

No.

**IN THE
SUPREME COURT OF CALIFORNIA**

MARK FERGUSON, on behalf of himself and all others
similarly situated,

Plaintiff/Appellant,

vs.

FRIENDFINDER, INC., ANDREW B. CONRU, CONRU
INTERACTIVE, INC., et. al.,

Defendants/Respondents.

After a Decision by the Court of Appeal

First Appellate District

PETITION FOR REVIEW

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
ISSUE PRESENTED	1
WHY REVIEW SHOULD BE GRANTED	2
BACKGROUND	3
A. The Complaint and Proceedings Below	3
B. The Statute	4
C. The Internet	6
LEGAL DISCUSSION.....	7
 BUSINESS & PROFESSIONS CODE SECTION 17538.4 UNCONSTITUTIONALLY REGULATES COMMERCE OUTSIDE CALIFORNIA AND, IN COMBINATION WITH SIMILAR STATUTES ACTUALLY OR POTENTIALLY ENACTED BY OTHER STATES, THREATENS TO BURDEN INTERSTATE COMMERCE ON THE INTERNET WITH PARALYZING INCONSISTENT REQUIREMENTS. 	
CONCLUSION	13
DECISION OF THE COURT OF APPEAL ATTACHED	
PROOF OF SERVICE ATTACHED	

TABLE OF AUTHORITIES

Constitutional Provision

United States Constitution, art 1, § 8..... 8

Cases

American Libraries Association v. Pataki (S.D.N.Y. 1997) 969
F.Supp. 160 7

Bancroft & Masters, Inc. v. Augusta National, Inc. (9th
Cir. 2000) 223 F.3d 1082 12

Bibb v. Navajo Freight Lines, Inc. (1959) 359 U.S. 520..... 8

City of Oakland v. Oakland Raiders (1985) 174 Cal.App.3d 414,
418 13

Digital Equipment Corp. v. AltaVista Tech., Inc. (D.
Mass. 1997) 960 F.Supp. 456..... 7

Edgar v. MITE Corp. (1982) 457 U.S. 624 10

Gibbons v. Ogden (1824) 22 U.S. (1 Wheat.) 1 8

Healy v. The Beer Institute (1989) 491 U.S. 324 9-11

NCAA v. Miller (9th Cir. 1993) 10 F.3d 633 11

Partree v. San Diego Chargers Football Co. (1983) 34 Cal.3d 378,
384 13

Reno v. American Civil Liberties Union (1997) 521 U.S. 844..... 6, 7

Southern Pacific Co. v. Arizona (1945) 325 U.S. 761 8

State v. Heckel (Wash. 2001) 24 P.3d 404 12

Wabash, St. L. & P. Ry. Co. v. Illinois (1886) 118 U.S. 557 8

Statutes

Business & Professions Code §§ 17200 <i>et seq.</i>	4
Business & Professions Code § 17500.....	4
Business & Professions Code § 17538.4.....	passim
Business & Professions Code § 17538.4(d).....	12
Rev. Code of Wash. 19.190.010.....	12

Other Authorities

Judicial Council Comment to Code of Civil Procedure § 410.10 (West’s Annotated Codes)	12
Note, " <i>Who Controls the Internet? States' Rights and the Reawakening of the Dormant Commerce Clause</i> ," 73 So.Cal.L.Rev. 1424 (2000)	9

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ISSUE PRESENTED

Does Business & Professions Code § 17538.4, which prescribes the exact content and positioning of information in unsolicited e-mail advertisements, including mandatory symbols at the beginning of the single short "subject line" and mandatory information in the "first text in the body," violate the Dormant Commerce Clause of the United States Constitution because it has practical effects of regulating such e-mail advertisements nationally and of actually and potentially conflicting with statutes enacted by other States that impose similar requirements but that differ in detail?

WHY REVIEW SHOULD BE GRANTED

State laws affecting interstate commerce must comply with the Commerce Clause of the United States Constitution, which, in its "Dormant" aspect, prohibits a State from regulating commerce outside its borders or subjecting interstate commerce to potentially paralyzing inconsistent obligations. The Dormant Commerce Clause limitation on State regulation is crucially important when the Internet is involved because of the Internet's instantaneous national reach and the absence of geographical identification of participants in Internet communications. In 1998, the legislature amended Business and Professions Code § 17538.4¹ (that formerly dealt only with facsimile transmissions) to regulate unsolicited e-mail advertising without due regard for the Dormant Commerce Clause and the statute is facially unconstitutional.

Petitioners have been sued in a civil action for allegedly failing to comply with the mandates of § 17538.4 that require certain specific information in the single short "subject line" of unsolicited e-mail advertising and other specific information in the "first text in the body of the message." The statute contains no practical geographical constraints on its application.

¹ Unless otherwise indicated, all further statutory references are to the Business and Professions Code.

Despite accusatory language in the opening sentence in the decision of the Court of Appeal (p. 1 of the "slip opinion," attached hereto), there was nothing "deceptive or misleading" about defendants' alleged e-mail advertisements. Defendants are not charged with having done anything other than sending unsolicited e-mail advertisements that failed to comply with § 17538.4.

The Dormant Commerce Clause is a judicially-interpreted limitation on state legislation, but the decision of the Court of Appeal, certified for publication in pertinent part, fails to provide the needed guidance. The Court of Appeal decision confused the proper standard for review of the statute with irrelevant standards; it analogized, without analysis, § 17538.4 to other California statutes, inherently geographically-specific, that prohibit sexual predators from using the Internet to make contact with their victims and to a Washington statute that incorporates appropriate geographical constraints; and it subliminally read into § 17538.4 a fallacious geographical limitation.

This Court should provide the legislature and the lower courts with an interpretation of the Dormant Commerce Clause applicable to Internet legislation. California is at the center of Internet development and a ruling by this Court will resound throughout the nation. This case provides an ideal vehicle for such a determination.

BACKGROUND

A. The Complaint and Proceedings Below.

Plaintiff Mark Ferguson, on behalf of himself and an alleged class and pursuant to the provisions of §§ 17200 *et seq.* (Unfair Competition Law) and § 17500 (Unlawful Advertising) filed this action against an Internet business, Friendfinder, Inc. and its principal Andrew B. Conru (plus Conru's business corporation) alleging that defendants sent "unsolicited advertising by means of Internet email." The central allegation of plaintiff's operative First Amended Complaint alleged that:

"Defendants' email advertisements violate Business and Professions Code section 17538.4 for the following reasons: the subject lines of the email messages failed to begin with the characters "ADV:"; the first line of the email messages failed to contain information about how recipients could have their email addresses removed from further advertising campaigns; the email messages failed to provide a valid return email address to which Plaintiffs could respond; and the headers of the email messages were altered to mask the identity of the sender."²

The Superior Court of San Francisco County sustained defendants' demurrer without leave to amend. In a decision filed on January 2, 2002, the First District reversed and remanded.

B. The Statute.

² Plaintiff also alleged a cause of action for trespass to chattels. In an unpublished portion of its opinion, that the Court of Appeal re-instated that cause of action based upon a contention in plaintiff's appellate brief that downloading and deleting unwanted e-mail "causes physical damage to a computer system." See the opinion of the Court of Appeal at 17.

Section 17538.4 provides in pertinent part (emphasis added to identify the language at issue herein):

(a) ***No person or entity conducting business in this state*** shall ... electronically mail (e-mail) or cause to be e-mailed, documents consisting of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit unless:

...

(2) In the case of e-mail, that person or entity establishes a toll-free telephone number or valid sender operated return e-mail address that the recipient of the unsolicited documents may call or e-mail to notify the sender not to e-mail any further unsolicited documents.

(b) All unsolicited ... e-mail documents subject to this section shall include a statement informing the recipient of the ... valid return address to which the recipient may ... e-mail... notifying the sender not to ... e-mail any further unsolicited documents to the ... e-mail address, or addresses, specified by the recipient.

...In the case of the e-mail, the statement shall be ***the first text of the body of the message*** and shall be of the same size as the majority of the text of the message.

(c) Upon notification by a recipient of his or her request not to receive any further unsolicited ... e-mailed documents, no person or entity conducting business in this state shall ... e-mail or cause to be e-mailed any unsolicited documents to that recipient.

(d) ***In the case of e-mail, this section shall apply when the unsolicited e-mailed documents are delivered to a California resident via an electronic mail service provider's service or equipment located in this state. For these purposes "electronic mail service provider" means any business or organization qualified to do business in this state that provides individuals, corporations, or other entities the ability to send or receive electronic mail through equipment located in this state and that is an intermediary in sending or receiving electronic mail.***

(e) As used in this section, "unsolicited e-mailed documents" means any e-mailed document or documents consisting of

advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit that meet both of the following requirements:

(1) The documents are addressed to a recipient with whom the initiator does not have an existing business or personal relationship.

(2) The documents are not sent at the request of, or with the express consent of, the recipient.

...

(g) In the case of e-mail that consists of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit, ***the subject line of each and every message shall include "ADV:" as the first four characters.*** If these messages contain information that consists of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit, that may only be viewed, purchased, rented, leased, or held in possession by an individual 18 years of age and older, the subject line of each and every message shall include "ADV:ADLT" as the first eight characters.

C. The Internet.

Although the Internet became available to consumers only during the 1990's, its novel features have already been recognized by the nation's courts. Technology has created:

“a unique medium — known to its users as ‘cyberspace’ — located in no particular geographical location, but available to anyone, anywhere in the world, with access to the Internet.” (*Reno v. American Civil Liberties Union* (1997) 521 U.S. 844, 851.)

”To paraphrase Gertrude Stein, as far as the Internet is concerned, not only is there perhaps ‘no there there,’ the ‘there’ is everywhere where there is Internet access.” (*Digital Equipment Corp. v. AltaVista Tech., Inc.* (D. Mass. 1997) 960 F.Supp. 456, 462.)

“Several major national ‘online services’ such as America Online, CompuServe, the Microsoft Network, and Prodigy offer access.” (*Reno v. ACLU*, supra at 521 U.S. 850.) There is no centralized point from which services can be blocked. (*Id.* at 853.)

In *American Libraries Association v. Pataki* (S.D.N.Y. 1997) 969 F.Supp. 160, the court invoked the dormant Commerce Clause and struck down a New York Penal Law section that prohibited an individual from using a computer communication system to send images depicting nudity or sexual conduct to a minor.

"The conclusion that the Act must apply to interstate as well as intrastate communications receives perhaps its strongest support from the nature of the Internet itself. The Internet is wholly insensitive to geographical distinctions. In almost every case, users of the Internet neither know nor care about the physical location of the Internet resources they access. Internet protocols were designed to ignore rather than document geographic locations." (969 F.Supp. at 170.)

"Even in the context of e-mail, ... a message from one New Yorker to another New Yorker may well pass through a number of states en route ... Thus, a message from an Internet user sitting at a computer in New York may travel via one or more states before reaching a recipient who is also sitting at a terminal in New York" (*Id.* at 171.)

LEGAL DISCUSSION

BUSINESS & PROFESSIONS CODE SECTION 17538.4 UNCONSTITUTIONALLY REGULATES COMMERCE OUTSIDE CALIFORNIA AND, IN COMBINATION WITH SIMILAR STATUTES ACTUALLY OR POTENTIALLY ENACTED BY OTHER STATES, THREATENS TO BURDEN INTERSTATE COMMERCE ON THE INTERNET WITH PARALYZING INCONSISTENT REQUIREMENTS.

The United States Constitution grants Congress the power "To regulate Commerce ... among the several States." (Art 1, § 8.) Beginning with *Gibbons v. Ogden* (1824) 22 U.S. (1 Wheat.) 1, which struck down a law granting state citizens a monopoly over navigation of New York waters, the Supreme Court has held that this power implies restrictions on the authority of local governments to enact legislation regulating interstate commerce. These restrictions are collectively called the Dormant Commerce Clause which as been applied to invalidate state railroad rate legislation (*Wabash, St. L. & P. Ry. Co. v. Illinois* (1886) 118 U.S. 557), limits on the length of trains (*Southern Pacific Co. v. Arizona* (1945) 325 U.S. 761) and prescriptions about the size and shape of mudflaps on trucks (*Bibb v. Navajo Freight Lines, Inc.* (1959) 359 U.S. 520).

The Dormant Commerce Clause performs a *function* (maintaining the flow of interstate commerce) rather than stating a

doctrine. As a consequence, there are a variety of rationales that have been applied.³

In its decision, the Court of Appeal set up and knocked down straw target rationales that are not involved in this case, such as the rationale that prohibits discrimination against out-of-state actors (Court of Appeal opinion at 6) and the rationale that weighs the local benefit against the burden on interstate commerce (*Id.* at 12-15). The problem with § 17538.4 is a different one, namely that it fails to incorporate necessary geographical limitations and regulates commerce taking place entirely outside California. Such failures make the present statute constitutionally infirm.

The applicable principles were stated in the *Healy v. The Beer Institute* (1989) 491 U.S. 324, 336-337:

³ Thus, one commentator concluded that "there is no one static constitutional analysis that provides a simple solution." Note, "*Who Controls the Internet? States' Rights and the Reawakening of the Dormant Commerce Clause*," 73 So. Cal. L. Rev. 1424, 1431 (2000).

"Taken together, our cases concerning the extra-territorial effects of state economic regulation stand at a minimum for the following propositions: First, the 'Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State,' *Edgar v. MITE Corp.*, 457 U.S. 624, 642-643 (1982) (plurality opinion); ... Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. ***The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. ... Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation.*** Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." (Emphasis added.)

In enacting § 17538.4, the legislature attempted to incorporate some geographical limitations. These, however, were ineffectual. A statute that "exceeds the inherent limits of the enacting State's authority ... is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." (*Healy*, supra, at 491 U.S. 336.) The ineffectual limitations are complicated by the mandatory characters that must be inserted at the beginning of the single short "subject line" of an e-mail message and mandatory

information that must be provided in the "first text in the body of the message." If other states were to enact similar statutes, but differing in detail, the result would be "gridlock." (*Id.* at 340.) It is the ***possibility*** of such conflicting statutes and not their present existence that it at issue. The issue is "***potential interaction or conflict*** with similar statutes in other jurisdictions." *NCAA v. Miller* (9th Cir. 1993) 10 F.3d 633, 639 (striking down a Nevada law that required specified procedures in NCAA hearings).⁴

The Court of Appeal stated that suitable limitations were incorporated in § 17538.4 because the statute regulated only:

"individuals and entities who (1) do business in California, (2) utilize equipment located in California and (3) send [unsolicited commercial e-mail] to California residents." Decision of the Court of Appeal at 9.

None of these supposed geographical limitations has any ***practical effect*** (*Healy*, quoted *supra*). (1) Under expansive principles of personal jurisdiction, essentially any individual or entity sending commercial e-mail into the State will be "doing business in

⁴ In fact, the State of Pennsylvania ***has*** enacted a statute that prescribes different symbols that must be inserted at the beginning of the "subject line" of unsolicited e-mail advertisements. The Court of Appeal stated that it expected an e-mailer who complied with one statute and not the other to be able to defend on the basis of "the doctrine of substantial compliance." Decision of Court of Appeal at 12, n.4.

California." (See the Judicial Council Comment to Code of Civil Procedure § 410.10 (West's Annotated Codes); and *Bancroft & Masters, Inc. v. Augusta National, Inc.* (9th Cir. 2000) 223 F.3d 1082 (Internet context).) (2) The Court of Appeal apparently misread the pertinent section of § 17538.4 which applies "when the unsolicited e-mailed documents are *delivered* to a California resident via an electronic mail service provider's service *or equipment* located in this state." (Section 17538.4(d).) (3) There is nothing to identify a California resident who has an "aol.com" e-mail address and who uses America Online equipment located locally to connect to AOL's central computer in Virginia.⁵

The language of § 17538.4 has the "practical effect" of imposing California's regulation on unsolicited e-mail throughout the nation. To the extent other states mandate symbols and language to be included at the beginning of the single "subject line" and/or the "first text in the body of the message," legitimate advertisers will be

⁵ The California statute should be contrasted with the Washington statute involved in *State v. Heckel* (Wash. 2001) 24 P.3d 404 discussed by the Court of Appeal at 11 and 13-15 of its opinion. The Washington statute provides that "No person may *initiate* the transmission ... of a commercial electronic mail message *from a computer located in Washington* or to *an electronic mail address that the sender knows, or has reason to know, is held by a Washington resident...*" Rev. Code of Wash. 19.190.010 (emphasis added), quoted in *Heckel*, supra, at 24 P.3d 407.

paralyzed and driven off the Internet. Such a result runs afoul of the Dormant Commerce Clause. Section 17538.4 is "the precise kind of parochial meddling with the national economy that the Commerce Clause was designed to prohibit." (*City of Oakland v. Oakland Raiders* (1985) 174 Cal.App.3d 414, 418; see also *Partree v. San Diego Chargers Football Co.* (1983) 34 Cal.3d 378, 384.) The statute has a serious constitutional infirmity and judicial review by this Court is needed.

CONCLUSION

State statutes regulating Internet communications and commerce must take account of the Dormant Commerce Clause to avoid interference with one another and with the federal system. Section 17538.4 was not crafted with the necessary care and would impose California's regulatory scheme throughout the nation. Its detailed mandates are additional complications. This case provides the means for this Court to analyze the issue and provide guidance for the legislature and the lower courts. Review of the decision of the Court of Appeal is therefore appropriate.

For the foregoing reasons, petitioners request that this Court grant review in this case.

Dated:

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