No. 13-10951

In the United States Court of Appeals for the Eleventh Circuit

FREDY D. OSORIO,
Plaintiff-Appellant,

and

CLARA BETANCOURT
Third-Party Defendant-Appellant

v.

STATE FARM BANK, F.S.B.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida

BRIEF FOR APPELLANTS

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to Circuit Rule 26.1-1, appellants certify that the following persons and entities have an interest in the outcome of these appeals:

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument would not aid this Court's resolution of this appeal because the issues are not complex. The case requires the straightforward application of a single subparagraph of the Telephone Consumer Protection Act. 47 U.S.C. § 227(b)(1)(A). The Act's plain meaning is confirmed by the Federal Communications Commission's authoritative interpretations and by the only federal court of appeals decision to have addressed the issue. *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637 (7th Cir. 2012) (Easterbrook, J.). And the error in the decision below is as plain as the statute's language: the decision resolved the case based on the wrong statutory provisions. These issues are simple enough that argument would serve little purpose.

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INTRODUCTION

Over a six-month period, State Farm Bank used an autodialer to repeatedly call Fredy Osorio's cell phone in a futile attempt to collect a debt he didn't owe. Long after State Farm learned it had the wrong number, it kept calling—about twice per day, for a total of 327 calls.

It was just these sort of harassing phone calls that led Congress to adopt the Telephone Consumer Protection Act (TCPA). 47 U.S.C. § 227 note. Autodialers like State Farm's, once unleashed, mindlessly repeat their assigned task "like the buckets enchanted by the Sorcerer's Apprentice," with no regard for the resulting inconvenience and cell phone bills. *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 639 (7th Cir. 2012) (Easterbrook, J.). Responding to "consumer outrage," the TCPA prohibits autodialer calls to cell phones unless the caller has obtained the "express consent of the called party." 47 U.S.C. § 227(b)(1)(A).

State Farm's actions were a straightforward TCPA violation: There is no dispute that the company used an autodialer to repeatedly call Osorio's cell phone and that Osorio never consented—in fact, he affirmatively objected—to receiving those calls. The district court reached the opposite conclusion only by setting aside the TCPA in favor of *other* statutory provisions, none relevant to Osorio's claim. And the court went further, holding third-party defendant Clara Betancourt liable

for "negligently" providing Osorio's phone number as an emergency contact and ordering her to pay State Farm nearly $140,000 in attorneys' fees and costs—the entire cost of State Farm's defense of the TCPA claim.

The district court's holdings disregard both the plain language of the relevant TCPA provision and authoritative interpretations of that provision by the Federal Communications Commission (FCC). That legal error rendered the TCPA powerless to stop a classic example of the conduct the law was designed to prevent. This court should reverse both the district court's grant of summary judgment to State Farm and its award of fees against Betancourt.

JURISDICTIONAL STATEMENT

Plaintiff-appellant Fredy Osorio brought the underlying case in the district court under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227. The district court had jurisdiction under 28 U.S.C. § 1331. Defendant State Farm Bank filed a third-party complaint against Clara Betancourt, invoking the court's diversity jurisdiction under 28 U.S.C. § 1332. On January 31, 2013, the court entered a final judgment dismissing Osorio's claim against State Farm and granting judgment to State Farm on its claims against Betancourt. RE 150-51 (Doc. 96). On May 1, 2013, Osorio and Betancourt filed a notice of appeal under Federal Rule of Appellate Procedure 4(a)(1)(A). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. The TCPA prohibits automated calls to cell phones in the absence of "prior express consent of the *called party*." 47 U.S.C. § 227(b)(1)(A) (emphasis added). Can the required "express consent" be provided by *someone else's* unauthorized provision of the called party's cell phone number?

2. Assuming that one person can provide the "express consent" required by the TCPA on behalf of another, can that consent be revoked orally, or does a separate provision of the Fair Debt Collection Practices Act require that the revocation be made in writing?

3. Did the district court err in holding that Florida law entitles State Farm to recover from Betancourt the fees and costs it incurred in defending Osorio's TCPA claim?

STATEMENT OF THE CASE AND OF THE FACTS

A. Statutory and Regulatory Background

1. Congress passed the TCPA in response to the public's "outrage over the proliferation of intrusive, nuisance calls." 47 U.S.C. § 227 note. Although the law targets a variety of such intrusive practices, its legislative history suggests that Congress was particularly concerned with the increasing use of "automatic telephone dialing system[s]," or "autodialers," which can store and automatically call long lists of phone numbers. 47 U.S.C. § 227(a)(2). Autodialers "can generate

far more calls to residences than a telemarketer can manually," and Congress regarded such calls as "more intrusive to the privacy concerns of the called party than live solicitations." *In re Rules & Regulations Implementing Tel. Consumer Prot. Act of 1991*, 17 FCC Rcd. 17459, 17474 (2002). As the TCPA's sponsor put it:

> 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. 30,821–30,822 (1991) (Statement of Sen. Hollings).

Since the TCPA's enactment in 1991, the burden that such calls impose on consumers has only become more serious. New technologies have made automated calling both cheaper and more effective, leading to "increased public concern about the effect on consumer privacy." 17 FCC Rcd. at 17460. At the same time, the number of cell phones in use by consumers has exploded. While "[a]n automated call to a landline phone can be an annoyance; an automated call to a cell phone adds expense to annoyance." *Soppet*, 679 F.3d at 638. "[W]hether they pay in advance or after the minutes are used," consumers ultimately bear the cost of these calls. *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 23 FCC Rcd. 559, 562 (2008) .

2. Because most people have no way to stop unwanted calls on their own, Congress found that "[b]anning such automated or prerecorded telephone calls …

is the only effective means of protecting telephone consumers from this nuisance and privacy invasion." 47 U.S.C. § 227 note § 2(12). The TCPA's first prohibition, subparagraph (A) of § 227(b)(1), broadly restricts the use of autodialers in calls to cell phones or other devices for which consumers are charged a fee:

> It shall be unlawful for any person within the United States … 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 … or any service for which the called party is charged for the call.

47 U.S.C. § 227(b)(1)(A).

By its plain language, the restriction is subject to only two exceptions: (1) calls "for emergency purposes," and (2) calls "made with the prior express consent of the called party." *Id.* Moreover, although Congress gave the FCC rulemaking authority over many aspects of the law, it limited the agency's authority to create additional exemptions under subparagraph (A) to calls "that are not charged to the called party." *Id.* § 227(b)(2)(C).

A second TCPA prohibition is also relevant to this appeal, but only because the district court mistakenly applied it to Osorio's claim. Subparagraph (B) of § 227(b)(1) regulates calls to *residential* phones, not cell phones, and prohibits only prerecorded or artificial messages, not autodialers generally. Like subparagraph

(A), this provision contains exceptions for emergency calls and prior express consent, but it also allows the FCC to adopt additional exemptions for calls that do not "adversely affect … privacy rights." 47 U.S.C. § 227(b)(1)(B), (b)(2). The FCC invoked that authority in 1992 to exempt calls that do not involve an "unsolicited advertisement" or for which the caller has an "established business relationship" with the called party. 7 FCC Rcd. at 8755; 47 C.F.R. § 64.1200(a)(2)(iii)–(iv). Because it believed that all debt-collection calls under subparagraph (B) would fall within one or both of these exemptions, the FCC rejected proposals for a separate exemption governing debt collection. *Id.* Importantly, however, both the statute and the FCC's implementing regulations expressly apply only to subparagraph (B)'s prohibition on prerecorded calls to *residential* lines. 47 U.S.C. § 227(b)(1)(B), (b)(2). Congress gave the FCC no authority to create similar exemptions to subparagraph (A)'s prohibition on the use of autodialers, and the agency did not purport to do so. 7 FCC Rcd. at 8755 (adopting the exemptions "from the prohibition on prerecorded or artificial voice message calls to residences").

B. Facts and Proceedings Below

1. The events giving rise to this case began in May 2007, when Clara Betancourt visited an insurance agency to buy car insurance. RE 37 ¶ 15 (Doc. 37). The insurance agent filled out the application form on her behalf. *Id.* When asked

for a second phone number for the application, Betancourt gave Fredy Osorio's cell phone number, believing she was providing an emergency contact number. RE 85-86 ¶¶ 20-21 (Doc. 71); RE 124-25 (Doc. 85). Osorio and Betancourt are not married, but Osorio is the father of Betancourt's child (now an adult), and rents a room in Betancourt's house. RE 72-73 ¶ 3 (Doc. 65); RE 124-25 (Doc. 85). Thus, Osorio was a logical choice for an emergency contact.

After completing the insurance application, the insurance agent offered to finance Betancourt's car-insurance premiums on a credit card issued by defendant State Farm Bank. RE 82 ¶ 7 (Doc. 71). When she accepted, the agent transferred the information from the car insurance application to the credit application and submitted the completed application to State Farm. *Id.* Betancourt did not review or sign the application before State Farm submitted it. RE 53-54 ¶¶ 1-4 (Doc. 46); RE 82 ¶ 7 (Doc. 71). As a result, some information on the application—including Betancourt's home address—was wrong. RE 82 ¶ 7 (Doc. 71).

Over the next three years, Betancourt updated and corrected her contact information with State Farm several times, but retained Osorio's number as a second number on her account. RE 38-39 ¶¶ 21-23 (Doc. 37); RE 85-86 ¶¶ 20-21 (Doc. 71); RE 118 (Doc. 85). On September 29, 2010, shortly after she defaulted on her loan, Betancourt called State Farm and asked that Osorio's number be

removed from the account and that no further calls be placed to that number. RE 54 ¶ 5 (Doc. 46); RE 74-75 ¶ 24 (Doc. 65); RE 125 (Doc. 85). State Farm's records show that, although it updated Betancourt's home telephone number in response to the call, it continued to list Osorio's number as Betancourt's "work" number. RE 74-75 ¶ 24 (Doc. 65).

Two months later, State Farm began debt collection efforts against Betancourt, using an autodialer to systematically call both Betancourt's and Osorio's cell phone numbers. RE 91-94 ¶¶ 31-35 (Doc. 71). In response to these calls, Osorio told State Farm that the called number belonged to him and provided a different number where Betancourt could be reached. *Id.* ¶¶ 31-32. Nevertheless, the calls continued. In total, State Farm called Osorio's cell phone 327 times over a six-month period, in addition to hundreds of additional calls to Betancourt. RE 54 ¶ 6 (Doc. 46).

2. Osorio sued State Farm Bank, alleging in his single-count complaint that the bank had used an autodialer to call his cell phone in violation of the TCPA. RE 13-14 (Doc. 1); RE 117-18 (Doc. 85). In response, State Farm moved for summary judgment. RE 117 (Doc. 85). In addition, it filed a third-party complaint asserting a variety of state-law theories against Betancourt, including breach of contract, open account, account stated, and negligent misrepresentation, and moved for summary

judgment on those claims. RE 24-32 ¶¶ 22-70 (Doc. 13); RE 56 ¶ 1 (Doc. 49); RE 129 (Doc. 86).

In its motion for summary judgment on Osorio's claims, State Farm did not dispute that it had used an "automated telephone dialing system" to call Osorio's "cellular telephone service" and that Osorio had never consented to the calls. RE 56 ¶ 1 (Doc. 49); RE 61 ¶ 1 (Doc. 56). Nevertheless, the district court granted State Farm's motion on the ground that Betancourt had provided State Farm with Osorio's number, RE 124-26 (Doc. 85), intending it as an emergency contact number. RE 85-86 ¶¶ 20-21 (Doc. 71). Relying on an exemption to subparagraph (B) governing prerecorded calls to home phones, the court held that Betancourt had developed an established business relationship with State Farm. RE 123 (Doc. 85). Moreover, because Betancourt and Osorio lived in the same house and had an adult son, the court concluded that Betancourt shared "common authority" over Osorio's phone number and thus had authority to consent to automated calls *"on Osorio's behalf*." *Id.* at 124-25 (Doc. 85) (emphasis added).

The court also rejected Osorio's argument that consent, even if given, had been revoked. *Id.* at 125-26 (Doc. 85). The court found "exceedingly persuasive" a line of cases from the Western District of New York, which had rejected TCPA claims under a provision of the Fair Debt Collections Practices Act (FDCPA)

allowing consumers to halt debt collections efforts with a written request. RE 125 (Doc. 85) (citing *Starkey v. Firstsource Advantage, LLC*, 2010 WL 2541756 (W.D.N.Y. Mar. 11, 2010), *report and recommendation adopted*, 2010 WL 2541731 (W.D.N.Y. June 21, 2010). Because State Farm's "actions constituted debt collection practices," the Court held that "the legality of [its] efforts was governed" by the FDCPA provision, "which does not recognize verbal revocations." RE 126 (Doc. 85). Accordingly, it held "Osorio's and Betancourt's verbal revocations insufficient as a matter of law" to revoke consent. RE 126 (Doc. 85).

The court also granted State Farm's motion for summary judgment on its claims against Betancourt. RE 135 (Doc. 86). In all but one of those claims, State Farm sought recovery of the amount of Betancourt's debt—about $8,000—and attorneys' fees expended in recovering that debt. *Id.* at 132-33. Betancourt did not contest those aspects of State Farm's claims. *Id.* at 132-33, 134-35; RE 139, 146 & n.10 (Doc. 95). She did, however, contest State Farm's common-law claim for negligent misrepresentation, under which it claimed entitlement to attorneys' fees and costs for its defense of Osorio's TCPA claim. RE 133 (Doc. 86); RE 139-40, 142 (Doc. 95).

Ignoring its own conclusion that Betancourt had authority to provide Osorio's cell number—the key holding supporting its grant of summary judgment

against Osorio—the court held Betancourt liable under Florida law for negligently providing that number to State Farm. RE 133-34 (Doc. 86). The court awarded nearly $140,000 in fees and costs. RE 149 (Doc. 95). Although it did not distinguish the amount awarded by claim, the court acknowledged that—because Betancourt had not disputed her liability on the unpaid debt—most of the fees were attributable to State Farm's TCPA defense. *Id.* at 139 n.2; 143 n.7; 146 n.10.

SUMMARY OF THE ARGUMENT

I. The district court erred in holding that Betancourt could consent "on Osorio's behalf" to automated calls to Osorio's cell phone. Subparagraph (A) of 47 U.S.C. § 227(b)(1), on which Osorio's claims were based, allows such calls only with the "prior consent of the called party." The "called party" here was Osorio, not Betancourt, and there is no dispute that Osorio never expressly consented to State Farm's calls.

The district court went astray in relying on an exemption under subparagraph (B) of 47 U.S.C. § 227(b)(1), which allows calls to the *home* number of a consumer with whom the caller has an "existing business relationship." That exemption, and this Court's decision construing it in *Meadows v. Franklin Collection Services,* 414 Fed. App'x 230 (11th Cir. 2011), has no relevance to Osorio's claims under subparagraph (A).

II. The court also erred in rejected Osorio's argument that any consent (if it ever existed) had been revoked when both he and Betancourt told State Farm to stop calling. The court's holding that those instructions were ineffective was based on a provision of the wrong statute—the Fair Debt Collections Practices Act (FDCPA). Again, that statute has no relevance to Osorio's claims, especially given that State Farm is a *creditor*, not an independent debt collector, and is thus not subject to the FDCPA's requirements.

III. Finally, the district court erred in ordering Betancourt to pay State Farm's attorneys' fees and costs for the bank's defense of Osorio's TCPA claim. The court's holding that Betancourt was negligent in providing State Farm with Osorio's phone number flies in the face of its holding that Betancourt held shared authority over that number. It cannot *both* be true that Betancourt had authority over Osorio's number *and* that her use of that number was a negligent misrepresentation.

Moreover, the district court failed to address a critical element of negligent misrepresentation under Florida law—the requirement of justifiable reliance. Even if Betancourt were negligent in providing Osorio's phone number, it could not have been reasonable for State Farm in response to violate federal law by repeatedly calling Osorio despite instructions to stop.

ARGUMENT

I. The District Court Erred in Holding that Betancourt Could Consent to Receiving Debt-Collection Calls on Osorio's Behalf.

A. The district court granted summary judgment to State Farm on Osorio's TCPA claim based on the statute's exemption for calls made with "the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A). Although State Farm never argued that Osorio had *personally* consented to receive debt collections calls on his cell phone, the court nevertheless held the exemption satisfied because "*Betancourt* provided express consent … *on Osorio's behalf*." RE 124 (Doc. 85) (emphasis added).

The district court's conclusion cannot be squared with the TCPA's plain language. The exemption on which the court relied requires "the prior express consent *of the called party*." 47 U.S.C. § 227(b)(1)(A) (emphasis added). The "called party" in § 227(b)(1)(A) is "the person subscribing to the called number at the time the call is made." *Soppet*, 679 F.3d at 643. There is no dispute that the person subscribing to the called number here was *Osorio*, and that Osorio never consented to receiving State Farm's calls.

To be sure, the FCC has, as the district court noted, construed the "prior express consent" exemption to include calls to "wireless numbers that are provided by the called party to a creditor in connection with an existing debt." *In re Rules and*

Regs. Implementing the Telephone Consumer Protection Act of 1991, 23 FCC Rcd. 559 (2008) (2008 TCPA Order). The FCC reached that interpretation based on its conclusion that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." *Id.* Like the statutory language itself, however, the FCC's interpretation depends on the consent of the "called party." *Id.* Betancourt's use of Osorio's number, under that interpretation, constitutes at most *her* knowing consent; it cannot be said to constitute *Osorio's* invitation to be called at that number. The FCC has never suggested that a called party expressly consents when *someone else* knowingly provides the called party's number in connection with a debt.

B. In reaching the contrary conclusion, the district court relied on this Court's unpublished decision in *Meadows v. Franklin Collection Services*, which held that debt collectors were not liable under subparagraph (B) of § 227(b)(1), which prohibits use of prerecorded messages in calls to *home* phone lines, because the calls were made in an attempt to collect a debt and were thus except from the subparagraphs coverage. 414 Fed. App'x 230 (11th Cir. 2011).

Subparagraph (B), on which the claim in *Meadows* was based, expressly grants the FCC authority to create additional exemptions for calls to residential

lines that "will not adversely affect ... privacy rights." 47 U.S.C. § 227(b)(1)(B), (b)(2). Under that authority, the FCC exempted calls "made for commercial purposes which do not transmit an unsolicited advertisement" or "to a party with whom the caller has an established business relationship." *In re Rules and Regs. Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd. 8752, 8755 (Oct. 16, 1992) (1992 TCPA Order); 47 C.F.R. § 64.1200(a)(2)(iv). As *Meadows* observed, the FCC appears to have intended these exemptions, taken together, to exempt "*all* debt-collection circumstances" from subparagraph (B)'s coverage. 1992 TCPA Order at 8769 (concluding that the exemptions made a separate debt-collections exemption unnecessary); *see also Watson v. NCO Grp., Inc.*, 462 F. Supp. 2d 641, 644 (E.D. Pa. 2006) (noting that the FCC proceeded from the premise that "all debt collection calls involve a prior or existing business relationship"). Thus, *Meadows* concluded, the exemptions apply even "when a debt collector contacts a non-debtor in an effort to collect a debt." 414 Fed. App'x at 230.

At the same time, however, the FCC has also been clear that debt collectors *are* subject to the prohibitions in subparagraph (A) of § 227(b)(1), on which Osorio's claim here is based. *See* 2008 TCPA Order at 565 (noting the prohibition on automatic dialer calls applies "regardless" of the content of the calls); *In Re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014, 14017

(2003) 2003 Order at ("We affirm that under the TCPA, it is unlawful to make *any call* using an automatic telephone dialing system or an artificial or prerecorded message to any wireless telephone number." (emphasis added)); *see also Adamcik v. Credit Control Servs., Inc.*, 832 F. Supp. 2d 744, 751 (W.D. Tex. 2011). Unlike subparagraph (B), subparagraph (A) regulates calls to *cell* phones, not residential phones, and autodialers in addition to prerecorded messages. *See* 1992 TCPA Order (adopting the exemption to "the restriction on artificial or prerecorded message calls to residences").

The FCC has never purported to exempt debt collectors from subparagraph (A), and the TCPA gives it no authority to create such an exemption: The law allows the agency to exempt calls to cellular phones only for classes of calls that "are not charged to the called party." *Id.* §227(b)(2)(C). *Meadows*, which relied on subparagraph (B)'s exemptions, thus has no application to Osorio's claim under subparagraph (A). *See Breslow v. Wells Fargo Bank, N.A.*, 857 F. Supp. 2d 1316, 1319-22 (S.D. Fla. 2012) (holding that *Meadows* ... is distinguishable" from subparagraph (A) claims because it "held that calls to an intended recipient with whom the caller had an *existing business relationship* were exempt from the TCPA's prohibitions of prerecorded calls to *residences*."); *Bentley v. Bank of Am., N.A.*, 773 F. Supp. 2d 1367, 1374 (S.D. Fla. 2011) (same).

C. The district court's conclusion that Betancourt had "common authority" over Osorio's phone is both factually wrong and irrelevant to his claim. RE 124 (Doc. 85). In reaching that conclusion, the court relied on the following facts: that Osorio had a child with Betancourt (who is now an adult); that he rents a room from her and thus, as the district court put it, "cohabitates" with her; and that, at their son's request, he added a phone to his cell phone plan for her use. RE 72-73 ¶¶ 3, 5 (Doc. 65); RE 123-24 (Doc. 85). None of these facts suggest that Betancourt had "authority" over Osorio's cell phone. More importantly, they do not support an inference that Osorio consented to calls from State Farm. And even if they *did* support that inference, it would still not be enough. The TCPA requires Osorio's *express*, not inferred, consent.[1]

The district court's only authority for its "common authority" rationale was an unpublished district court decision, *Gutierrez v. Barclays Group*, 2011 WL 579238 (S.D. Cal. 2011), which borrowed the concept from cases involving consent to search under the Fourth Amendment. Unlike this case, *Gutierrez* involved facts that were relevant to the question of common authority: The plaintiff there had given

[1] The court also noted Betancourt's statement that she did not feel obligated to obtain Osorio's permission before listing him as an emergency contact. RE 124-25 (Doc. 85). Again, that has nothing to do with Osorio's express consent. No authority is required to list someone as an emergency contact, and those who have been listed as emergency contacts by others would likely be surprised to learn that they have therefore expressly consented to debt-collection calls on their cell phones.

her husband permission to use and give out her phone number, and paid for the phone's subscription from a joint account. Even so, the court's importation of the concept of "common authority" from the Fourth Amendment cannot be reconciled with the TCPA's plain language. In the Fourth Amendment context, the idea of common authority suggests that more than one person has independent authority to consent to the search of a property, not that one person has authority to provide consent on behalf of another.

For example, it may be true that Betancourt has sufficient authority to consent to a search of Osorio's room while he is away. Assuming that is true, however, the consent would be her own, not Osorio's. It would thus be wrong to say, as the district court did here, that she had consented "on *Osorio's behalf*." RE 124-25 (Doc. 85) (emphasis added). And even if her consent could be imputed to Osorio in that way, it would constitute at most *implied*, not express, consent.

D. Ultimately, the district court's holding that Osorio "expressly consented" to receive calls from State Farm appears to originate not from the language of the TCPA or anything that Osorio did, but from the court's view that it would be unfair to hold State Farm liable for its reliance on a number provided by Betancourt. Whatever can be said for the merits of that view as a matter of policy, it is not the law as Congress enacted it. "Courts may not rewrite the language of a

statute in the guise of interpreting it in order to further what they deem to be a better policy than the one Congress wrote." *Norelus v. Denny's, Inc.*, 628 F.3d 1270, 1301 (11th Cir. 2010). The federal courts' function "is to apply statutes …, not to 'improve' statutes by altering them." *Wright v. Sec'y, Dep't of Corrs.*, 278 F.3d 1245, 1255 (11th Cir. 2002); *see also Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 642 (7th Cir. 2012) (holding that the power to interpret laws does not encompass "substantive changes designed to make the law 'better.'").

As this Court has recognized, the TCPA is a strict liability regime, imposing a relatively small amount of statutory damages (up to $500) for *any* violation of its requirements. *Penzer v. Transp. Ins. Co.*, 545 F.3d 1303, 1311 (11th Cir. 2008). Where a violation is knowing or willful, the statute provides for greater penalties: up to three times the normal amount. *Id.* If the defendant's knowledge were *always* required, as the district court's opinion suggests, the TCPA's ordinary statutory damages provision would be rendered superfluous.

There are valid reasons for Congress to have chosen this strict liability regime. For one thing, it provides a clear standard for liability instead of one that requires an examination of the complicated facts of every case, which would strain not only courts but the litigants who bear the costs of discovery, briefing, and possible trial. Moreover, the statutory damages imposed by the TCPA are modest

and the obligations imposed not particularly burdensome. As Judge Easterbrook noted in *Soppet*, all a debt collector needs to do to avoid liability under the statute is to confirm that it has the right number by looking up the number's owner, or (because subparagraph (A) prohibits only *automated* calls) by making an initial in-person call before unleashing an autodialer on a possibly innocent consumer. 679 F.3d at 642.

II. The TCPA Does Not Require Revocation of Consent to Be in Writing.

Even if the district court were correct to conclude that Betancourt could consent to receive calls on Osorio's behalf, that consent was revoked when Betancourt asked State Farm to remove the number from her account and when Osorio told State Farm that the number belonged to him. State Farm ignored these communications and kept calling—on average about twice per day over a six-month period, for a total of 327 calls.

In addressing Betancourt's and Osorio's attempt to revoke permission to call Osorio's phone, the district court abandoned its flexible approach to consent under the TCPA. Instead, it read into the statute a rigorous new requirement—that, once given, a consumer's express consent to receive calls on a cell phone can be revoked only in writing. The court, however, cited nothing in the TCPA's language or the FCC's interpretation of that language that even suggests such a requirement.

Instead, the district court relied on another unpublished district court decision, *Starkey v. Firstsource Advantage, LLC*, 2010 WL 2541756 (W.D.N.Y. Mar. 11, 2010), *report and recommendation adopted*, 2010 WL 2541731 (W.D.N.Y. June 21, 2010). Both the reasoning in *Starkey* and the district court's application of the case here are seriously flawed.

To begin with, *Starkey* applied the wrong statute. Although acknowledging that "the TCPA [had] some application to the … case insofar as defendant was placing prerecorded automated calls to plaintiff's cellular telephone," the court found the TCPA's requirements inapplicable because "Congress has clearly stated that debt collection efforts are governed by the FDCPA." *Id.* at *6. The court therefore looked to the FDCPA rather than the TCPA for standards governing withdrawal of consent. It found what it considered a suitable standard in 15 U.S.C. § 1692c(c), which provides that a "debt collector shall not communicate further with [a] consumer" when the consumer "notifies [the] debt collector in writing that the consumer … wishes the debt collector to cease further communication." 15 U.S.C. § 1692c(c).

Although the FDCPA does provide a mechanism for consumers to stop unwanted communications from debt collectors, that provision has nothing to do with the TCPA's prohibition on using autodialers to call cell phones. *Starkey*'s only

explanation for its reliance on the FDCPA was that the case was a "debt collection case, not a telemarketing case." 2010 WL 2541756, at *4. Unless a specific exemption applies, however, the FCC considers the TCPA applicable to *all* calls, including calls from debt collectors. *See* 2008 Ruling at 565 (noting the prohibition on calls to cell phones applies "regardless" of the content of the calls); 2003 Order ("We affirm that under the TCPA, it is unlawful to make *any call* using an automatic telephone dialing system or an artificial or prerecorded message to any wireless telephone number." (emphasis added)). And nothing in the FDCPA excuses debt collectors from compliance with other federal statutes governing their conduct, including the TCPA. A debt collector could not defend against wire fraud charges, for example, by arguing that the case is "a debt collection case, not a wire fraud case."

Starkey was thus wrong to hold that compliance with the FDCPA excuses a debt collector from compliance with the TCPA. But the district court's application of *Starkey* to this case was doubly wrong because the defendant—State Farm Bank—is a *creditor*, not an independent debt collector. The FDCPA defines "debt collector[s]" as those who regularly enforce the debts *of another*. 15 U.S.C. § 1692a(6). A creditor collecting its own debts in its own name is thus not a "debt collector" and is not subject to liability under the FDCPA. *See Goia v. CitiFinancial*

Auto, 499 F. App'x 930, 934 (11th Cir. 2012); *see also Montgomery v. Huntington Bank*, 346 F.3d 693, 699 (6th Cir. 2003) ("A … creditor is not a debt collector for the purposes of the FDCPA and creditors are not subject to the FDCPA when collecting their accounts."). For that reason, Osorio's complaint did not include FDCPA claims.

III. Betancourt Is Not Responsible for the Cost of State Farm's TCPA Defense.

Even if the district court were somehow correct to grant summary judgment against Osorio's TCPA claim, it should not have ordered Betancourt to pay State Farm's attorneys' fees and costs on that claim. The district court's rejection of Osorio's claim hinged on its holding that Betancourt shared "common authority" with Osorio over his phone number and thus had authority to provide the number to State Farm. RE 124-25 (Doc. 85). But if it is true that Betancourt had authority to distribute Osorio's number, it makes no sense to hold that, by distributing the number, Betancourt committed negligent misrepresentation. It cannot be true both that Betancourt shared authority over Osorio's phone number *and* that her use of that number was a misrepresentation. Thus, assuming the correctness of the district court's view of the law, its award of fees was nevertheless error.

As already explained, however, the district court was *not* correct to grant summary judgment against Osorio, and its award of fees and costs thus fails for the

same reasons as that order. Critical to the tort of negligent misrepresentation under Florida law is proof of injury resulting from *justifiable reliance* on the misrepresentation.[2] Even assuming that Betancourt misrepresented Osorio's phone number as her own, it could not have been "justifiable" for State Farm to violate federal law.[3]

As the Florida Supreme Court has made clear, a key difference between the torts of fraudulent misrepresentation and negligent misrepresentation under state

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[2] The tort of negligent misrepresentation under Florida law requires proof of four elements: " (1) [a] misrepresentation of a material fact; (2) the representor ... ma[d]e the representation without knowledge as to its truth or falsity, or ... under circumstances in which he ought to have known of its falsity; (3) the representor ... intend[ed] that the misrepresentation induce another to act on it; (4) injury must result to the party acting in justifiable reliance on the misrepresentation." *Souran v. Travelers Ins. Co.*, 982 F.2d 1497, 1503 (11th Cir. 1993).

[3] Betancourt disputed below, and continues to dispute, State Farm's claim that she misrepresented Osorio's number as her own. The parties agree that Betancourt never filled out State Farm's loan application—rather, she provided Osorio's number orally in the course of applying for car insurance. RE 37 ¶ 15 (Doc. 37); RE 53-54 ¶¶ 1-4 (Doc. 46); RE 82 ¶ 7 (Doc. 71). That information was transcribed by the insurance agent onto an insurance application, transcribed once again onto State Farm's credit application, and sent to State Farm without being signed or reviewed by Betancourt. *Id.*

None of those facts is disputed. The parties do dispute, however, whether Betancourt ever represented Osorio's phone number as her own. Betancourt testified that she provided Osorio's number in response to the agent's request for a "second" number, which she understood to be an emergency contact number. RE 85-86 ¶¶ 20-21 (Doc. 71); RE 124-25 (Doc. 85). If Betancourt's testimony is credited—as it must be on summary judgment—there was no representation. At the very least, the issue requires resolving a material dispute of fact, and the district court should not have granted State Farm summary judgment.

law is the requirement of "justifiable reliance." *Gilchrist Timber Co. v. ITT Rayonier, Inc.*, 696 So. 2d 334, 336 (Fla. 1997). In a fraudulent misrepresentation case, the defendant is liable for the plaintiff's reliance on a misrepresentation even if the plaintiff could have discovered the truth through reasonable investigation. *Butler v. Yusem*, 44 So. 3d 102, 105 (Fla. 2010). But "negligence is less objectionable than fraud," and the recipient of a misrepresentation is therefore responsible for responding to the erroneous information reasonably—including conducting an investigation or taking other precautions when appropriate. The recipient, in other words, cannot "hide behind the unintentional negligence of the misrepresenter when the recipient is likewise negligent in failing to discover the error." *Id.*; *see also Gilchrist Timber*, 696 So. 2d at 336.

In this case, the standard of conduct required of State Farm is dictated by the TCPA—a federal statute. The TCPA allows automated calls to cell phone numbers only where the recipient has *expressly* consented to receipt of the call and puts the burden of proving that consent squarely on the calling party. There is nothing unreasonable about the TCPA's requirement. As explained earlier, State Farm could have protected itself simply by looking up the number's owner or by making an initial in-person call. Because it is common for phone numbers to change hands, *Soppet*, 679 F.3d at 638, it is not unreasonable to expect a creditor to

take such simple steps before exposing an innocent consumer to an autodialer's harassment. If Florida's common law held otherwise—that engaging in conduct violating the TCPA is "justifiable"—that holding would have to give way before the federal law's contrary requirement. *See Howlett v. Rose*, 496 U.S. 356, 370, n.16 (1990) ("An excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source."). Absent some clear indication that Florida law commands that holding, this Court should avoid a clash between state and federal law.

At the end of the day, even if it could be said that State Farm was justified in calling Osorio without verifying the number (a questionable conclusion at best), there is no excuse for *continuing to call him*—more than 300 times over the following six months—after being told to stop.

CONCLUSION

This Court should reverse the district court's grant of summary judgment to defendant-appellee State Farm Bank against plaintiff-appellant Fredy Osorio. The Court should also reverse the district court's grant of summary judgment to State

Farm and its award of fees and costs against third-party defendant Clara Betancourt.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on June 17, 2013, I served via third-party commercial carrier for delivery within three business days a copy of the foregoing brief to the Office of the Clerk and to the following counsel:

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