No. 14-10414

In the United States Court of Appeals for the Eleventh Circuit

JOSEPH B. MURPHY,
an individual on behalf of himself and all others similarly situated
Plaintiff-Appellant,

v.

DCI BIOLOGICALS ORLANDO, LLC; DCI BIOLOGICALS, INC.; and MEDERV BIOLOGICALS, LLC,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

BRIEF FOR PLAINTIFF-APPELLANT JOSEPH B. MURPHY

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May 8, 2014

CERTIFICATE OF INTERESTED PERSONS

Counsel hereby certify that the following persons and entities have a known interest in the outcome of this appeal:

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2. DCI Biologicals Orlando, LLC, Defendant-Appellee
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8. The Honorable Charlene E. Honeywell, U.S. District Judge
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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant Joseph B. Murphy requests oral argument. This appeal turns on the meaning of a key requirement of the Telephone Consumer Protection Act (TCPA)—that anyone who sends autodialed text messages to a cell phone must first obtain the recipient's "prior express consent." 47 U.S.C. § 227(b)(1)(A). The district court's decision in this case inverts that requirement (reading it to permit *implied* rather than express consent), misconstrues Federal Communications Commission regulations, and erroneously disclaims jurisdiction under the Hobbs Act.

If left standing, the district court's interpretation of the TCPA would mean that any consumer who at any time provides a cell-phone number to any other party may be subject to unlimited spam text messages or calls at any time thereafter, for any reason. That would give telemarketers carte blanche to harass and annoy their erstwhile customers—exactly the opposite of what Congress intended.

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INTRODUCTION

The Telephone Consumer Protection Act (TCPA) is the key federal statute aimed at curbing unwanted telemarketing. Among other things, the TCPA makes it "unlawful for any person" to use an autodialer to send text messages to a cell phone unless the recipient has given his or her "prior express consent." 47 U.S.C. § 227(b)(1)(A). This appeal turns on the meaning of "prior express consent."

Joseph Murphy gave blood plasma at DCI Biologicals' blood plasma center during the spring and summer of 2010. On his first visit, DCI asked him to provide sensitive information about himself, including his criminal history, medical history, social security number, and personal contact information. Given the highly sensitive nature of these matters, DCI assured Mr. Murphy that it would safeguard his information and was collecting it only to process him as a "new donor."

After two years of zero contact, DCI sent Mr. Murphy a series of unsolicited text messages—with exclamation marks, aggressive use of all-caps text, and color photographs—aimed at enticing him to reenter into a commercial relationship. DCI never had Mr. Murphy's "prior express consent" to use his private information to solicit his business in this way. And indeed, the company does not argue that it did. Instead, it invokes two Federal Communications Commission (FCC) rulings that, it argues, gave telemarketers the unfettered right to spam any number

of text messages at any time for any reason, so long as the target of those messages has provided a contact number any time in the past.

The FCC did no such thing. To the contrary, in 2003, the FCC specifically "reject[ed] proposals" to "create implied consent" for autodialed calls and text messages to cell phones where a consumer "provides his wireless number as a contact number to a business"—the very exception DCI seeks here. Indeed, the FCC couldn't create such an exception even if it wanted to: *Implied* consent is the opposite of the *express* consent required by Congress.

The district court, however, agreed with DCI, thereby inverting the statute's text, misconstruing the FCC's rules, and ignoring the only FCC ruling to have squarely confronted the question of whether telemarketers can infer "prior express consent" to send autodialed text messages from the bare provision of a cell-phone contact number. And the district court went still further. It concluded that the Hobbs Act—which gives federal courts of appeals exclusive jurisdiction "to enjoin, set aside, suspend" or "determine the validity of" a final FCC order, 28 U.S.C. § 2342—prevented it from entertaining Mr. Murphy's complaint at all.

But Mr. Murphy has no quarrel with any of the FCC's rules. The rulings cited by DCI have little if anything to do with his complaint, and the 2003 ruling (presented to the district court but not analyzed by it) compels Mr. Murphy's interpretation of the statute. This case starts and stops with the "fundamental

canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) (internal quotations omitted). That "ordinary, contemporary, common meaning" compels a clear result: Although Mr. Murphy did provide his cell-phone number as part of a highly sensitive questionnaire to facilitate his donation of blood plasma, that's all he did. That one act did not constitute "prior express consent" to be spammed with text solicitations two years after his relationship with the donation center ended. The district court's cascade of errors should be put right on that common-sense reading of the statute.

JURISDICTIONAL STATEMENT

Plaintiff-appellant Joseph Murphy brought this case under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227. The district court had jurisdiction under 28 U.S.C. § 1331, but erroneously claimed to lack jurisdiction under the Hobbs Act, 28 U.S.C. § 2342(1). This brief addresses the district court's jurisdictional error in Part II of the Argument.

The district court entered a final judgment dismissing Murphy's complaint on December 31, 2013. DN 87. Mr. Murphy then timely filed a notice of appeal under Federal Rule of Appellate Procedure 4(a)(1)(A) on January 28, 2014. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The TCPA makes it "unlawful for any person" to use an automatic dialing system to send a text message to a cell phone without the "prior express consent" of the recipient. 47 U.S.C. § 227(b)(1)(A). This appeal presents two issues:

1. Can "Prior Express Consent" Be Implied? By providing his cell-phone number to DCI on a sensitive and confidential questionnaire, did Mr. Murphy give "prior express consent," within the meaning of the TCPA, to DCI's auto-dialed text messages sent two years later?

2. Does the Hobbs Act Apply? Under the Hobbs Act, federal district courts lack jurisdiction "to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" a final FCC order. 28 U.S.C. § 2342. Does the Hobbs Act apply here, where the complaint does not question or challenge any FCC rule?

STATEMENT OF THE CASE AND OF THE FACTS

A. Statutory and Regulatory Background

1. The Telephone Consumer Protection Act of 1991

Congress passed the TCPA in response to the public's "outrage over the proliferation of intrusive, nuisance calls." 47 U.S.C. § 227 note. Although the law targets a variety of abusive practices, its history suggests that Congress was particularly concerned with the increasing use of "automatic telephone dialing system[s]," or "autodialers." 47 U.S.C. § 227(a)(1). Autodialers can store and

automatically call long lists of phone numbers, often repeatedly, and are "frequently used to send artificial or prerecorded messages." *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 17 F.C.C.R. 17459, 17474 (2002). Congress aimed its fire at these so-called "robocalls." As the TCPA's sponsor put it:

> Computerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall.

137 Cong. Rec. 30,821–30, 822 (1991) (Statement of Sen. Hollings).

Since the TCPA's enactment in 1991, the burden of telemarketing calls on consumers has only increased. New technologies have made automated calls both cheaper and more effective, leading to "increased public concern about the effect on consumer privacy." 17 F.C.C.R. at 17460. At the same time, "the substantial increase in the number of consumers who use wireless phone service, sometimes as their only phone service, means that autodialed and prerecorded calls are increasingly intrusive." *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C.R. 1830, 1839-40 (2012).

Because cell-phone users "often are billed by the minute as soon as the call is answered—and routing a call to voicemail counts as answering the call"—they ultimately bear the costs of these calls, regardless of "whether they pay in advance or after the minutes are used." *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 638 (7th Cir. 2012); *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of*

1991, 23 F.C.C.R. 559, 562 (2008). As Judge Easterbrook has explained: "An automated call to a landline can be an annoyance; an automated call to a cell phone adds expense to the annoyance." *Soppet*, 679 F.3d at 638.

Because customers either pay for text messaging by the message or pay a fee for enhanced texting features, the same is true for text messages sent to cell phones. The FCC has made clear that the TCPA's protections apply equally to "both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls," *i.e.* text messages. *See In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Report and Order*, 18 F.C.C.R. 14014, 14115 (2003); 47 C.F.R. § 64.1200(a)(1)(iii). These protections are needed. One recent study reported that of the 79% of cell-phone owners who use text messaging, 69% receive unwanted spam, 25% on a weekly basis. *See* DN 54 ¶ 16 (citing Jan Boyles and Lee Rainie, *Mobile Phone Problems*, Pew Research Center, August 2, 2012).

Because most people have no way to stop unwanted calls and messages, Congress found that "[b]anning such automated or prerecorded telephone calls . . . is the only effective means of protecting telephone consumers from this nuisance and privacy invasion." 47 U.S.C. § 227 note § 2(12). The TCPA therefore broadly restricts autodialer calls to cell phones or devices for which consumers are charged a fee:

> It shall be unlawful for any person within the United States . . . to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a . . . cellular telephone service . . . or any service for which the called party is charged for the call.

47 U.S.C. § 227(b)(1)(A).

Two aspects of this prohibition are relevant here. *First*, it applies to "any" use of an "automatic telephone dialing system." The statute defines the term "automatic telephone dialing system" to mean "equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers." 47 U.S.C. § 227(a)(1) (internal numbering omitted). The FCC—tasked with implementing the TCPA, *see* 47 U.S.C. § 227(b)(2)(C)—"has emphasized that this definition covers any equipment that has the specified *capacity* to generate numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated or come from calling lists." *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C.R. 15391, 15392–93, ¶ 2, n.5 (2012). This provision, then, is aimed at technology that can dial phone numbers en masse.

Second, the provision is subject to only two exceptions: (1) calls "for emergency purposes," and (2) calls "made with the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A). Because soliciting a commercial relationship is not

an emergency purpose, using an autodialer to send a text message to a cell phone is permissible only if the called party expressly consents "to the use of these machines." S. Rep. No. 102-178, 1991 U.S.C.C.A.N. at 1971. In other words, Congress designed an opt-in system, not an opt-out one: If consumers want to receive such calls, they must give their "prior express consent."

What constitutes "prior express consent" is not defined by the Act, but a few examples are provided in the legislative history: A consumer who agrees to be "called back by a computer" has provided express consent. *Id.* at 1972. So has one who clearly states that he "consents to listening to a recorded or computerized message." S. Rep. No. 102-178, 1991 U.S.C.C.A.N. at 1971.

2. The FCC's interpretation of "prior express consent"

In the twenty-two years since Congress enacted the TCPA, the FCC has addressed the meaning of "prior express consent" and its synonyms five times, as relevant to this appeal: as applied to residential land lines (in 1992), fax and phone solicitations (in 1995), cell phones (in 2003), in the debtor-creditor context (in 2008), and, most recently, to the form that "prior express consent" can take (in 2012). Each ruling demonstrates the FCC's sensitivity to technological context.

a. The 1992 Residential Landline Ruling

One year after Congress enacted the TCPA, the FCC issued its first rule to "establish procedures for avoiding unwanted telephone solicitations to residences,

and to regulate the use of automatic telephone dialing systems, prerecorded or artificial voice messages, and telephone facsimile machines." *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C.R. 8752, 8753 (1992) ("The 1992 Residential Landline Ruling"). Recognizing that some consumers prefer to "knowingly release their phone numbers," the FCC addressed concerns that telemarketers seeking to comply with the TCPA would not know when interested customers had consented to calls on their residential phone lines. The FCC concluded that consumers who "knowingly release their phone numbers" to a telemarketer will have granted "prior express to consent" to be contacted, "given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." *Id*.

But the 1992 Residential Landline Ruling nowhere addressed text messages, and addressed the then-nascent cell-phone industry only briefly—to permit the providers of cell-phone service to contact their subscribers. *Id.* at 8775. The 1992 Residential Landline Ruling has nothing to say about telemarketing via cell phone.

The exclusion of telemarketing by text message was not an oversight: The first commercial text message in the United States wasn't even sent until June 7, 1993—almost a year after the Commission finalized its 1992 Ruling.[1]

[1] *See* Giles Turnbull, *America's First Ever Text Message: 'Burp'*, TIME MAGAZINE, June 8, 2011, *available at* http://techland.time.com/2011/06/08/americas-first-ever-sms-message-burp/.

b. The 1995 Fax and Phone Solicitation Ruling

Although telephone solicitation is governed by a different subsection of the TCPA, *see* 47 U.S.C. § 227(c), the interpretation of the analogous statutory term for "prior express consent"—"prior express permission or invitation"—demonstrates the FCC's attention to technological context. In the context of unwanted solicitation by fax machine, the Commission determined that a consumer had not granted "prior express permission" to receive faxes merely by providing his or her fax number. *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 10 F.C.C.R. 12391, 12408 (1995) ("1995 Fax and Phone Solicitation Ruling").

In reaching this conclusion, the FCC found that "the intent of the TCPA" was not "to equate mere distribution or publication of a telephone facsimile number with prior express permission or invitation to receive such advertisements." *Id.* Instead, "prior express permission or invitation" required a plain-language interpretation: *Express* consent to receive faxes could not be *inferred* from the provision of a contact number.

So, too, for the TCPA provisions governing phone solicitations. In the 1995 Fax and Phone Solicitation Ruling, the FCC concluded that "there is no indication that Congress intended that calls be excepted from telephone solicitation restrictions unless the residential subscriber has (a) clearly stated that the telemarketer may call, and (b) clearly expressed an understanding that the telemarketer's

subsequent call will be made for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services." *Id.* at 12397. Such clear statements, expressed *before* the messages are sent, are essential to "prior express permission or invitation."

c. The 2003 Cell Phone Ruling

The 1992 and 1995 rulings, however, did not squarely address telemarketers' responsibilities to cell-phone subscribers, and did not consider the unique context of spam voice and text messages for those subscribers. The FCC had no reason to address this context: Consumer cell-phone users were still relatively rare in the early 1990s. Cell phones' widespread use by the 2000s, however, led the FCC in 2003 to explain how the TCPA applied to this new technology. *See In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C.R. 14014 (2003) ("The 2003 Cell Phone Ruling"). In the 2003 Cell Phone Ruling, the FCC summarized the TCPA's application to cell phones up until that point. As noted above, in 1992 the Commission permitted cellular carriers to use autodialers to contact *t*heir own cell-phone subscribers. *Id.* at 14111. But the cell-phone industry had changed in the eleven years since the 1992 Ruling, and the FCC "sought comment on any developments anticipated . . . that may affect telemarketing to wireless phone numbers," in order to bring the use of cell phones more fully under the protections and appropriate exceptions of the TCPA.

The FCC's conclusions in 2003 were sweeping. Given the distinct payment structure for use of wireless technology, the Commission determined that, subject to the exceptions noted in the statute itself, "it is unlawful to make *any call* using an automatic telephone dialing system . . . to any wireless telephone number." *Id*. at 14115. "This encompasses both voice calls and text calls to wireless numbers." *Id.*

In reaching that comprehensive determination, the Commission faced industry proposals to create an exception to the TCPA's "prior express consent" requirement when a consumer provided a cell-phone number to a business. The Commission considered these proposals, but specifically "reject[ed] proposals . . . to create implied consent" for autodialed calls or messages to cell phones, even where "the [cellular] subscriber provides his wireless number as a contact number to a business." *Id*. at 14117 & n.623. After the 2003 Cell Phone Ruling, all telemarketers who would use an autodialer were on notice that "prior express consent"—at least for cell-phone calls—could *not* be inferred from a consumer's provision of a cell-phone number.

d. The 2008 Debtor-Creditor Ruling.

The 2003 Cell Phone Ruling was not the last word on the meaning of "prior express consent," even for cell phones. In 2008, the Commission addressed the specific question of autodialer use in the context of debtor-creditor contact for the purpose of debt collection. *In re Rules and Regulations Implementing the Tel. Consumer*

Prot. Act of 1991, 23 F.C.C.R. 559 (2008) ("The 2008 Debtor-Creditor Ruling"). In the 2008 Debtor-Creditor Ruling, the FCC sought to "clarify that autodialed and prerecorded message calls to wireless numbers that are provided by the called party to a creditor in connection with an existing debt are permissible as calls made with the 'prior express consent' of the called party." *Id.* at 559. The rule was limited to the debtor-creditor relationship, and concluded that when a debtor provides a cellular contact number to a creditor "in connection with an existing debt," *id*. at 564, the debtor-consumer has provided sufficient consent to be contacted with respect to that debt.

e. The 2012 Written Consent Ruling

Finally, in its most recent ruling, the FCC decided to require not just oral but "prior express *written* consent for all autodialed or prerecorded telemarketing calls to wireless numbers." *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C.R. 1830, 1831 ("The 2012 Written Consent Ruling") (emphasis added). Because "the TCPA is silent on the issue of what form of express consent—oral, written, or some other kind—is required," the FCC exercised its "discretion to determine, consistent with Congressional intent," the form of consent. *Id.* at 1838. It determined that written consent would "better protect both consumers and industry from erroneous claims that consent was or was not provided, given that, unlike oral consent, the existence of a paper or electronic

record can be more readily verified and may provide unambiguous proof of consent." *Id.* at 1838.

Although the 2012 Written Consent Ruling was not in force when DCI sent its text messages to Murphy, the ruling confirms that the TCPA has always required express (not implied) consent for wireless calls and text messages, and that the consent must be given with specificity. In addition to clarifying the form of express consent required going forward, the FCC confirmed that the consumer must receive "clear and conspicuous disclosure" that he or she "will receive future calls that deliver prerecorded messages by or on behalf of" the specified entity, and must "agree[] unambiguously to receive such calls" at the designated number. *Id.* at 1844. Moreover, the caller "bear[s] the burden of demonstrating that a clear and conspicuous disclosure was provided and that unambiguous consent was obtained." *Id.*

f. Table: Summary of FCC Rulings

The following table summarizes these FCC rulings:

Ruling	Description
1992 Residential Landline Ruling	➢ **Does not extend to text messages or cell phones** (except to permit carriers to contact their own subscribers). ➢ For telemarketing calls to residential landlines, consumers who "knowingly release their phone numbers" have granted "prior express consent," "given their invitation or permission to be called at the number which they have given, absent instructions to the contrary."
1995 Fax and Phone Solicitation Ruling	➢ **Clarifies that TCPA does not "equate mere distribution or publication" of a telephone number with prior express permission" with respect to faxes.** ➢ Consumer must have "(a) clearly stated that the telemarketer may call, and (b) clearly expressed an understanding that the telemarketer's subsequent call" will be for telemarketing purposes.
2003 Cell Phone Ruling	➢ **The FCC specifically "reject[s] proposals . . . to create implied consent" for autodialed calls and text messages to cell phones**—including where the cellphone "subscriber provides his wireless number as a contact number to a business."
2008 Debtor-Creditor Ruling	➢ **Addresses only debt-collection calls**—that is, calls made to a phone number provided to a creditor in connection with an existing debt. Has no application beyond debt-collection.
2012 Written Consent Ruling	➢ **Confirms that express consent requires "clear and conspicuous disclosure" that the consumer "will receive future calls that deliver prerecorded messages" and must "agree[] unambiguously to receive such calls."** ➢ Requires "prior express written consent for all autodialed or prerecorded telemarketing calls to wireless numbers."

B. Factual Background

DCI Biologicals, Inc. is in the business of buying and reselling blood products, including blood plasma. DN 59 at ¶ 24. It conducts that business throughout the United States through various subsidiaries, including DCI Biologicals Orlando, Inc. and Medserv, Inc. (collectively, "DCI").

Joseph Murphy sold his blood plasma to DCI on multiple dates between March 1 and June 14, 2010. When he first provided his blood plasma, Mr. Murphy had to fill out a detailed questionnaire, called a "New Donor Information Sheet," and at least three other medical releases and acknowledgment forms. DN 59 ¶¶ 66-69. These forms required the disclosure of highly sensitive information, including all tattoos and piercings, his medical history, social security number, criminal background, and contact information. *Id.* ¶¶ 36-37, 58, 66-70. Although the forms did leave a space for a "telephone number," the form nowhere mentioned cell phones, text messages, or the possibility that DCI would use any information provided for marketing purposes. In fact, the forms that Mr. Murphy and a DCI employee signed assured Mr. Murphy that "[e]very effort will be made to keep your study records confidential" and that "your identity will not be disclosed." DN 69-2. The forms also included the assurance that Mr. Murphy did "not give up any legal rights by signing" the releases. *Id.*

More than two years after Mr. Murphy had ceased contact with DCI, the company sent him several text messages dressed in the usual form of spam solicitations—multiple exclamation marks, aggressive use of caps lock, and poor grammar. By way of illustration, one message read as follows:

We NEED U Back $20 Special!!!
DCI Biologicals: DONATE TODAY! GET PAID TODAY! SAVE A LIFE TODAY! "$20 COME BACK SPECIAL"- Come back in and See Us & Get an Extra $5 on your NEXT 4 Donations!
DONATE UP TO 20 MIN FASTER WITH OUR NEWLY UP-GRADED MACHINES
Plasma Center Hours:
Mon. - Wed. - Fri.: 8AM - 6PM
Tues. - Thu. : 8AM - 7PM
Saturday: 8AM - 2PM
Located at:
150 N.W. 6th Street
Gainesville, FL 32601
For Questions Call: 352-378-9204
(Must Present Text)
(This Offer Expires 08-31-12)
Text STOP to 99000 to cancel.

DN 59 ¶ 89. The same text message included a large picture file of an enthusiastic woman flashing large quantities of cash, as seen below.

DN 59-1. The text messages were not sent by person, but were generated through an autodialer. *Id.* ¶ 84. DCI didn't develop its autodialing capability on its own. Instead, DCI shared its sensitive blood-donor information with a third-party marketing company—with whom Mr. Murphy had never had any relationship—and hired it to send autodialed marketing messages on DCI's behalf. DN 59 ¶ 35.

C. Procedural Background

Distressed by DCI's invasion of his privacy, Mr. Murphy filed a complaint against DCI on his own behalf and on behalf of a class of others similarly situated. DN 1. Mr. Murphy's complaint made three broad allegations. The complaint, as

amended, alleges that DCI's text messages, transmitted through third parties, violated (1) the TCPA's prohibition against the use of "any automatic telephone dialing system" without "the prior express consent of the called party," 47 U.S.C. § 227(b)(1)(A), or the Autodialer Counts; (2) various solicitation violations of FCC regulations prescribed under 47 U.S.C. § 227(c)(5), or the Solicitation Counts; and (3) various claims under state law. The complaint sought statutory damages of $500 or $1,500 per text message, injunctive relief, and other damages on behalf of the putative class. DN 59, at 25-86.

DCI filed a motion to dismiss the entire complaint, arguing, among other things, that Mr. Murphy provided the required "prior express consent" to receive the marketing text messages. DCI argued that the FCC's rules made clear that any consumer who provides a phone number waives any rights otherwise available under the TCPA. DCI also insisted that this conclusion was jurisdictional: Not only must Mr. Murphy lose his claim on the merits, but, under the Hobbs Act, no district court had jurisdiction to entertain his complaint at all. Given that lack of jurisdiction on the federal claims, DCI argued, the district court should also dismiss the state-law claims because it had lost supplemental jurisdiction.

The district court agreed across the board. Although it concluded that the TCPA "does not define 'express content,'" DN 87 at 10, the district court held that the FCC's 1992 Residential Landline Ruling and its 2008 Debtor-Creditor Ruling

redefined the term "prior express consent" to mean that a consumer who writes down a cell-phone number on an intake form has given consent to receive marketing text messages two years later. The district court also agreed with DCI's jurisdictional argument, concluding that "a careful review of the Hobbs Act and the applicable caselaw" meant that the district court had "no jurisdiction to review final FCC orders." *Id*. at 13. The district court did not address the dispositive effect that the 2003 Cell Phone Ruling has on the case, although that Ruling was argued before it. *See* DN 81. The district court also dismissed the counts under 47 U.S.C. § 227(c)(5), and dismissed the state-law claims for lack of subject matter jurisdiction (in light of the dismissal of all federal law claims). Mr. Murphy here appeals the dismissal of the Autodialer Counts, and seeks remand to consider in the first instance the state-law claims.

SUMMARY OF THE ARGUMENT

A "fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Sandifer*, 134 S. Ct. at 876. The TCPA prohibits the sending of automated text messages to a cell phone absent "the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A). This case turns entirely on the meaning of "prior express consent."

I. A. The question whether "express consent" may be implied, as DCI argues, is one of first impression in this Court. But it is not a hard question. Because the TCPA does not define "express consent," this Court must give the phrase its ordinary meaning: "clearly and unmistakably stated" consent. *Black's Law Dictionary* 346 (9th ed. 2009). And what the consent must clearly and unmistakably state is that the person agrees to receive text messages on his or cell phone from an automatic dialing system. That did not happen here, and DCI does not claim that it did.

Nevertheless, DCI argues that Mr. Murphy gave "prior express consent" to receive solicitations via text message two years after their commercial relationship ended simply because its intake forms asked for Mr. Murphy's contact information. But the form didn't mention text messages, cell phones, or the potential for use of his confidential information for marketing purposes. Under no plausible interpretation of the term "express consent" can it be said that Mr. Murphy gave "clearly and unmistakably stated" permission to receive autodialed marketing text messages.

B. DCI attempts to justify its failure to secure express consent from Mr. Murphy by arguing that it only followed the FCC's definition of "prior express consent" outlined in applicable FCC rulings. This is incorrect. The FCC has, indeed, repeatedly construed this term in various contexts, but the two rules that

form the backbone of DCI's justification—the FCC's 1992 Residential Landline Ruling and its 2008 Debtor-Creditor Rulings—do not apply to the facts of this case. In the first instance, the FCC provided the rule for residential Landline consumers who "knowingly give their phone numbers" to telemarketers; in the second instance, the FCC made clear that the debtor-creditor context requires special rules. Neither scenario applies here.

In fact, the FCC's only partial attempt to address the use of an autodialing system to send mass text messages comes to exactly the opposite conclusion. In its 2003 Cell Phone Ruling, the FCC determined that autodialers could *not* be used to send bulk voice or text messages to then-emergent cellular phone customers, and rejected proposals to infer consent from the provision of a cell-phone numbers via a business relationship. In other words, the FCC has encountered DCI's arguments before, and rejected them.

II. The Hobbs Act grants federal courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342. After misreading the FCC's rules to mean that the statutory term "prior express consent" actually meant "implied consent," the district court concluded that Mr. Murphy's complaint was in fact an

attempt to "set aside" two of the FCC's final rulings and, hence, that it lacked jurisdiction.

But the FCC rulings either don't apply to the present facts, or else come to Mr. Murphy's defense. Mr. Murphy therefore doesn't challenge the validity of a single FCC ruling. The Hobbs Act's jurisdictional bar isn't triggered. DCI's creative effort to close the courthouse doors to challenges of its illegal behavior fails because the FCC did not say what DCI argues it did.

ARGUMENT

I. By providing his contact information on an intake form, Joseph Murphy did not give his "prior express consent" to receive auto-dialed text messages on his cell phone two years later.

A. The district court's interpretation of "prior express consent" conflicts with the statute's plain meaning.

The TCPA does not define the key phrase at issue in this appeal: "prior express consent." 47 U.S.C. § 227(b)(1)(A). "When a statute does not define a term," courts generally "give the phrase its ordinary meaning." *FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1182 (2011) (internal quotation marks omitted). This is doubly true "where Congress uses terms that have accumulated settled meaning under . . . the common law." *Neder v. United States*, 527 U.S. 1, 21 (1999). In those instances, "a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Id.* As this Court recently

explained, as Congress used the term in the TCPA, "'[c]onsent' is such a term." *Osorio v. State Farm Bank, FSB*, --- F.3d ----, 2014 WL 1258023, at *8 (11th Cir. 2014). "Under the common law understanding of consent, the basic premise of consent is that it is given voluntarily." *Id.*

"Express consent" goes further still, and means "[c]onsent that is clearly and unmistakably stated." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir. 2009) (quoting *Black's Law Dictionary* 346 (9th ed. 2009)). "It is positive, direct, unequivocal consent, requiring no inference or implication to supply its meaning." *Black's Law Dictionary* 305 (6th ed. 1990). The term is best understood in opposition to "implied consent," which means "[c]onsent inferred from one's conduct rather than from one's direct expression," or "[c]onsent imputed as a result of circumstances that arise, such as when a surgeon removing a gall bladder discovers and removes colon cancer." *Black's Law Dictionary* 346 (9th ed. 2009). Congress knows the difference, and its choice should be honored. *See Roell v. Withrow*, 538 U.S. 580, 587 (2003) (explaining that Congress distinguished between implied and express consent with respect to consent to federal magistrate judges' jurisdiction); 18 U.S.C. § 3401(b) (allowing magistrate judges to preside over misdemeanor trials only if the defendant "expressly consents"). Implied consent is insufficient under the TCPA; only direct, unequivocal consent will do.

That consent required by the TCPA is both *express* and *specific*: The consumer must agree to be contacted by a message sent through an "automatic telephone dialing system" message. 47 U.S.C. § 227(b)(1)(A). And although text messages didn't exist when Congress first passed the TCPA, that statute's link between the "express consent" and the "automatic telephone dialing system" was intentional. *See* S. Rep. No. 102-178, 1991 U.S.C.C.A.N. at 1972, 1975 (explaining that a consumer who agrees to be "called back by a computer" has provided express consent, as has one who clearly states that he "consents to listening to a recorded or computerized message"). As one court to have confronted this issue colorfully put it: "'Express' means 'explicit,' not, as [the defendant] seems to think, 'implicit.' [The defendant] was not permitted to make an automated call to [the plaintiff's] cellular phone unless [the plaintiff] had previously said . . . something like this: 'I give you permission to use an automatic telephone dialing system to call my cellular phone.'" *Edeh v. Midland Credit Mgmt., Inc.*, 748 F. Supp. 2d. 1030, 1038 (D. Minn. 2010); *see also Thrasher-Lyon v. CCS Commerdal, ILC*, 2012 WL 3835089 (N.D. Ill. 2012) ("The consumer must give 'prior express consent' to robocalls—not to telephone calls in general—if they are to receive the automated calls that the legislature deemed invasive.").

Mr. Murphy never provided such permission, and DCI does not argue that he did. DCI contends instead that Murphy provided "prior express consent" to

receive the marketing text messages because he wrote his cell-phone number on an intake form. To state the proposition is to expose its flawed logic. In March 2010, Mr. Murphy filled out several pages of paperwork, answering among them sensitive questions about his medical and criminal history, and providing his social security number and contact information. Nowhere did the form mention cell phones, text messages, or any prospect that DCI would use the information provided for marketing purposes. In August 2012—more than two years after the relationship ended—DCI harvested that confidential information from the medical forms and used an autodialer to send Mr. Murphy telemarketing messages. Mr. Murphy never provided his express consent to receive such messages in this way. From the paperwork he signed, there was no indication that messages like these were even a possibility.

Consider the startling ramifications of the district court's redefinition of "express consent." Under the district court's rule, any business that ever asks for a person's contact information receives a license to use that information for any marketing purpose—forever. On this theory, a consumer who provides a cell-phone number to the pizza delivery man—on the unstated assumption that the number would be used, for example, if no one answers the door—has given "express consent" to the restaurant to use that number to send text messages forever after, even if the customer never orders pizza again.

The implications go still further. DCI also argued that the distinct corporate personalities didn't matter here, that by giving his cell-phone number to one DCI subsidiary, he gave it to all: DCI's "making a disclosure of a corporate affiliate is not a disclosure at all. It's like disclosing it to yourself." DN 89 at 15. If, for example, a consumer leaves his contact information at a Ben & Jerry's Ice Cream store in hopes of getting a free pint of ice cream, DCI's theory of "prior express consent" would mean that that consumer had given permission to receive autodialed spam texts from all related corporate subsidiaries—from Lipton Iced Tea to Suave shampoo to Ragu spaghetti sauce to Hellman's mayonnaise.[2]

The same would hold for any kind of business, so long as the consumer discloses her contact information, whatever the reason for that disclosure. This would include those businesses—such as online dating services or sperm banks—that are built on the limited disclosure of sensitive information. Under the district court's interpretation of the statute, then, a consumer who provides a cell-phone number—along with such sensitive information as sexual orientation, religious affiliation, or preferences in a dating partner—will have provided "prior express consent" to forever after receive marketing text messages that exploit (and potentially reveal to others) sensitive or embarrassing information.

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[2] All brands owned by Unilever USA. *See* Unilever Brands, *available at* http://www.unileverusa.com/brands-in-action/view-brands.aspx.

By requiring "prior express consent" to receive mass text messages, generated by an autodialer, Congress specifically intended to prevent these kinds of intrusive behaviors. Each term is of significance. Congress might have permitted the blanket use of autodialers entirely; it did not, and required consumer consent. Congress might have allowed telemarketers to infer a consumer's consent from his or her conduct; it did not, and required consumer consent to be "express." And Congress might have allowed consumers to opt-out of such messages after the fact; it did not, and required that consent "prior" to receiving the messages.

Merely providing a cell-phone number is therefore insufficient to show prior express consent. At best, a "patient providing a telephone number to a health care provider only *impliedly* consents to be contacted for reasons related to particular care the patient has received or solicited, not for general marketing purposes." *Carlson v. Nevada Eye Care Prof'ls*, 2013 WL 2319143, *3 (D. Nev. 2013) (emphasis added). Reaching the opposite conclusion "is just an inference (*i.e.*, a conclusion reached by considering the circumstances and deducing a logical consequence from a person's conduct). Because this conclusion must be inferred from conduct, that necessarily means that permission was not directly stated" and, hence, not "express." *Lusskin v. Seminole Comedy, Inc.*, 2013 WL 3147339, at *3 (S.D. Fla. 2013).

Neither this Court nor any other federal court of appeals has defined the term "prior express consent" in this context. *Cf. Satterfield*, 569 F.3d at 954-55

(deciding whether a consumer's "prior express consent" was transferrable to third parties); *Gager v. Dell Fin. Servs.*, 727 F.3d 265 (3d Cir. 2013) (determining whether "prior express consent," once given, can be revoked). Instead of relying on text or precedent, the best DCI could do in presenting its argument below was to cite district court cases finding consent on materially distinct facts. *See Roberts v. PayPal, Inc.*, 2013 WL 2384242 (N.D. Cal. 2013) (finding that a consumer's acceptance of an online agreement expressly allowing the company to send text messages using an autodialer constituted "prior express consent"); *Emanuel v. Los Angeles Lakers, Inc.*, 2013 WL 1719035 (C.D. Cal. 2013) (finding that a consumer who sent a message in response to the Lakers' invitation to post a text to the jumbotron at a basketball game, and who subsequently received a confirmatory message, had provided "prior express consent" to receive the confirmation); *Pinkard v. Wal-Mart Stores, Inc.*, 2012 WL 5511039 (N.D. Ala. 2012) (finding that a pharmacy had received a customer's "prior express consent" to receive text messages when she provided a cell-phone number at a pharmacy's explicit request, and the pharmacy sent messages "within hours" of receiving that information). Whatever their merits, Mr. Murphy's case is not remotely analogous to these cases, as their facts make clear.

The bottom line of the case is simple: The statutory text requires telemarketers to secure a cell-phone user's "prior express consent" before using an autodialer to blast her with text messages. And the district court did not purport to conclude

that Mr. Murphy provided "prior express consent" within the ordinary meaning of that phrase. It concluded instead that "prior express consent" should be a term of art that means "consent implied by the provision of one's cell-phone number." The district court's attempt to rewrite a statute to mean its very opposite "would be a feat more closely associated with the mutating commandments on the barn's wall in Animal Farm than with sincere [statutory] interpretation." *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 984 (7th Cir. 2008) (Easterbrook, J.). Because "[o]ne of the most reliable guides to interpreting statutes is to assume that Congress meant what it said," *Grandberry v. Keever*, 735 F.3d 616, 618 (7th Cir. 2013) (citing *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)), this Court should correct the district court's interpretive errors and make "prior express consent" mean "prior express consent."

B. The FCC has never ruled that merely providing a cell-phone number in a business transaction confers blanket consent to receive text messages.

1. The FCC's 1992 Residential Landline Ruling does not apply to cell phones.

Because DCI's position is untenable as a matter of statutory construction, it relies instead on a twenty-year-old rule for support that rule doesn't provide. In its 1992 Residential Landline Ruling, the first rule implementing the TCPA, the Commission responded to the concern that some residential customers might "knowingly release their phone numbers" to telemarketers—perhaps some

customers would like to receive their marketing contact, and should be permitted to do so. For those residential phone customers, the TCPA would not stand in their way. If a telemarketer invites that contact, and the residential consumer knowingly provides it, the Commission would infer "express consent" to receive calls to their landlines from an autodialing system on that basis.

From this nuanced and limited conclusion, DCI would infer a general, over-arching rule under which the FCC amended the TCPA and substituted "implied" for "express" in the statute's consent requirement. The Commission did no such thing. After the 1992 Residential Landline Ruling, any customer who gives her phone number to a telemarketer consents to receiving calls to her residence from an autodialed system. That's how telemarketers do business; when you knowingly participate in that business, you have consented to receiving those calls.

But whatever the virtues of the logic behind such knowing participation—and that logic explains well the district-court cases on which DCI relies, such as *Roberts* (the PayPal user agreement case) or *Emanuel* (the Lakers jumbotron case)—the reality is that the Commission was not addressing technology that did not yet exist. The first commercial text message was not sent in the United States until 1993. The 1992 Residential Landline Ruling applies, on its face, only to residential landlines. And the one exception, authorizing contact between wireless carriers and their subscribers, just underscores the limited nature of the FCC's ruling.

2. The FCC's 2008 Debtor-Creditor Ruling applies only to the debtor-creditor context.

The district court's reliance on the FCC's 2008 Debtor-Creditor Ruling can similarly be dismissed out of hand. In that Order, the FCC strictly limited its interpretation of "prior express consent" to cases involving a debtor-creditor relationship, to "clarify that autodialed and prerecorded message calls to wireless numbers that are provided by the called party to a creditor in connection with an existing debt are permissible as calls made with the 'prior express consent' of the called party." 2008 Debtor-Creditor Ruling, 23 F.C.C.R. at 559. DCI is not Mr. Murphy's creditor. The rule's conclusion in that specific context is unavailable in this one. Indeed, just pages before the district court concluded that the 2008 Debtor-Creditor Ruling was "binding on the district courts," it had dismissed any case law and regulations governing the "creditor-debtor relationship" as "inapplicable to this matter" given the unique nature of those relationships. DN 87 at 11-12. Just so. The 2008 Debtor-Creditor Ruling explains nothing about the relationship between DCI and Mr. Murphy.

In fact, the relationship between the 1992 Residential Landline Ruling and the 2008 Debtor-Creditor Ruling helps reveal the thinness of DCI's view of the regulatory landscape. DCI's theory of the case relies on the 2008 Debtor-Creditor Ruling's supposed reinforcement of the idea that the 1992 Residential Landline Ruling changed "express consent" to "implied consent" in all future cases. If that

reading of the 1992 Residential Landline Ruling were correct, there would have been no need for the 2008 Debtor-Creditor Ruling at all; the 1992 decision would have answered the question forever after. The 1992 Residential Landline Ruling did nothing of the sort, of course, as the FCC's many subsequent decisions make clear. *See, e.g.,* 2012 Written Consent Ruling, 27 F.C.C.R. at 1834 n.24 (specifically confirming that the 2008 Debtor-Creditor Ruling is limited to the debtor-creditor relationship)

The FCC's context-driven, fact-specific approach to interpreting "prior express consent" is clear in each of its many rules on the topic. The 1995 Fax and Phone Solicitation Ruling addressed the practice of sending unwanted faxes—in many ways, more similar to the receipt of text messages than telephone calls. In that ruling, the Commission determined that a consumer had not granted permission to receive faxes under the related statutory standard—"prior express permission or invitation"—merely by providing a fax number to the telemarketer because the Commission did "not believe that the intent of the TCPA is to equate mere distribution or publication of a telephone facsimile number with prior express permission or invitation to receive such advertisements." 1995 Fax and Phone Solicitation Ruling, 10 F.C.C.R. at 12408. Once again, the FCC approached a unique factual context, read the statute on its terms, and provided an interpretation of the statute that fit that factual context.

3. The FCC's 2003 Cell Phone Ruling addressed and specifically rejected DCI's interpretation of the statute.

In any event, the 1992, 1995, and 2008 rulings are something of a distraction in this appeal. None addressed the meaning of "prior express consent" in the cell-phone context, beyond the narrow case of the debtor-creditor relationship (in the 2008 Ruling). But the FCC did in fact anticipate—and reject outright—DCI's violation of the statute, and its proposed defense here. The 2003 Cell Phone Ruling—which the district court did not analyze, although it was discussed at length in the oral argument regarding DCI's motion to dismiss, *see* DN 89 at 27-29—reveals that the FCC never intended to water down the "express consent" requirement for the receipt of text messages via cell phones. In the 2003 Cell Phone Ruling, the FCC plainly stated that the authorization for "cellular carriers" to contact their subscribers using autodialing systems was limited to those carriers. 18 F.C.C.R. at 14111. And it explicitly rejected the argument that it should permit the equivalent of "implied consent" when a consumer like Mr. Murphy "provides his wireless number as a contact number to a business." *Id.* n. 623.

The 2003 Cell Phone Ruling resolves this appeal. There is no way to reconcile the district court's conclusion that the 1992 Residential Landline Ruling and the 2008 Debtor-Creditor Ruling changed "express consent" to "implied consent" in the context of cell phones when the 2003 Cell Phone Ruling considered, and rejected, that very proposal.

II. The Hobbs Act has no bearing on this appeal because Mr. Murphy doesn't challenge the validity of a single FCC Rule.

Because DCI cannot prevail under any plausible interpretation of the phrase "prior express consent," it attempts to pin its topsy-turvy reading of the statute on the FCC. Under traditional canons of administrative law, this gets things exactly backwards: Statutory clarity cannot be undone by regulatory ambiguity. "If Congress has directly spoken to the precise issue in question, if the intent of Congress is clear, that is the end of the matter." *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 233 (1986).

The Hobbs Act, however, provides that "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission" must be brought in the federal courts of appeals. 28 U.S.C. § 2342. But as the previous section explained, the FCC's Rulings don't bear on this question. A victory for Mr. Murphy leaves those rules undisturbed. Even under the Hobbs Act's most expansive interpretation, it does not deprive a court of jurisdiction to *follow* a rule's plain language and hold that it does not apply to a particular case. That should be the end of the story.

Even if one assumes (wrongly, in our view) that the 1992 Residential Landline Ruling or the 2008 Debtor-Creditor Ruling have some relevance to text messages outside the debtor-creditor context, the Hobbs Act still shouldn't come into play. Just as the Act does not deprive a court of jurisdiction to determine whether the facts of a particular case fall *within* the scope of an FCC order, it does

not deprive a court of jurisdiction to determine *what* the scope of that order is in the first place. "Although the Hobbs Act prevents the district court from considering the validity of final FCC orders, the court retains jurisdiction to determine whether the parties' actions violate FCC rules." *CE Design, Ltd. v. Prism Business Media, Inc.*, 606 F.3d 443, 446 n.3 (7th Cir. 2010). And to the extent the scope of the FCC's rule is ambiguous, the Court should resolve that ambiguity in a way that avoids a direct conflict with the plain language of the statute enacted by Congress—in this case, the TCPA's key requirement of "prior express consent." Whatever the contours or merits of the 1992 Residential Landline Ruling and the 2008 Debtor-Creditor Ruling—and their relationship to the 1995 Fax and Phone Solicitation Ruling and especially the 2003 Cell Phone Ruling—there can be little doubt that a donor's bare provision of a cell-phone number on a medical intake form two years before receiving marketing text messages from an autodialer is not "prior express consent," within any plausible interpretation of that phrase.

Of course, this is not to say that the Hobbs Act could never be relevant to a claim that a defendant had sent text messages using an autodialer without "prior express consent." This Court recently provided the standard to apply when determining whether the Hobbs Act would strip the district court of jurisdiction to hear a complaint that touches statutes implemented by the FCC. In *Self v. Bellsouth Mobility, Inc.*, the Court concluded that the Hobbs Act deprived the district court of

jurisdiction to consider a putative class action challenging certain fees AT&T charged its cell-phone customers. 700 F.3d 453 (11th Cir. 2012). Those fees, however, were specifically authorized by the FCC—a fact not challenged by the plaintiff. The plaintiff argued instead that the FCC's rules provided no cover for the defendant carrier because the rules themselves violated the law. The question, then, was whether the district court could adjudicate that claim, given the jurisdictional requirements of the Hobbs Act.

Self provided the general principle for answering this question: "Do [the plaintiff's] claims *necessarily conflict* with final orders of the FCC and thereby depend on the district court being able to collaterally review the correctness or validity of those orders?" *Id*. at 462 (emphasis added). If yes, then the district court, under the Hobbs Act, lacks jurisdiction. If no, then the Hobbs Act does not apply. In *Self*, the FCC "expressly permit[ted] carriers" to levy exactly the charges that the plaintiff claimed were illegal. *Id*. Because of this, the plaintiff's fight was with the FCC, not with the defendant, and the Hobbs Act prevented the district court from hearing the claim. *See also FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 (1984) (holding that "[l]itigants may not evade [the Hobbs Act] by requesting the District Court to enjoin action that is the outcome of the agency's order"); *Leckler v. Cashcall, Inc.*, 2008 WL 5000528, at *2 (N.D. Cal. 2008) (finding that the court lacked jurisdiction under the Hobbs Act to hear a challenge from a plaintiff-debtor to the

FCC's decision in the 2008 Debtor-Creditor Ruling that allowed the defendant-creditor to infer "prior express consent" from the provision of a cell-phone number, when the 2008 Ruling expressly allowed that inference).

The upshot of *Self* is that the Hobbs Act has no place where the FCC rules are not challenged. That is precisely Mr. Murphy's position. A case currently pending before this Court raises the same issue. *See Mais v. Gulf Coast Collection Bureau, Inc.*, 944 F. Supp. 2d 1226 (S.D. Fla. 2013), *appeal pending*, No. 13-14008 (11th Cir.). Although the district court there reviewed and applied the Hobbs Act in a case brought under the TCPA, plaintiff's counsel on appeal argues that, as with Mr. Murphy, the Hobbs Act need not be invoked at all because the complaint does not "necessarily conflict with final orders of the FCC." *Self*, 700 F.3d at 462; *see* Br. of Plaintiff-Appellee Mark S. Mais, at 30-31, in *Mais v. Gulf Coast Collection Bureau*, No. 13-14008 (11th Cir., filed Dec. 10, 2013).

As counsel urged in *Mais*, not only is it unnecessary to invoke the Hobbs Act, it is necessary *not* to do so. *See PDK Labs. Inc. v. U.S. D.E.A.*, 362 F.3d 786, 799 (D.C. Cir. 2004) ("[I]f it is not necessary to decide more, it is necessary not to decide more.") (Roberts, J., concurring). DCI urges the Court to close the courthouse door to any complaint based on a statute once construed by the FCC. That is not the standard this Court adopted in *Self*, and for good reason. Before a court concludes "that a statute withdraws the original jurisdiction of the district courts," it must first

identify "a clear statement from Congress" to that end. *S. New England Tel. Co. v. Global NAPs*, 624 F.3d 123, 135 (2d Cir. 2010) (citing *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 643-44 (2002)).

Cases like *Self* and *Mais* show exactly why the Hobbs Act is irrelevant to this appeal. Mr. Murphy does not challenge a single FCC rule. The rules cited either require that he prevail (the 2003 Cell Phone Ruling), strongly support his arguments (the 1995 Fax and Phone Solicitation Ruling and the 2008 Debtor-Creditor Ruling), or have little if anything to do with his case (the 1992 Residential Landline Ruling). The Hobbs Act accordingly presents no barrier to review and no reason to accept DCI's invitation to abdicate jurisdiction.

* * * *

This Court need look no further than the plain language of the TCPA to resolve this appeal. Congress required that telemarketers interested in sending autodialed messages secure a consumer's "prior express consent" to receive these messages. DCI failed to secure this consent, and therefore broke the law. And contrary to DCI's assertions, the FCC has not modified that statutory language to excuse the company's behavior. The FCC's rules either compel Mr. Murphy's contention that he never provided "prior express consent," or else address distinct factual scenarios that have nothing to do with DCI's practices. The FCC cannot

take the blame for the district court's mistaken decision, at DCI's urging, to turn the statute on its head.

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

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May 8, 2014

CERTIFICATE OF SERVICE

I certify that on May 8, 2014, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Eleventh Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: May 8, 2014

/s/ Deepak Gupta
Deepak Gupta

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 9,141 words.

Dated: May 8, 2014

/s/ Deepak Gupta
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