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December 15, 2005

VIA ELECTRONIC FILING

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

RE: In the Matter of ccAdvertising Petition for Expedited Declaratory Ruling
CG Docket No. 02-278
DA 05-1347, DA 04-3187

Dear Ms. Dortch:

Enclosed are copies of two recently-decided cases which are pertinent to the above-referenced pending Petition.

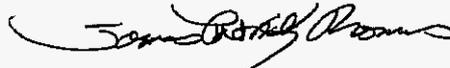
The first case, Utah Division of Consumer Protection v. Flagship Capital, Utah Supreme Court Case No. 20040172, 2005 UT 76, 2005 WL 2978928 (November 8, 2005), ruled Utah's exercise of police power to impose restrictions on autodialers was not preempted by the federal Telephone Consumer Protection Act. This conclusion is consistent with North Dakota's arguments before the Commission.

The second case, Fraternal Order of Police v. Stenehjem, 8th Circuit Court of Appeals Case Nos. 03-3848, 04-1619, 04-1620, 2005 WL 3299901 (December 7, 2005), ruled N.D.C.C. § 51-28-01(7)(2003), distinguishing between "in-house" charitable solicitors and professional charitable solicitors, does not violate the First Amendment. Additionally, North Dakota cites the case for the proposition that North Dakota's regulation of telemarketing activities in the interest of consumer privacy advances a significant government interest.

Mariene H. Dortch
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Opposing counsel is being served by copy of this letter with enclosures.

Sincerely,



James Patrick Thomas
Assistant Attorney General
Consumer Protection & Antitrust Division

Enclosures

cc: E. Ashton Johnston, Esq. (w/ encl.)(via e-mail)

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NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Utah.
 UTAH DIVISION OF CONSUMER PROTECTION,
 Plaintiff and Appellant,
 v.
 FLAGSHIP CAPITAL dba Integrated Credit
 Solutions, Defendant and Appellee.
 No. 20040172.

Nov. 8, 2005.

Background: State Division of Consumer Protection brought enforcement proceeding against telemarketing company for failure to comply with sanctions imposed when company violated Utah law. The Third District, Salt Lake, Stephen L. Henriod, J., granted company's motion to dismiss. Division appealed.

Holdings: The Supreme Court, Nehring, J., held that:

(1) federal Telephone Consumer Protection Act (TCPA) did not completely preempt Utah Telephone and Facsimile Solicitation Act and Utah Telephone Fraud Prevention Act;

(2) TCPA did not displace state's Acts under implied field preemption; and

(3) TCPA was not so incompatible with state's Acts as to render Acts preempted by conflict preemption. Reversed.

11 Appeal and Error 842(1)

30k842(1) Most Cited Cases

Whether a district court has subject-matter jurisdiction is a question of law which Supreme Court reviews for correctness.

21 Courts 489(1)

106k489(1) Most Cited Cases

State courts generally have subject-matter jurisdiction over cases arising under federal law.

31 Removal of Cases 18

334k18 Most Cited Cases

31 Removal of Cases 19(1)

334k19(1) Most Cited Cases

Action filed in a state court might be removed to federal court if it involves a federal question that arises under the Constitution, laws, or treaties of the United States. 28 U.S.C.A. § 1441(b).

41 Removal of Cases 25(1)

334k25(1) Most Cited Cases

Cause of action arising under state law might be removed to federal court when a federal statute wholly displaces the state-law cause of action through complete preemption. 28 U.S.C.A. § 1441(b).

51 States 18.11

360k18.11 Most Cited Cases

"Express preemption," often referred to as "complete preemption," exists where a federal statute states an intent to preempt state law.

61 States 18.81

360k18.81 Most Cited Cases

Federal Telephone Consumer Protection Act (TCPA) did not completely preempt Utah Telephone and Facsimile Solicitation Act and Utah Telephone Fraud Prevention Act; Congress did not state an intent to have TCPA preempt state law in context of interstate phone calls. Communications Act of 1934, § 227, 47 U.S.C.A. § 227; West's U.C.A. § § 13-25a-101 et seq., 13-26-1 et seq.

61 Telecommunications 734

372k734 Most Cited Cases

Federal Telephone Consumer Protection Act (TCPA) did not completely preempt Utah Telephone and Facsimile Solicitation Act and Utah Telephone Fraud Prevention Act; Congress did not state an intent to have TCPA preempt state law in context of interstate phone calls. Communications Act of 1934, § 227, 47 U.S.C.A. § 227; West's U.C.A. § § 13-25a-101 et seq., 13-26-1 et seq.

71 States 18.81

360k18.81 Most Cited Cases

Federal Telephone Consumer Protection Act (TCPA) did not displace Utah Telephone and Facsimile Solicitation Act and Utah Telephone Fraud Prevention Act under implied field preemption,

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although telemarketing was national and global in scope; Congress did not craft TCPA as all-pervasive regulatory scheme, and states had been left with discretion to determine whether welfare of their citizens required greater protection than that provided under federal law. Communications Act of 1934, § 227, 47 U.S.C.A. § 227; West's U.C.A. § § 13-25a-101 et seq., 13-26-1 et seq.

[7] Telecommunications 734

372k734 Most Cited Cases

Federal Telephone Consumer Protection Act (TCPA) did not displace Utah Telephone and Facsimile Solicitation Act and Utah Telephone Fraud Prevention Act under implied field preemption, although telemarketing was national and global in scope; Congress did not craft TCPA as all-pervasive regulatory scheme, and states had been left with discretion to determine whether welfare of their citizens required greater protection than that provided under federal law. Communications Act of 1934, § 227, 47 U.S.C.A. § 227; West's U.C.A. § § 13-25a-101 et seq., 13-26-1 et seq.

[8] States 18.7

360k18.7 Most Cited Cases

Generally, the presence of implied field preemption does not result in exclusive federal jurisdiction; even if a federal statute preempts the state cause of action through field preemption, the case can be brought in state court.

[9] Removal of Cases 25(1)

334k25(1) Most Cited Cases

Field preemption, under which federal statute implicitly overrides state law when scope of statute indicates that Congress intended federal law to occupy a field exclusively, empowers a party to remove the action from state court to federal court.

[9] States 18.7

360k18.7 Most Cited Cases

Field preemption, under which federal statute implicitly overrides state law when scope of statute indicates that Congress intended federal law to occupy a field exclusively, empowers a party to remove the action from state court to federal court.

[10] States 18.7

360k18.7 Most Cited Cases

Congressional intent to occupy a field exclusively is the key element of an implied field preemption analysis, which concerns whether federal statute implicitly overrides state law.

[11] States 18.7

360k18.7 Most Cited Cases

There are two ways in which congressional intent can be inferred regarding preemption: (1) the scheme of federal regulation must be so pervasive as to show Congress left no room for supplementation by states, or (2) the act concerns a field in which the federal interest dominates irrespective of the pervasiveness of regulatory schemes.

[12] States 18.13

360k18.13 Most Cited Cases

Where police power is at issue, there is a presumption that the state and federal regulations can constitutionally coexist, with a resulting burden of proof placed on the party claiming federal preemption.

[13] States 18.81

360k18.81 Most Cited Cases

Federal Telephone Consumer Protection Act (TCPA) was not so incompatible with Utah Telephone and Facsimile Solicitation Act and Utah Telephone Fraud Prevention Act as to render Utah's laws preempted by conflict preemption; Utah laws were not in conflict with TCPA and did not stand as obstacle to accomplishment and full objective of federal law, and national marketer would not confront any substantial hardship by being required to determine which of its calls reach telephones of Utah residents. Communications Act of 1934, § 227, 47 U.S.C.A. § 227; West's U.C.A. § § 13-25a-101 et seq., 13-26-1 et seq.

[13] Telecommunications 734

372k734 Most Cited Cases

Federal Telephone Consumer Protection Act (TCPA) was not so incompatible with Utah Telephone and Facsimile Solicitation Act and Utah Telephone Fraud Prevention Act as to render Utah's laws preempted by conflict preemption; Utah laws were not in conflict with TCPA and did not stand as obstacle to accomplishment and full objective of federal law, and national marketer would not confront any substantial hardship by being required to determine which of its calls reach telephones of Utah residents. Communications Act of 1934, § 227, 47 U.S.C.A. § 227; West's U.C.A. § § 13-25a-101 et seq., 13-26-1 et seq.

[14] States 18.5

360k18.5 Most Cited Cases

State law is preempted to the extent that it actually

conflicts with federal law.

[15] Telecommunications  1005
 372k1005 Most Cited Cases

In appeal that was brought by state Division of Consumer Protection concerning trial court's dismissal of Division's enforcement proceeding against telemarketing company for failure to comply with sanctions imposed when company violated state Telephone and Facsimile Solicitation Act and state Telephone Fraud Prevention Act, company failed to preserve for appellate review its claim that case was moot because state laws had been amended to exclude charities, where claim was not raised in trial court. West's U.C.A. § 13-26-1 et seq.; U.C.A.1953, 13-25a-103(2)(c) (Repealed).

[16] Telecommunications  888
 372k888 Most Cited Cases

Provision of state Telephone and Facsimile Solicitation Act allowing charities to operate an automated telephone dialing system did not render moot state Division of Consumer Protection's enforcement proceeding in trial court against telemarketing company for failure to comply with sanctions imposed when company violated Act; provision not in effect at time that citation was issued, and provision was repealed less than one year after its enactment. U.C.A.1953, 13-25a-103(2)(c) (Repealed).

Mark L. Shurtleff, Att'y Gen., Jeffrey S. Buckner, Asst. Att'y Gen., Salt Lake City, for plaintiff.

Richard D. Burbidge, J. Ryan Mitchell, Jefferson W. Gross, Salt Lake City, William E. Raney, Kansas City, MO, for defendant.

NEHRING, Justice:

*1 **1 The Utah Division of Consumer Protection brought an enforcement proceeding against Flagship Capital, a telemarketing company, for failure to comply with sanctions imposed when Flagship violated Utah law. The district court dismissed the case citing a lack of subject matter jurisdiction because it determined that certain provisions of the Utah Telephone and Facsimile Solicitation Act, Utah Code Ann. § § 13-25a-101 to -107 (2001), and the Utah Telephone Fraud Prevention Act, Utah Code Ann. § § 13-26-1 to -11 (Supp.2004), are preempted by the federal Telephone Consumer Protection Act, 47 U.S.C. § 227 (1991). The Division appealed the district court's dismissal. We reverse.

BACKGROUND

**2 Flagship Capital, a Florida based telemarketing company, placed an unsolicited telephone call to a Utah resident. [FN1] The Utah Division of Consumer Protection issued an administrative citation against Flagship for violation of the Utah Telephone and Facsimile Solicitation Act, Utah Code Ann. § § 13-25a-101 to -107 (2001), and the Telephone Fraud Prevention Act, Utah Code Ann. § 13-26-3 (Supp.2003) (collectively, "the Utah laws"). The Division's citation stated that Flagship was in violation of Utah law because it used an automated dialer to place the call, in violation of Utah Code section 13-25a-103(1), and also because Flagship failed to register as a telephone soliciting business, as required by Utah Code section 13-26-3. Flagship challenged the citation. In an enforcement hearing, the Division ruled that Flagship violated the Utah laws, and that the laws were not preempted by the federal Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 (1991). The Division fined Flagship \$2,000 and enjoined Flagship to comply with the registration requirement.

**3 Flagship appealed the Division's order to the Utah Department of Commerce, claiming again that the federal TCPA preempts the Utah laws. The Department of Commerce determined that the question of preemption is a matter of constitutional law which must be decided by the courts and was therefore outside the scope of the Division's review. The Department upheld all of the Division's conclusions unrelated to preemption and ordered Flagship to register and pay the fine.

**4 When Flagship failed to comply with the Department's order, the Division filed a civil complaint in the district court seeking enforcement of the Department's order. Flagship moved to dismiss the enforcement proceeding, again claiming that the Utah laws were preempted by the TCPA, and contending that the district court therefore did not have subject matter jurisdiction over the case. The district court agreed with Flagship and dismissed the case for lack of subject matter jurisdiction based on federal preemption. The Division appealed. We reverse.

ANALYSIS

**5 The Division challenges the district court's dismissal on three grounds: (1) that preemption does not deprive a state court of subject matter jurisdiction to enforce the Department's determination that Flagship was in violation of state law; (2) that Flagship waived its preemption defense because it

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did not pursue judicial review; and (3) that Flagship is barred by res judicata from asserting a preemption defense because that issue was already decided by the Department. Flagship presents a fourth issue on cross-appeal: that the appeal is moot because the legislature has modified the relevant laws in such a way that Flagship is now exempt from them. Before addressing any of the Division's claims, we first analyze whether the district court erred in finding that the Utah laws were preempted. Since we find that they were not preempted, there is no need to address the Division's other claims. Finally, we address Flagship's mootness claim.

I. FEDERAL PREEMPTION

*2 [1] **6 The primary issue before us is whether the district court erred in determining that it did not have subject matter jurisdiction over the enforcement proceeding between the Division and Flagship. Whether a district court has subject matter jurisdiction is a question of law which we review for correctness. Hous. Auth. v. Snyder, 2002 UT 28, ¶ 10, 44 P.3d 724.

[2][3] **7 State courts generally have subject matter jurisdiction over cases arising under federal law. However, an action filed in a state court might be removed to federal court if it involves a federal question that "aris [es] under the Constitution, laws, or treaties of the United States." Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987); see 28 U.S.C. § 1441(b) (authorizing any claim that arises under federal law to be removed to federal court). To determine whether a cause of action brought in state court is eligible for removal to federal court, the United States Supreme Court has established the "well-pleaded complaint rule," in which "a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law." Metro. Life, 481 U.S. at 63-64, 107 S.Ct. 1542.

[4] **8 There is, however, an exception to the well-pleaded complaint rule. A cause of action arising under state law might be removed to federal court "when a federal statute wholly displaces the state-law cause of action through complete preemption." Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 8, 123 S.Ct. 2058, 156 L.Ed.2d 1 (2003). This exception is necessary because "[w]hen the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law." *Id.*

**9 The district court invoked this exception to determine that it lacked subject matter jurisdiction over the Division's case. The district court's ruling was premised on its underlying conclusion that Utah Code sections 13-25a-103(1) and 13-26-3 (Supp.2003) are preempted by the federal Telephone Consumer Protection Act, 47 U.S.C. § 227 (1991).

**10 Although the parties elected to not appeal the question of preemption, we must nevertheless address it. If we conclude that the Utah laws are preempted by the TCPA, we must go on to address the question of whether Utah courts may nevertheless exercise jurisdiction over Flagship's alleged violations of the TCPA. If we conclude that the Utah laws are not preempted by the TCPA, then the state court clearly retains jurisdiction and we need not address the question further.

[5] **11 The United States Supreme Court has identified two types of preemption: express and implied. English v. Gen. Elec. Co., 496 U.S. 72, 78-79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990). Express preemption, often referred to as "complete preemption," exists where a federal statute states an intent to preempt state law. *Id.* By contrast, the Supreme Court has "recognized that a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, or when state law is in actual conflict with federal law." Freightliner Corp. v. Myrick, 514 U.S. 280, 287, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995) (citations omitted). These scenarios of implied preemption have acquired their own labels and have become known as "field preemption" and "conflict preemption," respectively. For reasons we explain below, we conclude that Flagship can look to none of these preemption doctrines, not complete preemption, nor field preemption, nor conflict preemption, to support its assertion that the TCPA preempts Utah law.

A. Complete Preemption

*3 [6] **12 The United States Supreme Court has found complete preemption in only two circumstances: certain causes of action under the Labor Management Relations Act of 1947, 29 U.S.C. § 185, Avco Corp. v. Machinists, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968), and the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § § 1001-1461, Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987). In each of these cases, "the federal statute at issue provided the exclusive cause of action for the claim asserted and also set forth

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procedures and remedies governing that cause of action." Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 8, 123 S.Ct. 2058, 156 L.Ed.2d 1 (2003). The preemptive power of those statutes was described as "unusually 'powerful,' " because they provided an express federal remedy for plaintiffs' claims to the exclusion of state remedies. For example, ERISA section 514, now codified at 29 U.S.C. § 1144, clearly states that "the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."

****13** While the message of complete preemption is delivered in a clear congressional voice, Congress remained mute on the subject of the federal TCPA's preemption of state law in the context of interstate phone calls. Because the TCPA does not meet the requirements necessary to show express preemption, we conclude that the TCPA does not completely preempt the Utah laws.

****14** This does not, of course, conclude the preemption inquiry. We next consider the more complex question of whether the TCPA impliedly preempts the Utah laws, either by conflict or by showing an intent to "occupy the field."

B. Implied Field Preemption

[7][8][9] ****15** Generally, the presence of implied field preemption does not result in exclusive federal jurisdiction. Even if a federal statute preempts the state cause of action through field preemption, the case can be brought in state court. Field preemption empowers a party to remove the action to federal court. However, Flagship insists that in this case field preemption has clear jurisdictional consequences. The TCPA assigns exclusive jurisdiction to the federal district courts in cases brought by states or their representatives. 47 U.S.C. § 227(f)(2). Therefore, Flagship claims that if the TCPA displaces Utah statutes through field preemption the district court would be stripped of jurisdiction.

[10][11] ****16** The key element of an implied field preemption analysis is congressional intent. The United States Supreme Court has explained:

[I]n the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of

Congress "touches a field in which federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."

*4 English v. Gen. Elec. Co., 496 U.S. 72, 79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990) (citations omitted). To summarize the Supreme Court in English, there are two ways in which congressional intent can be inferred: (1) the scheme of federal regulation must be so pervasive as to show Congress left no room for supplementation by states, or (2) the act concerns a field in which the federal interest dominates irrespective of the pervasiveness of regulatory schemes.

****17** As the facts of this case reveal, Congress did not craft the TCPA as an all-pervasive regulatory scheme. Flagship violated the Utah statutes by using an automated dialer to place a call to a residence and by failing to register in Utah as a telephone solicitation business. Under the TCPA, it is illegal to place a call to a residence using an artificial or prerecorded voice. 47 U.S.C. § 227(b)(1)(B). However, the subsection governing calls to residences does not, unlike the Utah laws, expressly prohibit the use of automatic telephone dialing systems. [FN2] The TCPA specifically proscribes the use of automatic telephone dialing systems in other instances, such as to an emergency phone line, hospital room, pager, cell phone, or simultaneous use of multiple lines of a multi-line business. 47 U.S.C. § 227(b)(1)(A), (D). The Utah law, however, is more comprehensive, prohibiting the use of an automated telephone dialing system in any instance, including, as here, to a residence. Thus it is apparent that Congress has left some room to the states to exercise legislative discretion to further protect its citizens from solicitation by automatic dialers.

****18** The second way to infer congressional intent is if the act concerns a field in which federal interests dominate. While it is unquestioned that telemarketing is national, in fact global, in its scope, this confluence of commerce and technology, despite its power to inspire widespread annoyance and worse, throughout our nation, has not necessarily thereby created an exclusive federal interest. The Supreme Court has stated that "every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law." Hillsborough County v. Automated Labs., Inc., 471 U.S. 707, 716, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985). An apt analogy is the regulation of interstate highways. There, the interstate nature of the field is

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so undisputable that the subject has the word "interstate" in its name. However, this does not mean that federal interests dominate in the regulation of this interstate system. Instead, most of the regulation of the highways is left to the individual states to regulate through their police power to protect their citizens' health, welfare, and safety. Interstate telemarketing fits a similar niche. Like interstate highways, there is a federal interest, as illustrated by the TCPA, to define the basic parameters within which interstate telemarketing may occur. Within those walls, however, the states are left with discretion to determine whether the welfare of their citizens requires greater protection and to act on that determination.

*5 **19 Furthermore, when exercising the police power, Congress legislates in a realm jealously guarded by the states, one that if easily ousted by implied congressional acts would erode fundamental notions of federalism. In such an instance, the Supreme Court has established a demanding burden for showing congressional intent, insisting that it must be easily recognizable:

Although this Court has not hesitated to draw an inference of field pre-emption where it is supported by the federal statutory and regulatory schemes, it has emphasized: "Where ... the field which congress [sic] is said to have pre-empted" includes areas that have "been traditionally occupied by the States," congressional intent to supersede state laws must be "clear and manifest."

English, 496 U.S. at 79, 110 S.Ct. 2270 (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977)). Rath specifically states that the police power is such an area traditionally occupied by the states, therefore requiring clear and manifest preemptive language. 430 U.S. at 525, 97 S.Ct. 1305.

[12] **20 Where the police power is at issue, there is a presumption that the regulations can constitutionally coexist, with a resulting burden of proof placed on the party claiming preemption. Hillsborough County, 471 U.S. at 716, 105 S.Ct. 2371. We conclude that Flagship has failed to establish that the TCPA clearly intended to preempt state laws concerning interstate telephone calls. Thus, we determine that Congress did not intend to "occupy the field" such that the Utah laws are preempted.

C. Implied Conflict Preemption

[13][14] **21 We next consider whether the federal TCPA and the Utah laws are so incompatible as to render the Utah laws preempted by conflict

preemption:

[S]tate law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

English, 496 U.S. at 79, 110 S.Ct. 2270 (citations omitted).

**22 Close examination of the Utah laws shows that they are not in conflict with the TCPA, nor do they stand as an obstacle to the accomplishment and full objective of federal law. We see no reason why telemarketing companies would be unable to comply with both the Utah laws and the federal statutes. This intention of the Utah legislature is made clear by Utah Code section 13-25a-103(4), which reads: "A person may not make or authorize a telephone solicitation in violation of Title 47 U.S.C. 227." The telemarketing standards set by our legislature are stricter than, but do not directly conflict with, the federal standards. A telemarketer who complies with the Utah standards will have little difficulty complying with the federal standards. Moreover, the record does not reflect that a national telemarketer would confront any substantial hardship by being required to determine which of its calls reach the telephones of Utah residents. Therefore, the Utah law does not force a telemarketer to conform its nationwide practices with Utah standards in order to prevent an inadvertent violation. [FN3] The telemarketer can simply identify those calls that would be made to Utah and choose to not make those calls or to conform those calls to the Utah regulations. That the TCPA creates a uniform nationwide minimum set of prohibited telemarketing activities does not mean that Utah's heightened standard for companies wishing to make phone calls to this state conflicts with the federal scheme.

*6 **23 Having concluded that the TCPA does not preempt the Utah laws either expressly or impliedly, we need not address the question of whether preemption is a jurisdictional question. Rather, because the Utah laws are independently valid, the district court had subject matter jurisdiction over this case.

II. MOOTNESS

[15][16] **24 Finally, Flagship argues that this case is moot because the Utah laws have been amended to exclude charities. We reject this argument because it was not raised below, and was thus not properly

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preserved. Even had this argument been preserved, mootness would not be a factor because charities were not exempt at the time Flagship was cited. The exemption for charities was enacted in 2003 after the citation issued but was short-lived, being repealed less than a year later. Utah Code Ann. § 13-25a-103(2)(c) (2003) (repealed 2004).

CONCLUSION

****25** Although the issue was not directly raised before us, we conclude that the district court erred in determining that Utah Code sections 13-25a-103(1) and 13-26-3 were preempted by the federal TCPA. Accordingly, we also conclude that the district court had subject matter jurisdiction over the case. Due to this conclusion, we need not address the Division's arguments concerning res judicata and waiver, and we reject Flagship's argument that the case is now moot.

****26** Chief Justice DURHAM, Associate Chief Justice WILKINS, Justice DURRANT, and Justice PARRISH concur in Justice NEHRING's opinion.

FN1. The call was placed through a related company called Integrated Credit Solutions and was made on behalf of Lighthouse Credit Foundation, a non-profit credit counseling and debt management organization.

FN2. Both the Utah laws and the TCPA define automatic telephone dialing systems as systems capable of storing or generating phone numbers and then calling those numbers. 47 U.S.C. § 227(a)(1); Utah Code Ann. § 13-25a-102(2).

FN3. This is in contrast to some other forms of mass advertising, most notably advertising through e-mail. E-mail solicitors have argued that varying state regulations make it virtually impossible to comply with all the regulations because it is usually impossible for them to know into which state an e-mail will be sent. That, however, is not true here, where the destination state can be discerned by merely identifying the phone number's area code.

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END OF DOCUMENT

HBriefs and Other Related Documents

Only the Westlaw citation is currently available.

United States Court of Appeals, Eighth Circuit.
FRATERNAL ORDER OF POLICE, NORTH
DAKOTA STATE LODGE; Veterans of Foreign
Wars, Department of North Dakota, Appellees,
v.

Wayne STENEHJEM, in his official capacity as
Attorney General of the State of North Dakota,
Appellant.

State of Indiana; State of Alaska; State of Idaho;
State of Illinois; State of Iowa; State of Maine; State
of Maryland; State of Missouri; State of Nevada;
State of Ohio; State of South Dakota; State of
Tennessee; State of Vermont; State of Wisconsin;
State of Wyoming; Amici on behalf of Appellant,
Alabama Sheriffs Association; Alabama Jaycees;
Alabama Peace Officers Association; American
Association of State Troopers, Inc.; American Ex-
Prisoners of War Service Foundation, Inc.; American
Legion, Department of Alabama; American Legion,
Department of Florida; American Legion,
Department Georgia; American Legion, Department
of Illinois; American Legion, Department of Texas;
American Legion, Department of Wisconsin;
American Legion, Department of Wyoming; Amvets
American Veterans; Department of Florida;
Department of Iowa; Amvets, Department of
Massachusetts; Amvets, Department of New Jersey
Service Foundation; Amvets, Department of
Wisconsin; Anne Arundal County (MD) Fire
Fighters, Local 1563; Arizona Narcotic Officers
Association; Arizona Paralyzed Veterans
Association; Associated Fire Fighters of Arizona;
Association of Oklahoma Narcotic Enforcers;
Associated Fire Fighters of Illinois; Baltimore
County (MD) Professional Fire Fighters Association;
Broward County (FL) Police Benevolent Association;
California Narcotic Officers Association; California
Professional Firefighters; California Peace;
California Reserve Peace Officers Association;
California Veterans Assistance Foundation, Inc.;
Cancer Fund of America; Chatham County (GA)
Police Association, Inc.; Chattanooga (TN)
Firefighters Association, Local 820; Clarksville (TN)
Fire Fighters Association; Colorado Jaycees;
Colorado State Firefighters Association; Colorado
State Lodge, Fraternal Order of Police; Colorado
Vietnam Veterans, Inc.; Committee for Missing
Children; Concord (NC) Professional Fire Fighters

Association; Connecticut Vietnam Veterans; Crime
Stoppers, Inc. (MN); Dade County (FL) Fire
Fighters; Dade County (FL) PBA; Delaware-
Maryland Paralyzed Veterans; Department of
Kansas, Veterans of Foreign Wars; Department of
Kentucky, Veterans of Foreign Wars; Department of
Michigan, Veterans of Foreign Wars; Department of
Montana, Veterans of Foreign Wars; Department of
Nebraska, Veterans of Foreign Wars; Department of
Nevada, Veterans of Foreign Wars; Department of
New York, Veterans of Foreign Wars; Department of
South Dakota, Veterans of Foreign Wars; Department
of Washington, Veterans of Foreign Wars; Disabled
American Veterans, Department of Washington;
Firefighters Charitable Foundation; Florida
Association of Professional EMTs and Paramedics;
Florida Fire and Emergency Services Foundation;
Florida Highway Patrol Command Officers
Association; Florida Law Enforcement Games;
Florida Professional Fire Fighters; Foundation of
Iowa Jaycees Charities; Georgia State Fire Fighters
Association; Georgia Association of EMTs, Inc.;
Georgia State Lodge, Fraternal Order of Police;
Hawaii State Fire Fighters Association; Idaho
Sheriffs Association; Illinois Police Association;
Illinois Vietnam Veterans, Inc.; Indiana Association
of Chiefs of Police; Indiana Association of Chiefs of
Police Foundation; I; International Law Enforcement
Games; Iowa Professional Fire Fighters; Iowa State
Peace Officers Council; Iowa State Police
Association; Iowa State Reserve Law Officers
Association; Kansas Jaycees; Kansas Peace Officers
Association; Kansas Sheriffs Association; Kansas
State Council of Fire Fighters; Kentucky Professional
Fire Fighters; Kentucky State Police Professional
Association; Lexington (NC) Fire Fighters
Association, Local 3064; Lisle-Woodridge Fire
Fighters Union; Maryland and District of Columbia
Professional Fire Fighters Association; Maryland
Sheriffs Association; Massachusetts Foundation for
the Advancement of Vietnam Veterans; Michigan
Jaycees; Michigan State Lodge, Fraternal Order of
Police; Mid-South Paralyzed Veterans Association
(TN, AR, MS); Military Order of the Purple Heart
Service Foundation; Minnesota Chiefs of Police
Association; Minnesota Jaycees; Minnesota State
Lodge, Fraternal Order of Police; Minnesota
Professional Fire Fighters; Minnesota State Patrol
Troopers Association; Missouri Federation of Police
Chiefs; Missouri Jaycees, Inc.; Missouri State
Council of Fire Fighters; Missouri Vietnam Veterans

Foundation; Mobile (AL) Fire Fighters Association; Montana Association of Chiefs of Police; Montana Jaycees; Montana Vietnam Veterans, Inc.; National Narcotic Officers Association Coalition (NNOAC); Nebraska Jaycees; Nebraska Sheriffs Association; Nevada State Firefighters' Association; New Hampshire Jaycees; New Jersey Deputy Fire Chiefs Association; New Jersey Vietnam Veterans, Inc.; New Mexico Sheriffs & Police Association; New York Association PBA, Inc.; New York State Union of Police Associations (AFL-CIO); New York Vietnam Veterans Foundation; North Dakota Jaycees; North Dakota Vietnam Veterans of America; Ohio Association of Emergency medical Services; Ohio Council of Police Safety Associations; Ohio Jaycees; Ohio Troopers Coalition, Inc.; Oklahoma Association of Chiefs of Police; Oklahoma Sheriffs and Peace Officers Association; Oklahoma Vietnam Veterans Charitable Foundation, Inc.; Palm Beach County (FL) Council of Fire Fighters and Paramedics; Peace Officers Association of Georgia, Inc.; Pennsylvania Professional Fire Fighters Association; Police Athletic League of New Jersey; Police Officers Association of Michigan; Police Officers Defense Fund of New York State, Inc.; Professional Fire Fighters of Alabama; Professional Fire Fighters of Georgia; Professional Firefighters of Greensboro (NC); Professional Fire Fighters of Oklahoma; Professional Fire Fighters & Paramedics of North Carolina; Professional Fire Fighters of North Dakota; Professional Fire Fighters of South Dakota; Professional Fire Fighters of Vermont; Professional Fire Fighters of West Virginia; Professional Fire Fighters of Wisconsin; Professional Fire Fighters Union of Indiana; Raleigh (NC) Professional Fire Fighters, Local 548; Rhode Island Vietnam Veterans of America, Inc.; Roanoke (VA) Fire Fighters Association; Rock Hill (SC) Fire Fighters Association; Rockford City (IL) Fire Fighters Union IAFF, Local # 413; Salem (VA) Professional Fire Fighters Association, Local # 3478; South Dakota State Lodge, Fraternal Order of Police; South Dakota Peace Officers Association; South Florida Council of Fire Fighters; Southeastern Paralyzed Veterans Association (GA, NC); Southwest Florida Professional Fire Fighters and Paramedics; State of Florida Association of Police Athletic/Activities Leagues; State Peace Officers Council (NV); State Troopers Association of Nebraska; Tennessee Jaycees; Tennessee Vietnam Veterans; Texas Department of Pubic Safety Officers Association; Texas Police Chiefs Association; Tulsa (OK) Fire Fighters Local 176; Uniformed Fire Fighters of Connecticut; United Professional Fire Fighters Association of Connecticut; Veterans

Assistance Foundation, Inc.; Veterans of Foreign Wars, Department of Massachusetts; Veterans of Foreign Wars, Department of New Mexico; Vietnam Veterans Buckeye Foundation, Inc.; Vietnam Veterans Foundation of Georgia; Vietnam Veterans of Iowa, Inc.; Vietnam Veterans Foundation of Texas, Inc.; Vietnam Veterans of Kentucky, Inc.; Vietnam Veterans of Nebraska; Vietnam Veterans of Virginia, Inc.; Virginia Professional Fire Fighters; Virginia State Firefighters Association; Washington Jaycees; Washington State Fire Fighters Association; Washington State Law Enforcement Association; West Virginia Chiefs of Police Association; West Virginia Deputy Sheriffs Association; West Virginia Troopers Association; West Virginia Vietnam Veterans Foundation; Wisconsin Jaycees; Wisconsin Law Enforcement Officers Association; Wisconsin Sheriffs & Deputy Sheriffs Association; Wisconsin Troopers Association, Inc.; Wisconsin Veterans Assistance Foundation, Amici on Behalf of Appellee. Fraternal Order of Police, North Dakota State Lodge; Veterans of Foreign Wars, Department of North Dakota, Appellees,

v.

Wayne Stenehjem, in his official capacity as Attorney General of the State of North Dakota, Appellant.
Fraternal Order of Police, North Dakota State Lodge; Veterans of Foreign Wars, Department of North Dakota, Appellants,

v.

Wayne Stenehjem, in his official capacity as Attorney General of the State of North Dakota, Appellee.

No. 03-3848, 04-1619, 04-1620.

Submitted: Nov. 19, 2004.

Filed: Dec. 7, 2005.

Appeals from the United States District Court for the District of North Dakota.

Counsel who presented argument on behalf of the appellant was Douglas A. Bahr, Office of Attorney General, of Bismarck, ND.

Counsel who presented argument on behalf of the appellee was Errol Copilevitz of Kansas City, MO. Sidney J. Spaeth of Fargo, ND appeared on the brief.

Before WOLLMAN and HEANEY, Circuit Judges, and HOLMES, ^{FNI}District Judge.

FNI. The Honorable J. Leon Holmes, United States District Judge for the Eastern

District of Arkansas, sitting by designation.

WOLLMAN, Circuit Judge.

I.

*1 This case involves a facial challenge to North Dakota Century Code Chapter 51-28 (the "Act"), which prohibits certain telephone solicitations of North Dakota residents who register with the state's "do-not-call" list. Plaintiffs are nonprofit organizations who rely on professional charitable solicitors for their fundraising.

The Act exempts telephone solicitations made by charitable organizations if "the telephone call is made by a volunteer or employee of the charitable organization" and the caller makes specified disclosures. N.D. Cent.Code § 51-28-01(7) (2003).^{FN2} The Act thus distinguishes between "in-house" charitable solicitors and professional charitable solicitors. Further, the Act's restrictions apply only to telephone solicitation. *See id.* Under the Act, a charity may hire an outside agency to call registrants to advocate the charity's message, but that agency may not solicit the registrant to donate funds.

FN2. The Act also exempts calls made with a resident's prior written consent; by or on behalf of any person with whom the resident has an established personal or business relationship; by or on behalf of pollsters unless the call is made through an automatic dialing-announcing service; by individuals soliciting without the intent to complete the solicitation on the phone but who will follow up with a face-to-face meeting; and by or on behalf of a political party, candidate, or other group with a political purpose. *Id.*

The district court invalidated a portion of the Act as a content-based regulation that failed strict scrutiny. The district court also awarded attorney's fees under 42 U.S.C. § 1988. North Dakota appeals from the invalidation of the Act, and the parties cross-appeal the award of attorney's fees. We reverse.

II.

We review *de novo* the district court's grant of judgment on the pleadings as to the unconstitutionality of the Act. Potthoff v. Morin, 245

F.3d 710, 715 (8th Cir.2001). Because professional charitable solicitation is fully protected speech, *see Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796 (1988), we begin our analysis by determining whether the North Dakota regulation is content neutral or content based.

The principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message the speech conveys. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* Regulation of expressive activity is content neutral if it is justified without reference to the content of the regulated speech. *Id.*

Applying these principles to North Dakota's statute, it is evident that the Act is content neutral. First, North Dakota has not distinguished between professional and in-house charitable solicitors because of any disagreement with the message that would be conveyed, for the message would be identical regardless of who conveyed it. Second, the regulation can be justified without reference to the content of the regulated speech, for North Dakota's interest is in protecting residential privacy.

Although the Act appears to make a subject matter distinction between advocacy and solicitation, a regulation that distinguishes between speech activities likely to produce the consequences that it seeks to prevent and speech activities unlikely to have those consequences "cannot be struck down for failure to maintain 'content neutrality.'" Hill v. Colorado, 530 U.S. 703, 724 (2000). As the Tenth Circuit observed in reviewing the commercial solicitation restrictions of the national do-not-call registry, the interest in residential privacy "is not limited to the ringing of the phone; rather, how invasive a phone call may be is also influenced by the manner and substance of the call." F.T.C. v. Mainstream Mktg. Servs., Inc., 345 F.3d 850, 855 (10th Cir.2003) (per curiam). Because solicitation may reasonably be viewed as more invasive than advocacy, we conclude that the Act is a content-neutral regulation. *See United States v. Kokinda*, 497 U.S. 720 (1990) (plurality of the Court upholding Postal Service regulation distinguishing between solicitation and advocacy); Nat'l Fed'n of the Blind of Arkansas, Inc. v. Prvor, 258 F.3d 851, 855 n.3 (8th Cir.2001). (rejecting the charity's argument that the regulation was content based because it regulated

only speech that solicits charitable contribution or commercial sales).

III.

*2 The test appropriate for regulation of professional charitable solicitation is derived from Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 636 (1980). Although the Supreme Court has not specified whether the *Schaumburg* test is an intermediate scrutiny review of a content-neutral regulation, we have interpreted it as such. See *Pryor*, 258 F.3d at 854.

We observed in *Pryor* that the *Schaumburg* test is “obviously very similar” to the time, place, and manner test enunciated in Ward. *Id.* at 855. We then considered: (a) whether the State had a sufficient or “legitimate” interest; (b) whether the interest identified was “significantly furthered” by a narrowly tailored regulation; and (c) whether the regulation substantially limited charitable solicitations. *Id.* at 855-56.

A.

The first question under *Pryor* is whether the State has a sufficient or legitimate interest. We have held that residential privacy is a “significant” government interest, particularly when telemarketing calls “are flourishing, and becoming a recurring nuisance by virtue of their quantity.” Van Bergen v. Minnesota, 59 F.3d 1541, 1555 (8th Cir.1995). See also Frisby v. Schultz, 487 U.S. 474, 484 (1988) (“The State’s interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.”). The rationale underlying the North Dakota regulation falls within this significant interest.

B.

We next consider whether North Dakota’s regulation is narrowly tailored. “The requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial interest that would be achieved less effectively absent the regulation and the means chosen does not burden substantially more speech than is necessary to further the [state’s] content-neutral interest.” Krantz v. City of Fort Smith, 160 F.3d 1214, 1219 (8th Cir.1998) (citations omitted); Ward, 491 U.S. at 799. When a content-

neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal. Hill, 530 U.S. at 726.

North Dakota’s goal of ensuring residential privacy would be achieved less effectively if the legislature exempted professional charitable solicitors from the Act. Seeking to balance the interest of callers against the privacy rights of subscribers, the legislature distinguished between in-house and professional charitable solicitors. North Dakota contends that the distinction is based upon the sheer volume of calls because “[a] charity using paid professional telemarketers is typically able to dial substantially more residential telephone numbers than if the charity used its own volunteers and employees.” Appellant’s Brief at 11. In this facial challenge, we are reluctant to second-guess the North Dakota Legislature’s judgment that professional charitable solicitors intrude more regularly on residents’ privacy than volunteers or employees and that the Act is a necessary means of enabling its citizens to halt these intrusions. See *Pryor*, 258 F.3d at 856 (giving deference to the state in a facial challenge to the state’s telephone solicitation regulations).

*3 The Fourth Circuit recently upheld the Federal Trade Commission’s (FTC’s) charity-specific do-not-call provision. Nat’l Fed’n of the Blind v. F.T.C., 420 F.3d 331, 341 (4th Cir.2005). Like the statute at issue here, the FTC regulation applied to professional charitable solicitors and exempted in-house or volunteer solicitors. The court held that the regulations struck an appropriate balance between “[t]he rights of charities and telefunders to communicate with potential donors” and “the right of those donors to enjoy residential peace.” *Id.* at 349-50. Accordingly, the court held that the provision was “a permissible governmental response to a legitimate and substantial public concern.” *Id.* at 350. We find the Fourth Circuit’s analysis persuasive, and we join in it in upholding the distinction between professional charitable solicitors and in-house charitable solicitors.

The appellees argue that this distinction renders the Act underinclusive because a ringing phone disrupts residential privacy whether the caller is a volunteer or a professional. They claim that the exemption of in-house charitable fundraisers demonstrates that the Act is not related to residential privacy. Although exceptions from an otherwise legitimate regulation of speech may undermine the government’s reasons for

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the regulation, City of Ladue v. Gilleo, 512 U.S. 43, 52 (1994), we do not perceive that to be the case here. North Dakota's do-not-call statute does not give one side of a debate an advantage over the other, but rather it reduces the total number of unwelcome telephone calls to private residences. "[T]he validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interest in an individual case." Ward, 491 U.S. at 801. In the case before us, the overall problem is the intrusion on residential privacy caused by unwanted telephone solicitation. We are satisfied that the Act furthers the state's interest in preserving residential privacy.

Additionally, the Act does not burden more speech than is necessary to further the State's interest in residential privacy. The place to which a regulation applies must be taken into account in determining whether a statute is narrowly tailored. Hill, 530 U.S. at 728. As the Court pointed out in Frisby v. Schultz, "[A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions." 487 U.S. at 484-85. Accordingly, we find it relevant that the Act applies only to personal residences. Further, a content-neutral and viewpoint-neutral opt-in provision like the one here limits the degree of government interference with First Amendment interests. See Rowan v. United States Post Office Dep't, 397 U.S. 728, 738 (1970) (statutory scheme giving sole discretion to private citizen to determine whether material was "erotically arousing or sexually provocative" avoided "possible constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a government official"); see also Mainstream Mktg. Servs., Inc. v. F.T.C., 358 F.3d 1228, 1242 (10th Cir.2004) (finding the national do-not-call registry narrowly tailored because "it restricts only calls that are targeted at unwilling recipients"). Although the opt-in nature of the Act is not dispositive, we find it important that the Act's restriction is triggered only when a resident joins the do-not-call registry. Absent this affirmative private action, there is no restriction on a charity's use of professional charitable solicitors. Because the Act prohibits only calls to unwilling residents in their homes, we hold that the Act is narrowly tailored to serve the government's substantial interest in protecting residential privacy.

*4 Finally, the Act need not be the least restrictive means to satisfy the tailoring requirement. Hill, 530 U.S. at 726. Although exempting all charitable

solicitations from the Act or requiring a charity-specific do-not-call list would be less restrictive than North Dakota's regulation, we are not convinced that the existence of these options renders the Act unconstitutional. Because this narrowly drawn, content-neutral statute does not entirely foreclose any means of communication, we are satisfied that the Act is sufficiently tailored to pass constitutional muster.

C.

We turn, then, to the final consideration under Pryor, whether North Dakota's regulation substantially limits charitable solicitations. We conclude that it does not. The Act prohibits calls to the homes of residents who have chosen not to receive calls from professional charitable solicitors. The Act does not foreclose all means of charitable solicitation directed at these residents. Employees or volunteers may solicit funds from all North Dakota residents, and professionals may solicit funds from residents who have not registered with the state's do-not-call list. Further, the charities may launch fundraising campaigns through the mail or in person. Although the Act restricts charitable solicitation, it leaves open several alternative channels of communication. Accordingly, we conclude that the Act does not substantially limit charitable solicitation.

IV.

Appellees argue that the Act is overbroad because it "makes no legitimate effort to distinguish telemarketing calls affecting residential privacy and innocuous speech" and it prevents unknown charities from soliciting North Dakota residents who have registered with the state's do-not-call list. Appellees' Brief at 26. "For a statute to fail on overbreadth grounds, 'there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protection of parties not before the Court.'" Pryor, 258 F.3d at 856 (quoting City Council v. Taxpayers for Vincent, 466 U.S. 789, 801(1984)). The North Dakota statute does not present that danger. When North Dakota citizens register on the do-not-call list, they choose to exclude telephone solicitation from their homes. The registrants have decided that the Act's banned phone calls intrude on their residential privacy. Further, unknown charities will be treated the same as the appellees. Appellees simply cannot support their claim that the Act impermissibly curtails the First

Amendment rights of parties not before this court.

Conclusion

In holding that the Act does not run afoul of the First Amendment, we echo Judge Wilkinson's observations:

In reviewing these rules, we have no wish to exaggerate. Not every home is a "peaceable kingdom." And it is not the end of the world when a family receives an abandoned call or a late night call that interrupts its evening. But it is one more small strain that families already stressed by twenty-first century life are forced to endure. Our Constitution does not require that we add to family burdens by forbidding even the most reasonable and minor restrictions on telemarketing practices.... Our Constitution does not prevent the democratic process from affording the American family some small respite and sense of surcease.

*5 Nat'l Fed'n of the Blind v. F.T.C., 420 F.3d at 343, 351.

North Dakota's narrowly tailored do-not-call statute significantly furthers the state's interest in residential privacy. The Act does not substantially limit charitable solicitations and is not unconstitutionally overbroad.

The judgment is reversed, and the case is remanded to the district court with direction to dismiss the complaint. Likewise, the order awarding attorney's fees is reversed.

HEANEY, Circuit Judge, dissenting.

I agree that the State of North Dakota has a legitimate interest in preserving residential privacy. Because I do not believe that its regulation is narrowly tailored to serve that goal, I respectfully dissent.

A "direct and substantial limitation" on charitable speech "cannot be sustained unless it serves a sufficiently strong, subordinating interest that [the government] is entitled to protect," and is narrowly drawn to serve the interest "without unnecessarily interfering with First Amendment freedoms." Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 636-37 (1980). Sec'y of State v. Joseph H. Munson Co., Inc., 467 U.S. 947, 960-61 (1984). But see Nat'l Fed'n of the Blind of Ark., Inc. v. Pryor, 258 F.3d 851, 854-55 (8th Cir.2001) (citing the Supreme Court's standard of analysis for restrictions on

charitable speech but applying a different, more lenient standard).

Consistent with Supreme Court precedent, the first consideration is whether North Dakota's Act directly and substantially limits charitable solicitation activity. I believe that it does. The law prohibits charities from hiring professional telemarketers to solicit funds for them, and it also provides civil penalties for charities who violate the law. The next inquiry is whether the Act serves a sufficiently strong, subordinating interest that the state is entitled to protect. I agree that protection from the invasion of residential privacy by unwanted solicitations is such an interest. See Frisby v. Schultz, 487 U.S. 474, 484 (1988); Carey v. Brown, 447 U.S. 455, 471 (1980); Rowan v. U.S. Post Office Dept., 397 U.S. 728, 737 (1970).

I do not agree, however, that North Dakota's regulation is narrowly drawn to serve the government's interest without unnecessarily interfering with First Amendment freedoms. First, the Act is overly restrictive. Telefundors in North Dakota are completely prohibited from soliciting charitable funds from members of the do-not-call list, no matter the time of the day nor the percentage of contributions earmarked for the charity. The state does not have a charity-specific do-not-call list, so North Dakotans who are adverse to commercial solicitation but open to charitable solicitation in their homes do not have the opportunity to hear the telefundors' messages. The regulation prevents potentially willing listeners from engaging in discourse about charitable contributions.

Furthermore, the Act is underinclusive. A law is underinclusive, and therefore not narrowly tailored, when it discriminates against some speakers but not others without a legitimate neutral justification for doing so. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429-30 (1993). "Even where, as here, the government has a compelling interest in regulating a particular type of speech, its distinctions between similarly situated actors must reflect a 'reasonable fit' between the restriction and the goal to be achieved by the disparate treatment." Nat'l Fed'n of the Blind v. FTC, 420 F.3d 331, 351 (4th Cir.2005) (Duncan, J., dissenting) (quoting Discovery Network, 507 U.S. at 417); ^{FM3} Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 789-92 (1988). Telefundors' and charities' in-house solicitors' messages are the same, and both types of speakers intrude into the privacy of the home. It remains unclear, then, why the government has restricted the

charitable speech of an unknown percentage of callers that invade residential privacy when so many other groups may intrude upon that privacy, thus diminishing the credibility of the government's rationale for restricting telefundors' speech.

FN3. The majority's holding is based in part on the Fourth Circuit's analysis in *National Federation of the Blind*. The Telemarketing Sales Rule, the regulation at issue in that case, was found to be a constitutional restriction on charitable speech. Notably, the TSR permits telefundors to call members of the national do-not-call list between the hours of 8:00 a.m. and 9:00 p.m., but not members of charity-specific do-not-call lists. The TRS is less restrictive than North Dakota's Act and is inapposite to the analysis before us.

*6 The state has provided no statistics to support its assertion that its restriction on telefundors' charitable solicitations will significantly reduce the number of telephone intrusions into private residences. While I might agree as a matter of common sense that prohibiting calls made by telefundors will limit the number of intrusions, the state has failed to support that contention in the record. ^{FN4} See *Nat'l Fed'n of the Blind*, 420 F.3d at 353 (Duncan, J., dissenting) (“[T]he FTC again presents *no evidence* that telefundors are more likely to be violators of consumer privacy or engage in abusive telemarketing practices than in-house solicitors. There is *no suggestion* in the record that consumers are more likely to feel that their privacy is invaded when receiving a call from a telefunder than a volunteer or in-house employee of a charitable organization.”); *Discovery Network*, 507 U.S. at 426 (holding that a selective ban on commercial newsracks was not justifiable merely because it would “in some small way limit the total number of newsracks”).

FN4. Several states submitted amicus briefs to buttress North Dakota's claim, but statistics from other states are not relevant to our assessment of the North Dakota regulation. Also, the majority supports its holding that the Act is narrowly drawn by relying on the North Dakota Legislature's conclusion that telefundors invade residential privacy more regularly than charitable volunteers or employees. Yet nothing in the record provides a basis for the

Legislature's conclusion.

North Dakota has failed to demonstrate that its ban on telefundors' calls will restore, or even significantly improve, residential privacy. Therefore, I would affirm the district court and hold that North Dakota's direct and substantial limitation on charitable speech cannot be sustained because, although it serves a sufficiently strong, subordinating interest that the state is entitled to protect, it is not narrowly drawn to serve the interest.

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