ORIGINAL

Supreme Court No. 59081

IN THE SUPREME COURT FOR THE STATE OF NEVADA

PAUL D.S. EDWARDS,

Plaintiff-Appellant-Petitioner,

vs.

NATIONAL CREDIT ADJUSTERS, LLC., a/k/a NCA, a/d/b/a 4 SUM, INC.,. and DOES L-XX, and ROE CORPORATIONS XXI-XXX, ET AL.

Defendants-Appellees-Respondents.

APPELLANT'S PETITION FOR EN BANC RECONSIDERATION OF A PANELS DECISION PURSUANT TO NRAP, RULE 40A

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13-04330

IN THE SUPREME COURT, FOR THE STATE OF NEVADA

PAUL D.S. EDWARDS, **Appellant,** *vs.* NATIONAL CREDIT ADJUSTERS, LLC., a/k/a NCA, a/d/b/a 4 SUM, INC. **Respondents.**	**SUPREME COURT NO.:** **59081**

APPELLANT'S PETITION FOR EN BANC RECONSIDERATION OF A PANELS DECISION PURSUANT TO NRAP, RULE 40A

On November 16, 2012, a panel of this Honorable Court filed a decision in the above matter **("Order 2")**, affirming the District Court's decision granting of Summary Judgment to Defendants-Respondents **("Respondents")**. However, in an earlier decision (September 28, 2010), a panel[1] of this Honorable Court vacated a District Court's granting of Summary Judgment to the same Respondents **("Order 1")**. Interestingly, each decision was made under [almost] identical theories and arguments. In Appeal 2, Appellant timely filed his Petition for Rehearing **("Petition")**. On January 31, 2013, the Appeal 2 Panel denied Appellant' Petition.

Appellant now seeks the full Honorable Court to grant his Petition for En Banc Reconsideration, pursuant to NRAP, Rule 40A(a)(1) because—

> "...reconsideration by the full court is necessary to secure or maintain uniformity of its decisions."

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[1]Justice Gibbons is the only Justice to sit on both panels.

Appellant further contends that NRAP, Rule 40A(a)(2) is also applicable because—

"...the proceeding involves a substantial precedential...or public policy issue."

Accordingly, it has become necessary for this Honorable Court to rectify the contradictoriness of decisions between Appeal 1 and Appeal 2.

The issue[s] of this litigation are of first impression and precedential setting, and because of the impact on public policy, this Honorable Court has the responsibility of clarifying which of the Appeals (Appeal 1 or Appeal 2) is the presidential setting decision controlling, in part, public policy.

Because there is a conflict in the decisions based on [substantially] the same arguments incorporated within Appellant's and Respondents' briefs; and due to the fact both of the Honorable Panels cited the same case law for reaching each' determination[s], Appellant argues that his Petition for En Banc Reconsideration of a Panels Decision **("En Banc Petition")** is necessary to establish a singular finding and decision between the conflict of decisions of the Appeal 1 and Appeal 2 Panels.

I. BRIEF STATEMENT OF FACTS RELEVANT TO THIS PETITION:

The Telephone Consumer Protection Act **("TCPA")** and its corresponding regulations (47 C.F.R. 64.1200 et seq.) prohibit the use of automatic telephone dialing systems or prerecorded voices *to wireless telephone numbers assigned to a cellular service, without the "prior express consent" of the called party.* Although over half the states had laws addressing the problem, the United States Congress **("Congress")** concluded that a federal law was needed to control those nuisance and cost incurring calls to consumers wireless telephones. *See* S. Rep. No. 102-178, at 3, reprinted in 1991 U.S.C.C.A.N. 1968, 1970.

The result was the Telephone Consumer Protection Act of 1991, enacted as an amendment to the Communications Act of 1934. Pub. L. No. 102-243, § 3(a), 105 Stat. 2395 (codified at 47 U.S.C. § 227). Incorporated in the TCPA was Congress' delegation of rulemaking authority to the Federal Communications Commission **("FCC")**. 47 U.S.C. §§ 227(b)(1)(A), (b)(2). Congress also provided for private citizens to bring civil suits for violations of the TCPA. 47 U.S.C. §§ 227(b)(3), 227(f)(1). In a TCPA suit, the plaintiff may obtain injunctive relief, actual damages, or statutory damages of $500 *per violation*, whichever is greater, or both injunctive relief and damages. 47 U.S.C. §§ 227(b)(3)(A), (B), or (C).

Subsequently, using the authority granted them by Congress, the FCC, in a Declaratory Ruling, made it unambiguous that calls to consumers wireless telephones, for debt collection purposes, violate the TCPA— *unless the cellular telephone number "was provided by the consumer to the creditor*." **(emphasis added)**. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Request of ACA International for Clarification and Declaratory Ruling, 23 FCC Rec. 559, 564-65 (2008) **("Declaratory Order")**.

In that same Declaratory Order the FCC also emphasized that pre-recorded calls could be particularly costly to cellular subscribers who pay for their calls (including pre-paid "bucket" minutes).

Pursuant to the TCPA, and its corresponding regulations, Appellant initiated this action against Respondents as a consequence of Respondents' placing (at a minimum) nine (9) autodialed, pre-recorded telephone calls to Appellant' wireless telephone number without Appellant' "prior express consent" to place such calls to his wireless telephone. 47 U.S.C. ¶ 227(b)(1)(A)(iii).

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In addition to the nine (9) autodialed, pre-recorded calls, Respondents' [also] failed, within those calls, to identify the caller or the purpose of the call. 47 C.F.R. ¶ 64.1200(a)(1)(iii), (b)(1) & (b)(2).[2] Appellant also maintained that because Respondents willfully or knowingly violated the TCPA, 47 U.S.C. ¶227(b)(1)(A)(iii), the court could treble the award. Appellant further claimed that Respondents also violated the Delivery Restrictions pertaining to the TCPA, 47 C.F.R. ¶ 64.1200(a)(1)(iii), (b)(1) & (b)(2); and several sections of Nevada's Revised Statutes **("NRS")**.

II. THE FULL COURT'S DETERMINATION IS REQUIRED TO BRING CONSISTENCY BETWEEN APPEAL 1 AND APPEAL 2:

1. In Appeal 1, the Honorable Panel Vacated the District Court's Granting of Summary Judgment to Defendants - Consequently, Plaintiff Prevailed:

In reaching its determination the Honorable Panel based its findings on the established fact that, "...both parties agree that respondent National Credit Adjusters, LLC **("NCA")** left pre-recorded messages on appellant Paul D.S. Edwards' cellular telephone at least four[3] times in October 2007." Order Affirming in Part, Reversing in Part, and Remanding **("Order 1")**. (footnote added).

In its Order 1, the Panel concurred with the FCC's Declaratory Oder, that—

> "Under 47 U.S.C. § 227, referred herein as the Telephone Consumer Protection Act (TCPA), a creditor or debt collector has the burden of showing that it had the consumer's prior express consent to place autodialed or pre-recorded calls to the consumer's wireless telephone. In re ACA International, 23 F.C.C.R. 559, 565 (2008).

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[2]A violation of any section under 47 C.F.R. 64.1200 is an instant violation on the first call.

[3]Appellant maintained there were nine (9) autodialed, pre-recorded calls to his wireless telephone.

The Panel also relied upon the decision in Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 951 (9th Cir. 2009), that—

> Express consent is "[c]onsent that is clearly and unmistakably stated." (internal quotations omitted)." Order 1.

Consequently, the Panel concluded that—

> "Specifically, based on the record and arguments before us, we conclude that NCA has failed to meet its burden of demonstrating that Edwards clearly and unmistakably consented to allowing NCA to place autodialed or pre-recorded calls to his wireless telephone. ACA International, 23 F.C.C.R. 559; Satterfield, 569 F.3d at 955." Order 1.

Accordingly, Appellant prevailed.

2. **In Appeal 2, the Honorable Panel Affirmed the District Court's Granting of Summary Judgment to Defendants - Consequently, Defendants Prevailed:**

As the Panel in Appeal 1, the Appeal 2 Panel, in support of their decision, also cited to and relied upon ACA International, 23 F.C.C.R. 559, 565 (2008), id., and Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 955 (9th Cir. 2009) (internal quotations omitted), id. Order 2.

However— given Appellant made [virtually] the identical arguments in his opening and reply briefs as he did in Appeal 1, and that Respondents [also] submitted nearly identical arguments in their Appeal 1 answering briefs— the Appeal 2 Panel arrived at a different and distinct conclusion, based upon [nearly] identically filed arguments in each Appeal.

Accordingly, Respondents prevailed.

3. **The Dissimilarities of Findings and Conclusions Between the Two Panels Should be Resolved by this Honorable Court:**

We now have two (2) different Honorable Panels, reviewing [virtually] identical arguments submitted by the same Appellant and Respondents, *yet each Panel arrived at, and provided, two (2) conflicting decisions.*

Of significance, is that both Panels based their decision upon the same legal citations— ACA International, 23 F.C.C.R. 559, 565 (2008), and Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 951 (9th Cir. 2009), id.

The Satterfield court, citing ACA International, 23 F.C.C.R. 559, 565 (2008), in part, acknowledged that:

> Congress has delegated the FCC with the authority to make rules and regulations to implement the TCPA. See 47 U.S.C. § 227(b)(2). Pursuant to this authority, the FCC stated, "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. Both the statute and our rules prohibit these calls, with limited exceptions, 'to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other common carrier service, or any service for which the called party is charged.'

The limited exception[s] referenced in the court' cite, id., was clearly stated in the ACA International, 23 F.C.C.R. 559, 565 (2008) Declaratory Order—

> "In this ruling, we clarify that *autodialed and prerecorded message calls to wireless numbers that are provided by the called party to a creditor* in connection with an existing debt *are permissible as calls made with the "prior express consent"* of the called party." **(emphasis added).**

The "prior express consent" exemption mandates that *it must have been a wireless telephone number that was provided to the creditor*, a mandate that is emphasized throughout the ten (10) page Declaratory Order— without deviation and leaving no possibility of ambiguity to the words used by the FCC. **(emphasis added).**

It is obvious that the Panel in Appeal 1 clearly understood the FCC's words— that only wireless numbers that are provided by the called party to a creditor in connection with an existing debt have given "prior express consent" to be contacted through the utilization of autodialers or pre-recorded messages.

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Nevertheless, the Appeal 2 Panel either chose to ignore the FCC' Declaratory Order, or misunderstood what the Declaratory Order stated, and concluded that the provision of any telephone number, wireless or otherwise, accords "prior express consent" to utilize autodialers or pre-recorded messages to contact a consumer on his/her/their wireless telephone. It appears that the Appeal 1 Panel concurred with the FCC's Declaratory Order, and Appeal 2's Panel chose to disregard the FCC's ruling, hence causing a conflict between the two (2) decisions.

It is undisputed by the parties that appellant provided, on his credit card application, the telephone number at issue, which, at that time, was his landline telephone number. It is also undisputed that by providing his landline number, Appellant consented to be contacted at that number. However, Appellant never provided "prior express consent" to receiving autodialed or pre-recorded calls at that same number. The parties also do not dispute the fact that [approximately] two (2) years after the original creditor sold Appellant' account, thus having no further interest in Appellant, Appellant "ported" his landline telephone number to a wireless provider— consequently making his landline number his cellular telephone number.

Hence, at the time Appellant completed his credit application, it was not a wireless number provided to the creditor, it was a landline number

Ironically, both Panels agree that express consent is "[c]onsent that is clearly and unmistakably stated." Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 955 (9th Cir. 2009) (internal quotations omitted).

4. Congress' Intent and the FCC's Interpretation are both Unequivocal:

The parties, as well as each Panel agree that this litigation hinges, in most part, on the propriety of a ruling by the Federal Communications Commission, that clarified that "autodialed and prerecorded message calls *to wireless numbers*

provided by the called party in connection with an existing debt" are permissible under the TCPA because they fall under the exception for calls made with the "prior express consent" of the called party. Declaratory Ruling, FCC 07-232, at ¶ 9 (Dec. 28, 2007) (2008).

If Congress' intent is clear, that is the end of the matter for the court, and the court must give effect to the unambiguously expressed intent of Congress." Chevron, U.S.A., Inc. v. National Resources Defense Council, 467 U.S. 837, 842-43 (1984).

Where "Congress has explicitly left a gap for the agency to fill," the agency's rules, as in this matter the FCC, will be "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Id. at 843-44. Where, Congress has delegated rulemaking authority to an agency, as it has delegated to the FCC, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Id. at 844.

The FCC, in carrying out its authorization to interpret the TCPA, *see, e.g.*, 47 U.S.C. § 227(b)(2) ("The Commission shall prescribe regulations to implement the requirements of this subsection."), has issued an order clarifying whether this situation— specific to creditors and debt collectors who use autodialers or prerecorded messages to communicate with their customers— meets Congress' exception for "prior express consent." Accordingly, the Panel 2 court must, as the Panel 1 court did, *give deference to the FCC's construction* unless it is manifestly contrary to Congress' intent or unreasonable.

On January 4, 2008, in response to a petition filed by ACA International, the FCC issued a Declaratory Ruling which held that "*the provision of a cell phone number to a creditor, e.g.*, as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding

the debt," **(emphasis added)**, and thus, that "autodialed and prerecorded message calls *to wireless numbers provided by the called party in connection with an existing debt* are made with the 'prior express consent' of the called party." Declaratory Order at ¶ 9.

Black's Law Dictionary defines "express consent" as "[t]hat directly given, either viva voce or in writing. It is positive, direct, unequivocal consent, requiring no inference or implication to supply its meaning." Black's Law Dictionary 276 (5th ed.1979). Similarly, it defines "express" as "[c]lear. Definite. Explicit. . . . Declared in terms; set forth in words. . . . Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct." Id. at 521. By contrast, "implied consent" is defined as "[t]hat manifested by signs, actions, or facts, or by inaction or silence, which raise a presumption that the consent has been given." Id. at 276.

In this litigation, the parties have conceded that providing a cell phone number on a credit application is granting "express consent" to be contacted at that wireless number utilizing autodialers or pre-recorded messages. However, as the parties also concur, Appellant never provided a wireless number to the original creditor nor to the Respondents. Moreover, even though, by providing his landline telephone number, Appellant consented to be contacted at that landline telephone number, Appellant never expressly gave to the original creditor, in words or "direct and appropriate language," explicit consent to be called using autodialers or prerecorded messages. An argument accepted by Appeal 1' Panel, yet denied by the Appeal 2's Panel.

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If, as [erroneously] concluded by the Appeal 2 Panel, that the provision of a landline number to the original creditor grants [prior] express consent to be called in general, without any consideration given to the method or type of call, the FCC's exemption would be contrary to the logic of the statute, and the FCC's Declaratory Order— an Order that requires that it must be a wireless number that was provided at the time the credit application was completed.

As the FCC has recognized, Congress enacted the TCPA in part because "Congress found that automated or prerecorded telephone calls were a greater nuisance and invasion of privacy than live calls. Moreover, such calls can be costly and inconvenient," consequently eroding public policy. *FCC, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC 03-153, 68 Fed. Reg. 44144, 44165 (July 25, 2003) ("2003 FCC Ruling"). Thus, in order for the exemption to apply, the called party *must expressly consent* not only to receiving telephone calls, but to receiving calls made by a caller using an autodialer or prerecorded message.

In sum, the FCC's interpretation of the TCPA reads out Congress' requirement that autodialed and prerecorded calls may be made to cell phone numbers, but only where the called party has provided the cell phone number. Any other interpretation is manifestly contrary to the plain language of the statute, and the FCC's Declaratory Order.

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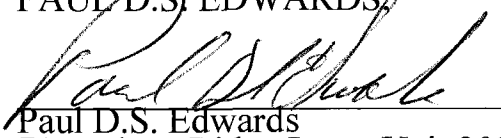
III. CONCLUSION:

The FCC's holding is unequivocal, irrefutable, and explicit. For "prior express consent" to be established, permitting autodialed or pre-recorded calls to a wireless telephone, the wireless number must have been provided to the creditor as part of a credit application, or that such number was provided during the transaction that resulted in the debt owed. Accordingly, for all of the foregoing reasons, Petitioner respectfully requests that this Court grant his Petition.

DATED this 8th day of February 2013.

Respectfully Submitted,

PAUL D.S. EDWARDS



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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

   [X] This brief has been prepared in a proportionally spaced typeface using WordPerfect X5 in 14 pt New Times Roman; or

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2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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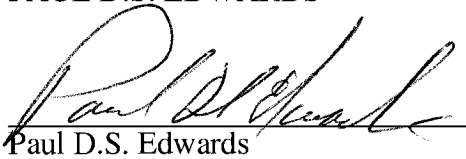
3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 8th day of February 2013.

PAUL D.S. EDWARDS



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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 8th day of February 2013, after being placed in a USPS "Priority Mail" envelope, and thereon placing sufficient postage, I deposited in a United States Postal Service receptacle, the Original and eight (8) copies of the following document[s]:

1. Appellant's Petition for En Banc Reconsideration of a Panels Decision Pursuant to NRAP, Rule 40A

and addressed to the following:

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I HEREBY FURTHER CERTIFY that on the 8th day of February 2013, after being placed in an envelope, and thereon placing sufficient postage, I deposited in a United States Postal Service receptacle, a true and correct copy of the following document[s]:

1. Appellant's Petition for En Banc Reconsideration of a Panels Decision Pursuant to NRAP, Rule 40A

and addressed to the following:

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