NO. 26-1537

United States Court of Appeals
for the
Fourth Circuit

DEBORAH BRADLEY, individually and on behalf of others similarly situated,

Plaintiff-Appellant,

– v. –

DENTALPLANS.COM, *et al*.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF OF NATIONAL CONSUMER LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

JENNIFER WAGNER
NATIONAL CONSUMER LAW CENTER
Seven Winthrop Square
Boston, Massachusetts 02110
(617) 542-8010

Counsel for Amicus Curiae

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
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No. 26-1537 Caption: Bradley v. DentalPlans.com, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Consumer Law Center
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Jennifer Wagner Date: 8-31-2026

Counsel for: National Consumer Law Center

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STATEMENT OF IDENTITY AND INTERESTS OF AMICUS CURIAE

The National Consumer Law Center (NCLC) is a nonprofit organization that works for consumer justice and economic security for low-income and other disadvantaged people in the United States through its expertise in policy analysis and advocacy, publications, litigation, expert witness services, and training. NCLC has long-standing expertise in federal consumer protection statutes, such as the Telephone Consumer Protection Act and the Telemarketing and Consumer Fraud and Abuse Prevention Act. NCLC publishes a 21-volume consumer law treatise series, including Federal Deception & Abuse Law (5th ed. 2024), updated at www.nclc.org/library, which includes lengthy and detailed chapters analyzing all aspects of the Telephone Consumer Protection Act and the FCC's regulations under that Act. NCLC staff have represented consumers' interests in numerous FCC rulemaking proceedings under the TCPA, and they have frequently testified before Congress on these issues.

All parties have consented to the filing of this brief. Amicus certifies that no party's counsel authored this 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 amicus curiae, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The decision of the district court should be reversed because the written consent regulation, promulgated by the Federal Communications Commission (FCC) and found in 47 C.F.R. § 64.1200(a)(2) and (a)(3), is within the scope of the authority Congress delegated to the agency. The FCC enacted the written consent regulation after a lengthy and careful rulemaking process, in which it explicitly considered the scope of its delegated authority and the need to provide strong consumer protections against telemarketing robocalls.[1] *See In the Matter of Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, ¶ 76, 27 F.C.C. Rcd. 1830, 1859 (2012) (2012 Order); *see also In the Matter of Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, 25 F.C.C. Rcd. 1501 (2010) (2010 NPRM).

The written consent regulation is necessary to implement the privacy protections central to the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227. Congress intended that the FCC would craft restrictions to combat certain types of calls that consumers find particularly intrusive. The written consent requirement, which applies only to telemarketing robocalls, is precisely this type of restriction and

[1] As used in this brief, the term "robocall" refers to calls using an automated telephone dialing system or an artificial or prerecorded voice.

is supported by a strong record which demonstrates that it is necessary to achieve the TCPA's purpose.

The written consent requirement prevents telemarketers from circumventing the TCPA's consent requirement, aids the FCC's enforcement efforts, and protects consumers' privacy rights. The FCC's rulemaking process describes high volumes of consumer complaints demonstrating frustrations with telemarketers' evasions of the TCPA's protections. The written consent requirement also reduces the potential for industry and consumer confusion regarding different requirements if a caller is subject to the FTC's TSR. It protects both consumers and industry from erroneous claims that consent was or was not given, because the existence of a paper or electronic record provides unambiguous proof of consent.

In promulgating the written consent requirement, the FCC was careful to stay within the boundaries of its delegated regulatory authority. In its 2012 Order enacting the written consent requirement, the agency cited Congressional delegations of regulatory authority in the Telephone Consumer Protection Act (TCPA) as well as ancillary authority derived from 47 U.S.C. §§ 154(i) and 303(r), and the Do-Not-Call Implementation Act (DNCIA), codified in relevant part at 15 U.S.C. § 6153. 2012 Order at ¶76.

These delegations of authority provide sufficient bases for the FCC's written consent requirement. First, the TCPA provides two grants of regulatory authority, sections 227(b)(2) and (c)(2), which authorize the FCC to craft regulations implementing the TCPA's consent requirements and protecting telephone subscriber's privacy rights. The written consent requirement fits neatly within the authority delegated to the FCC by section 227(b), and legislative and regulatory history demonstrates that section 227(c) further bolsters the FCC's authority to regulate telemarketing robocalls. Next, the FCC's ancillary authority expands the delegated authority in the TCPA itself by empowering the agency to promulgate regulations necessary to achieve its responsibilities under the TCPA. Lastly, the DNCIA provides a further grant of regulatory authority to harmonize the FCCs TCPA regulations with the Federal Trade Commission's (FTC) Telemarketing Sales Rule (TSR). These statutes, particularly when considered together, allow the FCC to promulgate regulations which are consistent with the language of the TCPA and necessary to achieve its goals.

Lastly, the written consent regulation is consistent with the language of the TCPA and Congress's legislative intent. The 2010 NPRM notes that "while the term 'prior express consent' appears in both subsections 227(b)(1)(A) and (b)(1)(B), the statute is silent regarding the precise form of such consent (*i.e.*, oral or written)." 2010 NPRM at ¶ 17. The written consent regulation mandates that prior express consent be written, but it explicitly incorporates federal and state laws recognizing electronic or digital signatures, 47 C.F.R. § 64.1200(f)(9), and the regulatory history makes it clear that the FCC interprets the rule to allow an electronic recording of oral consent. 2012 Order at ¶ 34. The written consent requirement does not preclude oral consent, but rather requires that prior express consent, whether in ink or speech, be clearly and unequivocally given and recorded. This is entirely consistent with the meaning of the term "prior express consent" in 1991 when the TCPA was enacted, and the trial court erred in concluding that the rule excluded oral consent.

ARGUMENT

I. Stopping Unwanted Telemarketing Calls is Essential for Protecting Consumer Privacy as Congress Intended.

First and foremost, the TCPA is intended to protect consumer privacy. When Congress debated the TCPA in November 1991, the bill's sponsor Sen. Hollings remarked: "Computerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall." 137 Cong. Rec. 30821 (1991). In the Senator's view, telemarketing calls were among the most pernicious of computerized calls, and he recognized them as a particular threat to privacy, stating: "Two months ago, a representative of the Direct Marketing Association said on television that telemarketers have a right to call us in our homes. This is absurd. I echo Supreme Court Justice Louis Brandeis, who wrote 100 years ago that 'the right to be left alone is the most comprehensive of rights and the one most valued by civilized man'." *Id.*

Though Sen. Hollings acknowledged that computerized telemarketing was of particular concern, the TCPA's prohibition against robocalling as drafted was content-neutral, intended to broadly ban *all* nonconsensual, non-emergency robocalling: "This bill carefully avoids drawing any distinctions among types of calls based on the content of the message being delivered … whether these calls are made for commercial, political, or other purposes. This content neutral approach is essential to preserve the unbiased, nondiscriminatory nature of this legislation." *Id.* at 30822. However, Congress did not fail to address computerized telemarketing and the particular threat to consumer privacy it represents. Instead of singling out automated telemarketing in the text of the statute, Congress vested the FCC with regulatory authority to protect consumers: As Senator Hollings stated, "If the FCC finds, however, that some distinctions can be justified on policy grounds and constitutional grounds, the FCC is free to adopt rules to recognize those distinctions." *Id.*

The FCC's prior express written consent regulation for telemarketing robocalls is just such a rule. It is an essential consumer privacy protection aimed at harm arising from telemarketing robocalls, and it is based on a strong record demonstrating its necessity. When the agency first proposed the written consent requirement, Commissioner McDowell echoed Senator Hollings' concerns, stating: "Over the years, consumers have complained about unsolicited telemarketing calls -

especially robocalls - interrupting their lives, especially around dinnertime and other important moments in their lives." 2010 NPRM at 1535. When the agency promulgated the written consent regulation, it did so "[b]ased on substantial record support, the volume of consumer complaints we continue to receive concerning unwanted, telemarketing robocalls, and the statutory goal of harmonizing our rules with those of the FTC." 2012 Order at ¶ 20. Among those motivating factors, "thousands of complaints regarding unwanted telemarketing robocalls," *Id.* at ¶ 22, were of particular importance. The agency concluded that "complaint data . . . show[s] that the proliferation of intrusive, annoying telemarketing calls continues to trouble consumers." *Id.* at ¶ 24.

In the years since the FCC enacted the written consent regulation, the need to control telemarketing robocalls to cellular lines has only increased. In 2024, virtually all Americans, over 98% or almost 331 million people, owned a cellphone.[2] As cellphones have made their way into pockets, so have telemarketers eager to exploit the unprecedented reach and access of mobile networks. Typically, about 2 billion unwanted telemarketing and scam calls are made to American telephones *every month.*[3] The ubiquity of cellular phones and consumer frustration caused by

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[2] https://www.consumeraffairs.com/cell_phones/cell-phone-statistics.html

[3] https://finance.yahoo.com/news/u-consumers-received-over-4-130000254.html (Americans received 2.7 billion unwanted robocalls just in June 2025).

unwanted telemarketing robocalls make the FCC's written consent regulation essential to implementing the TCPA as Congress intended.

II. Congress Delegated Broad Regulatory Authority to the FCC.

The FCC's 2012 Order was adopted "pursuant to the authority contained in Sections 1-4, 222, 227, and 303(r) of the Communications Act of 1934, as amended; 47 U.S.C. §§ 151-154, 222, 227, and the [DNCIA]." 2012 Order at ¶ 76. At least five provisions in the cited statutes are particularly relevant to the FCC's authority to enact the written consent regulation. Specifically, section 227(b)(2) and (c)(2) of the TCPA both grant the FCC broad authority to implement the statute; 47 U.S.C. §§ 154(i) and 303(r) grant ancillary authority to the FCC; and 15 U.S.C. § 6153 of the DNCIA mandates that the FCC "consult and coordinate with the Federal Trade Commission to maximize consistency" between the FCC's rules under the TCPA and a subsection of the Telemarketing Sales Rule (TSR), 16 C.F.R. § 310.4(b). Consideration of each of these provisions shows that the written consent requirement falls easily within the scope of the regulatory authority Congress delegated to the FCC.

A. Multiple TCPA Provisions Authorize the Prior Express Written Consent Requirement.

1. The authority delegated to the FCC by section 227(b)(2) to "implement the requirements" of the TCPA's robocall restrictions is broad enough to encompass the written consent requirement.

The TCPA contains two subsections delegating relevant authority to the FCC, specifically 47 U.S.C. § 227(b)(2) and (c)(2). The first of these delegations, section 227(b)(2), requires the FCC to "prescribe regulations to implement the requirements" of the TCPA's robocall restrictions. When Congress uses a broad term without qualification, limitations should not be read into it. *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002) (giving unqualified statutory term its expansive meaning). *See also Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 557 (9th Cir. 2016) (citing Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 101 (2012) ("Without some indication to the contrary, general words ... are to be accorded their full and fair scope.")). To "implement" means "[t]o complete, perform, carry into effect (a contract, agreement, etc.); to fulfil[l] (an engagement or promise)." Implement, Oxford English Dictionary (2d ed. 1989).

In *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1082 & n.1 (D.C. Cir. 2017), Justice Kavanaugh, then on the D.C. Circuit, held that the FCC's section 227(b)(2) authority to "prescribe regulations to implement the requirements" of subsection 227(b) allowed it to "reasonably define that concept [the phrase 'prior express invitation or permission'] within statutory boundaries" for purposes of junk faxes, including by addressing the question whether a fax recipient may revoke previously granted permission by sending a request to the sender.

Imposing a requirement that prior express consent to receive telemarketing calls be documented in writing or electronically is just as modest, if not more so, as the level of interpretation that Justice Kavanaugh approved. Unlike the question whether permission can be revoked, the written consent requirement is a non-substantive documentation or record-keeping requirement. *See* 2012 Order at ¶ 34 (documentation of consent may be obtained "using any medium or format permitted by the E-SIGN Act, as the FTC permits in the TSR", including, for example, a voice recording). Moreover, the legislative history of the TCPA shows that Congress expected that businesses would maintain appropriate documentation of consent: "enterprises relying on the exception should establish specific procedures for obtaining prior permission and maintaining appropriate documentation with respect to such permission." H.R. REP. 102-317 at pg. 13. The requirement that consent be written therefore falls within the scope of section 227(b)(2), and it is in conformity with Congress's intent and expectations.

The court in *Bais Yaakov* also found that section 227(b) did not provide authority for the FCC to impose a regulation requiring fax senders to provide a notice on solicited fax advertisements, because the text of the TCPA only requires such a notice on unsolicited fax advertisements. *Bais Yaakov*, 852 F.3d at 1082. This holding does not suggest that section 227(b) is insufficient authority for the FCC to promulgate the written consent requirement because applying a substantive notice requirement to solicited faxes, a type of communication that Congress elected to exclude from the TCPA, is inconsistent with the language of the statute. However, requiring that prior express consent for telemarketing robocalls be documented in a physical or electronic form merely reasonably defines prior express consent for a form of communication, telemarketing robocalls, that Congress made subject to the TCPA. Indeed, consumer outrage over unwanted, automated telemarketing was the catalyst behind the TCPA's enactment in the first place. *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 372 (2012) (discussing legislative history).

The written consent requirement is also a necessary part of implementing the statute's prohibition on robocalls, in that it is designed to ensure that the TCPA's affirmative defense of prior express consent does not undercut government and private robocall enforcement efforts. The FCC's 2012 Order adopting the requirement reasons that "requiring prior written consent will enhance the FCC's enforcement efforts and better protect both consumers and industry from erroneous claims that consent was or was not provided, given that, unlike oral consent, the existence of a paper or electronic record can be more readily verified and may provide unambiguous proof of consent." 2012 Order at ¶ 26. The written consent requirement is thus not an effort to reinterpret the plain language of the TCPA's consent defense; rather, it is intended to ensure that the defense functions as Congress intended. This is within the scope of the FCC's delegated authority to implement the statute.

Eliminating the requirement that prior express consent be written (or otherwise recorded) would mean that consumers would in many cases no longer have even an ostensible means of knowing to whom they have allegedly consented for telemarketing, since oral-only consent during an oftentimes-anonymous lead generation call does not create a record for the consumer. Nor is the consumer necessarily even informed in that situation of who the particular seller(s) are – for example, in the case of a lead generator requesting consent during an unsolicited cold-call, which consent might then be sold off to a dozen or more companies who place robocalls the consumer is unlikely to expect or desire.

Thus, the written consent provision should be upheld even if section 227(b)(2) were the only regulatory authority Congress delegated to the FCC. However, as the FCC noted in its 2012 Order, Congress has made several delegations of regulatory authority to the agency, and the written consent requirement is premised on more than just section 227(b)(2). This Court's precedents make it clear that proper review of agency regulation requires ascertaining the full scope of all regulatory authority delegated to the agency under the applicable statutory scheme. *Nat'l Fed'n of the Blind v. F.T.C.*, 420 F.3d 331, 338 (4th Cir. 2005) (considering the general grant of rulemaking authority to the FTC along with a more technical section that defines certain substantive terms; upholding FTC's authority to regulate non-fraudulent charitable fundraising calls). The Court must then determine whether the agency's regulation "evidences reasoned decision making on the part of the [agency] and is a reasonable exercise of Congress's specific delegation of authority." *United States v. Kokinda*, 146 F.4th 405, 418 (4th Cir. 2025), *cert. denied,* 146 S. Ct. 1775, 224 L. Ed. 2d 167 (2026). The scope of the authority granted by section 227(b)(2) should not be analyzed in isolation but should be informed by and interpreted in coordination with the authority granted by section 227(c)(2), discussed in the next section, and by other provisions of the Communications Act.

2. *The expansive authority delegated to the FCC by section 227(c)(2) to adopt rules to protect subscribers' privacy easily encompasses the written consent requirement.*

Congress delegated additional regulatory authority to the FCC in section 227(c)(2) of the TCPA, which requires the agency to "prescribe regulations to implement methods and procedures for protecting the privacy rights described in [section 227(c)(1), *i.e.* 'residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object'] in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers." The written consent requirement falls within the rulemaking authority of both section 227(b)(2) and (c)(2) of the TCPA because its subject matter concerns both the TCPA's robocall prohibitions and procedures for ensuring that telephone subscribers do not receive telephone solicitations to which they object.

The expansive nature of this delegation of authority is notable. Congress did not require the FCC to adopt any particular approach to protecting subscribers from unwanted telephone solicitations. Instead, it required the agency to "compare and evaluate alternative methods and procedures ("including … 'do not call' systems and any other alternatives, individually or in combination) for their effectiveness in protecting privacy rights, and in terms of their cost and other advantages and disadvantages." 47 U.S.C. § 227(c)(1)(A). It ordered the FCC to "develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section." 47 U.S.C. § 227(c)(1)(E).

This authority is by no means limited to some subset of the TCPA's provisions. Congress made clear in its findings that all of the provisions of the TCPA—including "unrestricted telemarketing" and "automated or prerecorded telephone calls" are intended to protect subscribers' privacy. Pub. L. 102-243, § 2(5), (10), (12), & (14), Dec. 20, 1991, 105 Stat. 2395, codified as 47 U.S.C. § 227 note. Thus, although housed in subsection (c) of the TCPA, the authority that section 227(c)(1) gives the FCC extends to protections found in subsection (b), as long as the focus is on telemarketing.

Nor is this authority limited to the creation of a nationwide do-not-call system. It requires the FCC to consider "any … alternatives" to protect residential subscribers' privacy. 47 U.S.C. § 227(c)(1)(A). It encompasses both "methods" and "procedures," clearly giving the FCC authority to impose procedural requirements such as permissible ways to document consent to receive telemarketing calls.

It cannot possibly be true that this authority is capacious enough to allow the FCC to choose whether or not to create a vast, nationwide do-not-call system, but not to allow the agency to address whether prior express consent to receive a telemarketing call must be documented in a physical or electronic writing. This is particularly clear in light of Congress's repeated focus on the requirement that the FCC choose "efficient" and "effective" methods and procedures to protect subscribers' privacy rights. Allowing telemarketers to bombard consumers with unwanted calls based on vague, undocumented claims of consent would not be efficient or effective.

Congress reiterated the broad scope of this delegation of authority and the importance to Congress that the FCC exercise it by actions after the original enactment of the TCPA. In 2003, it enacted the Do-Not-Call Implementation Act, Pub. L. 108-10. That law gave the FTC authority to establish fees sufficient to implement the do-not-call registry that the FTC's nationwide do-not-call rule and the FCC's parallel rule would rely on. It also instructed the FCC to wrap up its promulgation of its own do-not-call rule quickly, and to maximize the FCC rule's consistency with the FTC's rule.[4]

Later that year, Congress again demonstrated the importance of the creation of these privacy protections by enacting Pub. L. 108-82 to reiterate the FTC's authority to adopt its nationwide do-not-call rule. PL 108–82, September 29, 2003, 117 Stat 1006. The enactment of this law was extraordinary in that it occurred just six days after a district court (later reversed by the Tenth Circuit) held that the Telemarketing and Consumer Fraud and Abuse Prevention Act's delegation of authority to the FTC was insufficient to allow it to adopt the do-not-call rule. *U.S. Security v. Fed. Trade Comm'n*, 282 F. Supp. 2d 1285 (W.D. Okla. 2003), *rev'd*, *Mainstream Mktg., Inc. v. Fed. Trade Comm'n*, 358 F.3d 1228 (10th Cir. 2004). Congress's history shows steadfast support for both agencies' vigorous use of their delegated authority to protect consumers from unwanted telemarketing calls.

Section 227(c)(2) clearly gives the FCC broad authority and discretion to create protections against unwanted telephone solicitations. To the extent that any

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[4] PL 108–10, March 11, 2003, 117 Stat 557 ("FEDERAL COMMUNICATIONS COMMISSION DO-NOT-CALL REGULATIONS. Not later than 180 days after the date of enactment of this Act, the Federal Communications Commission shall issue a final rule pursuant to the rulemaking proceeding that it began on September 18, 2002, under the Telephone Consumer Protection Act (47 U.S.C. 227 et seq.). In issuing such rule, the Federal Communications Commission shall consult and coordinate with the Federal Trade Commission to maximize consistency with the rule promulgated by the Federal Trade Commission (16 CFR 310.4(b))").

provision of the FCC's rule—not just the nationwide do-not-call rule—applies to telephone solicitations, it must be measured against section 227(c)(2)'s expansive delegation of authority. Since the written consent provision expressly excludes non-telemarketing, informational calls such as "debt collection calls, airline notification calls, bank account fraud alerts, school and university notifications, research or survey calls, and wireless usage notifications," 2012 Order at ¶ 28, it falls within the scope of section 227(c)(2).

When it adopted the written consent regulation, the FCC specifically noted the potential for confusion about the scope of consent if it was oral consent that was not memorialized in any way: "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." 2012 Order at ¶ 25. The agency's reasoning makes it clear that the written consent requirement was intended, in part, to prevent this confusion, which could result in unwanted telephone solicitations consumers find objectionable. A written consent requirement would help avoid callers' confusion about their own obligations, as well. 2012 Order at ¶ 26.

Requiring consent to be documented falls within the scope of the FCC's authority to create rules that are "effective" and "efficient" in stopping calls that consumers do not wish to receive. The written consent regulation requires "a clear and conspicuous disclosure informing the person signing that . . . 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." 47 C.F.R. § 64.1200(f)(9). This directly addresses the risk of receiving objectionable telephone solicitations in line with the authority Congress delegated to the FCC in § 227(c)(2).

The facts of this case demonstrate why the FCC was right to be concerned that, without a requirement that prior express consent be documented, a consumer who only intended to consent to receive automated informational calls might start receiving unwanted automated telemarketing calls. The district court noted that the consumer here, Ms. Bradley, specifically "requested clarification, asking about the purpose of the automated calls." JA21, fn.9. Instead of giving her a clear and conspicuous disclosure that she was consenting to telemarketing calls, Appellee falsely stated that the automated calls were "to keep you updated with any plan information." *Id.* Written consent, as required by the FCC's rule, would have made it clear that Appellee was requesting consent to make telemarketing calls. The FCC's rule safeguards consumers from such telephone solicitations and is within the scope of the authority Congress delegated to protect telephone subscribers' privacy rights.

The 2012 Order adopting the rule shows that the agency took pains to ensure that the written consent requirement was not only an efficient and effective way to protect consumer privacy but also did so in "an … economic manner" as required by section 227(c)(2). For instance, the agency purposefully applied the written consent requirement only to telemarketing robocalls in order to protect the privacy rights addressed by section 227(c)(2) without burdening forms of non-commercial communication. Also, the rule allows written consent to be given through any means which satisfies the E-Sign Act, reasoning that: "Allowing documentation of consent under the [E-Sign] Act will minimize the costs and burdens of acquiring prior express written consent for autodialed or prerecorded telemarketing calls while protecting the privacy interests of consumers." 2012 Order at ¶ 34. This explicit balancing of privacy protections against the costs and burdens of compliance further demonstrates that the written consent requirement is within the regulatory authority Congress delegated to the FCC through both section 227(b)(2) and (c)(2).

Thus, although the authority delegated by section 227(b)(2) is sufficient in itself to enable the FCC to adopt the written consent rule, the authority of that section in combination with section 227(c)(2) provides a clear mandate from Congress.

B. The Written Consent Requirement Falls within the FCC's Ancillary Authority

The FCC also expressly relied on 47 U.S.C. §§ 154 and 303(r) for authority to promulgate the written consent requirement. 2012 Order at ¶ 76. These statutes delegate what has become known as the FCC's ancillary authority.

Section 154(i) provides:

> The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

Section 303(r) provides:

> Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—…
>
> (r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter… .

Both of these provisions apply to the FCC's functions under the TCPA. Section 154(i) applies to all of the FCC's "functions," without limitation. As for section 303(r), its reference to the provisions of "this chapter" is a reference to Chapter 5 of Title 47, in which the TCPA sits.

These two provisions thus provide authority ancillary to the FCC's authority to implement the TCPA's consent provisions for robocalls and to protect subscribers' privacy rights from telephone solicitations to which they object. 47 U.S.C. §§ 227(b)(2) and (c)(2). They also supplement the FCC's authority to enforce the provisions of the TCPA through forfeiture orders. *See* 47 U.S.C. §§ 227(b)(4), 503(b).

The standard for evaluating a regulation under the FCC's ancillary authority is "whether the Commission has reasonably determined that [the rule in question] will further the achievement of long-established regulatory goals") (internal quotation omitted). *United States v. Midwest Video Corp.*, 406 U.S. 649, 667–68 (1972) (upholding regulations under the FCC's ancillary authority, identified in note 12 as 47 U.S.C. § 303(r)); *see also United Video, Inc. v. F.C.C.*, 890 F.2d 1173, 1183 (D.C. Cir. 1989) (stating "the Commission's power under section 303(r) is broad" and upholding "rules that the Commission has found necessary to carry out its mandate under the Communications Act" where they "were reasonably adopted in furtherance of a valid communications policy goal."); *Nader v. F.C.C.*, 520 F.2d 182, 203 (D.C. Cir. 1975) ("The discretion that must be afforded the Commission in the exercise of its ratemaking power is enhanced by section 4(i) of the Communications Act").

As discussed in Section II(A), *supra*, the written consent regulation is necessary for the FCC to pursue valid statutory objectives. This necessity places the written consent regulation within the scope of the FCC's ancillary authority.

C. The DNCIA is a Separate Grant of Regulatory Authority Authorizing the Written Consent Requirement.

The last statute the FCC cited as authority for the written consent regulation is the DNCIA, enacted in 2003. That Act gave the FCC additional authority to conform its TCPA regulations to the FTC's Telemarketing Sales Rule (TSR). The relevant language of this statute reads:

> Not later than 180 days after the date of enactment of this Act, the Federal Communications Commission shall issue a final rule pursuant to the rulemaking proceeding that it began on September 18, 2002,

> under the Telephone Consumer Protection Act (47 U.S.C. 227 et seq.). In issuing such rule, the Federal Communications Commission shall consult and coordinate with the Federal Trade Commission to maximize consistency with the rule promulgated by the Federal Trade Commission (16 CFR 310.4(b)).

This language has been codified at 15 U.S.C. § 6153.

The legislative history makes it clear that Congress was concerned about conflicts between the FTC's do-not-call rule and any of the provisions of the FCC's TCPA rules, not just its DNC rule. The House Report noted:

> [T]he FTC's rule provid[es] for a safe harbor from the call "abandonment" requirements if a telemarketer, among other things, leaves a recorded message. Under the TCPA, however, Congress by statute prohibited telemarketers from leaving recorded messages. In order to remedy these types of inconsistencies, either the FTC or FCC must address them administratively, or Congress must address them legislatively. We encourage the FTC and the FCC to take the necessary steps to make their rules as consistent and compatible as possible.

H.R. Rep No. 108-8, at 4 (2003). The TCPA provisions this passage refers to are sections 227(b)(1)(A) and (B), which prohibit prerecorded voice calls without prior express consent—the very provisions at issue here. This passage shows the importance to Congress that the FCC coordinate its rules about prior express consent for prerecorded message calls—not just its do-not-call rule—with the FTC. It also shows that, while the statutory language focuses on the FCC's then-pending rulemaking, Congress's concern was not time-limited, but extended to "these types of inconsistencies" whenever they might arise.

In 2008, the FTC introduced amendments to the TSR which prohibit outbound telephone calls that deliver prerecorded telemarketing messages unless, among other things, the seller has previously obtained the recipient's signed, written agreement to receive such calls. *Telemarketing Sales Rule*, Final Rule Amendments, 73 Fed. Reg. 51164 (2008); 16 C.F.R. § 310.4(b)(1)(v). The FCC's written consent regulation is a direct transplant of the FTC's amendments to the TSR pursuant to Congress's command that the two agencies maximize consistency between their regulations. The FCC was explicit in its intent, stating:

> Consistent with the FTC's TSR, we conclude that a consumer's written consent to receive telemarketing robocalls must be signed and be sufficient to show that the consumer: (1) received "clear and conspicuous disclosure" of the consequences of providing the requested consent, *i.e.*, that the consumer will receive future calls that deliver prerecorded messages by or on behalf of a specific seller; and (2) having received this information, agrees unambiguously to receive such calls at a telephone number the consumer designates. In addition, the written agreement must be obtained "without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service."

2012 Order at ¶ 33 (quoting the FTC's do-not-call rule, 16 C.F.R. § 310.4(b)(v)). The written consent requirement thus comports with the FCC's authority and Congressional intent for consistency across the FCC and FTC regulations.

III. <u>The Written Consent Requirement is Consistent with the TCPA's Text.</u>

The District Court based its ruling on the premise that "prior express consent," as used in the TCPA, meant consent that was either oral or written. It based this conclusion on a reference to a single dictionary, the 1990 edition of Black’s Law Dictionary, which defined the term as consent that is “directly given, either *viva voce* or in writing. It is positive, direct, unequivocal consent, requiring no inference or implication to supply its meaning.” *Express consent*, Black's Law Dictionary (6th ed. 1990)). Over the years, the definition has been shortened to simply: “Consent that is clearly and unmistakably stated.” CONSENT, Black's Law Dictionary (12th ed. 2024). *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir. 2009) (citing Black's Law Dictionary 323 (8th ed. 2004)).

Even if this choice of a definition was correct, the District Court erred in concluding that the FCC’s written consent requirement was inconsistent with it. The District Court simply assumed that the FCC’s 2012 amendment to its rules, requiring that prior express consent for certain types of telemarketing calls be “written,” precluded consent that was given *viva voce* from qualifying. In doing so, it ignored both the FCC’s interpretation of the regulation, and half of the agency’s definition of prior express written consent.

The FCC made it clear when it announced the regulation that consent may be given *viva voce*, as well as through several other methods, as long as it is recorded. While the definition of “prior express consent” at 47 C.F.R. § 64.1200(f)(9)(i) uses the word “written,” the second half of the definition, section 64.1200(f)(9)(ii), adds:

> The term 'signature' shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

47 C.F.R. § 64.1200(f)(9)(ii). Neither the District Court nor the Fifth Circuit decision it followed even cites this part of the definition.

When it promulgated this regulation, the FCC stated: "consent obtained in compliance with the E-SIGN Act will satisfy the requirements of our revised rule, including permission obtained via an email, website form, text message, telephone keypress, or **voice recording**." 2012 Order at ¶ 34 (emphasis added). The district court overlooked this critical fact, which shows that the FCC's written consent regulation is not inconsistent with the plain language of the TCPA even if the statute is interpreted to preclude the FCC from mandating that express consent be written.

The federal E-SIGN Act provides that contracts and signatures cannot be denied legal effect solely because they are in electronic form. 15 U.S.C. § 7001(a). While E-SIGN section 7001(c)(6) provides that a recording of an oral communication cannot qualify as an electronic record for purposes of disclosures that would otherwise be required to be written, the statute does not prevent a recording of an oral communication from serving as a signature or agreement. The statute defines all the relevant terms—"record," "electronic record," and "electronic signature"—broadly in ways that would not exclude a recording of an oral communication. 15 U.S.C. § 7006(4), (5), (9).

Section 64.1200(f)(9)(ii) incorporates state law as well as federal law, and state law provides an independent basis to allow a recording of oral consent to serve as a writing. Section 7 of the Uniform Electronic Transactions Act (UETA)[5] provides:

> (c) If a law requires a record to be in writing, an electronic record satisfies the law.
> (d) If a law requires a signature, an electronic signature satisfies the law.

Subsection 2 of UETA defines a "record" broadly as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." UETA § 2 (13). An official comment to this definition makes it clear that a recording of an oral communication qualifies:

> This is a standard definition designed to embrace **all means of communicating or storing information** except human memory. It includes any method for storing or communicating information, including "writings." A record need not be indestructible or permanent, but the term does not include oral or other communications which are not stored or preserved by some means. Information that has not been retained other than through human memory does not qualify as a record.

UETA § 2, comment ("Record") (emphasis added). UETA defines "electronic signature" as "an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." The reference to "sound" and "record" make it clear that oral assent, if

[5] Available at: https://www.uniformlaws.org/committees/community-home?communitykey=2c04b76c-2b7d-4399-977e-d5876ba7e034.

recorded, qualifies. UETA or a similar electronic transactions statute has been enacted in every state. National Consumer Law Center, *Consumer Banking and Payments Law* Appx. I (7th ed. 2024).

Thus, the regulatory history and the reference in the regulation to federal and state law regarding electronic signatures make it clear that the FCC's rule does not preclude oral consent, as long as it is recorded. Indeed, the FCC was aware of the possibility that Congress might have intended to allow consent to be oral, *see* FCC, Proposed Rule, 75 Fed. Reg. 13471 ¶5 (Mar. 22, 2020) ("Certain statements in the legislative history, however, suggest that Congress may have contemplated that consent may be obtained orally or in writing"), and carefully crafted the rule to preserve that option, requiring only that oral consent be recorded. The choice to accept recorded oral consent as a writing is the FCC's interpretation of its own rule, and therefore it is controlling unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 462, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997). *See also Kisor v. Wilkie*, 588 U.S. 558, 139 S. Ct. 2400, 204 L. Ed. 2d 841 (2019) (rejecting a plea to overrule *Auer*).

The basis of the lower court's decision was a misperception of the FCC's rule as barring oral consent. As the FCC's written consent regulation does not preclude oral consent, the district court was mistaken in its determination that the written consent regulation is inconsistent with the language of the TCPA and the intent of Congress.

CONCLUSION

The Court should hold that the FCC's written consent requirement, found in 47 C.F.R. § 64.1200(a)(2) and (a)(3), is valid and enforceable.

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Respectfully submitted,

/s/ Jennifer Wagner
National Consumer Law Center
7 Winthrop Square
Boston, MA 02110
Tel. 617-542-8010
jwagner@nclc.org

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,410 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word. The text is in 14-point Times New Roman type.

Dated: August 31, 2026

/s/ Jennifer Wagner
Jennifer Wagner

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: August 31, 2026

/s/ Jennifer Wagner
Jennifer Wagner

Counsel for Amici Curiae