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Hijacked Consent: Debt Collection and the Telephone Consumer Protection Act

Michael A. DeNiro

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NOTE

HIJACKED CONSENT: DEBT COLLECTION AND THE TELEPHONE CONSUMER PROTECTION ACT

Michael A. DeNiro†

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INTRODUCTION: A DEBTOR'S LAMENT

Imagine that Donnie Debtor visits the hospital to receive emergency medical care. As Debtor is taken from the reception area, an administrator hands him a clipboard and asks him to provide his contact information. Debtor quickly writes down his home address and his cellular telephone number; he does not read the fine print on the forms, which says that the hospital may “use and disclose health infor-

† New York University, B.A. Art History (2008); Rutgers University, M.A. Art History (2011); Cornell Law School, J.D. Candidate (2015); *Cornell Law Review*, Online Editor; Cornell Moot Court Board, Bench Editor. For their thoughtful edits and comments, special thanks to Professor Dawn Chutkow and Nora Salvatore, as well as Alyssa Chen, Neil Anderson, Kathy Shao, and all other student members of the *Cornell Law Review* who assisted in preparing this Note for publication.

mation about [Debtor's] treatment and services to bill and collect payment from [Debtor], [his] insurance company or a third party payor."¹ A month later, Debtor gets a bill from the hospital; he does not pay the bill. Donnie Debtor is now formally a debtor, and he starts receiving autodialed telephone calls to his cell phone from Third Party Collector, which has purchased the debt. A real person does not make these calls. Instead, a computer makes them, and when Debtor answers, he hears a prerecorded message telling him to pay his bill. Debtor ignores the calls, which now come in unrelenting succession—one call a day, then two, then three. Frustration soon mounts over what Debtor views as plain harassment by a debt collector with whom he has no prior relationship.

What options are available to Debtor? In theory, Debtor can sue Third Party Collector under the Telephone Consumer Protection Act (TCPA), which prohibits exactly the type of calls Debtor is complaining of, unless Debtor gave "prior express consent" to be called. Because Debtor is convinced he did not give prior express consent to be hassled by a machine, he files his claim in court. But Debtor encounters an unexpected difficulty: Third Party Collector quickly presents to the judge a Federal Communications Commission (FCC) declaratory ruling from 2008 that says, according to Third Party Collector, that because Debtor provided his cell phone number to hospital personnel at the time of the transaction that created the debt, Debtor *did* give prior express consent to be called.

Generally, courts have been very willing to accept Third Party Collector's argument and to dismiss actions such as the one brought by Debtor. And so Debtor is stuck with those automated calls, at least until he pays off his debt. But is that the right result? Does the FCC ruling say what Third Party Collector says it does, and—more importantly—is it consistent with the statutory language of, and intent underlying, the TCPA?

Consider another scenario: Cathy Consumer buys a television from Retail Seller; Consumer incurs a debt to Seller by opening up a credit account with Seller rather than paying cash for the television at the time of sale. In connection with this transaction, Consumer fills out a credit application, which requires that Consumer provide her contact information, including her cellular telephone number. Seller's salesperson does not ask Consumer if it would be permissible for Seller to contact Consumer at the number provided regarding the

¹ This language comes from a document ("Notice of Privacy Practices") quoted in *Mais v. Gulf Coast Collection Bureau, Inc.*, 944 F. Supp. 2d 1226, 1240 n.6 (S.D. Fla. 2013), a case discussed *infra* Part II.

debt transaction.² A few months later, when Consumer loses her job and misses a payment, Seller initiates an autodialed call to Consumer's wireless number to collect on the debt. Did Consumer give prior consent to be called at that number, which she provided at the time of sale? Unfortunately for Consumer, most courts would likely find that, by providing her cellular telephone number, Consumer did consent to receive calls. But did she consent *expressly*, or only *impliedly*? And, more importantly, did she consent, either expressly or impliedly, to be called by a computer, to answer to a prerecorded message, or instead to be called by a person who engages her in conversation? Do these distinctions even matter?

This Note explores the foregoing questions at a time when TCPA actions are on the rise in federal courts.³ Part I of this Note provides the background for each of the scenarios described above: the passage of the TCPA and its purpose according to Congress; the FCC's 2008 declaratory ruling that clarified what constitutes "prior express consent"; and some of the outcomes in federal courts since 2008. Part II discusses a federal district court case, *Mais v. Gulf Coast Collection Bureau, Inc.*,⁴ which questioned the validity of the FCC's declaratory ruling and which plaintiffs have relied upon to argue their cause of action in other jurisdictions.⁵ Part III asks whether *Mais* (along with several companion cases) is a mere outlier in TCPA jurisprudence or whether it represents a much-needed corrective to an improper trend among the lower courts.⁶ Part III then provides an answer from several perspectives, concluding that although the FCC does conceiva-

² For the sake of this illustration, we can assume that the application does not mention or authorize such calls.

³ See Spencer Weber Waller et al., *The Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology* (Loyola Univ. Chicago Sch. of Law Res. Paper, 2013) (noting a 34% rise in TCPA litigation in federal courts between 2012 and 2013).

⁴ 944 F. Supp. 2d 1226 (S.D. Fla. 2013), *reconsideration denied*, No. 11-61936-Civ-RNS, 2013 U.S. Dist. LEXIS 73168 (May 23, 2013), *interlocutory appeal certified*, 944 F. Supp. 2d 1226, 1247 (S.D. Fla. June 10, 2013).

⁵ See, e.g., *Ranwick v. Texas Gila, LLC*, No. 13-2792 (RHK/SER), 2014 WL 3891663, at *3-4 (D. Minn. Aug. 7, 2014) (discussing plaintiff's reliance on *Mais* for his argument that the court could attack the validity of the 2008 FCC declaratory ruling which clarified that agency's interpretation of "prior express consent"); *Murphy v. DCI Biologicals Orlando, LLC*, No. 6:12-cv-1459-Orl-36KRS, 2013 WL 6865772, at *8 & n.11 (M.D. Fla. Dec. 31, 2013) (referring to plaintiff's reliance on *Mais* and another TCPA case decided by the same judge who decided *Mais* "for his proposition that express consent under the FCC Order really constitutes implied consent"); *Chavez v. Advantage Grp.*, 959 F. Supp. 2d 1279, 1281 (D. Colo. 2013) ("Plaintiff . . . rel[ies] on the district court's decision in *Mais v. Gulf Coast Collection Bureau, Inc.* I am not persuaded." (internal citation omitted)).

⁶ After this Note was accepted for publication, the Eleventh Circuit reversed the ruling of the district court in *Mais*. See *infra* note 113. Although unfortunate, the final disposition of the *Mais* case does not undermine its purpose here, which is to exemplify judicial scrutiny of the FCC's approach to prior express consent. Its analysis of the declaratory ruling, although no longer "good law" on which future plaintiffs might rely, is nonetheless valuable in highlighting some of the possible deficiencies in the FCC's approach.

bly have the authority to define “prior express consent,” the FCC’s 2008 ruling is not a fair or reasonable construction of the TCPA and unduly discounts the degree to which the TCPA’s protections for consumers should extend to debtors under certain circumstances. Lastly, the conclusion lays out the reasons why the FCC should revise its approach to prior express consent.

I

THE TCPA AND PRIOR EXPRESS CONSENT IN THE DEBT COLLECTION CONTEXT

In 1991, Congress enacted the TCPA to place restraints on autodialed telemarketing and commercial solicitation calls to residential and certain other telephone lines, calls that often feature an artificial voice or prerecorded message.⁷ At the time, Congress viewed such calls as an invasion of privacy and a nuisance affecting the safety and welfare of the public.⁸ For example, because a telemarketing call might tie up a landline, the sick and elderly were at risk of losing prompt medical attention if a call placed to 9-1-1 or a hospital was blocked by an autodialed call.⁹ From a privacy perspective, the TCPA’s advocates have generally framed the law in language that underscores the sanctity of the American hearth and home: the TCPA returned control to the American consumer, who could repose in peace at his dinner table or watch his favorite television programming without fear of interruption.¹⁰ To its proponents, the TCPA shielded families nestled comfortably within their homes from peddlers of unwanted goods bent on crashing these Norman Rockwell-esque scenes of domestic tranquility.¹¹

As such, one cannot characterize the TCPA as primarily a debtor-shielding statute (such as, for example, the Fair Debt Collection Practices Act). Rather, debt-collection calls from creditors with whom the called party had a preexisting relationship were likely not the in-

⁷ Telephone Consumer Protection Act (TCPA) of 1991, Pub. L. No. 102-243, § 2, 105 Stat. 2394 (1991) (congressional findings) (codified at 47 U.S.C § 227 (2012)).

⁸ *See id.* § 2 ¶¶ 5–6, 12; *see also* 137 CONG. REC. 30821 (1991) (statement of Sen. Hollings) (“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. . . . It is telephone terrorism, and it has got to stop.”).

⁹ *See* TCPA § 2 ¶ 5 (“[W]hen an emergency or medical assistance telephone line is seized [by a telemarketing call], [it creates] a risk to public safety.”).

¹⁰ *See* FCC Report and Order, Rules and Regulations Implementing Tel. Consumer Prot. Act of 1991, CG Docket No. 02-278, FCC 12-21, 27 FCC Rcd. 1830, 1849 ¶¶ 46–48 (2012) [hereinafter FCC, 2012 Report and Order] (statements of Chairman Genachowski and Commissioners McDowell and Clyburn); TCPA § 2 ¶ 6 (“Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.”).

¹¹ *See* FCC, 2012 Report and Order, *supra* note 10, at 46–48.

tended target of legislative action.¹² Accordingly, the TCPA's established business-relationship exemption served as a ready-made carveout for debt-collection calls made to residential lines (prior to its removal from the TCPA in 2012).¹³ In addition, the FCC, the agency charged with promulgating rules under the TCPA, has repeatedly stated that debt-collection calls are not commercial solicitations or telemarketing.¹⁴ Thus, a creditor or a third party collector seeking to collect on a debt is able to initiate an autodialed call or call using an artificial voice or prerecorded message to a debtor's residential line without violating the TCPA.¹⁵

Nonetheless, virtually all calls made to *wireless* numbers require the "prior express consent" of the called party—including debt-collection calls.¹⁶ The TCPA does not define prior express consent and neither do the TCPA's implementing regulations.¹⁷ While this lacuna might have otherwise left the door open for courts to interpret the prior express consent requirement according to common law principles, this has not been the actual result, at least in the creditor-debtor context.¹⁸ Instead, for debt-collection calls to wireless num-

¹² Cf. FCC, 2012 Report and Order, *supra* note 10, at 4 ¶ 7 ("[T]here is no indication that Congress intended that calls be exempted 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." (quoting Memorandum Opinion and Order, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, 10 FCC Rcd. 12391, 12396 ¶ 11 (1995) [hereinafter FCC, 1995 Opinion and Order])); Waller et al., *supra* note 3, at 17 (noting that "Congress did not intend to directly regulate debt collection practices with the TCPA," but that "[d]ebt collection came into the crosshairs of the TCPA because of the industry's use of [autodialing] technolog[y]").

¹³ See Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, 23 FCC Rcd. 559, 561 (2008) [hereinafter FCC, 2008 Order]. Such calls are now exempted under 47 C.F.R. § 64.1200(a) (3) (ii)–(iii) (2013).

¹⁴ See, e.g., FCC, 2008 Order, *supra* note 13, at 565 (confirming that "calls solely for the purpose of debt collection are not telephone solicitations and do not constitute telemarketing"). The FCC has regulatory authority pursuant to 47 U.S.C. § 227(b)(2).

¹⁵ See FCC, 2008 Order, *supra* note 13, at 565. This remains true despite recent changes to the rules implementing the TCPA that require prior express *written* consent for telemarketing calls made to wireless and residential lines. See *infra* note 136 and accompanying text. The changes became effective October 16, 2013. 47 C.F.R. § 64.1200.

¹⁶ See 47 U.S.C. § 227(b)(1)(A). The TCPA only exempts from the consent requirement calls made for an emergency purpose. See *id.*

¹⁷ See 47 U.S.C. § 227(a); 47 C.F.R. § 64.1200(f). The regulations now define "prior express written consent," however. See 47 C.F.R. § 64.1200(f)(8). The definition states, in part, that a "written agreement shall include a clear and conspicuous disclosure informing the person signing that [] . . . [b]y executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls *using an automatic telephone dialing system or an artificial or prerecorded voice . . .*" *Id.* § 64.1200(f)(8)(i) (emphasis added).

¹⁸ Context-specific clarifications of FCC regulations are not uncommon. See, e.g., Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, 27 FCC Rcd. 15391, 15395 (2012) [hereinafter FCC, SoundBite Ruling] (ruling that a one-time text

bers that are made using an autodialing system or which feature a prerecorded message, the FCC clarified its understanding of what might constitute prior express consent in a 2008 declaratory ruling (2008 Order), which was issued in response to a petition for clarification filed by a debt-collection trade association.¹⁹ According to the 2008 Order, “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.”²⁰ In other words, if a person provides a creditor his or her wireless number during a transaction that creates a debt, then—according to the FCC—that creditor has received prior express consent to call the person using an automatic telephone dialing system or an artificial voice or prerecorded message.²¹ If consent is contested, the creditor bears the burden of demonstrating that it procured the debtor’s wireless number in connection with a debt transaction—not, however, that it procured express verbal or written consent to call the consumer using an autodialing system or to deliver a prerecorded message.²²

Two problems stem from the 2008 Order: first, the 2008 Order does not require that a consumer-debtor give prior express consent to be called using an automatic telephone dialing system or prerecorded message at all; it merely repeats language from an FCC declaratory

message sent to a consumer who had revoked consent to receive commercial text messages confirming the consumer’s decision to opt-out did not violate the TCPA, and stating that its interpretation of the TCPA, “in the specific circumstances at issue here, is consistent with the goals and objectives of the TCPA”). While the definition of prior express consent discussed in this Note is also context specific, the FCC apparently believes that it provided a sufficient, *universal* definition of prior express consent—provision of the called party’s telephone number to the caller—in a 1992 declaratory ruling. *Cf.* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, 7 FCC Rcd. 8752, 8769 (1992) [hereinafter FCC, 1992 Order] (noting that “persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at that number, absent instructions to the contrary”).

¹⁹ FCC, 2008 Order, *supra* note 13, at 559. The petition was filed by ACA International, “an international trade organization of credit and collection companies that provide a wide variety of accounts receivable management services.” *Id.* at 559 n.1.

²⁰ *Id.* at 559.

²¹ *Id.* at 564 (“Because we find that autodialed and prerecorded message 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.” (footnote omitted)).

²² *See id.* at 564–65 (“To ensure that creditors and debt collectors call only those consumers who have consented to receive autodialed and prerecorded message calls, we conclude that the creditor should be responsible for demonstrating that the consumer provided prior express consent.”). Consent is an affirmative defense. *See Conklin v. Wells Fargo Bank, N.A.*, No. 6:13-cv-1246-Orl-37KRS, 2013 WL 6409731, at *3 (M.D. Fla. Dec. 9, 2013) (“As Plaintiff has pled that he did not give consent or alternatively revoked consent, he has adequately stated a TCPA claim, and [the defendant loan servicer’s] motion [to dismiss] is due to be denied on that ground. It will be Defendant’s task to prove consent at the summary-judgment stage.” (citation omitted)).

ruling from 1992 stating that persons who give out their telephone numbers “have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.”²³ The 2008 Order completely disregards how the call is made or whether the called party hears a prerecorded message upon answering despite the fact that the TCPA is very much concerned with *what type of call* is being made.²⁴ Perhaps aware of this, the FCC tried to bolster its approach by pointing to legislative intent, specifically a House of Representatives report noting that the TCPA’s restrictions do not apply to calls made to numbers provided to the caller by the called party “for use in normal business communications.”²⁵ But section 227(b)(1)(A)—the provision dealing with calls to wireless numbers—does not contain a business-relationship exemption, so the House report is not on point.

The second problem stemming from the 2008 Order is that the FCC’s approach to prior express consent in the debt-collection context hardly looks like prior *express* consent at all. Rather, the FCC has stated 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.”²⁶ But express consent is, well, express; there is no reason why it should have to be inferred from—or “reasonably evidence[d]” by—the circumstances.²⁷ Thus, the ultimate question is whether, by allowing prior consent to be reasonably evidenced by the actions of the debtor, the FCC has grafted an *implied* consent exemption onto section 227(b)(1)(A).²⁸

²³ FCC, 2008 Order, *supra* note 13, at 564 (quoting FCC, 1992 Order, *supra* note 18, at 8769).

²⁴ For example, section 227(b) of the TCPA imposes no restrictions on person-to-person calls made for debt collection purposes. *See* 47 U.S.C. § 227(b) (2012); *see also* Gager v. Dell Fin. Servs., LLC, 727 F.3d 265, 274 (3d Cir. 2013) (noting that defendant’s argument failed to make note of the fact that “creditors are permitted to attempt live, person-to-person calls in order to collect a debt”).

²⁵ FCC, 2008 Order, *supra* note 13, at 564 (quoting H.R. REP. NO. 102-317, at 17 (1991)); *see also* GroupMe, Inc./Skye Communications S.A.R.L. Petition for Declaratory Ruling, FCC 14-33, No. 02-278, at 3 ¶ 8 (Mar. 27, 2014) [hereinafter FCC, GroupMe Ruling] (“Congress did not expect the TCPA to be a barrier to normal, expected, and desired business communications.” (citing H.R. REP. NO. 102-317, at 17)).

²⁶ FCC, 2008 Order, *supra* note 13, at 564 (emphasis added).

²⁷ *See id.*; *infra* text accompanying note 161. For example, if a father tells his daughter, “I consent to you marrying Tom,” one would usually not say that his consent was predominantly inferred from the circumstances (his appearance, the tone of his voice, or any gestures accompanying his speech). Rather, his grant of consent is directly communicated by his words; it is express. Any inference that might follow from the circumstances is merely additional information that supports (or contradicts) an express declaration. If the father says nothing but all in attendance know from his gestures, facial expression, or lack of contradictory action that he has consented, then that consent is *implied*; it is not express.

²⁸ *Cf.* Mais v. Gulf Coast Collection Bureau, Inc., 944 F. Supp. 2d 1226, 1239 (S.D. Fla. 2013) (noting that “the FCC is not talking about ‘express consent,’ but is instead engraft-

Despite these concerns, courts have generally accepted arguments from creditors and debt collectors who contend that the 2008 Order virtually exempts them from the TCPA's coverage. *Chavez v. Advantage Group* provides an illustration of this line of cases.²⁹ The facts of *Chavez* are straightforward: Charlene Chavez visited Parkview Medical Center for the purpose of receiving medical services.³⁰ At that time, she provided Parkview with her cellular telephone number.³¹ Chavez then incurred a debt and failed to pay her bill when it came due; Parkview assigned the debt to a third party (Advantage Group) for collection.³² Advantage Group proceeded to call Chavez using an autodialing system, which Chavez argued was a violation of the TCPA because she never gave prior express consent to be called in such a manner.³³ Advantage Group moved for summary judgment on Chavez's TCPA claim; the court, concluding that "[Chavez] expressly consented to be contacted" by Advantage, granted the motion in Advantage's favor.³⁴ In reaching its decision, the court cited the 2008 Order and stated that providing a wireless number to a creditor constitutes prior express consent.³⁵ The court then rejected, without analysis, Chavez's argument that, contrary to what is suggested by the

ing into the statute an additional exception for 'implied consent'—one that Congress did not include"); *Thrasher-Lyon v. CCS Commercial, LLC*, No. 11 C 04473, 2012 WL 3835089, at *5 (N.D. Ill. Sept. 4, 2012) ("Bizarre would be to read 'express consent' as 'implied consent.' In ordinary parlance, there is no such thing as 'implied express consent'—that is an oxymoron.").

²⁹ 959 F. Supp. 2d 1279 (D. Colo. 2013). As a list of all relevant TCPA cases would be exceedingly long and ever expanding, the following provide a helpful starting point: *O'Connor v. Diversified Consultants, Inc.*, No. 4:11CV1722 RWS, 2013 WL 2319342, at *4–5 (E.D. Mo. May 28, 2013); *Jamison v. First Credit Servs., Inc.*, 290 F.R.D. 92, 99–101 (N.D. Ill. 2013); *Adamcik v. Credit Control Servs., Inc.*, 832 F. Supp. 2d 744, 753 (W.D. Tex. 2011); *Bates v. I.C. Sys., Inc.*, No. 09-CV-103A, 2009 WL 3459740, at *2 (W.D.N.Y. Oct. 19, 2009). See also *Roy v. Dell Fin. Servs., LLC*, No. 3:13-CV-738, 2013 WL 3678551, at *3 (M.D. Pa. July 12, 2013) (concluding that the TCPA does not apply *at all* to calls made for debt-collection purposes, but failing to distinguish between calls made to residential lines and calls made to wireless numbers).

³⁰ See *Chavez*, 959 F. Supp. 2d at 1280. That the transaction that created the debt was not a commercial transaction raises an entirely different question, which is whether the FCC meant for its 2008 Order to apply to debt transactions related to the provision of medical services. The *Mais* court argued, in the alternative, that even if the 2008 Order is entitled to *Chevron* deference, see *infra* notes 163–64 and accompanying text, nonetheless it does not apply to debts arising from medical care, see *Mais*, 944 F. Supp. 2d at 1239. This Note does not answer this question, except to suggest that application of the 2008 Order to such contexts further erodes the FCC's justifications for adopting such a permissible standard for consent.

³¹ *Chavez*, 959 F. Supp. 2d, at 1280.

³² *Id.*

³³ *Id.* at 1280–81.

³⁴ *Id.* at 1279–83. As is often the case, *Chavez* also involved a Fair Debt Collection Practices Act claim, which was not relevant to the TCPA claim or discussed in the opinion. See *id.* at 1280 n.2.

³⁵ *Id.* at 1281.

2008 Order, she did not expressly consent because she did not give Advantage Group permission to call her using an autodialing system.³⁶ The court considered itself bound by the 2008 Order and without jurisdiction to review it and therefore unable to look to the merits of the 2008 Order or determine whether the FCC's standard for prior express consent was appropriate as applied to the plaintiff's case.³⁷ Despite the likelihood of a question of material fact whether Chavez had actually given her prior express consent, the court, in ruling on the summary judgment motion, accepted Advantage's argument that, because Chavez had provided her number to Parkview, Advantage had thereby obtained her prior express consent to call her using an autodialing system.³⁸

The *Chavez* court considered itself obligated to follow the FCC's 2008 Order on account of a jurisdictional issue: the federal courts of appeals have "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 § 402(a) of [the Hobbs Act]."³⁹ Section 402(a) of the Hobbs Act in turn dictates that "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the [FCC] . . . shall be brought as provided by and in the manner prescribed in chapter 158 of title 28."⁴⁰ Thus, the federal district courts have no jurisdictional authority to decide TCPA claims without treating the FCC's 2008 Order as binding law.⁴¹ Therefore, because disregarding the 2008 Order would rob a federal district court of subject-matter jurisdiction as to a TCPA claim, most courts have accepted the validity of the 2008 Order without engaging with it on the merits.⁴²

³⁶ See *id.* at 1280–81.

³⁷ See *id.* at 1282.

³⁸ See *id.* at 1283.

³⁹ *Id.* at 1282 (emphasis added) (quoting 28 U.S.C. § 2342(1) (2012)) (internal quotation marks omitted).

⁴⁰ 47 U.S.C. § 402(a) (2012).

⁴¹ See, e.g., *Chavez*, 959 F. Supp. 2d at 1282 ("Regardless of how the claim is brought before the court, the practical effect of accepting plaintiff's argument here [that, contrary to the 2008 Order, she did not provide prior express consent] would be to set aside, annul, or suspend the 2008 FCC Ruling. I am without jurisdiction to effectuate that outcome." (internal quotation marks omitted)); *Thrasher-Lyon v. CCS Commercial, LLC*, No. 11 C 04473, 2012 WL 3835089, at *5 (N.D. Ill. Sept. 4, 2012) ("The FCC's creditor rule, which goes beyond the plain language of the TCPA to mitigate a burden on creditors that was likely not intended by the statute, is binding on this Court . . .").

⁴² See, e.g., *Kolinek v. Walgreen Co.*, No. 13 C 4806, 2014 WL 3056813, at *1 (N.D. Ill. July 7, 2014) (noting, in the course of ruling on plaintiff's motion for reconsideration, that the court had previously dismissed the plaintiff's TCPA action on the grounds that "the [FCC's] interpretation of the prior express consent defense is binding on federal district courts, including this one"—but nonetheless vacating its earlier opinion upon a finding that the plaintiff had not consented to receive the type of calls at issue); *Murphy v. DCI Biologicals Orlando, LLC*, No. 6:12-cv-1459-Orl-36KRS, 2013 WL 6865772, at *23 (M.D. Fla. Dec. 31, 2013) ("[I]f the [c]ourt determines the Hobbs Act to be applicable to this case, the [c]ourt is bound to apply the definition of 'express consent' from the 1992 FCC

Some courts, however, have reached the merits of the 2008 Order and have considered it either problematic or unworthy of judicial deference.⁴³ A few of these cases are discussed in the next section, with particular focus on one, *Mais v. Gulf Coast Collection Bureau, Inc.*, which represents the most systematic attack of the 2008 Order to date.

II

JUDICIAL CHALLENGES TO THE FCC'S INTERPRETATION OF PRIOR EXPRESS CONSENT

A. *Mais v. Gulf Coast Collection Bureau, Inc.*

The facts and procedural posture of *Mais* were as follows: the plaintiff was admitted to the hospital for medical treatment, and his wife gave his cell phone number to hospital personnel on a form that authorized the hospital to release the plaintiff's "healthcare information" for payment purposes.⁴⁴ The plaintiff then incurred a debt for his medical treatment, which he did not pay.⁴⁵ The debt was forwarded, along with the plaintiff's cell phone number, along a chain of entities until it eventually ended up in the hands of Gulf Coast Collection Bureau, Inc. (Gulf Coast), for collection purposes, pursuant to a written agreement between the holding company of the radiology provider that had treated the plaintiff (a separate entity from the hospital) and Gulf Coast, a third party collector.⁴⁶ After Gulf Coast attempted to contact the plaintiff about the debt using an automatic telephone dialing system, the plaintiff filed a class action lawsuit against Gulf Coast and a number of related entities in the Federal District Court for the Southern District of Florida.⁴⁷ The defendants then moved collectively for summary judgment on the plaintiff's TCPA claim, arguing that the wife's provision of the plaintiff's cell phone number to the hospital constituted prior express consent in

Order to this matter."); *Chavez*, 959 F. Supp. 2d at 1282 ("I therefore join with those courts that have found that the 2008 FCC Ruling is binding on the district courts and not subject to review except by the federal courts of appeals.").

⁴³ See *infra* Part II.

⁴⁴ 944 F. Supp. 2d 1226, 1230–31 (S.D. Fla. 2013).

⁴⁵ See *id.* at 1231.

⁴⁶ *Id.*

⁴⁷ *Id.* at 1230–33.

accordance with the FCC's 2008 Order.⁴⁸ The district court denied the motion on several grounds.⁴⁹

The court rejected the argument that the plaintiff had given prior express consent to be called by Gulf Coast at his wireless number.⁵⁰ In reaching that conclusion, the court determined that the FCC's 2008 Order was not entitled to *Chevron* deference because its interpretation of prior express consent contradicted the plain language of the statute.⁵¹ Prior to reaching the *Chevron* analysis, however, the court had to surmount the jurisdictional hurdle presented by the Hobbs Act: was this an action to "enjoin, set aside, annul, or suspend any order of the [FCC]"?⁵² Engaging in plain language statutory analysis, the court concluded first that the 2008 Order "pertain[ed] to the Defendants' affirmative defense of consent, [and] not to any element of [the] Plaintiff's claims";⁵³ and second that the plaintiff was not seeking "to enjoin, set aside, annul, or suspend" the order,⁵⁴ or even claiming that it was incorrect. "Instead, [the plaintiff's] position [was] that the 2008 FCC Ruling does not apply on these facts."⁵⁵

Finding jurisdictional competence, the court then proceeded to its *Chevron* analysis to determine whether the 2008 Order was entitled to deference.⁵⁶ First, the court asked "whether Congress ha[d] di-

⁴⁸ *Id.* at 1234. The defendants also argued that, "because they had consent to use and disclose Plaintiff's phone number under HIPAA [the Health Insurance Portability and Accountability Act], they also had consent to call him under the TCPA." *Id.* The defendants' argument proves too much: it demonstrates that, despite the written agreement being both intended for and drafted in consideration of purposes related to HIPAA, not the TCPA, the creditors felt justified in relying on the agreement for purposes of the TCPA (because through it they acquired the debtor's wireless number). *See id.* But it seems beyond reason to argue that a person expressly consents to calls from an autodialing system when he or she signs a form that merely grants the recipient of the signatory's wireless number the right to use that number for HIPAA purposes.

⁴⁹ *Id.* at 1241.

⁵⁰ *Id.*

⁵¹ *Id.* at 1238–39. For a discussion of *Chevron* deference, see *infra* notes 163–64 and accompanying text.

⁵² *Id.* at 1235–38 (quoting 47 U.S.C. § 402(a) (2012) (internal quotation marks omitted)).

⁵³ *Id.* at 1235.

⁵⁴ *Id.* (quoting 47 U.S.C. § 402(a) (internal quotation marks omitted)).

⁵⁵ *Id.* The court, in the course of its analysis of the Hobbs Act, stated the following:

The takeaway . . . is this: if a 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,' then the Hobbs Act deprives the district court of jurisdiction. That is not the case here. Plaintiff's claims do not necessarily hinge on invalidation of the 2008 FCC Ruling and Plaintiff does not even argue that it is invalid. . . . Therefore, the court of appeals does not have jurisdiction; this Court does.

Id. at 1236–37 (citations omitted) (quoting *Self v. Bellsouth Mobility, Inc.*, 700 F.3d 453, 462 (11th Cir. 2012)).

⁵⁶ *Id.* at 1238.

rectly spoken on the matter at issue” and, if so, whether its intent was clear.⁵⁷ The court then found that Congress *had* spoken directly on the matter when it explicitly stated that autodialed calls could not be made without “the prior express consent of the called party.”⁵⁸ Accordingly, the court next looked to “the common usage of those words [‘prior express consent’] to discern their meaning.”⁵⁹ It referred to *Black’s Law Dictionary*, which “defines ‘express consent’ as ‘[c]onsent that is clearly and unmistakably stated.’”⁶⁰ With this definition in hand, as well as the *Black’s Law Dictionary* definition of implied consent,⁶¹ the *Mais* court then concluded that the FCC’s 2008 Order was inconsistent with the statute’s plain language and therefore not worthy of judicial deference:

It should be clear from [the FCC’s interpretation of prior express consent] . . . that the FCC is not talking about “express consent,” but is instead engrafting into the statute an additional exception for “implied consent”—one that Congress did not include. Although it may be reasonable to presume that an individual, in providing a cell phone number on a credit application, consents to be called at that number by the creditor, such consent is “implied” through the individual’s conduct—that is, his act of writing down his number on the application. He has not directly, clearly, and unmistakably stated that the creditor may call him, and so he has not given “express consent.”⁶²

Accordingly, the *Mais* court rejected the defendants’ affirmative defense of consent because it found that the plaintiff had not expressly consented to be called by means of an automatic telephone dialing system.⁶³ The court also refused to enforce implied consent from the plaintiff’s wife’s provision of the plaintiff’s cell phone number to hospital personnel.⁶⁴ In the alternative, however, the

⁵⁷ *Id.*; see also *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (“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.”).

⁵⁸ *Mais*, 944 F. Supp. 2d at 1238 (emphasis omitted) (quoting 47 U.S.C. § 227(b)(1)(A)).

⁵⁹ *Id.*

⁶⁰ *Id.* (citing and quoting BLACK’S LAW DICTIONARY 356 (9th ed. 2009)); see also *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir. 2009) (“Express consent is [c]onsent that is clearly and unmistakably stated.” (quoting BLACK’S LAW DICTIONARY 323 (8th ed. 2004) (internal quotation marks omitted))).

⁶¹ See *Mais*, 944 F. Supp. 2d at 1238. *Black’s Law Dictionary* defines “implied consent” as “[c]onsent inferred from one’s conduct rather than from one’s direct expression.” BLACK’S LAW DICTIONARY 346 (9th ed. 2009).

⁶² *Mais*, 944 F. Supp. 2d at 1239.

⁶³ See *id.*

⁶⁴ See *id.* Cf. *Lusskin v. Seminole Comedy, Inc.*, No. 12-62173-Civ-SCOLA, 2013 WL 3147339, at *3 (S.D. Fla. June 19, 2013) (“It might be reasonable to infer that a person who gives his or her cell number to another party has consented to later be contacted, by that

court also concluded that the 2008 Order did not apply in the medical care setting, and that, even if it did apply, plaintiff had not given his “consent[] to be called by the relevant creditor.”⁶⁵ Therefore, the plaintiff escaped adverse summary judgment on the issue of whether he had given prior express consent to be called by means of an automatic telephone dialing system.⁶⁶

B. *Edeh* and *Thrasher-Lyon*

Before proceeding to the analysis of the *Mais* decision, it is worth considering two other cases that addressed the FCC’s interpretation of prior express consent: *Edeh v. Midland Credit Management, Inc.*⁶⁷ and *Thrasher-Lyon v. CCS Commercial, LLC.*⁶⁸ These cases highlight the nuances present in an otherwise straightforward dispute over statutory interpretation.

Edeh involved a plaintiff who defaulted on a credit card; a third party collector then placed one autodialed call to the plaintiff’s cellular telephone, seeking to collect the debt.⁶⁹ Following subsequent communications between plaintiff and the creditor, the plaintiff filed various claims, including a TCPA claim arising from the autodialed call made to his cell phone.⁷⁰ The collector, on motion for summary judgment, argued that it had received the plaintiff’s prior express consent when it received his cellular telephone number at the time it purchased the debt from the original creditor (the issuer of the card).⁷¹ The court quickly rejected the creditor’s argument, relying on the statutory language of the TCPA: “Midland’s call to Edeh’s cellular phone was permissible only if it was made ‘with [Edeh’s] prior *express* consent.’”⁷² According to the court, express consent must be explicit, not implicit, and is not given unless the consumer-debtor says (verbally or in writing) to either the collector or the collector’s predecessor in interest (i.e., the original creditor) “something like this: ‘I give you permission to use an automatic telephone dialing system to

party, at that number through an automatic-dialing-system. But this 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 (i.e., it was not expressed).”

⁶⁵ *Mais*, 944 F. Supp. 2d at 1239–41. See also FCC, 2008 Order, *supra* note 13, at 565 n.38 (explaining 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”).

⁶⁶ *Mais*, 944 F. Supp. 2d at 1246.

⁶⁷ 748 F. Supp. 2d 1030 (D. Minn. 2010).

⁶⁸ No. 11 C 04473, 2012 WL 3835089 (N.D. Ill. Sept. 4, 2012).

⁶⁹ *Edeh*, 748 F. Supp. 2d at 1033–34.

⁷⁰ See *id.* at 1034, 1038.

⁷¹ *Id.* at 1038.

⁷² *Id.* (alteration in original) (quoting 47 U.S.C. § 227(b)(1)(A)(iii) (2012)).

call my cellular phone.’”⁷³ The *Edeh* court thereby enunciated a heightened “magic words” standard for consent, requiring not only that a creditor obtain a consumer-debtor’s cellular telephone number at the time of a credit transaction (or from a predecessor in interest who obtained it in like circumstances), but also that the creditor actually obtain consent to use that number to place autodialed calls or calls delivering a prerecorded message.⁷⁴

Thrasher-Lyon involved a plaintiff who collided with an automobile while riding her bicycle.⁷⁵ She provided her contact information, including her wireless number, to the car’s driver and the responding police officer.⁷⁶ The driver’s insurance company subsequently contacted the plaintiff by phone and letter, seeking to collect the money it had paid to the driver pursuant to the driver’s insurance claim.⁷⁷ When the plaintiff failed to respond, the insurance company sold the debt to a third party collector.⁷⁸ The third party collector then placed at least one autodialed call to the plaintiff’s wireless number, and the plaintiff filed a TCPA claim.⁷⁹ In response to the claim, the defendant-collector averred that the plaintiff had given prior express consent to be contacted regarding the debt because she had voluntarily given her wireless number to the driver and police officer at the time of the accident and, when contacted at that number by the insurance company, had confirmed that it was a valid contact number.⁸⁰ The court, finding that the plaintiff had not given express consent to be contacted by the insurance company or the collector through an autodialing system, denied the defendant’s motion for summary judgment.⁸¹

The *Thrasher-Lyon* opinion adds two key elements to a critical analysis of the FCC’s 2008 Order. First, the court uncovered, perhaps inadvertently, what may be a common practice among third party collectors: the defendant-collector admitted to the court that, at the time it purchased the debt from the insurance company, it did not “take any steps to investigate or verify whether express consent [to be called

⁷³ *Id.*

⁷⁴ See *id.*; cf. *Thrasher-Lyon*, 2012 WL 3835089, at *5 (“‘Express’ connotes a requirement of specificity, not ‘general unrestricted permission’ inferred from the act of giving out a number”); FCC, 2008 Order, *supra* note 13, at 565 n.37 (encouraging 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 . . . at that number”).

⁷⁵ 2012 WL 3835089, at *1.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at *6.

using an autodialing system] was given.”⁸² Rather, the collector merely relied on the fact that the plaintiff had provided her wireless number to the original creditor, the insurance company.⁸³ In light of the fact that many of these TCPA cases involve third party collectors who have no direct contact with their debtors before placing autodialed calls,⁸⁴ the FCC’s standard for prior express consent, when put into practice, may therefore permit creditors to rely on a form of consent that is so attenuated and hypothesized as to be almost a myth.⁸⁵ This outcome, if supported by the evidence, contravenes the purpose of the TCPA because that statute requires prior express consent for *all* nonemergency calls made to wireless numbers using an autodialing system—not merely for those calls that are not placed to debtors.⁸⁶ Congress is free to write such a differential treatment into the statute; the FCC is not.⁸⁷

Second, the *Thrasher-Lyon* court carefully emphasized a point which complements the one made above (as well as the argument made by the *Edeh* court): the TCPA prohibits only those calls made to wireless numbers that are made without prior express consent and that either were initiated by an autodialing system or deliver a prerecorded voice or message.⁸⁸ Therefore, the question raised by a creditor’s assertion that the called party gave consent will necessarily be this: to what did the debtor give consent?⁸⁹ In *Thrasher-Lyon*, the creditor argued that a debtor “need only give general unrestricted permission and consent to be called at the subject number.”⁹⁰ Rejecting this argument, the court correctly noted that the TCPA remedies a *specific* wrong—namely, unsolicited autodialed calls or calls delivering a prerecorded message—and that the consent required by

⁸² See *id.* at *1 n.2 (noting in addition that, while the defendant denied assuming consent, the court did “not discern any material distinction between [defendant’s] admitted practice and ‘simply assuming’ consent”).

⁸³ See *id.* at *4.

⁸⁴ See, e.g., *Levy v. Receivables Performance Mgmt., LLC*, 972 F. Supp. 2d 409, 413 (E.D.N.Y. 2013) (noting that the debt collector autodialed debtor’s cellular telephone after purchasing the telephone number from debtor’s credit agency); *Thrasher-Lyon*, 2012 WL 3835089, at *1.

⁸⁵ Cf. *Zyburow v. NCSPlus, Inc.*, No. 12-CV-6677, 2014 WL 4536932, at *2 (S.D.N.Y. Sept. 15, 2014) (in the course of ruling on a motion for class certification in a TCPA class action, noting that the defendant collection agency “has no policies or procedures for determining whether . . . the recipients of its autodialed calls have provided prior express consent to receive such calls” and “by its own admission[] . . . keeps poor or non-existent records of which class members have given consent to the underlying creditor”).

⁸⁶ See 47 U.S.C. § 227(b)(1) (2012).

⁸⁷ Cf. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (“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.”).

⁸⁸ See *Thrasher-Lyon*, 2012 WL 3835089, at *1–3.

⁸⁹ *Id.* at *2 (“The question requiring interpretation is: ‘consent to *what?*’”).

⁹⁰ *Id.* (internal quotation marks omitted).

section 227(b)(1)(A) must necessarily be consent to be called *using those technologies*; “otherwise,” the court added, “the statute would exempt a broader class of calls than it bans in the first place.”⁹¹ Accordingly, when reviewing the FCC’s interpretation of prior express consent in the debt-collection context, it is important to determine whether that interpretation narrows the scope of consent that can be inferred from provision of a wireless number—because the FCC’s interpretation clearly allows for an inference of consent⁹²—from general consent to consent to receive autodialed calls. If it does not, then it is overinclusive of the types of calls it exempts from the TCPA’s prohibitions.⁹³

III

IS THE FCC’S INTERPRETATION ENTITLED TO JUDICIAL DEFERENCE?

This Part has three subparts: Subpart A addresses the *Mais* decision and significant counterarguments to its repudiation of the FCC’s 2008 Order. Subpart B discusses whether, in light of the purpose and function of the TCPA, the normative approach found in *Mais* and other, similar decisions is compelling enough to override the FCC’s judgment in crafting its standard for prior express consent in the debt-collection context. Subpart C considers whether Congress granted the FCC discretion to craft an expansive definition of prior express consent and whether the FCC’s approach represents a permissible construction of the statute.

A. Do Judicial Errors Undermine the *Mais* Court’s Analysis?

This subpart discusses and responds to several possible counterarguments to the *Mais* court’s repudiation of the 2008 Order, focusing in particular on legal or procedural criticisms. District courts both within and outside of the Eleventh Circuit have already criticized and refused to follow the *Mais* court’s analysis, mainly on procedural grounds.⁹⁴ This subpart argues that, although the *Mais* court under-

⁹¹ *Id.* at *2. *But see* *Ranwick v. Texas Gila, LLC*, No. 13-2792, 2014 WL 3891663, at *4 (D. Minn. Aug. 7, 2014) (accepting “[t]he thrust of the FCC’s [1992 and 2008 Orders,] [which] is that a person need not specifically consent to be contacted using an autodialer or artificial or prerecorded voice”).

⁹² *See supra* note 28 and accompanying text.

⁹³ *Cf. Leckler v. Cashcall, Inc. (Leckler I)*, 554 F. Supp. 2d 1025, 1030 (N.D. Cal. 2008) (rejecting the argument that Congress intended the phrase “prior express consent” to “apply merely to the act of calling,” and suggesting that if the exemption applied whenever a called party gave general consent to be called, “without any consideration given to the method or type of call, the exemption would be contrary to the logic of the statute”).

⁹⁴ *See, e.g., Ranwick*, 2014 WL 3891663, at *4 (“[T]he Court declines to follow *Mais* and will defer to the FCC’s interpretation of ‘prior express consent’ rather than opine on its validity.”); *Murphy v. DCI Biologicals Orlando, LLC*, No. 6:12-cv-1459-Orl-36KRS, 2013

mined its own analysis by operating beyond the jurisdictional bounds imposed by the Hobbs Act, the opinion nonetheless raises a valid objection to the FCC's interpretation of prior express consent and suggests that the FCC's approach is unreasonable in light of plain statutory language.

The first counterargument to the *Mais* court's treatment of the 2008 Order is that, based on the facts of the case, there was no reason why the court needed to repudiate the 2008 Order in order to deny the defendants' motion for summary judgment.⁹⁵ First, the plaintiff in *Mais* did not give his cell phone number to the hospital; his wife did.⁹⁶ Second, the hospital was not even the creditor with whom the plaintiff ultimately transacted.⁹⁷ Therefore, there was an argument to be made—and in fact the plaintiff made the argument—that, on its face, the FCC's 2008 Order was inapplicable to the facts of the case.⁹⁸ Accordingly, the court should have simply denied the motion for summary judgment because, if anyone gave prior express consent, it was the plaintiff's wife,⁹⁹ who presumably had an entirely different wireless number. The question of whether one may give prior express consent on behalf of a third person is not addressed in the FCC's 2008 Order; however, other courts have suggested that only the primary user of the phone may give consent.¹⁰⁰ Third, the FCC's exemption applies only

WL 6865772, at *8 (M.D. Fla. Dec. 31, 2013) (“[T]his Court agrees with the *Chavez* court [that *Mais* is an outlier] and joins those courts that have found that the 2008 FCC Ruling is binding on the district courts and not subject to review except by the federal courts of appeals.”); *Chavez v. Advantage Grp.*, 959 F. Supp. 2d 1279, 1281 (D. Colo. 2013) (finding the *Mais* court's analysis “legally insupportable”). *But see Zyburo v. NCSPlus, Inc.*, No. 12-CV-6677, 2014 WL 4536932, at *3 (S.D.N.Y. Sept. 15, 2014) (“[T]his Court agrees with the *Mais* Court that ‘[t]he FCC's construction is inconsistent with the statute's plain language because it impermissibly amends the TCPA to provide an exception for [implied consent]’” (quoting *Mais v. Gulf Coast Collection Bureau, Inc.*, 944 F. Supp. 2d 1226, 1239 (S.D. Fla. 2013))).

⁹⁵ In fact, the court itself seems to have admitted this. *See supra* note 55 and accompanying text.

⁹⁶ *Mais*, 944 F. Supp. 2d 1226, 1230–31.

⁹⁷ The plaintiff's wife provided his cellular telephone number to hospital personnel; however, as the court notes, plaintiff incurred a debt with Florida United Radiology, L.C., “a hospital-based provider that performs clinical services on behalf of hospital facilities” but which was a separate legal entity from the hospital. *Id.* It seems unlikely that Congress intended for consumers to have to disentangle the intricacies of an agency relationship in order to determine to whom consent should properly be given: consent should be available only to the creditor to whom the number was given (or a collector acting on the creditor's behalf) who uses the number to contact the consumer regarding the debt. *Cf.* FCC, 2008 Order, *supra* note 13, at 565 n.38 (“[P]rior express consent provided to a particular creditor will not entitle that creditor . . . to call a consumer's wireless number on behalf of other creditors, including on behalf of affiliated entities.”).

⁹⁸ *See Mais*, 944 F. Supp. 2d at 1235 (“[Plaintiff's] position is that the 2008 FCC Ruling does not apply on these facts.”).

⁹⁹ *See id.* at 1230–31.

¹⁰⁰ *See, e.g., Soppet v. Enhanced Recovery Co.*, 679 F.3d 637, 641 (7th Cir. 2012) (noting that “[c]onsent to call a given number must come from its current subscriber”); *Cellco*

to autodialed calls made to numbers provided by the called party to a creditor of the called party.¹⁰¹ Again, the called party in *Mais* was not the person who provided the wireless number, nor was the number given to the creditor who ultimately relied upon that consent.¹⁰² Therefore, either a genuine question of material fact existed whether the plaintiff had authorized his wife to give consent on his behalf, making a summary judgment ruling on the issue of consent inappropriate, or there was simply no consent at all, as a matter of law, because—read narrowly—both the TCPA and the 2008 Order suggest that consent must come directly from the called party.¹⁰³ If the court had taken either of these two approaches, it would have reached the same outcome (denial of defendants’ motion for summary judgment) and could have avoided upending the 2008 Order.

Unfortunately, the record does not disclose whether the plaintiff in *Mais* authorized his wife to give consent on his behalf; accordingly it is difficult to assess the strength of this counterargument.¹⁰⁴ But this line of inquiry does raise another concern regarding the 2008

P’ship v. Plaza Resorts Inc., No. 12-81238-CIV, 2013 WL 5436553, at *5 (S.D. Fla. Sept. 27, 2013) (“The Court starts with the proposition that the subscriber controls the telephone for all legally relevant purposes, since the subscriber is the person who is obligated to pay for the telephone and *has the authority to consent to receive calls that would otherwise be prohibited by the statute*. . . . The primary user of the telephone is the one who needs protection from nuisance calls and invasions of privacy, not a subscriber who never uses the telephone.” (emphasis added)). The FCC’s 2008 Order applies to automated calls made to wireless numbers “that are provided by the *called party* to a creditor in connection with an existing debt.” FCC, 2008 Order, *supra* note 13, at 559 (emphasis added). In March 2014, however, the FCC issued a declaratory ruling which suggests that, in certain circumstances, consent to be called using an autodialing system “may be obtained through and conveyed by an intermediary.” See FCC, GroupMe Ruling, *supra* note 25, at 3 ¶ 6. The future impact of the GroupMe Ruling on debt collection cases (including the applicability of the consent-by-intermediary rule to debt-collection calls) remains to be seen and, unfortunately, cannot be fully analyzed in this Note.

¹⁰¹ See FCC, 2008 Order, *supra* note 13, at 564–65 (“[P]rior 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.”); see also *supra* notes 72–73 and accompanying text.

¹⁰² See *Mais*, 944 F. Supp. 2d at 1230–31, 1241. To suggest that in the medical care context, under the unique circumstance where a person needing medical attention has a spouse or guardian fill out paperwork on his or her behalf, the spouse or guardian has thereby provided consent for autodialed calls from a third party is to go far beyond the language of either the TCPA or the FCC’s 2008 Order. Cf. FCC, 2008 Order, *supra* note 13, at 564–65.

¹⁰³ This would perhaps be a very narrow reading of the 2008 Order, but it could hardly be called “setting aside” or “determining the validity of” the order. Cf. FCC, 2008 Order, *supra* note 13, at 564–65. But see FCC, GroupMe Ruling, *supra* note 25, at 3 ¶ 6 (“[A] consumer’s prior express consent may be obtained through and conveyed by an intermediary . . .”).

¹⁰⁴ The court noted merely the following: “[T]he [c]ourt alternatively finds that Defendants have failed to show Plaintiff consented to be called by the relevant creditor. Plaintiff’s wife provided his phone number to the admissions clerk when Plaintiff was admitted to the Hospital.” *Mais*, 994 F. Supp. 2d at 1241.

Order: that defendants are using the 2008 Order as a shield in situations where its justifications are arguably at their weakest. Here, the record suggests that the plaintiff—the called party—was literally and figuratively not in a position to give the type of consent that would justify removing him from the statute’s protections.¹⁰⁵ Consent, if any, was very attenuated.¹⁰⁶ This fact, matched with the relatively low burden that the FCC’s interpretation of prior express consent places on vendors and creditors,¹⁰⁷ suggests that the 2008 Order, if left binding on the lower courts, will effectively “declaw” section 227(b)(1)(A) of the Act, at least in certain circumstances. Of course, maintaining the effectiveness of laws over time and carrying out their purpose may require flexibility in their application. However, flexibility does not mean that the operation of a statute is so affected as to remove protections from the class of persons the statute is intended to protect. Put simply, the FCC does not have clear statutory authority to “declaw” section 227(b)(1)(A) in this manner.¹⁰⁸

A second counterargument to the *Mais* decision is that the *Mais* court lacked subject matter jurisdiction to consider the validity of the 2008 Order because of the Hobbs Act.¹⁰⁹ This argument is more than just academic: a short time after issuing its initial order, the *Mais* court certified controlling questions of law to the Eleventh Circuit Court of Appeals.¹¹⁰ The appellate court will have to address the jurisdictional issue, in part because one of the questions certified was “[w]hether a district court has jurisdiction under the Hobbs Act to review an FCC order in a TCPA case when the plaintiff does not challenge the validity of that order.”¹¹¹ There are at least two possible outcomes. On the one hand, the appellate court could endorse the lower court’s assertion that, because the plaintiff was not contesting the validity of the 2008 Order (merely its application to the case), the court was not

¹⁰⁵ See *id.* at 1230 (“Because Plaintiff was ill, his wife . . . interacted with the Hospital admissions staff on his behalf.”).

¹⁰⁶ The defendants appear to have made the argument that the plaintiff’s consent could be inferred from the conduct of his wife. See *id.* at 1248 (noting that the defendant Gulf Coast “was asking the [c]ourt to imply consent from Plaintiff’s wife’s conduct”).

¹⁰⁷ See *supra* notes 23, 26–28 and accompanying text.

¹⁰⁸ See *infra* Part III.C.

¹⁰⁹ See, e.g., *Chavez v. Advantage Grp.*, 959 F. Supp. 2d 1279, 1282–83 (D. Colo. 2013) (“The *Mais* court went to great—indeed, one might say extreme—lengths to narrowly define [47 U.S.C. § 402(a)’s] jurisdictional provision. . . . I am not inclined to engage in the semantical machinations which allowed the *Mais* court to bypass the jurisdictional boundary established by Congress.”).

¹¹⁰ *Mais*, 944 F. Supp. 2d at 1253. One of the questions certified was “whether the FCC’s pronouncement[] on the issue[] of ‘prior express consent’ . . . [is] entitled to deference under *Chevron*.” *Id.*

¹¹¹ *Id.* Both the *Mais* opinion and subsequent order noted that there was “no Eleventh Circuit decision directly addressing whether the Hobbs Act bars review [of an FCC order] in this context.” *Id.* at 1236, 1249.

“setting aside” or “enjoining” the 2008 Order and was therefore not robbed of jurisdiction by the Hobbs Act;¹¹² the appellate court might then address the merits of the 2008 Order or affirm the ruling on other grounds (such as failure of consent by proxy). If, on the other hand, the appellate court rejects the district court’s exercise of subject matter jurisdiction, it will likely reverse the summary judgment ruling and remand the case with instructions binding on the district court judge.¹¹³

However, even if the lower court’s ruling is vacated, confusion among the district courts will likely continue, at least until the issue is resolved at a higher level. *Mais* is, as the saying goes, “*déjà vu* all over again”: in *Leckler v. Cashcall, Inc.*, a case in 2008, a district court similarly found the FCC’s 2008 Order “‘manifestly contrary to [the TCPA]’ and unreasonable” using the same sort of plain language analysis found in *Mais*.¹¹⁴ Accordingly, the *Leckler* court denied the defendant-creditor’s motion for partial summary judgment, finding that the plaintiff had not given prior express consent to be called by means of an autodialing system even though she had provided her wireless number to the defendant on a loan application—the very archetype of consent envisioned by the FCC Order.¹¹⁵ The defendant ultimately moved to vacate the order; the court then granted the motion and dismissed the case, finding that, because the 2008 Order was a “final order” for the purposes of 28 U.S.C. § 2342,¹¹⁶ the district court lacked jurisdictional authority to review it, and its judgment was therefore void.¹¹⁷

The *Leckler* court was clearly not aware of the requirements of the Hobbs Act until after it had issued the initial order; neither the plaintiff nor the defendant appear to have brought it to the court’s attention in their initial filings.¹¹⁸ But, importantly, the court never

¹¹² See *id.* at 1236–37.

¹¹³ After this Note was accepted for publication, the Eleventh Circuit held that the district court had exceeded its jurisdiction “[b]y refusing to enforce the FCC’s interpretation.” *Mais v. Gulf Coast Collection Bureau, Inc.*, No. 13-14008, 2014 WL 4802457, at *7 (11th Cir. Sept. 29, 2014). It then remanded the case with instructions to the lower court to enter summary judgment in favor of Gulf Coast Collection Bureau, Inc. See *id.* at *1.

¹¹⁴ *Leckler v. Cashcall, Inc. (Leckler I)*, 554 F. Supp. 2d 1025, 1029 (N.D. Cal. 2008) (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

¹¹⁵ *Id.* at 1033–34; see also FCC, 2008 Order, *supra* note 13, at 564 (concluding that “provision of a cell phone number to a creditor, *e.g.*, as part of a credit application,” constituted prior express consent).

¹¹⁶ 28 U.S.C. § 2342(1) establishes that the federal courts of appeals have “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 [the Hobbs Act].” 28 U.S.C. § 2342(1) (2012).

¹¹⁷ *Leckler v. Cashcall, Inc. (Leckler II)*, No. C 07-04002 SI, 2008 WL 5000528, at *1, *3 (N.D. Cal. Nov. 21, 2008).

¹¹⁸ See *id.* at *1 (noting that defendant “argued, for the first time,” that the district court lacked subject matter jurisdiction under the Hobbs Act only after filing a motion for

backtracked on its substantive analysis of the 2008 Order; it merely conceded lack of jurisdictional authority.¹¹⁹ Thus, one is left with the impression that, but for the curious snag in TCPA jurisprudence that is the Hobbs Act, the district courts would have long ago rejected the FCC's definition of prior express consent.¹²⁰ Accordingly, the ultimate disposition of the *Mais* case is less important than how the Eleventh Circuit reacts, if at all, to the lower court's analysis of the 2008 Order.

A third and final criticism of *Mais* might be that the court should have reached the second step of its *Chevron* analysis—whether the FCC's interpretation of prior express consent was “based on a permissible construction of the statute”—because Congress did not actually speak directly on the issue:¹²¹ the TCPA never defines prior express consent, suggesting that Congress intended the FCC to have discretion in crafting a definition in its implementing regulations.¹²² This argument is partially undermined, however, by the fact that, when the FCC changed its regulations implementing the TCPA in 2012, it continued to leave “prior express consent” undefined and instead added a definition of “prior express written consent”¹²³—a term that appears nowhere in the TCPA. Prior express written consent should be self-evident: it is evidenced by a written agreement that confers permission to call the signatory using an automatic telephone dialing system or prerecorded message, executed prior to the making of any such

interlocutory appeal to the Ninth Circuit on the issue of whether a consumer gave prior express consent by providing a lender with his or her wireless number).

¹¹⁹ See *id.* at *2–3.

¹²⁰ For example, after *Leckler II* was decided the Ninth Circuit Court of Appeals defined “prior express consent” (as it appears in § 227(b)(1)(A)) as “[c]onsent that is clearly and unmistakably stated,” albeit in a case not involving debt collection. See *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir. 2009) (quoting BLACK'S LAW DICTIONARY 323 (8th ed. 2004)). Strangely, the Ninth Circuit, in a later case that did involve debt collection, adopted the FCC's definition of prior express consent almost verbatim (without reference to *Satterfield*), but then amended its opinion without comment, framing the FCC's definition of consent as follows: “[P]rior express consent is consent to call a particular telephone number in connection with a particular debt *that is given before the call in question is placed.*” *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1042 (9th Cir. 2012) (emphasis added). Although the court cited to the 2008 Order, this is plainly not the FCC's standard but a heightened one requiring not only provision of a wireless number to a lender but also provision of express consent prior to the lender placing a specific call regarding the debt. See *id.* This odd, hybrid definition of prior express consent is simply sui generis and further highlights the difficulties posed by the FCC's definition.

¹²¹ See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

¹²² See *id.* at 843–44 (“If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.”).

¹²³ See 40 C.F.R. § 64.1200(f)(8) (2013).

call.¹²⁴ That the FCC felt compelled to define prior express *written* consent but not prior express consent suggests that either Congress or the FCC believed the definition of prior express consent to be apparent from the plain language of the statute. Nonetheless, leaving aside the jurisdictional question, there is merit to the argument that the *Mais* court should have reached the second prong of its *Chevron* analysis, and that, by not doing so, its analysis was incomplete. Therefore, the question of whether the FCC's interpretation represents a permissible construction of the statute will be addressed in Part III.C.¹²⁵

Despite these potential criticisms of the *Mais* decision, if outcomes are at least as important as the means to achieve them, it is worth considering whether, from a normative perspective, the court's essential point (as well as that of the *Edeh* and *Thrasher-Lyon* courts) holds water. In other words, in light of plain meaning language usage and everyday experience, was the court right when it suggested that the FCC's interpretation of prior express consent actually sounds a lot more like prior *implied* consent?¹²⁶ After all, the TCPA is, at its core, a consumer protection statute; courts should therefore construe it in a manner that is more favorable to consumers, rather than less favorable.¹²⁷ Despite serious doubt as to whether the *Mais* court could so easily forgo adopting the 2008 Order as binding law—doubts that will ultimately be resolved at the appellate level—the *Mais* court properly balked at what appears to be an abuse of discretion by the FCC.

B. Is the Analysis in *Mais* and Similar Cases Sufficiently Compelling to Override the FCC's Interpretation—Or Are Such Cases Mere Outliers in TCPA Jurisprudence?

This subpart discusses the normative arguments for and against the FCC's interpretation of prior express consent. It first reviews the language of the 2008 Order, recent changes to the rules implementing the TCPA, and the basic goals underlying the passage of the TCPA. It then argues that the TCPA represents a balancing of privacy and commercial interests and that an analysis of the FCC's interpretation of prior express consent must likewise take into consideration the conflicting interests of creditors and debtors. It concludes by arguing

¹²⁴ The regulations define prior express written consent as: “[A]n *agreement*, in writing, bearing the signature of the person called that *clearly authorizes* the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice” *Id.* (emphasis added).

¹²⁵ See *infra* Part III.C.

¹²⁶ See *supra* note 65 and accompanying text.

¹²⁷ Cf. *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 271 (3d Cir. 2013) (“Because the TCPA is a remedial statute, it should be construed to benefit consumers.”).

that, so long as communications between debtors and creditors are covered by section 227(b)(1)(A) of the TCPA, the compelling interests of creditors are not sufficient to override the reasonable protections that the TCPA offers to consumers.

Before placing an autodialed call or a call delivering a prerecorded message to a wireless number, the caller must obtain the called party's prior express consent.¹²⁸ According to the FCC's 2008 Order, when a creditor places an autodialed or prerecorded message call to a wireless number that was provided by the called party to the creditor in connection with an existing debt, the call is made with the "prior express consent" of the called party and therefore permissible under the TCPA.¹²⁹ An act independent from provision of the wireless number is not required because, according to the FCC, a person who provides his or her wireless number has, in effect, given his or her express consent to be called at that number using an autodialing system or prerecorded voice.¹³⁰ In other words, a debtor does not have to give express verbal or written permission to the creditor; the creditor may infer from provision of the wireless number that consent has been given, "absent instructions to the contrary."¹³¹ The FCC therefore allows consent to be inferred or implied even though the TCPA clearly requires *express* consent.

Can consent that is inferred also be express consent? *Black's Law Dictionary* defines express consent as consent that is "directly given": "[i]t is positive, direct, unequivocal consent, requiring no inference or implication to supply its meaning."¹³² From at least one perspective, then, the answer is clearly "no." Also, consider the following scenarios:

1. A man is out drinking with friends at a local bar. A woman with whom he has been exchanging glances throughout the night walks over to him, hands him a piece of paper, and says, "Call me." The woman's wireless number is written on the paper.
2. A corporate employee is drinking with business associates in the bar of a hotel where an industry convention is being held. A senior executive of a rival company walks over to the employee, hands her his business card, and says, "Your presentation today was really impressive. We could really use someone with your talent on our team. Call me." The executive's wireless work number is written on his business card.

¹²⁸ See 47 U.S.C. § 227(b)(1)(A) (2012).

¹²⁹ FCC, 2008 Order, *supra* note 13, at 559.

¹³⁰ See *id.* at 564.

¹³¹ *Id.* (quoting FCC, 1992 Order, *supra* note 18, at 8769).

¹³² BLACK'S LAW DICTIONARY 276 (5th ed. 1979).

In both situations, it is clear that the person providing his or her wireless number has given consent for the recipient to place a call to that number; the consent was *express*. But what sort of consent was being given? In both situations, the meaning of the consent must be inferred from the circumstances. The woman in the first scenario has clearly invited the man at the bar to call her and ask her out; it is less likely that she wants to engage in a business venture with him. The executive in the second scenario appears to be suggesting that the recipient-employee call to discuss taking on a position within the executive's company; the inference that he is hoping for a romantic dinner is more difficult to make. In both cases, the called parties would certainly be confused or even offended if the recipients of their wireless numbers upset their expectations by calling to sell magazine subscriptions.

The definition of express consent provided by *Black's Law Dictionary* and the conclusions drawn from these hypothetical scenarios suggests that, from a normative perspective, mere provision of one's wireless number to another cannot constitute express consent to be called using an autodialing system, absent some other indication of assent or circumstances which make such an inference inevitable. Rather, it is clear on the face of the 2008 Order that what the FCC is describing is implied or inferred consent: persons who provide their wireless numbers "have in effect given their invitation or permission to be called" using an autodialing system; consent "is deemed to be granted" if a wireless number is provided to a creditor during a debt transaction.¹³³ Surely, the FCC cannot be accused of mere sloppy drafting.

Instead, the questions that remain are why the FCC considers implied consent sufficient in the debt-collection context and why, in implementing a statute that clearly places the burden on *callers* to acquire prior express consent, the FCC felt that debtors (the *called* parties) should bear the burden of affirmatively revoking the consent that their creditors are otherwise free to infer. To state it more succinctly, how is an interpretation of prior express consent that transforms the meaning of section 227(b)(1)(A) into something like the following a permissible reading of the statute: "It shall not be unlawful for any person to make a call to a wireless number using an autodialing system or to initiate a call featuring an artificial or prerecorded

¹³³ See FCC, 2008 Order, *supra* note 13, at 564–65 (internal quotations omitted). That callers can infer consent to contact recipients using an autodialing telephone system from the mere provision of a wireless number also requires two leaps of inference: first, that the person providing the number is aware of the creditor's practice of using an autodialing system; and, second, that the person providing the number is consenting to calls which use that technology. Arguably, if a communication requires the piling of inference upon inference in order to be understood, it is not express (that is, clearly and unmistakably stated).

voice, as long as the called party provided the caller with his or her wireless number and did not say anything to the contrary”?

In 2012, the FCC revised its rules implementing the TCPA, citing a need for consistency with Federal Trade Commission (FTC) telemarketing rules and “substantial record support and evidence of continued consumer frustration with unwanted telemarketing robocalls.”¹³⁴ These revisions mainly accomplished two things: First, they eliminated the prior business-relationship exception for autodialed or prerecorded telemarketing calls to residential lines.¹³⁵ Second, autodialed or prerecorded telemarketing calls now require the prior express written consent of the called party when made to residential *and* wireless numbers.¹³⁶ The requirement for non-telemarketing calls made to wireless numbers (i.e., “prior express consent”) remains unchanged.¹³⁷

The FCC’s revisions not only create consistency with FTC rules. By requiring express written consent for telemarketing calls to wireless and residential numbers and by removing the prior business-relationship exemption, the FCC has also made it more difficult for telemarketers and telephone solicitors to reach consumers using autodialing systems or prerecorded messages.¹³⁸ And this change is intentional.¹³⁹ Although the FCC found it important to “strike an appropriate balance” between the interests of consumers and telemarketers, the revisions are, at least on their face, about further minimizing the adverse impact that unsolicited telemarketing calls have on consumers’ privacy interests.¹⁴⁰ FCC Commissioner Mignon Clyburn, for example, put emphasis on the idea of choice: “By requiring prior *written* consent, consumers will be making an *affirmative and definitive choice*, whether or not to receive telemarketing robocalls.”¹⁴¹

¹³⁴ FCC, 2012 Report and Order, *supra* note 10, at 8 ¶ 18.

¹³⁵ *Id.* at 2 ¶ 2.

¹³⁶ *Id.* The revisions also make it easier for consumers to opt-out of autodialed telemarketing calls once consent has been given. *See id.*

¹³⁷ *Id.* at 9 ¶ 21 (declining to extend written consent requirement to nontelemarketing automatic calls). In fact, in response to comments from Portfolio Recovery Association, a consumer debt purchasing company, which claimed that a written consent requirement for automated calls made to wireless numbers would adversely affect debt collectors, the FCC stated that “informational, non-telemarketing calls” do not require the prior express written consent of the called party. *Id.* at 40 ¶ 11. The FCC suggested that such calls require oral but not necessarily written consent. *See id.* at 12 ¶ 28. However, there is ambiguity in the order whether debt-collection calls are informational, or simply commercial calls that do not deliver an unsolicited advertisement. *See id.*

¹³⁸ *See, e.g., id.* at 18 ¶ 43 (“[E]limination of the EBR [(business-relationship exemption)] will require telemarketers to secure consent from consumers in some cases where they would not have obtained consent under the current rules.”).

¹³⁹ *See id.* at 2 ¶ 1 (“The protections we adopt will protect consumers from unwanted autodialed or prerecorded telemarketing calls . . .”).

¹⁴⁰ *Id.* at 38 ¶ 5, 47.

¹⁴¹ *Id.* at 48 (alteration in original).

This emphasis on choice suggests that the FCC's revisions made the TCPA's consent requirements more, not less, stringent.

While the written-consent requirement applies only to telemarketing calls, including calls made to wireless numbers, it comports with, and in some sense highlights, the logic of the entire statute: the TCPA is a consumer protection statute focused on consent.¹⁴² Therefore, although the heightened consent requirement introduced by the 2012 revisions does not apply to autodialed or prerecorded debt-collection calls made to wireless numbers, the underlying sentiment—that consumers have a choice, should be asked for their affirmative and express consent, and should be able to change their minds in the future—should still apply so long as the TCPA remains applicable to such calls.¹⁴³ The FCC has stated unequivocally that debt-collections calls are not completely exempt from the TCPA.¹⁴⁴ As such, there is no compelling reason why debtors should not receive the same substantive (if not procedural) rights under the TCPA as other consumers who are not receiving debt-collection calls.¹⁴⁵

As noted in Part I, the TCPA has two underlying goals: the protection of consumer privacy and the reduction of nuisance and threats to consumer health and safety.¹⁴⁶ In achieving these goals, the TCPA does not absolutely proscribe automated calls or prerecorded messages, as if they were toxic substances; it merely establishes parameters for parties who wish to make such calls. By doing so, the TCPA strikes a balance between individual privacy interests and commercial interests.¹⁴⁷ Accordingly, in looking at debt-collection calls covered by the TCPA, it is important to question whether regulating such calls is antithetical to the goals of the TCPA or elicits the same need to strike a balance between conflicting interests.

¹⁴² See *id.* at 46 (“For decades, Congress and the Commission have recognized that consumers should have control over the telemarketing calls that come to their homes and mobile devices, and be able to stop the ones that they don’t want to receive.”).

¹⁴³ Cf. Waller et al., *supra* note 3, at 53 (“The TCPA is more than just telemarketing regulation, it is an important consumer protection statute.”).

¹⁴⁴ See FCC, 2008 Order, *supra* note 13, at 565 ¶ 11.

¹⁴⁵ But see Colin Hector, *Debt Collection in the Information Age: New Technologies and the Fair Debt Collection Practices Act*, 99 CALIF. L. REV. 1601, 1630–32 (2011) (noting that heightened consent requirements for calls to debtors may impose unnecessary costs on creditors and perhaps make debtors “practically unreachable by phone”).

¹⁴⁶ See *supra* notes 8–9 and accompanying text.

¹⁴⁷ See Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2 ¶ 9, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227 (2012)) (requiring a balancing of privacy interests with “commercial freedoms of speech and trade”); *Luskin v. Seminole Comedy, Inc.*, No. 12-62173-Civ-SCOLA, 2013 WL 3147339, at *2 (S.D. Fla. June 19, 2013) (“The purpose of the TCPA was to strike a balance between protecting the privacy of individuals while still permitting legitimate telemarketing practices.”).

On the one hand, Congress likely did not have debt-collection calls specifically in mind when it enacted the TCPA.¹⁴⁸ In addition, there are policy arguments to be made in favor of allowing a lower threshold for consent in the debt-collection context. First, the argument that autodialed debt-collection calls to bona fide debtors constitute a threat to public welfare or safety is generally a weak one.¹⁴⁹ Second, society has an interest in ensuring that creditors or third party collectors are able to collect debts to which they are legally entitled, an interest that outweighs the interests of debtors in avoiding unwanted autodialed calls.¹⁵⁰ Third, the privacy interests of debtors are not as compelling as the privacy interests of nondebtors—who are merely trying to avoid unwanted telephone solicitations—because debtors have legal obligations that they should not be able to avoid merely by invoking their right to privacy. Lastly, debtors are protected against abusive debt-collection practices by other laws, such as the Fair Debt Collection Practices Act,¹⁵¹ which are more narrowly tailored to the debt-collection context.

On the other hand, Congress was not completely unaware of the effect the TCPA would have on debt-collection practices. For example, a Senate report that accompanied the TCPA states the following:

Some telemarketers asked that [the TCPA] be amended to exempt . . . automated calls made for debt collection purposes [This] exemption[] [is] not included in the bill, as reported. The Committee [on Commerce, Science, and Transportation] believes that such automated calls only should be permitted if the called party gives his or her consent to the use of these machines.¹⁵²

While such a report is only one piece of evidence that Congress clearly intended to empower debtors with the ability to give prior express consent—and note how the report calls specifically for consent “to the use of these [automatic telephone dialing] machines,”¹⁵³ not just generalized consent—it nonetheless fully comports with the plain language of section 227(b)(1)(A).¹⁵⁴ Thus, despite the counterarguments listed above—or even notwithstanding such arguments—Congress likely intended to protect *all* called parties from unwanted

¹⁴⁸ See *supra* note 12 and accompanying text.

¹⁴⁹ For example, such calls should not ordinarily block access to an emergency or hospital line.

¹⁵⁰ Cf. Hector, *supra* note 145, at 1630–32 (noting that heightened consent requirements for calls to debtors may impose unjustified burdens on debt collectors).

¹⁵¹ See 15 U.S.C. § 1692 (2012) (“It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors . . . and to promote consistent State action to protect consumers against debt collection abuses.”).

¹⁵² S. REP. NO. 102-178, at 3–4 (1991).

¹⁵³ *Id.*

¹⁵⁴ See 47 U.S.C. § 227(b)(1)(A) (2012) (requiring that consent be given to use “any automatic telephone dialing system or an artificial or prerecorded voice”).

autodialed calls to which they had not previously consented. If so, then Congress should decide whether to loosen the restrictions on calls made to one class of persons or another, not the FCC, unless the TCPA includes a specific grant of discretion to the FCC.

C. Did Congress Grant the FCC Discretion to Determine What Constitutes Prior Express Consent, and, if so, Is the FCC's Interpretation Reasonable?

Does the FCC have discretion to determine what constitutes prior express consent? As a threshold matter, the FCC is granted significant discretion by 47 U.S.C. § 227(b)(2).¹⁵⁵ However, with respect to calls made to wireless numbers, the FCC is expressly authorized to carve out an exemption only for calls made to wireless numbers “that are not charged to the called party”¹⁵⁶ This carveout provision has allowed the FCC to create an exemption for common carriers that wish to contact their subscribers about, for example, the delivery of customer services or new products, without receiving prior express consent.¹⁵⁷ The FCC has not used it to create a blanket exemption for calls that, incidentally, are not charged to the called party because callers generally have no way of telling whether a wireless subscriber will be charged for the call.¹⁵⁸ By comparison, the FCC has authority to exempt calls to residential lines when those calls are not made for a commercial purpose or when those calls are commercial in nature but do not adversely affect the privacy rights that the TCPA is intended to protect.¹⁵⁹ Accordingly, the FCC lacks statutory authority to create an actual implied consent exemption for autodialed calls to wireless numbers, even if the FCC finds that such calls would not adversely affect the privacy interests of debtors.

Even if the TCPA does not expressly grant the FCC authority to create a debt-collection exemption, it is arguably still entitled to craft a definition of prior express consent that would achieve the same ends—provided that its definition of prior express consent was a permissible construction of the statute. As noted *supra*, the *Mais* court

¹⁵⁵ See also Pub. L. No. 102-243, § 2 ¶ 13, 105 Stat. 2394 (1991) (congressional findings) (codified at 47 U.S.C. § 227 (2012)) (“[T]he [FCC] should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy.”). While this might seem like a justification for expanding the FCC’s discretion in crafting exemptions, a legislative finding simply does not have the same force of law as plain statutory text, and it should be presumed that such findings were incorporated into the drafting process and are therefore already reflected in the text of the statute.

¹⁵⁶ 47 U.S.C. § 227(b)(2)(C).

¹⁵⁷ See FCC, 2012 Report and Order, *supra* note 10, at 11–12 ¶ 27.

¹⁵⁸ See FCC, 2008 Order, *supra* note 13, at 562 n.22 (“[C]allers have no way to determine how consumers are charged for their wireless service.”).

¹⁵⁹ 47 U.S.C. § 227(b)(2)(B)(i), (ii)(I).

believed that Congress had settled the matter and that the statute was clear on its face.¹⁶⁰ However, it is more likely that, while Congress understood that express consent is largely self-evident (i.e., it is not *implied* consent), Congress wanted to give the FCC some discretion to dictate how telemarketers could obtain prior express consent—for example, verbally or in writing.¹⁶¹ Therefore, it left the FCC free to write its own definition of prior express consent, not so the FCC could change the requirement of section 227(b)(1)(A) from express to implied consent, but so the FCC could clarify the *form* of that consent.¹⁶² Of course, the fact that the FCC did not define prior express consent when it first implemented the TCPA suggests that the FCC itself believed the meaning of “prior express consent” to be self-evident or at least complicates the argument that the statute is so ambiguous as to conclusively prove that Congress meant to leave it to the FCC to define prior express consent. At the same time, however, the intent of Congress is not unmistakably clear on the face of the statute, as the *Mais* court argued.

Under *Chevron*, if a statute is ambiguous with respect to a specific issue or if the intent of Congress is unclear, then the answer provided by the agency charged with implementing the statute is entitled to judicial deference so long as it is based on a permissible construction of the statute.¹⁶³ The agency’s construction does not have to be the one a reviewing court would have chosen; it merely must be a reasonable one.¹⁶⁴ Because the TCPA is arguably ambiguous as to what constitutes prior express consent, the remaining question is therefore whether the FCC’s interpretation is a permissible construction of the statute, i.e., whether it is reasonable.¹⁶⁵ As I have argued in this Note, the FCC’s interpretation of prior express consent is not a permissible construction of section 227(b)(1)(A) because it allows a creditor to circumvent that section’s requirement of express consent altogether and to escape liability for prohibited calls by alleging that consent could be inferred from the mere provision of a consumer’s wireless

¹⁶⁰ See *supra* note 58 and accompanying text; see also *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (“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.”).

¹⁶¹ Cf. FCC, GroupMe Ruling, *supra* note 25, ¶ 8 (“Because the TCPA is silent on how consumer consent should be obtained, we exercise our discretion to interpret the requirement by looking to the consumer protection policies and goals underlying the TCPA.”).

¹⁶² See *Chevron*, 467 U.S. at 843.

¹⁶³ *Id.* at 844.

¹⁶⁴ *Id.*

¹⁶⁵ See *supra* notes 163–64 and accompanying text. Reasonable can mean “represent[ing] a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute,” not merely reasonable as a matter of “plain English” language usage. See *United States v. Shimer*, 367 U.S. 374, 383 (1961).

number.¹⁶⁶ In addition, the 2008 Order undermines Congress's intent to regulate a specific category of calls—autodialed calls or calls delivering a prerecorded message—because it does not require that a creditor prove that the called party actually consented, either expressly or impliedly, to calls made using those technologies.¹⁶⁷

CONCLUSION: WHY THE FCC SHOULD CHANGE ITS APPROACH TO
PRIOR EXPRESS CONSENT

The TCPA requires prior express consent for autodialed calls made to cellular telephone numbers, regardless of the content of the call.¹⁶⁸ The TCPA, however, does not define prior express consent.¹⁶⁹ Exercising its discretionary authority, the FCC has provided an interpretation of prior express consent that applies in the debt-collection context.¹⁷⁰ Federal district courts have generally treated this interpretation with deference because of the jurisdictional constraints of the Hobbs Act; others have considered the merits of the FCC's approach and rejected it on the grounds that it creates an implied consent exemption to section 227(b)(1)(A) that the FCC has no statutory authority to create.¹⁷¹ When the FCC revised its rules implementing the TCPA in 2012, it added an express *written* consent requirement for certain calls, not including debt-collection calls.¹⁷² It did not add a definition of prior express consent to the regulations themselves, perhaps because it is unclear what that definition would look like in light of its interpretation,¹⁷³ but the 2008 Order functions effectively as an alternative, binding law because the district courts are bound to apply it. As a result, there is currently a range of benchmarks for consent under the TCPA.

In enacting the TCPA, Congress established a regulatory “floor” for consent to autodialed calls and calls delivering a prerecorded message: when made to wireless numbers, such calls require the prior express consent of the called party.¹⁷⁴ Prior implied consent would fall below that regulatory floor and therefore not meet the requirements of the statute because, given the nature of the TCPA as a consumer

¹⁶⁶ See *supra* Part III.B.

¹⁶⁷ See *supra* Part III.B.

¹⁶⁸ See *supra* note 16 and accompanying text. With the exception of calls made for emergency purposes. See 47 U.S.C. § 227(b)(1)(A) (2012).

¹⁶⁹ See *supra* note 17 and accompanying text.

¹⁷⁰ See *supra* notes 21–20 and accompanying text.

¹⁷¹ See *supra* Part II.

¹⁷² See *supra* notes 136–37 and accompanying text.

¹⁷³ One can perhaps imagine what it would look like: “Prior express consent is consent that is inferred from the provision of a consumer’s wireless number to a vendor or creditor during a commercial transaction or a transaction giving rise to a creditor-debtor relationship.”

¹⁷⁴ See 47 U.S.C. § 227(b)(1)(A) (2012).

protection statute, acting on implied consent would increase the risk that the consumer's choice to receive or not receive such calls was not being honored.¹⁷⁵ This is true even if the inference of consent were unavoidable; the statute clearly requires express consent.¹⁷⁶ However, the statute does not define prior express consent and thus it is possible that such consent could take different forms—for example, written or verbal.¹⁷⁷ The degree to which the form of consent required by the FCC remains above the TCPA's regulatory floor would depend upon whether one could reasonably construe the consent as express; if no person could reasonably construe such consent as express, it would not satisfy the requirements of section 227 (b)(1)(A). Because the statute is relatively unambiguous, the range of reasonableness should be relatively narrow.¹⁷⁸

By allowing for implied consent in the debt-collection context, the FCC has impermissibly lowered the threshold for consent and frustrated the intent of Congress by failing to distinguish between generalized and specific consent.¹⁷⁹ Arguably, the FCC's approach makes debtors easier to reach and therefore respects the strong interests of creditors in reducing the cost of recovering capital.¹⁸⁰ But the TCPA was not enacted for the benefit of debt collectors.¹⁸¹ As such, this does not serve as a compelling justification for the FCC's current interpretation of prior express consent. On the other hand, there are several good reasons why the FCC should revise its approach.

First, the FCC is clearly capable of distinguishing between generalized consent and consent to receive a more specific type of call. For example, in its 2012 Report and Order, the FCC rejected the argument that a consumer who provides his or her wireless number to a vendor expects to receive marketing and service calls if the wireless number was only provided "as a point of contact."¹⁸² Thus, the FCC

¹⁷⁵ See *supra* notes 26–28 and accompanying text.

¹⁷⁶ See *supra* note 16 and accompanying text.

¹⁷⁷ See 47 U.S.C. § 227; *supra* note 18 and text accompanying note 161.

¹⁷⁸ Compare *City of Arlington v. FCC*, No. 11-1545, slip op. at 16 (5th Cir. May 20, 2013) ("Where Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow."), with *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.11 (1984) ("The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.").

¹⁷⁹ See *supra* notes 8–9 and Part III.C.

¹⁸⁰ See Hector, *supra* note 142, at 1630–32.

¹⁸¹ See *supra* notes 8–9 and accompanying text.

¹⁸² FCC, 2012 Report and Order, *supra* note 10, at 11 ¶ 25 ("Consumers who provide a wireless phone number for a limited purpose—for service calls only—do not necessarily expect to receive telemarketing calls that go beyond the limited purpose for which oral consent regarding service calls may have been granted.").

cannot argue that distinguishing between generalized and specific consent is difficult for the purpose of rulemaking. In addition, the FCC has itself argued that giving out one's contact information does not necessarily establish consent: in 1995, the FCC stated, "We do 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 . . . advertisements."¹⁸³ Accordingly, the FCC would not have to "reinvent the wheel" to revise its interpretation; it would simply have to look to its prior practice.

Second, the FCC has already shown itself capable of responding to criticism among jurists that its rules implementing the TCPA run counter to the plain language of the statute. Prior to passage of the Junk Fax Protection Act in 2005, there was considerable confusion among state courts over an FCC ruling that allowed consent to receive unsolicited facsimile (fax) advertisements to be inferred from an established business relationship.¹⁸⁴ At the time, unsolicited fax advertisements were prohibited by section 227(b)(1)(C) of the TCPA, and there was no prior business-relationship exception written into the statute;¹⁸⁵ there was, however, an established business relationship exception for unsolicited *telephone* solicitations, and the FCC argued that the TCPA should be construed to carry over the exception for telephone solicitations into the section dealing with fax solicitations.¹⁸⁶ Subsequently, numerous state courts, faced with lawsuits arising from unsolicited fax advertisements, rejected the FCC's interpretation of the TCPA as "at odds with the plain language of the statute."¹⁸⁷ More specifically, these courts focused on the fact that, while section 227(b)(2)(C) required the recipient's prior *express* consent to receive a fax advertisement, the FCC's rule allowed for consent to be *implied* from prior business dealings.¹⁸⁸

¹⁸³ FCC, 1995 Opinion and Order, *supra* note 12, at 12408 ¶ 37. The FCC stated that a prior business relationship would suffice to establish consent to facsimile communication. *See id.* Arguably, the FCC's definition of consent in the debt-collection context also relies on this notion of a business relationship between debtor and creditor. However, it is worth remembering that there is no prior business-relationship exemption to section 227(b)(1)(A). *See* 47 U.S.C. § 227 (2012).

¹⁸⁴ *See Weitzner v. Iridex Corp.*, No 05 CV 1254(RJD), 2006 WL 1851441, at *3 (E.D.N.Y. June 29, 2006) ("Numerous state courts examining the [TCPA] and its legislative history questioned whether the FCC's interpretation, applying the established business relationship exemption to facsimiles, was supported by the statute."); FCC, 1992 Order, *supra* note 18, at 8779 n.87 ("We note, however, that facsimile transmission from persons or entities who have an established business relationship with the recipient *can be deemed to be* invited or permitted by the recipient." (emphasis added)).

¹⁸⁵ *See Weitzner*, 2006 WL 1851441, at *3 (noting that there was a "provision prohibiting unsolicited facsimile advertisements").

¹⁸⁶ *See id.*

¹⁸⁷ *Id.* at *4 (citing numerous state court cases).

¹⁸⁸ *See id.* ("[T]he FCC's interpretation of the [established business relationship] defense would act to amend the TCPA's definition of unsolicited advertisement *from* a fax

In response to this criticism, the FCC decided to revise its rules so that a showing of a prior business relationship would no longer be sufficient for proving consent.¹⁸⁹ However, Congress stepped in and passed the Junk Fax Prevention Act, which wrote the established business exception into section 227(b)(1)(C).¹⁹⁰ Legislative intervention settled the argument between courts and the FCC, but, as one court pointed out, it did not necessarily affirm the FCC's original position.¹⁹¹ Rather, the FCC's revisions highlighted the fact that the FCC had perhaps lacked statutory authority to promulgate its rule.¹⁹² Likewise, the FCC's interpretation of prior express consent in the debt-collection context lacks support in the plain language of the TCPA, and the FCC should revise it because failing to do so will only lead to more confusion among the courts. If the FCC's interpretation really does comport with Congress's intent, then Congress remains free to revise the TCPA instead.

Third, the FCC should change its approach to prior express consent because doing so would make the FCC's rules consistent with the FTC's thinking on debt-collection calls to wireless numbers. In a 2009 workshop report on consumer debt, the FTC supported the idea that creditors should be allowed to contact consumers on their mobile phones, but only with consumers' prior express consent.¹⁹³ The report went on to state that such consent should be found only where "(1) the consumers have been adequately informed that they may receive collection calls on their mobile phones; and (2) the consumers have taken some affirmative step to indicate their agreement to receive such calls."¹⁹⁴ Although the FTC report may suffer the same flaw of failing to distinguish between general and specific consent, its standard does "provide[] greater protection for consumers" by requiring adequate notification and some "affirmative step to indicate . . . agreement," not merely provision of a wireless number.¹⁹⁵ Given that the FCC cited the need for conformity with FTC rules in its

sent without the recipient's prior express invitation or permission, to a fax sent without the recipient's prior express or implied invitation or permission. That interpretation conflicts with the plain language of the statute." (quoting *Kondos v. Lincoln Prop. Co.*, 2001 TCPA Rep. 1036, at *4 (Tex. Dist. Ct. July 12, 2001) (unpublished)) (internal quotation marks omitted)).

¹⁸⁹ See *id.* at *6.

¹⁹⁰ Pub. L. No. 109-21, 119 Stat. 359 (2005) (codified as amended at 47 U.S.C. § 227(b)(1)(c) (2012)).

¹⁹¹ See *Weitzner*, 2006 WL 1851441, at *8.

¹⁹² See *id.* ("More telling, perhaps, is the FCC's own uncertainty as to its authority to promulgate this exemption, as evidenced by its reversal of gears and its proposed elimination of the rule after ten years . . .").

¹⁹³ See FTC, COLLECTING CONSUMER DEBT: THE CHALLENGES OF CHANGE 41-42 (2009), available at <http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf>.

¹⁹⁴ *Id.* at 42.

¹⁹⁵ *Id.* at 42 & n.266.

2012 Report and Order (outlining revisions to 47 C.F.R. part 64.1200),¹⁹⁶ changing its standard for prior express consent to require notification and some affirmative, express indication of consent by consumers would further this goal of uniformity.

Finally, the FCC should revise its approach because the federal district courts are without jurisdictional authority to set aside the 2008 Order.¹⁹⁷ Without that authority, they must treat the 2008 Order as binding law and are without liberty to consider the merits of a plaintiff's claim that he or she was never given an affirmative and definitive choice whether to receive autodialed calls or calls delivering a prerecorded message, a right to which all called parties are entitled under the TCPA.¹⁹⁸ The federal courts of appeals, which do have authority to determine the validity of the 2008 Order, may eventually come to conflicting conclusions about its validity, setting up a possible appeal to the Supreme Court.¹⁹⁹ But the FCC has all the tools it needs to make a change now: an authorizing statute, cogent judicial reasoning to guide its hand, and, hopefully, this Note to provide a clarion call. The only question is: Will the FCC pick up the phone?

¹⁹⁶ See FCC, 2012 Report and Order, *supra* note 10, at 2 ¶ 2.

¹⁹⁷ See *supra* notes 39–41 and accompanying text.

¹⁹⁸ FCC, 2012 Report and Order, *supra* note 10, at 48 (statement of Commissioner Clyburn); see *supra* notes 41–43, 145 and accompanying text.

¹⁹⁹ See *supra* notes 111–13 and accompanying text.