No. 26-1537

In the United States Court of Appeals for the Fourth Circuit

DEBORAH BRADLEY,
individually and on behalf of all others similarly situated,
Plaintiff-Appellant,

v.

DENTALPLANS.COM; CIGNA HEALTH AND LIFE INSURANCE COMPANY,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Maryland

REDACTED OPENING BRIEF OF APPELLANT

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RULE 26.1 DISCLOSURE

No publicly held corporation has a direct financial interest in this litigation by reason of a franchise, lease, or other profit-sharing agreement, insurance, or indemnity agreement.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Administrative decisions

Other authorities

INTRODUCTION

"Americans passionately disagree about many things. But they are largely united in their disdain for robocalls." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 613 (2020). Deborah Bradley agrees. She purchased a one-year subscription from DentalPlans.com that would supposedly help her save on dental procedures. When signing up, DentalPlans asked her if it could send her prerecorded calls "to keep [her] updated with any plan information." She agreed that it could, as long as the calls were to keep her informed about her one-year subscription. A year later, frustrated with a subscription that proved to be so worthless she never used it, she chose to let her subscription lapse. That should have ended the calls. Instead, DentalPlans began calling her more than ever. Over the two months after her plan expired, DentalPlans placed ten prerecorded calls to Ms. Bradley—more than it had made during the entire year she was a customer—each urging her to buy a new plan she had already made clear she did not want. Ms. Bradley was one of tens of thousands of former customers DentalPlans robocalled the same way, sending more than 50,000 "winback" calls to people who had ended their subscription.

This is the abuse Congress enacted the Telephone Consumer Protection Act ("TCPA") to stop: unwanted, automated solicitations pressing consumers to buy products they never asked for. Congress prohibited such calls absent the consumer's "prior express consent," 47 U.S.C. § 227(b)(1)(A). But it didn't stop there. Recognizing that a bare consent requirement means little without a means to enforce it, Congress also directed the Federal Communications Commission ("FCC") to "prescribe regulations to implement" that requirement, *id.* § 227(b)(2). The FCC—which fields tens of thousands of robocall complaints and had watched its earlier, more permissive rules fail to stem them—did just that. It put in place a carefully calibrated set of procedures that required telemarketers to actually obtain and document a consumer's consent by, among other things, putting it in writing. And it kept that requirement flexible. Conscious of how modern technology has evolved, it told telemarketers that in writing did not always mean written in the traditional sense: email, text, a keypress, or even a voice recording could sometimes do.

In *Loper Bright Enterprises v. Raimondo*, the Supreme Court reaffirmed that Congress could "delegate[] discretionary authority to an agency" like the FCC to implement statutes in this way. 603 U.S. 369, 395 (2024). But the district court invalidated the rule anyway. According to the court below, because Congress did not specify whether prior express consent could be oral or written, the FCC could not either. But that turns Congress's delegation to the FCC on its head. It is precisely because Congress did not specify how consent should be obtained that the FCC, using its discretionary authority and reasoned experience, could do so.

Setting aside its decision on the FCC's written-consent rule, the district court erred for a second, independent reason. It held that Ms. Bradley consented to DentalPlans's winback calls because once she consented to receive some robocalls, while her plan was ongoing, she had consented to receive any robocall, even after her plan had expired. But consent has never worked that way, under the TCPA or the common-law principles it incorporates. Consent is specific to the context in which it is given. Here, Ms. Bradley, like thousands of former DentalPlans customers, consented to receive information from DentalPlans about her plan, for as long as she held it—not to a sales pitch for a new plan after she had terminated her relationship with DentalPlans.

"It would be dispiriting beyond belief if courts defeated Congress' obvious attempt to vindicate the public interest with interpretations that ignored the purpose, text, and structure of this Act at the behest of those whose abusive practices the legislative branch had meant to curb." *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 663 (4th Cir. 2019). Because the court below, at the behest of one such telemarketer, ignored what the TCPA actually requires, this Court should reverse.

JURISDICTIONAL STATEMENT

The district court had federal-question jurisdiction over Ms. Bradley's TCPA claims. 28 U.S.C. § 1331. The court entered its final judgment on April 3, 2026. JA26. Ms. Bradley timely appealed on April 28, 2026. JA44 (ECF 189). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. In the TCPA, Congress directed the FCC to "prescribe regulations to implement" the Act's requirement that consumers not receive robocalls

without their "prior express consent." 47 U.S.C. § 227(b)(1)(A), (b)(2). In response, the FCC required telemarketers to demonstrate they had obtained consumers' express consent by, among other things, documenting it in writing. 47 C.F.R. § 64.1200(a)(2) (2026). Did the FCC reasonably act within its delegated authority by implementing such a written-consent requirement?

2. Whether a consumer's limited consent to receive informational robocalls about a subscription she purchased constitutes prior express consent, under the TCPA, to receive telemarketing robocalls after that subscription ends?

STATEMENT OF THE CASE

A. Legal Background

Congress enacted the TCPA in 1991 in response to "growing public criticism of abusive telephone marketing practices." *Krakauer*, 925 F.3d at 649. Though noting that "[u]nrestricted telemarketing," in particular, is "an intrusive invasion of privacy," TCPA, Pub. L. No. 102-243, § 2(5), 105 Stat. 2394 (1991), Congress concluded that all automated calls were a "nuisance," *id.* § 2(10). For that reason, the Act 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). Violators can be sued for statutory damages, which are trebled for willful or knowing violations. *Id.* § 227(b)(3).

But Congress did not specify how to obtain and document consumers' "prior express consent." It certainly knew how to specify which forms consent could take. In a different subsection, for example, it prohibited "unsolicited advertisement[s]," 47 U.S.C. § 227(b)(1)(C), a term it defined to exclude material sent with the recipient's "prior express invitation or permission, in writing or otherwise," *id.* § 227(a)(5).

Instead, it directed the FCC, the agency it charged with the Act's enforcement, to fill up the details of the prior express consent requirement. It provided that "[t]he Commission shall prescribe regulations to implement the requirements of this subsection." 47 U.S.C. § 227(b)(2). And it gave the FCC discretion to calibrate those regulations to the intrusiveness of the call: the Commission, for example, "may, by rule or order, exempt from the requirements" of the TCPA's robocall provisions calls "that are not made for a commercial purpose," *id.* § 227(b)(2)(B)(i), reflecting Congress's finding that "most unwanted telephone solicitations are commercial in nature" while "noncommercial calls . . . are less intrusive to consumers because they are more expected," H.R. Rep. No. 102-317, at 16 (1991).

Exercising that delegated authority, the FCC first adopted rules permitting telemarketers to obtain prior express consent orally or in writing. *See In re Rules & Regs. Implementing the TCPA of 1991*, 20 FCC Rcd. 3788, 3804-05 & n.126 (2005). But that proved ineffectual. Consumers continued to complain, in droves, that they were receiving unwanted telemarketing calls.

In 2012, the FCC revised its regulation to require prior express written consent for prerecorded telemarketing calls. *In re Rules & Regs. Implementing the TCPA*, 27 FCC Rcd. 1830, 1831 (2012). It gave three reasons. First, the Do-Not-Call Implementation Act of 2003 (DNCIA) had directed the FCC, in issuing its TCPA rules, to "maximize consistency" with the Federal Trade Commission's parallel telemarketing rule, 15 U.S.C. § 6153. By 2012, the FTC had already enacted its own rule requiring many telemarketers to obtain written consent. 16 C.F.R. § 310.4(b)(1)(v)(A) (2024). Following suit, the FCC adopted many of the FTC rule's particulars, *see* 27 FCC Rcd. at 1843-44. Second, the writing requirement drew on the discretion Congress gave the FCC both to: "determine, consistent with Congressional intent, the form of express consent required" because the TCPA itself was "silent" on "what form of express consent—oral, written, or some other kind" was required, *id.* at 1838, and to treat commercial calls more strictly than others, *see id.* at 1833 (noting that the TCPA allows the FCC to exempt "calls not made for a commercial purpose"). For that reason, the rule reaches only calls that "include[] or introduce[] an advertisement or constitute[] telemarketing," 47 C.F.R. § 64.1200(a)(2)–(3), while informational calls remain governed by the prior, more permissive standard, *id.* § 64.1200(a)(1); 27 FCC Rcd. at 1841. Third, the FCC concluded from its experience that written consent was necessary to make the statute work: its earlier rules had left telemarketers "fail[ing] to secure the appropriate consent," so that consumers "continue[d] to experience frustration in receiving unwanted telemarketing robocalls." 27 FCC Rcd. at 1839. Requiring "permission in writing," it found, would furnish "unambiguous proof of consent" and guard against callers treating a consumer's agreement to calls "for a limited purpose" as consent to telemarketing. 27 FCC Rcd. at 1839-40.

But the FCC kept its written-consent requirement flexible enough to respond to modern technology. "Prior express written consent," it wrote, means "an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver . . . advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice," together with a "clear and conspicuous disclosure" that the consumer need not agree as a condition of purchase. 47 C.F.R. § 64.1200(f)(9), (f)(9)(i). But in writing, the FCC noted, does not always mean written in the traditional sense: A consumer's "signature" may be "electronic or digital," *id.* § 64.1200(f)(9)(ii), and so long as the telemarketer complies with the disclosure requirements of the E-SIGN Act, 15 U.S.C. § 7001(a), consent may be obtained "using any medium or format permitted by the E-SIGN Act . . . including permission obtained via an email, website form, text message, telephone keypress, or voice recording," 27 FCC Rcd. at 1844.

B. Factual Background

DentalPlans operates a "direct-to-consumer marketplace" that sells dental savings plans, which give subscribers discounts on dental treatment. JA64. One of those plans is provided by Cigna Health and Life Insurance Company. *Id.*

Subscriptions are sold largely over the phone. When a prospective customer calls in to enroll in a dental savings plan, DentalPlans representatives follow a standardized script to [redacted] JA101. The script starts by asking for the caller's number for a stated, limited reason: [redacted] JA106. If the caller gives a mobile number, the representative follows up by asking if she would "like to receive plan updates and promotions via text message?" JA64. The script then, separately, asks the prospective customer if DentalPlans may "contact [them] using an automatic telephonic dialing system and/or prerecorded message," while informing the prospective customer that they "not required to agree as a condition of purchasing any products and or services." JA64.

This is DentalPlans's entire script for obtaining consent to send robocalls. JA64-65. It is read to new customers, not former ones. And it is made in the context of establishing an ongoing subscription, not a previously terminated one.

For customers that opt in, DentalPlans uses robocalls to send them information about their active plan. DentalPlans, for example, calls every existing customer that chooses not to automatically renew her subscription that her plan is about to expire. JA65. But DentalPlans's use of robocalls does not end there.

When a current customer cancels her dental savings plan or allows it to lapse, DentalPlans begins to use robocalls for a different purpose. To "win back" the business of a former customer, DentalPlans sends prerecorded calls to sell her a "new product"—"a second subscription to a plan she chose not to renew." JA65, 73. These "winback" calls are a significant part of DentalPlans's telemarketing business; it placed more than 50,000 such robocalls to former customers during the relevant class period. JA65-66.

That is what happened to Deborah Bradley. In November 2018, she called DentalPlans to sign up for a dental savings plan. JA64. When asked if she wanted to receive prerecorded voice messages, Ms. Bradley asked the representative to clarify what the company understood that consent to entail. JA65, JA112.

> [redacted]
>
> **Representative:** [redacted] to keep you updated with any plan information.

With that confirmation—that DentalPlans would only be robocalling her to keep her informed about her plan—Ms. Bradley consented. She then paid for a dental savings plan with Cigna, set to start December 2018 and expire one year later with no automatic renewal. JA64-65.

The next time she spoke to DentalPlans was in September 2019. JA65. Ms. Bradley contacted DentalPlans to ask about her plan's coverage. *Id.* During that call, she confirmed with the representative that she did not want her plan to auto-renew. *Id.* DentalPlans then told her they would notify her before her plan expired. *Id.* This was the last time Ms. Bradley spoke to any live person at DentalPlans. *Id.*

As the expiration date approached, DentalPlans placed prerecorded calls to inform Ms. Bradley that her plan was ending and could be renewed. *Id.* Frustrated with the plan, which she never used because it did not, in fact, offer meaningful dental savings, Ms. Bradley chose not to renew and ignored these calls. *Id.* Her plan expired in December 2019. *Id.*

After her plan expired, DentalPlans began to spam Ms. Bradley with prerecorded messages urging her to purchase a new plan. *Id.* Take one typical call:

> Renew your plan today and get 25% off when you mention the special code "Secret 25." This offer won't last long so please call our DP at your service team back at 1-844-371-2316 between the hours of 8:30 a.m. and 10:00 p.m. Eastern Standard Time. Again, don't forget to mention the code "Secret25" to get your special 25% discount. Thank you and we look forward to speaking with you soon.

JA47. She received ten of these winback calls between December 2019 and February 2020, when the calls stopped. JA65. In other words, DentalPlans sent her robocalls more times in the two months after her plan expired and her relationship with DentalPlans ended, urging her to purchase a new plan, than she had during the entire year when her subscription was operative. Seeking to put an end to calls for a new subscription she had made clear she did not want, Ms. Bradley filed suit. JA66.

C. Procedural Background

1. Ms. Bradley brought a class action alleging that DentalPlans, on behalf of Cigna and other insurers, sent her and a class of other former customers prerecorded telemarketing calls without their consent in violation of § 227(b)(3) of the TCPA. JA45-58. Though she also initially brought a second claim under the TCPA's do-not-call-list provisions, she later abandoned it and the district court dismissed it with prejudice. JA66 n.3.

2. Following discovery, the parties filed cross-motions. Ms. Bradley moved to certify a class of DentalPlans's former customers generally (and a sub-class of its previous Cigna customers in particular) who had not given their prior express consent, written or otherwise, to receive its winback calls following a scripted conversation with DentalPlans. JA82. DentalPlans moved for summary judgment, arguing that Ms. Bradley lacked standing and, in any case, had provided prior express written consent to DentalPlans's winback calls consistent with FCC regulations. JA70, JA71.

The district court initially granted class certification and denied summary judgment. JA95. It first held, relying on this Court's decision in *Krakauer*, that "receipt of unwanted telemarketing calls prohibited under the TCPA was unambiguously sufficient to constitute an injury for Article III standing." JA71. Turning to consent, the court started by noting that the parties agreed here that consent was an affirmative defense under the TCPA that DentalPlans had to prove. JA72 n.5. Because DentalPlans's winback calls were "intended to sell" Ms. Bradley "a new product"—"a second subscription to a plan she chose not to renew"—the court below found they constituted telemarketing for which the FCC required written consent. JA73. But, the court continued, the FCC does not always require written consent to be in writing in the traditional sense. JA76. An agreement under the E-SIGN Act is "in writing" even if it is made via "voice recording" as long as the disclosures required by the E-SIGN Act are actually made in writing. JA76-77. But because, according to the court below, DentalPlans had not provided Ms. Bradley and other former customers with the written disclosures necessary to make their voice recordings operate as a written signature under the E-SIGN Act, they could not have given valid consent. JA81. In any case, the court alternatively concluded that there was a genuine dispute of material fact as to whether Ms. Bradley intended for her voice recording to function as a valid signature as required by the E-SIGN Act. JA81-82. Finally, the court held that the requirements of Fed. R. Civ. P. 23 were met, rejecting DentalPlans's "conclusory" argument that an arbitration clause included in the terms of service for its subscriptions continued to apply after those subscriptions had lapsed. JA83.

3. While this case was pending, the U.S. Supreme Court decided *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), and *McLaughlin Chiropractic Associates, Inc. v. McKesson Corp.*, 606 U.S. 146 (2025). DentalPlans moved for reconsideration and decertification, arguing in response to those decisions the district court was required to ignore the FCC's reasoned judgment of how to best implement the TCPA's "prior express consent" requirement. JA6. Ms. Bradley countered that, because Congress had delegated to the FCC the authority to ensure that consumers are not spammed with unwanted robocalls by mandating it both "implement" the "prior express consent" requirement in the TCPA and "maximize consistency" with the FTC's analogous telemarketing rule in the DNCIA, the best reading of both statutes is that they delegate discretionary authority to the FCC. *Id*. And, in any case, because DentalPlans never asked consumers during its scripted conversations if they wanted to receive telemarketing calls after cancelling or allowing their previous plan to lapse, Ms. Bradley argued that she could not have given her prior express consent. JA6-7.

On March 20, 2026, the district court granted DentalPlans's motion for reconsideration, granting summary judgment and decertifying the class. JA25. The court below recognized that Congress had "delegat[ed] authority to the FCC" to implement the TCPA's requirements. JA11. It acknowledged that the FCC had implemented a written consent requirement after the FTC did so, in response to Congress's mandate in the DNCIA that the FCC "maximize consistency" between their overlapping rules. JA15. And it agreed that the FCC's rule was "eminently reasonable." JA17. Despite this, the district court found that the FCC lacked the authority to impose a written consent requirement. JA17.

To start, the district court noted that two out-of-circuit decisions, *Insurance Marketing Coalition Ltd. v. FCC*, 127 F.4th 303 (11th Cir. 2025), and *Bradford v. Sovereign Pest Control of Texas, Inc.*, 167 F.4th 809 (5th Cir. 2026), had "discussed the FCC's authority to interpret 'prior express consent' in the wake of *Loper Bright*." JA11. Taking its cues from those decisions and from what it described as "relevant Fourth Circuit guidance underscoring the importance that a delegation of authority to an agency specifically authorize both the implementation *and* interpretation of statutory terms," the district court concluded that the FCC did not have the authority to interpret the meaning of "prior express consent" under the TCPA. JA17. Instead, it found, "[b]ecause Congress has required only prior express consent, not prior express *written* consent, that is all that is required to overcome an alleged TCPA violation." JA18.

The district court also determined that Ms. Bradley had given DentalPlans her express consent to receive winback calls after her subscription ended. JA22. According to the court, because Ms. Bradley had consented to receiving some robocalls from DentalPlans—specifically ones that would keep her "updated" about her "plan" when she first purchased it—she had consented to receiving any robocall from DentalPlans—including those attempting to sell her a "new product" for a service she "chose not to renew." JA18-22, 73.

Finally, the court below concluded that "[c]lass certification is not appropriate when summary judgment is granted to the defendant." JA23. Because it granted DentalPlans summary judgment, the district court concluded it had to decertify the class as well. *Id.*

On April 3, 2026, the district court entered judgment on behalf of DentalPlans and Cigna. JA26. Ms. Bradley timely appealed.

SUMMARY OF ARGUMENT

This Court should reverse the order below for two independent reasons. First, the FCC's regulation reasonably implemented, rather than unlawfully redefined, the TCPA's prior express consent requirement. Because the FCC acted pursuant to its discretionary delegated authority, this Court should respect that delegation. Second, and in any case, DentalPlans never obtained prior express consent from its former customers to spam them with telemarketing after their subscriptions had expired.

I.A. In *Loper Bright*, the U.S. Supreme Court announced the "unremarkable, yet elemental proposition" that in agency cases involving questions of statutory interpretation, it is up to the courts to independently determine the statute's best meaning. 603 U.S. at 391. But it also confirmed that, sometimes, "the best reading of the statute is that it delegates discretionary authority to an agency." *Id.* at 395. When a statute does so, courts must "respect such delegations of authority" by giving deference to agencies' "reasoned decisionmaking" that stays within "the boundaries of the delegated authority." *Id.* at 404 (internal citation and quotations omitted).

I.B. The TCPA includes such a delegation: It prohibits robocalls without "prior express consent," 47 U.S.C. § 227(b)(1)(A), but directs the FCC to "prescribe regulations to implement" that desired result, *id.* § 227(b)(2). This "delegation is a fill-up-the-details delegation." *Lesko v. United States*, 161 F.4th 1352, 1360 (Fed. Cir. 2025) (en banc). And its charge to "implement" the statute tells the FCC to "ensure by concrete measures that" the statute's desired end result—prior express consent—"[is] actually fulfilled." *City & Cnty. of San Francisco v. EPA*, 604 U.S. 334, 347 (2025) (citation modified). The FCC did just that: It reasonably exercised its delegated authority to ensure telemarketers actually obtain consumers' prior express consent by requiring them to document that consent in writing.

I.C. The district court nevertheless invalidated the rule. It decided that because "prior express consent" could be either oral or written, the FCC cannot use its delegated discretion to require it be written. That is wrong—by directing the FCC to "implement" "prior express consent," Congress gave the agency exactly the discretionary authority to decide what form consent should take for telemarketing calls.

II. Even if this Court disagrees that the FCC's written-consent requirement was a reasonable exercise of its delegated discretion, it should reverse for an independent reason: DentalPlans never obtained prior express consent from Ms. Bradley, or thousands of its former customers, to send them winback calls. The consent DentalPlans obtained through its sales script was, under the well-settled common law principles the TCPA incorporates, limited to prerecorded calls about the plan Ms. Bradley first purchased and expired when her plan did. DentalPlans's own representative confirmed this—the consent was, Ms. Bradley was told, "to keep [her] updated with any plan information." JA2.

The district court held, instead, that Ms. Bradley's consent to receive some robocalls while her plan was in effect was consent to receive any robocall even after her subscription—and her relationship with DentalPlans—had ended. But that is not how consent has ever worked, under either the common law or the TCPA.

STANDARD OF REVIEW

This Court "review[s] the district court's grant of summary judgment *de novo*, applying the same standards" as the court below and therefore "constru[ing] all facts and reasonable inferences in the light most favorable to the nonmoving party." *Wannamaker-Amos v. Purem Novi, Inc.*, 126 F.4th 244, 254 (4th Cir. 2025) (citation modified).

ARGUMENT

I. The FCC acted reasonably pursuant to its delegated discretionary authority to implement a written-consent requirement for telemarketers.

The district court held the FCC's regulation invalid on a single premise: Because the TCPA requires "prior express consent," the Act prohibits the agency from specifying how that consent is obtained. But that ignores the text and structure of the statute Congress enacted. Congress did not simply say "prior express consent" is required and leave it there. It instead expressly directed the FCC to "prescribe regulations to implement" this provision by, for example, treating "calls that are . . . made for a commercial purpose" more strictly. 47 U.S.C. § 227(b)(2), (b)(2)(B)(i). And by mandating telemarketers obtain written consent, the FCC did just that. It used its "delegate[d] discretionary authority," *Loper Bright*, 603 U.S. at 395, to specify the concrete steps telemarketers need to take to obtain and prove consent, thereby ensuring that the TCPA actually "solve[s]" the "problem" for which it was enacted: To stop "repeated and unwanted telemarketing calls." *Krakauer*, 925 F.3d at 663 (citing S. Rep. No. 102-178, at 1-2 (1991)).

A. Consistent with *Loper Bright*, Congress can expressly delegate to an agency discretionary authority to implement a statutory term.

In *Loper Bright*, the Supreme Court reaffirmed that the best reading of a "statute's meaning may well be that the agency is authorized to exercise a degree of discretion." 603 U.S. at 394. When Congress expressly delegates discretionary authority to an agency, "courts must respect the delegation, while ensuring that the agency acts within it." *Id.* at 413. A court does so by "fixing the boundaries of the delegated authority, and ensuring the agency has engaged in reasoned decisionmaking within those boundaries." *Id.* at 395. But setting up reasonable boundaries does not mean forcing agencies to parrot a statute's terms—that would leave no room for agencies to reasonably exercise "Congress's specific delegation of authority." *United States v. Kokinda*, 146 F.4th 405, 418 (4th Cir. 2025).

Delegation comes in many flavors. Statutes can, for example, "expressly delegate to an agency authority to give meaning to a particular statutory term," "prescribe rules to fill up the details of a statutory scheme," or "regulate subject to the limits imposed by a term or phrase that leaves agencies with flexibility." *Loper Bright*, 603 U.S. at 394-95 (internal citations and quotations omitted). Directing an agency to "issue regulations implementing" a statutory term, for example, is a "quintessential example" of an express delegation under *Loper Bright*. *Sutherland v. Peterson's Oil Servs., Inc.*, 126 F.4th 728, 738 n.5 (1st Cir. 2025). Because there is "no ambiguity in th[ese] express and plain grants of authority," delegations such as these "do not implicate the very basis of *Loper Bright*: that courts cannot defer to an agency's interpretation of an ambiguous statute." *Cogdell v. Reliance Standard Life Ins. Co.*, 169 F.4th 238, 257 n.18 (4th Cir. 2026).

In sum, an agency can put a delegation to work by "prescrib[ing] regulations necessary for administering" a statute. *Lesko*, 161 F.4th at 1360. In doing so, it is not interpreting ambiguous statutory terms, and therefore usurping the judicial role, but rather implementing an express legislative directive, and thereby effectuating Congress's judgment. That distinction is central to *Loper Bright*. When an agency is acting pursuant to discretionary authority from Congress, *Loper Bright* confirms that its regulations merit deferential treatment. But when an agency is interpreting, or giving "meaning," to a statutory term, 603 U.S. at 400, courts "are not bound by the agency's interpretation," though they may be informed by it. *McLaughlin Chiropractic Assocs., Inc. v. McKesson Corp.*, 606 U.S. 146, 155 (2025). That is why an executive branch interpretation of a statute has the "power to persuade" but "lack[s]" the "power to control." *Loper Bright*, 603 U.S. at 402 (internal citation omitted).

B. The FCC's written-consent requirement is a reasonable exercise of its expressly delegated authority.

The FCC's regulation ensures that telemarketers actually obtain consumers' prior express consent by, among other things, documenting consent in writing. This is a lawful exercise of the authority delegated to it by Congress in the TCPA because it reasonably implements, rather than unlawfully reinterprets, its requirements. **1.** In the TCPA, Congress told the FCC to prescribe regulations to "implement," or give practical effect to, its prior express consent requirement. **2.** The FCC acted pursuant to that delegated authority when it specified how telemarketers can obtain and document the "prior express consent" the statute requires. **3.** Requiring written consent for commercial calls that, experience has proven, consumers find especially intrusive was a reasonable exercise of the FCC's delegated discretion. Because the FCC acted within the bounds of its express delegation, this Court should "respect th[at] delegation," not override it. *Loper Bright*, 603 U.S. at 413.

1. The text of the TCPA authorizes the FCC to give practical effect to the statute's requirements. As with all questions of statutory interpretation, this Court should "begin with an examination of the statute's plain text." *Broughman v. Carver*, 624 F.3d 670, 675 (4th Cir. 2010) (internal citation omitted). Subsection 227(b) prohibits sending prerecorded messages to consumers' cellphones without "the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A). It then directs the FCC to "prescribe regulations to implement the requirements of this subsection," including the prior-express-consent provision. *Id.* § 227(b)(2). The most "natural reading" of Subsection 227(b) "is that it authorizes" the FCC "to set rules" that robocallers "must follow in order to achieve a desired result, namely," ensuring robocalls are made only with prior express consent. *City and Cnty. of San Francisco*, 604 U.S. at 347. In that way, it is a paradigmatic example of the type of statute, under *Loper Bright*, that delegates discretionary authority to an agency to prescribe rules that "fill up the details" of a statutory scheme. *Loper Bright*, 603 U.S. at 395.

Start with "prior express consent." The requirement has three parts. "Prior" is simple: "[B]efore" or "earlier in time." Webster's Ninth New Collegiate Dictionary 936 (1983). Because "consent" is not defined in the statute but has an "accumulated settled meaning" under the "common law," courts presume "Congress meant to incorporate" its "established meaning." *Neder v. United States*, 527 U.S. 1, 21 (1999); *see also Lucoff v. Navient Sols., LLC*, 981 F.3d 1299, 1304 (11th Cir. 2020) (noting that courts "use common law principles to interpret whether a party gave—or revoked—their 'prior express consent' to receive calls under the TCPA"). According to the common law, "[c]onsent is willingness in fact for conduct to occur." Restatement (Second) of Torts § 892 (1979). It can generally be "manifested directly" or through "silence or inaction." *Id.*, cmt. b. But Congress specified that it had to be manifested directly under the TCPA: Consent must be "express," or "directly given, either viva voce or in writing," rather than implied. *Consent*, Black's Law Dictionary (6th ed. 1990). Through Subsection 227(b), then, Congress clarified that consumers had to be "willing[]" to receive robocalls and had to "manifest[]" that willingness "directly." But it did not specify whether that direct manifestation had to be obtained orally, in writing, or both; it left that detail unsaid.

Next is "implement." To "implement" means "to give practical effect to and ensure of actual fulfillment by concrete measures." *City and Cnty. of San Francisco*, 604 U.S. at 347 (citing Webster's Third New International Dictionary (1976)); *see also Implement,* Webster's Tenth Collegiate Dictionary (1993) (giving the same definition around the time the TCPA was enacted). Subsection 227(b) tells the FCC to "implement" prior express consent—"that is, to ensure by concrete measures that" prior express consent is actually obtained. *City and Cnty. of San Francisco*, 604 U.S. at 347. In other words, prior express consent is the "end result" desired; the FCC's implementation is the concrete plan for achieving that end result. *Id.* ("Such a directive simply states the desired result; it does not implement that result.”).

To summarize, then: The TCPA states that its goal is that consumers directly demonstrate their willingness to receive robocalls before those calls are sent and directs the FCC to give that goal practical effect. But it did not tell the FCC how to ensure robocallers obtain, document, and prove prior express consent; it left that to the FCC to determine.

2. That is where the FCC’s written-consent requirement steps in. The FCC’s written-consent requirement is an example of exactly the type of concrete measure Congress expected the FCC to put in place to fill up the details of what compliance with Subsection 227(b)’s consent requirement would look like. It requires that telemarketers obtain and document the consumer’s prior express consent as “an agreement, in writing, bearing the signature of the person called” that “clearly authorize[s]” delivery of “advertisements or telemarketing messages” by “an artificial or prerecorded voice” and identifies the number to which such calls may be made. 47 C.F.R. § 64.1200(f)(9). And to ensure the consent is knowing, the rule requires “a clear and conspicuous disclosure” that the agreement authorizes prerecorded telemarketing calls. *Id.* § 64.1200(f)(9)(i)(A). This regulation does not change the fact that prior express consent is the TCPA’s end goal; instead, it specifies the concrete measures that must be taken to ensure such consent is meaningfully achieved. That is implementation in its ordinary sense.

That is consistent with what the Federal Circuit's *en banc*, post-*Loper Bright* decision in *Lesko v. United States* did. 161 F.4th 1352 (Fed. Cir. 2025) (en banc). The statute there required that overtime pay for federal officials be "officially ordered and approved," 5 U.S.C. § 5542(a), and authorized the agency to "prescribe regulations . . . necessary for the administration of" the statute, *id.* § 5548(a). The resulting regulation provided that overtime could be approved "only in writing." 5 C.F.R. § 550.111(c) (2015). The Federal Circuit upheld the writing requirement as "a valid exercise of . . . congressionally delegated rulemaking authority." *Lesko*, 161 F.4th at 1358. Because the statute "provides no guidance as to the mechanics of th[e] process," and because the statutory phrase "can encompass written form, oral form, or both," the court reasoned that Congress's silence "clears the path for [the agency] to fill up the details." *Id.* at 1359-60.

Same here. *Lesko* confirms that just because "express consent" can be oral or written does not mean that it has to be both. An agency can "administer," or "implement" this requirement—terms *Lesko* uses interchangeably, *see id.* at 1356, 1360, 1362–63—by deciding which form consent must take. The authority to "administer" or "implement" equally creates "fill-up-the-details delegation[s]" conferring "discretionary authority to determine the formalities required." *Id.* at 1360.

Four features of the statutory structure within which the FCC operates confirm that the FCC's implementation of prior express consent is lawful. First, Congress recognized that the FCC "should have the flexibility to design different rules for those types of automated or prerecorded calls it finds are not considered a nuisance or an invasion of privacy, or for noncommercial calls." TCPA, Pub. L. No. 102-243 § 2(13), 105 Stat. 2394 (1991). That is because, Congress found, the "record suggest[ed] that most unwanted telephone solicitations are commercial in nature" and that "noncommercial calls . . . are less intrusive to consumers because they are more expected." H.R. Rep. No. 102-317, at 16 (1991). It enacted that common-sense finding into the TCPA. Subsection 227(b) enables the FCC to treat "calls made for a commercial purpose" more strictly than other kinds of robocalls. 47 U.S.C. § 227(b)(2)(B)(i). The regulation here tracks that distinction: It reasonably requires written consent for a prerecorded call "that includes or introduces an advertisement or constitutes telemarketing," 47 C.F.R. § 64.1200(a)(2)-(3), while permitting oral consent for an informational one, 27 FCC Rcd. 1830, 1841; *see* 47 C.F.R. § 64.1200(a)(1).

Second, when Congress wanted to specify the form that consent must take, it knew how to say so. The TCPA's fax provisions bar sending an "unsolicited advertisement," 47 U.S.C. § 227(b)(1)(C), but exempt faxes the recipient invited through "prior express invitation or permission." There, Congress spelled out the form that permission could take: "in writing or otherwise." *Id.* § 227(a)(5). The robocall provisions contain no such language. They require "prior express consent" and stop there. That contrast matters. If the phrase "prior express consent" already meant, on its own, that both oral and written consent must be accepted, then Congress's addition of "in writing or otherwise" in the fax provision would have been pointless—and courts do not read Congress to add words that do no work. *See Corley v. United States*, 556 U.S. 303, 314 (2009). The better reading is the opposite: because Congress addressed the form of consent expressly for faxes but left it unaddressed for robocalls, it left that choice to the agency it charged with implementing the statute.

Third, the written-consent requirement likewise tracks the text of the DNCIA. In that Act, Congress directed the FCC to "maximize consistency" with the FTC's own telemarketing rule—a rule that requires written consent for robocalls. 16 C.F.R. § 310.4(b)(1)(v)(A). The FCC did so by adopting many of that rule's particulars, including its "clear and conspicuous" disclosure and, of course, its written-consent requirement. 27 FCC Rcd. at 1843-44.

Finally, the FCC's regulation is flexible. It accepts any "electronic or digital" signature valid under state or federal law. *Id.* § 64.1200(f)(9)(ii). That means, under the federal E-SIGN Act, an agreement can be "in writing" even if it is not written. *See* 15 U.S.C. § 7001(a). The regulation permits telemarketers to obtain consent "using any medium or format permitted by the E-SIGN Act," including "via e-mail, website form, text message, telephone keypress, or voice recording," as long as it complies with the E-SIGN Act's disclosure requirements. 27 FCC Rcd. at 1844. In that way, it is more a requirement that prior express consent be documented and demonstrable, rather than that it be "written" in the traditional sense of the word.

3. And the FCC's written-consent requirement is a reasonable exercise of the discretion Congress delegated to it under Subsection 227(b). 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." *Seven Cnty. Infrastructure Coal. v. Eagle Cnty.*, 605 U.S. 168, 179-80 (2025) (citing *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)); *see also Loper Bright*, 603 U.S. at 395 (citing the same precedent for the applicable standard of review of regulations enacted pursuant to delegated discretionary authority).

The FCC's written-consent requirement is reasonable and reasonably explained. Its earlier, more permissive rules had not required written consent for telemarketing robocalls, *see* 20 FCC Rcd. 3788, 3804–05 & n.126, and that approach had proved inadequate: Telemarketers continuously "failed to secure the appropriate consent" and therefore consumers "continue[d] to experience frustration in receiving unwanted telemarketing robocalls," 27 FCC Rcd. at 1839. To stop the "proliferation of intrusive, annoying calls," the FCC determined that a written-consent requirement would work more effectively. *Id.*

A written-consent requirement that "reduce[s] the chance of consumer confusion," the FCC also found, serves consumers and telemarketers alike.

Id. For telemarketers, being able to demonstrate compliance is critical because the TCPA gives federal agencies, states, and consumers a significant "stick." Any telemarketer in violation of Section 227(b) faces suits for statutory damages and, if the violation was willful or knowing, those damages can be trebled. *Krakauer*, 925 F.3d at 649. Once accused of violating the Act, a telemarketer must affirmatively prove that a consumer gave her consent, that consent was "express" rather than implied, and it was obtained "prior" to sending the robocall. *See, e.g., Beard v. John Hiester Chevrolet, LLC*, 640 F. Supp. 3d 420, 428 (E.D.N.C. 2022) (noting that consent is an affirmative defense under the TCPA). By telling telemarketers how to "meet" Subsection 227(b)'s consent requirement, the FCC equips telemarketers to defend themselves "from erroneous claims that consent was or was not provided." 77 Fed. Reg. 34,233, 34,235 (June 11, 2012).

* * *

In sum, the TCPA's "delegation falls within the type of delegations," under *Loper Bright*, "that provide agencies discretion to regulate." *Lesko*, 161 F.4th at 1360. The FCC used that discretion, as Congress required, by implementing a written-consent requirement agency experience and consumer frustration proved would work better at ensuring telemarketers actually obtain consumers' prior express consent.

C. The district court's contrary reading would leave the FCC's delegation with nothing to do.

According to the district court, the FCC impermissibly interpreted the TCPA by specifying the form "prior express consent" had to take for telemarketing calls. It relied on two out-of-circuit decisions—*Bradford v. Sovereign Pest Control of Texas, Inc.*, 167 F.4th 809 (5th Cir. 2026), and *Insurance Marketing Coalition Ltd. v. FCC*, 127 F.4th 303 (11th Cir. 2025)—both of which treated the phrase "prior express consent" as the beginning and end of the analysis. *Bradford* reasoned that, because "express consent" "encompasses both oral and written consent," the FCC's rule requiring telemarketers to document consumers' consent has "no basis" in the text. 167 F.4th at 812. *Insurance Marketing Coalition* similarly read the statute to "require[] only 'prior express consent,' not 'prior express consent' plus" in the context of analyzing a different FCC regulation. 127 F.4th at 312.

But, as the Federal Circuit demonstrated in *Lesko*, that "prior express consent" can be obtained both orally and in writing does not preclude the FCC from using its discretionary authority to specify that it must be in writing. Quite the opposite—that Congress did not specify which form prior express consent must take is the very reason the requirement calls out for agency implementation. *Lesko* confronted the identical premise—that a consent-type requirement "can encompass written form, oral form, or both"—and drew the opposite and correct conclusion: a phrase that can take either form is an occasion for the agency to specify which, not a bar against its doing so. 161 F.4th at 1359; *see supra* Section I.B.2. Neither *Bradford* nor

Insurance Marketing Coalition reckoned with that reasoning. Nor did they grapple with the neighboring fax provision, where Congress did specify the form of consent—"in writing or otherwise," 47 U.S.C. § 227(a)(5)—confirming that the bare "prior express consent" in the robocall provisions leaves that choice to the agency. *See supra* Section I.B.2. And tellingly, *Bradford* never asked whether the authority to "implement" is an express delegation under *Loper Bright* at all, while *Insurance Marketing Coalition* noted the delegation but did not meaningfully engage with it.

If that direction—that the FCC "implement" "prior express consent"—means anything, the agency "must be able to do something" more than parrot the statutory text. *Duffus v. MaineHealth*, 791 F. Supp. 3d 61, 80 (D. Me. 2025). Read as the Fifth and Eleventh Circuits required, the delegation would authorize nothing: "[E]very regulation would simply restate the statute verbatim." *Id.* at 77.

The district court also misread this Court's decision in *Kokinda*. It took *Kokinda* to rest on the Attorney General's authority to "interpret and implement" the Sex Offender Registration and Notification Act, 34 U.S.C. § 20912(b), and treated the absence of a parallel "interpret" delegation here as fatal. But *Kokinda* did not announce a magic-words rule by which an agency has discretionary authority only when a statute gives it the authority both to interpret and implement. Defining a statutory term, as *Loper Bright* held, is just one of a range of permissible delegations. *See* 603 U.S. at 394-95 & n.5. And this Court upheld the regulation there as "a reasonable exercise of

Congress's specific delegation of authority," 146 F.4th at 418, without suggesting that an authority to implement alone would not have sufficed.

The FCC here was exercising a different kind of discretionary authority, one which did not require it to define any statutory term. The regulation upheld in *Kokinda* defined a statutory term—where an offender "habitually lives" given "that the term 'is not self-explanatory and requires further definition'"—and so needed a delegation to "interpret." *Id.* at 416 (quoting *The National Guidelines for SORNA*, 73 Fed. Reg. 38,030, 38,061 (July 2, 2008)). The FCC's rule defines nothing. It leaves "prior express consent" to mean exactly what it has always meant and answers only a question the statute does not resolve: how that consent must be obtained and documented. A rule that specifies *how* a requirement is satisfied, without touching *what* the requirement means, needs only authority to implement. That is what the FCC did. Had the district court correctly identified that the FCC was implementing the TCPA, it would have started with its observation that its written-consent requirement was "eminently reasonable" and ended there.

II. DentalPlans never obtained prior express consent to send its former customers telemarketing to purchase a new product.

Whether or not the FCC's written-consent requirement was a reasonable exercise of its delegated authority, the district court erred for an independent reason: DentalPlans never obtained its former customers' prior express consent to send prerecorded calls soliciting them to purchase a new plan after their existing plan had ended. While enrolling customers in a particular dental savings plan, DentalPlans asks if they agree to receiving prerecorded messages. That gave DentalPlans the go-ahead to send its active subscribers robocalls about that plan, which it did by, for example, informing customers that their plan was about to expire. But that consent did not extend to robocalls urging former customers to purchase a second, different product that they made clear they did not want when their relationship with DentalPlans had ended.

A. Express consent, both parties agree, is an affirmative defense for which DentalPlans bears the burden of proof. JA72 n.5; *see, e.g., Beard*, 640 F. Supp. 3d at 428; *In re Rules & Regs. Implementing the TCPA*, 23 FCC Rcd. 559, 565 (2008) (noting that FCC "conclude[d]" that telemarketers "should be responsible for demonstrating that the consumer provided prior express consent"). Three settled features of the concept are relevant here.

First, "express" consent must be stated, not inferred. When Congress enacted the TCPA, "express consent" meant consent "directly given," "positive," "unequivocal," and "requiring no inference or implication to supply its meaning." *Consent*, Black's Law Dictionary (6th ed. 1990).

Second, consent is context-specific. "To be effective," consent must be given to "particular conduct." Restatement (Second) of Torts § 892A(2)(b) (1979). Because the "scope of consent" "depends heavily upon" the "interpretation of the circumstances," *Schweitzer v. Comenity Bank*, 866 F.3d 1273, 1279 (11th Cir. 2017) (quoting Dan Dobbs *et al.*, The Law of Torts

(2d ed. 2011)), it can be "limited," *id.* (citing Restatement (Second) of Torts § 892A cmt. g). When someone either expressly "limit[s]" her "consent to acts done for a particular purpose," or that limitation is "implied from the terms of consent or the circumstances," then consent is "conditioned upon th[at] purpose, and it confers no privilege to do the same act for a different purpose." Restatement (Second) of Torts § 892A cmt. g.

Third, consent can be revoked. *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 271 (3d Cir. 2013). At common law, "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." *Id.* at 271 (quoting Restatement (Second) of Torts § 892A(3) & cmt. i). Revocation can be express, "manifested" by "any words or conduct inconsistent with continued consent," or "apparent from the terms of the original consent itself, as when a specified time limit expires." *Id.* So, for example, when a "license" to use a copyrighted song expires, so does the consent that it carried. *Id.*

The FCC's orders interpreting consent are instructive (though not binding). *Loper Bright*, 603 U.S. at 394 (in "determining the meaning of statutory provisions," courts may "seek aid from the interpretations of those responsible for implementing particular statutes" (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))). Consistent with the common law, the FCC has held that when a consumer gives her number to a telemarketer, it does not mean she has consented to robocalls for all time and all purposes. Instead, consent extends to robocalls "closely related to the purpose for which the telephone number was originally provided." *In re Rules & Regs. Implementing the TCPA*, 30 FCC Rcd. 7961, 8028 n.474 (2015). That is why, for example, the FCC had long exempted certain types of telemarketing (and still exempts certain types of faxes) sent to someone with whom an established business relationship exists as long as that "relationship has not previously been terminated by either party." 47 C.F.R. § 64.1200(f)(5).

Consent given for one type of robocall in one type of context does not, in short, mean consent for any robocall in any context. And if consent is tied to a transaction with an expiration date, consent ends when the clock runs.

B. DentalPlans cannot meet its burden to demonstrate it obtained prior express consent for its winback calls from any of its former customers, including Ms. Bradley. DentalPlans obtained consent to place prerecorded calls in the same way every time: through a single enrollment script, used when a prospective client called to sign up for a plan. That context established the scope of the consent. A customer calling to purchase a dental savings plan, asked in the course of that purchase whether she would agree to be contacted by prerecorded message, consented to prerecorded calls about that plan only. Her consent is "conditioned upon th[at] purpose" and "confers no privilege to do the same act for a different purpose." Restatement (Second) of Torts § 892A(3) & cmt. g. That consent expired when former customers' subscriptions did.

To understand the scope of the consent DentalPlans obtained from its former customers, take the two types of robocalls it sent. While their subscriptions were active, DentalPlans left its customers prerecorded messages informing them that they should renew before their savings plan expired. DentalPlans's customers clearly consented to receiving those calls. The winback calls were different. Placed after subscriptions had lapsed, the winback calls no longer informed active customers about their current plan but rather solicited former customers to buy a new one. DentalPlans knew this—it sent winback calls specifically to win back customers who had chosen to cancel their subscriptions. DentalPlans's winback calls, in other words, were not closely related to the purpose for which its former customers had given their consent in the first place.

Ms. Bradley's experience is representative. When DentalPlans asked her if she would agree to receive prerecorded calls, Ms. Bradley asked what that would entail. DentalPlans confirmed that the calls would be to "keep [her] updated with any plan information." JA2. Prodded to define the scope of the consent it sought, in other words, DentalPlans confirmed what any prospective customer would have expected after being read DentalPlans's enrollment script: The consent that DentalPlans sought was for prerecorded calls conveying information about the plan the consumer was purchasing.

The court below erred in holding otherwise. It concluded that, because Ms. Bradley had consented to receiving some robocalls (about her plan), she had consented to any robocall (about a different product). But as well-settled common law principles and persuasive FCC orders confirm, consent is bound to the particular purpose for which it is given and lasts only as long as the telemarketer has no reason to believe that the consumer is no longer willing. Ms. Bradley, like all of DentalPlans's former customers, consented to updates about the plan she bought, for as long as she held it. She did not consent to solicitations for a new plan, after her old plan—and the relationship it defined—had ended.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's grant of DentalPlans's motion for reconsideration, summary judgment, and decertification.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 8,686 words excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Georgia font.

August 24, 2026 /s/Ana M. Builes

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2026, I electronically filed sealed and redacted public versions of the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fourth Circuit by using the CM/ECF system. I further certify that I caused a copy of the sealed version of the brief to be served via email, without prior written consent, to the following counsel of record:

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