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Supreme Court of Texas.
THE CHAIR KING, INC., et al., Petitioners, v. GTE MOBILNET OF HOUSTON, INC.,
and Chick-Fil-A, Inc., Respondents.
No. 04-0570.

April 14, 2005

Appearances:
Murry B. Cohen, (argued), Akin Gump Strauss Hauer & Feld, LLP, Houston, TX, for Petitioner: GTE Mobilnet of Houston.
Geoffrey H. Bracken, (argued), Gardere Wynne Sewell, LLP, Houston, TX, for Petitioner: Chick-Fil-A, Inc.
Thomas C. Wright, (argued), Wright Brown & Close, LLP, Houston, TX, for Respondent: Jerome Kosoy, M.D.
Chad Michael Forbes, (argued), Gardere Wynne Sewell LLP, Houston, for Respondents: Jerome Kosoy, M.D.; Jeffrey Musker; The Chair King, INC.; Chair King, S.A., INC.; Ford & Associates; Vantage Shoe Warehouse, INC.; Counselor Systems INC.; Pope Escrow Company.

Before:

Chief Justice Wallace B. Jefferson, Justice Don R. Willett, Justice H arriet O'Neill, Justice David Medina, Justice Paul W. Green, Justice N athan L. Hecht, Justice Dale Wainwright did not participate in the decision, Justice Phil Johnson, Justice Scott A. Brister.

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CHIEF JUSTICE JEFFERSON: Please be seated. The court is ready to hear arguments in 04-0570 GTE Mobilnet of Houston, Inc. v. The Chair King, and others.
SPEAKER: May it please the Court. Mr. Cohen and Mr. Bracken will present arguments for the petitioners. Petitioner has reserved five minutes for rebuttal. Mr. Cohen will open with the first ten minutes. Mr. Cohen will present the rebuttal.

ORAL ARGUMENT OF MURRY B. COHEN ON BEHALF OF THE PETITIONER

MR. COHEN: Mr. Chief Justice, may it please the Court. This case is about unsolicited faxes. This is not a case about advertising. It is not even a case about fax advertising, both of which are perfectly

legal activities. Rather it is about the one activity that is prohibited under the Telephone Consumer Protection Act, which is unsolicited faxes. That's the reason we're here today. And the issue on agency is whether GTE Mobilnet of Houston controlled the activity that is critical to agency law, the sending of the unsolicited faxes. A bit about the history of this case. It has a long and tortured history. The plaintiffs lost in many courts before they scored a victory in the 14th Court of Appeals. Their coach brought their court case in the federal district court in Houston which held against them on the basis that the Telephone Consumer Protection Act, the TCPA, applied only to interstate faxes. And these were intrastate faxes. The plaintiffs lost their appeal to the Fifth Circuit which held jurisdiction for such a private cause of action under the act was exclusive from the state, not the federal courts. They then lost in the trial court on a summary judgment rendered by Judge Harvy Blan. He held on three bases that are before this Court today for review for the defendants. First, that no cause of action existed under the TCPA, 'cause Texas had not opted in by passing legislation to commit its citizens to bring such a claim. Second, that such a claim existed only for the sending of interstate faxes and these were intrastate faxes. Third, that the offensive comment, the sending of unsolicited faxes was done by independent contractors, not by GTE Mobilnet.

In this respect, it's important to realize that on this agency issue there are two lines of authority. First, we have that GTE extending out to its independent contractor and independent agent, Mobile Communications, who then hired AdverFax to do its faxing. So, in respect to Mobile Communications, the holding is that GTE could be liable for the acts, not of itself or of its contractor, but for the independent contractor of its independent contractor.

JUSTICE O'NEILL: I didn't look at the contracts that were signed with the AdverFax or the advertisers. Apparently, they don't say anything about their customer base being subscribers or consenting receivers. Is that right?

MR. COHEN: That is right. They signed up, like what you're telling me, the contract, I believe, is simply is a piece of paper on one page that says advertising contract.

JUSTICE: Right.

MR. COHEN: It is pretty illegible in the record. About the only thing you can read is $322.58.

JUSTICE O'NEILL: Right.

MR. COHEN: There's nothing in there about who has the authority to govern solicited versus unsolicited faxes.

JUSTICE O'NEILL: Okay. So let me, let me just ask, I know in the summary judgment record, we've got an affidavit. We've got testimony that says that they only did that. They only sent to subscribers and they made every effort to only send to subscribers. Is there any evidence that -- that was understood between the parties at the time the contract was entered?

MR. COHEN: That that was understood by the parties?

JUSTICE O'NEILL: Yes.

MR. COHEN: There is, your Honor. The affidavit you're talking about is the affidavit that Mr. Chodrow who is the president of AdverFax. And what he said in his affidavit was clients who placed ads, now that would be Mobile Communications with AdverFax, were informed that AdverFax was subscriber-based and would send its ads only to people who requested it. He goes on to say, nobody's an agent for me. I run my business. Once the client approved the ad, it was AdverFax who

decides who will receive the ad.

JUSTICE O'NEILL: Right. But was there any dispute in the testimony as to whether, in fact, that was the case.

MR. COHEN: That affidavit was uncontroverted. It was not disputed by the opposition. Not disputed by affidavit.

JUSTICE O'NEILL: The court of appeals, though, pretty much determined that it was sort of self-serving and therefore, maybe not the type of summary judgment proved that is controvertible. And so therefore, it in itself created the fact issue.

MR. COHEN: That's what it said. It compared it to the case of Anderson v. Sneider. I think that was a mistake by the court of appeals. The affidavit in Anderson v. Sneider is hopelessly inadequate. In effect, it says, we're not liable. Just give us a summary judgment. We didn't cause this. We weren't negligent. We didn't breach the contract. Anyone would recognize that as an inadequate affidavit. Here, what our client, [inaudible] to Mr. Zachorn. Mr. Zachorn said was we didn't send this. Nobody acting on our behalf did. It challenges the English Language Act. I believe is to try to figure out a way to say that better.

JUSTICE MEDINA: But what about by vicarious liability?

MR. COHEN: Let's talk about vicarious liability, Justice Medina. I think that's the biggest flaw in the 14th Court of Appeals' opinion is the discussion of vicarious liability. You will notice, if you look at the 14th Court of Appeals opinion on that subject. Now, this was a long and complicated opinion for which frankly the court deserves a lot of credit. It did a good job in a difficult case. But on the subject of vicarious liability, it erred. The entire discretion of that is about two-thirds of a page long. You would notice it is a Texas common law authority free zone. It doesn't cite any cases from Texas. Instead it cites an FCC regulation. And it cites intermediate courts of appeals opinions from Georgia and from Maryland. I'm not one to disparage decisions of the intermediate courts of appeals. But I think, that is conspicuous in this case. Now what you have here is a court, in about three sentences, takes a provision in an FCC regulation. Notice not a Congressional statute, an FCC regulation, something done by the executive branch and says, this states that people will be liable for whom the faxes are sent will ultimately be liable. Therefore, since Mr. Sacar says, these were sent by our independent contractors, there's per se automatically a fact issue that across the boat prevents summary judgment. Now think about that for just a second. No discussion, State Independent Contractor law. No discussion of Shelby Comm. . [inaudible]. State Farm, [inaudible] today v. Troger. Not a word about control. Just if you use an independent contractor, you can be liable. I respectfully submit that is the opposite of Texas law. If you use an independent contractor in Texas, as in most other states, as a general rule, you're not liable unless there is a fact issue about how much control you exercised over the activity of the independent contractor, the particular activity that injured the plaintiff.

JUSTICE O'NEILL: Do we reach that question if we decide that Texas is an opt in state?

MR. COHEN: No Ma'am. No, Justice. We do not.

JUSTICE O'NEILL: And do we reach the statute of limitations question as to Chick-Fil-A?

MR. COHEN: I don't wanna steal Mr. Bracken's thunder, but I'll say no. Each of these questions is an independent question. It really hit the Tigris and Euphrates restated in federal law. And if GTE Mobilnet prevails on any one of them, it prevails, I believe, in the universal

rendition without discussion of the argument.

JUSTICE: What is determined when you talk about control?

MR. COHEN: The reason I mentioned this is this -- this is what's missing from the 14th Court of Appeals' opinion. What is determined with his answer in the face of [inaudible]. We consider the nature of the matters to which the right of control extends to be determinative. And where should this Court's focus be? The focus should be on whether Exxon had the right to control the alleged security defects that led to [inaudible] injury. Thus, in this case, whether GTE Mobilnet had right to control the faxing defects that led to the plaintiff's injuries.

JUSTICE: And why is that the law?

MR. COHEN: Because, as the Court said in Judell applying the traditional test the right of control over a general operations simply does not answer this question. If anybody missed that point in 1993, it was driven home more recently in 2004, in the recent case of Shell Oil v. Cont. in which this Court stated thru Justice Brister, it is not enough to show that an oil company controlled some security measures if the ones that controlled had nothing to do with the criminal act that ultimately occurred. Thus, I will urge to you, it is not enough that GTE control some advertising or even some faxing measures if the ones in control had nothing to do with the plaintiff's injury.

JUSTICE: That's about ten minutes.

MR. COHEN: That's about ten minutes? And I know that Mr. Bracken is looking at me in [inaudible].

ORAL ARGUMENT OF GEOFFREY H. BRACKEN ON BEHALF OF THE PETITIONER

MR. BRACKEN: Good morning. If this is defined as this is an opt-in state and that you should you don't have to think about the limitations issue.

JUSTICE O'NEILL: Well, wait. Let me ask you a question on that point. I was a bit perplexed by the court of appeals opinion in that it seemed to indicate because the arguments had not been made about the pre-1999 Texas law that somehow we couldn't consider it. And it seems to me, we have to consider it in interpreting what this means for Texas.

MR. BRACKEN: I agree with you, your Honor. Certainly, that's not force that AutoFax [inaudible] what they consider to be the unequivocal language of the statute to rule accordingly. I think from that standpoint, I think it's that black and white with all due respect to Judge Fos . And I think you can look at it and determine what that language means based upon established cases and the statute itself in determining what it means. That language [inaudible] Chik-Fil-A with regard to the limitations issue. And my opposition here before this Court wants to argue that this is simply an announcement for this Court to see what federal limitations or provision applies to a federal law. Well, you can't look at it like that in a vacuum where the very statute that we were talking about says that where procedural laws is in Texas. And remember, of course, that this cause of action can't be brought anywhere else other than the entire state of Texas in our district court system. So, we think the proper analysis is if this Court is persuaded that Texas procedural law applies and it should be based upon the two of you, where you have a situation where you get a federal calling admittedly going to state board, you need to defer to the state

statutes of limitations.

And furthermore, the Callot opinion authored by Judge Grady which talks about the fact that when you have a, which is a tort claim which is -- this is a big thing that we have here. You go with the previous limitations as opposed to the previous limitations. And it's an easy determination before this Court because our opposition never before Judge Brown or at any time before the court of appeals ever argued that four-year Texas residual statute of limitations applied. So, with all due respect we think they're precluded [inaudible] in making that argument. We take the case law is clear that to rule that a four-year federal limitations statute applied would be to emasculate the language that says, if otherwise permitted by the law school rules of the court. Again, the court we're talking about here is the Texas district. We believe that Judge Brown appropriately applied the two-year statute. Judge Fos likewise found there no error. And we ask the Court to not remand this case, but rather find it in favor of Chick-Fil-A on the limitations issue. If there are no other questions.

JUSTICE: Thank you, Counsel.

CHIEF JUSTICE JEFFERSON: I neglected to mention earlier that Justice Wainwright is not sitting in this case. And the Court is ready to hear argument from the respondents.

SPEAKER: May it please the Court. Mr. Wright and Mr. Forbes will present argument for the respondent. Mr. Wright will open the first 15 minutes.

ORAL ARGUMENT OF THOMAS C. WRIGHT FOR THE RESPONDENT

MR. WRIGHT: May it please the Court. Being a recourse, I am going to address the issue that GTE has raised and then leave to Mr. Forbes the two minutes to talk about the statute of limitations. Mr. Cohen criticizes the Court of Appeals for not citing the Texas agency law --

JUSTICE O'NEILL: -- Well, but --

MR. WRIGHT: Yes.

JUSTICE: Let me just ask you, do you agree that if Texas is an opt-in state, that takes care of everything?

MR. WRIGHT: Well, it disposes of this case. And we'll send it to the United States Supreme Court, because this will become the first State that holds that --

JUSTICE O'NEILL: Well, and I wanna ask you about that. How many other states have determined that this, otherwise, permitted language is an opt-out type provision?

MR. WRIGHT: There is about nine other cases that all reject opt-in. And I believe two of the cases and there's two recent cases that I should bring to the Court's attention. The case of Maryland last August and a federal district court case out of Louisiana that I'll get the cite for you in a minute. They both say it's really acknowledgement. Now, acknowledgment is the third alternative that we did not brief in this Court because when we briefed it, we were trying to convince the Court not to take the petition, that the court of appeals was right. And we went under either opt-out or acknowledgement. But the court of appeals discusses the acknowledgement theory. And two recent courts have adopted that. No court except [inaudible] out of the court of appeals, has ever said it has to be opt-in.

JUSTICE O'NEILL: Well, let me ask you, of those that have said

it's opt-out, have there been statutes in the states that dealt with unsolicited junk e-mails or junk faxes?

MR. WRIGHT: The Maryland Court of Appeals, Intermediate Court of Appeals had held and I believe this is cited in the brief, that a prior Maryland statute, in effect, opted out of the later TCPA. But Maryland's Supreme Court, last August, said, no. That's not right. In the first place, this is not an opt-out statute. We did not opt out. This is an acknowledgement statute. Opt out and in fact opt in, create too many constitutional problems, says the Maryland court. Says the Louisiana District Court and the county [inaudible]

JUSTICE O'NEILL: What type of construct did Maryland or did any of these states have to deal with these type of ...?

MR. WRIGHT: Well, they had a statute that was probably similar to Texas statute that outlawed it but did not create a private kind of action, prior to the passage of the TCPA.

JUSTICE O'NEILL: But, do you think that's significant in analyzing this issue? I mean, the court of appeals sort of crossed over that, but it strikes me that if it's unless otherwise whatever the language is --

MR. WRIGHT: Well, it says if otherwise permitted.

JUSTICE O'NEILL: If otherwise permitted. And Texas otherwise permit it. Texas --

MR. WRIGHT: Yes. Texas otherwise permits this by having courts of general jurisdiction that are obliged to automatically to entertain cases under federal statutes.

JUSTICE: No, but Texas, otherwise, specifically permitted, through criminal actions or class C misdemeanor, right?

MR. WRIGHT: Well, if, your Honor, is gonna say that you can opt out prior to the option even being given to you to opt out, I don't think that's, you know -- I don't think that's logical to say that Congress ... The Congress already knew as long as --

JUSTICE O'NEILL: -- Well, it's not so much that you've opted out, it's that you've already crafted a relief mechanism. And so if you've crafted a relief mechanism, that means there'[s no private right of action.

MR. WRIGHT: Well, except that the TCPA says that it preempts any less restrictive state statute, even as it has to do with intrastate faxes. So, you know, to say that Congress went to all of this trouble thinking that nobody was gonna implement it, because 40 states already had some law, that probably, you know, many of them did not create a private cause of action.

JUSTICE O'NEILL: Well, help me with that preemption language. If it preempts, why would they let some states say no. You can't have a private cause of action.

MR. WRIGHT: Well, that's the difficulty with the opt out. My client would win, either under the opt out or the acknowledgement. But to tell you the truth, I think the acknowledgement theory makes more sense across the board. That's what we argued in the court of appeals. And that's what, you know, these more recent cases have adopted and said, you know, we're creating constitutional problems by saying that states can just take themselves out of enforcing this federal statute.

JUSTICE O'NEILL: Well but, you know, only if the states are enforcing it in another way. I mean, they can't ... I would agree that if the states weren't doing anything and there was nothing on the books about it, they couldn't ignore it. But if they've already crafted a remedy of their own, then they're not ignoring a federal piece. I mean --

MR. WRIGHT: Well, they're refusing to enforce a private right of

action that Congress expressively created.

JUSTICE O'NEILL: Because they've otherwise provided.

MR. WRIGHT: Well, it's -- otherwise, I don't think it's otherwise providing to say, no, you can't do it.

JUSTICE O'NEILL: But, what's so unusual about that? I mean, the Congress just said create federal causes of action, so you go to federal court with these. That's not a problem. It's not a constitutional issue.

MR. WRIGHT: Well, here, the statute has been interpreted by federal courts to divest federal courts of jurisdiction. So that now, what GTE is arguing is that Congress created a private cause of action that could be brought nowhere until some state decided to opt in. So that's the position they find themselves in.

JUSTICE: Now, what's this vicarious liability issue that you were gonna talk about?

MR. WRIGHT: Well, I wanna talk about that and I appreciate the question. This is a federal statute. Whether we ever get to Texas law, vicarious liability is a big question. Congress and the United States Supreme Court have empowered the FCC, the GTE [inaudible], to interpret these statutes and enforce it. It's right there in the statute. The Supreme Court has said, and we cited the Meat case in our brief, that, you know, no matter what the rule is somewhere else, in the federal government, when an agency is empowered to interpret and enforce its statute, its interpretations are given great weight. In fact, they're given controlling weight unless the court finds it's inconsistent with the statute. So, when the FCC says the people on whose behalf the fax was sent are those who are liable, that has got to be given weight and that's exactly what the court of appeals did. But if we get to Texas law, the record, I think, has been grossly underestimated. Mr. Sacar's affidavit says these faxes were sent by their agents. You call them independent agents. That's sent by their agents. Their contract, GTE's contract with Mobilnet, requires GTE approval in advance of advertisement. And that's what they got. There is a document in the case, the preapproval form that was sent from Mobil to GTE Mobilnet.

JUSTICE: Didn't that same memo prohibit representatives from advertising via fax?

MR. WRIGHT: That's a different memo. There is a memo that says that, and yet, even after that memo, GTE expressly authorized, with its signature, and paid for advertisements from AdverFax. There are invoices in the file in the summary judgement record, checks by GTE directly to AdverFax. And GTE's own admissions in this case say and admit that these ad agencies had GTE's permission and authority to send the faxes. There's a question about, you know, whether they were told this was just subscriber only. Our affidavits, our client's affidavits contradict that because we got faxes from GTE. And we did not consent. And we were not subscribers. So for them to say that, oh, this was just far removed and we didn't know anything about that is not only contrary to the statutory intent, as found by every case that has addressed this, it's contrary to Texas Agency Law. You know, we keep going back and forth between independent contractor and agencies. They are an agent that sign an agency agreement. Mr. Sacar says, they are agents. An agent can bind his principal if he is acting within the scope of his authority. They were expressly authorized to send faxes. They send the fax to somebody that's unauthorized. Are they liable? If you hire a driver, and the driver is your agent, and you tell him not to run red lights, and he runs a red light. You can always say that I'm not gonna do that. Is the company liable? Yes. This is the common principle of

agency law. These cases you're talking about, Wolfe and Trevor about a professional being able to exercise their own professional judgment, a doctor, a lawyer. That's not what we're talking about here. The very affidavit that Mr. [inaudible] was talking about said, the customer, GTE, had to choose where these faxes were going. The zone that controls the contents, that controls the time or the date, when they were gonna be sent, how often they were gonna be sent. And AdverFax's own advertisements to get customers like GTE says, look, you know, this is a great way to send advertisements out. It costs 2 or 3 cents a page or a piece, rather than, you know, sending a mail in.

JUSTICE: Well, but on your ... let's take your chauffeur analogy. If it's true, if the chauffeur ran a stop sign that would probably be within the scope of the agency. But if the chauffeur loaded the trunk up with bombs and blew up the World Trade Center that would probably not be within the scope of the agency. So there are limits. Only so many intentional acts this agent could do, for which the principal would be liable.

MR. WRIGHT: Well, it doesn't matter whether the sending of the fax is intentional or not --

JUSTICE: Well, you don't send fax by accidents. But you intentionally send them. And you know whether you have authority to send them to those people or not.

MR. WRIGHT: Well, that's what I think may be in dispute. Because they got this massive computer database of thousands and thousands of numbers. And they say, you know, if you looked through the record of about how they compiled a list over time, some of this, before the TCPA, they said they had these people. They also say when people called and said, we don't wanna be on your list, they took them off, which indicates that they had people on there that didn't really wanna be on there. So, I think the intentionality is not really an issue. It's a threshold. If we can prove GTE intentionally sent this to people who didn't want it, we get $1500 a fax and not $500. That's what's the statute says. But I think that, you know, under the Celtic Life case which we've quoted, an agent is normally responsible. It can -- a principal that is, is normally responsible for the conduct of the agent within the scope of their duties. I think that, you know, as I said, this accounting outsourcing case is 329F7789, I believe that's cited in our petition. All of the cases, in fact, on all of their points, are against them. They come here without case authority except for the Four Board case. They come here without the support of anything the FCC has said. The FCC is with us on interstate, intrastate. The FCC says, the cause of action can be brought right away unless the state has prohibited it. So, that would indicate an opt out. The FCC, as I've noticed, or noted has said that the person on whose behalf the fax is sent is liable. So, with due respect, I think, the court of appeals got it right as far as it went on GTE's points. We ask this Court to affirm that in part. And if there are no questions on these issues, I'll relinquish some more time to Mr. Forbes to address the statute of limitations. Thank you.

ORAL ARGUMENT OF CHAD MICHAEL FORBES ON BEHALF OF THE RESPONDENT

MR. FORBES: May it please the Court. The Congress enacted Section 1658, the four-year default limitations period, to provide a uniform

four-year statute of limitations for all federal actions that it enacted after 1991 that did not contain an express limitations period. And the TCPA meets all of this criteria. The only reason that Congress put the, except as provided, except as otherwise provided by law exemption into Section 1658 is because it thought that maybe in the future Congress itself may want to pass a -- a civil action that contains a different limitations period. It did not put that language in the statute as Chick-Fil-A argues to revise the very practice that it said, that it meant to eliminate by that statute which was to -- which was borrowing state law for federal actions. There's numerous reasons why the court of appeals was wrong on this. The first, the easiest reason to look at is neither the TCPA or the Texas law provides otherwise. Under the exception in Section 1658, the TCPA has no express limitations period. And, that's likely because Congress recognized that just a year earlier, they provided a four-year default for all federal claims. Texas law did not provide any specific limitations period for the TCPA. Nothing in the legislative history that TCPA says that Congress meant for this ambiguous language if otherwise permitted by the laws or rules of court of a state meant to extend that, so that states could create their own limitations provision.

The only mention in the legislative history was, that states were allowed to control and administer these claims by venue rules and by jurisdictional rules. Hence, under -- if you look at it under that analysis that -- that these states can only control the venue and jurisdictional rules, this case is no different from the Jones case . The United States Supreme Court, in Jones v. Donnelly , applied Section 1658 to the Civil Rights Act of 1991. And the only difference between that case and the TCPA is that states have exclusive jurisdiction. But other than that, there is no difference. And that exclusive jurisdiction only, you know, does not take -- does not give the states the right to set limitations periods. All that does is give them the right to administer these claims where there have been new jurisdictional rules. Chick-Fil-A makes the point that, well these -- these cases can or cannot end up in a federal court. In fact, the federal district courts are already starting to accept these cases under the first new jurisdiction. I've cited those in my brief. So, if we go to Chick-Fil-A's position then we're brought right back to the decision that -- that Congress meant to eliminate, which was applying state law limitations to these federal actions. I notice that my green light is up. And I think that's for the five minutes on time, so, I'll just continue to speak.

JUSTICE O'NEILL: Are you, or can you speak to the Octen Octatic Knowledgement argument?

MR. FORBES: Sure, I can, your Honor.

JUSTICE O'NEILL: Okay. Because I -- I feel like I may be missing something here. It -- it seems that Congress intended to allow state courts to bring suit if the fax is more interstate, as well. Because they had not been able to do that before?

MR. FORBES: I agree.

JUSTICE O'NEILL: Why would it not be reasonable interpretation to look at this language. A person or entity may, if otherwise permitted by the laws of the state. Well, Texas did not otherwise permit. Because Texas didn't have a proper right of action. Texas dealt with it by criminal law statute. So, Texas did not otherwise permit. So, why couldn't you interpret this as Congress' intent if the state just decided to allow private cause of action, we're going to let them go for interstate, as well? If they've affirmatively made a decision not

to allow a proper right of action, they don't need this. If they've done nothing, then it would be -- there's nothing to prohibit. And they would be otherwise permitted because there's nothing there to hinder it. Why -- why would that not be a plain language interpretation?

MR. FORBES: I -- I think it's, it's a reasonable interpretation except for the fact that all, but 40 of the states had already passed the legislation trying to regulate these faxes. They -- all the states hated this. Congress hated the -- the Jones faxes. The states hated it. So --

JUSTICE O'NEILL: Did - did most of the states do it through criminal or civil?

MR. FORBES: I don't know how the answer to that, your Honor.

JUSTICE O'NEILL: Well, but that's -- wouldn't that be critical, because if they allowed a private right of action civilly, then this would do just what the statute intended to do. That is, allow them to pursue civilly interstate. But if the state had chosen to do it criminally, then it did not otherwise permit a private right of action. And, we therefore have to opt in.

MR. FORBES: I see your point. I don't know how many states had civil -- had past civil legislation at that time. I believe that most of them have. And regardless of the point whether it's criminal or civil, they're trying to regulate these interstate. They needed up for Congress. Go ahead.

JUSTICE O'NEILL: -- I mean, I'm not -- I can see that, too. It could be -- it would make perfect sense to me if -- if they have done that civilly. They wouldn't then need to opt in after this because this just gives them that supplement. But if they ... and if they hadn't done anything at all, that this would say, there's really nothing to stand in the way, it's otherwise permitted because there's nothing dealing with it at state level. But there's a criminal enforcement phase, then a proper right of action is not otherwise permitted. Therefore, you need to opt in to get this federal supplement.

MR. FORBES: Well if there's only a criminal, I believe there would be a proper right of action because Congress may pass a TCPA then they meant it to be immediately enforceable. And the FCC has actually stated that. And as Mr. Wright said, they are authoritative on this issue. The question was asked for -- I don't know. The question was asked but they said a person, as soon as the TCPA is passed, they've immediately forcible actions at court. So, whether or not the 40 states had gone criminal or civil, they needed help with the interstate regulation. In fact [inaudible]

JUSTICE O'NEILL: -- If all -- If all of this language meant was you have state courts, they're open, and you can go in to state courts, why would you need this because everybody's got state courts and, in appropriate courts of that state to bring the federal action? What -- what does this language mean?

MR. FORBES: The if otherwise permitted by the laws or rules of court of a state and bring an appropriate -- bring an appropriate court of that state, I believe all those -- those addressed different concepts. I mean, they address venue and jurisdictional laws. I -- I felt, you know, the Congress wrote that in there. I don't think we have to say that it would be superfluous or redundant just because they put that language in there. Again, I mean, they were -- they were just trying to be clear as far as I'm concerned, about the acknowledgement position. And, you know, if -- if the jurisdictional laws and rules of court on venue rules, permits you to do it, then you could bring it in an appropriate court of that state which would presumably mean --

actually that would probably mean the jurisdictional rules versus the laws and rules of court on venue rules and personal jurisdictional rules.

JUSTICE O'NEILL: So, you would say, it doesn't mean the courts, the state courts can set how they want to prosecute? If they've made no decision, this gives them an avenue for relief. But if they've decided, we only want to do these criminally. We only want to authorize the AG. We don't want to flood our courts with these cases. The state could not choose to do that?

MR. FORBES: They couldn't if the acknowledgement position was taken. They could if the opt out, yes. But, you know, the state court can refuse civil rights actions. They can't refuse under criminal law. So, the TCPA is no different. The only reason the language is inserted is to make sure that everyone knew that they weren't encroaching on the state's sovereign right to run their courts. That's in the legislative history. Consider the [inaudible] that.

MARSHALL: Any further questions? Thank you, Counsel.

REBUTTAL ARGUMENT OF MURRY B. COHEN ON BEHALF OF THE PETITIONER

MR. COHEN: May it please the Court. As you point out, Texas already has a procedure in place, had it in place before the TCPA. It was in the criminal system that people are entitled to bring this public and not private cause of action where the 252 district attorneys of the state.

JUSTICE: Would the -- the ruling you seek be consistent around the country with what other courts have done or not?

MR. COHEN: An opt-in ruling would not be consistent. At least, I can see that that is a minority position. The courts are split on it and the Autoflex case is the major proposition in favor about it. So, it would not be --

JUSTICE O'NEILL: Well --

MR. COHEN: -- consistent with all the other courts who have done it.

JUSTICE O'NEILL: It seems to me, of course, I haven't read the cases but it seems like they analyze the opt-in/opt-out acknowledgement just based on this language alone, without looking at what the state already had in place?

MR. COHEN: I cannot argue with that. I would like to point out that it was specifically addressed by Counsel a moment ago that an opt-in provision would not be consistent with an acknowledgement position taken by the federal courts for the Middle District of Louisiana. I respectfully disagree with that. The acknowledgement position is, as I understand it, it's between the opt-in and the opt-out position. And may be a position that says that states generally have the right to structure their own court systems according to their own procedural rules. That's just it. [inaudible].

JUSTICE O'NEILL: Well, and that's why it seems odd to me they'd ignore what a state has done in deciding what this language means because if -- if ... is there any indication -- I don't know if I can say it, like I said a minute ago, but is there any indication that -- that Congress did intend that the states got a proper right of action we'd wanna expand it. If they don't, then -- then this creates it. But if they -- if they don't permit a private cause of action because

they've crafted a, a criminal remedy, then this was not intended to stand in the way?

MR. COHEN: Your Honor, I'll try to answer that by saying that if the Congress intended that everybody was in, unless they opted out, all they had to say was unless otherwise prohibited by state law instead of if permitted by appropriate state court rule or law. I think the meaning of those words would be clear than any more with one case, the onus is on the legislature to act affirmatively to get in to the regime. And the other is that often to get out of the regime.

I'd like to make one observation on the subject of interstate versus intrastate. One question not answered in the briefs of the plaintiffs' argument today is why would Congress spend one minute, given the state's control over interstate and, excuse me -- intrastate faxes. It is undisputed that at least since 1934, under the FCC Act, the Act [inaudible] today, that it applies to interstate. It reserves intrastate communications to control of the state courts unless specifically otherwise provided. Although, they say there is a broad provision to the contrary, I ask the Court to please note Section 152-B of the Federal Communications Act. That's the part that was added when they added the amendments including 227, which is the Consumer Protection Act and the language in Section 227-D and E which says that state law is preserved except for the technical and procedural standards in Section 227D, governing all fax communications.

I'll close with this observation. I know that Chief Justice Jefferson has recently addressed the legislature and the state of the judiciary about the issue of judicial pay. And I'll simply say to the state of our law now is that our state courts are in charge of enforcing exclusively jurisdiction, with exclusive jurisdiction of the federal causes of action. In doing so, under law dictated not by its own precedents, but by the -- not even by Congress but on the rule of the FCC, this places all state agency law, and truly, you already are federal judges. And I think a great case would be made in the legislature IF YOU raise your point to the level of those words.

CHIEF JUSTICE JEFFERSON: Any further questions?

MR. COHEN: We respectfully ask the Court to reverse the judgment of the court of appeals. [inaudible]

CHIEF JUSTICE JEFFERSON: Thank you, Counsel. The cause is submitted. That concludes all oral argument today. And the marshall will now adjourn the Court.

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