Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
Petition for Declaratory Ruling that the FCC has Exclusive Regulatory Jurisdiction Over Interstate Telemarketing	)	DA 05-1346

REPLY COMMENTS OF JOINT PETITIONERS

TABLE OF CONTENTS

SUMMARY

In these reply comments, Joint Petitioners respond to a number of states and consumer groups that urge the Commission to deny the Joint Petition for a hodgepodge of statutory and policy reasons. These commenters either misstate or misunderstand the Joint Petition and, as a result, raise arguments that are either unpersuasive or irrelevant.

To begin, several opponents of the Joint Petition seriously mischaracterize it, greatly exaggerating the scope of the petition and overstating the relief requested. In short, they claim that Joint Petitioners ask the Commission to declare its exclusive authority over *every* consumer harm committed by way of an interstate call such that states are deprived of *all* authority to protect consumers. Nothing could be further from the truth. The Joint Petition seeks a declaratory ruling only with respect to interstate telemarketing and would have no affect on other state laws and regulations. Moreover, as explained by an entire section of the original Joint Petition that these commenters somehow missed, the Commission's exclusive jurisdiction over interstate telemarketing is no impediment to state efforts to protect consumers.

As the Joint Petition explained, the 1934 Communications Act ("1934 Act" or "Communications Act") conferred upon this Commission the exclusive authority to regulate interstate communications and reserved to the states the authority to regulate intrastate communications. Almost sixty years later, Congress enacted the Telephone Consumer Protection Act of 1991 (TCPA) against this jurisdictional backdrop. At that time, Congress *made absolutely clear* that the Commission's Section 2 authority extends to regulating interstate telemarketing, *expanded* the agency's jurisdiction to include regulation of intrastate telemarketing, and *reaffirmed* that the states may regulate the latter but not the former.

The Joint Petition's opponents first mistakenly argue that the text and legislative history of the TCPA undermine our jurisdictional analysis. Viewed in the context of the long-established jurisdictional framework, however, the text and history of the TCPA completely support the Joint Petition's approach. Second, opponents suggest that the *FTC's* regulatory jurisdiction over interstate telemarketing somehow expands state jurisdiction as well. But Congress's decision to confer upon two *federal* agencies the authority to regulate interstate telemarketing has nothing to do with the traditional division of authority between the FCC and the states. Third, opponents argue that the Joint Petition analysis is flawed because telemarketing regulation, like regulations of fraud or deception committed over the telephone, fall outside the Commission's Section 2 jurisdiction. But, unlike fraud or deception, interstate telemarketing is plainly encompassed within the Commission's broad jurisdiction over "interstate communications." Moreover, a number of state laws directly regulate the telecommunications network or services, which even the states now appear to concede they cannot lawfully regulate.

Significantly, however, this Commission need not confine itself to a consideration of whether *Congress* has already displaced all state regulation of interstate telemarketing. Should the Commission find that Congress's division between federal and state authority remains unclear as applied to interstate telemarketing, then – as we urged in the Joint Petition – the Commission should recognize that it has authority to clarify that division and should do so now. The few commenters who address this argument fundamentally misunderstand it, arguing that *because* – in their mistaken view – Congress did not confer exclusive authority over interstate telemarketing on the FCC, the agency has no power to preempt state laws in that area. That is flatly wrong. Under well-established Supreme Court precedent, opponents' narrow focus on *congressional* intent to preempt is misplaced. Because the Commission's authority to regulate interstate telemarketing is undisputed, its power to displace state regulation in that area is equally uncontestable.

Finally, several parties attempt to minimize the burden faced by interstate telemarketers forced to comply with the existing morass of confusing and inconsistent state regulations. On the contrary, this burden is substantial. While some computer programs exist to aid in compliance with federal and state do-not-call laws, there is no way that such programs can address the complexity of state laws purporting to regulate interstate telemarketing. Moreover, the compliance burdens that telemarketers face are broad and multidimensional. In addition to the costs of tracking, interpreting, and following the ever-growing number of state laws, telemarketers face litigation, financial, and reputational risks that cannot be overstated in their importance.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
Petition for Declaratory Ruling that the FCC has Exclusive Regulatory Jurisdiction Over Interstate Telemarketing	)	DA 05-1346

REPLY COMMENTS OF JOINT PETITIONERS

Joint Petitioners[1] submit these Reply Comments in support of the Petition for Declaratory Ruling ("Joint Petition") that we filed with the Commission on April 29, 2005.[2]

I. STATE AND CONSUMER GROUP COMMENTERS DRAMATICALLY MISCHARACTERIZE THE JOINT PETITION.

The Comments submitted by the states and consumer advocacy groups opposing the Joint Petition seriously misrepresent its scope and overstate the nature of the requested relief. In essence, opponents claim that the Joint Petition asks the Commission to declare that only it – and

1 Americall Group, Inc.; American Bankers Association; American Breast Cancer Foundation; American Financial Services Association; American Resort Development Association; American Teleservices Association; America's Community Bankers; AnswerNet Network; Cancer Recovery Foundation of America; Connextions; Direct Marketing Association; Effective Teleservices, Inc.; FreeEats.com, Inc. d/b/a ccAdvertising; Humane Society of Greater Akron; InfoCision Management Corp.; Kids Wish Network; Miracle Flights for Kids; Multiple Sclerosis Association of America; National Children's Cancer Society; Noble Systems Corp.; Northwest Direct Marketing, Inc.; NPS; Optima Direct, Inc.; Precision Response Corp.; SITEL Corp.; SoundBite Communications, Inc.; Synergy Solutions, Inc.; Tele-Response Center, Inc.; TeleTech Holdings, Inc.; TPG TeleManagement, Inc.; and West Business Services, LP.

2 Joint Petitioners represent a broad coalition of organizations engaged in interstate commerce that comply scrupulously with federal telemarketing regulations but are adversely affected by the prospect (or in some cases, the actuality) of state efforts to subject interstate telemarketing to state regulations that exceed and in many cases conflict with applicable federal regulations. The coalition includes entities that represent a large and varied sampling of the national economy – commercial companies that rely on lawful telemarketing to sell goods and services, political advocacy organizations, non-profit organizations that rely on lawful telemarketing to solicit charitable contributions, and vendors that provide calling and other services to all of the above.

not the states – has jurisdiction to protect consumers from *any* harm committed via an interstate call. In fact, however, the Joint Petition seeks only a declaration of exclusive federal *regulatory* jurisdiction in the specific area of interstate telemarketing regulated under the Telephone Consumer Protection Act of 1991 (TCPA) – relief that would not prevent the states from *enforcing* uniform federal rules against harmful interstate telemarketing calls or protecting consumers through the application of state laws of general applicability.

A. The Joint Petition Only Addresses Interstate Telemarketing.

A number of state and consumer commenters misleadingly suggest that the Joint Petitioners ask the Commission to vastly expand its jurisdiction to cover every consumer harm that could be committed by way of an interstate call. The coalition of attorneys general, for example, asserts that the Joint Petition seeks a ruling that "only the FCC, and not the states, may protect consumers from telephone calls that cross state lines."[3] Likewise, Indiana claims that Joint Petitioners "argue[] that the Federal Communications Act of 1934 forecloses all enforcement of state consumer protection laws against fraud and harassment committed by way of interstate telephone calls."[4] Indiana goes on to suggest that, under Joint Petitioners' jurisdictional approach, the FCC would have the sole "responsibility for safeguarding consumers from *all* injuries that can occur by way of an interstate telephone call."[5] But these "sky-is-falling" claims distort the reach of the Joint Petition.[6]

---

3 Comments of Attorneys General of 48 States and Territories at 2 ("Attorneys General Comments").

4 Comments of Indiana at 2 ("Indiana Comments").

5 *Id* at 26.

6 *See, e.g.*, Alliance Petition at 40-42. Part III of the Joint Petitioners' four-part petition was headed, "ACKNOWLEDGING THAT THE FCC HAS EXCLUSIVE JURISDICTION OVER INTERSTATE TELEMARKETING CALLS WILL NOT IMPAIR STATE CONSUMER PROTECTION ACTIVITIES." This section stated expressly that the Joint Petitioners do not challenge the states' rights to enforce consumer protection laws of general applicability, or to enforce more stringent intrastate telemarketing regulations, or even to punish interstate telemarketers for violating the federal rules.

The Joint Petition requests a declaratory ruling clarifying that Congress afforded to the FCC exclusive jurisdiction over *interstate telemarketing*, and, correspondingly, that states have no authority to *regulate in that area*. Thus, the Joint Petition's scope begins and ends with the regulation of interstate telemarketing: it does not encompass laws governing obscene, fraudulent, or deceptive calls, which, as explained below, are not subject to exclusive federal jurisdiction.

B. Acknowledging Exclusive Federal Jurisdiction Over Interstate Telemarketing Calls Will Not Impair State Efforts to Protect Consumers.

The Joint Petition's opponents claim that it would deprive states of the authority and ability to protect their consumers. With respect to telemarketing specifically, a number of commenters contend that the states will be prevented from investigating violations and bringing enforcement proceedings.[7] Other commenters suggest that enforcement of all state consumer protection laws will be impaired. AARP, for example, asserts that "Commission preemption of the interstate application of state telemarketing laws would leave consumers vulnerable and exposed."[8] The Attorneys General claim that adopting Joint Petitioners' approach "would eviscerate state protections from fraudulent and harassing calls" and would result in a world "where there would be no stopping, without federal intervention, the fraud, harassment, and other harms unscrupulous firms and individuals could inflict on consumers."[9] Wholly unfounded, such dire predictions distort the record by overstating the effects of granting the Joint Petition.

---

7 *See e.g.,* Comments of the Tennessee Regulatory Authority at 14-19; Comments of the Electronic Privacy Information Center, etc. at 19.

8 Comments of AARP at 12 ("AAPR Comments").

9 Attorneys General Comments at 2-3, 5.

In fact, granting the Joint Petition would not impinge on state anti-fraud efforts in any way. Joint Petitioners value consumers' privacy interests and the need for states to protect consumers against fraudulent and deceptive practices. Accordingly, the Joint Petition is by no means an effort to undermine state laws against fraudulent or deceptive practices. Granting the Joint Petition will not affect state actions to challenge either violations of the uniform federal do-not-call rules or state statutes of general applicability prohibiting consumer fraud or deceptive practices. The TCPA itself indisputably establishes a clear role for state enforcement of both the federal interstate telemarketing rules and general state statutes.

First, Section 227(f)(1) expressly allows state attorneys general the right to enforce the TCPA in federal court and to seek either equitable relief or monetary damages.[10] Section 227(f)(5) provides that for purposes of bringing such an action, the state remains empowered "to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence."[11] As a result, recognition that Congress has conferred on the FCC exclusive *regulatory* authority over interstate communications requires only that *the rule of decision with respect to alleged violations of telemarketing regulation be governed by the federal rules*. This has no effect on state enforcement. States can and should continue to investigate and enforce alleged violations of the uniform federal telemarketing rules by interstate telemarketers. Second, Section 227(f)(6) of the TCPA explicitly preserves the right of state attorneys general to proceed in state court against telemarketers "on the basis of an alleged violation of any *general* civil or criminal statute of such State,"[12] *i.e.*, a statute applicable to *all* persons and entities located or conducting activities in the

---

10 47 U.S.C. § 227(f)(1) & (2).

11 *Id.* § 227(f)(5).

12 *Id.* § 227(f)(6) (emphasis added).

state, rather than expressly directed toward those entities that Congress chose to regulate under the TCPA.[13]

Indiana states that the FCC "has not been charged with responsibility for prosecuting consumer injury cases just because the injury is occasioned by an interstate telephone call." Joint Petitioners agree. But the FCC *has been charged* with establishing regulations for interstate telemarketing that balance consumers' need for privacy with the interests of legitimate telemarketers. Recognizing that Congress conferred upon the Commission the exclusive authority to adopt and implement interstate telemarketing regulations, as Joint Petitioners advocate, in no way addresses, let alone interferes with, state police powers or long-arm statutes used to protect consumers generally against fraud, deception, obscenity, or other harms that fall outside exclusive federal jurisdiction.

II. NONE OF OPPONENTS' ARGUMENTS UNDERMINE THE FACT THAT CONGRESS ESTABLISHED EXCLUSIVE FEDERAL JURISDICTION OVER INTERSTATE TELEMARKETING.

The Joint Petition sets forth in detail our view that the 1934 Communications Act created a jurisdictional dichotomy that has been a fundament of communication regulation ever since: federal authority over interstate communications and state authority over intrastate communications.[14] In the years following that enactment, judicial and Commission precedent

---

[13] Notably, in *Operator Services Providers of America/Petition for Expedited Declaratory Ruling*, Memorandum Opinion and Order, 6 F.C.C. Rcd. 4475 (1991) ¶¶ 8-12 ("*OSPA*"), the Commission addressed the effect of a provision similar to Section 227(f)(6). Section 414 of the Communications Act states that the Act shall not "abridge or alter the remedies now existing at common law or by statute, but the provisions of this Chapter are in addition to such remedies." 47 U.S.C. § 414. The Commission rejected the argument that it did not have exclusive jurisdiction over interstate operator services "because states have authority to protect consumers against unfair, deceptive, and fraudulent practices of interstate carriers . . . under Section 414 . . . ." *OSPA* at ¶ 8. It found that Section 414 "preserves the availability against interstate carriers of such preexisting state remedies as tort, breach of contract, negligence, fraud, and misrepresentation – remedies generally applicable to all corporations operating in the state, not just telecommunications carriers." *Id.* ¶ 11. The same is true here.

[14] *See* 47 U.S.C. 151(a) & (b).

established that these realms of authority were exclusive.[15] In 1991, however, Congress *expanded* federal authority over telemarketing by amending Section 2(b) of the Communications Act to give the Commission jurisdiction over both interstate and intrastate calls.[16] Congress's determination that expanding the FCC's authority in this regard required amending Section 2 confirms beyond question Congress's view that telemarketing regulation falls within the ambit of Section 2. At the same time, Congress confirmed that the states lacked jurisdiction over interstate telemarketing calls.[17]

In its 2003 Report and Order, the Commission correctly recognized the jurisdictional divide inherent in the 1934 Act, observing that "states traditionally have had jurisdiction over *only* intrastate calls, while the Commission has had jurisdiction over interstate calls."[18] The Commission, however, stopped short of expressly declaring its exclusive regulatory jurisdiction over interstate telemarketing. Instead, the Commission indicated that any state regulation that is inconsistent with the federal scheme "almost certainly would be preempted" and called for voluntary harmonization of state rules with the new federal regulations.[19] Unfortunately, such

[15] *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984). *See also State Corp. Comm'n of Kansas v. FCC*, 787 F.2d 1421, 1426 (10th Cir. 1986) (noting that it is the FCC's "basic function under the Act" to govern "'all interstate and foreign communication by radio or wire'") (quoting Section 2(a)); *AT&T Communications v. Public Service Comm'n*, 625 F. Supp. 1204, 1208 (D. Wyo. 1985) ("It is beyond dispute that interstate telecommunications service is normally outside the reach of state commissions and within the exclusive jurisdiction of the FCC.") Commission precedent is in accord. *American Telephone and Telegraph Company and the Associated Bell System Companies Interconnection With Specialized Carriers in Furnishing Interstate Foreign Exchange (FX) Service and Common Control Switching Arrangements (CCSA)*, Memorandum Opinion and Order, 56 FCC 2d 14 (1975) (¶ 21); *OSPA* at ¶ 10.

[16] Specifically, Congress added section 227 to the *exceptions* to the usual rule of section 2(b) that the Commission lacks jurisdiction over intrastate communications. *See* 47 U.S.C. § 152(b) (historical notes, explaining the 1991 amendments).

[17] *See* Telephone Consumer Protection Act of 1991, Pub. L. 102-243 § 2(7) (finding that "[o]ver half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operation").

[18] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* Report and Order, 18 F.C.C. Rcd. 14014 (2003) ¶ 83 (emphasis added) ("*Report and Order*").

[19] *Id.* at ¶ 84.

harmonization was not forthcoming.[20] The Joint Petition thus urged the Commission to take its prior observations to their logical conclusion and expressly declare that states have no authority to regulate interstate telemarketing.

In their comments, Joint Petition opponents present a scattershot array of statutory and policy contentions to undermine this straightforward jurisdictional analysis.[21] None of their arguments has merit.

A. The Text And History of the TCPA Support, Rather Than Undermine, the Joint Petition's Jurisdictional Analysis.

The state commenters assert that in enacting the TCPA, Congress did not intend to preclude states from regulating interstate telemarketing. These arguments are fundamentally misguided. In particular, they ignore the fact that Congress enacted the TCPA with the full understanding that the pre-existing jurisdictional divide between federal and state regulation under the 1934 Act meant that the states never possessed the authority to regulate interstate telemarketing in the first place.

The states mistakenly rely on Section 227(e), which they claim "expressly prohibits preemption of *any* state law that *prohibits* telemarketing calls (even as applied to interstate calls)."[22] Section 227(e) does no such thing.

---

[20] The Joint Petition provides a detailed overview of the complex landscape of existing and proposed state laws and rules that purport to regulate interstate telemarketing. Joint Petition at 9-22.

[21] Echoing state motions to dismiss the individual conflict preemption petitions, Indiana has also filed a "motion to dismiss" the Joint Petition, arguing that it is barred by sovereign immunity. *See* State of Indiana Motion to Dismiss Alliance Contact Services, *et. al.* Joint Petition on Grounds of Sovereign Immunity, CG Docket No. 02-278 (filed July 29, 2005). Such "motions" (which seem to us to have the same effect under the Commission's rules as an *ex parte* letter) illustrate the states' continued intransigence and have no legal merit. As previous commenters have explained, the instant proceedings are plainly not sufficiently "adjudicatory" in nature to entitle the states to the shield of sovereign immunity. *Compare Tennessee v. U.S. Dept. of Transp.*, 326 F.3d 729, 734 (2003) (states not immune from agency preemption ruling following notice and comment procedures akin to informal rulemaking), *with Federal Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) (extending state sovereign immunity to an agency adjudication that "walks, talks, and squawks" like a lawsuit). Indeed, such arguments are particularly misplaced here, where Joint Petitioners ask the Commission to adopt a straightforward jurisdictional approach to these proceedings based solely on federal statutory interpretation.

Section 227(e)(1) provides:

> Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive *intrastate* requirements or regulations on, or which prohibits--
> (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
> (B) the use of automatic telephone dialing systems;
> (C) the use of artificial or prerecorded voice messages; or
> (D) the making of telephone solicitations.[23]

Section 227(e)(1) accords the states no authority whatsoever over *interstate* calls; indeed, the word "interstate" never appears. To the contrary, section 227(e)(1) reflects Congress's desire in the TCPA to remain faithful to the basic jurisdictional division underlying the Communications Act. Specifically, it makes clear that while Congress's amendment of Section 2(b) expanded *federal* power over intrastate calls, the TCPA restricts, but does not eliminate, *state* authority over such calls.

Furthermore, there is no mystery regarding why Section 227(e)(1) focuses exclusively on preemption of *intrastate* telemarketing laws: The (uncodified) legislative findings in section 2(7) of the TCPA explain that the whole reason for the existence of the TCPA is precisely because "telemarketers can evade [the] prohibitions [of existing state telemarketing laws] through interstate operations."[24] This makes crystal clear why the "savings clause" addresses only intrastate telemarketing laws, why there is no express preemption provision for interstate laws, and why the Congressional command for states to harmonize their (intrastate) do-not-call lists with the federal list is not inconsistent with the jurisdictional analysis presented in the Joint Petition.

Continued . . .

22 Indiana Comments at 16.

23 47 U.S.C. § 227 (e) (emphasis added).

24 Pub. L. 102-243 § 2(7).

The states' contrary reading of section 227(e) as prohibiting preemption of state regulations of interstate telemarketing effectively reads the word "intrastate" out of the provision altogether. New Jersey, for example, argues that "[t]he 'or' in the clause 'or which prohibits' signals that the option of a State imposing requirements which prohibit the making of telephone solicitations is distinct from the clause excepting from preemption more restrictive intrastate requirements imposed by States."[25] Under that reading, however, a state *either* may impose more restrictive regulations on *intrastate* telemarketing *or* may impose complete prohibitions on *both intrastate and interstate* telemarketing. Given the jurisdictional backdrop of the Communications Act and the TCPA's amendment expanding federal authority over *intrastate* telemarketing, New Jersey's interpretation is plainly fanciful. Congress adopted Section 227(e) to delineate the extent to which states' retained authority over *intrastate* telemarketing. Nothing in the text of the provision fundamentally realigns the long-standing jurisdictional divide between federal and state regulatory authority.

Indiana's reliance on Section 227(e)(2) and 227(c)(3)(J) is similarly misplaced. Read consistently with the long-established jurisdictional division, these provisions permit only the states' continued regulation of *intrastate* "telephone solicitations," as well as the use of the national registry "for purposes of administering or enforcing state law" with respect to *intrastate* telemarketing. No more persuasive is Indiana's attempt to bolster the states' view by pointing to cases purporting to interpret the TCPA as "disclaim[ing] preemption of *all* state laws."[26] Rather than speaking to the question at issue, such cases either concern the TCPA's requirement that

---

[25] Comments of New Jersey Attorney General at 6 ("New Jersey Comments"); Indiana Comments at 15-17.

[26] Indiana Comments at 16.

certain causes of action be brought in state court (and others in federal court)[27] or conclude that the TCPA does not preempt *intrastate* telemarketing.[28]

Joint Petition opponents further argue that Congress could not have intended to "preempt" state regulation of interstate telemarketing at the time of the TCPA's enactment because the statute does not include any provision expressly displacing state regulation of interstate telemarketing.[29] Against the pre-existing jurisdictional backdrop set forth above, however, that purported omission is irrelevant. Rather, Congress's express preservation of state authority over *intrastate* regulation – without mentioning *interstate* regulation – only confirms that Congress intended the TCPA to be interpreted in accordance with existing law. Had Congress intended states to have authority over interstate telemarketing, it would have had to amend Section 2(a) to allow states to regulate interstate telemarketing, just as it amended Section 2(b) to allow the Commission to regulate intrastate telemarketing. Congress did no such thing, and nothing in the TCPA's text or history suggests that Congress intended to confer upon the states *any* authority to regulate interstate telemarketing.

EPIC argues that Congress's overriding goal in enacting the TCPA was protecting consumer privacy, a goal allegedly subsuming the interests of legitimate telemarketers and the need for uniform regulatory standards. This is plainly wrong. In enacting the TCPA, Congress explicitly found that "[i]ndividual's privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals

---

27 *International Science & Technology Institute, Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1152 (4th Cir. 1997); *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1289 (11th Cir. 1988).

28 *Van Bergen v. Minnesota*, 59 F.3d 1541, 1548 (8th Cir. 1995). *Van Bergen* involved the efforts of a candidate for governor of Minnesota to use automatic dialing-announcing devices (ADADs) to reach *in-state* voters. When Minnesota passed a law banning the use of ADADs for that purpose, Van Bergen argued that the law was preempted but the court disagreed, holding that the TCPA "expressly does not preempt state regulation of *intrastate* ADAD calls that differs from federal regulation." *Id.*

29 AARP Comments at 6; Indiana Comments at 17-18.

and permits legitimate telemarketing practices."[30] Moreover, the TCPA's legislative history confirms Congress's clear desire to adopt a *unified* federal regime that would protect telemarketers from duplicative regulation.[31] The House Committee Report specifically states that "federal legislation is needed to . . . protect legitimate telemarketers from having to meet multiple standards."[32] Furthermore, one of the House bill's co-sponsors noted that the bill would "preempt inconsistent State law" to "ensure a uniform approach to this nationwide problem" and "that telemarketers are not subject to two layers of regulation."[33] Throughout the TCPA rulemaking proceedings, the Commission has attempted to achieve these congressional objectives.[34]

B. The FTC's Authority Over Interstate Telemarketing Is Irrelevant to Congress's Jurisdictional Division Between The FCC and The States.

A number of commenters[35] maintain that Congress's conferral of concurrent *federal* authority over interstate telemarketing on the FTC somehow supports *state* regulatory authority over the area. That claim lacks any basis in law or logic.

Indiana, for example, asserts that "the very fact that Congress has divided the federal program between the FCC and the FTC undermines any argument that do-not-call rules are part

---

30 *See* TCPA § 2(9).

31 For example, the House Report accompanying the legislation noted that the legislative record "documents the existence of a *national* problem and argues persuasively in favor of *federal* intervention." H.R. Rep. 102-317 at 10 (emphasis added).

32 *Id.*

33 137 Cong. Rec. H. 10339, 10342 (Nov. 18, 1991) (Rep. Rinaldo).

34 *See, e.g., Report & Order* ¶ 1 (The Commission's rules "strike an appropriate balance between maximizing consumer privacy protections and avoiding imposing undue burdens on telemarketers"); *id.* ¶ 83 ("We conclude that inconsistent interstate rules frustrate the federal objective of creating uniform national rules, to avoid burdensome compliance costs for telemarketers and potential consumer confusion.") In adopting the Established Business Relationship exception, for example, the Commission determined that it "constitutes a reasonable balance between the interests of consumers that may object to such calls with the interests of sellers in contacting their customers." *Id.* ¶ 43; *See also id.* ¶¶ 26, 29, 31, 40, 46, 86, 89, 90, 92, 94, 113, 134, 149, 193, 210.

35 *See* AARP Comments at 5-8; National Consumer Law Center Comments at 6; Indiana Comments at 19-23.

of the fundamental and exclusive power of the FCC."[36] That is incorrect. The 1934 Act divided regulatory authority over communications between the FCC and state regulatory authorities, granting the FCC exclusive jurisdiction over interstate communications. Decades later, Congress evinced its intent that another *federal* agency, the *FTC*, should participate with the *FCC* in regulating interstate telemarketing.[37] The ability to confer concurrent federal regulatory authority is plainly within Congress's legitimate legislative authority. But such shared federal agency jurisdiction in no way undermines either Congress's division of authority between *federal* and *state* authorities in the 1934 Communications Act or its adherence to that division in the TCPA.[38] If, for example, Congress were to authorize both the federal Environmental Protection Agency and the Nuclear Regulatory Commission to decommission nuclear facilities, that obviously would not mean that Indiana could suddenly do so as well. In other words, the question of whether and which federal agencies may share responsibility for interstate telemarketing regulation has no bearing on whether the Commission's regulation of interstate telemarketing is exclusive of state authority.

The fact that the Do-Not-Call Implementation Act requires the FCC to report on "the progress of coordinating the operation and enforcement of the 'do-not-call' registry with similar registries established and maintained by the various States"[39] is equally unhelpful to the Joint Petition's opponents. Because Congress had – in the TCPA – expanded federal authority to

---

[36] Indiana Comments at 21.

[37] Specifically, in reversing a federal district court ruling that the TFACPA had not delegated to the FTC the authority to create a national do-not-call registry, *U.S. Security v. FTC*, 282 F. Supp. 2d 1285, 1291 (W.D. Okla. 2003), Congress expressly provided to the FTC the regulatory authority that the district court had found lacking. *See* An Act To Ratify the Authority of the Federal Trade Commission to Establish a Do-Not-Call Registry, Pub. L. 108-82 (2003).

[38] For similar reasons, Indiana's argument concerning the FTC's authority to regulate charitable solicitations is also misplaced. *See* Indiana Comments at 20-22.

[39] Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat 557, § 4(b)(4) (2003).

allow both the FCC and the states to regulate *intrastate* telemarketing, as well as authorizing both federal and state authorities to *enforce* the federal rules with respect to interstate telemarketing, it makes perfect sense that the regulatory authorities should be required to confer.

Finally, the states' reliance on debates concerning the FTC's authority held years after the TCPA was enacted reveal nothing relevant about Congress's intent in adopting the TCPA. As the D.C. Circuit has explained, it goes "without saying that members of Congress have no power, once a statute has been passed, to alter its interpretation by post-hoc 'explanations' of what it means."[40] Indiana's attempts to rely on its own Senator's statements[41] are particularly unpersuasive given that "the remarks of a single legislator . . . are not controlling in analyzing legislative history."[42]

C. Interstate Telemarketing Falls Within the FCC's Exclusive Jurisdiction Under Section 2(a).

Indiana argues that Congress, the Commission, the courts and Joint Petitioners are all wrong in asserting that Section 2 of the 1934 Communications Act gave the FCC exclusive jurisdiction over interstate calls and gave the states exclusive jurisdiction (with some exceptions) over intrastate calls.[43] According to Indiana, that view ignores the "limited reach of the [1934 Communications Act]," which covers only "the provision of telephone service, the physical facilities of telephone service, or the price of telephone service."[44] Under Indiana's narrow reading of the 1934 Communications Act, telemarketing regulation falls outside of the "limited

---

[40] *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 365 (D.C. Cir. 1989).

[41] *See* Indiana Comments at 20.

[42] *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979).

[43] Indiana Comments 5-7; 11-13.

[44] *Id.* at 9, 10.

meaning of 'communication by wire' as used in section 2(b)"[45] because communication by wire is purportedly distinct from the "behavior of the individuals participating in interstate calls, the words that they use, and the harm that they inflict with the communication."[46] But it is Indiana – not the Congress, the Commission, or the courts – whose interpretation of the federal statutory scheme applicable to interstate telemarketing is wrong.

Indeed, Indiana's reading of the Communications Act may be the first time in the Act's history that it has been characterized as having "limited reach." In fact, far from "limited," Section 2 confers upon the FCC jurisdiction over "all interstate and foreign communication by wire or radio."[47] The term "communication by wire" is broadly defined as "the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."[48] Contrary to Indiana's view, therefore, "the power to regulate an 'interstate communication by wire'" is not merely "the power to regulate the means of interstate transmission" and reception of such transmission,[49] but also includes the power to regulate "*all instrumentalities, facilities, apparatus, and services* . . . *incidental to such transmission*."[50]

On its face, this broad grant of authority to the FCC encompasses all regulation of interstate telemarketing. Telemarketing certainly comprises the "*transmission* of sounds . . . by

[45] *Id.* at 12.

[46] *Id.* at 8.

[47] 47 U.S.C. § 152(a).

[48] 47 U.S.C. § 153(52).

[49] Indiana Comments at 8.

[50] 47 U.S.C. § 153(52) (emphasis added).

aid of wire"[51] – indeed, as defined in the TCPA, "telephone solicitation" is "the initiation of a telephone call or message" "which is *transmitted* to any person" "for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services."[52] As such, all regulation of interstate telemarketing fits comfortably within Section 2(a). Moreover, interstate telemarketing is also a "service" that is "incidental" to the "transmission of sounds" by wire, and within Section 2(a) for that reason as well.[53]

Certainly Congress, the Commission, and the courts have long understood the broad language of Section 2(a) to confer upon the Commission *exclusive* jurisdiction (*vis-à-vis* the states) over *interstate* transmission and all apparatus and services incidental thereto, while the states retain authority over intrastate transmission under Section 2(b). Indiana's efforts to divorce the TCPA from this statutory backdrop against which it was enacted are unavailing. Indeed, as noted above, in enacting the TCPA Congress *expressly* placed telemarketing *as a whole* within Title II of the Communications Act by amending Section 2(b) to expand the Commission's jurisdiction to include *intrastate* telemarketing. Congress could not more clearly have confirmed its view that "telemarketing" lies within the ambit of Section 2(a). Beyond this amendment, however, the TCPA did not otherwise alter the statute's basic delineation of regulatory authority between federal and state jurisdiction, nor did it grant the FCC any additional authority beyond that already conferred by Section 2(a).

Even if the regulation of interstate telemarketing as a whole were not off limits to the states, it would be clear that much of the state regulation at issue here would run afoul of the congressional division of authority. While the states attempt to distinguish fraudulent or

---

[51] *Id.*

[52] *Id.* § 227(a)(4) (emphasis added).

[53] *Id.* § 153(52).

deceptive "conduct" that only happens to occur in connection with an interstate call (over which the states claim authority) from regulation of the telecommunications network and services (which even the states concede they cannot regulate) the state regulations themselves make no attempt to respect this line. For example, some state laws and rules purport to regulate interstate telemarketing in such a way that violations can occur *even if no one picks up the telephone.* [54] *Rather, the call itself is the offense*. The same is true of limitations on calling hours. And the point is even more obvious in the context of restrictions on the use of fax machines, predictive dialers, and Automatic Dialing and Announcing Devices ("ADADs"). *Here, the use of the "apparatus" of transmission is the offense* – not anything untoward that takes place *on* the call. Such regulation of the telephone calls and apparatus plainly fall within the FCC's exclusive jurisdiction.

The states' attempts to regulate telemarketers' use of ADADs, predictive dialers, fax machines and other equipment also trespass upon federal authority for another reason: These devices qualify as "customer premises equipment" or equipment "employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications"[55] within the Commission's Section 2(a) authority.[56] Indeed, the regulation of ADADs and prerecorded

---

54 *See, e.g.*, Ala. Code § 8-19C-2(a) (forbidding calls "to the telephone line of any residential subscriber in this state" who is on the state do-not-call list). This has nothing to do with the regulation of fraudulent or deceptive conduct that only happens to take place in the context of a telephone call. *Cf.* Indiana comments at 9 (implying that the Joint Petitioners are attempting to avoid the application of state laws that "protect consumers from all predators who happen to use telephones").

55 47 U.S.C. § 153(14).

56 *Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198, 214 (D.C. Cir. 1982) (explaining that the FCC has jurisdiction over customer premises equipment pursuant to Section 2(a)); *cf. Mainstream Mktg. Serv., Inc. v. FTC*, 283 F. Supp. 2d 1151, 1169 (D. Colo. 2003) (discussing FCC jurisdiction over customer premises equipment in context of the FTC's authority).

messages are expressly exempted even from the preservation of state authority over *intrastate* telemarketing in Section 227(e)(1).[57]

Indiana and other opposing commenters are flatly mistaken in their suggestion that telemarketing regulations are simply consumer protection laws and are no different from laws regulating fraud, deception, harassment, or obscenity when such acts are conducted over the telephone.[58] Conducted by legitimate businesses, telemarketing is a service incidental to transmission taking place by wire; fraud, deception, and obscenity are not. Congress has conferred upon the FCC exclusive jurisdiction over the former, but not the latter.

Thus, state regulation of interstate telemarketing services is no different from the state regulation of interstate operator services at issue in the Commission's *OSPA* decision.[59] In *OSPA*, the Commission explained in no uncertain terms "[t]he Commission's jurisdiction over interstate and foreign communications is exclusive of state authority" and that Congress had "deprived the states of authority to regulate the rates or other terms and conditions under which interstate communications service may be offered in a state."[60] The Commission held that state regulation of interstate operator services – which included disclosure requirements about the content of what could and could not be said on a call – was barred by Section 2(a). So too here. Like operator services, interstate telemarketing is an interstate service within the FCC's exclusive jurisdiction, and Congress has "deprived the states of the authority to regulate the . . .

---

57 The states have also proposed additional regulations that they clearly lack authority to apply to interstate calls. For example, at least fourteen states have proposed that, upon a customer's request, a call be rerouted either from a telesales representative to an employee of the seller or from a foreign call center to the United States. Under Section 2(a), only the Commission has the authority to regulate the network in such ways.

58 *See* Indiana Comments at 26; New Jersey Comments at 6; Attorneys General Comments at 5-6.

59 *See OSPA*, 6 F.C.C. Rcd. 4475 (1991).

60 *Id.* at 4476-77 (¶ 10).

terms and conditions under which" interstate telemarketing "may be offered in a state."[61] Consistent with *OSPA*, the Commission should make clear that state telemarketing regulations cannot properly be applied to interstate telemarketing – although, again, the states *can* properly enforce the uniform federal rules.

In sum, there is a large area within which states are entitled to regulate without regard to federal telecommunications law – namely, laws of general applicability, in which the use of a telephone or any other network device is incidental. And at the other extreme, there is a large area within which federal telecommunications law is supreme – namely, laws that specifically regulate the use of telephones, telephone networks, and telephone network devices for interstate communications. If a given law proscribes conduct that would be perfectly lawful but for the fact that the telephone network is involved, we are clearly in the latter zone, and state authority to legislate is limited by the jurisdictional dichotomy Congress adopted in the Communications Act, as amended by the TCPA.

III. IF THE COMMISSION FINDS CONGRESS'S LINE BETWEEN FEDERAL AND STATE AUTHORITY UNCLEAR, THE COMMISSION HAS AMPLE AUTHORITY TO CLARIFY THAT LINE AND SHOULD DO SO NOW.

As set forth in the Joint Petition and above, there is no need here for the Commission to take on the task of distinguishing the FCC's regulatory jurisdiction from that of the states, because *Congress* has already done so: the federal authorities have exclusive jurisdiction to *regulate* interstate telemarketing, while the states enjoy authority both to *enforce* the federal regulations and to regulate intrastate telemarketing. The issue of "preemption" does not arise at all – the matter is one of congressionally determined jurisdiction. In the event, however, that the Commission believes that Congress's division of authority between federal and state authorities

[61] *Id.*

is unclear, then – as the Joint Petitioners also urge in our Petition[62] – a critical fact about preemption that has been largely overlooked bears emphasis: *The Commission itself has authority to preempt state regulation that could frustrate the implementation of federal rules.*

Although few state commenters address this point, those who do appear fundamentally to misunderstand it. Indiana, for example, characterizes the Petition as arguing that "the FCC can do whatever it wants, so long as Congress has not prohibited it from doing so."[63] Indiana urges that, to the contrary, the "FCC may not impose preemption without congressional authority."[64] But Indiana does not bother even to cite, let alone address, the Supreme Court precedent discussed in our Petition that confirms federal agencies' ability to preempt state laws and regulations when necessary to prevent state regulation from undermining federal policies. *City of New York v. FCC*, 486 U.S. 57 (1988).

City of New York states in no uncertain terms that "in a situation where state law is claimed to be pre-empted by federal regulation, a 'narrow focus on Congress's intent to supersede state law [is] misdirected,' *for '[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law.'*"[65] Rather, "'a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation' and hence render unenforceable state or local laws that otherwise are not inconsistent with federal

---

62 Joint Petition at 42-44.

63 Indiana Comments at 23.

64 *Id.*

65 *City of New York*, 486 U.S. at 64, *quoting Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 154 (1982) (emphasis added).

law."[66] "[T]he inquiry becomes whether the federal agency has properly *exercised* its own delegated authority."[67]

Two recent federal court of appeals cases have applied these principles in an analogous context involving agency preemption.[68] In *Wachovia* and *Wells Fargo*, the Second and Ninth Circuits confronted the question whether regulations issued by the Office of the Comptroller of the Currency ("OCC") preempt state banking laws governing local operating subsidiaries of nationally chartered banks. The *Wachovia* court quoted the Supreme Court's statements that "'a pre-emptive regulation's force does not depend on express congressional authorization to displace state law' and that a 'narrow focus' on Congress's intent to supercede state law is 'misdirected.'"[69] "Given these principles," the court wrote, the state (Connecticut) "*incorrectly* attempts to frame the issue as whether Congress has expressly and clearly manifested an intent to preempt state . . . power over operating subsidiaries."[70] In short, both the *Wachovia* and *Wells Fargo* courts concluded that "once the OCC's authority to . . . regulate operating subsidiaries as it has done is established, *its authority to displace" state regulation naturally "follows*."[71]

The same analysis applies here – once the FCC's authority to regulate interstate telemarketing (as it has done) is established, its authority to displace state regulation naturally follows. And of course, there can be no serious question here that the Commission *does have* "delegated authority,"[72] to regulate interstate (and, indeed, intrastate) telemarketing. In its

---

66 *Id*. at 63-64 (1988), *quoting Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986).

67 *City of New York*, 486 U.S. at 64 (emphasis added).

68 *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005); *Wells Fargo Bank, N.A. v. Boutris*, 2005 WL 1924713 (9th Cir. 2005).

69 414 F.3d at 314.

70 *Id.* at 314-15 (emphasis added).

71 *Wells Fargo*, 2005 WL 1924713, *7 (emphasis added).

72 *City of New York*, 486 U.S. at 64.

proceeding captioned *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, that is precisely what the Commission has done.[73] Accordingly, under *City of New York*, the Commission has only to make clear that it has *exercised* its authority to "render unenforceable state or local laws" governing interstate telemarketing.

Under *City of New York*, an agency may exercise its preemptive authority in one of two ways: either by determining that its authority is "exclusive and preempts any state efforts to regulate in the forbidden area" ("field preemption") or by finding that state or local laws and regulations would conflict with,or frustrate achievement of, the federal regime the agency has adopted ("conflict preemption").[74] In the present case, those two approaches collapse into a single determination – Joint Petitioners ask the Commission to declare its authority over interstate telemarketing "exclusive" because allowing a vast array of burdensome and inconsistent state regulations would frustrate the federal regime's basic goal of uniformity.

The declaration Joint Petitioners seek under *City of New York* is, of course, fully consistent with Indiana's "basic preemption principles." Like *City of New York* itself, *Louisiana Public Service* and *United States v. Shimer* simply restrict an agency's preemptive power to areas in which the agency has congressionally delegated authority to regulate.[75] In the present circumstances, there is no real question that the FCC has authority to regulate interstate telemarketing. And Indiana's discussion of a presumption against preemption is beside the point – that presumption applies when a court is attempting to determine from an ambiguous statute

[73] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 F.C.C. Rcd. 8752 (1992); *Report and Order*.

[74] *City of New York*, 486 U.S. at 64. Notably, conflict preemption applies not only when compliance with both federal and state regulations is a "physical impossibility," but also, when the state rules "stand[] as an obstacle to the accomplishment and execution" of the federal purposes. *Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 486 (10th Cir. 1998) (considering preemption of local zoning ordinance) (citing *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996)).

[75] *See* Indiana Comments at 24 (discussing *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986), and *United States v. Shimer*, 367 U.S. 374 (1961)).

whether *Congress* preempted state law.[76] In contrast, in the context of *agency* preemption, "[w]e are concerned with whether Congress intended to delegate" regulatory authority to the agency, "*not* with whether Congress" itself intended to preempt state law.[77] Again, as set forth above, there is no question that Congress has conferred authority on the FCC to regulate interstate telemarketing. Accordingly, the only remaining issue under *City of New York* is whether the agency has clearly "exercised" its preemptive authority. That is precisely what we now urge the Commission to do.

Significantly, this Commission frequently *has* exercised that authority and been affirmed by the courts.[78] Indeed, the Commission has just recently exercised its "own power to preempt" to bar states from applying any "traditional 'telephone company' regulations" to Vonage's DigitalVoice and similar VOIP services.[79] In its *Vonage Order*, the Commission did not suggest that state regulation is preempted by a specific congressional pronouncement; rather, the Commission concluded that applying traditional regulation to Vonage's service would "directly conflict[] with [the *Commission's*] pro-competitive deregulatory rules and policies."[80] Similarly, the Commission should conclude here that state regulation of interstate telemarketing is

---

[76] Moreover, even in the context of congressional preemption, the presumption against preemption disappears in areas historically subject to federal regulation. *See, e.g.*, *Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 183 (2d Cir. 2005). Regulation of interstate telemarketing is such an area.

[77] *Wells Fargo*, 321 F.3d at 493 (emphasis added).

[78] *See*, *e.g.*, *Computer & Communications Industry Ass'n v. FCC* ("*CCIA*"), 693 F.2d 198, 214-15 (D.C. Cir. 1982) (upholding Commission's preclusion of state regulation of customer premises equipment (CPE) that was incompatible with the federal objective of developing a competitive CPE market); *California v. FCC*, 75 F.3d 1350, 1360 (9th Cir. 1996) (upholding Commission preemption of state call blocking regulations inconsistent with federal regulatory goals).

[79] *Vonage Holdings Corporation Petition for Declaratory Ruling, Opinion and Order*, WC No. 03-211, FCC 04-267, ¶ 1 (Nov. 9, 2004).

[80] *Id*. at ¶ 20.

inconsistent with the sound, pro-competitive policy of prohibiting multiple, inconsistent regulation.[81]

IV. COMPLYING WITH THE MULTIPLICITY OF INCOMPATIBLE STATE LAWS IMPOSES SIGNIFICANT BURDENS AND RISKS ON INTERSTATE TELEMARKETERS.

Several parties claim that interstate telemarketers face only minimal burdens in complying with the existing multiplicity of state do-not-call regulations. AARP asserts, citing nothing for support, that "the burden of complying with [state] rules is minimal for telemarketers."[82] EPIC similarly doubts that "state anti-telemarketing laws have been an inconvenience to" legitimate telemarketers and claims that "new technologies make compliance with state laws easier."[83] Indiana labels "absurd" the seemingly self-evident fact that compliance with a welter of conflicting state laws is "burdensome."[84] But these parties greatly overstate the ability of technologies to ensure compliance with the far-ranging and widely divergent state laws and greatly understate the extent and breadth of the burdens incurred by telemarketers.

In asserting that the compliance burden on telemarketers is minimal, both EPIC and Indiana point to the existence of technologies that facilitate compliance with federal and state do-not-call registries. Such technologies do not, however, address the complex landscape of other state laws and rules that purport to regulate interstate telemarketing.[85] Indeed, the suggestion that technology can ensure compliance with that nearly incomprehensible landscape is totally implausible.

---

81 Notably, much of the legal analysis in the *Vonage* decision is devoted to section 2(b) – which the Commission properly viewed as the primary obstacle to preempting state regulation of VoIP service. Of course, as discussed above, section 2(b) is no obstacle here – the states have no authority under section 2(b) to regulate *interstate* telemarketing.

82 AARP Comments at 7.

83 EPIC Comments at 21-22; *see id.* at 22-26.

84 Indiana Comments at 32.

85 Joint Petition at 9-22.

While technology may facilitate basic call blocking, there is no way that any computer program can accommodate all of the various exemptions and requirements among the individual state laws. For example, a computer program will not selectively block calls to Louisiana on days when the governor has declared a state of emergency. And while computer programs may be effective at screening calls against states' do-not-call lists, they cannot determine whether a call recipient falls within a specific state's uniquely worded Established Business Relationship exemption. The instances are myriad where technology cannot assist companies in their efforts to comply with 50 states' varied telemarketing regulations.

In addition, the lack of uniformity that makes compliance so burdensome does not only concern more restrictive state regulations on interstate telemarketing. Some states' laws, including those of Indiana and Alabama, contain exemptions for local interests such as real estate brokers,[86] insurance agents,[87] or investment brokers,[88] that are *less restrictive* than the Commission's rules. These less restrictive state laws still involve compliance burdens for interstate telemarketers, yet have *absolutely no countervailing privacy benefits for consumers*. Thus, suggestions by opposing commenters that federal preemption will "dilute [states'] more vigorous protections"[89] and "defeat the cause of liberty and individual privacy"[90] are revealed as mere rhetoric. As things stand, federal rules are sometimes less strict, and sometimes more so. The main goal that federal preemption will achieve is the *uniform* national standards for

86 *See* Ind. Code § 24-4.7-1-1(4).

87 *Id.* § 4.7-1-1(5).

88 *See* Ala. Code. Ann. § 8-19A-4(4); *see also id.* § 8-19A4(1)-(3) & (5)-25 (listing exceptions to Alabama's do-not-call regulations).

89 EPIC Comments at 17.

90 Indiana Comments at 29.

interstate telemarketing intended by Congress in the TCPA and already largely embraced by the Commission.

Further, opposing commenters deliberately take an unrealistically narrow view of the burdens involved in complying with state telemarketing laws. In reality, the compliance burdens faced by interstate telemarketers are multidimensional. The costs of compliance include, *inter alia*, tracking and interpreting the ever-growing number of enacted and proposed state laws and regulations; informing state legislators and authorities of the cost and revenue impacts of regulations on marketing programs; and researching complaints of alleged violations that turn out to be erroneous. Moreover, the risks involved are at least three-fold. First, companies making calls that fully comply with the federal rules still face legal risks as they must either litigate against states seeking to enforce often inscrutable state rules,[91] or else settle out of court – which is the only choice for less financially secure companies.[92] Second, such companies must choose between the risk of potentially large fines and penalties and the impact of foregoing marketing in certain states altogether. Third, such companies face real reputational risks, as certain state officials excoriate companies that attempt to exercise their rights by challenging state telemarketing regulations. The importance of these reputational risks is difficult to overstate.

---

[91] *See North Dakota v. FreeEats.com, Inc.*, Opinion and Order, No. 04-C-1694 (N.D. Dist. Ct. Feb. 2, 2005).

[92] *See* Letter from Scott Kaplan, Telelytics, LLC, to FCC Chairman Kevin Martin at 3-4, CG Docket No. 02-278 (July 29, 2005).

CONCLUSION

For all of these reasons, the Commission should grant the Joint Petition

Respectfully submitted,*

Americall Group, Inc.
Howard N. Scaife
Executive Vice President and
Chief Information Officer

American Bankers Association
James D. McLaughlin
Director of Regulatory and Trust Affairs

American Breast Cancer Foundation
Phyllis Wolf
President

American Financial Services Association
Robert E. McKew
Senior Vice President and General Counsel

American Resort Development Association
Sandra Yartin DePoy
Vice President, Federal & Regulatory Affairs

American Teleservices Association
Tim Searcy
Chief Executive Officer

Kids Wish Network
Mark Breiner
President

Miracle Flights for Kids
Ann McGee
National President

Multiple Sclerosis Association of America
Douglas Franklin
President and Chief Executive Officer

National Children's Cancer Society
Mark Stolze
President

Noble Systems Corp.
Chris Hodges
Senior Vice President - Sales & Marketing

Northwest Direct Marketing, Inc.
Timothy C. Rote
Chairman and Chief Executive Officer

* Some signatories to this petition are unrepresented and others are represented by a variety of different attorneys. Because of the large number of petitioners, and for the sake of simplicity, all correspondence and service copies should be directed to the attention of Mark A. Grannis, and Timothy J. Simeone at Harris, Wiltshire & Grannis LLP, 1200 Eighteenth Street NW, Suite 1200, Washington, DC 20036.

America’s Community Bankers
Michael W. Briggs
Chief Legal Officer

AnswerNet Network
Gary Pudles
President and Chief Executive Officer

Cancer Recovery Foundation of America
Greg Anderson
President

Connextions
Rob Panepinto
President

ccAdvertising
Gabriel S. Joseph III
President

Direct Marketing Association
John A. Greco, Jr.
President and CEO

Effective Teleservices, Inc.
A.C. (Chuck) Smith
President and Chief Operating Officer

Humane Society of Greater Akron
Rich Farkas
Executive Director

InfoCision Management Corporation
Steve Brubaker
Senior Vice President - Corporate Affairs

NPS
Michael R. Mountford
President & Chief Executive Officer

Optima Direct, Inc.
Greg Kapuscinski
General Manager

Precision Response Corp.
John Hall
Chief Executive Officer

SITEL Corporation
Kathleen M. Quinn
Vice President and Senior Counsel, North America

SoundBite Communications, Inc
Peter R. Shields
President and Chief Executive Officer

Synergy Solutions, Inc
Lori L. Fentem
President

Tele-Response Center, Inc
Stuart Discount
President and Chief Executive Officer

TeleTech Holdings, Inc
Sharon A. O'Leary
Senior Vice President, General Counsel and Secretary

TPG TeleManagement, Inc
Lisa DeFalco
President

West Business Services, LP
Janette Nelson
Associate Counsel - Compliance