

16-2104

United States Court of Appeals for the Second Circuit

ALBERTO REYES, JR.,
PLAINTIFF-COUNTER-DEFENDANT-APPELLANT,

v.

LINCOLN AUTOMOTIVE FINANCIAL SERVICES,
DEFENDANT-COUNTER-CLAIMANT-APPELLEE.

ON APPEAL FROM A JUDGMENT OF THE EASTERN DISTRICT OF NEW YORK

**AMICUS BRIEF FOR NATIONAL CONSUMER LAW CENTER,
NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, CONSUMER
FEDERATION OF AMERICA AND PUBLIC CITIZEN, INC.
IN SUPPORT OF PLAINTIFF-COUNTER-DEFENDANT-APPELLANT**

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STATEMENT OF IDENTITY AND INTEREST IN CASE¹

The National Consumer Law Center, the National Association of Consumer Advocates, Consumer Federation of America, and Public Citizen are non-profit organizations dedicated to improving the lives of consumers. All of the organizations have extensive experience in consumer protection legal issues, including the intrusions and costs of increasingly rampant automatically dialed “robocalls” and texts to cell phones. All amici have advocated for comprehensive protections under the Telephone Consumer Protection Act (“TCPA”) and have a strong interest in ensuring that repetitive, harassing, and unwanted robocalls are curbed.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici urge rehearing *en banc* because the panel’s decision, if allowed to stand, would unleash a torrent of unwanted and invasive robocalls and texts to cell phones, affecting nearly every consumer and small business in the nation—*who would have no way to stop the calls*. Prohibiting revocation of consent to receive these calls whenever consent is part of a

¹ No party’s counsel authored this Amici Curiae brief in whole or in part; no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief; and no person, other than the Amici Curiae, their members, or their counsel, contributed money that was intended to fund preparing or submitting the brief.

contract term would eliminate the primary protection against this onslaught of unwanted calls.

Further, the panel's decision conflicts with both the Federal Communication Commission's (FCC's) determination that consumers' consent is revocable and decisions of other Circuits that have allowed revocation of consent that was provided as part of a contract.

This Court should rehear this case *en banc* to prevent the evisceration of the TCPA's fundamental privacy protections.

ARGUMENT

I. THE PANEL'S HOLDING THAT CONTRACTUAL CONSENT TO RECEIVE ROBOCALLS IS IRREVOCABLE EVISCERATES THE TCPA'S PRIVACY PROTECTIONS.

A. Robocalls will be unstoppable and unending if the Panel's decision stands.

The panel's decision would mean that autodialed and prerecorded voice calls and texts to cell phones would multiply exponentially and affect nearly every individual and business entity in the United States. Written, oral, or implied contracts underlie almost all our commercial dealings. Many standardized form contracts already include boilerplate language giving consent for prerecorded and autodialed calls. If the panel's decision stands, these clauses are likely to become universal.

The panel's decision makes such consent irrevocable in perpetuity. It would radically weaken control over the invasions of privacy that Congress sought to prevent by enacting the TCPA. The unstoppable automated calls unleashed by the ruling can be expected to include:

- Prerecorded voice calls from cable companies about the coming week's shows and specials;
- Artificial voice calls from credit card companies pushing teaser interest rates for balance transfers;
- Daily reminders from pharmacies to refill prescriptions, even if they have already been filled elsewhere;
- Prerecorded survey calls from businesses about the quality of their services;
- Prerecorded calls and texts reminding debtors to make payments on extensions of credit, encouraging them to set up automated payments, dunning them for past-due payments, or offering new credit.

Once a consumer signed a contract with a boilerplate clause consenting to be contacted telephonically—which all contracts would quickly incorporate—*there would be nothing a cell phone user could do to stop or limit these calls.*

B. The volume of unwanted robocalls and texts has already reached epidemic proportions.

U.S. consumers already receive 2.4 billion robocalls a month. *See* Ajit Pai, *Springing Forward for the Public Interest: The FCC's March Agenda*, Medium (Mar. 2, 2016), <https://medium.com/@AjitPaiFCC/springing-forward-for-the-public-interest-the-fccs-march-agenda-337b8ef582bc>. Some estimate that 35 percent of all calls placed in the U.S. are robocalls. *Rage Against Robocalls*, Consumer Reports (July 28, 2015).

Consumers complain about these calls in epic numbers, as well: The FCC receives more than 200,000 complaints annually regarding unwanted calls, and the FTC received around 5.3 million complaints regarding telemarketing calls in 2016 alone. Travis LeBlanc, *Robocallers Face Growing International Alliance*, FCC BLOG, Nov. 21, 2016, <https://www.fcc.gov/news-events/blog/2016/11/21/robocallers-face-growing-international-alliance>; Federal Trade Commission, *National Do Not Call Registry Data Book for Fiscal Year 2016* (2016), <https://www.ftc.gov/reports/national-do-not-call-registry-data-book-fiscal-year-2016>.

The TCPA was passed in 1991 in direct response to the “[v]oluminous consumer complaints about abuses of telephone technology—for example, computerized calls dispatched to private homes.” *Mims v. Arrow Fin. Servs., L.L.C.*, 132 S. Ct. 740, 744 (2012). Yet the volume of complaints continues

to increase. Robocalls are very inexpensive to make. According to the FTC, “[w]ith such a cheap and scalable business model, bad actors can blast literally tens of millions of illegal robocalls over the course of a single day at less than 1 cent per minute.” Hearing Before the Senate Comm. on Commerce, Sci., and Transp.’s Subcomm. on Consumer Prot., Prod. Safety, and Ins. (July 10, 2013) (statement of Lois Greisman, Associate Director, Division of Marketing Practices, FTC) at 5.

The TCPA is essentially a privacy protection law, intended to protect consumers and small businesses from the intrusions of unwanted automated and prerecorded calls. When Congress enacted the TCPA, it found that automated and prerecorded calls are “a nuisance and an invasion of privacy, regardless of the type of call” Pub. L. No. 102–243, 105 Stat. 2394 §§ 12-13 (1991). Except for emergency calls, the TCPA permits prerecorded and autodialed calls to cell phones *only if* the cell phone user has given “prior express consent” to receive them. 47 U.S.C. § 227(b)(1)(A)(iii).

The deluge of complaints to federal agencies demonstrates that—left unchecked—autodialers will bombard consumers and small businesses with calls and texts. And the panel’s decision will remove the primary protection available to stop these robocalls.

C. Robocalling abuses by one large debt servicer illustrate the future reality if consumers cannot revoke consent.

A recent request to the FCC by several national consumer groups to bring an enforcement action against Navient Solutions, LLC, for its persistent calls to student loan debtors and others, despite requests for the calls to stop, provides a preview of what life will be like for everyone if the panel's decision is permitted to stand. *See* Letter from National Consumer Law Center, et al., to Michael Carowitz, (Jun. 12, 2017), <https://ecfsapi.fcc.gov/file/106121158414766/Enforcement-Request%20Filed.pdf>.

The consumer groups' petition cites hundreds of complaints regarding Navient's unrelenting phone calls. Some examples include:

1. "I am receiving at least 10 calls a day at all times on both numbers. . . ." Complaint #2258603.
2. "Continued to call during all hours of the night and repeatedly contacted on Sundays all day." Complaint #2259371.
3. "Navient calls me 10+ times a day after only being 1 day late for payment, if I don't answer then they harass my Mother because she is a cosigner, they call from different numbers every time and even outside of their business hours. If I answer

and tell them that I plan to make a payment they still call and harass me every day.” Complaint #1868439.

4. “[A subsidiary of Navient] contacts our business multiple times every day in reference to a worker’s personal debt despite being advised over and over that this is a business These tactics include calling the direct lines of every employee which are listed on our website. The calls usually total more than 10 per day.” Complaint #1744968.
5. “After I have spoken to them, or my father has spoken to them, because they also call his phone about the debt, they still call at least 5 times a day. Even when payments have been made No matter what I receive at least 5 phone calls a day, including weekends. [T]hey will call from several different . . . numbers to call me 5 times a day. They call my father and demand he pay more than he can” Complaint #1765362.

Navient claims that a 2015 statutory amendment frees it entirely from the TCPA’s consent requirement, so it is able to make these incessant robocalls to cell phone users who have revoked their consent to be called—and even to those who never consented at all. Whether this position is correct or incorrect is not germane here. The point here is that Navient’s

behavior illustrates the nightmare scenario if the panel’s decision is permitted to stand: relentless calls even when consumers beg for the calls to cease.

D. Other callers also make hundreds and thousands of unwanted robocalls.

A small selection of the many cases challenging invasive robocalls illustrates just some of the abuses to which consumers have been subjected:

- *Dominguez v. Yahoo, Inc.*, 629 Fed.Appx. 369 (3d Cir. Oct. 23, 2015) (Yahoo sent 27,809 wrong number text messages in 17 months, and refused to stop after the consumer’s many pleas).
- *King v. Time Warner Cable*, 113 F.Supp. 3d 718 (S.D.N.Y. July 7, 2015), *appeal filed*, No. 15-2474 (2d Cir. Aug. 6, 2015) (153 robocalls even after the consumer informed the defendant that it was calling the wrong person and asked it to stop calling; on appeal, defendant has argued that the consent provision in its contract with the plaintiff, which applied to calls “for any purpose,” entitled it to make these wrong number calls to her. *See* Letter to Catherine O’Hagan Wolfe, Clerk of the

Court for the United States Court of Appeals for the Second Circuit, from Matthew A. Brill (Jun. 28, 2017)).

- *Munro v. King Broadcasting Co.*, 2013 WL 6185233 (W.D. Wash. Nov. 26, 2013) (hundreds of text messages despite consumer's dozens of requests for the company to stop).
- *Beal v. Wyndham Vacation Resorts, Inc.*, 956 F. Supp. 2d 962 (W.D. Wis. 2013) (dozens of robocalls to consumer's cell phone, which continued despite repeated requests to stop calling).

In every one of these cases the callers argued that the TCPA prohibition on calling or texting cell phones without consent did not apply to them for one reason or another. If the TCPA is interpreted to permit automated calls to cell phones despite revocation of consent, these invasive, annoying, and expensive calls will increase astronomically.

One should not assume that business interests in maintaining the good will of their customers will operate to limit future unwanted robocalls. As illustrated by the volume of consumer complaints, callers clearly see significant commercial value in repeatedly robocalling consumers' cell phones regardless of requests to stop. These callers have simply decided that

it is more cost-effective to ignore the clearly expressed wishes of consumers and continue to make these automated calls and texts.

Not just consumers, but also small businesses will be impacted if the panel's decision is allowed to stand. Many individuals and small businesses today rely *exclusively* on their cell phones as their only means of telephone communication. *See* Stephen Blumberg and Julian Luke, U.S. Dep't of Health and Human Services, National Center for Health Statistics, Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July–December 2016.

In most cases, prior express consent to receive robocalls under the TCPA is provided in a contractual framework. Such transactions are almost always memorialized in adhesion contracts that a consumer or small business has no ability to negotiate or change. If consent is irrevocable, as the panel decision held, cell phone users seeking to obtain any goods or services will regularly be required—by operation of boilerplate terms included in standardized form contracts of adhesion—to consent to robocalls, and will be powerless to stop them.

E. Lower-income consumers will suffer additional harm from exponentially increasing volumes of unwanted and invasive robocalls.

While the panel decision endangers the fundamental privacy rights of every cell phone user, lower-income individuals will suffer disproportionate harm if the panel decision is allowed to stand. About one-third of American cell phone users—particularly low-income consumers—have pay-as-you-go, limited-minute prepaid wireless plans. Federal Communications Commission, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, Nineteenth Report, Docket No. DA-16-1061, ¶¶ 12, 46 (Sept. 23, 2016). Prepaid wireless plans typically provide a fixed number of minutes, and often texts, for a set price, after which the user must purchase additional minutes. Many consumers are billed for incoming calls in addition to outgoing calls, making them very sensitive to repetitive, unwanted calls.

In particular, most of the almost 12.5 million low-income households that maintain essential telephone service through the federal Lifeline Assistance Program have limited-minute prepaid cell phone plans. Universal Service Administrative Company, 2016 Annual Report 14 (2016), https://www.usac.org/_res/documents/about/pdf/annual-reports/usac-annual-report-interactive-2016.pdf; Federal Communications Commission, Second

Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order 15-71, ¶ 16 (Rel. June 22, 2015), https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-71A1.pdf. These families rely on these limited minutes for all their essential telephone communication—for health care, transportation, job searches, communications with their children’s school or daycare provider, and to avoid social isolation. Unstoppable robocalls can quickly deplete these precious and limited cell phone minutes.

II. THIS COURT MISCONSTRUED THE FCC’S 2015 ORDER AND DIRECTLY APPLICABLE DECISIONS FROM OTHER CIRCUITS.

In a 2015 order, the FCC authoritatively determined that consumers can revoke their prior express consent to receive robocalls on their cell phones. The FCC ruled: “Where the consumer gives prior express consent, the consumer may also revoke that consent.” *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 30 FCC Rcd. 7961, at ¶ 62 (July 10, 2015). The FCC’s Order applies broadly; it is not limited or qualified in any way that would suggest the TCPA’s revocation rights are inapplicable to written contracts. *See id.* at ¶ 63. To the contrary, the FCC explicitly rejected the argument that callers can limit the means by which a consumer may exercise

the right to revoke consent. *Id.* at ¶¶ 66-67. The FCC’s 2015 Order so zealously protects the consumer’s right to revoke by “using any reasonable method” that it cannot be reasonably read to allow a complete elimination of every means of revocation of consent given in such a contractual waiver in an adhesion contract. Because it misconstrued the FCC’s 2015 order, the panel decision failed to give it appropriate weight. *See Blow v. Bijora, Inc.*, 855 F.3d 793, 802-803 (7th Cir. 2017) (“absent a direct appeal to review the 2015 FCC’s Order’s interpretation of an autodialer, we are bound to follow it”); *Murphy v. DCI Biological Orlando, L.L.C.*, 797 F.3d 1302, 1307-1308 (11th Cir. 2015) (district court lacked jurisdiction under Hobbs Act to review FCC interpretation of the TCPA).

The panel’s decision also indicates that it believed that the other circuit courts that had dealt with revocation of consent had not squarely considered the issue of whether “the TCPA also permits a consumer to unilaterally revoke his or her consent to be contacted by telephone when that consent is given, not gratuitously, but as bargained-for consideration in a bilateral contract.” *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51, 56 (2d Cir. 2017). But the panel was mistaken on this point. In both the Third and Eleventh Circuit cases, the consumer had provided consent in the application for open-end credit. *Gager v. Dell Financial Services, LLC*, 727 F.3d 265

(3d Cir. 2013); *Osorio v. State Farm Bank*, 746 F.3d 1242 (11th Cir. 2014).

The application is the only document signed by a consumer in an open-end consumer credit transaction, and therefore the consent provided in those cases was exactly like the consent provided in this case: in a document signed by the consumer to access consumer credit.

CONCLUSION

For the foregoing reasons, the Court should grant the Appellant's Petition for Rehearing and Rehearing *En Banc*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 2,584 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2017, I electronically filed the within Brief using the Appellate CM/ECF system. I further certify that on April 27, 2017, six paper copies, identical to the electronically filed Brief, were sent to the Clerk of the Court via priority mail, postage prepaid.

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