No. 13-14008

In the United States Court of Appeals for the Eleventh Circuit

GULF COAST COLLECTION BUREAU, INC.,
Defendant-Appellant,

v.

MARK S. MAIS, on behalf of himself and all others similarly situated,
Plaintiff-Appellee.

On Interlocutory Appeal from the
United States District Court for the Southern District of Florida

BRIEF FOR PLAINTIFF-APPELLEE MARK S. MAIS

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CERTIFICATE OF INTERESTED PERSONS

Eleventh Circuit Rule 26.1-1 states that the certificate of interested persons contained in the appellee's brief must include only persons and entities that were omitted from the certificate contained in previous briefs filed in the appeal. Counsel hereby certify that the certificate of interested persons contained in the appellant's brief and the amicus brief of ACA International is complete, with the exception of additional counsel for the appellee: Jonathan E. Taylor of Gupta Beck PLLC in Washington, DC.

/s/ Deepak Gupta
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STATEMENT REGARDING ORAL ARGUMENT

If this case squarely presented the question that the appellant says it does—the extent to which the Hobbs Act deprives a district court of jurisdiction to fully adjudicate a claim or defense predicated on a rule of the Federal Communications Commission (FCC)—then oral argument would be warranted. That question raises difficult and weighty issues that appellate courts have struggled with, and this Court would benefit from the opportunity to question the parties about their respective positions.

But before this Court can even grapple with that question, it must address a logically antecedent issue: Does the agency's rule apply to the facts of this case at all? Because the answer to that question is no—as the rule's express limitation itself makes clear—and because the appellant has provided the Court with no analysis of that limitation nor any justification for why this Court should (or could) disregard it, the appellee does not believe that oral argument would aid the Court's decision-making in this case. But should the Court disagree, he respectfully requests that he be given the same amount of oral argument time as the appellant.

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INTRODUCTION

Congress enacted the Telephone Consumer Protection Act (TCPA) in response to public outrage at intrusive and harassing phone calls. Among other things, the TCPA prohibits the use of autodialers to place non-emergency calls to a cell phone absent the recipient's "prior express consent." 47 U.S.C. § 227(b)(1)(A).

When Mark Mais was admitted to the hospital emergency room, his wife Laura filled out the intake forms and included Mark's cell-phone number. The forms said nothing about consent to receive automated collection calls. Yet Mark later received dozens of calls from Gulf Coast, a third-party bill collector. This appeal turns on whether these facts, standing alone, indicate that Mais gave "prior express consent" under the TCPA. In arguing that they do, Gulf Coast makes no attempt to explain how Mais provided "prior express consent" under the ordinary meaning of that phrase. Indeed, it does not even attempt to define the phrase.

Instead, Gulf Coast seeks refuge in two FCC rules. But neither rule applies here. One rule creates a special exemption for healthcare-related calls to *residential* lines—not cell phones. The rule does not interpret "prior express consent" at all. And, in any event, the hospital's admission forms here asked only for consent to the disclosure of "health information" about "treatment and services." No reasonable person could think this meant consent to receive automated collection calls on a cell phone. Yet that is exactly what Gulf Coast argues on appeal.

The second FCC rule allows consent to be "deemed" granted, but only when a consumer provides his "cell phone number to a creditor, *e.g.*, as part of a credit application." Here, Mais's wife provided his number to a *hospital*, which Gulf Coast admits is not the creditor.

For Gulf Coast to prevail on appeal, then, this Court would have to *expand* the scope of at least one of these two FCC rules—beyond even the agency's own express limits. And it would have to expand them into the teeth of a statute that (1) does not permit *any* cell-phone exemptions like those for landlines, and (2) does not permit implied consent but rather requires "prior express consent."

Gulf Coast invites the Court to extend the agency's rules for policy reasons. But the core argument in its brief is that the Court *lacks* authority to "alter" or "redefin[e] the scope" of an FCC rule. Doing so here would be particularly inapt because the FCC has recently interpreted "prior express consent" to require (1) "clear and conspicuous disclosure" that a consumer will receive automated calls and (2) that a consumer "agrees unambiguously to receive such calls."

So this Court need not—and therefore should not—reach the question that Gulf Coast and its amicus give almost exclusive attention: To what extent does the Hobbs Act deprive a district court of jurisdiction to determine if an FCC rule is entitled to deference, at least as a predicate to adjudicating a party's claims or defenses? That is a thorny question of administrative law, raising concerns the

courts of appeals have struggled with for years. And in fairness, the district court should not have reached the question either. The district court rightly concluded that both FCC rules were inapplicable; that should have been the end of the matter. And if this Court has any doubt on that score, it should be resolved in Mais's favor. Courts should be sure that a rule really applies before declining jurisdiction over otherwise legitimate claims on that basis.

STATEMENT OF THE ISSUES

The TCPA makes it "unlawful for any person" to use an autodialer "to make any call" to a cell-phone number without the "prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A). This appeal presents two issues arising out of that prohibition:

1. "Health Information" About "Treatment and Services." By authorizing a hospital to disclose "health information" about his "treatment and services," did Mark Mais thereby give "prior express consent," within the meaning of the TCPA, to a third-party bill collector who later placed dozens of calls to his cell phone using an autodialer?

2. The Bare Provision of the Cell-Phone Number. By providing his cell-phone number to the hospital, without more, did Mais give "prior express consent," within the meaning of the TCPA, to the bill collector's autodialer calls to his cell phone?

a. 2008 FCC Ruling. Should this Court expand the scope of a 2008 FCC Ruling—which, by its own terms, applies only to information given by consumers to particular creditors—to authorize the collector's calls to Mais's cell phone on behalf of a creditor other than the hospital?

b. Hobbs Act. The Hobbs Act deprives district courts of jurisdiction only "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. Did the Act preclude the district court from concluding that the FCC Ruling did not apply to the facts of this case?

STATEMENT OF THE CASE AND OF THE FACTS

A. Statutory and Regulatory Background

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 such intrusive practices, its legislative 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 FCC Rcd. 17459, 17474 (2002). For these reasons, Congress regarded autodialed calls as "more intrusive to

the privacy concerns of the called party than live" calls. *Id.* 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).

Of particular concern to Congress were autodialed calls to cell phones. 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 FCC Rcd. 559, 562 (2008) (2008 FCC Ruling). 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.[1]

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[1] These concerns have grown significantly since the TCPA's enactment in 1991. As the FCC recently noted: "[T]he 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 the wireless context . . . . Further, the costs of receiving autodialed or prerecorded telemarketing calls to wireless numbers often rests with the wireless subscriber, even in cases where the amount of time consumed by the calls is deducted from a bucket of minutes." *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 FCC Rcd. 1830, 1839-40 (2012) (2012 FCC Ruling).

Because most people have no way to stop unwanted calls on their own, Congress determined 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). And because consumers are *charged* for that nuisance and privacy invasion when called on their cell phones, Congress afforded consumers special protection against those calls.

1. *The TCPA's cell-phone provision.* The TCPA's cell-phone provision broadly restricts the use of autodialers in calls to cell phones or other 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).

Several aspects of this provision are relevant here. *First*, the provision applies to "any" autodialed or prerecorded call to a cell phone, including debt-collection calls. Although interest groups lobbied Congress to exempt these calls from the TCPA, Congress did not do so. *See* S. Rep. No. 102-178, *reprinted in* 1991 U.S.C.C.A.N. 1968, 1971 (1991). *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 debt collection is not an emergency purpose, using an autodialer to call a cell phone for this reason 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. 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." *Id.* at 1975. *Third*, although Congress gave the FCC rulemaking authority over many aspects of the TCPA, it limited the agency's authority to create additional exemptions to the cell-phone provision: Only calls "that are not charged to the called party" may be exempted. 47 U.S.C. § 227(b)(2)(C).

2. *The TCPA's landline provision.* A second provision of the Act regulates calls to landlines. *Id.* § 227(b)(1)(B). Like the cell-phone provision, this provision contains exceptions for emergency calls and "prior express consent." *Id.* But unlike the cell-phone provision, the landline provision prohibits only prerecorded or artificial messages, not autodialers generally. And it allows the FCC to adopt a broader range of exemptions: The agency may exempt non-commercial calls, as well as calls that do not "adversely affect . . . privacy rights" and do not contain an "unsolicited advertisement." *Id.* § 227(b)(2)(B).

The FCC invoked that authority in 1992 to exempt residential calls where the caller has an "established business relationship" with the called party. *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 FCC Rcd. 8752, 8755 (1992). The agency determined that these calls—which it believed would generally include debt-collection calls—do "not adversely affect . . . privacy interests" and "can be deemed to be invited or permitted" by the called party. *Id.* at 8770-73. The exemption, however, does *not* apply to cell-phone calls. Congress gave the FCC no authority to create a similar exemption for those calls, and the agency did not purport to do so. 47 U.S.C. § 227(b)(1), (b)(2); 7 FCC Rcd. at 8755 (adopting the exemptions "from the prohibition on prerecorded or artificial voice message calls to residences").

In 2012, the FCC reversed course. It concluded that the "established business relationship" exemption "has adversely affected consumer privacy rights" and that "many consumers do not consider prerecorded calls made pursuant to an established business relationship either invited or expected." 2012 FCC Ruling, 27 FCC Rcd. at 1846-47. The agency thus eliminated the exemption "for prerecorded telemarketing calls to residential lines." *Id.* at 1845.

In the same ruling, the FCC added an exemption for "all prerecorded health care-related calls to residential lines that are subject to" the Health Insurance Portability and Accountability Act (HIPAA). *Id.* at 1852. Because "HIPAA requires

an individual's written authorization before his or her protected health information can be used or disclosed for marketing purposes," the FCC found that "health care-related calls, subject to HIPAA, to residential lines do not constitute an unsolicited advertisement and will not adversely affect . . . privacy rights." *Id.* at 1856. As with the "established business relationship" exemption, however, this exemption—by its own terms—does not extend to cell-phone calls. *See id.* at 1852 (invoking authority to "establish exemptions from the prohibitions on prerecorded voice calls to residential lines").

3. The FCC's interpretation of "prior express consent." The 2012 Ruling also interprets the term "prior express consent"—an exception to both the cell-phone and landline provisions. Because "the TCPA is silent on the issue of what *form* of express consent—oral, written, or some other kind—is required," the FCC has "discretion to determine, consistent with Congressional intent," the form the express consent may take. *Id.* at 1838 (emphasis added).

The 2012 Ruling exercises the agency's discretion by requiring "prior express written consent for autodialed or prerecorded telemarketing calls to wireless numbers." *Id.* at 1840. The FCC determined that requiring express consent in writing 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.* This writing requirement, however, does not apply to debt-collection calls. *Id.* at 1841. Those calls continue to "require either written or oral consent if made to wireless consumers" and do "not require any consent when made to residential [landline] consumers." *Id.*[2]

In addition to setting forth the *form* of express consent, the FCC confirmed that its *content* requires specificity: The consumer must receive "clear and conspicuous disclosure" that he "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.*

Only for a single narrow category of calls has the FCC interpreted "prior express consent" to mean something other than "clear and conspicuous disclosure" and "unambiguous consent" to receive autodialed calls. In an earlier ruling, the agency "conclude[d] that the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent" to be called "at that number regarding the debt." 2008 FCC Ruling, 23 FCC Rcd. at

[2] *See also id.* at 1842 ("Section 227(b)(1)(A) and our implementing rules continue to require some form of prior express consent for autodialed or prerecorded non-telemarketing calls to wireless numbers. . . . We leave it to the caller to determine, when making an autodialed or prerecorded non-telemarketing call to a wireless number, whether to rely on oral or written consent in complying with the statutory consent requirement.").

564. The FCC emphasized, however, "that prior express consent is deemed to be granted *only* if the wireless number was provided by the consumer to the *creditor*." *Id.* (emphasis added). "In addition, prior express consent provided to a particular creditor will not entitle that creditor (or third party collector) to call a consumer's wireless number on behalf of other creditors, *including on behalf of affiliated entities*." *Id.* at 565 n.38 (emphasis added). Thus, providing a number to someone *other* than the creditor—even to an affiliated entity of the creditor—will not count as express consent. And even for those calls covered by the 2008 Ruling—where the number was provided by the consumer to the creditor as part of a credit application—the FCC "encourage[d] creditors to include language on credit applications and other documents informing the consumer that, by providing a wireless telephone number, the consumer consents to receiving autodialed and prerecorded message calls from the creditor or its third party debt collector at that number." *Id.* at 565 n.37.

B. Factual Background

In 2009, Mark Mais went to the emergency room at Westside Regional Hospital for medical treatment. DE 121, ¶ 1; DE 158, ¶ 2. His spouse Laura provided his cell-phone number to hospital staff upon his admission. *Id.* She signed several intake forms consenting to release his "healthcare information" to other

parties consistent with HIPAA. DE 121-4. One paragraph explained how this information could be used for payment purposes:

> **For Payment.** We may use and disclose health information about your treatment and services to bill and collect payment from you, your insurance company or a third party payer. For example, we may need to give your insurance company information about your surgery so they will pay us or reimburse us for treatment. We may also tell your health plan about treatment you are going to receive to determine whether your plan will cover it.

DE 121-4, at 3. Apart from this disclosure of "health information" about "treatment and services," the forms did not mention that the hospital or its affiliates might call Mais on his cell phone regarding a debt—let alone that these calls could be made using an autodialer. Nor did his spouse otherwise consent to him being called on his cell phone using automated equipment.

After being admitted, Mais received treatment from Florida United Radiology, a clinical-services provider (and a separate entity from the hospital). DE 121, ¶ 1. He incurred an alleged debt of $49.03 to Florida United for the treatment. *Id.* Neither he nor his spouse provided Florida United—the creditor of the debt—with his cell-phone number or signed an agreement with the company. DE 158, ¶¶ 4-5; DE 173, ¶¶ 4-5.

At the time, Florida United used the billing company McKesson to access patient information and send out bills on its behalf. McKesson obtained Mais's cell-

phone number from the hospital and eventually forwarded the number to Gulf Coast Collection Bureau, a debt collector. DE 158, ¶¶ 5-6; DE 173, ¶¶ 5-6.

Gulf Coast proceeded to call Mais's cell phone dozens of times using its automated system, and left several messages concerning his debt. DE 158, ¶¶ 8-12. It did not bother checking whether it was calling a landline or cell-phone number—even though it could have easily done so with basic technology—and does not distinguish between them when autodialing consumers. *Id.*

C. Procedural Background

Mais brought this action against Gulf Coast for violating the TCPA's cell-phone provision by calling his cell phone using an autodialer without his "express consent" to do so. 47 U.S.C. § 227(b)(1)(A). Because consent is an affirmative defense, the burden is on the party asserting it to show that it obtained prior express consent before calling the consumer. *See* 2008 FCC Ruling, 23 F.C.C.R. at 565.

Gulf Coast attempted to make that showing based on two pieces of evidence: (1) the HIPAA disclosures—including the disclosure of "health information about . . . treatment and services to bill and collect payment"—and (2) the provision of Mais's cell-phone number to Westside Hospital. The question in this case is whether either of those two things constitutes "prior express consent" under the TCPA.

The district court's decision. The district court below held that neither qualifies as express consent.

1. *Health Information*. As to the first piece of evidence: The court rejected Gulf Coast's argument that it could not have violated the TCPA because it complied with HIPAA. "The TCPA is a separate statute," the court explained, and it "imposes separate requirements." DE 198, at 6. The court acknowledged that the 2012 FCC Ruling creates an exemption for *landline* calls subject to HIPAA, but this exemption "does not apply here because it does not address debt collection calls to *cell phones*." *Id.* at 7 n.3 (emphasis added). The court also considered the specific language of the disclosures and determined that it is not express consent because it is "not clear that the patient would understand 'health information about your treatment and services' to mean his cell phone number." *Id.* at 14 n.6.

2. *Provision of the Number, Standing Alone.* As to the second piece of evidence: The district court concluded that Mais's spouse did not provide "express consent" simply by giving his cell-phone number to Westside Hospital. The court rejected Gulf Coast's argument based on the 2008 FCC Ruling, which determined "that the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent," 23 FCC Rcd. at 564. The court did so for three independent reasons.

First, the court determined that the 2008 FCC Ruling applies to consumer-credit transactions; it "does not apply to the medical care setting, at least under the facts of this case." DE 198, at 13. *Second*, even if the Ruling did apply to the provision of medical care, it would not cover the facts of this case because—as the Ruling itself makes clear—"prior express consent is deemed to be granted *only if* the wireless number was provided by the consumer to the *creditor*." *Id.* at 15 (second emphasis added). And here, Mais's number was provided to the *hospital*, not the creditor.

Finally, the court held that, even if the 2008 FCC Ruling were applicable, there was no "prior express consent" under the TCPA. To find express consent on the facts of this case—where Mais's spouse merely provided his cell-phone number "to the Hospital admissions clerk"—would be to reach a conclusion "inconsistent with the statute's plain language." *Id.* at 12. The court therefore declined, in the alternative, to apply the ruling in this particular case. The court held that it had jurisdiction to do so consistent with the Hobbs Act, which 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. Because § 402(a) makes reviewable "[a]ny proceeding to enjoin, set aside, annul, or

suspend any order of the Commission," and this case does not fit that description, the district court determined that it had jurisdiction. DE 198, at 7-11.

The district court granted partial summary judgment to Mais, leaving the issue whether the TCPA violations were willful. The court certified an interlocutory appeal of its summary-judgment ruling under 28 U.S.C. § 1292(b), and Gulf Coast filed a petition for interlocutory review in this Court shortly thereafter. This Court granted the petition on September 4, 2013.

SUMMARY OF THE ARGUMENT

The TCPA prohibits any non-emergency call made to a cell phone using an autodialer, unless it was "made with the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A). This appeal hinges on whether Mark Mais provided "express consent" to receive dozens of autodialed calls on his cell phone by doing two things: (1) agreeing to let Westside Hospital disclose "health information" about his "treatment and services," and (2) including his cell-phone number on the hospital's admissions form. Neither is "express consent."

I. 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 be called *using an autodialer*—as the

FCC's 2012 Ruling confirms. That did not happen here, and Gulf Coast does not claim that it did.

Nevertheless, Gulf Coast argues that Mais gave "express consent" in this case because Westside Hospital's inpatient forms contained HIPAA disclosures, including a paragraph in which the patient consents to the disclosure of certain "health information" about "treatment and services." But complying with HIPAA does not mean complying with the TCPA. Even though the FCC has created an *exemption* from the "express consent" requirement for "all prerecorded health care-related calls to *residential* lines that are subject to HIPAA," that exemption does not (and cannot) apply to calls made to *cell phones*. 2012 FCC Ruling, 27 FCC Rcd. at 1852 (emphasis added). And without an exemption, there is no way that agreeing to the disclosure of "health information" about "treatment and services" constitutes "express consent" to be called on one's cell phone using an autodialer.

II.A. The second piece of evidence that Gulf Coast points to—the bare fact that Mais provided his cell-phone number to Westside Hospital upon admission—is even weaker. Yet Gulf Coast claims that this constitutes "express consent" under the FCC's 2008 Ruling, which "conclude[d] that the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent" to be called "at that number regarding the debt." 23 FCC Rcd. at

564. Further, Gulf Coast asserts that the district court lacked jurisdiction under the Hobbs Act to hold otherwise.

But even if the Hobbs Act deprives a district court of jurisdiction to determine the *validity* of an FCC ruling, it does not deprive the court of jurisdiction to determine its *applicability* (or its scope). And the FCC's 2008 Ruling itself "emphasize[d] that prior express consent is deemed to be granted *only* if the wireless number was provided by the consumer to the *creditor*," and stressed that providing the number to "affiliated entities" would not do. *Id.* at 564-565 & n.38 (emphasis added). Here, Mais gave his cell-phone to the *hospital*, not the creditor. The ruling—by its own terms—is inapplicable.

Gulf Coast's only response to this textual argument is that the FCC's express limitation on its own rule is bad policy. But not only does Gulf Coast get the policy wrong, its own brief repeatedly argues that this Court has no authority to "alter" or "redefin[e] the scope" of the FCC's Ruling for policy reasons. Gulf Coast Br. 21, 34.

II.B. Because the text of the 2008 FCC Ruling itself makes clear that it is inapplicable here, the Hobbs Act has no bearing on this appeal. And even if this Court were to find that the 2008 FCC Ruling is ambiguous, the Court should resolve that ambiguity in a way that avoids a conflict with the plain language of the statute—the TCPA's key requirement of "prior express consent."

ARGUMENT

I. By permitting Westside Hospital to disclose "health information" about his "treatment and services," Mark Mais did not give his "prior express consent" to receiving autodialer calls on his cell phone.

The TCPA does not define the term "prior express consent." "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). "Express consent" ordinarily means "[c]onsent that is clearly and unmistakably stated." Black's Law Dictionary 346 (9th ed. 2009); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir. 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 contrasts with "implied consent"—or "[c]onsent inferred from one's conduct rather than from one's direct expression." Black's Law Dictionary 346 (9th ed. 2009). Implied consent is insufficient under the TCPA; only direct, unequivocal consent will do.

That consent must also be specific: The consumer must agree to be called by an "automatic telephone dialing system or an artificial or prerecorded voice" message. 47 U.S.C. § 227(b)(1)(A). Not only is that what the statute says—it is how the FCC recently interpreted the term. *See* 2012 FCC Ruling, 27 FCC Rcd. at 1844. The FCC explained that "express consent"—whatever its form—means that the consumer must receive "clear and conspicuous disclosure" that he "will receive

future calls that deliver prerecorded messages by or on behalf of" a specified entity, and must "agree[] unambiguously to receive such calls" at the designated number. *Id.* And it is what Congress intended the term to mean. *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").

Gulf Coast contends that Mais provided "express consent" here because Westside Hospital's inpatient forms contained disclosures consistent with HIPAA—including a paragraph in which the patient consents to the disclosure of certain "health information" about "treatment and services." This is both a legal argument and a factual one. The legal argument, stated simply, is that compliance with one statute (HIPAA) constitutes compliance with another (the TCPA). Stated less simply, it is that a medical provider's compliance with HIPAA "equates to 'prior express consent' for affiliates and agents of that provider to call the patient on his cell phone for debt collection purposes using an automated telephone dialing system." Gulf Coast Br. 41 (initial capitalization removed).

But as Gulf Coast concedes: "*Unlike the TCPA*, HIPAA does not require a medical provider to have *any* consent, express or implied, from a consumer to use his cell phone number to obtain payment for its services." *Mitchem v. Ill. Collection Serv., Inc.*, 2012 WL 170968, at *2 (N.D. Ill. Jan. 20, 2012) (first emphasis added);

see also Gulf Coast Br. 42 ("HIPAA's implementing regulations allow a covered entity to use and disclose health information without patient consent for 'treatment, payment, and health care operations.'"). Complying with HIPAA, then, cannot in itself give rise to "express consent" under the TCPA. "The TCPA is a separate statute that imposes separate requirements." DE 198, at 6 (Order). So HIPAA might indeed allow for the disclosure of a patient's cell-phone number for payment purposes. *See* Gulf Coast Br. 47. And a debt collector may manually call that number for collection purposes. But if the collector wants to use an autodialer to do so, then it must comply with the TCPA.

It is true that the FCC recently created an exemption from the TCPA's consent requirement for "all prerecorded health care-related calls to *residential* lines that are subject to HIPAA" based on the fact that "HIPAA requires an individual's written authorization before his or her protected health information can be used or disclosed for marketing purposes." 2012 FCC Ruling, 27 FCC Rcd. at 1852, 1856 (emphasis added). But that exemption does not and cannot apply to calls made to *cell phones*. *See id.* at 1852 (invoking authority to "establish exemptions from the prohibitions on prerecorded voice calls to residential lines"). And it has nothing to do with the meaning of "prior express consent." To the contrary, the 2012 FCC Ruling establishes an *exemption* from that requirement that would be unnecessary if complying with HIPAA automatically meant having express consent to autodial a

cell phone. Gulf Coast is therefore wrong when it says (at 45) that the FCC has "expressly recogniz[ed] that HIPAA governs the issue of 'consent' under the TCPA." The FCC has done no such thing.

Gulf Coast's factual argument focuses on the specific language of the HIPAA disclosures given to Mais, but it too amounts to a claim that HIPAA compliance equals TCPA compliance. Gulf Coast contends that Mais gave express consent to be called using an autodialer by agreeing to let the hospital disclose "healthcare information for purposes of treatment, payment, or healthcare operations" because HIPAA defines "healthcare information" to include "telephone numbers." Gulf Coast Br. 44, 47 (citing 45 C.F.R. § 164.514(b)(2)(D)).

But even if a patient would understand the phrase "healthcare information" to include "telephone numbers"—a dubious and unsupported proposition—the paragraph notifying Mais how this information might be used for payment purposes is more limited: It states that the hospital "may use and disclose health information *about your treatment and services* to bill and collect payment from you." DE 122-7, 48:2-10 (emphasis added). And the examples that follow are similarly limited: They mention "giv[ing] your insurance company information about your surgery so they will pay us or reimburse us for treatment," and "tell[ing] your health plan about treatment you are going to receive to determine whether your plan will cover it." *Id.* "Treatment and services," however, do not "clearly and

unmistakably" include one's cell-phone number. Black's Law Dictionary 346 (9th ed. 2009). And even if they did, (1) express consent to permit the disclosure of one's number is not express consent *to be called* (which requires an inference), and (2) Westside Hospital's HIPAA disclosures nowhere authorize an entity to call the patient *using an autodialer*, or even hint at this possibility. That is a far cry from the direct, unequivocal consent required by the TCPA.

II. By giving his cell-phone number to Westside Hospital upon admission, Mark Mais did not give "prior express consent" to receiving autodialer calls on his cell phone.

Apart from the HIPAA disclosures, the only other evidence Gulf Coast relies on to show "express consent" in this case is the bare fact that Mais provided his cell-phone number to Westside Hospital upon admission. Yet Gulf Coast makes no attempt to show how this act, on its own, meets the ordinary definition of "express consent"—that is, "positive, direct, unequivocal consent, requiring no inference or implication to supply its meaning." Black's Law Dictionary 305 (6th ed. 1990). Nor does Gulf Coast make an effort to satisfy the FCC's most recent definition of the term: that the consumer has received "clear and conspicuous disclosure" that he "will receive future calls that deliver prerecorded messages by or on behalf of" a specified entity, and has "agree[d] unambiguously to receive such calls" at the designated number. 2012 FCC Ruling, 27 FCC Rcd. at 1844.

Rather, Gulf Coast argues that it had express consent under the FCC's 2008 Ruling—which "conclude[d] that the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent" to be called "at that number regarding the debt"—and that the district court lacked jurisdiction under the Hobbs Act to hold otherwise. 23 FCC Rcd. at 564.

But the FCC's 2008 Ruling simply does not apply to the facts of this case, and the Hobbs Act did not preclude the district court from saying so. The Hobbs Act deprives district courts of jurisdiction only "to enjoin, set aside, suspend (in whole or in part), or to determine the *validity* of" a final FCC order—not to determine the *applicability* of one. 28 U.S.C. § 2342 (emphasis added). The Act thus comes into play only if "this case fits within the scope of" the 2008 FCC ruling. *Leyse v. Clear Channel Broad., Inc.*, 2013 WL 5926700, *1 (6th Cir. Nov. 5, 2013). And "both the district court and this court" undoubtedly have "jurisdiction to consider" that question, as even Gulf Coast's cases acknowledge. *See, e.g.*, *CE Design, Ltd. v. Prism Business Media, Inc.*, 606 F.3d 443, 446 n.3 (7th Cir. 2010) ("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.").

A. The 2008 FCC Ruling is inapplicable by its own terms and this Court lacks authority to expand its scope.

In its 2008 ruling, the FCC determined that providing "a cell phone number to a creditor, *e.g.*, as part of a credit application," constitutes "prior express consent" to be called about the debt. 23 FCC Rcd. at 564. But the agency carefully cabined the scope of that determination: It "emphasize[d] that prior express consent is deemed to be granted *only* if the wireless number was provided by the consumer to the creditor." *Id.* (emphasis added). Put conversely, if the number was *not* provided by the consumer to the creditor, then prior express consent is *not* "deemed to be granted," and the caller must show that it obtained express consent in some other way, under the term's ordinary definition. Moreover, the 2008 FCC Ruling interprets the consumer-creditor relationship strictly, stressing that "prior express consent provided to a particular creditor will not entitle that creditor (or third party collector) to call a consumer's wireless number on behalf of other creditors, including on behalf of affiliated entities." *Id.* at 565 n.38; *see also Moise v. Credit Control Services, Inc.*, --- F. Supp. 2d ---, 2011 WL 10623106, *2 (S.D. Fla. Oct. 11, 2011) ("Nothing in either the TCPA or the FCC order indicates that consent to one creditor is consent to another creditor who has some relationship with the first

creditor. In fact footnote 38 [of the 2008 FCC Ruling], quoted above, would imply the opposite.").[3]

These express limitations on the scope of the 2008 FCC Ruling make clear that it does not extend to cover the calls made in this case. Mais listed his cell-phone number on an intake form at Westside Hospital; he did not give the number to Florida United—the *creditor* of the alleged debt. (Nor did he give the number as part of a credit application.) Thus, under the plain language of the 2008 FCC Ruling, express consent is not "deemed to be granted," so Gulf Coast has the burden of providing additional evidence to show that it had express consent. *See id.* (holding that, "[b]ased on the plain language of the TCPA and the FCC order," if the plaintiff did not give "his cell phone number directly to [creditor] Quest Diagnostics," but gave it "only to [his] treating physician, then [he] did not give prior express consent to Quest or its third party collector").

That means that Gulf Coast must demonstrate that Mais received "clear and conspicuous disclosure" that he could "receive future calls that deliver prerecorded messages by or on behalf of" Florida United, and then "agree[d] unambiguously to

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[3] Although the 2008 FCC Ruling quotes a sentence from an earlier ruling stating that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given," the 2008 Ruling "clarif[ied] that such calls are permissible" when made to a cell phone for debt-collection purposes "*only* if the wireless number was provided by the consumer to the creditor . . . during the transaction that resulted in the debt owed." 23 FCC Rcd. at 564-65 (quoting 7 FCC Rcd. at 8769) (emphasis added).

receive such calls" on his cell phone. 2012 FCC Ruling, 27 FCC Rcd. at 1844. Gulf Coast has not met (or tried to meet) that burden.

Gulf Coast's only response to this textual argument—which was adopted by the district court as an independent holding, *see* DE 198, at 15—is to complain (in less than a paragraph) that it would make for bad policy. According to Gulf Coast, "separate written consent would have to be obtained by each 'creditor' provider at a hospital," and thus "a Business Associates Agreement or any joint medical consent form could not be utilized to also comply with the TCPA's consent requirements." Gulf Coast Br. 40-41. "This is precisely the unworkable situation," says Gulf Coast, that "the FCC Ruling intended to avoid." Gulf Coast Br. 41.

None of that is correct. For one thing, Gulf Coast is wrong about the policy implications of following the plain text of the 2008 FCC Ruling. "Separate written consent" would *not* have to be obtained by every hospital-based provider; a "joint medical consent form" could be used so long as it provided "express consent" to be called on an autodialer. It is only if the provider wants consent to be "deemed" granted for debt-collection purposes—based solely on the patient's provision of a cell-phone number—that the provider must ensure that it gets the number directly. Otherwise, the patient must receive "clear and conspicuous disclosure" that he could "receive future calls that deliver prerecorded messages by or on behalf of"

the provider, and must "agree[] unambiguously to receive such calls." 2012 FCC Ruling, 27 FCC Rcd. at 1844.

For another thing, this policy is not "precisely the unworkable situation the FCC Ruling intended to avoid." What *is* precise, however, is the language the FCC used to limit the scope of its ruling. Gulf Coast pleads to this Court to expand that scope—and override the agency's considered judgment—for what Gulf Coast considers to be good policy. But as Gulf Coast itself repeatedly argues, this Court has no authority to "alter" or "redefin[e] the scope" of the FCC's Ruling for policy reasons. Gulf Coast Br. 21, 34. And to do so here would be particularly inappropriate because (1) the agency has recently issued a ruling that interprets the same statutory term ("prior express consent") as generally requiring much more than providing a cell-phone number, *see* 2012 FCC Ruling, 27 FCC Rcd. at 1844; (2) this interpretation accords with the ordinary meaning of term, as used in the TCPA; and (3) the rationale underlying the 2008 FCC Ruling—that a consumer who provides a cell-phone number on a credit application can reasonably expect to be called regarding a debt—carries far less force under the circumstances of this case, where Mais provided his number as part of the hospital admissions process, and thus would expect to be called for reasons "likely relat[ing] to treatment, care, and insurance." DE 198, at 14 (Order).

If Gulf Coast disagrees with the FCC's decision to limit its own ruling, then it can petition the agency to expand it. Or it can lobby Congress to create an exemption for debt-collection calls—which Congress refused to do when it enacted the TCPA. *See* S. Rep. No. 102-178, 1991 U.S.C.C.A.N. at 1971. Or, if Gulf Coast thinks that the FCC's express limitation of its own ruling is somehow inconsistent with the text of the TCPA, then it can ask the agency to reconsider the ruling and then seek review in the court of appeals if necessary. But what Gulf Coast cannot do, by its own admission, is ask this Court to go beyond the express scope of the regulation. "If the regulation is wrong—it is best changed in a different way than in this proceeding." Gulf Coast Br. 50.[4]

[4] Neither Gulf Coast nor its amicus cited the two cases from the only court to come to a different conclusion. *See Kenny v. Mercantile Adjustment Bureau*, 2013 WL 1855782 (W.D.N.Y. May 1, 2013); *Nigro v. Mercantile Adjustment Bureau, LLC*, 2013 WL 951497 (W.D.N.Y. Mar. 12, 2013). That court reasoned: "There is no basis . . . for drawing an inference that the FCC intended this ruling to limit the application of the prior express consent exemption to parties with a consumer-creditor relationship. Such a conclusion would run afoul of the plain language of the TCPA which exempts any call to a cellular telephone service 'made with the prior express consent of *the called party*.'" *Kenny*, 2013 WL 1855782, at *6.

There are at least three problems with this reasoning. One: There is no need to "draw[] an inference" about what "the FCC intended" because the ruling is expressly limited. Two: The only thing that might "run afoul of the plain language of the TCPA" is extending the agency's ruling beyond its scope to cover a situation that does not meet the ordinary definition of "express consent." Three: Even if that were not so, Gulf Coast's own argument (at 22-29) would seem to compel the conclusion that a district court lacks the authority to disregard the FCC's express limitation on its own rule because the court believes it "run[s] afoul" of the TCPA.

B. The Hobbs Act has no bearing on this appeal.

Because the text of the 2008 FCC Ruling itself makes clear that it is inapplicable here—and because Gulf Coast offers no legal argument to the contrary—the Hobbs Act has no bearing on this appeal. Even under the 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.

But even if this Court were to find that the 2008 FCC Ruling is ambiguous, 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. 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 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 2008 FCC Ruling, there can be little doubt that a patient's bare provision of a cell-phone number upon admission to a hospital emergency room is not "prior express consent"—in the ordinary meaning of that

term—to be called repeatedly on one's cell phone by a third-party bill collector using an autodialer.[5]

Thus, this Court need not consider whether the district court had jurisdiction under the Hobbs Act to hold that the FCC's Ruling is not entitled to deference as a predicate to adjudicating the parties' claims and defenses. And because this Court need not reach that question, it should not. *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). That question—which the district court decided unnecessarily, and to which Gulf Coast and amicus ACA International devote the vast majority of their briefs—is a difficult one. It raises tricky interpretive puzzles, as well as profound problems about the limits of the administrative state and due process of law. Consider just a few:

- The Hobbs Act gives the court 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 [FCC] made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342 (emphasis added). It does the same for "all *rules*, *regulations*, or final *orders*" of the Secretary of Transportation and the Surface Transportation Board. *Id.* (emphasis added). And the Administrative

[5] One court has referred to the 2008 FCC Ruling as imposing an "implied express consent" requirement. *Adamcik v. Credit Control Servs., Inc.*, 832 F. Supp. 2d 744, 748 (W.D. Tex. 2011).

Procedure Act defines "order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter *other than rule making* but including licensing." 5 U.S.C. § 551(6) (emphasis added). Does the term "order," as used in the Hobbs Act, include "rules" and "regulations"? That is a "thorny question." *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 345 (1st Cir. 2004).

- The Hobbs Act applies only to "final orders of the [FCC] *made reviewable by section 402(a) of title 47*." 28 U.S.C. § 2342 (emphasis added). And § 402(a) makes reviewable "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission." 47 U.S.C. § 402(a). Does the Hobbs Act apply to this case, which is not a "proceeding to enjoin, set aside, annul, or suspend" an FCC order? The district court sensibly concluded that the answer is no.
- The Hobbs Act also provides that [a]ny party aggrieved by the [FCC's] final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies." 28 U.S.C. § 2344. Is it permissible to apply the Hobbs Act here, where Mark Mais did not file a petition for reconsideration within 60 days of the 2008 FCC Ruling because he was not even aware of it, let alone "aggrieved" by it? As the Fifth Circuit observed, it is unfair to "require everyone who wishes to protect himself from arbitrary

agency action not only to become a faithful reader of the notices of proposed rulemaking published each day in the Federal Register, but a psychic able to predict the possible changes that could be made in the proposal when the rule is finally promulgated." *City of Seabrook v. EPA*, 659 F.2d 1349, 1360-61 (5th Cir. 1981).

- Imagine that the government brought a forfeiture action against an individual seeking his personal property, based on a FCC ruling, and he wanted to assert a defense, either statutory or constitutional. Would the Hobbs Act deprive the court of jurisdiction to hear that defense, forcing the court to enter judgment against him even if he is in the right? At least one court of appeals has said no. *See United States v. Any & All Radio Station Transmission Equip.*, 204 F.3d 658, 666-67 (6th Cir. 2000) ("*Maquina Musical*").
- Or suppose the roles in this case were reversed, and Mais were the one relying on an FCC rule that Gulf Coast claimed was inconsistent with the TCPA. Would the Hobbs Act force the court to find Gulf Coast liable? What would Gulf Coast then do?

As these questions show, the extreme position staked out by Gulf Coast and its amicus cannot be right, and there is a reason that courts of appeals have truly struggled with this question. *See Leyse*, 2013 WL 5926700 (modifying opinion on rehearing); *United States v. Any & All Radio Station Transmission Equip.*, 207 F.3d 458

(8th Cir. 2000) (reversing opinion on rehearing); *compare id. with Maquina Musical*, 204 F.3d at 666-67. Given the complexity of the jurisdictional issue, this Court should make certain that the 2008 FCC Ruling *really* applies to the facts before declining jurisdiction over otherwise legitimate claims based on the Hobbs Act. Because the ruling does not apply here, the Court can save the Hobbs Act for another day—when it is actually forced to confront the question.

* * * *

At the end of the day, this is a simple case that has been made needlessly complex. Responding to an American public fed up with telemarketers and autodialers, Congress passed a law: No autodialer calls to cell phones unless the recipient gives "prior express consent." The question is whether Gulf Coast violated that law when it placed dozens of autodialer calls to Mark Mais's cell phone, or whether the papers Mais signed on admission to the hospital gave Gulf Coast the go-ahead to make those calls. This Court can answer that question without so much as cracking open a treatise on administrative law.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 10, 2013, I electronically filed the foregoing answer 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: December 10, 2013

/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 8,462 words, excluding the items that may be excluded under Rule 32(a)(7)(B)(iii).

Dated: December 10, 2013

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