

# Application of the Telephone Consumer Protection Act to Intrastate Telemarketing Calls and Faxes

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## I. INTRODUCTION

They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall.

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It is telephone terrorism, and it has got to stop.<sup>1</sup>

In 1991, with the passage of the Telephone Consumer Protection Act of 1991 (TCPA),<sup>2</sup> Congress took the first significant step in curbing what many perceived as an onslaught of telemarketing that had invaded Americans homes. However, what began as a straightforward remedy to telephone terrorism resulted in a less than perfect example of legislative clarity.

The TCPA presents “an unusual constellation of statutory features.”<sup>3</sup> It provides a federal right to be free from certain types of telephone solicitations and facsimiles (faxes), but it does not permit a victim to enforce that right in federal court.<sup>4</sup> The TCPA’s principal enforcement

1. 137 CONG. REC. 30,821 (1991) (statement of Sen. Hollings). Senator Hollings sponsored the Automated Telephone Consumer Protection Act of 1991 (TCPA).

2. See Pub. L. No. 102-234, 105 Stat. 2394 (1991) (codified as amended in scattered sections of 47 U.S.C. (1994)). The TCPA amends the Communications Act of 1934. See 47 U.S.C. § 201 *et seq.* In general, the TCPA restricts the use of automatic telephone dialing systems, artificial or prerecorded voice, and telephone facsimile machines to send unsolicited advertisements. The TCPA prohibits automatically dialed and prerecorded voice message calls to emergency lines, any health care facility or similar establishment, and numbers assigned to radio common carrier services or any service for which the called party is charged for the call, unless the call is made with the prior express consent of the called party or is made for emergency purposes. The TCPA also prohibits calls made without prior consent to a residence using an artificial or prerecorded voice to deliver a message, unless it is an emergency call or is exempt under rules promulgated by the Federal Communications Commission (FCC). Unsolicited advertisements may not be transmitted by telephone facsimile machines without prior express permission or invitation. Users of such machines or those transmitting artificial or prerecorded voice messages are subject to certain identification requirements. The statute contains various remedies for violations of the TCPA. See 47 U.S.C. § 227 (1994).

3. *Erienet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 515 (3d Cir. 1998).

4. See *id.* at 520; *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1287-88 (11th Cir. 1998); *Foxhall Realty Law Office, Inc. v. Telecommunications Premium Servs., Ltd.*, 156 F.3d 432, 438 (2d Cir. 1998); *International Science & Tech. Inst., Inc. v. Inacom Comm., Inc.*, 106 F.3d 1146, 1150 (4th Cir. 1997) (stating that “[w]e today reach the somewhat unusual conclusion that state courts have exclusive jurisdiction over a cause of action created by federal law”); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 509 (5th Cir. 1997); *but see Kenro, Inc. v. Fax Daily, Inc.*, 904 F. Supp. 912, 915 (S.D. Ind. 1995), *on reh’g*, 962 F. Supp. 1162, 1172 (S.D. Ind. 1997) (declining to follow *International Science* and holding that federal courts have federal question jurisdiction over TCPA claims

mechanism is a private suit, but the TCPA does not permit an award of attorney fees to the prevailing party, as do most other private attorney general statutes.<sup>5</sup> The TCPA is practically incapable of forming the basis of a class action,<sup>6</sup> even though, in theory, it provides relief for large numbers of victims of identical violations resulting from identical acts by identical actors. In a final and ironic twist of legislative compromise, although the TCPA proscribes a wide range of offensive conduct, Congress intended for private enforcement actions to be brought by *pro se* plaintiffs in small claims court and practically limited enforcement to such tribunals.<sup>7</sup>

Lack of access to federal courts and to the class action form of litigation, the nominal harm and imperfect prosecution (almost exclusively by *pro se* plaintiffs) essentially insures that few TCPA cases will result in reasoned appellate decisions. Moreover, state small claims courts (over which Holmeses, Hands, and Cardozos rarely preside) are poor forums for producing uniform interpretations of federal law. The problem has been exacerbated by a dearth of cogent law review scholarship and analysis to aid construction, producing a body of divergent and conflicting decisions. This Article seeks to promote uniform construction and application of the TCPA.<sup>8</sup>

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under 28 U.S.C. § 1331); *see also Erienet, Inc.*, 156 F.3d at 521 (Alito, J., dissenting). For a more complete exploration of federal jurisdictional question of the TCPA, see Fabian D. Gonell, *Statutory Interpretation of Federal Jurisdictional Statutes: Jurisdiction of the Private Right of Action under the TCPA*, 66 FORDHAM L. REV. 1895 (1998).

5. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7604(d) (1994) (providing litigation costs to any party); Fair Labor Standards Act, 29 U.S.C. § 216(b) (1994); Consumer Credit Protection Act, 15 U.S.C. §§ 1681n(c), 1681o(c) (Supp. II 1996); Cable Communications Policy Act, 47 U.S.C. § 551(f)(2)(C) (1994).

6. Because a telemarketer's defenses generally involve questions particular to each plaintiff (consent, invitation, number of calls, established business relationship, etc.), it is unlikely that any class of recipients of "live" telemarketing calls could meet the commonality requirements of state class action statutes. *See, e.g.*, N.Y. CPLR LAW § 901(2) (McKinney 1999). Although fewer defenses are available for claims based on receipt of unsolicited fax advertisements, class actions for unsolicited faxes have met mixed results. *Compare* Forman v. Data Transfer, Inc., 164 F.R.D. 400 (E.D. Pa. 1995) (denying class certification under FED. R. CIV. P. 23 on the basis that individual questions of consent to receive fax advertisement predominated) *with* Nicholson v. Hooters of Augusta, No. 95-RCCV-616 (Richland Co., Ga. Aug. 26, 1998) (granting motion for class certification where the class excluded those who had affirmatively consented to receipt of such fax advertisements).

7. *See* 137 CONG. REC. 30,821 (1991) (statement of Sen. Hollings) ("Nevertheless, it is my hope that [s]tates will make it as easy as possible for consumers to bring such [TCPA] actions, preferably in small claims court . . . . Small claims court or a similar court would allow the consumer to appear before the court without an attorney."). For a brief exploration of other problems enforcing the TCPA in state small claims courts, see Margaret H. Marr, *Small Claims Court Enforcement of Federal Unsolicited Fax Law* (last modified Jan. 15, 1998) <<http://www.imc.org/imc-spam/smallclaims.html>>.

8. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 812 (1995) (stating that

Because the TCPA does not preempt and Congress expressly intended it to coexist with state telemarketing law, there has been confusion regarding the application of the TCPA to intrastate telemarketing calls and fax advertisements. The analysis has two branches. First, did Congress intend the TCPA to cover intrastate calls? Second, if Congress intended the TCPA to cover intrastate calls, does Congress have the constitutional authority to regulate calls and faxes that are purely intrastate in nature? The answer to both of these questions is an unqualified "yes."

## II. RECENT DECISIONS

*Chair King, Inc. v. Houston Cellular Corp.*,<sup>9</sup> a later vacated unpublished federal district court decision, was the first case to address the question of whether the TCPA applies to intrastate telemarketing activity. That court concluded that "the TCPA only attempts to regulate interstate telemarketing activity,"<sup>10</sup> and "the recipient of an intrastate fax advertisement has no private right of action under the TCPA."<sup>11</sup>

Another federal court considered this question in another unreported case, also later vacated on other grounds, in *Nicholson v. Hooters of Augusta, Inc.*<sup>12</sup> The *Nicholson* court, citing the soon-to-be-vacated<sup>13</sup> *Chair King* decision, also held that "[t]he TCPA regulates only interstate transmissions."<sup>14</sup>

The courts of appeals later vacated both *Chair King* and *Nicholson* for lack of subject matter jurisdiction.<sup>15</sup> Both cases are now proceeding in their respective state courts. Even though vacated, the reasoning and conclusions of these district court decisions refuse to die; they reappear in

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"federal law 'should be the same everywhere' and 'their construction should be uniform'").

9. No. H-95-1066, slip op. (S.D. Tex. 1995), *vacated*, 131 F.3d 507 (5th Cir. 1997).

10. *Id.* at 2.

11. *Id.*

12. *Nicholson v. Hooters of Augusta, Inc.*, No. CV 195-101 (S.D. Ga. Sept. 4, 1996), *vacated*, 136 F.3d 1287 (11th Cir. 1998), *modified*, 140 F.3d 898 (11th Cir. 1998). *Nicholson* originally brought suit in Georgia state court, and the defendant Hooters removed to federal district court. Ultimately, the Eleventh Circuit remanded the case to state court. To date, the case is pending in state court and expected to go to trial in 2000.

13. The court of appeals vacated the district court's decision in *Chair King* on December 15, 1997. *See Chair King*, 131 F.3d at 509.

14. *Nicholson*, slip op. at 9.

15. Both district courts proceeded on the assumption that they had subject matter jurisdiction over the cases arising under the TCPA. During the pendency of both appeals, however, the Fourth Circuit decided *International Science* and provided persuasive authority that federal courts lack subject matter jurisdiction over TCPA cases. On appeal, the courts of appeal vacated both *Chair King* and *Nicholson* for lack of subject matter jurisdiction, following *International Science*, without addressing the lower courts' holding as to application of the TCPA to intrastate calls.

telemarketers' arguments in other TCPA cases,<sup>16</sup> and telemarketers are likely to continue to raise these arguments in the future.

Several subsequent decisions from state courts have also addressed the application of the TCPA to intrastate calls and faxes.<sup>17</sup> In *Stone v. Grossman*,<sup>18</sup> a Florida court initially granted summary judgment to the telemarketer on the ground that the TCPA did not apply to intrastate calls. After the Federal Communications Commission (FCC) submitted an interpretive letter to the court, the court reheard the issue *sua sponte* and vacated the judgment, reinstating the plaintiff's claims under the TCPA.<sup>19</sup> In *Internet America, Inc. v. American Blast Fax, Inc.*,<sup>20</sup> a Texas court concluded that the TCPA "does not apply to exclusively intrastate communications."<sup>21</sup> On rehearing, however, the trial court ordered further discovery to determine if any of the alleged faxes may have been interstate.<sup>22</sup> Most recently, the Georgia state court hearing *Nicholson* on remand denied the defendant's motion to dismiss, holding that the TCPA applies to intrastate faxes.<sup>23</sup> These cases are all still pending as of this writing.

The federal district courts in *Chair King* and *Nicholson* both erroneously held the TCPA applicable only to interstate calls. Both courts failed to consider the TCPA's conforming amendment, which explicitly

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16. For example, the defendant in *Lindberg v. American Blast Fax, Inc.* sought summary judgment on January 28, 1999, citing the vacated *Chair King* decision as applicable law without realizing that the decision had been vacated, albeit on other grounds. See Defendant's Motion for Summary Judgment at 3-4, *Lindberg v. American Blast Fax, Inc.*, No. JS98-00771M (Precinct Two, Dallas Co., Tex.). Similar arguments were made by the defendant in *Nicholson v. Hooters of Augusta*, No. 95-RCCV-616 (Richland Co., Ga. Aug. 26, 1998).

17. Records from telemarketing watchdog groups and consumer organizations such as Private Citizen indicate that several hundred TCPA cases have been initiated since the law went into effect. However, due to the informal and summary nature of the small claims courts where the vast majority of such cases are heard, only a small number of cases have resulted in a formal decision.

18. No. 97-5611 (25) (Broward Co., Fla. Dec. 22, 1998).

19. *See id.*

20. No. 99-01036-L (Dallas D.C. Tex. July 13, 1999).

21. *Id.* at 1 (granting summary judgment on 47 U.S.C. § 227 claims).

22. *See id.*

23. *Nicholson v. Hooters of Augusta*, No. 95-RCCV-616, at 2 (order denying summary judgment at 5, Super. Ct. Richmond Co., Ga. July 13, 1999) ("[S]ections 227 and 152 are clear on their faces that the TCPA can govern interstate or intrastate activities. Accordingly, section 227(b)(1)(C) should be construed to be applicable to both interstate and intrastate activities. . . ."). The state court explicitly considered the federal district court's earlier holding in the same case—that the TCPA does not apply to purely intrastate faxes—and rejected that conclusion as flawed.

provides for application to intrastate calls and faxes.<sup>24</sup> Neither court considered explicit statements of intent in the legislative history,<sup>25</sup> nor did they defer to, or even consider the FCC's interpretation of the statute, which explicitly provides for intrastate application.<sup>26</sup> The *Chair King* court held, in a largely unreasoned two-page decision, that the TCPA did not apply to intrastate calls simply because it "does not state otherwise."<sup>27</sup> This simplistic analysis is flawed for two reasons. First, the conforming amendment included in the statute demonstrates the clear intention of Congress that the TCPA reach intrastate calls.<sup>28</sup> Second, the Communications Act of 1934, as amended (Act)<sup>29</sup> has been found to apply generally to intrastate communications even where Congress does not explicitly mention intrastate communications.<sup>30</sup> Only a breathtaking lack of concern for consistency could require an explicit reference to intrastate calls with respect to the TCPA. The district court in *Nicholson* provided a somewhat more detailed but equally flawed reasoning for its decision. The *Nicholson* court cited *Van Bergen v. Minnesota*<sup>31</sup> in support of the conclusion that the TCPA had been intended to address only interstate violations.<sup>32</sup>

The *Nicholson* court, however, took this statement out of context. In *Van Bergen*, the court was considering possible preemption of a Minnesota "junk fax" statute by the TCPA and stated:

The congressional findings appended to the TCPA state that "[o]ver half the [s]tates now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operation; therefore, [f]ederal law is needed to control residential telemarketing practices." *This finding suggests* that the TCPA was intended not to supplant state law, but to provide

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24. See discussion *infra* Part III.A.

25. See discussion *infra* Part III.D.

26. See discussion *infra* Part III.E.

27. *Chair King v. Houston Cellular Corp.*, No. H-95-1066, slip op. at 2 (S.D. Tex. 1995), *vacated*, 131 F.3d 507 (5th Cir. 1997) ("The statute does not state otherwise and to so hold would controvert constitutional guarantees under the Commerce Clause.").

28. See discussion *infra* Part III.A.

29. ch. 652, 48 Stat. 1064 (codified as amended at scattered sections 47 U.S.C.).

30. See *Benanti v. United States*, 355 U.S. 96, 99 (1957) (holding that section 605 of the Communications Act of 1934 (Act) applies to both intrastate and interstate communications); see also *infra* note 63. Section 223(b) of the Act extends to intrastate as well as interstate communications, even though that section does not specifically refer to intrastate communications)).

31. 59 F.3d 1541 (8th Cir. 1995).

32. See *Nicholson v. Hooters of Augusta, Inc.*, No. CV 195-101, slip op. at 6 (S.D. Ga. Sept. 4, 1996) (noting that "the TCPA was intended not to supplant state law, but to provide interstitial law preventing evasion of state law by calling across state lines").

interstitial law preventing evasion of state law by calling across state lines.<sup>33</sup>

Obviously the TCPA does provide interstitial law; it serves, among other things, as a gap filler by addressing misconduct which crosses state lines that state legislatures may be powerless to proscribe. But, like numerous other federal laws and the Act itself, the TCPA is not limited in its scope to gap filling. For example, while section 223 of the Act provides restrictions on interstate commercial delivery of indecent materials to persons under eighteen years of age,<sup>34</sup> it also applies to intrastate delivery.<sup>35</sup> Similarly, section 225 provides both interstate and intrastate law on telecommunications services for handicapped persons.<sup>36</sup> The federal statute proscribing unauthorized interception of communications, 47 U.S.C. § 605, applies both to interstate and intrastate communications.<sup>37</sup> A finding that the TCPA proscribes interstate misconduct is in no way dispositive of whether it also proscribes the same conduct occurring entirely within the borders of a single state.

### III. CONSTRUCTION

An analysis of the intrastate application of the TCPA requires a review of the statute itself, its legislative history, its construction, and its interpretations by the FCC.

#### A. *The Conforming Amendment*

The statute's conforming amendment presents the clearest evidence that Congress intended the TCPA to reach intrastate calls and faxes. By way of background, an established body of law (including FCC interpretations) limits the application of the Act to interstate and foreign communications.<sup>38</sup> The Eighth Circuit described this restriction as "a *Louisiana* built fence that is hog tight, horse high, and bull strong, preventing the FCC from intruding on the states' intrastate turf."<sup>39</sup>

This body of law, however, is inapplicable to the TCPA since Congress explicitly exempted the TCPA, along with several other sections

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33. *Van Bergen*, 59 F.3d at 1548 (emphasis added).

34. See 47 U.S.C.A. § 223(a)(B)(ii), (b)(2), (d)(1) (West 1998).

35. See Regulations Concerning Indecent Comm. by Tel., *Notice of Proposed Rule Making*, 5 F.C.C.R. 1011, para. 9 (1990).

36. See 47 U.S.C. § 225(a)(1) (Supp. III 1997).

37. See *Benanti v. United States*, 355 U.S. 96 (1957).

38. See 47 U.S.C. § 152 (1994); see, e.g., *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986); but see *Benanti*, 355 U.S. 96.

39. *Iowa Util. Bd. v. FCC*, 120 F.3d 753, 800 (8th Cir. 1997), *rev'd sub nom. AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366 (1999).

of the Act, from being contained within the *Louisiana*-built fence.<sup>40</sup> When Congress amended the Act with the TCPA, Congress also included a section styled as a conforming amendment.<sup>41</sup> It is this conforming amendment that permits the TCPA to apply to intrastate calls and faxes. It reads in its entirety as follows: Section 2(b) of the [Act] (47 U.S.C. 152(b)) is amended by striking “Except as provided” and all that follows through “and subject to the provisions” and inserting “Except as provided in sections 223 through 227, inclusive, and subject to the provisions.”<sup>42</sup>

Congress designed the conforming amendment to add the new telemarketing law (section 227) to the list of sections (47 U.S.C. § 152(b)) expanding the application of the statute not only to interstate telemarketing but also to intrastate activities. After the amendment, the section reads:

(b) Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the [FCC] 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 . . . .<sup>43</sup>

The addition of the TCPA to the list of enumerated exceptions in section 152(b) represents a manifest and implacable determination on the part of Congress to bring intrastate telemarketing misconduct within the ambit of the statute.

### B. *The Savings Clause*

The TCPA does not mention interstate or intrastate calls except in section 227(e), which functions as a savings clause for state laws that are more restrictive of intrastate calls. The TCPA is like many other federal schemes in that it establishes broad minimum standards upon which the several states were free to enhance.<sup>44</sup> The savings clause<sup>45</sup> permits states to

40. 47 U.S.C. § 152(b) (1994) (listing exceptions).

41. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, 105 Stat. 2394, 2401 (1991).

42. *Id.* § 3.

43. 47 U.S.C. § 152(b).

44. *See, e.g.*, Fair Labor Standards Act of 1970, 29 U.S.C.A. § 291 *et seq.* (West 1998); Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.* (West 1999).

45. The savings clause is codified at 47 U.S.C. § 227(e) and provides, in relevant part:

(e) Effect on State law

(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



retain laws restricting intrastate calls that are more restrictive than the TCPA.

The savings clause serves only to preserve more restrictive state laws so that less restrictive state laws will be subject to preemption.<sup>46</sup> Congress was well aware when drafting the TCPA that states had no authority to regulate interstate calls,<sup>47</sup> so any saved (or preempted) state laws could *only* be state laws regarding intrastate calls. Congress manifestly intended, by enacting the TCPA, to create a “single set of ground rules” for “both intrastate and interstate unsolicited calls.”<sup>48</sup> A court’s conclusion that the TCPA applied only to interstate calls would frustrate that intent.

More importantly, state law can only apply to intrastate calls. If the TCPA only applied to interstate calls, there would be no overlap between the TCPA and state law. In that case, the TCPA would not apply to intrastate calls and no need exists to either preempt or save state statutes. Interpreting the TCPA to apply exclusively to interstate calls would make the savings clause mere surplusage.<sup>49</sup>

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prohibits—

- (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
- (B) the use of automatic telephone dialing systems;
- (C) the use of artificial or prerecorded voice messages; or
- (D) the making of telephone solicitations.

47 U.S.C. § 227(e) (1994).

46. *See* FMC Corp. v. Holliday, 498 U.S. 52, 56-57 (1990). “Pre-emption [sic] may be either express or implied, and ‘is compelled whether Congress’[s] command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.’” *Id.* Less restrictive state laws would also be preempted where they conflict with provisions of the TCPA.

47. “States do not have jurisdiction over interstate calls.” S. REP. NO. 102-178, at 3 (1991), *reprinted in* 1991 U.S.C.C.A.N. at 1968, 1970; S. REP. NO. 102-177, at 3 (1991); 137 CONG. REC. 30,821 (1991) (statement of Sen. Hollings) (“The State law does not, and cannot, regulate interstate calls.”); *see also* *Telemarketing/Privacy Issues: Hearings on H.R. 1304 and 1305 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong. 28, 29, 83 (1991), *Telemarketing Practices: Hearings on H.R. 628, 2131, and 2184 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong. 3-4 (1989).

48. 137 CONG. REC. 5304 (daily ed. Mar. 6, 1991) (Statement of Rep. Markey) “The legislation [The Telephone Advertising Consumer Rights Act of 1991, H.R. 1304, 102d Cong.], which covers both intrastate and interstate unsolicited calls, will establish [f]ederal guidelines that will fill the regulatory gap due to differences in [f]ederal and [s]tate telemarketing regulations. This will give advertisers a single set of ground rules and prevent them from falling through the cracks between Federal and State statutes.” *Id.* (emphasis added). *See* discussion *infra* Part III.D.

49. *See* Platt v. Union Pacific R.R. Co., 99 U.S. 48, 58 (1878). “Congress is not to be presumed to have used words for no purpose. . . . [T]he admitted rules of statutory construction declare that a legislature is presumed to have used no superfluous words. Courts are to accord a meaning, if possible, to every word in a statute.” *Id.* (*quoted with*

### C. Rules for Local Calls

Another indication from the TCPA in addressing its application to intrastate calls is the statute's directive to the FCC to promulgate rules to implement the statute.<sup>50</sup> Congress directed the FCC to consider whether the rules it would promulgate under the TCPA should be different for local calls.<sup>51</sup> The explanation for this language is found in the Senate Report:

4. *The reported bill includes language specifically addressing local solicitations.* As part of its rulemaking, the FCC should consider whether local telephone solicitations including those made by small businesses and holders of second-class mail permits, should be able to operate with less burdensome methods and procedures than other telephone solicitations. The FCC should consider the costs of alternative methods and procedures to *local telephone solicitation* and to small businesses. Much telephone solicitation is done nationally or regionally, making it difficult for [s]tate or local bodies to oversee. Some telephone solicitation is, however, done by businesses that serve a single locality. Such local telemarketing, within a metropolitan area or even smaller community, may be subject to local "better business" community standards. Some local businesses such as local grocery stores, local newspapers, and local health maintenance organizations are rooted in the community and responsive to community standards. The FCC should consider the extent and effectiveness of these local regulations in its decisions.<sup>52</sup>

Thus, there was a perceived difference in substance and character between national solicitation calls and local solicitation calls. As a result, Congress delegated to the FCC the task of determining if such "local solicitations" should be treated differently. It is difficult to construe the term local as used here by Congress to wholly exclude intrastate calls. In its rule making, the FCC requested comments on its proposed regulations on telephone solicitations, "whether local or interstate."<sup>53</sup> However, the FCC

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approval in *Bailey v. United States*, 516 U.S. 137 (1995)).

50. See 47 U.S.C. § 227(c)(1) (1994).

51. See 47 U.S.C. § 227(c)(1)(C). "[T]he [FCC] shall initiate a rulemaking proceeding . . . [that] shall . . . (C) consider whether different methods and procedures may apply for *local telephone solicitations*, such as local telephone solicitations of small businesses or holders of second class mail permits." *Id.* (emphasis added). Several industry groups representing entities that solicit on a purely local basis heavily lobbied for this provision. For example, then-Senator Albert Gore specifically mentioned Olan Mills (a photography studio franchise) as his constituent which makes "calls [that] are local in nature, and rarely cross state boundaries" and that this is the "kind of business meant by the committee to be considered under [the local calls exemption] provision." 137 CONG. REC. 30,820 (1991) (Statement of Sen. Gore). Congress and the FCC rejected, although aware of, Senator Gore's urgings that provided additional evidence that Congress intended the TCPA to reach intrastate calls.

52. S. REP. No. 102-177, at 5-6 (1991) (emphasis added).

53. Telephone Consumer Protection Act of 1991, *Notice of Proposed Rulemaking*, 7

did not choose to treat local calls differently from interstate calls. Therefore, the statute's implementing rules, and hence the statute, apply equally to interstate and intrastate calls.

#### *D. Legislative History*

The statute's language itself, especially the conforming amendment, illustrates that Congress intended the TCPA to apply to intrastate calls.<sup>54</sup> The legislative history confirms this interpretation. While there is only sparse history addressing the application of the TCPA to intrastate calls,<sup>55</sup> the House sponsor,<sup>56</sup> Congressman Markey, introduced the bill<sup>57</sup> in the House with the following statement:

The legislation, *which covers both intrastate and interstate unsolicited calls*, will establish [f]ederal guidelines that will fill the regulatory gap due to differences in [f]ederal and [s]tate telemarketing regulations. This will give advertisers a single set of ground rules and prevent them from falling through the cracks between [f]ederal and [s]tate statutes.<sup>58</sup>

Congressman Markey's clear statement and the absence of any contrary statement in the legislative history strongly suggest the application of the TCPA to purely intrastate calls.

#### *E. Administrative Interpretations*

The Supreme Court has repeatedly held that the interpretation of a statute by the administrative agency charged with administering that statute is entitled to great deference.<sup>59</sup> Further, a construing court need only be satisfied that the agency's interpretation is a permissible one under the

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F.C.C.R. 2736, para. 23 (1992).

54. See 47 U.S.C. § 152(b) (1994).

55. For a comprehensive survey of the legislative history of the TCPA in general, see Gonell, *supra* note 4, at 1912-18.

56. See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt.").

57. See The Telephone Advertising Consumer Rights Act of 1991, H.R. 1304, 102d Cong. (1991).

58. 137 CONG. REC. 793 (daily ed. Mar. 6, 1991) (statement of Rep. Markey) (emphasis added).

59. See *Smith v. Robinson*, 468 U.S. 992, 1027 (1984) ("And, of course, the interpretation of the Act by the agency responsible for its enforcement is entitled to great deference."); see also *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations." (footnote omitted)).

statute, even if the agency's interpretation is not the one the construing court would favor absent the administrative view.<sup>60</sup>

A 1993 public notice entitled *Telephone Solicitations, Autodialed and Artificial or Prerecorded Voice Message Telephone Calls, and the Use of Facsimile Machines*<sup>61</sup> contained the first FCC interpretation directly addressing application of the TCPA to intrastate calls and faxes. The FCC answered the question of the TCPA's application to intrastate calls, stating explicitly:

*Yes. FCC rules apply to in-state calls.*

In addition, states may apply their own regulations to in-state calls for the following types of calls if those regulations are more restrictive than FCC rules: (1) calls using autodialers or artificial or prerecorded voice messages, (2) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements, and (3) the making of *telephone solicitations*.<sup>62</sup>

Furthermore, the FCC has cited the TCPA as an example of one section of the Act that "gives the FCC jurisdiction over intrastate telephone solicitations despite the lack of any specific reference to intrastate communications."<sup>63</sup>

The FCC has consistently adhered to this view. As noted,<sup>64</sup> after learning that a Florida state court had granted summary judgment on the purported basis that the TCPA did not apply to intrastate calls,<sup>65</sup> the FCC took the affirmative step of issuing an interpretive letter stating that "the TCPA governs both intrastate and interstate telephone solicitations," citing 47 U.S.C. § 152(b).<sup>66</sup> Following receipt of the FCC's letter, the court sua

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60. "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." See *Chevron USA, Inc.*, 467 U.S. at 843 n.11 (citation omitted). For a discussion of the policy of deference to agency construction, see Denise W. DeFranco, *Chevron and Canons of Statutory Construction*, 58 GEO. WASH. L. REV. 829 (1990).

61. *Consumer Alert*, 8 F.C.C.R. 480 (1993).

62. *Id.* at 481 (emphasis added).

63. Petition of the People of the State of Cal. and the Pub. Util. Comm'n of the State of Cal. to Retain Regulatory Authority over Intrastate Cellular Serv. Rates, *Order on Reconsideration*, 11 F.C.C.R. 796, 810 n.56 (1995) (stating that "section 227 gives the FCC jurisdiction over intrastate telephone solicitations despite the lack of any specific reference to intrastate communications" (citation omitted) (emphasis added)).

64. See *supra* Part II.

65. See *Stone v. Grossman*, No. 97-5611 (25) (Broward County, Fla. Dec. 22, 1998) (order vacating summary judgment).

66. Letter from Jennifer Myers, Staff Attorney, Enforcement Division of the Common Carrier Bureau of the FCC, to Barbara Ranalli, Office of the Honorable George A. Brescher (Nov. 13, 1998) (on file with the *Federal Communications Law Journal*). Courts traditionally give significant deference to such letters. See, e.g., *Coca Cola Co. v. Atchison*,

sponte reconsidered its prior ruling and reinstated the plaintiff's TCPA claim.<sup>67</sup>

#### IV. CONSTITUTIONAL ANALYSIS

While the TCPA by its terms and as a matter of legislative intent applies to intrastate calls, the constitutionality of that application has been questioned. Both the *Chair King* and *Nicholson* federal district courts largely avoided undertaking this analysis, although the district court in *Nicholson* noted that the construction urged by the plaintiff "might cause the TCPA to violate the Commerce Clause."<sup>68</sup> In *Lorillard v. Pons*,<sup>69</sup> the Supreme Court restated the canon of construction that a court should first dispose of all nonconstitutional issues and avoid a constitutional question if another issue is dispositive.<sup>70</sup> This does not mean that a court should favor an interpretation simply to avoid *consideration* of the constitutional question. To favor one possible interpretation over another because one interpretation is unconstitutional, the construing court must first determine that one interpretation actually is unconstitutional and not that it simply *might* be unconstitutional.<sup>71</sup> Invoking the principle that a construing court should choose among alternative interpretations by avoiding the one that is unconstitutional requires first that the avoided interpretation would violate the Constitution. The following analysis shows that there was no need to avoid the question, as Congress had ample authority to exercise its Commerce Clause powers over the telemarketing industry.

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Topeka, and Santa Fe Ry. Co., 608 F.2d 213, 222-23 (5th Cir. 1979) (holding that agency opinion letters "although less authoritative than regulations or formal decisions, are entitled to be 'weighted carefully' and to 'great deference' if they state a reasonable conclusion."); *see also* Blessitt v. Retirement Plan for Employees of Dixie Engine Co., 848 F.2d 1164, 1172 (11th Cir. 1988) (deferring to agency interpretation of regulation in opinion letter); NORMAN J. SINGER, STATES AND STATUTORY CONSTRUCTION § 49.05, at 17 (5th ed. 1992).

67. *See Stone*, No. 97-5611, slip op. at 1. *Stone* is still pending in the Broward County state court.

68. *See Nicholson v. Hooters of Augusta, Inc.*, No. CV 195-101 slip op. at 8-9 (S.D. Ga. Sept. 4, 1996).

69. 434 U.S. 575 (1978).

70. *See id.* at 577.

71. Indeed, had the *Nicholson* court strictly applied *Lorillard*, it would have avoided any constitutional question and disposed of the case solely on its own (erroneous) holding that the Georgia state statute with respect to unsolicited faxes stood as an obstacle to private suits under the TCPA. "By logical extension, if a state has not authorized private civil enforcement of its own telecommunications regulations, a private cause of action may not be brought under the TCPA." *Nicholson*, No. CV 195-101 slip op. at 5.

### A. *Standards for Commerce Clause Review*

The Commerce Clause<sup>72</sup> provides broad powers for Congress to regulate even intrastate matters when those matters involve a sufficient impact on interstate commerce.<sup>73</sup> What is and is not within the reach of Congress's seemingly limitless interstate commerce powers has remained a subject of controversy.<sup>74</sup> In *United States v. Lopez*,<sup>75</sup> the Supreme Court's pendulum began what seems to be a slight backswing toward finding some limits on Congress's power under the Commerce Clause.<sup>76</sup>

Some of the inconsistency in Commerce Clause jurisprudence has resulted from changes in the nature of this country's modes of commerce which directly affect the scope of Congress's powers under the Commerce Clause. This century has seen technological and transportation advances contribute to the nationalization of commerce, which has led to a natural and corresponding expansion of Congress's perceived authority under the Commerce Clause.<sup>77</sup> In spite of that expansion, it is axiomatic that there remains a realm of commerce that is wholly intrastate—independent of the

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72. U.S. CONST. art. I, § 8.

73. *See* *Weiss v. United States*, 308 U.S. 321, 327 (1939) (“And, as Congress has power, when necessary for the protection of interstate commerce, to regulate intrastate transactions, there is no constitutional requirement that the scope of the statute be limited so as to exclude intrastate communications.” (footnote omitted)).

74. *See* *United States v. Lopez*, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring). “The progression of our Commerce Clause cases from *Gibbons* to the present was not marked, however, by a coherent or consistent course of interpretation . . .” *Id.*

75. *See id.* at 549.

76. In *Lopez*, the Court held for the first (and only) time in 60 years, that an act of Congress regulating private persons exceeded the authority granted under the Commerce Clause. *Lopez* hinged on the determination by the Court that the Gun Free Schools Zone Act “is a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.” *Id.* at 561. Since telemarketing is by definition a commercial marketing activity, the TCPA would not likely be susceptible to a *Lopez* challenge. In addition, the decision in *Lopez* has been narrowly interpreted. *See e.g.*, *United States v. Jackson*, 111 F.3d 101, 101 (per curiam) (11th Cir. 1997) (“[W]e have refused to apply *Lopez* broadly in other contexts.”), *cert. denied*, 522 U.S. 878 (1997); *Cheffer v. Reno*, 55 F.3d 1517 (11th Cir. 1995) (holding that the Freedom of Access to Clinic Entrances Act of 1994 was within Congress's Commerce Clause power because providing reproductive services is a commercial activity); *United States v. Genao*, 79 F.3d 1333, 1337 (2d Cir. 1996) (upholding Comprehensive Drug Abuse Prevention and Control Act of 1970 against a *Lopez* challenge, finding narcotics trafficking to be an economic activity with obvious substantial effect on interstate commerce); *United States v. Hampshire*, 95 F.3d 999 (10th Cir. 1996) (upholding constitutionality of the Child Support Recovery Act of 1992 against a *Lopez* challenge), *cert. denied*, 519 U.S. 1084 (1997).

77. *See* *New York v. United States*, 505 U.S. 144 (1992). “The volume of interstate commerce and the range of commonly accepted objects of government regulation have, however, expanded considerably in the last 200 years, and the regulatory authority of Congress has expanded along with them.” *Id.* at 158.

channels and instrumentalities of interstate commerce and without an effect on interstate commerce—sufficient to bring it within the ambit of “commerce.”

Intrastate telemarketing calls and faxes are not in that realm, however. The federal power over interstate commerce is plenary and can reach even intrastate communications.<sup>78</sup>

*B. Channels, Instrumentalities, and the Class of Activities Doctrine*

*Lopez* summarized the three prongs of Congress’s powers over commerce:

Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress’[s] commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*,<sup>79</sup> [sic] those activities that substantially affect interstate commerce.

To appreciate how far these powers reach, consider the Supreme Court’s decisions in *United States v. Sullivan*<sup>80</sup> and *Wickard v. Filburn*.<sup>81</sup> In *Sullivan*, the labeling requirements of the federal Food, Drug, and Cosmetic Act of 1938 were held to apply to a local druggist who obtained a product in bulk and repackaged it for local sale, because the product had at some time in its life traveled in interstate commerce before reaching the druggist.<sup>82</sup> In *Wickard*, a farmer was subject to penalty provisions of the Agricultural Adjustment Act of 1938 for growing wheat in excess of his allotment, even though the wheat was fully consumed by the farmer on his own property and never directly entered the stream of commerce.<sup>83</sup> The Court reasoned that if many farmers undertook such actions, there would be a significant effect on interstate commerce; and thus, the application to the individual farmer was appropriate, even though his individual impact was small and wholly intrastate.<sup>84</sup>

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78. See *Pavlak v. Church*, 727 F.2d 1425, 1427 (9th Cir. 1984). “Federal jurisdiction over purely intrastate communications under the [Act] derives from Congress’[s] plenary power to regulate interstate commerce through regulating the means of such commerce.” *Id.*

79. *Lopez*, 514 U.S. at 558-59.

80. 332 U.S. 689 (1948).

81. 317 U.S. 111 (1942).

82. See *Sullivan*, 332 U.S. at 689.

83. See *Wickard*, 317 U.S. at 128.

84. See *id.* at 128-29. Some authorities believe the Court’s farthest reaching Commerce

Given the logic of cases such as *Sullivan* and *Wickard*, it is difficult to imagine any telephone solicitation that does not satisfy *Lopez*. Telemarketing is itself a commercial activity, and the sophisticated computers, software, and advanced electronic switching equipment used by modern telemarketers are products of interstate commerce. In addition, “[i]t is well established that telephones, even when used intrastate, constitute instrumentalities of interstate commerce.”<sup>85</sup> By definition, the national telecommunications infrastructure is a channel of interstate commerce.<sup>86</sup> This infrastructure also blurs the line between interstate and intrastate calls. Modern telecommunications providers “route” calls via differing paths depending on a number of parameters such as performance and availability.<sup>87</sup> With today’s technology, a straight-line path is neither necessarily the fastest or least expensive routing. A call between two locations within the same state is commonly carried over a route that will cross into another state and then back.<sup>88</sup> Other technologies, such as call

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Clause decisions, such as *Wickard*, should be reexamined. *See, e.g., Lopez*, 514 U.S. at 594-95 (Thomas, J., concurring). However, *Wickard* has not been revisited or disfavored by the Court and remains good law. Most importantly, it was favorably cited in *Lopez*, albeit as “perhaps the most far reaching example of Commerce Clause authority over intrastate activity” that the Court has upheld. *Id.* at 560.

85. *United States v. Weathers*, 169 F.3d 336, 341 (6th Cir. 1999), *cert. denied*, 120 S. Ct. 101 (1999); *see United States v. Gilbert*, 181 F.3d 152, 158 (1st Cir. 1999) (noting that “a telephone is an instrumentality of interstate commerce and this alone is a sufficient basis for jurisdiction based on interstate commerce.”); *United States v. Clayton*, 108 F.3d 1114, 1117 (9th Cir.), *cert. denied*, 118 S. Ct. 233 (1997) (“Telephones are instrumentalities of interstate commerce. As such, they fall under category two of *Lopez*, and no further inquiry is necessary to determine that their regulation . . . is within the Commerce Clause authority.” (citation omitted)); *Pavlak v. Church*, 727 F.2d 1425, 1427 (9th Cir. 1984) (“Since the telephone is an instrumentality of interstate commerce, Congress has plenary power under the Constitution to regulate its use and abuse.” (citation omitted)); *Peavy v. Harman*, 37 F. Supp.2d 495, 519 (N.D. Tex. 1999) (“The telephone is indisputably an instrumentality of interstate commerce. As such, it is subject to federal regulation even when used purely for intrastate purposed.” (citations omitted)).

86. *See Kerbs v. Fall River Indus., Inc.*, 502 F.2d 731, 738 (10th Cir. 1974) (“Both intrastate and interstate telephone communications are part of an aggregate telephonic system as a whole. And as long as the instrumentality itself is an integral part of an interstate system, Congress has power, when necessary for the protection of interstate commerce, to include intrastate activities within its regulatory control.” (citations omitted)); *see also United States v. Kunzman*, 54 F.3d 1522, 1527 (10th Cir. 1995); *Loveridge v. Dreagoux*, 678 F.2d 870, 874 (10th Cir. 1982); *Alley v. Miramon*, 614 F.2d 1372, 1379 (5th Cir. 1980).

87. Such “routing” is similar to the manner in which trucking companies may carry goods between two points within the same state but may travel a route that crosses state lines to avoid delays, congestion, or otherwise undesirable routes, and thus explicitly subjects themselves to interstate trucking regulations.

88. *See, e.g., United States v. Kammersell*, 7 F. Supp.2d 1196, 1200 (D. Utah 1998), *aff’d*, 196 F.3d 1137 (10th Cir. 1999) (finding that a threatening message sent by telephone modem between two computers four miles apart, both located in Utah, traveled an “interstate” path between the sender and recipient); *United States v. Stevens*, 842 F. Supp.



forwarding—where a call to one’s neighbor across the street may actually be carried through another state—contribute to the confusion. For that reason, the general rule has developed, emphasizing the nature of the communication as determinative, rather than the physical location of the facilities used.<sup>89</sup>

Such a technical analysis is unnecessary, however, because the telephone is an instrumentality of interstate commerce; thus, even purely intrastate telemarketing activity can properly be regulated by Congress under its Commerce Clause powers as a class of activity.<sup>90</sup> This class of activities doctrine has sustained congressional regulation of intrastate commercial activities such as loan sharking,<sup>91</sup> intrastate mining,<sup>92</sup> restaurants,<sup>93</sup> hotels,<sup>94</sup> and drug dealing.<sup>95</sup> The vast majority of telemarketing calls are interstate calls.<sup>96</sup> By regulating telemarketing as a class of activity, isolated instances of conduct within the class are consistently regulated despite the intrastate nature of a few specific instances.<sup>97</sup> “Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power ‘to excise, as

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96, 98 (S.D.N.Y. 1994) (paging system constituted interstate commerce even though the paged party was in the same state as the paging party).

89. *See* *United States v. Southwestern Cable Co.*, 392 U.S. 157, 169 (1968) (indicating that the character of the television broadcasting is national, and individual stations operating in a purely intrastate manner are properly within the regulatory authority of the FCC); *see also* *Aquionics Acceptance Corp. v. Kollar*, 503 F.2d 1225, 1228 (6th Cir. 1974) (“It is the character of the instrument used rather than the nature of the call, which determines.”); *New York Tel. Co. v. FCC*, 631 F.2d 1059, 1066 (2d Cir. 1980) (“The key to jurisdiction is the nature of the communication itself rather than the physical location of the technology.”).

90. *See* *Fry v. United States*, 421 U.S. 542, 547 (1975) (“Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the [s]tates or with foreign nations.”); *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942).

91. *See* *Perez v. United States*, 402 U.S. 146 (1971).

92. *See* *Hodel v. Virginia Surface Mining & Reclamation Ass’n., Inc.*, 452 U.S. 264 (1981).

93. *See* *Katzenbach v. McClung*, 379 U.S. 294 (1964).

94. *See* *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

95. *See* *United States v. Genao*, 79 F.3d 1333, 1337 (2d Cir. 1996).

96. *See* S. 1462, *The Automated Telephone Consumer Protection Act of 1991*; S. 1410, *The Telephone Advertising Consumer Protection Act*; and S. 857, *Equal Billing for Long Distance Charges: Hearings on S. 875, 1410, and 1462 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 102d Cong. 11 (1991) (prepared statement of Steven W. Hamm, Administrator of the South Carolina Department of Consumer Affairs) (“The overwhelming majority of [telemarketing] calls are interstate in nature . . .”).

97. *See* *United States v. Lopez*, 514 U.S. 549, 558 (1995) (“[W]here a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.” (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27)).

trivial, individual instances' of the class."<sup>98</sup> Even if the call itself is not an interstate call, it is likely a solicitation for goods or services that have traveled or will travel in interstate commerce. The local nature of some of these goods or services does not prevent Congress from exercising authority over the commercial activity as a whole.<sup>99</sup>

Importantly, an effect on interstate commerce need not be demonstrated.<sup>100</sup> This doctrine moots a construing court's inquiry into the interstate or intrastate nature of a particular call. Such a question, because of the complex routing of calls even between two locations wholly within the same state, is often impossible to answer with any certainty, in spite of the conclusion reached by the *Nicholson* district court.<sup>101</sup>

By logical extension, if intrastate telemarketing calls seeking to sell local products were beyond the reach of Congress's Commerce Clause powers, then that same telemarketer defendant would be equally beyond the reach of the federal minimum wage law, beyond the reach of Occupational Safety and Health Act of 1970<sup>102</sup> and beyond the reach of Employees Retirement and Income Security Act of 1974.<sup>103</sup>

### C. Congressional Findings

The class of activities standard is especially appropriate when considered with the legislative history of the TCPA and Congress's findings on the pervasiveness of telemarketing.<sup>104</sup> Congress apparently considered the total incidence of telemarketing practices on commerce, much as the Court considered total incidence of loan sharking in *Perez v.*

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98. *Perez v. United States*, 402 U.S. 146, 154 (1971) (citation omitted).

99. *See Proyect v. United States*, 101 F.3d 11, 14 (2d Cir. 1996) (per curiam) ("The fact that certain intrastate activities within this class . . . may not actually have a significant effect on interstate commerce is therefore irrelevant." (footnote omitted)); *see also Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc.*, 379 U.S. 241.

100. *See Pavlak v. Church*, 727 F.2d 1425, 1427 (9th Cir. 1984) ("Whether or not there was an effect on interstate commerce is irrelevant. Since the telephone is an instrumentality of interstate commerce, Congress has plenary power under the Constitution to regulate its use and abuse." (citation omitted)); *see also Heart of Atlanta Motel, Inc.*, 379 U.S. at 256; *Hoke & Economides v. United States*, 227 U.S. 308, 320 (1913).

101. *See Nicholson v. Hooters of Augusta, Inc.*, No. CV 195-101, slip op. at 9 (S.D. Ga. Sept. 4, 1996) ("The fax Plaintiff Nicholson received was a purely intrastate transmission. Accordingly, Plaintiff Nicholson has no claim under the TCPA.").

102. 29 U.S.C.A. §§ 651-78 (West 1999).

103. 29 U.S.C.A. §§ 1001-1461 (West 1999).

104. *See Telephone Consumer Protection Act of 1991*, § 2(1), Pub. L. No. 102-243, 105 Stat. 2394 (codified as amended at 47 U.S.C. § 227) ("The use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques.").

*United States*.<sup>105</sup> In addition to finding pervasiveness, Congress has also weighed in on telemarketing's impact on interstate commerce: "The [Senate] Committee [on Commerce, Science, and Transportation] believes that [f]ederal legislation is necessary to protect the public from unsolicited telephone solicitations. These calls can be an invasion of privacy, an impediment to interstate commerce, and a disruption to essential public safety services."<sup>106</sup>

Traditionally, when Congress has determined that an activity affects interstate commerce, the courts only need to inquire whether the finding is rational.<sup>107</sup> "The judicial task is at an end once the court determines that Congress acted rationally in adopting a particular regulatory scheme,"<sup>108</sup> however, such congressional findings are not absolutely dispositive.<sup>109</sup> It is ultimately a judicial, rather than a legislative, question.<sup>110</sup> In practice, however, no modern case involving a federal statute regulating individuals has been invalidated under the Commerce Clause powers when Congress enacted that statute based on congressional findings that the activity sought to be regulated had a sufficient effect on interstate commerce.<sup>111</sup> At a minimum, such findings give a statute "some *extra* leeway"<sup>112</sup> and enable a court "to evaluate the legislative judgment that the activity in question

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105. See *Perez*, 402 U.S. at 152 ("In emphasis of our position that it was the class of *activities* regulated that was the measure, we acknowledged that Congress appropriately considered the 'total incidence' of the practice on commerce." (citation omitted)).

106. S. REP. NO. 102-177, at 9 (1991).

107. See *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 17 (1990) ("We evaluate this claim under the traditional rationality standard of review: we must defer to a congressional finding that a regulated activity affects interstate commerce 'if there is any rational basis for such a finding,' and we must ensure only that the means selected by Congress are 'reasonably adapted to the end permitted by the Constitution.'" (citations omitted)).

108. *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276 (1981).

109. See *id.* at 311 (Rehnquist, J., concurring in judgment). ("[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.").

110. See *United States v. Lopez*, 514 U.S. 549, 557 n.2 (1995) (citing *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 273 (1964) (Black, J., concurring)).

111. When enacted, neither the Gun Free School Zone Act nor its legislative history contained any "express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." *Lopez*, 514 U.S. at 562 (citation omitted). The other modern cases rebuking Congress's regulation of activities under the interstate commerce power all involved application to state sovereigns and not to individuals. See, e.g., *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

112. *Lopez*, 514 U.S. at 617 (Breyer, J., concurring).

substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye.”<sup>113</sup>

Because of Congress’s findings, the TCPA is—at a minimum—entitled to that extra leeway in determining whether there is sufficient impact on interstate commerce. Telemarketing was a \$435 billion industry in 1990.<sup>114</sup> At the time of consideration in 1990, Congress found that more than three hundred thousand solicitors were calling more than eighteen million Americans every day.<sup>115</sup> Congress also cited published studies that show only .1% of the population likes to receive unsolicited calls,<sup>116</sup> and that 75% of people favored restrictions on those calls.<sup>117</sup> Even the telemarketing industry itself published a study showing that 69% of people considered telemarketing an “offensive way of selling things”<sup>118</sup> and 81.3% think it is either an invasion of privacy or a nuisance.<sup>119</sup>

These findings lead to the conclusion that the impact of the telemarketing industry cannot be characterized as wholly intrastate in nature, and a system of regulation imposing nationwide minimum standards appears to have been a rational response by Congress to the demands of the public for at least limited relief from telemarketing calls.

## V. CONCLUSION

The TCPA applies not only to interstate but also to purely intrastate telemarketing calls and faxes. To conclude otherwise would ignore the statute’s conforming amendment, its language with respect to local calls, the FCC’s administrative interpretations, and the clear legislative history. Extensive factual analyses supported congressional findings of telemarketing impact on interstate commerce. TCPA regulation of intrastate telemarketing communications is thus a rational exercise of Congress’s interstate commerce authority under the channels, instrumentalities, and class of activities doctrines.

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113. *Id.* at 563.

114. *See* Telephone Consumer Protection Act of 1991, § 2(4), Pub. L. No. 102-243, 105 Stat. 2394 (codified as amended at 47 U.S.C. § 227).

115. *See id.* § 2(3).

116. *See* S. REP. NO. 102-177, at 9 (1991); *see also* Mark S. Nadel, *Rings of Privacy: Unsolicited Telephone Calls and the Right of Privacy*, 4 YALE J. ON REG. 99, 128 (1986).

117. *See* S. REP. NO. 102-177, at 3.

118. Stephen F. Walker, *Consumer Perceptions of Telemarketing*, TELEMARKETING, Mar. 1991, at 70.

119. *See* Institute for Research in Social Science, *Harris Study No. 912046* (visited Feb. 6, 2000) <[http://www.irss.unc.edu/data\\_archive/pollsearch.html](http://www.irss.unc.edu/data_archive/pollsearch.html)>.