UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

DONELLA HARRIEL, individually and on behalf of a class of all persons and entities similarly situated,

Plaintiff,

vs. Case No. 8:25-cv-01165-TPB-SPF

BEALLS, INC.

Defendant.

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

The Court should deny Defendant Bealls' motion to dismiss. Residential subscribers of cellular telephone numbers are entitled to the protections of the Telephone Consumer Protection Act's National Do Not Call Registry provision under the statute's plain language. The term "residential telephone subscriber" encompasses all types of telephone lines (landline and cellular) so long as they are used for personal purposes. And this is the only interpretation consistent with the TCPA's purpose of protecting residential privacy interests.

ARGUMENT

Cellular Telephone Numbers are Protected under the TCPA's National Do Not Call Registry Provision

The facts in this case are not in dispute. Plaintiff uses her cellular telephone number for personal and household purposes, and that number is listed on the

National Do Not Call Registry. Complaint (ECF 1) at ¶¶ 18-21. As a result, Defendant does not argue that Plaintiff's number that Defendant called is not used for residential purposes. Instead, Defendant argues that because the number Plaintiff uses for residential purposes is a cellular telephone number, as a matter of law, it is not protected under the TCPA's National Do Not Call Registry provision. This argument fails under the TCPA's plain language. It also runs contrary to the TCPA's express purpose.

"The [TCPA] was enacted in 1991 because, as Congress put it, [m]any consumers [were] outraged over the proliferation of intrusive, nuisance [telemarketing] calls to their homes." *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1264 (11th Cir. 2019). "The TCPA . . . authorized the FCC to promulgate regulations concerning the need to protect residential subscribers' privacy rights to avoid receiving telephone solicitations to which they object." *Id*. at 1265. Using this authority, "[t]he FCC promulgated regulations creating a national do-not-call list[.]" *Id*.

More specifically, the FCC declared: "No person or entity shall initiate any telephone solicitation to . . . [a] residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the Federal Government." 47 C.F.R. § 64.1200(c)(2). Accordingly, "[t]he TCPA creates a

private right of action for anyone who receives more than one call within a year from the same entity in violation of [the DNC Registry]." *Cordoba*, 942 F.3d at 1265 (citing 47 U.S.C. § 227(c)(5)).

And cellular telephone numbers are entitled to the protections of the TCPA's National Do Not Call Registry provision. Even ignoring the FCC's interpretations, all of the "district courts that have considered this issue post-*Loper* [*Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024)] have reached the same conclusion: cellular telephone users can be considered 'residential telephone subscribers' under § 227(c). *See Cacho v. McCarthy & Kelly LLP*, No. 23-CV-11157 (LJL), 739 F. Supp. 3d 195, 2024 U.S. Dist. LEXIS 117544, 2024 WL 3293628, at *9 (S.D.N.Y. July 3, 2024) ('The Court therefore rejects Defendant's contention that Plaintiff falls outside the TCPA's protective ambit merely because he received the challenged calls on his cellphone.'); *Lyman v. Quinstreet, Inc.*, No. 23-CV-05056-PCP, 2024 U.S. Dist. LEXIS 123132, 2024 WL 3406992, at *4 (N.D. Cal. July 12, 2024) ('the statutory text does not support [Defendant's] position, and instead is best read to include at least some cellular phone subscribers within the category of *residential telephone subscribers*')." *See Lirones v. Leaf Home Water Sols., LLC*, No. 5:23-cv-02087, 2024 U.S. Dist. LEXIS 165900, at *14-19 (N.D. Ohio Sep. 16, 2024); *Hudson v. Palm Beach Tan, Inc.*, No. 1:23CV486(WO)(JEP), 2024 U.S. Dist. LEXIS 165676, at *11 (M.D.N.C. Aug. 12, 2024) ("Third, this approach is

consistent with the applicable regulatory provisions and FCC interpretation. In this regard, the statutory language of 47 U.S.C. § 227 does not explicitly preclude a cell phone from being considered a 'residential telephone.' … Further, the private right of action created under 47 U.S.C. § 227(c)(5) of the TCPA is premised on a 'violation of the regulations prescribed under this subsection.' As relevant here, subsections (c)(2) and (d) of those regulations prohibit an entity from calling a person on the national Do-Not-Call registry or on the entity's internal do-not-call list, respectively. Those same regulations also unambiguously state that the rules set forth in these subsections 'are applicable to any person or entity making telephone solicitations or telemarketing calls to wireless telephone numbers to the extent described in the Commission's Report and Order, CG Docket No. 02-278, FCC 03-153, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*.' 47 C.F.R. § 64.1200(e).").

This is because the TCPA's National Do Not Call Registry provision "provides protections to a certain type of phone user, regardless of the technology." *Lirones*, 2024 U.S. Dist. LEXIS 165900, at *14-19; *Jackson v. Direct Bldg. Supplies LLC*, No. 4:23-CV-01569, 2024 WL 184449, at *5 (M.D. Pa. Jan. 17, 2024) ("The best reading of the word 'residential' is not that it modifies the 'telephone,' but rather that 'residential' and 'telephone' both modify the 'subscriber.' So instead of describing a 'subscriber' who owns a 'residential telephone,' Section 227(c)(1)

describes a 'telephone subscriber' who has subscribed for 'residential,' i.e., personal, purposes. 'Residential' is therefore used in the broader sense of 'relating to a resident' to distinguish such a subscriber from a business or commercial telephone subscriber, who cannot be added to the Do Not Call registry.").

"Cellular telephones . . . are a kind of telephonic communications technology. A 'residential subscriber,' by contrast, does not refer to the specific phone technology, but to the type or identity of the subscriber to the technology. Thus, a 'residential subscriber' and a cellular telephone are not members of the same genus." *Lirones*, 2024 U.S. Dist. LEXIS 165900, at *14-19.

"The inclusion of the term 'cellular telephone' in § 227(b) and its exclusion from § 227(c) does not indicate that Congress intentionally omitted cellular telephones from § 227(c)'s protections; 'Had Congress wished to limit section 227(c) to specified telephone technologies rather than specified telephone subscribers, it would have indicated somewhere in that section that the [Do Not Call] registry is limited to a *residential telephone* ***line***, as Congress used that term in the preceding subsection.'" *Id*. "If the term *residential* referred to the telephone technology, then 'Congress's reference to a residential telephone *line* [in § 227(b)] would be surplusage, as a residential telephone would necessarily be a landline instead of a cellphone.'" *Id*.; *cf. Morgan v. U.S. Xpress, Inc.*, No. 3:17-cv-00085, 2018 U.S. Dist. LEXIS 125001, at *3-9 (W.D. Va. July 25, 2018) [cited in

Defendant's motion] (finding that under § 227(b)(1), "the structure and language of the TCPA demonstrate that calls made to a cell phone are not calls made to a 'residential telephone line'").

"Furthermore, according to the TCPA's plain language and dictionary definitions of 'residence' and 'subscriber,' 'a residential subscriber is one who maintains a phone for residential purposes . . . i.e., for personal activities associated with his or her private, domestic life.'" *Lirones*, 2024 U.S. Dist. LEXIS 165900, at *14-19.

Accordingly, "based on the text of the statute and tools of statutory interpretation, the Court [should] reach the same conclusion in the absence of any FCC interpretation of the term 'residential subscriber'—that Plaintiff McGonigle's allegations supporting the conclusion that he is a residential subscriber of his cellular telephone number "satisfy both the plain text of the TCPA and the FCC's regulations". *Id*.

As one Court put it, addressing a similar motion: "even if the FCC's ruling is not entitled to deference, an independent analysis reveals that the agency got it right." *Abboud v. Lotta Dough, LLC*, No. 1:24-CV-00482-JRN, 2025 U.S. Dist. LEXIS 35547, *3 (W.D. Tex. Feb. 27, 2025). This Court can—and should—follow suit.

Indeed, every court to address this issue after the Supreme Court's ruling in *McLaughlin Chiropractic Assocs., Inc. v. McKesson Corp.*, 145 S. Ct. 2006 (2025), has reached the exact same conclusion—that cellular telephone numbers are protected under the TCPA's National Do Not Call Registry provision—including in the Eleventh Circuit:

> Defendant's interpretation of a residential subscriber ignores the fact that "residential" modifies "subscriber," meaning that the definition is tethered to a type of person rather than a type of technology. And although Defendant points out that Congress has occasionally used the term "cellular telephone service" and could have done so here if it intended for the TCPA to cover cell phones, Defendant overlooks the fact that Congress has also used the term "residential telephone line" elsewhere in the TCPA. Put differently, Congress has sometimes limited the scope of the TCPA to specific types of phone lines, but, in this case, has limited the TCPA only to a particular type of subscriber. Thus, Defendant's argument is misplaced.
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> Further, while not determinative, the Court also notes that Plaintiff's interpretation of "residential subscriber" comports with the overall purpose of the TCPA. As the Eleventh Circuit has observed, the TCPA is designed to protect residential privacy, a government interest articulated in the legislative history of the Act. Regardless of whether a person receives a call to their home phone or a personal cell phone, the negative impact to their residential privacy remains the same. Defendant's interpretation of the TCPA would yield strange results, protecting the privacy interests of a landline subscriber but not a cell phone subscriber—even when the cell phone is the sole phone for home use, as is increasingly the case. In other words, Defendant's interpretation would tie residential privacy interests to an obsolete and disappearing phone technology. Thus, Plaintiff's interpretation of the TCPA aligns with both the plain text and the objectives of the TCPA.

Isaacs v. USHealth Advisors, LLC, No. 3:24-cv-00216-LMM, 2025 U.S. Dist. LEXIS 152625, at *7-9 (N.D. Ga. Aug. 7, 2025) (cleaned up); *Ferrell v. Colourpop*

Cosmetics, LLC, No. 2:25-cv-01324, 2025 U.S. Dist. LEXIS 140893, at *16-17 (C.D. Cal. July 22, 2025) ("In 1991, when the TCPA was enacted, Webster's Dictionary defined 'residential' as 'used as a residence or by residents.' *See Wilson v. Hard Eight Nutrition LLC*, No. 6:25-cv-00144-AA, 2025 U.S. Dist. LEXIS 122504, 2025 WL 1784815, at *5 (D. Or. June 27, 2025) (quoting Residential, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY). In the context of the statute, the word 'residential' modifies the phrase 'telephone subscribers,' requiring courts to look to whether the telephone subscription is for 'residential' use in the home, or for another purpose, such as business. This distinction between 'residential subscribers' and 'business subscribers' is the same one drawn elsewhere in the statute. *See* 47 U.S.C. § 227(a)(2)(A). Thus, the term 'residential telephone subscribers' can be understood to refer to 'individuals, subscribers, who make regular payments to use telephone service at home, that is, people who use a telephone for a personal or private purpose.' *Wilson*, 2025 U.S. Dist. LEXIS 122504, 2025 WL 1784815, at *5. Under the plain language of the statute, it is the use of the phone, not the technology underlying the phone, that determines whether the phone qualifies for protection. This interpretation is consistent with the statutory focus on 'privacy rights,' because the intrusion on telephone subscribers' privacy would be the same when a call is made to any personal phone used in the home, whether

wireline or wireless. The congressional purpose in enacting the TCPA also supports this construction.").

The Supreme Court and Circuit Court cases Defendant cites do not support a different conclusion. In fact, none of those cases addressed the statutory interpretation question present here.

For example, in *Facebook, Inc. v. Duguid* did the Supreme Court reference 47 C.F.R. § 64.1200(c)(2) or 47 U.S.C. § 227(c)(5), or use the word "residential" even in passing. *See* 592 U.S. 395 (2021). Considering the Court's holding—"that a necessary feature of an autodialer under § 227(a)(1)(A) is the capacity to use a random or sequential number generator to either store or produce phone numbers to be called," *id*. at 409—it had no reason to.

Similarly, nowhere in *Osorio v. State Farm Bank, F.S.B.* or *Breslow v. Wells Fargo Bank, N.A.* did the Eleventh Circuit reference 47 C.F.R. § 64.1200(c)(2) or 47 U.S.C. § 227(c)(5). *See* 746 F.3d 1242 (11th Cir. 2014); 755 F.3d 1265 (11th Cir. 2014). Again, the respective holdings did not require as much. *See Osorio*, 746 F.3d at 1252 ("We accordingly reject State Farm's argument that the 'intended recipient' is the 'called party' referred to in 47 U.S.C. § 227(b)(1)(A)."); *Breslow*, 755 F.3d at 1267 ("Because Breslow, the subscriber to the cell phone service, did not consent to Wells Fargo's calling via audial system, she is entitled to partial summary judgment.").

As well, the Third Circuit in *Gager v. Dell Fin. Servs., LLC* did not reference 47 C.F.R. § 64.1200(c)(2) or 47 U.S.C. § 227(c)(5). *See* 727 F.3d 265 (3d Cir. 2013). Once more, it had no reason to, as it was "asked to resolve two issues . . . : (1) whether the TCPA allows a consumer to revoke her "prior express consent" to be contacted via an automated telephone dialing system on her cellular phone and (2) if a revocation right exists, whether there is a temporal limitation on that right." 727 F.3d at 268.

Considering as much, the language from *Facebook*, *Osorio*, *Breslow*, and *Gager* on which Defendant relies is, at best, *dicta*, because it goes "beyond the facts of the case." *Edwards v. Prime, Inc.,* 602 F.3d 1276, 1298 (11th Cir. 2010). "And *dicta* is not binding on anyone for any purpose." *Id*. Stated otherwise, "what is said in a prior opinion about a question not presented there is *dicta*, and *dicta* is not binding precedent[.]" *Id*. (citing *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller,* 957 F.2d 1575, 1578 (11th Cir. 1992). Consequently, any contention Defendant sets forth regarding 47 C.F.R. § 64.1200(c)(2) or 47 U.S.C. § 227(c)(5), based on decisions that have nothing to do with those provisions, carries very little, if any weight.

And the district court cases Defendant relies on are generally inapplicable for the same reason—because they addressed different language in a different part of the TCPA (the robocalls provision) that is not at issue in this case. *See, e.g., Morris*

v. Lincare, Inc., No. 8:22-cv-2048-CEH-AAS, 2023 U.S. Dist. LEXIS 145522, at *10 (M.D. Fla. Aug. 18, 2023) ("[C]alls to a cell phone that are violative of the TCPA are addressed under § 227(b)(1)(A)(iii), whereas calls to a residential line are properly brought in a separate count under § 227(b)(1)(B)."); *Morgan v. U.S. Xpress, Inc.*, No. 3:17-cv-00085, 2018 U.S. Dist. LEXIS 125001, at *3-9 (W.D. Va. July 25, 2018) (finding that for a claim under the TCPA's robocalls provision, "the structure and language of the TCPA demonstrate that calls made to a cell phone are not calls made to a 'residential telephone line'"); *see also Hudson v. Palm Beach Tan, Inc.*, No. 1:23CV486(WO)(JEP), 2024 U.S. Dist. LEXIS 165676, at *8 (M.D.N.C. Aug. 12, 2024) (denying motion to dismiss and rejecting the defendant's reliance on the cases Defendant cites here, *Gaker v. Q3M Ins. Sols.,* No. 3:22-CV-00296-RJC-DSC, 2023 U.S. Dist. LEXIS 44919 (W.D.N.C. Feb. 7, 2023), and *Morgan v. U.S. Xpress, Inc.*, No. 3:17-cv-00085, 2018 U.S. Dist. LEXIS 125001, 2018 WL 3580775, at *1 (W.D. Va. July 25, 2018), because the reasoning in those cases did "not provide a sufficient basis to reject the weight of authority" finding that cellular telephones are protected by the TCPA's National Do Not Call Registry provision).

Ultimately, the Supreme Court's ruling in *McLaughlin Chiropractic* does not impact the Plaintiff's arguments, which are all based on the plain text of the statute and regulations promulgated pursuant to an express grant of Congressional

authority. *See Seven Cty. Infrastructure Coal. v. Eagle Cty.*, 145 S. Ct. 1497 (2025) ("But when an agency exercises discretion granted by a statute, judicial review is typically conducted under the Administrative Procedure Act's deferential arbitrary-and-capricious standard. Under that standard, a court asks not whether it agrees with the agency decision, but rather only whether the agency action was reasonable and reasonably explained."); *Chennette v. Porch.Com, Inc.*, 50 F.4th 1217, 1223 (9th Cir. 2022) ("Section 227(c) of the TCPA directs the FCC to promulgate regulations under which 'residential subscribers' may request that their telephone numbers be included in a national do-not-call registry and database, and to prohibit telephone solicitation to 'any subscriber included in such database.' 47 U.S.C. § 227(c)(3)(F). … FCC regulations protecting residential subscribers 'are applicable to any person or entity making telephone solicitations or telemarketing calls to *wireless* telephone numbers ….' 47 C.F.R. § 64.1200(e) (emphasis added). In the view of the FCC, … 'it is more consistent with the overall intent of the TCPA to allow wireless subscribers to benefit from the full range of TCPA protections,' and 'wireless subscribers often use their wireless phones in the same manner in which they use their residential wireline phones.'").

The Court should therefore deny Defendant Bealls' motion to dismiss.

Dated: August 11, 2025

Respectfully submitted,

/s/ Avi R. Kaufman

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 11, 2025, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, and it is being served this day on all counsel of record via transmission of Notice of Electronic Filing generated by CM/ECF.

/s/ Avi R. Kaufman