# 16-2104-cv

**In the United States Court of Appeals**
**for the Second Circuit**

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ALBERTO REYES, JR.,
*Plaintiff-Appellant,*

v.

LINCOLN AUTOMOTIVE FINANCIAL SERVICES,
*Defendant-Appellee.*

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On Appeal from the United States District Court for the
Eastern District of New York
Case No. 2:15-cv-560
Hon. Leonard D. Wexler

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## APPELLANT'S PETITION FOR REHEARING AND REHEARING *EN BANC*

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## STATEMENT RESPECTING REHEARING AND REHEARING *EN BANC*

Rehearing or rehearing *en banc* is warranted because this case presents a question of exceptional importance because the panel decision:

(1) conflicts with the holdings of the Third, *Gager v. Dell Financial Services, LLC*, 727 F.3d 265 (3d Cir. 2013); Ninth, *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037 (9th Circ. 2017); and Eleventh Circuits, *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014); that consumers have the right to revoke consent to be robocalled under the Telephone Consumer Protection Act;

(2) conflicts with the Federal Communications Commission's authoritative conclusion that consumers have the right to revoke consent to be robocalled under the Telephone Consumer Protection Act. *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 F.C.C. Rcd. 7961, 7964, 7969 (July 10, 2015); and

(3) opens the door to widespread fine-print waivers of substantive consumer protection law.

## INTRODUCTION

The Telephone Consumer Protection Act (TCPA) is intended to curb the staggering numbers of unwanted robocalls Americans receive by prohibiting autodialed or pre-recorded calls to consumers' cell phones unless consumers give "prior express consent." Three federal courts of appeals—every other court of appeals to have considered the question—and the Federal Communications Commission (FCC) have concluded that, inherent in the concept of TCPA consumer consent is the ability to *revoke* that consent. Neither the other courts, nor the FCC have so much as hinted at any exceptions or qualifications to that right, which is grounded in the text and purpose of the TCPA and is consistent with the common law. To the contrary, the FCC has stressed that the very notion of TCPA consumer consent dissolves if that consent is irrevocable.

The panel decision in this case is in conflict with those well-considered rulings. The panel held that a consumer's consent to be robocalled on his cell phone is *not* revocable where the consent occurs in the context of a contract. If left to stand, that holding creates chaos and uncertainty, especially for nationwide companies that use automated

systems to contact their customers' cell phones—in addition to the usual compelling reasons to avoid a circuit split, following the panel's ruling may put a company in the crosshairs of an FCC enforcement action.

Rehearing should also be granted because it opens the door to the evisceration of statutory consumer rights. Federal consumer protection statutes cannot be contracted around. Otherwise, in the modern world of lengthy, one-sided, boilerplate contracts, companies will seek to avoid compliance with federal law by dropping waivers into the fine print. Perhaps a company would prefer not to comply with the Federal Debt Collection Practices Act, the Truth in Lending Act, or the usury limits imposed by the Military Lending Act. If all it took for a company to avoid liability for violating those laws was to include a waiver in the fine print, those consumer protections would have little value. Here, by saying that consent to be robodialed cannot be revoked if it is in a contract, the Court creates an incentive for each company using robodialers to insert exactly that language into their contracts.

# BACKGROUND

## A. Statutory and Regulatory Background

### *1. The TCPA*

The TCPA is a remedial consumer protection statute designed to protect Americans from "the scourge of modern civilization": robocalls. 137 Cong. Reg. 30,821 (1991); *see* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(10) 105 Stat. 2394, 2394 (1991) (consumers "consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy"). Recognizing that most consumers have no practical way to avoid these unwanted robocalls, which can be made en masse with little marginal expense, Congress saw banning robocalls as the only effective way to solve the problem. *Id.* § 2(12). Because unwanted robodialed calls to cell phones are especially problematic—cell phones are with us everywhere, and consumers may be charged for each call or text—the restrictions on calls to cell phones are greater than to landlines.

Specifically, the TCPA makes it unlawful "to make any call (other than a call made for emergency purposes or made with the prior express

consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a . . . cellular telephone service." 47 U.S.C. § 227(b)(1)(A)(iii). Despite the longstanding prohibitions of the TCPA, unwanted robodialing is the number one consumer complaint in America today. In 2016, there were almost *four million* robocall complaints reported to the FCC and the Federal Trade Commission—up from two million in 2014.[1]

It's no wonder the complaints are skyrocketing. Four years ago, "bad actors [could] blast literally tens of millions of illegal robocalls over the course of a single day at less than 1 cent per minute." *Stopping*

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[1] *National Do Not Call Registry Data Book FY 2016, October 1, 2015–September 30, 2016*, Federal Trade Commission (Dec. 2016), https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2016/dnc_data_book_fy_2016_post.pdf; *Consumer Complaints Data–Unwanted Calls, FCC–Open Data*, Federal Communications Commission, https://opendata.fcc.gov/Consumer-and-Government-Affairs/Consumer-Complaints-Data-Unwanted-Calls/vakf-fz8e; *Fact Sheet: Wheeler Proposal to Protect and Empower Consumers Against Unwanted Robocalls, Texts to Wireless Phones*, Federal Communications Commission, https://apps.fcc.gov/edocs_public/attachmatch/DOC-333676A1.pdf; *National Do Not Call Registry Data Book FY 2014*, Federal Trade Commission (Nov. 2014), https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2014/dncdatabookfy2014.pdf.

*Fraudulent Robocall Scams: Can More Be Done?, Before Subcomm. on Consumer Prot., Prod. Safety & Ins. of the S. Comm. on Commerce, Sci. & Transp.*, 113th Cong. 5 (2013). Continued advances in technology and the ubiquity of cell phones mean that robocalling and robotexting "has never been easier or less expensive," making the TCPA's prohibition on unwanted calls ever more important. *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 F.C.C. Rcd. 7961, 7970 (July 10, 2015) (2015 FCC Order).

*2. The FCC's Rule on Revocation of Consent to Be Robocalled*

Congress gave the FCC authority to implement and enforce the TCPA. 47 U.S.C. § 227(b)(2). Pursuant to that authority, the FCC has ruled that "prior express consent" in the TCPA means that, not only must consumers give prior express consent to be robocalled on their cell phones, but consumers have an unqualified right to revoke their consent through any reasonable means. 2015 FCC Order 7993-94.

Specifically, in 2012, the FCC confirmed that consumers can fully revoke their consent and explained that consumer consent "is not unlimited." *In the Matter of Rules & Regulations Implementing the*

*Telephone Consumer Protection Act of 1991, SoundBite Commc'ns, Inc.*, 27 FCC Rcd. 15391, 15397 (Nov. 29, 2012) (*SoundBite*).

In 2015, the FCC reiterated that the consumer right to revoke consent is critical to the TCPA. 2015 FCC Order 7993. The FCC explained that an alternative "interpretation that would *lock consumers into* receiving unlimited, unwanted texts and voice calls is counter to the consumer-protection purposes of the TCPA and to common-law notions of consent." *Id.* at 7994 (emphasis added). *See also In Re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 31 FCC Rcd. 9074, 9090 (Aug. 11, 2016) ("The Commission has determined that an ability to stop unwanted calls is critical to the TCPA's goal of consumer protection."). The FCC stressed that it did not "rely on common law to interpret the TCPA" and was not attempting "to substitute common law for statutory law," but nevertheless noted that its "conclusion is consistent with the common law right of revocation" 2015 FCC Order 7995. Nowhere in any of its orders did the FCC make any exception for when a consumer's prior express consent occurs in the context of a contract.

The FCC did expressly reject the argument that a caller could designate the means of revocation stating flatly that "callers may not control consumers' ability to revoke consent." *Id.* at 7996. In short, the FCC has made clear that consumers' right to revoke consent by any reasonable means is a non-negotiable statutory guarantee.

### B. The Decisions of the Third, Ninth, and Eleventh Circuits.

The three other Circuits to have considered the question have confirmed that the TCPA gives consumers an unqualified right to revoke consent to be robocalled on their cell phones.

*Gager v. Dell Financial Services, LLC*, 727 F.3d 265 (3d Cir. 2013), involved prior express consent given as part of an application for open-ended credit. In holding that the consumer could revoke her consent to be called, *Gager* relied, in part, on the FCC's *SoundBite* order's conclusion that consumers have a right to revoke consent to be robocalled. *Id.* at 269, 271-72. Further, the Third Circuit expressly rejected Dell's argument that Gager could not revoke her consent as a matter of contract law because the consent to be called was part of the consideration for granting Gager's credit application—the only credit-

related document that Gager signed. *Id.* at 273-74. The court explained that the contractual relationship between the parties did not waive Gager's rights under the TCPA. *Id.* at 274. In its 2015 Order, the FCC expressly agreed with *Gager*. 2015 FCC Order 7993.

The Eleventh Circuit, in *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014), which also involved consent given in the context of an open-ended credit application, followed *Gager* as to whether consent could be revoked, and the only real question was whether oral revocation was valid. *Id.* at 1252 (following *Gager*), 1255 (discussing oral revocation). In discussing oral revocation, *Osorio* referenced the possibility that a contract might designate the *method* of revocation—a possibility that has since been foreclosed by the FCC's 2015 Order—but made no indication that an agreement could foreclose revocation *altogether*. *Id.* at 1255.

The Ninth Circuit addressed revocation of consent in *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1048 (9th Cir. 2017), and found the FCC's 2015 Order's conclusion reasonable for purposes of deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense*

*Council, Inc.*, 467 U.S. 837, 843-44 (1984). The consumer gave his cell phone number to a gym, and his cell phone number was included as part of his gym membership agreement. *Van Patten*, 847 F.3d at 1040. A substantial question was whether the cancelation of Van Patten's gym membership constituted a revocation of his consent (it didn't). *Id.* at 1047.

Additionally, numerous district courts across the country have expressly held that the TCPA permits consumers to revoke their consent to be robodialed on their cell phones even where consent was given in the context of contracts. *Target Nat'l Bank v. Welch*, 2016 WL 1157043, at *5 (M.D. Fla. Mar. 24, 2016) (consumer "entitled to orally revoke her grant of prior express consent, its embodiment in the written credit card agreement notwithstanding"); *Cartrette v. Time Warner Cable, Inc.*, 157 F. Supp. 3d 448, 453 (E.D. N.C. 2016) ("[S]uch a contract does not prevent a consumer from revoking her prior express consent pursuant to the TCPA."); *Galbreath v. Time Warner Cable, Inc.*, 2015 WL 9450593, at *4 (E.D. N.C. Dec. 22, 2015) ("Although companies like TWC remain free to include express-consent provisions in contracts

with customers, the FCC's 2015 Order requires companies to accept revocation of consent by any reasonable method[.]") (internal quotations omitted); *Skinner v. Bluestem Brands, Inc.*, 2015 WL 4135269, at *3 (S.D. Miss. July 8, 2015) ("Fingerhut has not pointed to any legal authority giving parties permission to contract around the TCPA."); *Berg v. Verizon Wireless*, 2013 WL 8446598, at *1 (W.D. Wis. June 21, 2013) ("Nothing in this broad language [of the TCPA] suggests that consumers who consent initially in the context of a contractual relationship should be treated differently under the statute.").

### C. This Litigation

Alberto Reyes, Jr., brought this TCPA suit against Lincoln Automotive Financial Services. Slip Op. 3. As part of a car leasing agreement, Reyes agreed to be robodialed on his cell phone. *Id.* at 4-5. When Lincoln began to robocall him incessantly to collect his lease payments, Reyes alleges that he revoked his consent in writing. *Id.* at 5. Following the alleged revocation, Lincoln admits that it called Reyes on his cell phone a staggering 500 additional times, with 389 of those being robocalls. *Id.*

The district court granted Lincoln's motion for summary judgment because (1) Reyes's evidence of revocation was insufficient, and (2) the TCPA does not allow revocation where consent was part of a contract. *Id.* at 6. This Court reversed as to the evidentiary question and affirmed as to the TCPA issue. *Id.* at 7, 12.

The panel recognized that *Gager*, *Osorio*, and the 2015 FCC Order had all concluded that consumers may revoke their consent to be robodialed on their cell phones, but claimed that each dealt only with consent given "freely and unilaterally," and not where it was "bargained-for consideration in a bilateral contract." *Id.* at 11. Those conclusions and the text of the TCPA, the panel said, "evidence[ ] no intent to deviate from common-law rules defining 'consent,'" which typically allow for revocation. *Id.* at 12. Where the consent is given in the context of a contract, the panel reasoned, it becomes a bargained-for term of the contract that cannot be unilaterally revoked. *Id.* at 14.

## REASONS FOR GRANTING REHEARING OR REHEARING *EN BANC*

### I. The Panel's Decision Conflicts with the FCC's Authoritative Interpretation that the TCPA Does Not Permit Consumer Consent to Be Irrevocable.

The text of the TCPA does not discuss agreement or contracts; it discusses "consent"; the *only* non-emergency exception to the TCPA's general prohibition on robodialing cell phones is if the consumer "consents." 47 U.S.C. § 227(b)(1)(A)(iii). As the panel correctly pointed out, the common-law definition of "consent" is as freely given, gratuitous, and something that may be revoked at any time. *See* Black's Law Dictionary (10th ed. 2014) ("consent" is "voluntary yielding to what another proposes or desires"); Restatement (Second) of Torts §892A, cmt. i (1979) ("consent is terminated when the actor knows or has reason to know that the other is no longer willing for him to continue the particular conduct"). At common law, consent only may become "irrevocable" in very limited circumstances, including where a contract's "own terms" make consent irrevocable or a "separate contract" makes the consent binding. *Id.* The contract at issue here contains no term

expressly making consent irrevocable, and, regardless, for the reasons explained below, such a term would not be enforceable under the TCPA.

There is no exception to the TCPA's prohibition on robocalls for binding contracts wherein a consumer agrees to be called; only where the consumer "consents." So while a consumer may very well consent to receive robocalls on his or her cell phone in the context of a contract, for the statutory exception to the prohibition on robocalls to apply at all, it must still be freely revocable consent. Where the panel got it wrong was assuming that the TCPA permits parties to contract around the consent requirement in the statute. If the so-called consent is actually a binding contractual term, it does not comport with what the statute intended by "consent." *See* 2015 FCC Order 7994 ("lock[ing] consumers into receiving unlimited, unwanted texts and voice calls is counter to the consumer-protection purposes of the TCPA").

The fact that the TCPA does not expressly address this question is not dispositive. A determination of legislative intent to prohibit certain contractual terms "may be manifested by . . . other terms of a statute interpreted in light of the purpose of its enactment." Restatement (First) of Contracts § 580(2)(e) (1932). Thus, even if the contract's own

terms or a separate contract expressly provided that the consent to receive robocalls was irrevocable and binding, such a contract would be contrary to the plain language and policy of the TCPA and thus illegal and unenforceable. *See* Restatement (First) of Contracts § 580(1) (1932) ("Any bargain is illegal if either the formation or the performance thereof is prohibited by constitution or statute"); *Kaiser-Frazer Corp. v. Otis & Co.*, 195 F.2d 838, 843-44 (2nd Cir. 1952) (finding a contract unenforceable where it "violate[d] the laws of the United States and contravene[d] the public policy as expressed in those laws").

In refusing to allow Reyes to revoke his consent, the panel's decision conflicts not only with the "consent" language of the statute, but also with the FCC's authoritative interpretation of the TCPA. The FCC's 2015 Order states that consumer consent to receive robocalls is revocable—and it provided for no exceptions. Further, the FCC has explained repeatedly that locking consumers in to consent—without allowing for revocation—is contrary to the TCPA and to the common-law definition of "consent." 2015 FCC Order 7994; *see also Soundbite*, at 7. In its opinion, the panel summarily dismissed the FCC 2015 Order as not addressing the issue at hand—consent given in the context of a

contract—but completely ignored the FCC's repeated admonition that permanent, irrevocable consumer consent is not permitted by the TCPA.

The FCC's 2015 Order interpreting the TCPA to require revocation of consent is a final order binding on this Court pursuant to the Hobbs Act. *Sterling v. Mercantile Adjustment Bureau, L.L.C.*, 667 Fed. App'x 344 (2d Cir. 2016) (because of Hobbs Act, FCC ruling that caller must have consent of actual called party is incontestable); *see also Baisden v. Credit Adjustments, Inc.*, 813 F.3d 338, 342 (6th Cir. 2016); *Murphy v. DCI Biologicals Orlando, L.L.C.*, 797 F.3d 1302, 1307 (11th Cir. 2015); *Nack v. Walburg*, 715 F.3d 680, 685-86 (8th Cir. 2013).

If the decision is left standing, callers, particularly nationwide callers, are stuck in the untenable position of relying on this Court's holding but risking an FCC enforcement action for doing so. As such, rehearing is warranted to address this conflict.

## II. The Panel Decision Conflicts with the Decisions of the Third, Ninth, and Eleventh Circuits.

Rehearing is also warranted because the panel decision is in conflict with the Third, Ninth, and Eleventh Circuits' holdings that the TCPA gives consumers a right to revoke consent to be robodialed on their cell phones. As discussed above, and just like the FCC Order, none of those decisions hints at an exception for consent given in the context of a contract.

In particular, *Gager* expressly rejected arguments identical to the ones the panel accepted here—that consent to be called can be contractual bargained-for consideration. 727 F.3d at 273-74. The defendant argued that the consumer's open-ended credit application had only been approved because the consumer had consented to robocalls and, as a matter of contract law, she could not later revoke her consent. *Id.* at 273. Not so, the Third Circuit held: "Dell's argument that its contractual relationship with Gager somehow waives her rights under the TCPA is incorrect. The fact that Gager entered into a contractual relationship with Dell did not exempt Dell from the TCPA's

requirements. As discussed above, she retained the right to revoke her prior express consent." *Id.* at 274.[2]

This panel held the opposite, that Reyes's contractual relationship with Lincoln *does* waive his right to revoke consent under the TCPA, and that parties *can* contract around the TCPA's revocation requirement. Slip Op. 12-14. As such, the panel's decision is in conflict with the Third Circuit.

*Van Patten* involved consent given as part of both an application for gym membership and a membership agreement. 847 F.3d at 1040. Finding it enough that the TCPA empowers consumers to revoke their consent to be called, the Ninth Circuit did not find it necessary to delve into whether the consent was part of a contract. *See id.* at 1046-48. That too is in tension with this panel's focus on the contractual context of Reyes's consent.

This Court's departure from the rules of other Circuits would give rise to confusion and prove problematic to nationwide callers

[2] *Osorio* did not address a contract-based argument but, like *Gager*, it involved consent given in the context of an open-ended credit application; the application would have been the only document the consumer signed. *See Osorio*, 745 F.3d at 1247.

attempting to systematically comply with the TCPA. As such, rehearing is warranted to resolve this conflict between the Circuits.

## III. The Panel Decision Opens the Door for Fine-Print Waivers of Substantive Consumer Rights.

Finally, this Court should grant rehearing because the panel's decision permits parties to contract around substantive consumer rights—permission that would, as a practical matter, eviscerate the protections enacted by Congress. In modern life, consumer contracts for everyday products consist of fine-print boilerplate that consumers do not read, do not have the time to read, often do not understand if read, and are offered on a take-it-or-leave-it basis. If drafters can avoid having to comply with federal law by including waivers in the boilerplate, they certainly will do so. Here, if callers can avoid the TCPA's right of revocation by including it in the contract—as Lincoln did here—they will do so, and the TCPA will largely become a nullity. *See* Restatement (First) of Contracts § 580(1) (1932) ("Any bargain is illegal if either the formation or the performance thereof is prohibited by constitution or statute"); *Kaiser-Frazer*, 195 F.2d at 843-44 (contract

that "violate[d] the laws of the United States and contravene[d] the public policy as expressed in those laws" unenforceable).

These problems are not unique to the TCPA. For example, the Fair Debt Collection Practices Act (FDPCA), much like the TCPA, gives consumers the right to tell debt collectors to stop contacting them. 15 U.S.C. § 1692c. No one has suggested that collectors and creditors could avoid having to comply with consumers' stop-contact requests by having consumers agree to permanently allow contact in their credit agreements. If a consumer could contract away her rights under the FDCPA, it would have little force.

Consumer protection is not limited to contact restrictions. The Military Lending Act, for example, prohibits lenders from imposing interest rates greater than 36% on active duty military families. 32 C.F.R. § 232.4(b). Under the panel's rule here, servicemembers could enter into an enforceable contract with a higher interest rate—obliterating one of the primary protections of the statute. The list of vulnerable consumer protections goes on.

The panel acknowledged the possibility that enforcing contractual terms eliminating consumer rights undercuts the TCPA, but shrugged

its shoulders, dismissing the problem as a "hypothetical" "policy" concern for Congress to solve rather than a complex legal question about the intersection of federal consumer protection rights and modern contract law. Slip Op. 17. (And, if the panel is correct that consumers can contract away their statutory rights, Congressional action could not solve the problem.) In contrast, when presented with a not-so-hypothetical contract that purported to waive all federal statutory consumer rights, the Fourth Circuit called it "simply unenforceable." *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 673 (4th Cir. 2016) (Wilkerson, J.); *see also Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) ("prospective waiver of a party's right to pursue statutory remedies" violates public policy). There is no principled distinction between a contract purporting to waive some federal consumer rights and a contract purporting to waive all of them. This Court should grant rehearing to grapple with the question whether substantive consumer rights can be waived via contract.

## CONCLUSION

For these reasons, the petition for rehearing or rehearing *en banc* should be granted.

Respectfully submitted,

July 20, 2017

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because this brief contains 3,876 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by Microsoft Word 2013. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a) because this brief has been prepared in proportionally spaced typeface using 14-point Century Schoolbook font.

/s/ Leah M. Nicholls
Leah M. Nicholls
*Counsel for Appellant*

July 20, 2017

## CERTIFICATE OF SERVICE

I certify that on July 20, 2017, I electronically filed the foregoing Appellant's Petition for Rehearing and Rehearing *En Banc* via the CM/ECF system and served all parties or counsel via CM/ECF system.

/s/ Leah M. Nicholls
Leah M. Nicholls

# APPENDIX

# In the
# United States Court of Appeals
## For the Second Circuit

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AUGUST TERM, 2016

ARGUED: APRIL 4, 2017
DECIDED: JUNE 22, 2017

No. 16-2104-cv

ALBERTO REYES, JR.,
*Plaintiff-Appellant,*

*v.*

LINCOLN AUTOMOTIVE FINANCIAL SERVICES,
*Defendant-Appellee.**

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Appeal from the United States District Court
for the Eastern District of New York.
No. 15 Civ. 560 – Leonard D. Wexler, *Judge*.

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Before: WALKER, JACOBS, and PARKER, *Circuit Judges*.

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* The Clerk of Court is directed to amend the caption as shown above.

Plaintiff-appellant Alberto Reyes, Jr., appeals a judgment of the United States District Court for the Eastern District of New York (Leonard D. Wexler, *J.*). Judgment was entered following the grant of summary judgment to the defendant-appellee, Lincoln Automotive Financial Services ("Lincoln"), on Reyes's claim for damages stemming from Lincoln's alleged violation of the Telephone Consumer Protection Act ("TCPA"), Pub. L. No. 102-243, 105 Stat. 2394 (1991) *codified at* 47 U.S.C. § 227. Reyes leased an automobile from Lincoln and, as a condition of the lease agreement, consented to receive manual or automated telephone calls from Lincoln. Lincoln called Reyes regularly after he defaulted on his lease obligations, and continued to do so after Reyes allegedly revoked his consent to be called. Reyes sued for damages under the TCPA. The district court granted summary judgment for Lincoln, on the basis that (1) the evidence of consent revocation was insufficient, and (2) in any event the TCPA does not permit revocation when consent is provided as consideration in a binding contract. We hold that (1) Reyes did introduce sufficient evidence from which a jury could conclude that he revoked his consent, but that (2) the TCPA does not permit a consumer to revoke its consent to be called when that consent forms part of a bargained-for exchange. We therefore AFFIRM the judgment of the district court.

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YITZCHAK ZELMAN, Marcus & Zelman, LLC, Ocean, NJ, *for Plaintiffs-Appellees*.

JESSICA L. ELLSWORTH (Morgan L. Goodspeed, *on the brief*), Hogan Lovells US LLP, Washington, DC, *for Defendants-Appellants*.

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JOHN M. WALKER, JR., *Circuit Judge*:

Plaintiff-appellant Alberto Reyes, Jr., appeals a judgment of the United States District Court for the Eastern District of New York (Leonard D. Wexler, *J.*). Judgment was entered following the grant of summary judgment to the defendant-appellee, Lincoln Automotive Financial Services ("Lincoln"), on Reyes's claim for damages stemming from Lincoln's alleged violation of the Telephone Consumer Protection Act ("TCPA"), Pub. L. No. 102-243, 105 Stat. 2394 (1991) *codified at* 47 U.S.C. § 227. Reyes leased an automobile from Lincoln and, as a condition of the lease agreement, consented to receive manual or automated telephone calls from Lincoln. Lincoln called Reyes regularly after he defaulted on his lease obligations, and continued to do so after Reyes allegedly revoked his consent to be called. Reyes sued for damages under the TCPA. The district court granted summary judgment for Lincoln, on the basis that (1) the evidence of consent revocation was insufficient, and (2) in any event the TCPA does not permit revocation when

consent is provided as consideration in a binding contract. We hold that (1) Reyes did introduce sufficient evidence from which a jury could conclude that he revoked his consent, but that (2) the TCPA does not permit a consumer to revoke its consent to be called when that consent forms part of a bargained-for exchange. We therefore AFFIRM the judgment of the district court.

## BACKGROUND

In 2012, Reyes leased a new Lincoln MKZ luxury sedan from a Ford dealership.[1] Lincoln financed the lease. In his lease application, Reyes provided several personal details, including his cellular phone number. The lease itself contained a number of provisions to which Reyes assented when finalizing the agreement. One provision permitted Lincoln to contact Reyes, and read as follows:

> You [Reyes] also expressly consent and agree to Lessor [Ford], Finance Company, Holder and their affiliates, agents and service providers may use written, electronic or verbal means to contact you. This consent includes, but is not limited to, contact by manual calling methods, prerecorded or artificial voice messages, text messages, emails and/or automatic telephone dialing systems. You agree that Lessor, Finance Company, Holder and their affiliates, agents and service providers may use any email address or any telephone number you provide,

[1] "Lincoln Automotive Financial Services" is a registered trade name of Ford Motor Credit Company LLC, and not an independent company.

> now or in the future, including a number for a cellular phone or other wireless device, regardless of whether you incur charges as a result.

At some point after the lease was finalized, Reyes stopped making his required payments. As a result, on multiple occasions, Lincoln called Reyes in an attempt to cure his default.

Reyes disputed his balance on the lease, and also claims that he requested that Lincoln cease contacting him. Reyes asserts that on June 14, 2013, he mailed a letter to Lincoln in which he wrote: "I would also like to request in writing that no telephone contact be made by your office to my cell phone." Lincoln contends that it never received Reyes's letter, or any other request to cease its calls. At his deposition, Reyes testified to mailing the letter to the P.O. box listed on Lincoln's invoices and produced a copy of the letter that did not bear an address or postmark and referenced an incorrect account number. Despite his alleged revocation of consent, Lincoln continued to call Reyes. Following the close of discovery, Lincoln's attorney confirmed that Lincoln had called him 141 times with a customer representative on the line, and had called him with pre-recorded messages an additional 389 times.

On February 6, 2015, Reyes filed a complaint against Lincoln in the Eastern District of New York, alleging violations of the TCPA

and seeking $720,000 in damages.[2] On June 20, 2016, Judge Wexler granted summary judgment to Lincoln, holding that (1) Reyes had failed to produce sufficient evidence from which a reasonable jury could conclude that he had ever revoked his consent to be contacted by Lincoln, and (2) that, in any event, the TCPA does not permit a party to a legally binding contract to unilaterally revoke bargained-for consent to be contacted by telephone.

Reyes now timely appeals both rulings.

## DISCUSSION

A district court's grant of summary judgment is reviewed *de novo*. *Gallo v. Prudential Residential Servs., Ltd. P'ship*, 22 F.3d 1219, 1224 (2d Cir. 1994). On a motion for summary judgment, the court must "resolv[e] all ambiguities and draw[] all permissible factual inferences in favor of the party against whom summary judgment is sought." *Burg v. Gosselin*, 591 F.3d 95, 97 (2d Cir. 2010). Summary judgment is appropriate only "if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). All

[2] Reyes also initially sought damages under the Fair Debt Collection Practices Act ("FDCPA"), but abandoned those claims prior to summary judgment because Lincoln is not a "debt collection agency" within the meaning of the FDCPA. Only his TCPA claims remain.

legal conclusions by a district court are reviewed *de novo*. *United States v. Livecchi*, 711 F.3d 345, 351 (2d Cir. 2013) (per curiam).

On appeal, Reyes contends (1) that he introduced sufficient evidence to create a triable issue of fact as to whether he placed Lincoln on notice of his revocation of consent; and (2) that the TCPA, construed in light of its broad remedial purpose to protect consumers from unwanted phone calls, does permit a party to revoke consent to be called, even if that consent was given as part of a contractual agreement.

## I. Whether Reyes revoked his consent to be contacted was a triable issue of fact

As a preliminary matter, we agree with Reyes that the district court's finding that he did not revoke his consent to be contacted by telephone was improper on summary judgment. This material issue of fact was in dispute and raised a jury question. Reyes testified in a sworn deposition that he mailed a letter to Lincoln revoking his consent; submitted an affidavit to that effect; and introduced a copy of the letter as evidence in defending Lincoln's motion for summary judgment. The district court discounted this evidence as "insufficient," because Reyes "does not recall the address that he mailed the Letter to," and because "he has no record that the Letter was actually sent to Defendant." The district court also noted that

Lincoln sent a letter to Reyes on December 1, 2014, stating that it had never received any revocation of consent from Reyes.

The district court's conclusion that Reyes did not revoke his consent rested on an impermissible assessment by the court of Reyes's credibility. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . [when] he is ruling on a motion for summary judgment."). Reyes introduced two separate forms of sworn testimony asserting that he had mailed a letter revoking his consent to be called, and Lincoln responded in turn that it had never received the letter. Adverse parties commonly advance "conflicting versions of the events" throughout the course of a litigation. *Jeffreys v. City of N.Y.*, 426 F.3d 549, 553-54 (2d Cir. 2005) (quoting *Rule v. Brine, Inc.*, 85 F.3d 1002, 1011 (2d Cir. 1996). In such instances, on summary judgment, the district court is required to "resolv[e] all ambiguities and [draw] all permissible factual inferences in favor of the party against whom summary judgment [is] sought." *Burg*, 591 F.3d at 97. "[T]he judge must ask . . . not whether . . . the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Jeffreys*, 426 F.3d at 553 (quoting *Anderson*, 477 U.S. at 252). Under this standard, the district judge

erred in concluding that no reasonable jury could find that Reyes revoked his consent, when Reyes introduced sworn testimony to the contrary.[3] Whether that testimony was reliable was a question of fact for the jury. *See id*.

## II. Under the TCPA a party is not able to revoke consent that is a term in a prior contract

We next turn to the district court's determination that the TCPA does not permit Reyes to unilaterally revoke his consent. Congress enacted the TCPA to protect consumers from "[u]nrestricted telemarketing," which it determined could be "an intrusive invasion of privacy." *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 372 (2012) (internal quotation marks and citation omitted) *accord Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 268 (3d Cir. 2013). To mitigate this problem, the act prohibits, subject to narrow exceptions not pertinent here, any person within the United States from "initiat[ing] any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(B). The TCPA also authorizes the Federal

[3] Whatever impact the use of the wrong account number may be reasonably assumed to have on Reyes's attempt at revocation, the district court did not rely on that fact.

Communications Commission ("FCC") to promulgate rules and regulations in order to further implement the act's provisions. 47 U.S.C. § 227(b)(2).

While the act requires that any party wishing to make live or prerecorded calls obtain prior express consent, the statute is silent as to whether a party that has so consented can subsequently revoke that consent. Two of our sister circuit courts have ruled that a party can revoke prior consent under the terms of the act. In *Gager v. Dell Financial Services*, the Third Circuit held that the plaintiff, who consented to be called in an application for a line of credit that she submitted to the defendant, was permitted to later revoke that consent after receiving harassing calls upon her default on the loan. 727 F.3d at 267-68. The court reasoned that "consent," as defined under the common law, is traditionally considered to be revocable. *Id*. at 270. Moreover, permitting consumers to revoke consent would further Congress's purpose in enacting the TCPA, which was "to protect consumers from unwanted automated telephone calls." *Id*. at 271. The Eleventh Circuit, in *Osorio v. State Farm Bank F.S.B.*, adopted the Third Circuit's reasoning and held that the plaintiff in that case, who had consented to receive calls from the defendant in an application for auto insurance, could revoke her consent. 746 F.3d 1242, 1253 (11th Cir. 2014). In 2015, the FCC relied on these two cases in ruling that "prior express consent" is revocable under the TCPA.

*See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, 7993-94 (2015) (hereinafter "2015 FCC Ruling").

*Gager*, *Osorio*, and the 2015 FCC Ruling considered a narrow question: whether the TCPA allows a consumer who has freely and unilaterally given his or her informed consent to be contacted can later revoke that consent. *See Osorio*, 746 F.3d at 1253; *Gager*, 727 F.3d at 270. Reyes's appeal presents a different question, which has not been addressed by the FCC or, to our knowledge, by any federal circuit court of appeal: 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 contends that the same principles that the FCC and the Third and Eleventh Circuits relied on in their previous rulings apply to this situation as well. He argues that (1) under the common law definition of the term, which Congress is presumed to have adopted when it drafted the TCPA, any form of "consent" (whether contractual or not) is revocable by the consenting party at any time; and (2) permitting parties to revoke their consent to be called is consistent with the remedial purpose of the TCPA, which was designed by Congress to afford consumers broad protection from harassing phone calls.

We agree with the district court that the TCPA does not permit a party who agrees to be contacted as part of a bargained-for exchange to unilaterally revoke that consent, and we decline to read such a provision into the act. As an initial matter, Reyes is correct that when Congress uses a term, such as "consent," that has "accumulated [a] settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of th[at] term[]." *Neder v. United States*, 527 U.S. 1, 21 (1999) (citation omitted). The text of the TCPA evidences no intent to deviate from common law rules in defining "consent," and the FCC and other federal appellate courts have applied the common law definition of the term when interpreting the act. *See Gager*, 727 F.3d at 270; 2015 FCC Ruling at *7961 (holding that permitting "unwanted texts and voice calls is counter . . . to common-law notions of consent").

"Consent," however, is not always revocable under the common law. A distinction in this regard must be drawn between tort and contract law. In tort law, "consent" is generally defined as a gratuitous action, or "[a] voluntary yielding to what another proposes or desires." *Black's Law Dictionary* (10th ed. 2014); *see also Gager*, 727 F.3d at 270 ("Under the common law understanding of consent, the basic premise of consent is that it is given voluntarily." (internal quotation marks omitted)). In *Gager* and *Osorio* the

plaintiffs provided such voluntary consent to be contacted by furnishing their telephone numbers to businesses in connection with loan and insurance applications, respectively. *See Gager*, 727 F.3d at 267; *Osorio*, 746 F.3d at 1247; *see also Rules and Regulations Implementing the TCPA*, 7 F.C.C. Rcd. 8752, 8769 (1992) (ruling that the "knowing[]" release of a phone number to a third party constitutes "express consent" to receive telephone calls from that party under the TCPA). The courts in those cases found, and the 2015 FCC ruling confirmed, that consent of this kind, which is not given in exchange for any consideration, and which is not incorporated into a binding legal agreement, may be revoked by the consenting party at any time. This conclusion is well-supported by common law authority, which counsels that "[u]pon termination of consent its effectiveness is terminated." RESTATEMENT (SECOND) OF TORTS § 892A(5) (AM. LAW INST. 1979).

Reyes's consent to be contacted by telephone, however, was not provided gratuitously; it was included as an express provision of a contract to lease an automobile from Lincoln. Under such circumstances, "consent," as that term is used in the TCPA, is not revocable. The common law is clear that consent to another's actions can "become irrevocable" when it is provided in a legally binding agreement, RESTATEMENT (SECOND) OF TORTS § 892A(5) (AM. LAW INST. 1979), in which case any "attempted termination is not

effective," *id.* at cmt. i. *See also* 13-67 CORBIN ON CONTRACTS § 67.1 (2017) (noting that "a party who is under a legal duty [to perform a contractual obligation] by virtue of its assent" has the burden to prove that that duty was discharged by some subsequent event, such as recission by "mutual agreement" or by the exercise of a contractual right to terminate). This rule derives from the requirement that every provision of a contract—including any proposed modification—receive the "mutual assent" of every contracting party in order to have legal effect. *Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 783 (2d Cir. 2003) ("[F]undamental to the establishment of a contract modification is proof of each element requisite to the formulation of a contract, including mutual assent to its terms." (internal quotation marks and citation omitted)). It is black-letter law that one party may not alter a bilateral contract by revoking a term without the consent of a counterparty. *See* RESTATEMENT (SECOND) OF CONTRACTS § 287 cmt. a (AM. LAW INST. 1981) (requiring "assent by the other party" before a proposed alteration to a contract becomes valid). Yet reading the TCPA's definition of "consent" to permit unilateral revocation at any time, as Reyes suggests, would permit him to do just that. Absent express statutory language to the contrary, we cannot conclude that Congress intended to alter the common law of contracts in this way. *See Neder*, 527 U.S. at 21-23.

Reyes also argues that his consent to be contacted is revocable because that consent was not an "essential term" of his lease agreement with Lincoln. This argument is meritless. In contract law, "essential terms" are those terms that are necessary in order to lend an agreement sufficient detail to be enforceable by a court. *Brookhaven Hous. Coal. v. Solomon*, 583 F.2d 584, 593 (2d Cir. 1978) ("If essential terms of an agreement are omitted or are phrased in too indefinite a manner, no legally enforceable contract will result."). For example, a contract for the sale of goods must contain terms such as the quantity of goods to be sold and the price at which they will be purchased. But a contractual term does not need to be "essential" in order to be enforced as part of a binding agreement. It is a fundamental rule of contracts that parties may bind themselves to any terms, so long as the basic conditions of contract formation (e.g., consideration and mutual assent) are met. *Chesapeake Energy Corp. v. Bank of N.Y. Mellon Trust Co.*, 773 F.3d 110, 114 (2d Cir. 2014) (noting the common law rule that a "contract should be construed so as to give full meaning and effect to *all* of its provisions"(alterations, internal quotation marks and citation omitted) (emphasis added)). A party who has agreed to a particular term in a valid contract cannot later renege on that term or unilaterally declare it to no longer apply simply because the contract could have been formed without it. Contracting parties are bound to perform on the terms that they *did*

agree to, not what they *might* have agreed to under different circumstances.

Reyes counters that because the TCPA is a remedial statute enacted to protect consumers from unwanted telephone calls, any ambiguities in its text must be construed to further that purpose. *See Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 562 (1987) (holding that when interpreting broad remedial statutes, courts should apply a "standard of liberal construction in order to accomplish [Congress's] objects" (citation omitted)); *E.E.O.C. v. Staten Island Sav. Bank*, 207 F.3d 144, 149 (2d Cir. 2000) ("[I]t is our duty to interpret remedial statutes broadly."). A liberal reading of an ambiguous term might favor a right to revoke contractual consent. But for the remedial rule of statutory interpretation to apply, the statute must contain an actual ambiguity to construe in the consumer's favor, and we find no lack of clarity in the TCPA's use of the term "consent." It was well-established at the time that Congress drafted the TCPA that consent becomes irrevocable when it is integrated into a binding contract, and we find no indication in the statute's text that Congress intended to deviate from this common-law principle in its use of the word "consent." *See Neder*, 527 U.S. at 21.

We are sensitive to the argument that businesses may undermine the effectiveness of the TCPA by inserting "consent"

clauses of the type signed by Reyes into standard sales contracts, thereby making revocation impossible in many instances. *See, e.g.*, *Skinner v. Bluestem Brands, Inc.*, No. 3:14-CV-256-CWR-FKB, 2015 WL 4135269, at *3 (S.D. Miss. July 8, 2015). But this hypothetical concern, if valid, is grounded in public policy considerations rather than legal ones; if the abuse came to pass, it would therefore be "for the Congress to resolve—not the courts." *Atl. City Elec. Co. v. Gen. Elec. Co.*, 312 F.2d 236, 244 (2d Cir. 1962) (en banc). We are not free to substitute our own policy preferences for those of the legislature by reading a right to revoke contractual consent into the TCPA where Congress has provided none.

## CONCLUSION

We have considered Reyes's remaining arguments, and we find them meritless. We therefore AFFIRM the judgment of the district court.