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

In the Matter of)	
)	
Rules and Regulations Implementing)	CG Docket No. 02-278
The Telephone Consumer Protection Act of 1991)	
)	
Petition For Declaratory Ruling Of)	
The Fax Ban Coalition)	
)	

TO: The Commission

PETITION FOR DECLARATORY RULING

SUMMARY

The Fax Ban Coalition,¹ by its counsel, hereby requests that the Commission promptly issue declaratory rulings pursuant to Section 1.2 of its rules: (1) affirming that, under its general grant of exclusive authority to regulate interstate communications, the Commission has exclusive authority to regulate interstate commercial fax messages; and (2) finding that Section 17538.43 of the California Business and Professions Code,² and all other State laws that purport to regulate interstate facsimile transmissions, are preempted by the federal Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227.

These steps are necessary because California has recently adopted a fax law that has the effect of countermanding a recently enacted amendment to the TCPA. This California law, which threatens to impose substantial and unwarranted burdens on members of the Coalition, is

¹ A list of the members of the Fax Ban Coalition is attached to this Petition at Appendix A.

² Approved by Governor Schwarzenegger on October 7, 2005. The text of the statute is included in Appendix B.

preempted by the Communications Act and violates the Commerce Clause of the U.S. Constitution. Time is of the essence because the California law goes into effect on January 1, 2006.³

The California law, like the many State fax laws that have come before it, seeks to regulate not only commercial faxes sent within California but also faxes sent between California and other States – even though President Bush signed into law in July 2005 legislation affirmatively permitting what California now purports to prohibit. The result of this overreaching by California and other States is a jumble of fax regulation that is inconsistent with Congressional intent and the Commission’s goals in implementing the TCPA, and impermissibly burdens the companies and other organizations that are members of the Fax Ban Coalition as they seek to conduct business between States.

BACKGROUND

The members of the Fax Ban Coalition (the “Coalition”) are a diverse group of small and large businesses and other organizations active in a variety of industries. Coalition members include bankers, health care providers, magazine publishers, trade show operators, restaurateurs, travel agents, attorneys, insurance agents, and scores of other small businesses and professionals that form the core of the American economy.

The Coalition’s members rely heavily on fax technology in their day-to-day work, and many have seen their operations adversely affected by the inconsistent and burdensome requirements of the fax statutes of the various States. These state laws prohibit myriad interstate con-

³ Members of the Fax Ban Coalition are simultaneously filing an action challenging the new California law in the United States District Court for the Eastern District of California. The plaintiffs in that action seek a declaration that the California law is preempted by the Communications Act and violates the Commerce Clause, and preliminary and permanent injunctive relief.

duct that Congress plainly did not intend to disrupt. As a result of these laws, Coalition members cannot effectively serve their customers and continue to participate effectively in the national economy.

Telephone Consumer Protection Act. In response to the inconsistencies in commercial fax transmission and telemarketing regulation in the United States, and because the States lack jurisdiction over interstate communications, Congress in 1991 enacted the TCPA, 47 U.S.C. § 227. Among other reasons, this legislation was needed “to both relieve states of a portion of their regulatory burden and protect legitimate telemarketers from having to meet multiple legal standards.”⁴

In the TCPA, Congress established a framework for regulation of telemarketing and fax marketing and identified State regulation that would be permitted. Because States lack jurisdiction to regulate interstate communications, Congress had no reason to address State authority to regulate interstate telemarketing and fax marketing. But because the TCPA regulates interstate *and* intrastate telemarketing and fax marketing, Congress had to make explicit its intent that Section 227 not be read to preempt, or to authorize the Commission to preempt, state regulation of intrastate telemarketing and fax marketing. Congress therefore provided that “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”⁵ Congress also directed the

⁴ H.R. Rep. No. 102-317, at 10 (1991).

⁵ 47 U.S.C. § 227(e)(1) (emphasis added).

Commission to initiate a rulemaking to develop methods and procedures for implementing the statute.⁶

In 1992, the Commission adopted rules implementing the TCPA,⁷ thereafter addressed petitions for reconsideration in 1995 and 1997,⁸ and ultimately issued a comprehensive Report and Order revising its implementation of the TCPA in 2003.⁹ In the 2003 Order, the Commission instituted, with the Federal Trade Commission, a national do-not-call registry and in other ways established a comprehensive national scheme for regulating telemarketing and fax marketing. The Commission was clear in that Order that it, and Congress, intended to create a uniform national structure for regulation in this area, and warned that “inconsistent interstate rules [in State law] frustrate the federal objective of creating uniform national rules” and therefore would be preempted by the TCPA.¹⁰

Junk Fax Prevention Act of 1995. To underscore its intentions with regard to uniform regulation of commercial fax transmissions, Congress this summer passed the Junk Fax Preven-

⁶ *Id.* § 227(c)(2).

⁷ *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report & Order, 7 FCC Rcd. 8752 (1992) (“1992 Order”); *see also* 47 C.F.R. § 64.1200.

⁸ *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Mem. Op. & Order, 10 FCC Rcd. 12391 (1995) (“1995 Reconsideration Order”); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Order on Further Recon., 12 FCC Rcd. 4609 (1997) (“1997 Reconsideration Order”).

⁹ *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report & Order, 18 FCC Rcd. 14014 (2003) (“TCPA Order”).

¹⁰ *Id.* at ¶ 83.

tion Act of 2005 (“JFPA”).¹¹ Congress enacted the JFPA to codify the Commission’s 1992 rule permitting businesses and other entities to send commercial faxes to recipients with which they have established business relationships (“EBR”), notwithstanding the TCPA’s overall ban on unsolicited commercial faxes.

Congress legislated the EBR exception because it found the requirement of signed, written prior fax permission to be difficult for businesses and unnecessary for consumers. Without the JFPA, “the cost of complying with the FCC’s . . . rules [would] be enormous, and [absent the EBR exception, the law would] severely hamper legitimate fax communications between businesses and their customers and between associations and their members.”¹² In addition to codifying the EBR exception, the JFPA imposed opt-out requirements and made other changes to Section 227 relating to commercial fax messages.

State Regulation. Unfortunately, neither the TCPA nor the JFPA has dissuaded States from seeking to regulate interstate communications. When California on October 7, 2005 enacted a law purporting to regulate interstate transmission of facsimile messages, it became the thirty-second State to enact a law at variance with the fax provisions of the TCPA.¹³

The California law is particularly egregious because it is a direct attempt to invalidate Congress’s changes to Section 227 of the Communications Act, as amended by the JFPA. Thus, California’s new law contains the text of Section 227 but without the JFPA amendments, and applies that language to any person sending faxes into or out of California. The new California law states:

¹¹ Pub. L. No. 109-21, 119 Stat. 359 (2005).

¹² 151 Cong. Rec. H5262-04, H5264 (remarks of Rep. Upton) (daily ed. Jun. 28, 2005).

¹³ A chart summarizing the fax statutes of these States is attached as Appendix C.

It is unlawful for a person or entity, if either the person or entity or the recipient is located within California, to use any telephone facsimile machine, computer, or other device to send, or cause another person or entity to use such a device to send, an unsolicited advertisement to a telephone facsimile machine.¹⁴

The California law exempts from the prohibition against “unsolicited advertisements” situations where the sender receives the recipient’s “prior express invitation or permission.” The law, however, requires “prior express invitation or permission,” even where the sender has an established business relationship with the sender. The California law thus effectively eliminates the EBR exception to the prohibition on unsolicited faxes in the JFPA. That exception does not require express prior consent to send commercial faxes in situations where the sender has an established business relationship with the sender.

The California law, moreover, does not specify what form that invitation or permission must take to be effective.¹⁵ Violators of the California law, which could include persons out-of-State who send faxes into the State and companies in California faxing to any other State, are subject to injunctive relief, the greater of actual damages of \$500 per occurrence, and treble damages in the case of a “willful” violation.¹⁶

Other States have adopted laws that purport to control the format of interstate faxes, the content of those faxes, handling of opt-out requests for fax transmissions sent from an out-of-State business, and whether or not certain interstate faxes can be sent at all. Each of these State statutes seeks to impose unique and substantial requirements on legitimate business entities such

¹⁴ SB 833, 2005-2006 Sess., at § 1(b)(1) (Cal. 2005).

¹⁵ *Id.* at § 1(a)(2). The TCPA, by contrast, delegates authority to the FCC to make this determination. 47 U.S.C. § 227(b)(2).

¹⁶ *Id.* at § 1(b)(2).

that an interstate fax sent legally to one recipient might violate State law when sent to another. For national companies and organizations, the chaos associated with State fax laws makes it extremely difficult to conduct business without unintentionally running afoul of some provision in the various State fax statutes. Moreover, the creation of private causes of action under State law has led to an explosion of lawsuits – many of them unfounded – which require businesses to defend themselves in distant locations or settle baseless claims to avoid the cost of litigation.

Since States began undermining the TCPA by enacting inconsistent legislation, parties across the country have urged the Commission to declare that State laws governing interstate commercial telephone calls are preempted by federal law. Eight petitions for declaratory ruling have been filed with the Commission challenging the State laws of California, Florida, North Dakota, New Jersey, Wisconsin, and Indiana.¹⁷ In addition, on April 29, 2005, a group of 33 organizations (the “Joint Petitioners”) filed a petition for declaratory ruling requesting that the Commission assert exclusive regulatory jurisdiction over interstate telemarketing calls.¹⁸

¹⁷ See *Mark Boling*, Petition for Declaratory Ruling, CG Docket No. 02-278 (filed Mar. 11, 2003) (California); *Express Consolidation, Inc.*, Petition for Declaratory Ruling, CG Docket No. 02-278 (filed Jul. 13, 2004) (Florida; subsequently dismissed); *FreeEats.com*, Petition for Declaratory Ruling, CG Docket No. 02-278 (filed Sep. 13, 2004) (North Dakota); *American Tele-services Ass’n*, Petition for Declaratory Ruling, CG Docket No. 02-278 (filed Oct. 4, 2004) (New Jersey); *Consumer Bankers Ass’n*, Petition for Declaratory Ruling, CG Docket No. 02-278 (filed Nov. 19, 2004) (Wisconsin); *Consumer Bankers Ass’n*, Petition for Declaratory Ruling, CG Docket No. 02-278 (filed Nov. 19, 2004) (Indiana); *Nat’l City Mortgage Co.*, Petition for Declaratory Ruling, CG Docket No. 02-278 (filed Nov. 22, 2004) (Florida); *TSA Stores, Inc.*, Petition for Declaratory Ruling, CG Docket No. 02-278 (filed Feb. 1, 2005) (Florida).

¹⁸ *Alliance Contract Servs.*, Joint Petition for Declaratory Ruling That The FCC Has Exclusive Regulatory Jurisdiction Over Interstate Telemarketing, CG Docket No. 02-278 (filed Apr. 29, 2005) (“Joint Petition”).

The confusion associated with inconsistent State laws governing interstate communications of commercial messages is not limited to telemarketing. The members of the Fax Ban Coalition are struggling with the morass of State legislation that restricts their ability to use faxes to conduct business in a reasonable and efficient manner. The Coalition files this petition seeking relief from these unwarranted and unlawful burdens.

ANALYSIS

I. STATES LACK JURISDICTION TO REGULATE INTERSTATE FAX COMMUNICATIONS.

The time has come for the Commission to rectify the chaotic results of the States' invasion of the FCC's sphere of authority by affirming that the Commission has exclusive jurisdiction over interstate fax communications, as it has over all other interstate communications, and by preempting all State laws that purport to regulate in that area. Those actions are critical to giving effect to the TCPA and JFPA and the Commission's rules adopted under that statutory authority. Those actions are also necessary to enforce the FCC's exclusive jurisdiction to regulate interstate communications, as Congress and the courts have done in Section 227 of the Communications Act and in the decades of communications law that came before it.

A. States Lack Jurisdiction To Regulate Interstate Communications.

In enacting the Communications Act of 1934, Congress granted the Commission exclusive jurisdiction over "all interstate and foreign communication,"¹⁹ creating a regime in which "[i]nterstate communications are *totally entrusted* to the FCC."²⁰ Congress correspondingly

¹⁹ 47 U.S.C. § 152.

²⁰ *NARUC v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) (citation omitted and emphasis added).

granted the States jurisdiction to regulate intrastate communications, but the States' jurisdiction is not exclusive. Section 227 is among the provisions of the Communications that permits the Commission to regulate intrastate communications.²¹

With such exceptions as Section 227, this allocation of power to regulate communications – interstate regulation exclusively to the federal government, and intrastate regulation to the States – has been a foundation of United States communications law for over seventy years. As the Supreme Court would acknowledge more than fifty years after the statute's enactment, the Communications Act of 1934 “divide[d] the world into two hemispheres – one comprised of interstate service, over which the FCC would have plenary authority, and the other made up of intrastate service, over which the States would retain exclusive jurisdiction.”²²

It was against this backdrop, and the decades of history that developed from it, that Congress enacted the TCPA. Congress itself recognized that the TCPA was needed because States lack power to regulate interstate communications. One of the findings in the TCPA states, for example, “Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations.”²³ Similarly, the Senate Committee Report noted that “[f]ederal action is necessary because States do not have jurisdiction to protect their citizens against those who . . . place interstate telephone calls.”²⁴

²¹ 47 U.S.C. § 152(b).

²² *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986).

²³ H.R. Rep. No. 102-317, at 2 (1991).

²⁴ S. Rep. No. 102-178, at 5 (1991).

B. Exclusive Federal Regulation of Interstate Commercial Fax Transmissions is Consistent With Congressional Intent and Section 227(e)(1).

The Commission properly recognized in the *TCPA Order* that Congress, in enacting the TCPA, sought to achieve two goals: To promote a scheme that respected consumers' privacy, and to provide a uniform workable framework for compliance by businesses and organizations acting in good faith.²⁵ As the Joint Petitioners note in the telemarketing context,²⁶ Congress intended to achieve these goals by (1) asserting federal power over intrastate calls,²⁷ (2) restricting, but not eliminating, State authority over intrastate calls,²⁸ and (3) not granting the States authority over interstate calls.²⁹

Because the TCPA authorizes the FCC to regulate intrastate as well as interstate fax communications, Congress was required to make clear its intent that Section 227 does not preempt or authorize the Commission to preempt state regulation of intrastate fax communications. Congress did so in Section 227(e)(1) of the Act, saving from preemption State laws that “impose

²⁵ *TCPA Order* at ¶ 83 (citing 137 Cong. Rec. S18317-01, at 1 (daily ed. Nov. 26, 1991) (remarks of Sen. Pressler) (“The Federal Government needs to act now on uniform legislation to protect consumers.”)).

²⁶ Joint Petition at 35.

²⁷ *TCPA Order* at ¶ 83 (“We recognize that States traditionally have had jurisdiction over only intrastate calls.... Congress enacted [the TCPA] to give the Commission jurisdiction over both interstate and intrastate . . . calls.”).

²⁸ *Id.* (concluding that Congress intended that “inconsistent interstate rules” established by States would “frustrate the federal objective of creating uniform national rules” and should be preempted).

²⁹ S. Rep. No. 102-178 at 5 (1991) (concluding that the TCPA was “necessary” because “States do not have jurisdiction to protect their citizens against those who . . . place interstate telephone calls.”).

more restrictive *intrastate* requirements or regulations on, or which prohibit[],” the use of fax machines to send unsolicited advertisements.³⁰

Because Section 152 of the Communications Act grants the FCC exclusive jurisdiction to regulate interstate communications, Congress had no need to address preemption of state regulation of interstate faxes; doing so would have been redundant.³¹ However, because Section 152 leaves the FCC with jurisdiction to regulate intrastate fax advertisements under Section 227,³² Congress had to make explicit that Section 227 does not preempt, or authorize the FCC to preempt, more restrictive State regulation of intrastate fax advertisements.³³

Moreover, under the principle *expressio unius est exclusio alterius* – the express mention of one thing implies the exclusion of other things not mentioned – it is presumed that “when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions.”³⁴ Thus, for example, the Ninth Circuit has held that the presence of an express preemption provision in the Communications Act “supports an inference that Congress did not intend to preempt matters *beyond* the reach of that provision.”³⁵ Under this principle of construction, even if States *did* otherwise have jurisdiction to regulate interstate communications,

³⁰ 47 U.S.C. § 227(e)(1) (emphasis added).

³¹ See *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988) (rejecting construction that would create redundancy in statute); *United States v. Johal*, 421 F.3d 955, 959 (9th Cir. 2005) (rejecting reading of intent standard in criminal statute because statute “already provides” for convictions based on that standard).

³² See 47 U.S.C. § 152(b).

³³ See *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618 (7th Cir. 1998) (explaining that the purpose of a savings clause is to “nix” an inference).

³⁴ *Silvers v. Sony Pictures Entm’t, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005).

³⁵ *Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.*, 423 F.3d 1056, 1072 (9th Cir. 2005).

the fact that Section 227(e)(1) negatives an inference of preemptive intent only with respect to *intrastate* fax advertisements would mean, by implication, that Section 227 bars States from regulating *interstate* fax advertisements.

Inexplicably, the Commission stated in its 2003 TCPA Order that the TCPA’s “silence” with respect to state regulation of interstate communications rendered Section 227 “ambiguous” with regard to preemption of State regulation of interstate calls.³⁶ That conclusion is plain error. There is no ambiguity, because the statute says clearly what States can do, “impose[] more restrictive intrastate requirements,” and what the Commission cannot do: preempt such intrastate requirements. Congress did not need to add that States cannot impose interstate requirements, because the Communications Act assigns jurisdiction over interstate communications exclusively to the federal government.³⁷ It is arbitrary and unreasonable to characterize the statute as “ambiguous” because it does not redundantly provide that States lack authority over interstate communications.³⁸

Some commenters in CG Docket No. 02-278 argue that the subtitle of Section 227(e)(1), “State Law Not Preempted,” suggests that *no* State law is preempted by the TCPA. But this ignores the fact that the provision’s disclaimer of preemptive intent is limited to “more restrictive” intrastate regulation by the States. In addition, “the title of a statute [is] of use only when [it]

³⁶ *TCPA Order* at ¶ 82.

³⁷ *See* Part II.B, *infra*.

³⁸ *Cf. Iowa Utils. Bd. v. FCC*, 525 U.S. 366 (1999) (by adding the Telecommunications Act of 1996 to the 1934 Act, Congress incorporated those provisions into the general regulatory scheme, with its broad federal scope, inherent in the 1934 Act).

shed[s] light on some ambiguous word or phrase in the statute itself.”³⁹ As explained, Section 227(e)(1) is not ambiguous. In context, the title “State Law Not Preempted” signifies a provision defining *which* state laws are not preempted, not a provision saying that *no* state laws are preempted. That is the only reading that jibes with the text of Section 227(e)(1), Congress’ goals in enacting the TCPA, and the overarching framework of the Communications Act.⁴⁰

C. Exclusive Federal Regulation Is Consistent With Prior Commission Decisions.

In the *TCPA Order*, the Commission served notice that “more restrictive state efforts to regulate interstate calling would almost certainly conflict with [the Commission’s] rules” and would therefore be preempted.⁴¹ Since the TCPA Order was adopted, however, thirty-two States have ignored the Commission’s warnings and have passed laws that impede the effectiveness of the Commission’s TCPA rulemaking. If the Commission persists in its view that States are not automatically barred from regulating interstate telemarketing and faxes, this Petition calls upon the Commission to find state laws that do so to be preempted.

The Commission’s suggestion that state laws regulating interstate telemarketing and fax communications are not automatically preempted has produced a riot of inconsistent and varying state regulations that makes it impossible for the Commission’s TCPA rules to be effective, and

³⁹ *Carter v. United States*, 530 U.S. 255, 267 (2000) (citations and internal quotations omitted).

⁴⁰ “The titles of statutes are simply reference guides and cannot limit or contravene the statutory text.” *United States v. Jac Natori Co.*, 108 F.3d 295, 299 (Fed. Cir. 1997). “[A] statute’s title may not undo that which the statute itself makes plain,” *United States v. Waters*, 158 F.3d 933, 938 (6th Cir. 1998), and “a statute’s caption must yield to its text when the two conflict,” *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003).

⁴¹ *Id.* at ¶ 82.

transforms good-faith users of fax technology into unwitting lawbreakers. Even businesses that seek to comply scrupulously with every State law stand little chance of succeeding, since many fax numbers are “800” numbers that cannot be associated with any particular geographic area and because some intended fax recipients in other States may forward their fax numbers to a fax number in a State that outlaws that particular fax.

The Commission must revise its approach and declare on a uniform and national basis that, although the TCPA bars the Commission from preempting States regulation of intrastate fax communications, the Commission has exclusive jurisdiction to regulate interstate commercial fax messages and all State efforts to do so are preempted.

The Commission has repeatedly acknowledged the basic principle that regulation of interstate communications belongs exclusively to the federal government: “The States do not have jurisdiction over interstate communications.”⁴² “The Commission’s jurisdiction over interstate and foreign communications is exclusive of State authority.”⁴³ “In the absence of a specific statutory provision regarding jurisdiction . . . Congress has given the Commission exclusive jurisdiction over ‘all interstate and foreign communication’ and ‘all persons engaged . . . in such communication.’”⁴⁴ Even in the 2003 *TCPA Order*, the Commission “recognize[d] that States traditionally have had jurisdiction over all intrastate calls, while the Commission has had jurisdiction over interstate calls.”⁴⁵

⁴² *AT&T Co.*, Mem. Op. & Order, 56 FCC 2d 14 at ¶ 21 (1975).

⁴³ Operator Services Providers of America Petition for Expedited Declaratory Ruling, Mem. Op. & Order, 6 FCC Rcd. 4475 at ¶ 10 (1991) (“OSPA”).

⁴⁴ *Vonage Holdings Corp.*, Mem. Op. & Order, 19 FCC Rcd. 22404 at ¶ 16 (2005).

⁴⁵ Citing *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355 (1986).

As the Joint Petitioners explain in detail, the Commission has concluded in an analogous case that the Communications Act precludes a State from regulating interstate calls to operator service providers.⁴⁶ In its decision preempting that State regulation, the Commission announced that it “has plenary and comprehensive jurisdiction over interstate and foreign communications” that is “exclusive of State authority.”⁴⁷ The Commission further found that, “[w]here Congress has given this Commission exclusive authority over interstate and foreign communications, we need not demonstrate that ‘State regulation of interstate communications would impose some burden on interstate commerce or would frustrate some particular policy goal of Congress or this Commission.’”⁴⁸

In the case of the TCPA, the various State laws regulating interstate commercial fax calls plainly frustrate Congressional and Commission policy. Taken together, the practical effect of the State laws in this area is to invalidate efforts by Congress and the Commission to establish a uniform regulatory scheme for interstate commercial fax calls. Accordingly, the Commission should preempt all State laws purporting to regulate interstate commercial fax transmissions and assert exclusive jurisdiction over such regulation.

D. The Commission Has Authority To Preempt State Laws Purporting To Regulate Interstate Commercial Fax Communication.

Finally, it is well established that the Commission can, consistent with its statutory and constitutional authority, declare that all State fax statutes which purport to regulate interstate communication are preempted by federal law. The Supreme Court first recognized in *Louisiana*

⁴⁶ Joint Petition at 36, *citing OSPA*, *supra* note 43.

⁴⁷ *OSPA*, 6 FCC Rcd. 4475 at ¶ 10.

⁴⁸ *Id.* at ¶ 10 & n.10 (*quoting Chesapeake & Potomac Tel. Co.*, 2 FCC Rcd. 3528 (1987)).

Public Service Commission that “a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.”⁴⁹ In that case, the Court concluded that, because Sections 151 and 152 demonstrate Congress’s general intent to divide regulatory authority between the FCC and the States, the FCC had the ability to preempt State laws which interfered with areas in which the FCC’s authority was exclusive.⁵⁰ The Court reiterated this policy two years after the *Louisiana* decision, and found, based on a review of Congressional activity during the preceding two years, that Congress approved of the Supreme Court’s conclusion that the Commission had this preemptive authority.⁵¹

An assertion of exclusive jurisdiction over interstate fax communications, and an attendant preemption of inconsistent State laws, would be fully consistent with States’ exercise of their plenary police authority. The TCPA provides that “[n]othing contained in this subsection 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.”⁵² Congress thus preserved state police authority to perpetrate fraud, theft, or harassment, or to violate other State civil or criminal laws of general applicability.

II. STATE REGULATION OF INTERSTATE FAX COMMUNICATIONS CONFLICTS WITH FEDERAL GOALS.

In adopting and implementing the TCPA and the JFPA, Congress and the Commission sought to create uniform standards for the regulation of interstate fax transmissions and to protect

⁴⁹ *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 368-69 (1986).

⁵⁰ *Id.* at 63-65.

⁵¹ *City of New York v. FCC*, 486 U.S. 57, 66-67 (1988).

⁵² 47 U.S.C. § 227(f)(6).

consumers' privacy while not impeding the activities of legitimate businesses and organizations. The efforts of Congress and the Commission, however, have been undercut by the hodgepodge of State laws that, together, work to undermine the TCPA and the Commission's implementing regulations and make full compliance on a national level practically impossible. The Commission has recognized that, in enacting the TCPA, "it was the clear intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations."⁵³ The Commission should hold that, like telemarketing laws, all State fax laws that regulate the same interstate conduct as the TCPA necessarily undermine Congress's attempt to create a uniform and workable scheme for regulating fax transmissions.

A. California

When Congress this year adopted the JFPA to codify the established business relationship exception to the ban on unsolicited commercial fax messages, it spoke clearly and emphatically that protecting individuals' privacy interest did not require impeding how businesses communicate with their own customers. Congress acted out of concern that changes to the FCC's rules adopted in July 2003 to eliminate a regulatory EBR exemption would harm businesses and make compliance with Section 227 expensive and difficult with little consumer benefit.

The law recently enacted in California imposes restrictions on both intrastate and *interstate* communications identical to the text of Section 227 before Congress amended it by passing the JFPA to add an EBR exception. That is, California acted swiftly in an attempt to overrule Congress on a matter of interstate commerce over which the Constitution gives Congress explicit authority.

⁵³ TCPA Order at ¶ 83.

The effect of California's law is that a supplier in Maine, for example, cannot send a fax about a newly available product line to an established customer in California without an explicit invitation to send the fax. By the same token, a pharmaceutical company in California may not send new product information to a pharmacy in New York, but a competing pharmaceutical company in Colorado may do so. These results are not acceptable given that Congress unequivocally stated, just a few months ago, that interstate commercial faxes of this type are permissible in the context of an established business relationship.

In the legislative history accompanying the bill that became California's fax law, the California legislature announced its intention to override Congress's plain intent in enacting the JFPA. Specifically, the sponsor of the State bill explained that the bill's primary purpose was to address the State's concern that Congress would "create[] a loophole in the TCPA [to] allow[] any business from whom a recipient bought goods or services in the previous seven years to send unsolicited faxes . . . as long as an opt-out procedure was provided in the . . . fax" ⁵⁴ But California's attempt to override Congressional action is at odds with federal law. Specifically, the U.S. Court of Appeals for the District of Columbia Circuit has held that "[i]nterstate communications are *totally entrusted* to the FCC, which is charged with providing a rapid, efficient, Nation-wide, and world-wide . . . communication service." ⁵⁵ Even the California Court of Appeal acknowledges the basic principle that "states do not have jurisdiction over interstate calls." ⁵⁶

⁵⁴ See, e.g., Cal. Sen. Ctte. on Bus., Profs. & Econ. Dev., Analysis of Sen. Bill 833 (2005-2006 Reg. Sess.), at 3 (Apr. 12, 2005). The established business relationship exception currently in force extends at most for 18 months, not the seven years cited by the California legislature. 47 C.F.R. § 64.1200(f)(3).

⁵⁵ *NARUC v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984).

⁵⁶ *Kaufman v. ACS Sys., Inc.*, 110 Cal. App. 4th 886, 896 (Ct. App. 2003) (citation omitted).

The federal government, not the State, has exclusive authority to regulate interstate faxes, and any state statute restricting interstate fax messages must be preempted by federal law.

B. Other States

Like California's statute, the laws of the other States that could be interpreted as restricting interstate fax transmission have impeded the interstate commerce of the members of the Coalition and scores of other businesses and organizations. Moreover, because each State imposes different requirements for interstate faxes, business and associations face difficult challenge working on a national scale to be in full compliance with each and every provision.

For instance, a distributor might routinely send faxes to inform its existing customers when new product lines become available. To do so, it could obtain the customers' fax telephone numbers in the course of doing business with the customer and compose a fax that complies with Section 227's opt-out notice requirement and all other aspects of federal law. However, sending the same fax – a fax that is fully compliant with federal law – to one customer in each of the fifty States could subject the distributor to substantial civil and criminal liability under various State laws.

Among many other violations, this hypothetical fax would violate the laws of thirteen States because those States have statutes that are more restrictive as to interstate communications than federal law and do not include EBR exceptions. The fax cannot be sent to Ohio if the recipient fax machine is located at a residence, but it can be sent to a business.⁵⁷ The fax would violate the laws of Minnesota, New Mexico, and Rhode Island if the opt-out notification is not in

⁵⁷ Ohio Rev. Code Ann. § 4931.75.

9-point type or larger.⁵⁸ It would violate the law of Minnesota, New Mexico, Pennsylvania, and Rhode Island if the fax failed to announce that opt-outs may be made to a specified toll-free telephone number, as opposed to by some other means.⁵⁹ (Opt-outs are *not* effective in Washington, however, if they are made via telephone.⁶⁰) And in Michigan, it would be a violation if the fax number was obtained from an industry directory, since that publication cannot be construed as an invitation to send a fax.⁶¹ The sender cannot even send a fax to its customer in Michigan by asking that customer to fax an authorization; in Michigan, written permission cannot be obtained by fax.⁶² All of these States have sought or could seek to enforce their rules against interstate faxes despite the Commission's specific rules in each of these areas.

Congress did not intend to require businesses and other organizations to contend with this patchwork of conflicting and inconsistent requirements when engaged in interstate communications. In passing the TCPA and the JFPA, Congress instead sought to create a uniform and consistent regime for interstate fax regulation that respects privacy but does not burden legitimate business activity. If senders cannot rely on federal law, or on the FCC rules promulgated under its authority, for guidance on how to construct a compliant fax message sent in interstate commerce, then Congress's guiding purpose in enacting Section 227 will have been defeated.

⁵⁸ Minn. Stat. § 325E.395; N.M. Stat. § 57-12-22; R.I. Gen. Laws § 6-47-1.

⁵⁹ Minn. Stat. § 325E.395; N.M. Stat. § 57-12-22; 18 Pa. Cons. Stat. § 7661; R.I. Gen. Laws § 6-47-1.

⁶⁰ Wash. Rev. Code § 80.30.540.

⁶¹ Mich. Comp. Laws § 445.1772.

⁶² *Id.*

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

FAX BAN COALITION

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Attachments

Appendix A

APPENDIX A

MEMBERS OF THE FAX BAN COALITION

American Advertising Federation
American Bankers Association
American Dental Association
American Electronics Association
American Express Company
American Hotel & Lodging Association
American Society of Association Executives
American Society of Travel Agents
America's Community Bankers
Arett Sales
Associated General Contractors of America
Association for Suppliers of Printing, Publishing & Converting Technologies
Association of Equipment Manufacturers
Association of National Advertisers
AstraZeneca
BellSouth
Canfield Associates
Cardinal Health Inc.
Cendant Corporation
Chamber of Commerce of the United States
Community Associations Institute
Consumer Bankers Association
Consumer Electronics Association
Consumer Mortgage Coalition
Credit Union National Association
Detroit Regional Chamber
Direct Marketing Association
Ferguson Inc.
First Empire Securities Inc.
Gemair Group
Healthcare Distribution Management Association
Independent Insurance Agents & Brokers of America
International Association of Amusement Parks & Attractions
International Cemetery and Funeral Association
International Foodservice Distributors Association
International Franchise Association
Jefferson Consulting Group LLC
Magazine Publishers of America
Mail 2 Media
Marathon Oil Corporation
Marlin Leasing Corporation

McGraw-Hill Companies (The)
Mortgage Bankers Association
Myron Corporation
National Association of Automobile Dealers
National Association of Fastener Distributors
National Association of Home Builders
National Association of Manufacturers
National Association of Mortgage Brokers
National Association of Wholesaler-Distributors
National Auctioneers Association
National Automobile Dealers Association
National Corn Growers Association
National Fastener Distributors Association
National Federation of Independent Business
National Funeral Directors Association
National Grocers Association
National Multi Housing Council
National Newspaper Association
National Restaurant Association
National Retail Federation
National Stone Sand & Gravel Association
New Jersey Chamber of Commerce
Newspaper Association of America
Ohio School Boards Association
Pennsylvania Steel Sales Corp
Premiere Global Services Inc.
Reed Elsevier
Retired Enlisted Association
Right2Communicate.org
San Diego Employers Association
SmartVoice
Software & Information Industry Association
Steel Solutions
Steel Warehouse
Tri-State Printer & Copier Supply
United States Telecommunications Association
Venn Strategies, LLC
Wine & Spirits Wholesalers of America
Xpedite Systems, Inc.
Yellow Pages Association
Zurich North America

Appendix B

Senate Bill No. 833

CHAPTER 667

An act to add Section 17538.43 to the Business and Professions Code, relating to advertising.

[Approved by Governor October 7, 2005. Filed with
Secretary of State October 7, 2005.]

LEGISLATIVE COUNSEL'S DIGEST

SB 833, Bowen. Unsolicited advertising faxes.

Existing state law imposes various requirements and prohibitions on different forms of advertising. A violation of the provisions governing advertising is a crime.

This bill would make it unlawful for a person or entity, if located in California or if the recipient is located in California, to use any device to send, or cause any other person or entity to use a device to send, an unsolicited advertisement to a telephone facsimile machine, except as specified. The bill would authorize the recipient of an unsolicited advertising fax to bring an action for a violation of these provisions for injunctive relief, actual damages or statutory damages of \$500 per violation, whichever is greater, or both injunctive relief and damages, and, if the violation was willful, would authorize a court to award treble damages. The bill would also make it unlawful for a person or entity, if located in California or the recipient is located in California, to initiate a facsimile communication using a machine that does not provide specified identification, or to use a device to send a message via a telephone facsimile machine unless the message is clearly marked with certain identifying information.

Because a violation of the bill would be a crime, it would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. Section 17538.43 is added to the Business and Professions Code, to read:

17538.43. (a) As used in this section, the following terms have the following meanings:

(1) “Telephone facsimile machine” means equipment that has the capacity to do either or both of the following:

(A) Transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line.

(B) Transcribe text or images, or both, from an electronic signal received over a regular telephone line onto paper.

(2) “Unsolicited advertisement” means any material advertising the commercial availability or quality of any property, goods, or services that is transmitted to any person or entity without that person’s or entity’s prior express invitation or permission. Prior express invitation or permission may be obtained for a specific or unlimited number of advertisements and may be obtained for a specific or unlimited period of time.

(b) (1) It is unlawful for a person or entity, if either the person or entity or the recipient is located within California, to use any telephone facsimile machine, computer, or other device to send, or cause another person or entity to use such a device to send, an unsolicited advertisement to a telephone facsimile machine.

(2) In addition to any other remedy provided by law, including a remedy provided by the Telephone Consumer Act (47 U.S.C. Sec. 227 and following), a person or entity may bring an action for a violation of this subdivision seeking the following relief:

(A) Injunctive relief against further violations.

(B) Actual damages or statutory damages of five hundred dollars (\$500) per violation, whichever amount is greater.

(C) Both injunctive relief and damages as set forth in subparagraphs (A) and (B).

If the court finds that the defendant willfully or knowingly violated this subdivision, the court may, in its discretion, increase the amount of the award to an amount equal to not more than three times the amount otherwise available under subparagraph (B).

(c) It is unlawful for a person or entity, if either the person or entity or the recipient is located in California, to do either of the following:

(1) Initiate any communication using a telephone facsimile machine that does not clearly mark, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of the business, other entity, or individual.

(2) Use a computer or other electronic device to send any message via a telephone facsimile machine unless it is clearly marked, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and the identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of the business, other entity, or individual.

(d) This section shall not apply to a facsimile sent by or on behalf of a professional or trade association that is a tax-exempt nonprofit

organization and in furtherance of the association's tax-exempt purpose to a member of the association, provided that all of the following conditions are met:

- (1) The member voluntarily provided the association the facsimile number to which the facsimile was sent.
- (2) The facsimile is not primarily for the purpose of advertising the commercial availability or quality of any property, goods, or services of one or more third parties.
- (3) The member who is sent the facsimile has not requested that the association stop sending facsimiles for the purpose of advertising the commercial availability or quality of any property, goods, or services of one or more third parties.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

Appendix C

STATE FAX STATUTES

<u>State</u>	<u>Statute</u>	<u>Limited to Intrastate?</u>	<u>Established Business Relationship Exception?</u>	<u>Nonprofit Exception?</u>	<u>Opt-Out Requirement?</u>	<u>Timing requirements?</u>	<u>Specific formatting requirements?</u>
Arizona	Ariz. Rev. Stat. § 44-1482	No	No	No	Yes, within three business days.	No	Include name, address, fax, and toll-free or local telephone number on first page.
California	Cal. Bus. & Prof. Code § 17538.43	No	No	Tax-exempt professional and trade associations' faxes to members, under limited circumstances.	No; all commercial faxes banned without explicit permission.	No	No
Colorado	Colo. Rev. Stat. §§ 6-1-702, 6-1-903, 6-1-905, 6-1-906	No	Yes	Yes	No; all commercial faxes banned without explicit permission.	No	Fax header must contain specified information.
Connecticut	Conn. Gen. Stat. §§ 42-288a, 52-570c	No	No EBR in statute creating civil cause of action against sender.	No	No; all commercial faxes banned without explicit permission.	No	No
Florida	Fla. Stat. § 365.1657	Yes	No	No	No; all commercial faxes banned without explicit permission.	No	No
Georgia	Ga. Code Ann. § 46-5-25	No	Yes	No	Yes, immediately.	No	No
Idaho	Idaho Code Ann. § 48-1003	No	Yes	No	No	No	No
Illinois	720 Ill. Comp. Stat. § 5/26-3	No	Requires reasonable belief of permission.	No	Yes	No	No
Kansas	Kan. Stat. Ann. § 50-670	No	Yes	No	Yes, immediately.	No	No
Kentucky	Ky. Rev. Stat. Ann. §§ 367.46951, 367.46955	No; applies to interstate faxes sent from Kentucky.	Limited	No	Yes, immediately.	Permitted between 10 a.m. and 9 p.m. local time.	No
Louisiana	La. Rev. Stat. Ann. §§ 51:1745-15:1747	No; applies to interstate faxes sent to Louisiana.	Yes	No	No	No	No
Maine	Me. Rev. Stat. Ann. tit. 10, § 1496	No	Yes	No	Yes, immediately.	No	No
Maryland	Md. Code Ann., Com. Law § 14-1313	No	Yes	No	No	No	No
Massachusetts	Mass. Gen. Laws ch 159C, §§ 1, 3	No	Yes	Yes	Yes, immediately.	No	No
Michigan	Mich. Comp. Laws § 445.1772	No	No	No	No; sender must get permission from recipient by means other than a fax machine. General opt-ins to a trade or marketing association are effective, but listing a fax number in an industry directory is insufficient.	No	No

STATE FAX STATUTES

<u>State</u>	<u>Statute</u>	<u>Limited to Intrastate?</u>	<u>Established Business Relationship Exception?</u>	<u>Nonprofit Exception?</u>	<u>Opt-Out Requirement?</u>	<u>Timing requirements?</u>	<u>Specific formatting requirements?</u>
Minnesota	Minn. Stat. § 325E.395	No	No	No	Yes; opt-out must be accepted via a toll-free telephone number and be effective immediately.	No	Must include opt-out statement in at least 9-point type which includes a toll-free telephone number for opt-outs.
Montana	Mont. Code Ann. § 30-14-1501	No	No	No	No; all commercial faxes banned without explicit permission.	No	No
Nebraska	Neb. Rev. Stat. § 86-245	No	No	No	No; all commercial faxes banned without explicit permission.	No	No
Nevada	Nev. Rev. Stat. § 207.325	No	Yes	No	No	No	No
New Jersey	N.J. Stat. Ann. § 56:8-158	Yes	Yes	Yes; faxes may be sent to members as long as they received an opt-out notice when joining the organization.	Yes; opt-out must be accepted by domestic mail and by fax and be effective immediately.	No	Opt-out statement, indicating that opt-outs are possible, must be included on the first page of the fax, along with a domestic address and fax number for receipt of opt-outs.
New Mexico	N.M. Stat. § 57-12-22.	No	Yes	No	Yes; opt-out must be accepted via toll-free telephone number and be effective immediately.	Faxes permitted between 9 a.m. and 9 p.m.	Must include opt-out statement in at least 9-point type which includes a toll-free telephone number for opt-outs.
New York	N.Y. Gen. Bus. Law § 396-aa	No	Yes	No	Yes, written or faxes opt-outs; effective immediately.	Any fax less than five pages may be sent between 9 p.m. and 6 a.m.	No
North Carolina	N.C. Gen. Stat. §§ 75-101, 75.102, 75.105	No; applies to interstate faxes sent to North Carolina recipients.	Yes	No	Yes; effective within thirty days.	Forbidden before 8 a.m. and after 9 p.m.	No
North Dakota	N.D. Cent. Code § 51-07-23	No	Yes	No	Yes	Any fax less than two pages may be sent between 9 p.m. and 6 a.m. unless the recipient has opted out.	No
Ohio	Ohio Rev. Code Ann. §§ 4931.75, 4931.99	Likely Yes (applies to "advertisements intended to be so transmitted within this state")	Yes, but only if fax is sent to a business.	No	Yes	A recipient may require that commercial faxes be sent between 7 p.m. and 5 a.m.	No
Oklahoma	Okla. Stat. tit. 21, §§ 1861-63	No; applies to interstate faxes sent to Oklahoma recipients.	Yes	No	No	Any fax less than two pages may be sent during "normal business hours."	No
Oregon	Or. Rev. Stat. § 646.872	No	No	No	Yes; all faxes permitted unless a written opt-out, effective for one year, is received.	No	No
Pennsylvania	18 Pa. Cons. Stat. § 7661; 73 Pa. Stat. § 2250.1-2250.8	No	No	No	Yes; must be accepted by e-mail or toll free telephone number.	No	Must list either a return e-mail address or toll-free telephone number.

STATE FAX STATUTES

<u>State</u>	<u>Statute</u>	<u>Limited to Intrastate?</u>	<u>Established Business Relationship Exception?</u>	<u>Nonprofit Exception?</u>	<u>Opt-Out Requirement?</u>	<u>Timing requirements?</u>	<u>Specific formatting requirements?</u>
Rhode Island	R.I. Gen. Laws § 647-1	No	Yes	No	Yes; opt-outs must be accepted via toll-free telephone number.	No	Opt-out statement must be in at least 9-point type, the first text in the body of the fax and be the same size as the majority of the text of the message.
South Carolina	S.C. Code Ann. §§ 15-75-50, 15-75-51	No	Yes	No	Yes; opt-outs must be accepted by telephone, in writing, or by fax.	No	No
Tennessee	Tenn. Code Ann. §§ 65-4-501 to 65-4-506	No	No	No	No; all commercial faxes banned without explicit permission.	No	Specified header information required.
Texas	Tex. Bus. & Com. Code Ann. §§ 35.47, 44.151-44.153	No	Yes	No	Yes, within 24 hours. All commercial faxes are banned if the sender knows that the recipient will be charged for the fax.	Commercial faxes may not be sent after 11 p.m. or before 7 a.m.	Opt-out notice must be in 12-point font and include the sender's correct name, street address, and a toll-free or local telephone number.
Utah	Utah Code Ann. §§ 13-25a-101 to 13-25a-111	No	Yes	No	No	No	No
Virginia	Va. Code Ann. § 8.01-40.2	No	No	No	No; all commercial faxes banned without explicit permission.	No	No
Washington	Wash. Rev. Code § 80.36.540	No	Yes, unless recipient is a government entity.	No	Yes; opt-outs must be accepted in writing or by fax.	No	No
West Virginia	W. Va. Code § 46A-2-139	Yes	No	No	Yes; all faxes permitted unless an opt-out is received via certified mail or fax.	No	No
Wisconsin	Wis. Stat. § 134.72	No; applies to interstate faxes sent to Wisconsin recipients.	Yes	No	Yes	Only one-page commercial faxes may be sent between 9 p.m. and 6 a.m.	No