No. _____

IN THE

Supreme Court of the United States

FREEEATS.COM, INC.,

Petitioner,

v.

STATE OF NORTH DAKOTA
EX REL. WAYNE STENEHJEM,
ATTORNEY GENERAL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is North Dakota Century Code § 51-28-02, which restricts the making of prerecorded telephone calls to residents of that State, preempted by the Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), and the implementing rule adopted by the Federal Communications Commission, 47 C.F.R. § 64.1200(a)(2)(ii) (2005), as applied to prerecorded interstate telephone calls that seek to survey the recipient's political views?

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Petitioner, FreeEats.com, is a privately-held company doing business as ccAdvertising. No publicly held company holds 10% or more of the stock of FreeEats.com.

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OPINIONS BELOW

The opinion of the Supreme Court of North Dakota was issued on April 21, 2006 and is reported at 712 N.W.2d 828 (2006). (App., *infra*, 1a). The decision of the District Court for Burleigh County is not reported. (App., *infra*, 27 a).

JURISDICTION

The Supreme Court of North Dakota entered its judgment on April 21, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

The Supremacy Clause of the United States Constitution, Art. VI, cl. 2, and relevant provisions of the Communications Act of 1934 and the North Dakota Century Code are set forth in the Petition Appendix.

STATEMENT

This case concerns whether a North Dakota statute that makes it illegal to make prerecorded interstate telephone calls to residents of that state for political polling purposes is preempted by a rule issued by the Federal Communications Commission under the Telephone Consumer Protection Act of 1991 (the "TCPA"), Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227), that permits such calls.

Telephones are an important instrument in political campaigns. Petitioner FreeEats.com is a survey and database company that relies upon interactive-voice-response and speech-recognition technology on outbound calls using prerecorded messages to query households through survey polls, identify supporters, and later encourage those supporters to turn out to vote. The company has used this technology in many political campaigns and initiatives, including campaigns in the State of North Dakota in the 2004 elections.

1. The Telephone Consumer Protection Act

Section 2(a) of the Communications Act of 1934 authorizes the FCC to regulate interstate telephone calls. It provides, in pertinent part:

> The provisions of this chapter shall apply to all *interstate* and foreign communications by wire or radio . . . .

47 U.S.C. § 152(a) (emphasis added). Section 2(b) of the Act further provides:

> *Except as provided in sections 223 through 227* of this title, inclusive, . . . nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with *intrastate* communication service by wire or radio of any carrier . . . .

47 U.S.C. § 152(b) (emphasis added). These two provisions have long established the basic structure of telephone regulation in the United States. The FCC generally has exclusive jurisdiction to regulate interstate calls, while the States generally have authority to regulate intrastate calls. *See, e.g.*, *City of New York v. FCC*, 486 U.S. 57 (1988).

In 1991, Congress adopted the TCPA, which amended the Communications Act to make it unlawful to place certain types of telemarketing calls, whether interstate or intrastate in nature, and authorized the FCC to grant exemptions from these restrictions under certain circumstances.

The TCPA did not amend Section 152(a), governing FCC regulation of interstate calls, but did amend Section 152(b), concerning State jurisdiction over intrastate communications, through the introductory phrase "Except as provided in sections 223 through 227 of this title." *See* Pub. L. No. 102-243, § 3(b), 105 Stat. 2401.

In adopting the TCPA, Congress made two findings that are relevant to this case. Section 2(7) of the TCPA, 105 Stat. 2394, provides:

> Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal

> law is needed to control residential telemarketing practices.

Further, Section 2(13), 105 Stat. 2395, provides:

> While the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for these types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution.

To provide the federal law "needed to control residential telemarketing practices," Congress enacted Section 227(b) of the Communications Act, which provides:

> It shall be unlawful for any person within the United States — . . .
>
> (B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B).

47 U.S.C. § 227(b)(1)(B). The phrase "any telephone call" establishes federal jurisdiction over defined categories of both intrastate and interstate telemarketing calls.

To implement the finding in Section 2(13), Congress adopted Section 227(b)(2)(B), 47 U.S.C. § 227(b)(2)(B), which provides, in pertinent part:

> In implementing the requirements of this subsection, the Commission – . . .

> (B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe –
>
> > (i) calls that are not made for a commercial purpose . . . .

The TCPA also contained a saving clause, 47 U.S.C. § 227(e)(1), incorporated into Section 152(b). It provides:

> (1) State law not preempted
>
> Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits – . . .
>
> > (C) the use of artificial or prerecorded voice messages; . . . .

The issue in this case is whether this provision authorizes the States to restrict interstate telemarketing calls that the FCC permits.

2. FCC Implementation of Section 227(b)(2)(B).

In 1992, the FCC exercised the authority granted by Congress in Section 227(b)(2)(B) and adopted a rule that exempted all prerecorded calls made for a noncommercial purpose from the prohibition that otherwise would apply.[1] 47 C.F.R. § 64.1200(a)(2)(ii) (2005) provides:

> (a) No person or entity may: . . .

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[1] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 7 FCC Rcd 8752 (1992) ("*1992 Report and Order*").

> (2) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call: . . .
>
> (ii) Is not made for a commercial purpose . . . .

In creating this exemption, the FCC stated:

> We find that the exemption, for non-commercial calls from the prohibition on prerecorded messages to residences includes calls conducting research, market surveys, *political polling* or similar activities which do not involve solicitation as defined by our rules.

1992 Report and Order ¶ 41 (emphasis added).

Since 1992, many States have adopted laws that restrict telemarketing calls to their residents, including calls with prerecorded messages. Many of these statutes apply to both interstate and intrastate calls, without distinction.

In July 2003, the FCC issued a rule to establish a nationwide Do Not Call Registry for telemarketing calls and to make a number of other changes to its telemarketing regulations.[2] In that rulemaking, the FCC expressly reaffirmed the exemption for prerecorded, noncommercial calls. It also considered the proliferation of State laws that purported to regulate interstate telemarketing calls.

The FCC concluded 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." *2003 Report and Order* ¶ 83. It found that the TCPA preserved for the States authority to impose more restrictive

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[2] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 18 FCC Rcd 14014 (2003) ("*2003 Report and Order*").

requirements on *intrastate* telemarketing calls. *Id*. ¶ 82. The Commission further concluded, based on the rule-making record, "inconsistent interstate rules frustrate the federal objective of creating uniform national rules, to avoid burdensome compliance costs and potential consumer confusion." *Id*. ¶ 83.

> [A]ny state regulation of interstate telemarketing that differs from our rules *almost certainly* would conflict with and frustrate the federal scheme and *almost certainly* would be preempted.

Id. ¶ 84 (emphasis added).

3. The State Enforcement Action Against FreeEats.com

In 2003, North Dakota enacted a law that, with exceptions not relevant here, restricts prerecorded calls to its residents. N.D. Cent. Code § 51-28-02 provides, in pertinent part:

> A caller may not use or connect to a telephone line an automatic dialing-announcing device unless the subscriber has knowingly requested, consented to, permitted, or authorized receipt of the message or the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered. . . .

This law applies to both interstate and intrastate calls and does not differentiate between commercial and non-commercial calls, if they are prerecorded. Each call placed in violation of the statute is a separate violation, subject to a civil money penalty of $2,000. *Id*. §§ 51-28-17 & -19.

In August 2004, FreeEats.com placed numerous prerecorded telephone calls from its call center in Ashburn, Virginia to residences in North Dakota. The calls sought to determine the recipient's views on issues that were relevant to the 2004 elections. (App. 4a-5a).

On September 17, 2004, the Attorney General of North Dakota brought this enforcement action against FreeEats.com, seeking civil money penalties for violation of Section 51-28-02 by these prerecorded calls. (App. 5a).[3] The company potentially faced many millions of dollars in penalties, due to the large number of political polling calls involved.[4]

In the trial court, FreeEats.com argued that the State statute directly conflicted with the TCPA and the FCC's implementing rule, insofar as applied to prerecorded interstate political polling calls, and thus was preempted by the Supremacy Clause. (App. 28a). The court concluded that Section 51-28-02 was not preempted and that these interstate calls to North Dakota residents were illegal. (App. 29a-33a). The court imposed a civil money penalty of $10,000, plus attorney fees and costs. (App. 5a).

On appeal, the Supreme Court of North Dakota affirmed. It held that federal law did not preempt application of Section 51-28-02 to prerecorded, interstate political polling calls, based on the saving clause of the TCPA. (App. 26a). The court rejected FreeEats.com's argument that its interpretation of the saving clause should be governed by *United States v. Locke*, 529 U.S. 89 (2000), which concluded that a State is not entitled to an "assumption" of nonpreemption when it regulates in an area with a history of significant federal presence. Rather, the court assumed that Congress did not intend to preempt the State's police power and required the company to bear

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[3] Earlier in 2004, the State invoked the statute against the campaign of General Wesley Clark for having used prerecorded messages in a presidential primary election. *See Attorney General Looks into Clark Calls, Bismarck Tribune*, Jan. 24, 2004.

[4] In filings with the FCC, FreeEats.com stated that it had attempted to call each of the 235,000 households in North Dakota with a publicly-available, listed telephone number. *In the Matter of ccAdvertising*, Petition for Expedited Declaratory Ruling, FCC, CG Docket No. 02-278, filed Sept. 13, 2004.

the "burden of proving it was the clear and manifest intent of Congress to supersede state law." (App. 16a (citing *Bates v. Dow Agrosciences LLC,* 125 S. Ct. 1788, 1801 (2005), and *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992), and other cases)).

In interpreting the saving clause, the court focused on the word "or" preceded by a comma, which separated the phrase "more restrictive intrastate requirements or regulations" from the phrase "which prohibits." It concluded that the use of the disjunctive "or," preceded by a comma, indicates that the word "intrastate" in the first clause does not modify the second clause. (App. 10a-11a). The court therefore held that while the State might not be able to regulate prerecorded, interstate political polling calls to North Dakota residents, it had authority to prohibit such calls. (App. 11a-12a).[5]

REASONS FOR GRANTING THE PETITION

This case presents an important question of law that has not been, but should be, decided by this Court concerning the respective authorities of the federal government and the States to regulate prerecorded, interstate telephone calls.

The decision of the Supreme Court of North Dakota conflicts with this Court's decisions in *United States v. Locke*, 529 U.S. 89 (2000), and *City of New York v.* FCC, 486 U.S. 57 (1988), which establish the principles governing preemption of a State law that applies to interstate

[5] The court also noted in passing that the TCPA preserves the ability of a state to bring actions in its courts for violation "of any general civil or criminal statute." (App. 21a (quoting 47 U.S.C. § 227(f)(6))). The court did not hold that Section 227(f)(6) was an independent basis for its decision; rather, it cited this provision in finding that the TCPA did not preempt the field of telemarketing regulation. In any event, there is no basis for a claim that Section 227(f)(6) provides a *second* basis for ignoring a valid FCC rule adopted pursuant to Section 227(b).

telephone service, an area long regulated at the federal level.

As applied to the calls made by FreeEats.com, N.D. Cent. Code § 51-28-02 conflicts with the FCC's rule that permits prerecorded, noncommercial interstate calls and impairs the FCC's authority to establish uniform, nationwide standards in this networked industry. The decision of the North Dakota court also frustrates the decisions made by Congress and the FCC about the appropriate balancing of consumer privacy interests and the important First Amendment rights that attach to noncommercial speech communicated through these calls.

Since 1934, Congress generally has given the FCC regulatory authority over interstate calls and has reserved regulation of intrastate calls to the States. In the TCPA, Congress did not change this basic structure; it did not amend the provision of the Communications Act that establishes the FCC's authority over interstate calls. Congress did, however, amend Section 152(b) to extend federal jurisdiction over certain categories of intrastate telemarketing calls that previously had been fenced off from federal regulation. The FCC subsequently exercised the specific authority delegated to it by Congress to permit prerecorded interstate calls for noncommercial purposes, including calls for political polling purposes.

The North Dakota court erred in upholding the State law as applied to punish Petitioner for making prerecorded interstate calls that are permissible under federal law. In reaching this conclusion, the court ignored the structure of the Communications Act and the substantive provisions of the TCPA. It also ignored the FCC's conclusion that State statutes conflicting with its TCPA rule "almost certainly" would frustrate the federal interest and "almost certainly" would be preempted. *2003 Report and Order* ¶ 84.

Instead, the court undertook a purported "plain language" interpretation of the TCPA saving clause, divorced from its context. (App. 7a). It applied an "assumption" about the operation of conflict preemption principles that is inconsistent with *Locke* and other decisions of this Court concerning the interpretation of a saving clause in a field long subject to federal regulation. Starting from these erroneous premises, the court misinterpreted the saving clause which, properly construed, limits the extension of federal authority to regulate *intrastate* calls, an area previously "fenced off" from federal jurisdiction. The court improperly converted the saving clause into a mechanism that allows the States to invade the exclusive authority of the FCC to regulate *interstate* calls. This decision directly conflicts with the FCC rule and frustrates the federal interest.

The question of the respective authorities of the FCC and the States to regulate prerecorded, noncommercial interstate calls is an important and recurrent legal issue that warrants review by the Court at this time. Many States have adopted laws that conflict with various provisions of the FCC's TCPA regulations, including its rule that permits prerecorded interstate polling calls, and have justified their statutes based on the TCPA saving clause.

These conflicting and overlapping State laws threaten the existence of the uniform, national standards for interstate calls that Congress and the FCC believe are essential in this networked industry. In addition to frustrating the federal purposes, these laws impose substantial burdens on telemarketers in conducting interstate activities clearly authorized by the FCC's regulations. Even when acting in compliance with federal law, telemarketers may face substantial *in terrorem* threats from state regulation, such as the hundreds of millions of dollars in civil penalties to which Petitioner was exposed.

This case presents an appropriate vehicle in which to resolve this legal question. The decision below is a final judgment in an enforcement action. There are no threshold questions of standing or ripeness and no disputed questions of fact that might interfere with the Court's ability to reach the merits of the issue.

Further, the question is presented in the context of North Dakota's prohibition of prerecorded, noncommercial interstate political polling calls. The chilling effect of that decision on political speech demonstrates both the practical significance of the legal issue and the importance of the Congressionally-directed balancing of First Amendment and consumer interests that the FCC made in determining that these calls should be permitted.

The Supreme Court of North Dakota explicitly declined to follow the decision of the only federal court that has considered whether the TCPA saving clause avoids preemption of State laws that conflict with the statute as applied to interstate calls. (App. 26a (declining to follow *Chamber of Commerce v. Lockyer*, 2006 WL 462482 (E.D. Cal. Feb. 26, 2006))). Instead, it adopted the erroneous interpretation of the saving clause devised by the Supreme Court of Utah in a case involving the regulation of prerecorded commercial interstate calls. (*Id.* (citing *Utah Div. of Consumer Prot. v. Flagship Capital*, 125 P.3d 894 (Utah 2005))). Accordingly, this important legal issue is appropriately framed for resolution by the Court at this time.

I. THE DECISION OF THE SUPREME COURT OF NORTH DAKOTA IS ERRONEOUS AND CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

Under the Supremacy Clause, any state legislation that burdens or conflicts with a federal law is invalid. U.S. Const. art VI, cl. 2. A state law conflicts with federal law if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *E.g.*, *Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000). The statutorily authorized regulations of a federal agency preempt any state law that conflicts with those rules or would frustrate accomplishment of their purposes. *City of New York v. FCC*, 486 U.S. 57, 64 (FCC rule implementing statutory authority to establish technical standards for cable television signals preempts more stringent local requirements).

The North Dakota statute restricts prerecorded, noncommercial interstate telemarketing calls and squarely conflicts with the FCC's rule permitting such calls. The Supreme Court of North Dakota nonetheless held that the State statute was not preempted by the FCC regulation. That decision is erroneous. It conflicts with prior decisions of this Court that have recognized exclusive federal jurisdiction to regulate interstate calls and cases that determine the proper interpretation of a saving clause in a preemption challenge to a conflicting State law in an area, like telephone service, where the federal government exercises pervasive regulatory authority.

A. Prerecorded Interstate Political Polling Calls Are Permitted by FCC Regulation.

In adopting the TCPA, Congress acted against a background of federal preemption of State laws governing interstate calls. *See City of New York*, 486 U.S. at 66 (preemption found where Congress "acted against a background of federal pre-emption on this particular issue").

Since 1934, the FCC generally has exercised exclusive regulatory authority over interstate telephone calls, and the States generally have regulated intrastate calls. This division of authority is reflected in the jurisdictional provisions of the Communications Act. Section 152(a) provides that the FCC's authority "shall apply to all interstate and foreign communications by wire or radio . . . .." Section 152(b) further provides that "[e]xcept as provided in sections 223 through 227," the FCC shall not have "jurisdiction with respect to . . . intrastate communication service."

Section 152(b) generally has the effect of "fenc[ing] off from FCC reach or regulation" matters in connection with intrastate service. *See Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 382-83 (1986). Congress has, from time to time, amended this provision and granted the FCC jurisdiction over intrastate activities that previously were regulated by the States.[6]

The TCPA did not amend Section 152(a) governing FCC authority over interstate calls. Rather, Congress again amended Section 152(b) in a manner that expanded federal jurisdiction and limited the previously existing State authority over intrastate calls. This revision implemented the Congressional finding in Section 2(7) that an expansion of federal authority was necessary in order to control residential telemarketing practices. 105 Stat. 2394.[7] Neither the findings nor the substantive provisions of the TCPA contain any suggestion that Congress intended to expand State authority over interstate calls.

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[6] *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) (local competition provisions of the Telecommunications Act of 1996 extended federal authority to intrastate matters previously regulated by the States).

[7] The legislative history of the TCPA confirms that Congress intended to give the FCC jurisdiction over some intrastate calls but contains no indications that Congress intended to give the States jurisdiction over interstate calls. *See* S. Rep. No. 102-178, at 3 (1991).

Section 227(b)(1) generally prohibits all prerecorded interstate or intrastate telemarketing calls without the consent of the recipient, unless the FCC specifically exempts a type of prerecorded call under Section 227 (b)(2). Section 227(b)(2)(B) provides in turn that the FCC "may, by rule or order, exempt from the requirements of paragraph (1)(B) . . . (i) calls that are not made for a commercial purpose . . . ." This provision implements the Congressional finding in Section 2(13) that the FCC should have the flexibility to design different rules for noncommercial calls, "consistent with the free speech protections embodied in the First Amendment of the Constitution." 105 Stat. 2395.

Section 227(b)(2) thus explicitly provides the FCC with authority to adopt rules governing the legality of prerecorded noncommercial calls. *See AT&T Corp.*, 525 U.S. at 377-78. The FCC exercised that power by adopting a rule, 47 C.F.R. § 64.1200(a)(2)(ii). It exempts all noncommercial calls from the otherwise applicable statutory prohibition on prerecorded calls. The FCC expressly found that political polling calls were exempt from the prohibition on prerecorded calls. *1992 Report and Order* ¶ 40.

In 2003, the FCC conducted a further rulemaking that addressed its authority over interstate telemarketing calls. *2003 Report and Order* ¶¶ 82-84. The FCC stated that "any state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted." *Id*. ¶ 84.

In sum, the TCPA modified the allocation of regulatory responsibility over telephone calls in one direction only: by expanding federal jurisdiction. Nothing in the statutory findings or the substantive provisions of the TCPA suggests that Congress altered the jurisdictional boundary in the other direction. The TCPA did not give

the States authority to regulate any interstate telemarketing calls. In particular, it did not amend Section 152(a) in any respect.

The prerecorded interstate interactive-voice-response and speech-recognition political polling calls made by FreeEats.com to North Dakota residents fall within the exemption created by 47 C.F.R. § 64.1200(a)(2)(ii) and therefore are permitted under federal law.

B. The Saving Clause of the TCPA Does Not Authorize North Dakota To Regulate Prerecorded Noncommercial Interstate Calls.

The TCPA saving clause, Section 227(e)(1), provides, in pertinent part:

> Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits – . . .
>
> (C) the use of artificial or prerecorded voice messages . . . .

The interpretation of this provision adopted by the Supreme Court of North Dakota transformed Section 227(e)(1) into a mechanism that expands State authority to regulate interstate calls. That construction contradicts the structure of the Communications Act and conflicts with this Court's decisions governing the proper interpretation of a saving clause in an area of longstanding federal regulation.

The saving clause is inartfully drafted, and its language is ambiguous. What is clear is that the word "interstate" does not appear in Section 227(e)(1)(C). Nothing

in its text plainly grants the States jurisdiction over interstate calls. The more natural reading of this provision is that in extending federal authority, Congress accommodated the States by preserving more stringent local statutes governing intrastate calls.

The North Dakota court found that the language of Section 227(e)(1) was unambiguous (App. 10a-11a); this allowed it to avoid even mentioning, let alone addressing, the contrary FCC construction articulated in its 2003 rulemaking. *See United States v. Mead*, 533 U.S. 218, 226-27 (2001). To devise its "unambiguous" construction, the court had to introduce a grammatical error into Section 227(e)(1). Its reading, that the States may not restrict but may prohibit interstate calls, would deprive an entire phrase in the saving clause of meaning and would produce a result that is at odds with the longstanding history of telephone regulation. Indeed, under the logic of the court's own distinction between restrictions and prohibitions, the North Dakota statute still would not be saved.

In light of the ambiguity in Section 227(b)(1), its interpretation should be guided by the traditional tools used to help construe a statute, including its structure and context and its interpretation by the agency Congress charged with its implementation. The North Dakota court erred by ignoring these factors and by giving broad effect to the saving clause "where doing so would upset the careful regulatory scheme established by federal law." *Locke*, 529 U.S. at 106.

1. The Court Ignored the Structure of the Communications Act. The North Dakota court erred in interpreting Section 227(e)(1) as overturning the basic allocation of responsibility that has existed since 1934 and authorizing the States to regulate a category of interstate calls. The court ignored the critical fact that the TCPA did not amend Section 152(a), which generally provides the FCC

with exclusive regulatory jurisdiction over interstate calls, but amended only Section 152(b), to expand federal authority in an area – regulation of intrastate calls – that previously had been fenced off. This structural factor alone precludes an interpretation that the saving clause included in Section 152(b) accomplished a fundamental transformation in the regulatory scheme and authorized the States to regulate a category of interstate calls.

The text of the statute shows that Congress recognized a need for expansion of federal authority. Nothing in the findings or substantive provisions of the TCPA suggests that Congress intended to accomplish an abrupt shift in federal law by authorizing the States to regulate interstate calls.

2. The Court Applied an Improper Preemption Standard. The Supreme Court of North Dakota found that because the police powers of the State were involved, its analysis properly began with an "assumption" that Congress did not intend to abrogate a State statute implementing the police power and that the party claiming preemption bears "the burden of proving it was the clear and manifest intent of Congress to supersede state law." (App. 16a; *see id*. 15a). The court erred as a matter of law.

In *United States v. Locke*, 529 U.S. 89 (2000), the Court considered the proper interpretation of a saving clause that allegedly prevented conflict preemption of state regulations in an area – maritime commerce – long regulated by the federal government. Relying on its prior decision in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), the Court concluded that "an 'assumption' of non-pre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *Id*. at 108.

The FCC has long regulated interstate telephone calls. Section 1 of the Communications Act, 47 U.S.C. §

151, charges the agency with ensuring efficient, nationwide phone service. *See Louisiana Public Service*, 476 U.S. at 370. Under these circumstances:

> [T]here is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers. Rather, we must ask whether the local laws in question are consistent with the federal statutory structure, which has as one of its objectives a uniformity of regulation . . . .

Locke, 529 U.S. at 108. Accordingly, the North Dakota court erred by applying the wrong preemption standard and improperly imposed a burden of proof on Petitioner.

3. The Court Erroneously Interpreted Section 227(e)(1). The Supreme Court of North Dakota found that Section 227(e)(1) contained two clauses that modify the object "any State law" – (1) "that imposes more restrictive intrastate requirements or regulations"; and (2) "which prohibits." The court focused on the comma, followed by the word "or" that separates these two clauses. It found that the comma followed by a disjunctive conjunction created two parallel and independent phrases, and thus two independent regulatory requirements. (App. 10a-11a).

The word "interstate" does not appear in Section 227(e)(1). The court supplied it by assuming that the presence of "intrastate" in the first clause, and its absence in the second parallel clause, must have meant that Congress intended to draw a distinction and to allow the States to prohibit interstate calls.

This court's interpretation is based on an obvious grammatical mistake. Section 227(e)(1) does not introduce both clauses with the word "that," as would be required to create parallel clauses. Rather, it uses two different words, "that" and "which" to introduce these provisions; literally interpreted, the clauses are not parallel.

The North Dakota court simply ignored Congress' actual choice of the word "which" and implicitly revised the text as if Congress had used the word "that" instead.

Due to the ambiguity in the language of the saving clause, it is difficult to develop a rational interpretation based on its plain language alone. The word "that" introduces a restrictive clause, and the word "which" signals a nonrestrictive clause. *The Chicago Manual of Style* § 5.42 (14th rev. ed. 1993). "Which" is "used as a relative pronoun in a clause that provides additional information about the antecedent." *Webster's II New College Dictionary* 1257 (1995).

The better view is that the antecedent of "which" is not "any State law," as the court assumed, but rather the entire phrase "any State law that imposes more restrictive intrastate requirements or regulations on the use of artificial or prerecorded messages." The clause introduced by "which" provides additional information about the kinds of measures that a State is permitted to adopt for intrastate calls – i.e., it may prohibit them as well as restrict them. The comma is necessary grammatically to separate "or which prohibits" from the phrase "requirements or regulations," in which two words already are joined by a disjunctive conjunction.

This interpretation follows the principle of giving meaning to Congress' use of the different words "that" and "which" to introduce the two clauses. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Thus, properly construed, the term "intrastate" applies to both clauses.

The North Dakota court's contrary interpretation of the saving clause produces absurd results. First, under its construction, States would have the lesser authority to impose "requirements or regulations" on intrastate calls, but would have the greater power to "prohibit" interstate calls. This outcome conflicts with the basic allocation of authority in the Communications Act, under which the

States may regulate intrastate calls but have no authority over interstate calls.

Second, even accepting the court's logic, the North Dakota statute would not qualify as a "prohibition," but rather would constitute a "requirement[] or regulation[]" that could only be imposed on intrastate calls. Section 51-28-02 does not in fact absolutely ban prerecorded calls. Rather, it restricts their use to situations in which a live operator is on the line to solicit consent. Accordingly, there are substantial reasons to believe that the court's interpretation is erroneous.

As a functional matter, the court's interpretation would have the first clause serve the true purpose of a saving clause – limiting the degree of intrusion of federal authority into a domain previously allocated to the States. However, it would make the second clause serve as an affirmative grant of power to the States, a delegation that is reflected nowhere else in the TCPA. In *Locke*, the Court cautioned against interpreting language in a saving clause in a manner that would upset a settled regulatory framework and allow the States to regulate matters long regulated by the federal government.

> We think it quite unlikely that Congress would use a means so indirect as the savings clauses . . . to upset the settled division of authority by allowing states to impose additional unique substantive regulation . . . . We decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.

Locke, 529 U.S. at 106.

By ignoring the other provisions of the statute and basing its construction on the presence of a comma, the Supreme Court of North Dakota ignored this Court's warning in *United States National Bank of Oregon v. In-*

dependent Insurance Agents of America, Inc., 508 U.S. 439 (1993):

> [T]he meaning of a statute will typically heed the commands of its punctuation. But a purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning. . . . No more than isolated words or sentences is punctuation alone a reliable guide for discovery of a statute's meaning.

508 U.S. at 454-455 (internal citation omitted).

In sum, the Supreme Court of North Dakota erred in interpreting the saving clause. In the structure of the Communications Act and the context of the TCPA, that provision limits the extent of the federal intrusion into the State sphere but does not grant the States authority to override FCC rules governing interstate calls.

The only federal court to have considered this issue held, in the context of commercial calls, that the TCPA saving clause does not authorize the States to regulate interstate communications. In *Chamber of Commerce v. Lockyer*, 2006 WL 462482 (E.D. Cal., Feb. 26, 2006), the court considered a conflict preemption challenge to a State law that imposed more stringent restrictions on interstate fax advertisements than federal law. Section 227 of the TCPA, as amended, permits a telemarketer to transmit unsolicited fax advertisements under certain conditions to recipients with which it has an established business relationship. A subsequently enacted California law required the sender to obtain express prior consent if either the transmitter or the recipient of the fax was in California. The State defended the law on the ground that the TCPA saving clause authorized it to prohibit interstate fax transmissions.

The court held that an interpretation of Section 227(e)(1) that would have the term "intrastate" modify the first phrase, but not modify "prohibit," would be irrational.

> If the savings clause is construed to preserve the right [of the States] to restrict both intrastate and interstate telecommunications, then the word "intrastate" places no constraint on the States' jurisdiction over telecommunications and the inclusion of the work "intrastate" would be surplusage. . . . [T]he Court believes that its duty to give each word some operative effect where possible precludes such a construction.

2006 WL 462482 at *8. The court correctly found that the word "intrastate" also modified "prohibits" and held the California law unconstitutional insofar as applied to interstate calls.

II. REVIEW OF THIS IMPORTANT LEGAL ISSUE IS WARRANTED.

The decision of the Supreme Court of North Dakota compromises the FCC's authority to regulate interstate telemarketing calls, by misinterpreting the TCPA saving clause to allow States to trump the uniform national standards that Congress intended to establish for interstate telephone calls. The Court should review this important legal issue at this time, in light of the adverse effects of the decision and the clear error in its reasoning, rather than waiting while the adverse effects of its decision ramify through the legal system and create further problems.

The North Dakota decision is being watched closely by Attorneys General and telemarketers. If the decision stands, it will create a chaotic situation in which interstate political polling and other non-commercial calls will be governed by a patchwork of overlapping and conflict-

ing State laws, undermining the goals of uniformity in regulating a networked industry and respect for political speech rights that Congress recognized in adopting the TCPA. These conflicting local consumer protection restrictions would make it difficult and expensive for political pollsters and campaigns to use interstate calls. Moreover, given the volume of calls involved, pollsters will be exposed to potentially enormous penalties if they run afoul of one of the non-uniform restrictions imposed by a single State.

Several States have adopted laws that subject prerecorded interstate telephone calls to more stringent requirements than the federal standards. For example, the Minnesota statute prohibiting prerecorded calls applies to both noncommercial and commercial calls and has been enforced against prerecorded political polling calls.[8] Arizona, Colorado, Georgia, New Mexico, North Carolina, and Texas also prohibit the use of pre-recorded messages for commercial solicitations without prior consent, even when the caller has an established business relationship with the consumer. These calls are permitted under the FCC's rules.[9]

The preemption issue has arisen in several other contexts, in which States have adopted laws that are inconsistent with or more stringent than the federal standards.

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[8] Minn. Stat. § 325E.27. In *Van Bergen v. State of Minnesota*, 59 F.3d 1541 (8th Cir. 1995), the Eighth Circuit upheld this statute against a preemption challenge by a candidate for Governor who sought to make *intrastate* political polling calls in support of his candidacy. The record before the Supreme Court of North Dakota demonstrated that the calls at issue in *Van Bergen* were intrastate in nature. Appellant's Reply Brief at 2-3 & Addendum.

[9] *See* Ariz. Rev. Stat. §§ 13-2919, 44-1278(B)(4) & (5); Colo. Rev. Stat. §§ 18-9-311, 6-1-302(2)(a); Ga. Code Ann. §§ 46-5-23 & 24; N.M. Stat. Ann. § 57-12-22; N.C. Gen. Stat. § 75-104; Tex. Util. Code § 55.126; *compare* 47 C.F.R. § 64.1200(a)(2)(iv) (2005) (allowing prerecorded calls to those with whom the caller has an established business relationship).

These areas include restrictions on calls for noncommercial purposes,[10] calls by non-profit entities,[11] calls to persons with whom the telemarketer has a preexisting business relationship,[12] disclosure requirements,[13] and calling hours and holiday restrictions.[14]

Inconsistent State statutes continue to proliferate despite the FCC's warning that such laws "almost certainly" would be preempted if applied to interstate calls.[15] State

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[10] *See* Minn. Stat. § 325E.27; Mont. Code §45-8-216; N.H. Rev. Stat. § 359-E:1; N.D. Cent. Code § 51-28-02.

[11] Under the FCC rule, calls made by non-profit organizations are exempt from the do-not-call rules. 47 C.F.R. §§ 64.1200(d)(7), (f)(9). Twenty-one States place additional restrictions on such calls. *See*, *e.g.*, Alaska Stat. § 45.50.475 (exemption applies only to calls made by members or volunteers of the non-profit, and only if made to other members, previous donors, or those who recently expressed an interest in donating).

[12] *See* Ind. Code 24-4.7-1-1 (no exemption for established business relationships); Mo. Rev. Stat. § 407.1095(3)(b); La. Rev. Stat. Ann. § 45:844.12(6)(c), Mich. Comp. Laws Ann. § 455.111(j) (period for defining the existence of an established business relationship shorter than the 18 months established by 47 C.F.R. § 64.1200(f)(3)).

[13] Thirty States have imposed additional requirements on the content and timing of disclosures to be made during telemarketing calls beyond the detailed requirements set forth in the FCC rule (47 C.F.R. § 64.1200(d)(4)). *Compare* Ky. Rev. Stat. Ann. § 367.46953, N.M. Stat. Ann. § 57-12-22; Kan. Stat. Ann. § 50-670(b)(4).

[14] The FCC rule allows telemarketing calls between 8 a.m. and 9 p.m. but imposes no restrictions on the days on which calls may be made. 47 C.F.R. § 64.1200(c)(1). Seventeen States further restrict calling hours, ban calls on weekends, or prohibit calls during holidays. *See*, *e.g.*, La. Rev. Stat. Ann. §§ 45:811(3), 1:55 (prohibiting telemarketing calls between 8-9 p.m., and on Sunday and federal and State holidays).

[15] *E.g.*, on June 2, 2006, Tennessee enacted a law (S.B. 3162) that authorized its own state do-not-call list nearly three years after the FCC issued its rule creating a single national list. On March 13, 2006, Mississippi enacted a successor Telephone Solicitation Act that differed from the federal standards. Miss. S.B. 2695. On March 17, 2006, Indiana enacted legislation (H.B. 1280) concerning fax advertisements that differed significantly from the federal provisions. The inconsis-

legislatures continue to consider proposed legislation that is inconsistent with the federal rules.[16] State Attorneys General also routinely enforce State statutes against interstate calls; many of these cases have been settled prior to a decision on the merits of the preemption defense because of the threat of enormous *in terrorem* fines that are potentially imposed for every call made in violation of the statutes.[17]

The question of the proper application of this Court's preemption decisions to the TCPA saving clause has been addressed in several prior decisions.

For example, in *Utah Division of Consumer Protection v. Flagship Capital*, 125 P.3d 894 (2005), the Supreme Court of Utah considered whether a State law that prohibited use of automatic telephone dialing systems was preempted by the TCPA, which regulates but does not prohibit such calls. 47 U.S.C. § 227(b)(1)(D). The Supreme Court reversed a lower court decision that had dismissed on preemption grounds a State enforcement action against a Florida telemarketer. Ignoring the long history of federal regulation, the court erroneously held that since the police power was at issue, there was a presumption that the State law was constitutional and that

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tent California statute at issue in *Chamber of Commerce* similarly was passed after adoption of the federal law.

[16] *E*.g., on January 10, 2005, a bill was introduced in the Alaska legislature (Alaska H.B. 62) that sought to ban prerecorded calls to persons on the Alaska or federal do-not-call lists when the purpose of the call was "to communicate a message made to convince potential voters concerning the outcome of an election of a candidate or made to influence the outcome of a proposition." *See also* Iowa H.B. 36 (introduced January 11, 2005) (proposing to remove all exemptions to the prohibition on prerecorded messages, which would restrict political calls).

[17] TCPA preemption claims also have arisen in several cases involving efforts by telemarketers to remove State enforcement actions to federal court. *See, e.g.*, *North Carolina v. Debt Management Services Inc.*, No. 5:03-CV-950-FL(3) (E.D.N.C. Mar. 8, 2004); *Florida v. The Sports Authority*, No. 6:04-cv-115-Orl-JGG (M.D. Fla. June 4, 2004).

the challenger faced a burden of proving that it was unconstitutional. 125 P.3d at 900. It further found that there was no conflict between the Utah law and the federal law, because the telemarketer could comply with both standards if it simply chose not to make calls to Utah residents. *Id*. at 901. The court concluded:

> 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.

Id. Its holding is plainly inconsistent with prior decisions of this Court, which establish that a State cannot avoid a preemption challenge by arguing that the regulated entity should simply refrain from performing the activity that is lawful under the federal standard. *See, e.g.*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379-80 (2000) ("Sanctions are drawn not only to bar what they prohibit but to allow what they permit, and the inconsistency of sanctions here undermines the congressional calibration of force.").

By contrast, in *Chamber of Commerce v. Lockyer*, the Eastern District of California held that a State statute that imposed more restrictive standards on interstate fax advertisements than federal law, by requiring express prior consent of the recipient, was preempted because the more stringent provision created an obstacle to the accomplishment of the federal purposes. 2006 WL 462482 at *8.

In reaching its decision, the Supreme Court of North Dakota explicitly declined to follow the decision in *Chamber of Commerce* and chose instead to adopt the reasoning of the Supreme Court of Utah in *Flagship Capital*. (App. 26a). It thereby repeated the two legal errors made by the Utah court, in applying an improper preemption standard to an area with a long history of exclusive fed-

eral regulation, and in concluding that the State statute did not frustrate the federal purposes because Petitioner could have avoided any problem "if it had complied with North Dakota law and refrained from placing calls to North Dakota residents." (App. 22a).

Until this Court definitively decides the question, disputes will continue to arise concerning the legal authority of the States under the TCPA to impose more stringent restrictions on interstate telephone calls than were adopted by Congress and the FCC. This cause presents the preemption question in the context of a final judgment in an enforcement action. The legal issue is squarely presented, and there are no threshold procedural issues or questions of fact that would complicate the Court's ability to reach the merits.

Further, the question arises in the context of a prohibition of prerecorded, interstate political polling calls. The political speech considerations demonstrate the practical significance of the legal issue and the chilling effect of the North Dakota statute as applied to prohibit expression that is fully protected under the First Amendment.

The interests of judicial economy would be served by resolving the issue at this time, before there is further fracturing of what Congress intended to be uniform national rules governing interstate calls and before litigation on this issue proliferates further.

In its 2003 rulemaking, the FCC stated its belief that "any state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted." *2003 Report and Order* ¶ 84. The agency explicitly urged the States to refrain from creating such conflicts: "We reiterate the interest in uniformity – as recognized by Congress – and encourage states to avoid subjecting telemarketers to inconsistent rules." *Id*. Nevertheless, as noted, the States continue to

adopt laws that are more stringent than the counterpart federal rules.

In the 2003 proceeding, the FCC also stated that it would establish a process by which "any party that believes a state law is inconsistent with section 227 or our rules may seek a declaratory ruling from the Commission" and that it would "consider any alleged conflicts between state and federal requirements and the need for preemption on a case-by-case basis." *Id*. Many parties have sought declaratory rulings from the FCC that various State statutes regulating commercial telemarketing calls are preempted.[18] Indeed, shortly before the initiation of this enforcement action, FreeEats.com filed a petition seeking a declaratory ruling that Section 51-28-02 was preempted.[19] To date, the FCC has not acted upon any of these submissions.

The pendency of the requests before the FCC in no way argues against granting the Petition in this case. The North Dakota court has entered a final judgment against Petitioner holding that the TCPA does not preempt Section 51-28-02. Even if the FCC were to issue a declaratory ruling on the company's submission, that action would have no impact on its liability in this case and would provide scant protection for Petitioner or another telemarketer if it were to place political polling calls to North Dakota residents in the future.

Moreover, since the issue arises in the context of an enforcement action, it is both more concrete and unburdened by the peripheral administrative law issues that might accompany an appeal from a hypothetical future FCC decision.

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[18] *See, e.g.*, Joint Petition, *In the Matter of Alliance Contact Services*, FCC, CG Docket No. 02-278, filed April 29, 2005 (filed by 32 parties).

[19] *In the Matter of ccAdvertising*, Petition for Expedited Declaratory Ruling, FCC, CG Docket No. 02-278, filed Sept. 13, 2004.

The importance of the constitutional considerations that persuaded Congress to adopt a specific provision in the TCPA applicable to noncommercial prerecorded calls makes this a particularly appropriate case in which to review the recurrent issue concerning the proper interpretation of the TCPA saving clause.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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