

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

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In the Matter of )  
 )  
Alliance For Contact Services, *et al.*, )  
 ) CG Docket No. 02-278  
Petition For Declaratory Ruling That The )  
FCC Has Exclusive Regulatory )  
Jurisdiction Over Interstate Telemarketing )

**VERIZON'S REPLY COMMENTS SUPPORTING JOINT PETITION FOR  
DECLARATORY RULING REGARDING EXCLUSIVE FEDERAL JURISDICTION  
OVER INTERSTATE TELEMARKETING**

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**Introduction**

As Verizon and numerous others demonstrated in their opening comments, the Telephone Consumer Protection Act of 1991 (“TCPA”),<sup>1</sup> which was incorporated into the Communications Act of 1934,<sup>2</sup> grants the Commission exclusive jurisdiction over all interstate telemarketing, and states therefore have no authority to regulate in that area. In addition, separate and apart from the fact that it has exclusive jurisdiction, the Commission also has the authority categorically to preempt state regulations regarding interstate telemarketing that differ in any way from the Commission’s rules, on the grounds that different state laws necessarily either will directly conflict with, or will frustrate the objectives of, the federal regulatory scheme. Finally, a ruling from this Commission declaring its preemptive authority over interstate telemarketing is the most efficient means to bring an end to the current situation, in which a growing number of states

<sup>1</sup> *Telephone Consumer Protection Act of 1991*, Public Law 102-243, 105 Stat. 2394 (1991); 47 U.S.C. § 227.

<sup>2</sup> 47 U.S.C. §§ 151 *et seq.*

enact and enforce laws that purport to govern interstate calls, creating a patchwork of different, inconsistent standards for interstate telemarketing throughout the country.<sup>3</sup>

Some commenters, however, nevertheless urge the Commission to deny the coalition's petition. As discussed in more detail below, none of the arguments raised by opponents of the petition have merit. *First*, opponents misread Supreme Court precedent to claim that this Commission is barred by sovereign immunity from even considering the coalition's petition on its merits. *Second*, opponents rely on a tortured reading of the TCPA and its legislative history to claim that Congress did not intend for the federal government to have exclusive jurisdiction over interstate telemarketing. *Third*, opponents erroneously argue that the Commission cannot preempt state laws under implied conflict preemption principles because, they claim, it is not impossible to comply with both federal and state regulation. *Fourth*, opponents claim that state do-not-call regimes are somehow better than the federal scheme and argue that the Commission should not displace "superior" laws. *Finally*, opponents incorrectly assert that if the coalition's petition is granted, states will be powerless to enforce do-not-call rules against calls that cross

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<sup>3</sup> See generally Comments Of Verizon Supporting Joint Petition, CG Docket No. 02-278 (filed July 29, 2005) ("*Verizon Comments*"); see also Comments Of Tele-Response Center, Inc., CG Docket No. 02-278 (filed July 29, 2005); Bank Of America Corporation Comments, CG Docket No. 02-278 (filed July 29, 2005); Comments Of Coalition Of Non-Profit Organizations, CG Docket No. 02-278 (filed July 29, 2005) ("*Non-Profit Coalition Comments*"); Comments Of Consumer Bankers Ass'n In Support Of Joint Petition, CG Docket No. 02-278 (filed July 29, 2005); Comments Of MBNA America Bank, N.A., CG Docket No. 02-278 (filed July 29, 2005) ("*MBNA Comments*"); Comments Of The National Ass'n Of Broadcasters, CG Docket No. 02-278 (filed July 29, 2005); Comments Of Charter Communications, Inc., CG Docket No. 02-278 (filed July 29, 2005) ("*Charter Comments*"); Comments Of Interstate Sellers & Teleservices Providers, CG Docket No. 02-278 (filed July 29, 2005) ("*Interstate Sellers & Teleservices Comments*"); Comments Of Telelytics, LLC, CG Docket No. 02-278 (filed July 29, 2005); BellSouth Comments, CG Docket No. 02-278 (filed July 29, 2005); Nat'l Ass'n Of Realtors' Comments On Joint Petition For Declaratory Ruling, CG Docket No. 02-278 (filed July 29, 2005); Comments Of Venetian Casino Resort, LLC, CG Docket No. 02-278 (filed July 29, 2005).

state borders. As shown below, none of these arguments should give this Commission pause, and the coalition's petition should be granted.

**I. State Officials' Claims Of Sovereign Immunity Are Misplaced**

State officials opposing the coalition's petition assert that this Commission is barred even from considering the preemptive effect of the federal do-not-call regime.<sup>4</sup> According to these commenters, any decision that a state's do-not-call law is preempted by federal laws and regulations would infringe upon that state's sovereign immunity under the Eleventh Amendment. Not so.

The Eleventh Amendment provides that "the judicial Power of the United States shall not be construed to extend to any suit in law or equity, *commenced or prosecuted against* one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const., amend. XI (emphasis added). In general terms, the Eleventh Amendment has been interpreted to bar a lawsuit that names as a defendant a state, a state agency, or a state official in his or her official capacity, and that seeks relief, such as the payment of damages or an injunction, directly from the state or agency or official.<sup>5</sup>

Opponents, however, ask the Commission to expand sovereign immunity well beyond any prior interpretation of the Eleventh Amendment. According to these opponents, sovereign immunity should not be limited only to suits where a state, state agency, or official may be required to provide some relief. Instead, they argue, sovereign immunity should be expanded to bar *any* federal proceedings that implicate the validity of a state law, because the state may have

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<sup>4</sup> See, e.g., State Of Indiana's Motion To Dismiss Alliance Contact Services *et al.* Joint Petition On Grounds Of Sovereign Immunity, CG Docket No. 02-278 (filed July 29, 2005); Supplemental Comments Of The Attorney General Of New Jersey, CG Docket No. 02-278 (filed July 29, 2005).

<sup>5</sup> See generally *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974); *Greiss v. Colorado*, 841 F.2d 1042, 1045-47 (10th Cir. 1988).

an interest in defending the validity of its law and may have to participate in the federal proceeding to do so. Notably, these opponents cite no authority for such a broad interpretation of the Eleventh Amendment or sovereign immunity – nor could they. Taken to its logical conclusion, the opponents’ argument would mean that *no* federal court or agency could decide whether a state law is preempted by federal law, unless the state gave its express consent. For example, no defendant, even in a lawsuit between private parties, would be able to raise preemption as a defense against a claimed violation of state law without getting the consent of the state. Of course, that is not the law. Federal courts and agencies routinely resolve questions regarding the preemption of state law without infringing on states’ sovereign immunity.<sup>6</sup>

The opponents base their novel view of sovereign immunity on a misreading of a Supreme Court case, *Federal Maritime Commission v. South Carolina State Ports Authority*.<sup>7</sup> In *Federal Maritime Commission*, a private party filed a complaint before the Federal Maritime Commission (“FMC”), alleging that South Carolina violated the Shipping Act of 1984. The complaint sought a temporary restraining order and preliminary injunction against the state, as well as damages and attorneys’ fees.<sup>8</sup> In defense, the state argued that the Eleventh Amendment – which on its face only restricts the exercise of “judicial power” against the states – also grants

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<sup>6</sup> See, e.g., *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000); *Forest Park II v. Hadley*, 336 F.3d 724 (8th Cir. 2003); see also, e.g., *California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (affirming FCC’s preemption decisions in *Computer III Remand Proceedings: Bell Operating Company Safeguards & Tier I Local Exchange Co. Safeguards*, 6 FCC Rcd 7571 (1991)); *State Corp. Comm’n of Kansas v. FCC*, 787 F.2d 1421 (10th Cir. 1986) (affirming FCC’s preemption decisions in *Establishment of Interstate Toll Settlements & Jurisdictional Separations Requiring the Use of Seven Calendar Day Studies by the Florida Public Service Comm’n*, 93 F.C.C. 2d 1287 (1983)).

<sup>7</sup> *Federal Maritime Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002).

<sup>8</sup> *Id.* at 747-49.

sovereign immunity from administrative proceedings.<sup>9</sup> Although the Supreme Court upheld South Carolina’s claim to sovereign immunity in that case, the Court carefully limited its holding to *adjudicative* administrative proceedings. The Court explained that sovereign immunity was justified in that case because “the similarities between FMC proceedings and civil litigation are overwhelming.”<sup>10</sup> As the Court noted, the adjudicatory proceedings before the FMC were largely governed by the same Federal Rules of Civil Procedure that govern federal civil litigation and provided for discovery on par with that in civil litigation. Moreover, the FMC proceedings were adjudicated by an administrative law judge with authority similar to that of an Article III judge – including the authority to order injunctive relief, to require payment of damages, and to award attorneys fees. As the lower court had summarized, the FMC adjudicatory proceeding “walks, talks, and squawks very much like a lawsuit”<sup>11</sup> against the state and was therefore barred by the doctrine of sovereign immunity.<sup>12</sup> At the same time, however, the Court made clear that its holding did not apply to an agency’s *rulemaking* functions: “Sovereign immunity concerns are not implicated, for example, when the Federal Government enacts a rule opposed by a State.”<sup>13</sup>

Indeed, the Court of Appeals for the Sixth Circuit has applied the principles laid out in *Federal Maritime Commission* and rejected sovereign immunity arguments identical to those raised by opponents here. In *Tennessee v. United States Department of Transportation*, the court confirmed that sovereign immunity does *not* bar a federal agency from acting on (and granting) a

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<sup>9</sup> See *id.* at 753-54.

<sup>10</sup> *Id.* at 759.

<sup>11</sup> *Id.* at 757 (quoting *S.C. State Ports Auth. v. Federal Maritime Comm’n*, 243 F.3d 165, 174 (4th Cir. 2001)).

<sup>12</sup> *Federal Maritime Comm’n*, 535 U.S. at 753-69.

<sup>13</sup> *Id.* at 764 n.16.

petition for a declaratory ruling that a state law is preempted.<sup>14</sup> As the Sixth Circuit recognized, a petition for a declaratory ruling on preemption “quite plainly, does not mirror federal civil litigation.”<sup>15</sup> Such petitions do not “direct the entry of relief against the” state, but rather “serve[] as an administrative interpretation of a federal statute, prospective only in its application and warranting *Chevron* deference in subsequent litigation.”<sup>16</sup> The same is true here. The coalition’s petition does not involve the filing of a complaint, issuing discovery requests, or ordering relief against a state. Rather, the petition requests that the Commission interpret the scope of a federal statute and federal rules, which is a quintessential rulemaking function.<sup>17</sup> As in the *Tennessee* case, sovereign immunity principles simply do not apply here, and the Commission should address the merits of the coalition’s petition.

## **II. The Statutory Language And Legislative History Of The TCPA Clearly Establish Exclusive Federal Jurisdiction Over Interstate Telemarketing**

As Verizon and numerous others demonstrated in their opening comments, the language and legislative history of the TCPA clearly establish that states have no authority to regulate interstate telemarketing. The TCPA granted the Commission jurisdiction over *all* telemarketing – *interstate* and *intrastate*. The *only* exception to Congress’ grant of exclusive authority over all telemarketing is a section providing that “State law[s] that impose[] more restrictive *intrastate*

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<sup>14</sup> *Tennessee v. U.S. Dep’t of Transp.*, 326 F.3d 729, 732-37 (6th Cir. 2003).

<sup>15</sup> *Id.* at 735.

<sup>16</sup> *Id.* at 735-36 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)).

<sup>17</sup> Indeed, the fact that this is a rulemaking proceeding, rather than an adjudicative proceeding of the type at issue in *Federal Maritime Commission*, also is evidenced by the fact that the Commission in the prior rulemaking proceeding already declared that an inconsistent state law that purported to govern interstate telecommunications “almost certainly would be preempted.” *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report & Order, 18 FCC Rcd 14014, ¶ 84 (2003) (“*TCPA Order*”). Ruling on the coalition’s petition has no different effect than if the Commission had, in the *TCPA Order*, declared that such laws *are* preempted.

requirements or regulations” on certain specified activities are not preempted. *See* § 227(e)(1) (emphasis added). Any other regulation of telemarketing – including *all* regulation of interstate telemarketing – is within the sole province of the federal government.<sup>18</sup>

Nevertheless, those commenters favoring state-by-state, piecemeal regulation of interstate telemarketing assert that Congress has not granted the federal government exclusive authority over interstate telemarketing regulation. None of the arguments raised by opponents of the petition withstand scrutiny. *First*, the reading of the statutory language advanced by opponents produces absurd results and should be rejected. Opponents argue that the language of § 227(e)(1) permits states to regulate not only *intrastate* telemarketing – but *interstate* telemarketing as well. Opponents assert that the “intrastate” limitation on state authority refers only to “requirements and regulations” and has no connection to the rest of § 227(e)(1). Thus, opponents claim, states’ authority to impose “more restrictive . . . requirements and regulations” is limited only to intrastate calls, but states would have unlimited authority to “prohibit” entirely all interstate telemarketing crossing their borders.<sup>19</sup> It simply makes no sense, however, that Congress would ban states from taking the smaller regulatory step of enacting “more restrictive . . . requirements and regulations” on interstate telemarketing, but would invite states to take the much larger step of prohibiting interstate telemarketing altogether. Basic principles of statutory interpretation counsel that statutes should not be interpreted in a manner that would produce

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<sup>18</sup> *See Verizon Comments* at 2-5; *see also, e.g., MBNA Comments* at 1-8; *Charter Comments* at 4-5.

<sup>19</sup> *See, e.g., Comments Of The Attorney General Of The State Of New Jersey*, CG Docket No. 02-278 at 6 (filed July 29, 2005) (“*New Jersey Comments*”).

nonsensical results.<sup>20</sup> Because opponents' reading of the TCPA would lead to absurd consequences, the Commission should reject opponents' argument.

Opponents cite *International Science & Technology*<sup>21</sup> in support of their strained reading of the TCPA, but the case does not support opponents' argument. The issue in *International Science & Technology* was whether state or federal courts had jurisdiction to hear private claims arising under the TCPA – not whether states have authority to enact substantive laws regulating interstate telemarketing. In any event, the court's statement in dicta that "state law is not preempted by the TCPA" does not address the issue before the Commission, because it does not distinguish between state regulation of intrastate telemarketing and interstate telemarketing.

Even if opponents' tortured reading of the statutory language were valid – and it is not – it would not advance their cause in any event. Even under opponents' reading, opponents concede that states have no authority to impose "more restrictive . . . restrictions and regulations" on interstate telemarketing.<sup>22</sup> Yet, the telemarketing laws enacted by the states are clearly "more restrictive . . . requirements and regulations." These laws impose a series of conditions on when telemarketing may occur. For example, as detailed in the coalition's petition, state telemarketing laws impose a variety of regulatory requirements, including the advance submission of telemarketing scripts, limitations on the times of day that calls may take place, and rules

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<sup>20</sup> See, e.g., *United States v. X-Citement Video*, 513 U.S. 64, 69 (1994) ("Some applications of respondents' position would produce results that were not merely odd, but positively absurd. . . . We do not assume that Congress, in passing laws, intended such results."); *United States v. Wilson*, 290 F.3d 347, 361 (D.C. Cir. 2002) (in statutory interpretation, "absurd results are strongly disfavored").

<sup>21</sup> *International Science & Technology, Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146 (4th Cir. 1997) (cited in State Of Indiana's Comments In Opposition To Alliance Contact Services *et al.* Joint Petition For Declaratory Ruling, CG Docket No. 02-278 at 16 (filed July 29, 2005) ("*Indiana Comments*").

<sup>22</sup> See, e.g., *Indiana Comments* at 15-17.

regarding the permissible amount of time to disconnect a call.<sup>23</sup> Such hands-on regulation of interstate telemarketing by the states is prohibited even under states' extreme reading of the statute.

*Second*, opponents focus on a subsection that appeared in an early draft of the TCPA and claim that its deletion signals Congress' intent not to grant the federal government exclusive jurisdiction over interstate telemarketing.<sup>24</sup> Early drafts of the TCPA included the following provision: "This section preempts any provisions of State law concerning interstate communications that are inconsistent with the interstate communications provisions of this section." *See* 137 Cong. Rec. 16200, at 16203 (Nov. 7, 1991). According to opponents, the fact that Congress deleted this preemption section indicates that Congress intended for states to regulate interstate telemarketing.

Opponents' reading fails to put the deleted provision into its proper context with the rest of the TCPA and its legislative history. As discussed above and in Verizon's opening comments, the structure and language of the TCPA *as enacted* makes clear that the federal government has exclusive jurisdiction over *all* telemarketing, including interstate telemarketing, with one limited exception. Because the only exception to this across the board preemption is limited to intrastate regulations of certain activities, the final statute is clear that *any* state law regulating interstate telemarketing is invalid. The legislative history of the TCPA *as enacted* further confirms that "State regulation of interstate communications, including interstate communications initiated for

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<sup>23</sup> *Coalition Petition* at 9-32; *see also Non-Profit Coalition Comments* at 3-7; *Interstate Sellers & Teleservices Providers Comments* at 6-7, 9-10.

<sup>24</sup> *See, e.g., Comments Of AARP In Opposition To Alliance Contact Services et al. Petition For Declaratory Ruling, CG Docket No. 02-278 at 5-6 (filed July 29, 2005) ("AARP Comments"); Indiana Comments* at 17-18.

telemarketing purposes, is preempted.”<sup>25</sup> Accordingly, the final statute as enacted is more broadly preemptive than the deleted provision, and the logical conclusion is that the provision was omitted because the statute as enacted leaves states *no* authority to regulate interstate telemarketing, whether or not their rules are inconsistent with the federal regime. This is so because the deleted provision stated only that *inconsistent* state laws regarding interstate telemarketing are displaced – erroneously suggesting that states may retain some residual authority to regulate interstate telemarketing, so long as the state laws were not inconsistent. By deleting that provision, Congress merely eliminated a provision that was inconsistent with the more broadly preemptive provisions of the statute that was actually enacted.

*Finally*, opponents claim that because a second *federal* agency, the Federal Trade Commission (“FTC”), is involved in regulating interstate telemarketing, this means that the *states* must be permitted to regulate interstate telemarketing as well.<sup>26</sup> To the contrary, the FTC’s role in regulating interstate telemarketing is a further indication of Congress’ intent to create a *national* scheme and to foreclose state regulation of interstate telemarketing. As Verizon and numerous other commenters explained, states are barred from regulating conduct in a field “that Congress, by its legislation, intended to be occupied exclusively by the federal

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<sup>25</sup> 137 Cong. Rec. S. 18781, at 18784 (Nov. 27, 1991) (statement of bill sponsor Senator Hollings) (emphases added); *see also Telephone Consumer Protection Act of 1991*, § 2(7) (Congressional finding that state “statutes restricting various uses of the telephone for marketing” cannot control “interstate operations”); 137 Cong. Rec. S. 16200, at 16203, 102nd Cong. 1st Sess. (Nov. 7, 1991) (bill sponsor Senator Pressler clarifying that “States remain free to adopt laws affecting *intrastate* communications”) (emphasis added); 137 Cong. Rec. S. 16204, at 16205, 102nd Cong. 1st Sess. (Nov. 7, 1991) (statement of bill sponsor Senator Hollings: “*The State law does not, and cannot, regulate interstate calls. Only Congress can protect citizens from telephone calls that cross State boundaries. That is why Federal legislation is essential.*”) (emphasis added).

<sup>26</sup> *See, e.g., New Jersey Comments* at 8.

government.”<sup>27</sup> State regulations are therefore invalid if Congress has demonstrated its intent to supersede state law by crafting its own “unified and comprehensive regulatory system” governing the area. *See Southwestern Bell*, 199 F.3d at 1190.

That is precisely what Congress has done with regard to interstate telemarketing. Congress has occupied the field of interstate telemarketing through a comprehensive legislative framework for telemarketing regulation and delegations of authority to this Commission and the FTC. Congress enacted the TCPA to provide a comprehensive federal framework governing interstate telemarketing and directed this Commission to promulgate regulations implementing it. Congress supplemented this comprehensive regulatory scheme by enacting the Telemarketing Consumer Fraud and Abuse Prevention Act and directing the FTC to promulgate rules implementing that statute. *See* 15 U.S.C. §§ 6101-08. Congress ensured that this Commission and the FTC would create a comprehensive and coordinated federal regime by ordering the two agencies to “consult and coordinate” their activities “to maximize consistency” and to file annual reports with Congress detailing the agencies’ coordination.<sup>28</sup> Pursuant to Congress’ comprehensive regulatory system, this Commission and the FTC have established requirements addressing a broad range of issues, big and small, such as: the national do-not-call registry, the use of automatic dialing and prerecorded messages, the minimum number of rings before a telemarketer may disconnect a call, unsolicited facsimile messages, mandatory disclosures, limitations on the time of day when telemarketing calls can be made, and bans on calls to emergency telephone lines, health care facilities, pagers, and cellular phones.<sup>29</sup> This “unified

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<sup>27</sup> *See Southwestern Bell Wireless Inc. v. Johnson County Bd. of County Comm’rs*, 199 F.3d 1185, 1190 (10th Cir. 1999).

<sup>28</sup> *Do-Not-Call Implementation Act*, Public Law 108-10, 117 Stat. 557 (2003).

<sup>29</sup> *See* 47 U.S.C. § 227; 47 C.F.R. §§ 64.1200, 64.1601, 68.318; *see also* 15 U.S.C. §§ 6101-08; 16 C.F.R. §§ 310.1-310.9.

and comprehensive regulatory system” occupies the field and leaves no room for state regulation with regard to interstate telemarketing. *See Southwestern Bell*, 199 F.3d at 1190. That this comprehensive federal regime of interstate telemarketing regulation was established through two federal agencies, rather than one, does nothing to diminish the federal government’s exclusive jurisdiction – and states’ lack of jurisdiction – in the field of interstate telecommunications.

### **III. State Regulation Of Interstate Telemarketing Impermissibly Conflicts With And Frustrates The Federal Regulatory Scheme**

Even if states had jurisdiction to regulate interstate telemarketing – and as explained above, they do not – state laws that differ in any way from the federal regulations would still be invalid. As Verizon explained in its opening comments, under the doctrine of implied conflict preemption, state law is preempted whenever it “stands as an obstacle” to the “full purposes and objectives” of federal law “whether that ‘obstacle’ goes by the name of ‘conflicting; contrary to; . . . repugnance; difference; irreconcilability; inconsistency; violence; curtailment; . . . interference,’ or the like.” *Geier*, 529 U.S. at 873. Accordingly, this Commission properly preempts any “state or local law that conflicts with [its] regulations *or* frustrates the purposes thereof.” *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (emphasis added).<sup>30</sup> In the case of state regulation of interstate telemarketing, *both* of these standards for preemption are satisfied. The Commission therefore has the authority to preempt state law that differs in any respect from the federal standards.

Opponents of the coalition’s petition attempt to avoid conflict preemption, but to no avail. *First*, one commenter attempts to avoid the conflict preemption analysis altogether by

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<sup>30</sup> *See also Operator Services Providers of America Petition for Expedited Declaratory Ruling*, 6 FCC Rcd 4475 ¶ 16 (1991) (“*Operator Services*”) (“a conflict [for purposes of preemption] arises when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”).

arguing that the TCPA's express preemption of state law with regard to certain technical matters means that the TCPA can have no other preemptive effect, citing *Cipollone v. Liggett Group*.<sup>31</sup> *See Indiana Comments* at 18-19. The commenter's reliance on *Cipollone* is misplaced. The Supreme Court has expressly denounced such a reading of *Cipollone* on multiple occasions. As the Supreme Court has explained, an express preemption provision "does *not* foreclose" implied conflict preemption.<sup>32</sup>

*Second*, opponents argue that there can be no conflict preemption because state and federal do-not-call laws share a common goal: the protection of consumer privacy.<sup>33</sup> Although opponents correctly note that protecting consumer privacy is *one* of the goals of the federal regime, opponents ignore another key policy of the TCPA and the federal program: "promot[ing] a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations." *TCPA Order* ¶ 83. Moreover, opponents' argument that a common goal bars a finding of conflict preemption is mistaken in any event. As the Supreme Court has made clear, conflict preemption applies whenever state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>34</sup> And, in determining whether state law stands as an obstacle, "it is not enough to say that the ultimate goal of both federal and state law" is the same.<sup>35</sup> Rather, "a state law also is preempted if it

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<sup>31</sup> *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992).

<sup>32</sup> *See Geier*, 529 U.S. at 869 (emphasis added); *see also, e.g., Freightliner Corp. v. Myrick*, 514 U.S. 280, 287-88 (1995) (the argument that express preemption forecloses conflict preemption is "without merit").

<sup>33</sup> *See, e.g., Comments Of The Electronic Privacy Info. Ctr. et al.*, CG Docket No. 02-278 at 10 (filed July 29, 2005).

<sup>34</sup> *See Geier*, 529 U.S. at 873; *see also Forest Park II*, 336 F.3d at 733.

<sup>35</sup> *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987); *Forest Park II*, 336 F.3d at 733.

interferes with the *methods* by which the federal statute was designed to reach that goal.”<sup>36</sup>

Thus, the Commission properly preempts state laws that conflict with or frustrate the federal regulatory scheme, even if those laws purport to further some of the same goals advanced by the Commission.

*Third*, opponents argue that there can be no conflict preemption because developments in telemarketing software can purportedly facilitate compliance with multiple overlapping state and federal regulations.<sup>37</sup> Conflict preemption, however, is not limited to situations where compliance with federal and state laws is impossible. The Court has expressly rejected the notion that preemption is limited to cases involving “impossibility”:

This Court has not previously driven a legal wedge . . . between “conflicts” that prevent or frustrate the accomplishment of a federal objective and “conflicts” that make it “impossible” for private parties to comply with both state and federal law. *Rather, it has said that both forms of conflicting state law are “nullified” by the Supremacy Clause.*<sup>38</sup>

Accordingly, this Commission properly preempts any “state or local law that conflicts with [its] regulations *or* frustrates the purposes thereof” – even if compliance with both laws is technically possible. *City of New York*, 486 U.S. at 64, 66 (emphasis added).<sup>39</sup>

Regardless of opponents’ claims that state laws share some of the Commission’s goals, and regardless of claimed developments in telemarketing software, both of these standards for

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<sup>36</sup> See *Int’l Paper*, 479 U.S. at 494 (emphasis added); *Forest Park II*, 336 F.3d at 733.

<sup>37</sup> See, e.g., Comments Of The World Privacy Forum, CG Docket No. 02-278 (filed July 29, 2005); State Of Indiana’s Supplemental Comments In Opposition To The Consumer Bankers’ Association’s Petition To Declare Indiana’s Telephone Privacy Law Preempted, CG Docket No. 02-278 (filed July 29, 2005).

<sup>38</sup> *Geier*, 529 U.S. at 869 (emphasis added).

<sup>39</sup> See also *Operator Services* ¶ 16 (“a conflict [for purposes of preemption] arises when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”).

preemption are satisfied in the case of state regulation of interstate telemarketing. The myriad state laws imposing different, and often more restrictive, regulations on interstate telemarketing unavoidably conflict with the federal regime because they upset the careful balance struck by the Commission in crafting its rules after considering numerous competing policy concerns. In so doing, these state laws “make impossible achieving the balance” sought by Congress and the Commission and conflict with the methods chosen by federal authorities to achieve federal objectives.<sup>40</sup> Moreover, the patchwork of inconsistent state laws necessarily stand as an obstacle to Congress’ stated goal of creating a uniform national standard to govern interstate telemarketing calls.<sup>41</sup> Indeed, the Commission has already recognized that “any state regulation of interstate telemarketing calls that differs from [the federal do-not-call] rules *almost certainly would conflict with and frustrate* the federal scheme and almost certainly would be preempted.” See *TCPA Order* ¶ 84 (emphasis added). Opponents’ claims of shared goals and glowing descriptions of telemarketing software do not diminish these conflicts and obstacles, or the preemptive effect of federal telemarketing laws and regulations.

#### **IV. Preemption Would Not Interfere With States’ Ability To Protect Their Residents From Unlawful Telemarketing Or Other Unlawful Behavior Involving Interstate Calls**

Finally, opponents of the coalition’s petition urge the Commission not to grant the coalition’s petition by claiming that preempting state telemarketing laws would have negative consequences for consumers. *First*, opponents have touted the benefits of more restrictive state

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<sup>40</sup> See *Operator Services* ¶ 16; see also *Geier*, 529 U.S. at 874-886 (preempting more restrictive state standards because they upset the balance of different technologies established by the Department of Transportation); *Forest Park II*, 336 F.3d at 733 (preempting state standards because they employed different methods than the federal law in attempting to achieve the same goals).

<sup>41</sup> See *Coalition Petition* at 9-32 (summarizing the ways in which state telemarketing laws conflict with and frustrate the federal regulatory scheme); *Interstate Sellers & Teleservices Comments* at 6-7, 9-10.

do-not-call laws, essentially arguing that the Commission should not preempt “superior” state laws. However, the question raised by the coalition’s petition is *not* whether the states have properly balanced the various concerns surrounding do-not-call policies for interstate calls. That balance has already been struck by Congress and this Commission and, under the Supremacy Clause of the Constitution, that decision trumps any conflicting decision by the states.

Opponents’ arguments touting the virtues of the various state laws are therefore irrelevant to the legal issues of exclusive jurisdiction and preemption and should be disregarded.

*Second*, opponents have argued that preempting state telemarketing laws would bar states from enforcing a wide variety of laws anytime that an interstate telephone call is involved in the violation. Opponents have argued, for example, that if state telemarketing laws are preempted, states would be unable to bring state charges or claims against those who perpetrate fraud by way of interstate calls, or those who make obscene phone calls across state lines.<sup>42</sup> Opponents’ comments have even catalogued examples of state enforcement actions against fraudulent schemes that involved interstate calls, claiming that such enforcement actions could not be brought in the future if the coalition’s petition is granted.

Opponents, however, ignore the difference between state telemarketing regulations and generally applicable laws that may apply in the context of a telephone call. Congress specifically provided that nothing in the TCPA “shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.” *See* 47 U.S.C. § 227(f)(6). This provision ensures that state officials are free to enforce state laws of general applicability.

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<sup>42</sup> *See, e.g.*, AARP Comments at 12-13; Comments Of The Nat’l Consumer Law Center, CG Docket No. 02-278 at 7 (filed July 29, 2005); Comments Of The Undersigned Attorneys General In Opposition To Alliance Contract Services et al. Petition For Declaratory Ruling, CG Docket No. 02-278 at 5-7 (filed July 29, 2005) (“*Attorneys General Comments*”).

Accordingly, contrary to the comments of opponents, an order preempting state telemarketing laws as applied to interstate calls will not affect states' authority to enforce generally applicable criminal and civil laws.<sup>43</sup> For example, if a caller makes interstate phone calls in which the caller defrauds the called party, such that the caller's actions satisfy the elements of a state law fraud claim, preemption of state telemarketing laws will not prevent state officials from bringing state fraud claims against the caller. Indeed, the great majority of the prior state enforcement actions cited in opponents' comments fall into this category – cases involving misrepresentations that would almost certainly be actionable under general state fraud law, whether the misrepresentations were communicated by telephone or by some other method.<sup>44</sup> By contrast, a preemption order would merely clarify that a state may not apply state telemarketing laws – laws that attempt to regulate telemarketing specifically – to interstate calls.

*Third*, opponents also argue that preemption will cripple efforts to enforce even those regulations that are specific to telemarketing. These opponents claim that if the Commission grants the coalition's petition, states will be barred from enforcing telemarketing laws, and consumers will be left with no effective protection from unlawful telemarketing.<sup>45</sup> But these claims simply ignore the fact that Congress itself prescribed a very specific – and exclusive – remedial scheme for violations of the telemarketing rules. Specifically, § 227(f) empowers state attorneys general and other authorized state officials to investigate and bring a civil action against “any person [that] has engaged or is engaging in a pattern or practice” of unlawful

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<sup>43</sup> See, e.g., *Interstate Sellers & Teleservices Comments* at 11-12 (under § 227(f), states retain authority to enforce consumer protection laws of general applicability).

<sup>44</sup> See generally *Attorneys General Comments* at Exhibit A.

<sup>45</sup> See, e.g., *Comments Of The Tennessee Regulatory Authority Opposing Telemarketers' Requests For Federal Preemption Of State Telemarketing Law As Applied To Interstate Calls*, CG Docket No. 02-278 at 14-19 (filed July 29, 2005) (“*Tennessee Regulatory Authority Comments*”).

telemarketing to state residents and provides that federal district courts have exclusive jurisdiction over any such actions. State officials may seek an injunction, damages or statutory damages, or both. State officials also may seek treble damages in the case of willful or knowing violations.<sup>46</sup> The only limitation on state-initiated actions is that, where this Commission has instituted such a civil action, no state can initiate a duplicative action. And an order from this Commission confirming that state regulation of telemarketing is preempted would do nothing to change the ability of state to pursue the civil actions prescribed by Congress under § 227(f).

### CONCLUSION

For the foregoing reasons, the coalition's petition should be granted.

Respectfully submitted,



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<sup>46</sup> Section 227(f)(1) provides:

“Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive \$500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the preceding sentence.”