

No. 11-56600

**United States Court Of Appeals
For The Ninth Circuit**

JESSE MEYER, etc.,

Plaintiff and Appellee,

vs.

PORTFOLIO RECOVERY ASSOCIATES, LLC, etc.,

Defendant and Appellant.

*Appeal from United States District Court,
Southern District of California, Case No. 3:11-cv-01008*

Hon. Anthony J. Battaglia, United States District Judge

**Brief of Amici Curiae in Support of
Petition for Rehearing**

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CORPORATE DISCLOSURE STATEMENT

[Fed. R. App. 26.1, 29(c)]

Pursuant to Fed. R. App. P. 26.1 and 29(c), amici curiae states that neither the American Financial Services Association (“AFSA”) nor the California Financial Services Association (“CFSA”) have any parent corporation, nor does any publicly held corporation hold 10% or more of either Association’s stock.

STATEMENT PURSUANT TO F.R. APP. 29(c)(5)

No party’s counsel authored this brief in whole or in part. No party or a party’s counsel contributed money that was intended to fund preparing or submitting this brief. Other than AFSA, CFSA and their members, no person contributed money that was intended to fund preparing or submitting this brief.

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I.

INTRODUCTION

The American Financial Services Association (“AFSA”) and the California Financial Services Association (“CFSA”) file this amicus curiae brief in support of appellant’s petition for rehearing to request that the Court reconsider and remove from its opinion two sentences (the “Two Sentences”) which are incorrect, for the reasons stated in this brief, unnecessary to the Court’s decision, and potentially troublesome for creditors and debt collectors.

The Two Sentences state:

Pursuant to the FCC ruling, prior express consent is deemed granted only if the wireless number was provided by the consumer to the creditor, *and only if it was provided at the time of the transaction that resulted in the debt at issue.* [Citation.] Thus, consumers who provided their cellular telephone numbers to creditors *after the time of the original transaction* are not deemed to have consented to be contacted at those numbers for purposes of the TCPA.

Slip opn. at 12258 (emphasis added).

Amici respectfully submit that the emphasized portions of the Two Sentences are incorrect. They misconstrue the cited FCC ruling and the Telephone Consumer Protection Act (“TCPA”) which the ruling interprets.

The TCPA allows auto-dialed calls to wireless numbers if the calls are “made with the prior express consent of the called party.” 47 U.S.C. § 227(b)(1)(A)(iii). Nothing in the statute requires that consent be given in a credit application, “at the time

of the transaction,” or at any other particular time. The statute requires only that “express consent” be given before the cell phone number is auto-dialed.

The FCC ruling that the panel opinion cites does not purport to, and could not, impose restrictions on “prior express consent” not found in the statute. Instead, the ruling states that “autodialed ... calls to wireless numbers provided by the called party *in connection with an existing debt* are made with the ‘prior express consent’ of the called party”¹

“In connection with an existing debt” conforms to the statutory wording and purpose, as well as the common law of consent on which the TCPA drew. The phrase delimits the scope of consent, not its timing. Consent to be called about one debt or transaction is not consent to be called about any other debt or transaction. That principle adequately resolves the issues raised in this case.

The Court need not and should not retain the Two Sentences that erroneously restrict the time when “prior express consent” may be given rather than limiting the scope of a customer’s consent to be called.

¹ *In re Rules & Regs. Implementing TCPA; Request of ACA Int’l for Clarification*, 23 F.C.C.R. 559, 564 ¶9 (2008) (“*ACA Clarification*”) (emphasis added). Restating this principle in the following paragraph, the FCC ruling substitutes “during the transaction” for “in connection with an existing debt.” *Id.* at 564-65 ¶10. The FCC must have intended the two phrases to have equivalent meanings as it gave no reasoned argument, and cited no authority, for imposing any temporal restriction on the TCPA’s “prior express consent” exemption.

II.

INTEREST OF AMICI CURIAE

AFSA is the nation's largest trade association representing market-funded providers of financial services to consumers and small businesses. AFSA has a broad membership, ranging from large international financial services firms to single-office, independently owned consumer finance companies.

For over 90 years, AFSA has represented financial services companies that hold a leadership position in their markets and conform to the highest standards of customer service and ethical business practices. AFSA is dedicated to protecting access to credit and consumer choice. It encourages ethical business practices and supports financial education for consumers of all ages. AFSA advocates before legislative, executive and judicial bodies on issues affecting its members' interests. *See, e.g., Am. Fin. Serv. Ass'n v. City of Oakland*, 34 Cal.4th 1239 (2005).

CFSA is a non-profit trade association representing major national and international corporations and independent lenders with operations in the State of California. CFSA members provide a broad range of financial services, including consumer and commercial loans, retail installment financing, automobile and mobile home financing, home purchase and home equity loans, credit cards, and lines of credit.

CFSA's mission is to foster ethical practices and high standards of conduct in the finance industry. CFSA strives to improve conditions within the industry and pro-

mote a greater knowledge and understanding of the economic and social aspects of consumer lending among all Californians. CFSA advocates in its members' interests before the California Legislature and regulatory bodies as well as the courts.

Many of amici's members use autodialing equipment to call their customers to collect debts and for other reasons. Many of amici's members also use third party debt collectors to make similar calls to customers. The Two Sentences of the panel's opinion subject amici's members to significant potential liability under the TCPA.

III.

PRIOR EXPRESS CONSENT MAY BE GIVEN AT ANY TIME BUT MUST BE IN CONNECTION WITH THE CALLED-ABOUT TRANSACTION

A. The TCPA Imposes No Temporal Limit On Express Consent

Interpretation of the TCPA and the FCC's implementing regulation and clarification rulings must start with the statutory language.² The TCPA's words impose no temporal limitations on express consent, other than that consent must precede the auto-dialed call. Nor does the TCPA's legislative history suggest that

² See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.")

Congress intended to impose any other temporal restriction on a called party's consent.

The pertinent portion of the TCPA provides:

It shall be unlawful for any person within the United States—

(A) to make any call (other than a call ... made *with the prior express consent of the called party*) using any automatic telephone dialing system ...

* * *

(iii) to any telephone number assigned to a ... cellular telephone service

47 U.S.C. § 227(b)(1) (emphasis added).

The emphasized words of § 227(b)(1)(A) are clear. An auto-dialed call to a cell phone is permitted if the called party expressly consented to the call before it was made. Other than requiring consent before the call, the statutory language imposes no temporal restraint on when consent must be given. Under the clear statutory wording, consent given at any time before the call suffices.

The legislative history of the TCPA's 1991 amendment—which added the quoted language—confirms that consent was to be broadly construed and was not subject to any unstated temporal restrictions. For example, the Senate Report on the draft legislation points out that one of the key changes to the initially proposed bill broadened the consent exemption:

The reported bill deletes the requirement that all consent must be in writing. Many persons order goods over the phone and may give their oral consent to being called back by a computer telling them that their product is ready for pickup. The reported bill allows consent to be given either orally or in writing.

S. Rep. No. 102-178, at 5 (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1972.³

In short, no temporal restriction on the “express consent” exemption can be found in the TCPA’s statutory text or legislative history—other than that the consent must be given “prior” to the call.

B. Congress Did Not Authorize The FCC To Restrict The Consent Exemption

In 47 U.S.C. § 227(b)(2), Congress authorized the FCC to “prescribe regulations to implement the requirements of this subsection”—i.e., § 227(b). The paragraph goes on to authorize the FCC to adopt *additional* exemptions from § 227(b)(1)(B)’s ban on prerecorded phone calls to residential land line phones and to § 227(b)(1)(A)(iii)’s ban on auto-dialed calls to cell phones.

³ Similarly, the House Report on a prior version of the bill stated that calls would be permitted “where the called party has in essence requested the contact by providing the caller with their telephone number for use in normal business communications. In addition, if a subscriber has given “prior express permission or invitation” to a telephone solicitation, this consent renders the call solicited and relieves the caller of liability for relying on such permission. The Committee did not attempt to define precisely the form in which express permission or invitation must be given, but did not see a compelling need for such consent to be in written form.” H. Rep. No. 102-317, at 13 (1991). “[T]his bill prohibits automated or prerecorded telephone calls to the home, unless the called party consents to receiving such a call” 137 Cong. Rec. S18781-02 (Nov. 27, 1991) (remarks of Sen. Pressler).

In 2005, Congress substantially amended § 227(b)(2), adding to the FCC's powers to implement the TCPA, in particular through adopting a time limit on the established business relationship exemption. *See* Pub. L. 109-21, 119 Stat. 359 (July 9, 2005); S. Rep. No. 109-76, at 2, 5, 11 (2005), reprinted in 2005 U.S.C.C.A.N. 319, 320, 323, 328.

Notably missing from § 227(b)(2), both as originally enacted and as amended in 2005, is any language authorizing the FCC to restrict—rather than implement—the “prior express consent” exemption.

C. The FCC's Implementing Regulation Imposes No Time Limit On Consent

The FCC's regulation implementing the TCPA, 47 C.F.R. § 64.1200, closely mimics the statute's words. Like the statute, the regulation imposes no temporal restraint on when express consent may be given for an auto-dialed call, other than that it must be given before the auto-dialed call.

In pertinent part, the regulation states:

(a) No person or entity may:

(1) Except as provided in paragraph (a)(2) of this section, initiate any telephone call (other than a call ... made with the prior express consent of the called party) using an automatic telephone dialing system ...

* * *

(iii) To any telephone number assigned to a ... cellular telephone service

47 C.F.R. § 64.1200(a).

The regulation does not further define “prior express consent.” Its definition of “prior express *written* consent”—a term used in connection with other TCPA restrictions—describes the type of writing required, but again imposes no temporal restriction on when the consent must be given. *See* 47 C.F.R. § 64.1200(f)(8).

D. The FCC’s Prior Clarifications Impose No Temporal Restraint

In its ruling initially adopting 47 C.F.R. § 64.1200, the FCC commented on “prior express consent’s” meaning, again without imposing any temporal restraint on when consent may be given:

If a call is otherwise subject to the prohibitions of § 64.1200, 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, absent instructions to the contrary.⁵⁷ Hence, telemarketers will not violate our rules by calling a number which was provided as one at which the called party wishes to be reached. ...

⁵⁷ See House Report, 102–317, 1st Sess., 102nd Cong. (1991), at p. 13, which supports this interpretation, noting that in such instances “the called party has in essence requested the contact by providing the caller with their telephone number for use in normal business communications.”

In re Rules & Regs. Implementing the TCPA, 7 F.C.C.R. 8752, 8769 ¶ 31 (1992).⁴

After another lengthy rule-making proceeding, the FCC revised and clarified its TCPA regulation in 2003. In its 2003 ruling, the FCC again addressed the “prior express consent’s” meaning, this time emphasizing that “prior” means before the call, but otherwise imposing no time restriction on when consent may be given:

We also note that absent an established business relationship, the telemarketer must first obtain the prior express consent of the called party in order to lawfully initiate the call. Purporting to obtain consent during the call, such as requesting that a consumer “press 1” to receive further information, does not constitute the prior consent necessary to deliver the message in the first place, as the request to “press 1” is part of the telemarketing call.

In re Rules & Regs. Implementing the TCPA, 18 F.C.C.R. 14014, 14099 ¶ 142 (2003).

E. The FCC’s 2008 Clarification Requires Transaction-Specific Consent, Not Consent At A Particular Time

In 2005, ACA International, a trade association of creditors and debt collectors, petitioned the FCC to issue a clarification ruling, stating that the TCPA exempted all debt collection calls to cell phones. *ACA Clarification*, 23 F.C.C.R. at 559, 563 ¶¶ 1, 8.

In its ruling released in early 2008, the FCC gave ACA half a loaf. It declined to exempt debt collection calls categorically from the TCPA’s prohibition on auto-

⁴ The paragraph goes on to explain that “prior express consent” has not been given if the consumer’s telephone number is captured by “a Caller ID or an ANI device without notice to the residential telephone subscriber.” 7 F.C.C.R. at 8769 ¶ 31.

dialed calls to cell phone numbers. *ACA Clarification*, 23 F.C.C.R. at 565 ¶ 11. However, the FCC did clarify that debt collection calls are exempt if the called party provided his or her cell phone number to the creditor in connection with the transaction giving rise to the call.

Summarizing its conclusion at the start, the FCC stated:

In this ruling, we clarify that autodialed ... calls to wireless numbers that are provided to a creditor *in connection with an existing debt* are permissible as calls made with the “prior express consent” of the called party.

ACA Clarification, 23 F.C.C.R. at 559 ¶ 1 (emphasis added).

In the heart of its ruling, the FCC reiterated the “in connection with” requirement, stating:

Because we find that autodialed ... calls to wireless numbers provided by the called party *in connection with an existing debt* are made with the “prior express consent” of the called party, we clarify that such calls are permissible. We conclude that the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt.

ACA Clarification, 23 F.C.C.R. at 565 ¶ 9 (emphasis added; fn. omitted).

In support of this conclusion, the FCC cited its own 1992 ruling initially adopting 47 C.F.C. § 64.1200 and the House Report on what ultimately became the TCPA. *See pp. 8-9 above* (quoting both cited sources).

The following paragraph of the FCC's ruling also clarified that the burden is on the creditor to maintain records sufficient to prove the customer has given the required "prior express consent" to be called at the cell phone number. *ACA Clarification*, 23 F.C.C.R. at 565 ¶ 10. At the start of this paragraph, the FCC wrote a transition sentence, stating again the gist of its ruling, but in slightly different words which the panel opinion, unfortunately, misconstrues:

We emphasize that prior express consent is deemed to be granted only if the wireless number was provided by the consumer to the creditor, and that *such number was provided during the transaction that resulted in the debt owed*.

ACA Clarification, 23 F.C.C.R. at 565 ¶ 10 (emphasis added; fn. omitted).

The opinion's Two Sentences interpret the emphasized words of this transitional sentence as setting a temporal restriction on "prior express consent." The Two Sentences paraphrase "was provided *during* the transaction that resulted in the debt owed" as "was provided *at the time of* the transaction that resulted in the debt at issue," as opposed to "provided ... *after the time of* the original transaction" Slip opn., at 12258 (emphasis added.)

While “during” may have a temporal connotation in other contexts, in the FCC’s ruling it simply means “at any point in the course of.”⁵ Several lines of reasoning support this conclusion.

First, the transition sentence appears alone, without any supporting reasoning or citation of authority.⁶ As already demonstrated, no temporal restriction on “prior express consent” can be found in the TCPA, its legislative history or any of the FCC’s prior regulations or rulings.

Had the FCC intended to impose a completely new time restraint on “prior express consent,” it would have explained that departure from prior law and cited some reason or other basis for its decision to adopt that new restriction. Elsewhere, both in the 2008 ACA Clarification and in its prior rulings on TCPA matters, the FCC had carefully set forth its reason for each significant aspect of its regulations and clarifications. It would have followed the same practice had it thought the transitional

⁵ Merriam-Webster Online Dict., “during,” def. 2 (“at a point in the course of”); Merriam-Webster Third New Int’l Dict., p. 703, “during,” def. 2 (“at some point in the course of”); Dictionary.com, “during,” def. 2 (“at some time or point in the course of”); MacMillan Online Dict., “during,” def. 1 (“at one point within a period of time or a process”).

⁶ The footnote at the end of the transitional sentence cites only the ACA’s petition for the proposition that collection calls are made only to customers who had received a product without payment and, typically, have provided their telephone numbers for the purpose of receiving a call. *ACA Clarification*, 23 F.C.C.R. at 565 n. 36.

sentence said anything new, particularly anything as significant as imposing a time restraint on the prior express consent exemption.

That no reason or citation to authority follows the transitional sentence is a strong indication that it was intended merely to restate the rule stated at the start of the ruling and again in paragraph 9—that consent must be given “in connection with an existing debt”—a rule for which authority *is* cited in paragraph 9. *ACA Clarification*, 23 F.C.C.R. at 559, 565 ¶¶ 1, 9.

Second, requiring that consent be given “in connection with” the debt the caller is trying to collect fulfills the TCPA’s purpose. Requiring consent to be given “at the time of” the transaction does not.

The TCPA was intended to prevent unwarranted intrusions on telephone customers’ privacy. *See* Pub. L. 102–243, § 2(5), (9), (10), (13), (14), 105 Stat 2394 (Dec. 20, 1991). From the outset, Congress recognized and adopted, as part of the TCPA, a form of the well-established common law rule that consent is a defense to invasion of privacy, as it is to other intentional torts.⁷

⁷ *See* H. Rep. No. 102-317 at 17; *see also* Rest.2d Torts, § 892A(1); Cal. Civ. Code, § 3515; *Sanchez-Scott v. Alza Pharms.*, 86 Cal.App.4th 365, 376 (2001) (“The maxim of law that one ‘who consents to an act is not wronged by it’ applies to the tort of invasion of privacy.”); *Smith v. Capital One Fin. Corp.*, 2012 WL 3138024, t *4 (N.D. Cal. 2012) (“[B]ecause plaintiff concedes that she incurred a financial obligation, she ‘impliedly consent[ed] for the creditor to take reasonable steps to pursue payment even though it may result in actual, though not actionable, invasion of privacy.’ ”); *Bundren v. Superior Court*, 145 Cal.App.3d 784, 789 (1983) (same); *Crump v. Beck-*
(Fn. cont’d)

Both at common law and under the TCPA, consent provides only a “qualified privilege, conduct in excess of that consented to is not protected.”⁸ That is the point of the FCC’s clarification that auto-dialed calls to cell phones are permissible if the called party provided the telephone number “in connection with an existing debt.” *ACA Clarification*, 23 F.C.C.R. at 559, 565 ¶¶ 1, 9. The consent is limited in scope. It is transaction or debt specific. The debt collector exceeds the scope of consent (and hence violates the TCPA) if he auto-dials a cell phone number in connection with a transaction or debt other than the one in connection with which the called party provided the telephone number.⁹ Reading “during” to mean “at a point in the course of” the transaction is consistent with this limitation on the scope of consent rather than its timing.

By contrast, the common law, like the TCPA, places no temporal restraint on when consent may be given—other than that it must be given before the otherwise wrongful intrusion. Consent obviates the offensiveness of an intrusion no matter

(Fn. cont’d)

ley Newspapers, Inc., 173 W.Va. 699, 712-13, 320 S.E.2d 70, 84 (1984) (“As in other tort actions, consent to the invasion of privacy will bar recovery.”).

⁸ *Crump*, 173 W.Va. at 713, 320 S.E.2d at 84; Rest.2d Torts, § 892A(4); *Sanchez-Scott*, 86 Cal.App.4th at 377-78.

⁹ As the FCC’s clarification put it: “[P]rior 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.” *ACA Clarification*, 23 F.C.C.R. at 565 n. 38.

when consent is given. A debtor cannot complain of intrusion by auto-dialed calls to a cell phone whenever “the called party has provided the telephone number ... to the caller for use in normal business communications.” H. Rep. 102-317 at 27. That is true if the called party provides the number on a credit application. *ACA Clarification*, 23 F.C.C.R. at 564 ¶ 9. It is just as true if the called party provides the number to a debt collector, asking that calls be directed to that phone rather than, for example, a family land line phone. Late-given consent is just as effective as early-provided consent. He who consents to an act is not wronged by it—without regard for when consent is given. Cal. Civ. Code, § 3515.

The only case (prior to this Court’s decision) that addressed this point under the TCPA agreed timing was irrelevant to the effectiveness of consent:

Although the FCC did not define the exact parameters of the phrase “during the transaction that resulted in the debt owed,” a commonsense reading of that phrase does not lead to the conclusion that a phone number must be given at the precise time the account is activated. Moreover, given that the FCC emphasized that the relevant issue in evaluating “prior express consent” is whether a phone number has voluntarily been provided to the creditor, it would strain logic to conclude that a debtor’s voluntary provision of a contact number at the time an account is opened would constitute “prior express consent” to be called at that number, but that the equally voluntary provision of a contact number sometime after the account is opened would not. 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, absent instructions to the contrary.

Moore v. FirstSource Advantage, LLC, 2011 WL 4345703, at *10 (W.D. N.Y. 2011) (citations omitted).¹⁰

Third, the FCC lacked authority to impose a temporal limitation on “prior express consent”—even by duly noticed, adopted and promulgated regulation, let alone by using the word “during” in a single sentence of its “clarification” ruling. While courts defer to an agency’s interpretation of a statute that is silent or ambiguous on a question, they do not defer when the agency’s interpretation is incompatible with the statute’s express terms. *See Chevron U.S.A., Inc.*, 467 U.S. at 842-43; *Cuomo v. Clearing House Ass’n, L.L.C.*, 557 U.S. 519, 526-31 (2009).

Here, the TCPA is clear. “Prior express consent” suffices to permit an auto-dialed call to a cell phone. The TCPA does not qualify that permission. Apart from requiring consent be given “prior” to the call, it imposes no time limit on when consent must be given in order to be effective. The TCPA grants the FCC authority to implement this exemption—and to create, by regulation or ruling, other appropriate exemptions. The TCPA does *not* grant the FCC authority to limit the “prior express consent” exemption that Congress wrote into the statute.

¹⁰ Several other district court opinions have assumed, without discussion, that “prior express consent” was not time-delimited. *See Cavero v. Franklin Collection Serv., Inc.*, 2012 WL 279448, at *3-4 (S.D. Fla. 2012); *Conrad v. Gen. Motors Acceptance Corp.*, 2012 WL 2551146, at *3 (N.D. Tex. 2012); *Practice Mgmt. Support Servs., Inc. v. Appeal Solutions, Inc.*, 2010 WL 748170, at *2-3 (N.D. Ill. 2010); *Cunningham v. Credit Mgmt., L.P.*, 2010 WL 3791104, at *5 (N.D. Tex. 2010).

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 9th Circuit Rule 29-2(c)(2), because this brief contains 4,185 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word for Windows 2010, in Times New Roman, 14 point type.

Dated: October 31, 2012

/s/ Jan T. Chilton

Jan T. Chilton

9th Circuit Case Number(s) 11-56600

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) [October 31, 2012] .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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Signature (use "s/" format)

/s/ Jan T. Chilton