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June 19, 2003

VIA ELECTRONIC FILING

Marlene H. Dortch, Esquire
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

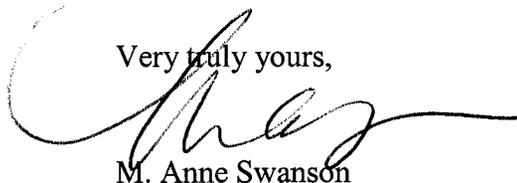
Re: Notification of Ex Parte Communication
CG Docket No. 02-278

Dear Ms. Dortch:

This is to advise you, in accordance with Section 1.1206 of the FCC's rules, that on June 18, 2003, Peter Cassat of this office and I, on behalf of Intuit Inc., telecopied to Matthew Brill, Senior Legal Advisor to Kathleen Q. Abernathy, the attached report of the Senate Commerce, Science and Transportation Committee and federal appellate decision. On June 18 and 19, 2003, we also discussed with Mr. Brill in two telephone conversations Intuit's views on preemption of state Do Not Call ("DNC") lists and its interest in having the FCC, at a minimum, clarify that the national DNC list would preempt all state lists and requirements for purposes of interstate calls.

As required by Section 1.1206(b), as modified by the policies applicable to electronic filings, one electronic copy of this letter is being submitted.

Very truly yours,



M. Anne Swanson

Enclosures
cc w/o encl. (by facsimile):
Matthew Brill, Esquire

V

United States Court of Appeals,
Fourth Circuit.

West Headnotes

**INTERNATIONAL SCIENCE &
TECHNOLOGY INSTITUTE,
INCORPORATED, Plaintiff-
Appellant,**
v.
**INACOM COMMUNICATIONS,
INCORPORATED, Defendant-Appellee.**

No. 96-1142.

Argued Oct. 29, 1996.
Decided Feb. 11, 1997.

Facsimile advertisement recipient brought class action against long-distance telephone services provider, alleging that provider sent unsolicited advertisements via facsimile machine in violation of Telephone Consumer Protection Act (TCPA). On provider's motion, the United States District Court for the Eastern District of Virginia, Claude M. Hilton, J., dismissed complaint for lack of subject matter jurisdiction. On appeal, the Court of Appeals, Niemeyer, Circuit Judge, held that: (1) Congress did not intend to confer concurrent jurisdiction in federal district courts over private civil actions for unsolicited advertisements via facsimile machine under TCPA when it provided that private civil actions "may" be brought in appropriate courts of states; (2) general federal-question jurisdiction statute did not confer jurisdiction on federal district court over private action for unsolicited advertisements via facsimile machine in violation of TCPA; (3) fact that, under TCPA, private actions for unsolicited advertisements via facsimile machine could be permitted in courts of some states and prohibited in others, as determined by states, did not render TCPA violative of equal protection; (4) TCPA's provision of exclusive state court jurisdiction over private actions for unsolicited advertisements via facsimile machine did not impermissibly commandeer state courts in violation of Tenth Amendment; and (5) TCPA provides for exclusive state court jurisdiction of private actions for unsolicited advertisements via facsimile machine.

Affirmed.

[1] Courts ⇨ 489(1)
106k489(1)

Congress did not intend to confer concurrent jurisdiction in federal district courts over private civil actions for unsolicited advertisements via facsimile machine under Telephone Consumer Protection Act (TCPA) when it provided that private civil actions "may" be brought in appropriate courts of states. Communications Act of 1934, § 227(b)(3), (e), (f)(2), as amended, 47 U.S.C.A. § 227(b)(3), (e), (f)(2).

[2] Statutes ⇨ 188
361k188

To discern whether Congress intended in Telephone Consumer Protection Act (TCPA) to authorize jurisdiction over private actions for unsolicited advertisements via facsimile machine exclusively in state courts, Court of Appeals first had to turn to TCPA's text. Communications Act of 1934, § 227(b)(3), as amended, 47 U.S.C.A. § 227(b)(3).

[3] Courts ⇨ 489(1)
106k489(1)

Federal statute's use of term "may" in providing that action may be brought in certain court does not itself confer exclusive jurisdiction on court mentioned.

[4] Federal Courts ⇨ 4
170Bk4

When Congress' permissive authorization of suit through use of term "may" in statute extends only to courts of general jurisdiction, that authorization cannot confer jurisdiction on unmentioned courts of limited jurisdiction, which require specific grant.

[5] Courts ⇨ 489(1)
106k489(1)

If federal statute permissively authorizes suit in federal court, that authorization does not of necessity preclude suit in state courts of general jurisdiction, which are presumed competent unless

otherwise stated.

[6] Courts ↻ 489(1)
106k489(1)

[6] Federal Courts ↻ 4
170Bk4

If federal statute authorizes suit in state courts of general jurisdiction through use of term "may," that authorization cannot confer jurisdiction on federal court because federal courts are competent to hear only those cases specifically authorized.

[7] Courts ↻ 489(1)
106k489(1)

[7] Federal Courts ↻ 4
170Bk4

While state courts are presumed to have jurisdiction over federally created causes of action unless Congress indicates otherwise, federal courts require specific grant of jurisdiction.

[8] Courts ↻ 489(1)
106k489(1)

Congress' alleged preemptive occupation of field of interstate telecommunications did not manifest congressional intent to establish concurrent federal jurisdiction over private civil actions for unsolicited advertisements via facsimile machine under Telephone Consumer Protection Act (TCPA); no congressional intent appeared in TCPA contrary to general rule that state courts may hear cases arising under Communications Act. Communications Act of 1934, §§ 201, 227(b)(3), as amended, 47 U.S.C.A. §§ 201, 227(b)(3).

[9] Courts ↻ 489(1)
106k489(1)

Unless Congress provides that federal jurisdiction shall be exclusive, claims based on substantive federal law may be brought in state court even though substantive federal law preempts state law.

[10] Courts ↻ 489(1)
106k489(1)

Regardless of whether Communications Act

preempts substantive state law, state courts may hear cases arising under Act except where contrary congressional intent appears. Communications Act of 1934, § 201 et seq., as amended, 47 U.S.C.A. § 201 et seq.

[11] Federal Courts ↻ 199
170Bk199

General federal-question jurisdiction statute did not confer jurisdiction on federal district court over private action for unsolicited advertisements via facsimile machine in violation of Telephone Consumer Protection Act (TCPA), despite contention that claim under Act arose under federal law; although Congress created action, it was from the beginning a cause of action in states' interest, Congress manifested intention in Act that private actions should be brought in state courts, and it would flout congressional intent to conclude that federal courts might nevertheless exercise federal-question jurisdiction. 28 U.S.C.A. § 1331; Communications Act of 1934, § 227(b)(3), as amended, 47 U.S.C.A. § 227(b)(3).

[12] Federal Courts ↻ 1.1
170Bk1.1

[12] Federal Courts ↻ 5
170Bk5

While Constitution authorizes judicial power of cases, in law and equity, arising under Constitution, laws, and treaties of United States, federal district courts have only that jurisdiction that Congress grants through statute. U.S.C.A. Const. Art. 3, § 1 et seq.; 28 U.S.C.A. § 1331.

[13] Federal Courts ↻ 161
170Bk161

In federal-question jurisdiction statute, providing that federal district courts shall have original jurisdiction of all civil actions arising under Constitution, laws, or treaties of United States, term "arising under" is narrower than similarly defined constitutional judicial power. U.S.C.A. Const. Art. 3, § 1 et seq.; 28 U.S.C.A. § 1331.

[14] Federal Courts ↻ 191
170Bk191

Because federal-question jurisdiction ultimately depends on act of Congress, scope of federal district courts' jurisdiction depends on that congressional intent manifested in statute. 28 U.S.C.A. § 1331.

[15] Federal Courts ⇨ 241
170Bk241

Congress gave federal-question jurisdiction to federal district courts to hear only those cases in which well-pleaded complaint establishes either that federal law creates cause of action or that plaintiff's right to relief necessarily depends on resolution of substantial question of federal law. 28 U.S.C.A. § 1331.

[16] Federal Courts ⇨ 191
170Bk191

In vast majority of cases where federal-question jurisdiction exists, federal law creates plaintiff's right of action. 28 U.S.C.A. § 1331.

[17] Federal Courts ⇨ 191
170Bk191

As a general matter, cause of action created by federal law will properly be brought in federal district courts. 28 U.S.C.A. § 1331.

[18] Federal Courts ⇨ 161
170Bk161

Statute governing federal-question jurisdiction is general federal-question statute, which gives federal district courts original jurisdiction unless specific statute assigns jurisdiction elsewhere. 28 U.S.C.A. § 1331.

[19] Federal Courts ⇨ 191
170Bk191

Federal law that creates cause of action may also manifest particular intent to assign cause of action to courts other than federal district courts, notwithstanding general principle announced in federal-question jurisdiction statute concerning jurisdiction of district courts. 28 U.S.C.A. § 1331.

[20] Federal Courts ⇨ 199
170Bk199
(Formerly 170Bk197)

Federal commerce jurisdiction statute did not confer jurisdiction on federal district court over private action for unsolicited advertisements via facsimile machine in violation of Telephone Consumer Protection Act (TCPA); Congress manifested intention in TCPA that private actions should be brought in state courts, and it would flout congressional intent to conclude that federal courts might nevertheless exercise commerce jurisdiction. 28 U.S.C.A. § 1337(a); Communications Act of 1934, § 227(b)(3), as amended, 47 U.S.C.A. § 227(b)(3).

[21] Federal Courts ⇨ 612.1
170Bk612.1

Court of Appeals would reject federal commerce jurisdiction statute as basis for federal district court jurisdiction over private action for unsolicited advertisements via facsimile machine under Telephone Consumer Protection Act (TCPA), as statute was not asserted as basis for jurisdiction in district court. 28 U.S.C.A. § 1337(a); Communications Act of 1934, § 227(b)(3), as amended, 47 U.S.C.A. § 227(b)(3).

[22] Constitutional Law ⇨ 48(1)
92k48(1)

Courts should favor otherwise permissible interpretation of statute to avoid serious constitutional questions.

[23] Constitutional Law ⇨ 48(1)
92k48(1)

Axiom of statutory interpretation, that courts should favor otherwise permissible interpretation of statute to avoid serious constitutional questions, neither commands nor permits Court of Appeals to construe statute in a way plainly contrary to intent of Congress.

[24] Constitutional Law ⇨ 249(2)
92k249(2)

[24] Courts ⇨ 489(1)
106k489(1)

Fact that, under Telephone Consumer Protection Act (TCPA), private actions for unsolicited

advertisements via facsimile machine, which could only be brought in state courts, could be permitted in courts of some states and prohibited in others, as determined by states, did not render Act violative of equal protection; Congress had legitimate interest in not overburdening state and federal courts, Congress had legitimate interest in respecting states' judgments about when their courts are overburdened, and Congress acted rationally in both closing federal courts and allowing states to close theirs to millions of private actions that could be filed. U.S.C.A. Const.Amend. 5; Communications Act of 1934, § 227(b)(3), as amended, 47 U.S.C.A. § 227(b)(3).

[25] Constitutional Law ☞213(2)
92k213(2)

[25] Constitutional Law ☞253.2(2)
92k253.2(2)

Any equal protection challenge to federal law must arise under equal protection component of Fifth Amendment due process clause, not Fourteenth Amendment which applies only to states. U.S.C.A. Const.Amend. 5, 14.

[26] Constitutional Law ☞209
92k209

[26] Constitutional Law ☞253.2(2)
92k253.2(2)

Standard for defining equal protection guarantee is same under Fifth and Fourteenth Amendments. U.S.C.A. Const.Amend. 5, 14.

[27] Constitutional Law ☞249(2)
92k249(2)

For purposes of reviewing equal protection challenge to Telephone Consumer Protection Act (TCPA), which allowed individual states to decide whether to allow private action in state court for unsolicited advertisements via facsimile machine, because inequality arose from classification that was not based on fundamental right or impermissible characteristic such as race, religion, or national origin, Court of Appeals' review of statutory provision was narrow; question was simply whether legislative classification was rationally related to legitimate governmental interest. U.S.C.A.

Const.Amend. 5; Communications Act of 1934, § 227(b)(3), as amended, 47 U.S.C.A. § 227(b)(3).

[28] Constitutional Law ☞249(2)
92k249(2)

For purposes of equal protection rational relation review of Telephone Consumer Protection Act (TCPA), which allowed individual states to decide whether to allow private action in state court for unsolicited advertisements via facsimile machine, TCPA was entitled to strong presumption of validity, and had to be sustained if there was any reasonably conceivable state of facts that could provide rational basis for classification. U.S.C.A. Const.Amend. 5; Communications Act of 1934, § 227(b)(3), as amended, 47 U.S.C.A. § 227(b)(3).

[29] Consumer Protection ☞32
92Hk32

In Telephone Consumer Protection Act (TCPA) provision authorizing filing of private action in state court for unsolicited advertisements via facsimile machine, clause "if otherwise permitted by the laws or rules of court of a State" does not condition substantive right to be free from unsolicited facsimile transmissions on state approval; rather, clause recognizes that states may refuse to exercise jurisdiction authorized by the statute. Communications Act of 1934, § 227(b)(3), as amended, 47 U.S.C.A. § 227(b)(3).

[30] Courts ☞489(1)
106k489(1)

[30] States ☞4.16(3)
360k4.16(3)

Telephone Consumer Protection Act's (TCPA) provision of exclusive state court jurisdiction over private actions for unsolicited advertisements via facsimile machine did not impermissibly commandeer state courts in violation of Tenth Amendment; Congress explicitly recognized states' power to reject enforcement in their courts of the federally created right and, in creating conditional right of action to enforce TCPA in state courts, Congress neither exceeded its delegated powers nor invaded province of state sovereignty. U.S.C.A. Const. Art. 6, cl. 2; Amend. 10; Communications Act of 1934, § 227(b)(3), as amended, 47 U.S.C.A.

§ 227(b)(3).

[31] States ↪4.16(1)
360k4.16(1)

For purposes of Tenth Amendment, Court of Appeals must be sensitive to any effort by Congress to commandeer state resources. U.S.C.A. Const.Amend. 10.

[32] States ↪4.16(3)
360k4.16(3)

Act of Congress may violate Tenth Amendment if it exceeds scope of delegated powers or invades province of state sovereignty reserved by Tenth Amendment. U.S.C.A. Const.Amend. 10.

[33] States ↪4.16(3)
360k4.16(3)

If power is delegated to Congress in Constitution, Tenth Amendment expressly disclaims any reservation of that power to states; if power is attribute of state sovereignty reserved by Tenth Amendment, it is necessarily power the Constitution has not conferred on Congress. U.S.C.A. Const.Amend. 10.

[34] States ↪18.1
360k18.1

Under supremacy clause, state courts may not refuse to enforce federal claims which are similar to state claims enforced in same courts, at least where federal enactment provides for concurrent jurisdiction in state and federal courts. U.S.C.A. Const. Art. 6, cl. 2.

[35] Courts ↪489(1)
106k489(1)

Telephone Consumer Protection Act (TCPA) provides for exclusive state court jurisdiction of private actions for unsolicited advertisements via facsimile machine. Communications Act of 1934, § 227(b)(3), as amended, 47 U.S.C.A. § 227(b)(3).

***1149 ARGUED:** John Thomas Ward, Ward, Kershaw & Minton, Baltimore, Maryland, for Appellant. John Patrick Passarelli, McGrath, North, Mullin & Kratz, P.C., Omaha, ***1150** Nebraska, for Appellee. **ON BRIEF:** Thomas J.

Minton, Ward, Kershaw & Minton, Baltimore, Maryland; Mark Rollinson, Leesburg, Virginia, for Appellant. Patrick E. Brookhouser, Jr., McGrath, North, Mullin & Kratz, P.C., Omaha, Nebraska; Scott A. Fenske, Thompson, Hine & Flory, Washington, DC, for Appellee.

Before NIEMEYER, WILLIAMS, and MOTZ, Circuit Judges.

Affirmed by published opinion. Judge NIEMEYER wrote the opinion, in which Judge WILLIAMS and Judge MOTZ joined.

OPINION

NIEMEYER, Circuit Judge:

We today reach the somewhat unusual conclusion that state courts have exclusive jurisdiction over a cause of action created by federal law. Holding that the states have been given, subject to their consent, exclusive subject matter jurisdiction over private actions authorized by the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, we affirm the district court's ruling dismissing this case.

I

In 1991, Congress amended the Communications Act of 1934, 47 U.S.C. § 201 *et seq.*, with the enactment of the Telephone Consumer Protection Act of 1991 ("TCPA"), Pub.L. No. 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227). The TCPA was enacted to "protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile ([f]ax) machines and automatic dialers." S.Rep. No. 102-178, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N.1968.

The relevant section of the TCPA provides, "It shall be unlawful for any person within the United States ... to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C).

The TCPA creates a private right of action to

obtain an injunction, 47 U.S.C. § 227(b)(3)(A), and to recover the actual monetary damages or \$500, whichever is greater. 47 U.S.C. § 227(b)(3)(B). If the court finds that the defendant "willfully or knowingly" violated the TCPA, it may treble the damage award. 47 U.S.C. § 227(b)(3). In creating a private right of action, the TCPA authorizes a plaintiff to file suit "if otherwise permitted by the laws or rules of court of a State ... in an appropriate court of that State." 47 U.S.C. § 227(b)(3). The TCPA also authorizes state attorneys general to bring civil actions on behalf of their state's residents to obtain an injunction against such calls and to recover monetary damages. 47 U.S.C. § 227(f)(1). The TCPA provides that the federal district courts have "exclusive jurisdiction" over actions brought by state attorneys general. 47 U.S.C. § 227(f)(2). Finally, the TCPA also authorizes the Federal Communications Commission to intervene as of right in any state attorney general's action. 47 U.S.C. § 227(f)(3).

II

During the summer months of 1995, International Science & Technology Institute, Inc. ("International Science") received at its fax machine several unsolicited advertisements for discount long-distance telephone service from Inacom Communications, Inc. ("Inacom"). International Science claims that Inacom sent "thousands of such unsolicited advertisements to small business enterprises throughout the United States in knowing and willful violation of the [TCPA]." Proceeding under the TCPA and invoking federal-question jurisdiction granted by 28 U.S.C. § 1331, International Science filed a class action suit in the district court, demanding \$500 for each violation--or \$1,500 if the court were to find the violation willful--and praying for injunctive relief against future unsolicited advertising. On Inacom's motion, the district court dismissed International Science's complaint for lack of subject matter jurisdiction, ruling that private actions authorized by the TCPA may be filed only in state courts. The court explained:

*1151 The language in § 227(b)(3) is unambiguous. The statute clearly places jurisdiction for a private right of action in the state courts, just as it places jurisdiction for actions brought by the State or the FCC in the District Courts of the United States. Contrary to plaintiff's assertion, there is no ambiguity created

because Congress omitted the phrase "exclusive jurisdiction" from § 227(b)(3).

In response to International Science's argument that the statute did not make state jurisdiction exclusive and that federal jurisdiction could therefore be implied, the district court ruled that it could not imply a federal right of action when Congress had expressed an intent to create only a right of action in state courts.

On appeal, International Science makes three arguments: (1) that the permissive language of 47 U.S.C. § 227(b)(3) that a private action *may* be brought in state courts does not make state court jurisdiction *exclusive*; (2) that a federally created cause of action "arises under" federal law within the meaning of 28 U.S.C. § 1331 granting district courts federal-question jurisdiction; and (3) that an exclusive jurisdictional grant to state courts would violate both the Equal Protection Clause of the Fourteenth Amendment and the Tenth Amendment.

III

[1][2][3] To discern whether Congress intended to authorize jurisdiction over private actions exclusively in state courts, we first turn, as we must, to the TCPA's text. *See, e.g., New York State Conf. of Blue Cross and Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 115 S.Ct. 1671, 1677, 131 L.Ed.2d 695 (1995). In determining congressional intent, analysis begins with interpretation of the statutory text and "move[s] on, as need be, to the structure and purpose of the Act in which it occurs". In relevant part, the TCPA provides that "a person or entity *may*, if otherwise permitted by the laws or rules of court of a State, *bring in an appropriate court of that State* " an action for violation of the TCPA's ban on unsolicited fax-advertising. 47 U.S.C. § 227(b)(3) (emphasis added). In providing that a private person "may bring" a TCPA action in an appropriate state court, Congress authorized state courts to enforce the right it created. In using the customary "may" language for conferring jurisdiction, [FN1] Congress did not prescribe that an action *must* be brought in court; rather it authorizes jurisdiction by stating that an action *may* be brought there. As International Science observes, it cannot be disputed that the term "may bring" is permissive, simply authorizing suit in state court by a person who elects to enforce the federal right. Use of the term "may"

does not itself confer exclusive jurisdiction on the court mentioned. *See, e.g., Tafflin v. Levitt*, 493 U.S. 455, 460-61, 110 S.Ct. 792, 795-96, 107 L.Ed.2d 887 (1990) (the grant of jurisdiction to federal courts through the phrase, "suits of a kind described 'may' be brought in federal district courts," "does not operate to oust a state court from concurrent jurisdiction over the cause of action").

FN1. *See, e.g., Age Discrimination in Employment Act*, 29 U.S.C. § 626(c)(1) ("Any person aggrieved *may bring* a civil action in any court of competent jurisdiction" (emphasis added)); *Clean Water Act*, 33 U.S.C. § 1319(b) ("Any action under this subsection *may be brought* in the district court of the United States" (emphasis added)); *Federal Employees Liability Act*, 45 U.S.C. § 56 ("an action *may be brought* in a district court of the United States" (emphasis added)); *Racketeer Influenced and Corrupt Organizations Act*, 18 U.S.C. § 1964(c) ("Any person injured in his business or property by reason of a violation of section 1962 of this chapter *may sue* therefor in any appropriate United States district court" (emphasis added)).

[4][5][6] When, however, the permissive authorization extends only to courts of general jurisdiction, that authorization cannot confer jurisdiction on unmentioned courts of *limited* jurisdiction, which require a specific grant. If a federal statute permissively authorizes suit in federal court, that authorization does not of necessity preclude suit in state courts of general jurisdiction, which are presumed competent unless otherwise stated. *See Tafflin, id.* But the contrary assertion cannot be true. If a statute authorizes suit in state courts of general jurisdiction through the use of the term "may," that authorization cannot confer jurisdiction on a federal court because federal courts are competent to hear only *1152 those cases specifically authorized. *See Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449, 12 L.Ed. 1147 (1850) (inferior federal courts only have jurisdiction which Congress confers).

[7] Thus, when International Science argues that the Supreme Court's holding in *Tafflin* has foreclosed our finding exclusive jurisdiction in state court for private TCPA actions, it fails to recognize that the circumstances in *Tafflin* are the reverse of those in the case before us. While state courts are presumed to have jurisdiction over federally created causes of action unless Congress indicates otherwise, *see*

Tafflin, 493 U.S. at 461, 110 S.Ct. at 796 ("mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction"), federal courts require a specific grant of jurisdiction, *see Sheldon*, 49 U.S. (8 How.) at 449. In light of this difference between the federal and state courts, it is meaningful that Congress explicitly mentioned *only* state courts in 47 U.S.C. § 227(b)(3) because under usual circumstances, mentioning state courts is unnecessary to vest them with concurrent jurisdiction.

Accordingly, we conclude that when, in § 227(b)(3) of the TCPA, Congress authorized jurisdiction over private actions in state courts without mentioning federal courts, it did not intend to grant jurisdiction over TCPA claims in federal district courts.

We are further confirmed in this construction of § 227(b)(3) by the fact that the TCPA, while authorizing state court jurisdiction for private rights of action, confers exclusive federal jurisdiction over actions by states attorneys general. *See* 47 U.S.C. § 227(f)(2) ("*the district courts of the United States ... shall have exclusive jurisdiction* over all civil actions brought under this subsection" (emphasis added)). We find it significant that in enacting the TCPA, Congress wrote precisely, making jurisdictional distinctions in the very same section of the Act by providing that private actions may be brought in appropriate state courts and that actions by the states must be brought in the federal courts. These jurisdictional distinctions are even more significant in light of the rest of the Communications Act where Congress provided explicitly for *concurrent* jurisdiction when it so intended. *See* 47 U.S.C. § 214(c) (authorizing injunction by *any court of general jurisdiction* for extension of lines or discontinuation of services contrary to certificates of public convenience and necessity); 47 U.S.C. § 407 (authorizing suit *in federal court or state court of general jurisdiction* for common carrier's failure to comply with order of payment); 47 U.S.C. § 415(f) (establishing one-year limitation on suits brought *in federal or state courts* to enforce Commission order for payment of money); 47 U.S.C. § 553(c)(1) (authorizing suit *in federal court or any other court of competent jurisdiction* for unauthorized cable reception); 47 U.S.C. § 555(a) (authorizing suit *in federal court or state court of general jurisdiction* to review actions by franchising authority); 47 U.S.C. § 605(e)(3)(A) (authorizing civil action *in federal*

court or any other court of competent jurisdiction for unauthorized publication). Thus while Congress has in the Communications Act explicitly expressed its intent to provide concurrent jurisdiction, it did not do so in 47 U.S.C. § 227(b)(3).

Finally, the legislative history of the TCPA supports our interpretation that Congress intended that private actions under 47 U.S.C. § 227(b)(3) be treated as small claims best resolved in state courts designed to handle them, so long as the states allow such actions. Senator Hollings, the sponsor of the bill, explained the relatively late addition of the § 227 private right of action as follows:

The substitute bill contains a private right-of-action provision that will make it easier for consumers to recover damages from receiving these computerized calls. The provision would allow consumers to bring an action in State court against any entity that violates the bill. The bill does not, because of constitutional constraints, dictate to the States which court in each State shall be the proper venue for such an action, as this is a matter for State legislators to determine. Nevertheless, it is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court....

Small claims court or a similar court would allow the consumer to appear before *1153 the court without an attorney. The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer. However, it would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than the potential damages. I thus expect that the States will act reasonably in permitting their citizens to go to court to enforce this bill.

137 Cong. Rec. S16205-06 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings). While Senator Hollings did not explicitly say that *only* state court jurisdiction was appropriate, we believe the clear thrust of his statement was consistent with the bill's text that state courts were the intended fora for private TCPA actions.

[8][9][10] International Science argues, notwithstanding, that a congressional intent to establish concurrent jurisdiction for private civil actions in both state and federal courts is manifested through its preemptive occupation of the field of interstate telecommunications. International Science states, "federal courts have exclusive

jurisdiction in respect of essentially all matters arising under chapter 5" of the Communications Act, citing *Harrison Higgins, Inc. v. AT & T Communications, Inc.*, 697 F.Supp. 220, 222 (E.D.Va.1988). International Science's reliance on the preemption principles of *Harrison Higgins*, however, is misplaced. The district court in *Harrison Higgins* decided that state substantive claims were preempted by the Communications Act, not that such preemption affected state court jurisdiction. Indeed, unless Congress provides that federal jurisdiction shall be exclusive, claims based on substantive federal law may be brought in state court even though the substantive federal law preempts state law. See *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 82 S.Ct. 519, 7 L.Ed.2d 483 (1962). In short, regardless of whether the Communications Act preempts substantive state law, state courts may hear cases arising under the Act except where a contrary congressional intent appears. No such intent appears in the TCPA. Indeed, it explicitly says that state courts may hear private actions based on substantive federal rights. See 47 U.S.C. § 227(b)(3). In any event, International Science's preemption argument must be rejected at its beginning because Congress stated that state law is not preempted by the TCPA. See 47 U.S.C. § 227(e) ("nothing in this section ... shall preempt any State law that imposes more restrictive intrastate requirements ... or which prohibits" certain enumerated practices (emphasis added)).

Accordingly, when Congress provided in § 227(b)(3) of the TCPA that private civil actions "may" be brought in the appropriate courts of the states, it did not intend to confer concurrent jurisdiction on the United States district courts.

IV

[11] International Science contends that, even if the TCPA does not itself provide for federal jurisdiction over private actions, the general federal-question jurisdictional statute, 28 U.S.C. § 1331, is sufficient to confer jurisdiction on the district court because a TCPA claim "arises under" federal law. To resolve this question, we need to determine the scope of 28 U.S.C. § 1331 and its relationship to specific jurisdictional statutes such as that involved here, 47 U.S.C. § 227(b)(3).

[12][13][14] While Article III of the Constitution

(Cite as: 106 F.3d 1146, *1153)

authorizes judicial power of "cases, in law and equity, arising under " (emphasis added) the Constitution, laws, and treaties of the United States, the district courts have only that jurisdiction that Congress grants through statute. See *Sheldon*, 49 U.S. (8 How.) at 449. Even though Congress has conferred general federal-question jurisdiction on the district courts under 28 U.S.C. § 1331 in terms similar to the constitutional provision--"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States"--the term "arising under" in the statute is narrower than the similarly defined constitutional power. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 495, 103 S.Ct. 1962, 1972, 76 L.Ed.2d 81 (1983). Because federal-question jurisdiction ultimately depends on an act of Congress, the scope of the district courts' *1154 jurisdiction depends on that congressional intent manifested in statute.

[15][16] Congress gave federal-question jurisdiction to district courts under 28 U.S.C. § 1331 to hear "only those cases in which a well-pleaded complaint establishes either [1] that federal law creates the cause of action or [2] that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28, 103 S.Ct. 2841, 2856, 77 L.Ed.2d 420 (1983); see also *Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 806 (4th Cir.1996). But in the "vast majority" of cases where federal question jurisdiction exists, federal law creates the plaintiff's right of action. See *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 808, 106 S.Ct. 3229, 3232, 92 L.Ed.2d 650 (1986). International Science maintains that this case is among that "vast majority" because federal law creates the cause of action which it now asserts. See *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260, 36 S.Ct. 585, 586, 60 L.Ed. 987 (1916) ("A suit arises under the law that creates the cause of action").

[17] It is true that, as a general matter, a cause of action created by federal law will properly be brought in the district courts. But "despite the usual reliability of the [principle that 'a suit arises under the law that creates the cause of action,' the Supreme] Court has sometimes found that formally federal causes of action were not properly brought

under federal-question jurisdiction." *Merrell Dow*, 478 U.S. at 814 n. 12, 106 S.Ct. at 3235 n. 12. For example, in *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 20 S.Ct. 726, 44 L.Ed. 864 (1900), the Supreme Court held that there was no federal-question jurisdiction over suits authorized by federal statute to determine mining claims. The Court found that, notwithstanding the federal statutory basis, Congress intended that because of the predominance of state issues the cases be litigated in state courts unless there was diversity of citizenship. *Id.* at 511, 20 S.Ct. at 728; see also *Blackburn v. Portland Gold Mining Co.*, 175 U.S. 571, 578-79, 587, 20 S.Ct. 222, 225, 228, 44 L.Ed. 276 (1900). We have similarly concluded that Congress intended that private TCPA cases be litigated in state courts, if the state consents.

Moreover, the dominant reason that Congress created a private TCPA action at all was out of solicitude for states which were thwarted in their attempts to stop unwanted telemarketing. Congress found in the statute:

Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices.

Pub.L. No. 102-243, § 2(7), 105 Stat. 2394 (1991). See also Sen. R. No. 102-178, at 3 (1991), reprinted in 1991 U.S.C.C.A.N. at 1970 ("States do not have jurisdiction over interstate calls. Many States have expressed a desire for Federal legislation to regulate interstate telemarketing calls to supplement their restrictions on intrastate calls"); *id.* at 5, reprinted in 1991 U.S.C.C.A.N. at 1973 ("Federal action is necessary because States do not have the jurisdiction to protect their citizens against those who use these machines to place interstate telephone calls"). Thus, although Congress created the private TCPA action, it was from the beginning a cause of action in the states' interest.

[18][19] International Science argues, nevertheless, that to construe 47 U.S.C. § 227(b)(3) to lodge private causes of action only in state courts is repugnant to the language of § 1331, which provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution [or] laws ... of the United States." (Emphasis added). It is clear, however, that § 1331

is a *general* federal-question statute, which gives the district courts original jurisdiction unless a specific statute assigns jurisdiction elsewhere. For example, "takings" claims in excess of \$10,000--undoubtedly "arising under the Constitution" as the term is used in § 1331--have been assigned exclusively to the Court of Federal Claims. See 28 U.S.C. § 1491(a)(1) (granting Court of Federal Claims jurisdiction) and 28 U.S.C. § 1346(a)(2) (granting district courts concurrent*1155 jurisdiction if the claim does not exceed \$10,000); [FN2] see also 28 U.S.C. § 1498(a) (patent and copyright claims against United States). And suits "commenced under" § 516 of the Tariff Act of 1930, 19 U.S.C. § 1516, can be brought only in the Court of International Trade. See 28 U.S.C. § 1581. See also 33 U.S.C. § 921(c) (vesting federal courts of appeals with original jurisdiction to review agency orders under Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, and the Black Lung Benefits program, 30 U.S.C. § 901 *et seq.*); 29 U.S.C. § 160(f) (vesting federal courts of appeals with original jurisdiction to review agency orders under National Labor Relations Act). Thus, the federal law that creates a cause of action may also manifest a particular intent to assign the cause of action to courts other than district courts, notwithstanding the general principle announced in § 1331. The only other court to address the issue before us found federal jurisdiction by ignoring that principle. See *Kenro, Inc. v. Fax Daily, Inc.*, 904 F.Supp. 912 (S.D.Ind.1995).

FN2. Notably, these statutes do not *explicitly* say that the Court of Federal Claims has exclusive jurisdiction over cases involving more than \$10,000. One might conclude that district courts had concurrent jurisdiction by virtue of 28 U.S.C. § 1331. But Congress' explicit announcement of concurrent jurisdiction in 28 U.S.C. § 1346--which would be superfluous if § 1331 already conferred concurrent jurisdiction-- leads quite naturally to the conclusion that jurisdiction of cases involving more than \$10,000 lies exclusively in the Court of Federal Claims by virtue of 28 U.S.C. § 1491. Similarly, as we noted above, the fact that state courts are presumed to have concurrent jurisdiction to enforce federal laws leads naturally to the conclusion that the TCPA's explicit provision for state jurisdiction creates exclusive jurisdiction in state courts.

International Science also argues, based on a misreading of *Merrell Dow*, that "federal courts

[whether the district courts or other federal courts] always have jurisdiction of cases arising under federal law, if a private right of action is intended at all." Contrary to International Science's argument, the focus of *Merrell Dow* was not on such a principle but on the intent of Congress. After determining that "Congress did not intend a private federal remedy for violations of the statute that it enacted," 478 U.S. at 811, 106 S.Ct. at 3233, the Court in *Merrell Dow* concluded:

[I]t would flout congressional intent to provide a private federal remedy for the violation of the federal statute. We think it would similarly flout, or at least undermine, congressional intent to conclude that the federal courts might nevertheless exercise federal-question jurisdiction and provide remedies for violations of that federal statute solely because the violation of the federal statute is said to be a "rebuttable presumption" or a "proximate cause" under state law, rather than a federal action under federal law.

Id. at 812, 106 S.Ct. at 3234.

[20][21] In the TCPA, Congress made explicit provision not only for federal actions by state attorneys general but also for state actions by private individuals. Had it not done so, we might be left with a question under *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), of whether the TCPA created an *implied* federal right of action cognizable as specified in 28 U.S.C. § 1331. But of course, in the TCPA Congress did manifest its specific intent that private TCPA actions should be brought in the state courts. As in *Merrell Dow*, "it would flout congressional intent [here] ... to conclude that the federal courts might nevertheless exercise federal question jurisdiction." 478 U.S. at 812, 106 S.Ct. at 3234. The particularized congressional intent manifested in 47 U.S.C. § 227(b)(3) governs, not the general proposition announced in § 1331. [FN3]

FN3. For precisely the same reason, we find no merit in International Science's argument, made first on appeal, that jurisdiction lies by virtue of 28 U.S.C. § 1337(a) which provides that "[t]he district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce...." We also reject it because § 1337 was not asserted as a basis for jurisdiction in the district court.

V

(Cite as: 106 F.3d 1146, *1155)

International Science argues finally that we should avoid finding exclusive state jurisdiction for private actions under 47 U.S.C. § 227(b)(3) because to do so raises constitutional *1156 questions. In particular, International Science argues that (1) finding exclusive state jurisdiction would result in a violation of the Equal Protection Clause of the Fourteenth Amendment and (2) interpreting the statute as creating exclusive state jurisdiction would infringe "the Tenth Amendment rights of states to govern without meddling from the federal government."

[22][23] We agree with International Science's general assertion that courts should favor an otherwise permissible interpretation of a statute to avoid serious constitutional questions. *See, e.g., Public Citizen v. Dept. of Justice*, 491 U.S. 440, 466-67, 109 S.Ct. 2558, 2572-73, 105 L.Ed.2d 377 (1989). But that axiom of statutory interpretation neither commands nor permits us to construe a statute in a way "plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397, 99 L.Ed.2d 645 (1988). As we have already concluded, Congress intended that private TCPA actions be brought, if at all, in state courts. Having reached that conclusion, we must address International Science's constitutional challenges.

A

[24][25][26] International Science first contends that to read the statute as authorizing exclusive state jurisdiction over private causes of action would violate the Fourteenth Amendment guarantee of "equal protection of the laws." U.S. Const. amend. XIV, § 1. As a technical matter, however, any equal protection challenge to a federal law must arise under the equal protection component of the Fifth Amendment's Due Process Clause, not the Fourteenth Amendment which applies only to states. Regardless of whether the argument is made under the Fourteenth Amendment or the Fifth Amendment, however, the standard for defining the equal protection guarantee is the same. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, ----, 115 S.Ct. 2097, 2106-08, 132 L.Ed.2d 158 (1995) (reaffirming cases holding that Fifth Amendment equal protection component is substantively equivalent to Fourteenth Amendment's Equal

Protection Clause).

International Science argues that interpreting 47 U.S.C. § 227(b)(3) to authorize jurisdiction exclusively in state courts would violate equal protection because the authorization is conditioned by the phrase, "if otherwise permitted by the laws or rules of a court of [that] State." Interpreting that clause to allow a private cause of action only where state law duplicates the TCPA's substantive prohibitions, International Science argues that where a state, as Virginia, for example, has no statutory prohibition against unsolicited fax transmissions, citizens of that state would not have the benefit of the federal right, whereas citizens of other states would.

[27][28][29] We believe that this argument is based on a misconstruction of the nature of the federal right. The clause in 47 U.S.C. § 227(b)(3) "if otherwise permitted by the laws or rules of court of a State" does not condition the substantive right to be free from unsolicited faxes on state approval. Indeed, that substantive right is enforceable by state attorneys general or the Federal Communications Commission irrespective of the availability of a private action in state court. Rather, the clause recognizes that states may refuse to exercise the jurisdiction authorized by the statute. Thus, a state could decide to prevent its courts from hearing private actions to enforce the TCPA's substantive rights. To that extent, the existence of a *private* right of action under the TCPA could vary from state to state. That inequality, however, touches only a statutory permission to enforce privately the same substantive rights which both the state and the federal government can enforce in federal court through other mechanisms. Moreover, because the inequality arises from a classification that is not based on a fundamental right or impermissible characteristic such as race, religion, or national origin, our review of the statutory provision under the Equal Protection Clause is narrow:

The question is simply whether the legislative classification is rationally related to a legitimate governmental interest. Under this standard, the Act is entitled to a strong presumption of validity, and must *1157 be sustained if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.

Thomasson v. Perry, 80 F.3d 915, 928 (4th Cir.1996) (citations, internal quotes, and emphasis

omitted).

We believe that it is readily apparent from the congressional findings contained in the TCPA itself that Congress considered the effect that a newly created private right of action would have on judicial administration. Specifically finding that 18 million telemarketing calls are made daily, Pub.L. No. 102-243, § 2(3), 105 Stat. 2394 (1991), Congress understandably avoided opening federal courts to the millions of potential private TCPA claims by authorizing private actions only in state courts, presumably in the small claims courts. Similarly concerned over the potential impact of private actions on the administration of state courts, Congress included a provision to allow the states to prohibit private TCPA actions in their courts. We have no doubt that Congress has a legitimate interest in not overburdening state and federal courts. Nor can it be doubted that Congress has a legitimate interest in respecting the states' judgments about when their courts are overburdened. With those interests in mind and recognizing that other enforcement mechanisms are available in the TCPA, we believe Congress acted rationally in both closing federal courts and allowing states to close theirs to the millions of private actions that could be filed if only a small portion of each year's 6.57 billion telemarketing transmissions were illegal under the TCPA.

The fact that private actions under the TCPA may be permitted in some state courts and prohibited in others, as determined by the states, does not render the TCPA violative of the equal protection component of the Fifth Amendment's Due Process Clause.

B

[30] International Science also argues that to interpret 47 U.S.C. § 227(b)(3) as providing for exclusive state court jurisdiction would "interfere with the Tenth Amendment rights of states to govern without meddling from the federal government." It argues that in creating *exclusive* state jurisdiction over private TCPA actions, Congress impermissibly has commandeered state courts. See *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992).

[31] While we agree that we must be sensitive to

any effort by Congress to commandeer state resources, see *New York*, 505 U.S. at 155, 112 S.Ct. at 2417, we conclude that, in enacting the TCPA, Congress went out of its way to avoid overstepping the limits of the Tenth Amendment by explicitly recognizing the states' power to reject enforcement in their courts of the federally created right.

[32][33] An act of Congress may violate the Tenth Amendment if it exceeds the scope of delegated powers or "invades the province of state sovereignty reserved by the Tenth Amendment." *New York*, 505 U.S. at 155, 112 S.Ct. at 2417. "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *Id.* at 156, 112 S.Ct. at 2417.

[34] In this case, Congress has not commanded state legislatures to legislate, as found impermissible in *New York*. See 505 U.S. at 178-79, 112 S.Ct. at 2429-30. Rather, it has, at most, directed that state courts enforce federal law, a requirement imposed on the states directly by the Supremacy Clause of Article VI, which provides that "the Laws of the United States which shall be made in Pursuance [of the Constitution] ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI. Indeed, since *Testa v. Katt*, 330 U.S. 386, 67 S.Ct. 810, 91 L.Ed. 967 (1947), it has been clear that state courts may not refuse to enforce federal claims which are similar to state claims enforced in the same courts, at least where the federal enactment provides for *concurrent* jurisdiction in state and federal courts. See also *Federal Energy Regulatory *1158 Comm'n v. Mississippi*, 456 U.S. 742, 760, 102 S.Ct. 2126, 2137-38, 72 L.Ed.2d 532 (1982) (extending *Testa* to state regulatory body with adjudicatory functions).

It is true that in the case before us, we do not have the ameliorating fact that the TCPA provides for concurrent federal jurisdiction over private civil actions. To the contrary, in the TCPA Congress took the unusual step of making state court jurisdiction exclusive. Apparently recognizing that

the exclusivity of state court jurisdiction could create a problem potentially left unresolved by *Testa*, Congress avoided any constitutional issue by refusing to coerce states to hear private TCPA actions, providing instead that a person or entity may, "if otherwise permitted by the laws or rules of court of a State," bring a TCPA action in an appropriate court of that state. 47 U.S.C. § 227(b)(3). States thus retain the ultimate decision of whether private TCPA actions will be cognizable in their courts. Indeed, if the state attorneys general refuse to bring action in federal court, enforcement of the TCPA will depend entirely on the Federal Communications Commission. Thus, under the TCPA, Congress respected the balance demanded by our system of federalism:

If state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense [and administrative burden] of [the TCPA], and they may continue to supplement that program to the extent state law is not pre-empted. Where Congress [thus] encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.

New York, 505 U.S. at 168, 112 S.Ct. at 2424. In creating a conditional right of action to enforce the TCPA in state courts, Congress neither exceeded

its delegated powers nor invaded the province of state sovereignty, which may still be exercised to prohibit the action. Indeed, from top to bottom, the private TCPA action reflects Congress' intent to enhance state sovereignty. Congress enacted the TCPA to assist states where they lacked jurisdiction; it empowered states themselves to enforce the TCPA in federal court; it authorized private enforcement exclusively in state courts; and it recognized state power to reject Congress' authorization.

VI

[35] While Congress created, in the TCPA, an individual right to be free from unsolicited fax advertising, it provided for private actions to enforce the right exclusively in state courts. Accordingly, jurisdiction of the United States district courts over private TCPA actions may not be premised on the general federal-question jurisdiction conferred by 28 U.S.C. § 1331. We affirm the ruling of the district court dismissing this action for lack of subject matter jurisdiction.

AFFIRMED.

106 F.3d 1146, 65 USLW 2548. 25 Media L. Rep 1498

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TELEPHONE CONSUMER PROTECTION ACT OF 1991

P.L. 102-243, see page 105 Stat. 2394

DATES OF CONSIDERATION AND PASSAGE

Senate: November 7, 27, 1991

House: November 18, 26, 1991

**Senate Report (Commerce, Science, and Transportation
Committee) No. 102-178, Oct. 8, 1991**
[To accompany S. 1462]

**House Report (Energy and Commerce Committee) No. 102-317,
Nov. 15, 1991**
[To accompany H.R. 1304]
Cong. Record Vol. 137 (1991)

RELATED REPORT

**Senate Report (Commerce, Science, and Transportation Committee)
No. 102-177, Oct. 8, 1991**
[To accompany S. 1410]

*The Senate bill was passed in lieu of the House bill. The
Senate Report (this page) is set out below and the President's
Signing Statement (page 1979) follows.*

SENATE REPORT NO. 102-178

[page 1]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 1462) to amend the Communications Act of 1934 to prohibit certain practices involving the use of telephone equipment for advertising and solicitation purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

PURPOSE OF THE BILL

The purposes of the bill are to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers.

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TELEPHONE CONSUMER PROT. ACT

P.L. 102-243

BACKGROUND AND NEEDS

A. CONSUMER COMPLAINTS

The use of automated equipment to engage in telemarketing is generating an increasing number of consumer complaints. The Federal Communications Commission (FCC) received over 2,300 complaints about telemarketing calls over the past year. The Federal Trade Commission, State regulatory agencies, local telephone companies, and congressional offices also have received substantial numbers of complaints.

Consumers are especially frustrated because there appears to be no way to prevent these calls. The telephone companies usually do

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not know when their lines are being used for telemarketing purposes, and, even if they did, it is questionable whether the telephone companies should be given the responsibility of preventing such calls by monitoring conversations. Having an unlisted number does not prevent those telemarketers that call numbers randomly or sequentially.

In general, those who complain about these calls believe that they are a nuisance and an invasion of privacy. Residential and business subscribers believe that these calls are an impediment to interstate commerce. In particular, they cite the following problems:

- automated calls are placed to lines reserved for emergency purposes, such as hospitals and fire and police stations;
- the entity placing the automated call does not identify itself;
- the automated calls fill the entire tape of an answering machine, preventing other callers from leaving messages;
- the automated calls will not disconnect the line for a long time after the called party hangs up the phone, thereby preventing the called party from placing his or her own calls;
- automated calls do not respond to human voice commands to disconnect the phone, especially in times of emergency;
- some automatic dialers will dial numbers in sequence, thereby tying up all the lines of a business and preventing any outgoing calls; and
- unsolicited calls placed to fax machines, and cellular or paging telephone numbers often impose a cost on the called party (fax messages require the called party to pay for the paper used, cellular users must pay for each incoming call, and paging customers must pay to return the call to the person who originated the call).

B. REASONS FOR THE CONSUMER COMPLAINTS

The growth of consumer complaints about these calls has two sources: the increasing number of telemarketing firms in the business of placing telephone calls, and the advance of technology which makes automated phone calls more cost-effective.

The telemarketing industry is growing by immense proportions and is now a multibillion dollar industry. Some estimates are that

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the telemarketing industry gathered \$435 billion in sales in 1990, a more than fourfold increase since 1984.

Recent changes in the telemarketing industry have made making unsolicited phone calls a more cost-effective method of reaching potential customers. Over the past few years, long distance telephone rates have fallen over 40 percent, thereby reducing the costs of engaging in long distance telemarketing. The costs of telemarketing have fallen even more with the advent of automatic dialer recorded message players (ADRMPs) or automatic dialing and announcing devices (ADADs). These machines automatically dial a telephone number and deliver to the called party an artificial or prerecorded voice message. Certain data indicate that the machines are used by more than 180,000 solicitors to call more than 7 million Americans every day. Each ADRMP has the capacity to dial as many of 1,000 telephone numbers each day.

[page 3]

C. THE NEED FOR LEGISLATION

Many consumers and consumer representatives believe that legislation is necessary to protect them from these calls. One survey found that about 75 percent of persons contacted favored some form of regulation of these calls, and one-half of these favored prohibiting all unsolicited calls.

As a result, over 40 States have enacted legislation limiting the use of ADRMPs or otherwise restricting unsolicited telemarketing. These measures have had limited effect, however, because States do not have jurisdiction over interstate calls. Many States have expressed a desire for Federal legislation to regulate interstate telemarketing calls to supplement their restrictions on intrastate calls.

The FCC, however, has decided not to take any action to regulate unsolicited calls. After examining this issue in 1980 and 1986, the FCC concluded that it did not need to take any action.¹ In its statement submitted to the Communications Subcommittee for the record of the hearing on this bill, FCC Chairman Alfred C. Sikes stated: "It is not clear, however, that sweeping Federal legislation is required. * * * [T]his may be a situation where continued regulatory scrutiny and monitoring, subject to congressional review and oversight, is preferable to passage of legislation."²

D. THE LEGISLATION

In response to these increasing consumer complaints and calls for Federal legislation, Senator Hollings introduced S. 1462, the "Automated Telephone Consumer Protection Act," on July 11, 1991. The bill as introduced proposed to ban artificial or prerecorded messages to residential consumers and to emergency lines, and to place restrictions on unsolicited advertisements delivered via fax machine. The bill received the strong support of consumer groups and many telephone customers.

E. RESPONSE TO THE TELEMARKETERS

Telemarketers generally believe that Federal legislation is unnecessary; they believe that the tremendous growth in the telemar-

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TELEPHONE CONSUMER PROT. ACT

P.L. 102-243

keting industry is evidence that many consumers benefit from these calls. The Direct Marketing Association and other groups representing companies that engage in telemarketing, however, do not oppose the restrictions contained in S. 1462 as reported. These companies do not use automatic dialers or other equipment to make automated telephone calls and thus do not object to the reported bill. They also do not object to banning telemarketing calls to emergency and mobile services numbers.

Some telemarketers asked that S. 1462 be amended to exempt the following automated calls: automated calls made by companies to tell people who have ordered products that the item is ready for pickup; automated calls made for debt collection purposes; and

¹ See, e.g., *Unsolicited Telephone Calls*, 77 FCC 2d 1023 (1980); *Automatic Dialing Devices*, FCC Release No. 86-352 (1986).

² Statement of Alfred C. Sikes, Chairman, FCC, before the Subcommittee on Communications, Committee on Commerce, Science, and Transportation, on S. 1410, S. 1462, and S. 857, July 24, 1991, pp. 1-2.

[page 4]

automated calls that ask a customer to "Please hold. An operator will be with you shortly."

These exemptions are not included in the bill, as reported. The Committee believes that such automated calls only should be permitted if the called party gives his or her consent to the use of these machines. In response to these concerns, however, the reported bill does not include the requirement included in the bill as introduced the requirement that any consent to receiving an automated call be in writing. The bill as reported thus will allow automated calls to be sent as long as the called party gives his or her prior express consent either orally or in writing.

F. CONSTITUTIONAL CONCERNS

Some people have raised questions about whether S. 1462 is consistent with the First Amendment protections of freedom of speech. The Committee believes that S. 1462 is an example of a reasonable time, place, and manner restriction on speech, which is constitutional. The reported bill, does not discriminate based on the content of the message. It applies equally whether the automated message is made for commercial, political, charitable or other purposes. The reported bill regulates the manner (that is, the use of an artificial or prerecorded voice) of speech and the place (the home) where the speech is received.

The Supreme Court has recognized the legitimacy of reasonable time, place, and manner restrictions on speech when the restrictions are not based on the content of the message being conveyed. In 1948, the Court upheld an ordinance banning sound trucks. *Kovacs v. Cooper*, 336 U.S. 77 (1948). The Supreme Court also has recognized that "in the privacy of the home * * * the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978). The case upheld an FCC ruling that prohibited the daytime broadcast of indecent language.

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In addition, it is clear that automated telephone calls that deliver an artificial or prerecorded voice message are more of a nuisance and a greater invasion of privacy than calls placed by "live" persons. These automated calls cannot interact with the customer except in preprogrammed ways, do not allow the caller to feel the frustration of the called party,³ fill an answering machine tape or a voice recording service,⁴ and do not disconnect the line even after

³ For instance, Mr. Steve Hamm, Administrator of the South Carolina Department of Consumer Affairs, testified that "[O]ne of the constant refrains that I hear . . . from consumers and business leaders who have gotten these kinds of computerized calls is they wish they had the ability to slam the telephone down on a live human being so that that organization would actually understand how angry and frustrated these kinds of calls make citizens, and slamming a phone down on a computer just does not have the same sense of release." Communications Subcommittee Hearing on S. 1410, S. 1462, and S. 857, July 24, 1991. Hearing Transcript, p. 22.

⁴ When machines call a person using an answering machine, the automated call can fill the entire tape of the answering machine, thereby preventing the called party from receiving other messages from other callers. When a person uses a voice recording system from the telephone company, the person often is required to pay for every message that is recorded. The amount of the payment often varies depending on the length of the call. When "live" persons place these telemarketing calls, they usually hang up soon after realizing that the called party is not personally available, thus minimizing payment.

[page 5]

the customer hangs up the telephone.⁵ For all these reasons, it is legitimate and consistent with the constitution to impose greater restrictions on automated calls than on calls placed by "live" persons.

G. CHANGES TO THE BILL AS INTRODUCED

In response to the comments received by the Committee, the version of S. 1462 reported by the Committee includes three changes to the bill as introduced. These changes are as follows:

- a. The reported bill deletes the ban on sending faxes to emergency phones or cellular phones. Some persons have fax machines in their cars and may want to receive fax messages. Further, there may be times when an emergency situation requires the use of a fax message.
- b. The reported bill deletes the requirement that all consent must be in writing. Many persons order goods over the phone and may give their oral consent to being called back by a computer telling them that their product is ready for pickup. The reported bill allows the consent to be given either orally or in writing.
- c. The bill as introduced banned automated telephone calls unless the call was placed by a "public school or other governmental entity." The reported bill replaces this language with an exception for "any emergency purposes." This will allow the use of automated calls when private individuals as well as schools and other government entities call for emergency purposes.

H. CONCLUSION

The Committee believes that Federal legislation is necessary to protect the public from automated telephone calls. These calls can

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TELEPHONE CONSUMER PROT. ACT
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be an invasion of privacy, an impediment to interstate commerce, and a disruption to essential public safety services. Federal action is necessary because States do not have the jurisdiction to protect their citizens against those who use these machines to place interstate telephone calls. The Federal Government has a legitimate interest in protecting the public, and the regulations required by the reported bill are the minimum necessary to protect the public against the harm caused by the use of these machines. These regu-

⁵ The disconnection problem is especially important and is one of the principal reasons why automated calls are more of a nuisance than calls placed by "live" persons. Automated calls often do not disconnect the line after the called party hangs up, thereby preventing the called party from being able to use his or her line to make outgoing calls. Testimony before the Committee and press accounts have given numerous examples of persons who tried to place a call for emergency purposes and who could not use their phones because the phones were tied up by an automated machine that failed to recognize that the called party had hung up the phone. This problem is not solved completely by the requirement in S. 1462 that these machines disconnect the line within five seconds of the time that the telephone network notifies the machines that the called party has hung up. When a called party hangs up on a "live" person, the "live" person can hear the called party hang up and can disconnect the line immediately. A machine, however, does not hear the called party hang up the phone. The machine must await a disconnect signal transmitted by the telephone network. The testimony of the FCC indicates that it can take up to 32 seconds for the telephone network to generate this signal so that the machine knows to disconnect its end of the line. Thus, even if the machines are required to disconnect within five seconds of being notified that the called party has hung up, the called party's line can remain tied up for up to 37 seconds after he or she hangs up the phone.

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lations are consistent with the constitutional guarantee of free speech.

LEGISLATIVE HISTORY

Senator Hollings introduced S. 1462 on July 11, 1991, which is co-sponsored by Senators Inouye, Stevens, Bentsen, and Simon. The Communications Subcommittee held a hearing on S. 1462 and S. 1410, the Telephone Advertising Consumer Rights Act, on July 24, 1991. Witnesses included representatives of consumer organizations, the Direct Marketing Association, and the mobile telephone services industry. On July 30, 1991, in open executive session, the Committee ordered S. 1462 reported, with an amendment in the nature of a substitute, without objection.

The House of Representatives also has been considering telemarketing legislation. The House Telecommunications and Finance Subcommittee favorably reported H.R. 1304, the Telephone Advertising Consumer Rights Act, on May 9, 1991, and the House Energy and Commerce Committee favorably reported a modified version of H.R. 1304 on July 30, 1991. This House bill contains restrictions on calls to emergency lines and unsolicited advertising by fax machine that are similar to the restrictions contained in S. 1462, as reported. Congresswoman Unsoeld (D-WA) has introduced legislation in the House (H.R. 1589) to ban the use of autodialers. No action on this bill has yet been taken.

In the 101st Congress, the House passed a bill (H.R. 2921), similar to the bill it is currently considering but that bill was not passed by the Senate before adjourned.

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SUMMARY OF MAJOR PROVISIONS

The bill would accomplish the following:

1. *Emergency and Cellular lines:* ban all autodialed calls, and artificial or prerecorded calls, to emergency lines and paging and cellular phones.

2. *Computerized calls to homes:* ban all computerized calls to the home, unless the called party consents to receiving them, or unless the calls are made for emergency purposes (the ban applies whether the automated call is made for commercial, political, religious, charitable or other purposes).

3. *Junk Fax:* ban all unsolicited advertisements sent by fax machine, unless the receiver invites or gives permission to receive such advertisements.

4. *Technical and Procedural Requirements:*

a. *Autodialers:* Autodialers must identify the initiator of the call, must give the telephone number of the business placing the call, and must disconnect the line within 5 seconds of receiving notice that the called party has hung up the telephone; and

b. *Fax machines:* Fax machines must identify the sender on each page or the first page of each transmission, and give the telephone number of the sending machine.

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ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 9, 1991.

HON. ERNEST F. HOLLINGS,
Chairman, Committee on Commerce, Science, and Transportation,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 1462, the Automated Telephone Consumer Protection Act, as ordered reported by the Senate Committee on Commerce, Science, and transportation on July 30, 1991. CBO estimates that enactment of this bill would result in increased costs to the federal government of \$750,000 over the next five years. Enactment of S. 1462 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to the bill.

S. 1462 would ban all prerecorded or automatically-dialed telephone calls to emergency, paging, or cellular telephone numbers and to residential subscribers without the express prior constant of the called party. The bill also would ban unsolicited facsimile advertisements. Finally, S. 1462 would require the Federal Communications Commission (FCC) to revise standards for facsimile and autodialing machines to require that they provide certain information about the sender.

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TELEPHONE CONSUMER PROT. ACT
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Based on information from the FCC, CBO estimates that development, implementation, and enforcement of the various bans and standards required by the bill would result in increased costs to the federal government of \$750,000 over the next five years.

No costs would be incurred by state or local governments as a result of enactment of this bill.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is John Webb, who can be reached at 226-2860.

Sincerely,

ROBERT D. REISCHAUER, *Director.*

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported.

NUMBER OF PERSONS COVERED

This bill, as reported imposes a limited regulatory burden on some equipment manufacturers and some telemarketers. As a result of this legislation, telemarketers must obtain the express consent of any residential telephone subscriber before placing an automated telephone call to that subscriber (unless the call is made for emergency purposes.) Most telemarketers that have contacted

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the Committee do not use these machines to place automated telephone calls to consumers' homes. If they do use these machines, such consent can be obtained at the beginning of a telephone call by a "live" person. For instance, when a consumer answers the phone, a "live" person can ask the consumer if he or she consents to listening to a recorded or computerized message. If the consumer indicates express consent, the "live" caller may switch to a recorded or computerized message. The Committee does not believe that this consent requirement will be an inordinate regulatory burden on the telemarketer.

Telemarketers also will be required to ensure that they do not place automated calls to residential customers, to emergency lines, or to cellular or paging numbers. These restrictions are necessary to accomplish the objectives of the bill. The bill, as reported, does not bar telemarketers from placing automated calls to business users.

Also, the reported bill prohibits telemarketers from sending unsolicited advertisements via a fax machine. Under the definition of "unsolicited advertisement" contained in the bill, the recipient either must invite or must give his or her permission to receive an advertisement via a fax machine. In other words, as long as the recipient of a fax either invites or grants permission, telemarketers may continue to send such fax messages. While telemarketers will be responsible for determining whether a potential recipient of an advertisement, in fact, has invited or given permission to receive such fax messages, such a responsibility, is the minimum necessary to protect unwilling recipients from receiving fax messages that

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SENATE REPORT NO. 102-178

are detrimental to the owner's uses of his or her fax machine. Such restrictions do not apply to fax messages that are not "advertisements."

Finally, the bill imposes some minimal technical requirements on all fax machines to include the name, address, and telephone number of the person sending any fax message. In addition, automated telephone equipment manufacturers must ensure that their equipment disconnects the called party's line within 5 seconds of the time the equipment is notified that the called party has hung up the telephone. These requirements may impose a minimal burden on the manufacturers of such machines, although most machines already comply with these requirements. The Committee has received no objections to these requirements.

These minimal burdens must be compared to the great number of people who will benefit from the protection of these regulations. As noted previously, it is estimated that these machines are used to call as many as 7 million Americans every day.

ECONOMIC IMPACT

The reported bill may have a minimal economic impact on the telemarketing industry. The bill prohibits telemarketers from using artificial or prerecorded voice messages to residential consumers without the prior express consent of the recipient of the call. As noted previously, however, most telemarketers do not place unsolicited telephone calls to residential customers using artificial or prerecorded messages. Further, this legislation continues to

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permit telemarketers to contact potential customers using "live" persons to place telephone calls, to call business customers through artificial or prerecorded voice messages, or to engage in any other method of advertising. The fact that the major telemarketers do not oppose this legislation further reflect the view that the potential economic impact on telemarketers, if any, will be small.

PRIVACY

The reported bill will result in a significant benefit in protecting the personal privacy of residential telephone subscribers. The evidence gathered by the Committee indicates that a substantial proportion of the public believes that these calls are a nuisance and an invasion of one's privacy rights in the home. The Supreme Court has recognized explicitly that the right to privacy is founded in the Constitution, and telemarketers who place telephone calls to the home can be considered "intruders" upon that privacy.

PAPERWORK

The reported bill adds a new section to the Communications Act of 1934, and it requires the FCC to revise its technical and procedural standards for fax machines and automated telephone equipment. These technical and procedural standards already exist in the industry; the FCC need only accept these standards, which already have been developed by the industry. The FCC also may ini-

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tiate a rulemaking proceeding to develop regulations to enforce the provisions of this bill. Such rulemaking proceedings are unlikely to require a great deal of paperwork because of the relatively straight-forward nature of the restrictions contained in this bill. The reported bill imposes no additional reporting requirements on any of the parties affected by the legislation. The paperwork burden on the FCC and on any parties affected by this bill thus will be minimal.

SECTION-BY-SECTION ANALYSIS

SECTION 1—SHORT TITLE

This section states that the bill's short title is the "Automated Telephone Consumer Protection Act."

SECTION 2—RESTRICTIONS ON THE USE OF AUTOMATED TELEPHONE EQUIPMENT

Subsection (a) adds a new section 228 to the Communications Act of 1934 establishing regulations concerning automatic dialing devices, fax machines, artificial or prerecorded voice messages, or other similar devices. The regulations concerning the use of these machines apply to the persons initiating the telephone call or sending the message and do not apply to the common carrier or other entity that transmits the call or message and that is not the originator or controller of the content of the call or message.

Subsection (a) of new section 228 sets forth definitions of an "automatic telephone dialing system," a "telephone facsimile machine" and an "unsolicited advertisement."

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New section 228(b)(1) prohibits any call using any automated telephone dialing system, or an artificial or prerecorded voice, to emergency, paging, or cellular telephone lines.

New section 228(b)(2) prohibits any call to a residence using an artificial or prerecorded voice message without the prior, express, oral or written consent of the called party, unless the call is initiated for emergency purposes. The FCC shall define what constitutes an "emergency." In general, any threat to the health or safety of the persons in a residence should be considered an emergency. In adopting a definition of this term, the FCC should consider whether disconnecting telephone service would constitute an emergency. If so, telephone companies would be permitted to use an artificial or prerecorded voice message to alert their customers that their telephone service was about to be disconnected unless payment of the outstanding balance was received.

New section 228(b)(3) prohibits sending unsolicited advertisements by a fax machine.

New section 228(c)(1)(A) prohibits the sending of a communication by a fax machine or automatic telephone dialing system that does not comply with technical standards prescribed under new section 228(c).

New section 228(c)(1)(B) requires that any message sent by a computer or other electronic device via fax machine must identify the

LEGISLATIVE HISTORY
SENATE REPORT NO. 102-178

date, time, company's name, and phone number in the margin of every page, or on the first page.

New section 228(c)(2) requires the FCC to set technical standards so that all fax machines which are manufactured after 6 months after the date of enactment of this section and which can be used for unsolicited advertising have the capability of making such identification of the sender of the message. The FCC shall exempt from such standards, for 18 months, those fax machines that cannot engage in automatic dialing and transmission and that cannot operate with a computer.

New section 228(c)(3) requires the FCC to set technical standards for systems sending artificial or prerecorded voice messages via telephone. New section 228(c)(3)(A) requires all artificial or prerecorded telephone messages to identify the business initiating the call and to state the telephone number or address of such business.

New section 228(c)(3)(B) requires any artificial or prerecorded voice system to release the called party's line within 5 seconds of receiving notification that the called party has hung up. This provision does not require such equipment to disconnect within 5 seconds of the time called party actually hangs up; it requires disconnection with 5 seconds of the time *it is notified* by the telephone network that the called party has hung up. This clarification is included in recognition that some telephone companies are not able to notify the calling party that the called party has hung up for several seconds. It is thus unrealistic to except such equipment to disconnect the line before it recognizes that the called party actually has hung up the telephone.

New section 228(d) states that nothing in this legislation preempts more restrictive State action regarding the use of fax machines, automatic telephone dialing systems, and artificial or prerecorded voice messages.

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Subsection (b) of the reported bill is a conforming amendment.

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STATEMENT

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27 Weekly

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The White House,
December 20, 1991.

SIGNING STATEMENT

P.L. 102-243

STATEMENT BY PRESIDENT OF THE UNITED STATES

**STATEMENT BY PRESIDENT GEORGE BUSH
UPON SIGNING S. 1462**

27 Weekly Compilation of Presidential Documents 1877,
December 23, 1991

Today I have signed into law S. 1462, the "Telephone Consumer Protection Act of 1991." This legislation is designed for the laudable purpose of protecting the privacy rights of telephone users. However, the Act could also lead to unnecessary regulation or curtailment of legitimate business activities. That is why the Administration opposed it when it was pending before the Congress. Indeed, the Administration is firmly opposed to current congressional efforts to re-regulate the telecommunications industry.

I have signed the bill because it gives the Federal Communications Commission ample authority to preserve legitimate business practices. These include automated calls to consumers with whom a business has preexisting business relationships, such as calls to notify consumers of the arrival of merchandise ordered from a catalog. I also understand that the Act gives the Commission flexibility to adapt its rules to changing market conditions. I fully expect that the Commission will use these authorities to ensure that the requirements of the Act are met at the least possible cost to the economy.

GEORGE BUSH

The White House,
December 20, 1991.

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