*'s contextual analysis of the footnote addresses the obvious point that the Supreme Court in *Duguid* plainly did not contemplate that the example it chose to *illustrate* the application of the

statutory definition's plain text would *fall outside* that definition. As Judge VanDyke's concurring opinion in this case aptly puts it, "[b]y removing any independent meaning for 'store' from the TCPA's definition of autodialer, … *Borden* has silently cut the legs out from under the Supreme Court's interpretive rationale in *Duguid*." Slip op. 10.

C. *Borden* misapplies the canon of consistent usage.

Borden's claim that the plain statutory language supports its holding because the term "random or sequential number generator" must be read to refer to a *telephone* number generator also distorts accepted principles of statutory construction. *Borden* asserts that because the references to "numbers" in the statutory definition—in the phrases "telephone numbers to be dialed" and "dial such numbers"—refer to telephone numbers, the word "number" in "number generator" must refer to telephone numbers as well. *Borden* invokes the proposition that words are interpreted in the context of the "company they keep" and asserts that it would be "illogical" for the statute to use "numbers" twice in one sentence to refer to telephone numbers, while using the word "number" in another sense between the two references to telephone numbers. 53 F.4th at 1233. In addition, *Borden* states that the TCPA "uses both

'telephone number' and 'number' interchangeably throughout the statute to mean telephone number, suggesting that in the definition section all uses of 'number' mean telephone number." *Id.* The view that all uses of the word "number" in either the definition or the TCPA generally must mean the same thing is unfounded.

Borden's analysis implicitly invokes the "presumption of consistent usage"—the interpretative principle that "[a] word or phrase is presumed to bear the same meaning throughout a text," while "a material variation in terms suggests a variation in meaning." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012). But *Borden* ignores that the application of this principle must be tempered by recognition that "drafters more than rarely use the same word to denote different concepts." *Id.* Accordingly, "[b]ecause it is so often disregarded, this canon is particularly defeasible by context." *Id.* at 171. Here, the context decisively cuts against *Borden*'s attempt to insert "telephone" before "number generator" in the name of consistent usage.

The TCPA's uses of the words "numbers" and "number" demonstrate that context rather than consistent usage is decisive in determining the meaning of those words as used in the statute. Outside

the definitional provision at issue, the TCPA uses those two words a total of 36 times. Of those uses, 11 clearly use "number" to refer to something other than a telephone number, in phrases such as "number of complaints."[4] Of the remaining 25 uses of "number" or "numbers," 23 refer specifically to "telephone" or "facsimile machine" numbers (or, in one instance, use the term "such number" to refer back to an immediately preceding use of the phrase "telephone facsimile machine number").[5] In only two instances where "number" or "numbers" is used without a modifier explicitly referring to a telephone does the context make it unmistakable that the intended meaning is "telephone number": One is a reference to "persons whose numbers are included" in a database previously described as containing "telephone numbers of residential subscribers who object to receiving telephone solicitations";[6] the other is a provision stating that the general definition of the term "caller identification service"—a service or device that provides a user with the

[4] *See* 47 U.S.C. §§ 227(b)(2)(G)–(I) & ((h)(2).

[5] *See id*. §§ 227(b)(1)(A)(iii), (b)(1)(C)(ii), (b)(2)(C), (b)(2)(D)(iv)–(v), (b)(2)(E)(i)–(ii), (b)(2)(H), (c)(3), (c)(3)(F)–(G), (c)(3)(K), (c)(4)(B)(i), (d)(1)(B), (d)(2), (d)(3)(A), (e)(8)(A)–(B), (e)(8)(C)(i), & (f)(2).

[6] 47 U.S.C. §§ 227(c)(3)(k), (3)(c).

"telephone number of, or other information regarding the origination of a call"—includes "automatic number identification services."[7]

The TCPA's autodialer definition is consistent with this pattern of context-specific meanings of the words "number" and "numbers." The definition uses the latter word twice, first in the phrase "telephone numbers to be dialed," and then in the phrase "dial such numbers." 47 U.S.C. § 227(a)(1). The first explicitly refers to telephone numbers. The second also unmistakably refers to telephone numbers, as confirmed both by its reference to "such numbers," which points back to the only previous use of the plural word "numbers" in the provision, and by its use of the verb "dial," the object of which can only be the "telephone numbers to be dialed" referred to earlier in the definition.

The autodialer definition's only use of the word "number" is completely different. Unlike the two uses of "numbers," it does not function as a plural noun describing things to be dialed, but as part of the adjectival phrase "random or sequential number" modifying the noun "generator," and describing a specific piece of technology that must be used in storing or producing the telephone numbers to be dialed. In that

[7] 47 U.S.C. § 227(e)(8)(B).

context, there is no reason for incorporating the absent word "telephone" into the term "random or sequential number generator." When the statute was enacted, the term "random or sequential number generator" had a widely accepted usage referring to computer technologies used to generate numbers generally, not telephone numbers specifically. For example, a 1992 publication on random number generators explained that "[a] random number generator is a computer procedure that scrambles the bits of a current number or set of numbers to produce a new number, in such a way that the result appears to be randomly distributed among the possible set of numbers and independent of the previously generated numbers."[8]

Contrary to *Borden*'s assertion, there is nothing confusing or illogical about "sandwich[ing]," 53 F.4th at 1233, that conventional term between the statute's two references to telephone numbers. Construing the statute without imposing the limitation "telephone" on the term "number generator" does not, as *Borden* states, yield a reading under

[8] George Marsaglia, "The Mathematics of Random Number Generators," 46 *Proceedings of Symposia in Applied Mathematics* 73, 73 (1992). *Cf.* Thomas J. Gogg & Jack R.A. Mott, *Improve Quality and Productivity with Simulation* (1992) ("A random number generator is any mechanism which produces independent random numbers.").

which the statute "first explicitly … invoke[s] phone numbers, then next … refer[s] to other non-telephone numbers, and then finally … go[es] back to phone numbers by calling them 'such numbers.'" *Id.* Rather, the only two references to "numbers" in the definition consistently refer to phone numbers, while the word "number" does not refer to "other … numbers," but to something else entirely: a form of technology. And *Borden*'s statement that "it would make no sense to dial the randomly generated number if it were not a telephone number," *id.*, assumes its own conclusion: that the numbers to be dialed must be randomly generated. That conclusion in no way follows from the textual requirement that random or sequential number generation be used in the process of storing or producing numbers to be called.

D. *Borden* wrongly elevates statutory purpose over text.

Finally, *Borden's* reliance on congressional purpose to alter the meaning of the statute's text is dramatically at odds with *Duguid*'s interpretive approach. *Duguid* invoked Congress's concerns about the use of autodialers that randomly dialed emergency service providers or tied up sequential blocks of numbers used by businesses, *see* 141 S. Ct. at 1171, as contextual reinforcement for the Court's conclusion that the

"clear commands" of the statutory text required it to reject a reading of the statute that, in the Court's view, would sweep far beyond those concerns and "capture virtually all modern cell phones," *id.* Unlike *Borden*, *Duguid* did not rely on context to impose a limit on the statute's scope not supported by the natural reading of its language.

Indeed, *Duguid* explicitly disavows such a purposive construction of the statute. Rejecting arguments that its reading would impede the TCPA's goals by unlashing a "torrent of robocalls," *id.* at 1172, the Court emphasized that such arguments provide "no justification for eschewing the best reading of § 227(1)(1)(A)," *id.* at 1173. Rather, courts "must interpret what Congress wrote." *Id.* As the Court explained, what Congress wrote is a statute that covers devices that use a random or sequential number generator either to produce *or* store telephone numbers to be dialed. *Id.* at 1170. In characterizing the TCPA as a "scalpel" rather than a "chainsaw," *Duguid* emphasized that the statute's language does not reach "any equipment that merely stores and dials telephone numbers." *Id.* at 1171. But nothing in *Duguid* suggests that a court may properly rely on its understanding of Congress's purposes to substitute an even smaller scalpel for the one chosen by Congress. *Borden*

does just that when it narrows the requirement that autodialers use random or sequential number generation in storing or producing numbers to be dialed to a requirement that they randomly or sequentially generate those numbers.

E. This Court should grant en banc review.

Borden's departure from sound principles of statutory construction in interpreting an important federal consumer protection statute, and the disagreement among this Court's judges that the approach has engendered—as reflected in Judge VanDyke's concurrence—presents an issue of exceptional importance meriting en banc review by this Court. Should the Court grant rehearing en banc in this case, it may also wish to grant the pending petition for initial en banc hearing in *Trim v. Reward Zone USA LLC*, No. 22-55517, which likewise presents the issue of the correctness of *Borden*'s statutory analysis. The complaint at issue in that case contains a detailed technical explanation of how random or sequential number generators are used in the devices at issue there to store and produce telephone numbers to be dialed without generating the telephone numbers themselves, context that may inform the Court's

consideration of the statutory issue. Whether together with *Trim* or by itself, however, this case merits en banc consideration.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for rehearing en banc to reconsider the correctness of *Borden*'s holding that an automated telephone dialing system must have the capacity to use a random or sequential number generator to generate telephone numbers to be called.

Respectfully submitted,

/s/Scott L. Nelson

Scott L. Nelson
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Amicus Curiae

February 13, 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 22-55517, Trim v. Reward Zone USA LLC. Trim also presents the question whether this Court's construction of the TCPA in Borden was correct, and a petition for initial en banc hearing is currently pending in Trim.

Signature /s/ Scott L. Nelson **Date** Feb. 13, 2023

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I hereby certify that this brief has been served through the Court's ECF system on counsel for all parties required to be served on February 13, 2023.

/s/ Scott L. Nelson
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