IN THE SUPREME COURT
STATE OF GEORGIA

CARNETT'S, INC.,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	Case Number S04G1241
MICHELLE HAMMOND, individually, and all other persons similarly situated,	)	
	)	
Appellee.	)	
	)	

BRIEF OF AMICI CURIAE ELECTRONIC PRIVACY INFORMATION CENTER AND PRIVATE CITIZEN, INC.

DOUG KERTSCHER
Georgia State Bar No. 416265
HILL, KERTSCHER & WHARTON, LLP
3350 Riverwood Parkway
Suite 800
Atlanta, Georgia 30339
770-953-0995

Attorney for Amici Curiae

COME NOW Electronic Privacy Information Center ("EPIC") and Private Citizen, Inc. ("PCI"), and submit this Amici Curiae Brief in support of appellee Michelle Hammond, showing this Court the following:

Statement of Interest

Junk faxing is simply electronic trespass as a means to committing advertising by theft -- the electronic equivalent of junk mail sent postage due. It is a serious consumer protection problem. A primary sender of junk faxes was fined more than $5 million for violations of the TCPA. In Re Fax.com, Inc., 17 F.C.C.R. 15,927 (F.C.C., Aug 07, 2002). A single junk faxer sent 1,634 junk faxes to just one law firm in a single week. Covington & Burling v. Int'l Mktng. & Research, Inc., 2003 TCPA Rep. 1164, 2003 WL 21384825 (D.C. Super. Apr. 16, 2003). Small businesses are caused significant costs of ink and paper as a result of the over 2 billion junk faxes sent each year. Bruce Horovitz, Like Garbo, Americans want to be left alone, USA Today,, (Oct. 15, 2003). Many consumers with fax machines unplug the devices in order to avoid junk fax broadcasting. Others have lost sales because of fax machines clogged with junk fax transmissions while customers attempt to send orders.

The amici curiae have considerable practical experience addressing privacy rights in general, and the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, in particular. If this Court were to reverse the decision of the Court of Appeals and

affirm the decision of the trial court, the efficacy of the TCPA would be threatened by denying consumers the ability to bring their cases in an efficient and effective fashion. The inability to bring TCPA claims as a class would be a serious setback to the privacy rights that the TCPA was intended to address and that the amici strive to protect.

Electronic Privacy Information Center. EPIC is a public interest research center in Washington, D.C. It was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values. EPIC publishes an e-mail and online newsletter on civil liberties in the information age – the EPIC Alert. It also publishes reports and books about privacy, open government, free speech, and other important topics related to civil liberties.

EPIC has advocated before the Federal Communications Commission and the Federal Trade Commission in their recent rule-makings concerning telemarketing, and specifically regarding the Telephone Consumer Protection Act and the privacy rights it affords individuals.

Private Citizen, Inc. PCI is a membership organization formed in 1988 by Robert Bulmash (who continues to serve as its president) to protect residents and businesses from the privacy-abusing practices of the telemarketing and direct marketing industry. PCI and Mr. Bulmash were significant forces behind the

creation of the TCPA itself, and PCI remains a leading resource for consumers in combating illegal telemarketing practices. PCI currently has many members in Georgia who are directly impacted by this case.

Argument & Citation of Authority

I. CLASS ACTIONS ARE ESSENTIAL TO GIVE EFFECT TO THE TCPA'S BAN ON JUNK FAXING.

The Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, is one of a long line of private attorney general statutes for consumer protection. Statutes such as TCPA, the Truth in Lending Act[1] ("TILA"), and the Fair Debt Collection Practices Act[2] ("FDCPA") rely on private consumer enforcement actions.

One difference between the TCPA and many other consumer protection statutes is that Congress did not provide for awards of attorney's fees in the TCPA. As a result, the small amount of damages available to an individual with a single TCPA claim ($500) is often not enough to attract counsel to represent the consumer. This is especially problematic in states such as Georgia where incorporated businesses must be represented in court by an attorney.[3]

---

[1] 15 U.S.C. § 1601.

[2] 15 U.S.C. § 1692.

[3] Amici note that this Court's decision in Eckles v. Atlanta Technology Group, Inc., 267 Ga. 801 (1997), requires incorporated businesses to be represented by counsel only in "courts of record." This would allow small businesses to

(continued...)

Though occasionally pro se plaintiffs manage to obtain some relief, they are more often unable to do the legal research required to refute the constitutional and other sophisticated arguments raised by junk faxers in TCPA litigation. One particular junk faxer personally known to amici, American Blastfax, Inc.,[4] made a practice of responding to consumer suits under the TCPA in small claims courts with 50 page motions raising complex defenses to the TCPA on First Amendment, Due Process, Commerce Clause, Tenth Amendment, "reverse preemption," and other sophisticated legal theories. Coupled with intimidating letters and threats of counterclaims, these tactics successfully scare off many pro se plaintiffs.

Appellant's conduct in this case has been no less aggressive. Here, appellant sued Michelle Hammond in federal court in retaliation for her filing this lawsuit. See Carentt's, Inc. v. Hammond et al., U.S. District Court (N.D. Ga.) Case No.

---

[3](...continued)
prosecute a TCPA claim in magistrate court without the aid of an attorney. However, because of the right to file a de novo appeal from a magistrate court judgment, a junk faxer can appeal any judgment against it to a court of record, thereby obligating its victim to go to the expense of retaining counsel. The cost of such representation will greatly exceed the potential recovery, even if the judgment were for treble damages. Small businesses — often the main victim of junk fax advertising transmissions — are unable to avail themselves of the protections of TCPA because its potential recovery falls far short of the cost of employing counsel.

[4] American Blast Fax, Inc. is the predecessor in interest of Sunbelt Communications and Marketing, LLC, the third-party defendant in this case.

1:03-CV-0177-TWT (the District Court dismissed the case).

One pro se plaintiff in the area of the TCPA, Doug McKenna, a software developer in Boulder, Colorado, sued a fax advertiser in small claims court. After obtaining a judgment, the advertiser appealed to the district court, forcing Mr. McKenna to spend 100 hours learning the law and writing briefs. Sixteen months later, he won and collected $500. While he considered his experience a moral victory, he recognizes that "economically, it was a complete loss." See Junk Faxes Are Illegal, So Why Are You Getting Them?, Consumer Reports, March 2004, at 47.

Not only are pro se plaintiffs inadequate to the task of dealing with well-funded defendants, small claims courts themselves often lack the resources to explore and weigh complicated constitutional and federal statutory construction arguments made by sophisticated corporate defendants against novice pro se consumers. While courts routinely determine that defenses raised to TCPA liability by junk faxers are "wholly without merit" and "misleading at best,"[5] those issues are not so clear to the myriad of small claims magistrates whose dockets generally consist of landlord-tenant disputes and other common claims. And in Georgia, magistrates need not be attorneys. State v. Slaughter, 252 Ga. 435, 439 (1984) (citing O.C.G.A. §

[5] E.g., Texas v. American Blast Fax, Inc., 121 F. Supp. 2d 1085 (W.D. Tex. 2000); Hooters of Augusta, Inc. v. Nicholson, 245 Ga. App. 363 (2000), cert. denied (Jan. 19, 2001).

15-10-22). As parties with significant experience collecting information about TCPA cases in small claims courts around the country, amici can state with personal knowledge that these issues are often lost by novice pro se consumers in small claims courts.

Cases that achieve class certification are a means to improve the correct application of the law. With access to the class action form of litigation, the cases are heard in "full-dress" courts and are argued by experienced and motivated counsel. Meaningful appeals are available and well-reasoned and persuasive case law is developed. It is that case law that can guide small claims courts, producing a more unified and cogent body of law. This is a benefit to the consumer and the statutory scheme Congress put into place when it enacted the TCPA. However, this is exactly what junk faxers do not want.

Junk faxers exploit the lack of case law to their benefit. They want to eviscerate the main force behind compliance with the TCPA. See Sarafin v. Sears, Roebuck & Co.. Inc., 73 F.R.D. 585, 588 (N.D. Ill. 1977) (recognizing that the threat of a class action has a "potent deterrent effect" on creditors, and that "[elliminating that deterrent for all large classes would emasculate the enforcement of the [Truth in Lending] Act").

Appellant argues that its systematic violation of the TCPA should be prosecuted through administrative channels and not through a class action. There is no legal authority for this

proposition. Junk faxers like appellant champion administrative enforcement because they fear the potential results of private class actions.

Administrative enforcement actions were not intended to be the sole mechanism for enforcing the prescripts of the TCPA. The sheer number of illegal junk fax campaigns, combined with the vigorous legal teams that junk faxers have at their disposal, challenge the resources of government regulators. Staff limitations are such that the private class action must be accepted if the objectives of the TCPA are to be realized. See Riley v. New Rapids Carpet Center, 294 A.2d 7, 11 (N.J. 1972) (discussing necessity of class actions for consumer fraud claims); see also Amici Curiae Brief of Georgia's Attorney General and Public Service Commission.

As the Court of Appeals correctly determined, there is no support for the trial court's holding that a class action is less superior to thousands of individual lawsuits merely because a government agency could possibly bring an administrative enforcement action. The superiority analysis required by O.C.G.A. § 9-11-23 contemplates a comparison between thousands of individual civil actions and a single class action, not a comparison between administrative and private actions as appellant argues.[6]

---

[6] Among the factors to be considered are: (1) the interest (continued...)

Administrative enforcement actions and class actions are disparate proceedings, with such different outcomes and objectives as to defy comparison. Administrative injunctions and penalties do not compensate the victims of the junk faxers' illegal advertising campaigns. Class actions, on the other hand, fulfill the TCPA's promise of a remedy for those targeted by junk faxers.[7]

Always lurking below the surface in TCPA class actions is the protest that the penalty set by Congress "falls too heavily upon violators." But if the penalty should not fall entirely on those who break the law, upon whom should it fall? Innocent consumers and businesses? By inviting this Court to second-guess the legislative decisions made by Congress in adopting the TCPA, appellant resurrects arguments cast aside by other courts.

---

[6](...continued)
of members of the class in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action. E.g., Boggs v. Alto Trailer Sales, Inc., 511 F.2d 114, 117 n.4 (5th Cir. 1975).

[7] Appellant also points to administrative fines as an example of the superiority of administrative enforcement. The facts tell a completely different story. The FCC has not been able to stamp out even the most notorious junk faxers. Following a lengthy legal battle, the FCC fined the notorious and prolific junk faxer Fax.com $5.4 million, calling the company's business a massive ongoing violation of the TCPA. In Re Fax.com, Inc., 17 F.C.C.R. 15,927 (F.C.C., Aug 07, 2002). But Fax.com's illegal activities continue unabated.

When a trial court found that potential liability under the TCPA of $45 million to $135 million prevented a class action from meeting the superiority requirement of Rule 23(b)(3), the Arizona Court of Appeals held that the trial court abused its discretion when it denied class certification:

> ***The [trial] court's ruling evinces a greater concern with the fairness of the consequences to the defendants should a plaintiff class prevail than with the procedural fairness of adjudicating the matter through a class action versus some other method.*** We agree with ESI that the fairness of the statutory penalty for the specific form of violation alleged here has been decided by Congress in enacting the law and that the court's determination that it would be unfair is an improper consideration in deciding whether a class action is the superior method of adjudication.

ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc., 50 P.3d 844, 850 (Ariz. Ct. App. 2002) (emphasis added). The Arizona Court of Appeals quickly dispatched the argument (which is also raised by appellant here) that large damages undercut the suitability of TCPA claims for class relief:

> That "ruinous or annihilating" damages should not be considered in the superiority analysis is particularly compelling in circumstances such as this, where ***the size of the class, and therefore, the potential class liability, is entirely within the control of the defendants. To deny the superiority of a class action because the size of the class made the damages annihilating would serve to encourage violation of the statute on a grand rather than a small scale.***

Id. at 851 (emphasis added). "[T]he possible impact on a defendant of a successful class action is no more a ground for denying a class action than it is for dismissing an individual

suit." A. Conte, Newberg on Class Actions, § 4:42 at 328 (4th ed. 2002).

If this Court were to adopt, as urged by appellant, the view of the trial court that a class action was not superior to a multitude individual actions just because a successful individual litigant can recover statutory damages, it would create a per se rule that class actions are never appropriate under consumer protection laws. Rollins v. Sears, Roebuck and Company, 71 F.R.D. 540, 544 (E.D. La. 1976).

II. THERE IS NO ESTABLISHED BUSINESS RELATIONSHIP EXEMPTION TO THE TCPA'S BAN ON JUNK FAXING.

The "established business relationship exemption" defense is one of the principal frivolous defenses raised by junk faxers faced with a TCPA claim. They assert this defense when faced with individual claims, even when they are engaged in random, indiscriminate faxing. They also assert this defense when faced with a class action. In the latter context, they hope to persuade courts to reject class certification of TCPA junk fax claims because of the theoretical possibility that some of their junk faxes may have been received by people who may have done business with the junk faxer (or a business affiliate with it in some way) at some point in recorded history.[8]

[8] Junk faxers regularly argue that the established business relationship exemption permits it to send advertising faxes to anyone who as ever done business with it or who has merely inquired about doing business with it, regardless of whether the (continued...)

In every case where a junk faxer has argued an established business relationship exculpates it from liability under the TCPA for sending junk faxes, the courts have refused to recognize that argument as valid. E.g., ESI Ergonomic Solutions, LLC. v. United Artists Theatre Circuit, Inc., 2003 TCPA Rep. 1086 (Ariz. Super. July 11, 2003) (order granting class cert. holding "EBR [established business relationship] is not a defense to junk-fax advertising violations under the Telephone Consumer Protection Act"); Penzer v. MSI Mktng., Inc. d/b/a Y2Marketing,2003 TCPA Rep. 1142 (Fla. Cir. Apr. 2, 2003) (order granting class cert. holding "plain language of the TCPA makes clear that the [established business relationship] defense does not apply to unsolicited facsimile advertisements").[9]

The TCPA makes it unlawful "to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. §

---

[8](...continued)
transaction or inquiry took place a week ago, a year ago, or a decade ago.

[9] Copies of these opinions published by the topical reporter service TCPA Reports, may be obtained online at http://www.tcpalaw.com. The Penzer case is particularly interesting in light of the trial court's decision in this case. In this case, the trial court held that "the considerable weight of authority points against class certification of TCPA claims generally." R. 495. This finding by the trial court is not true. At the same time the trial court inappropriately denied class certification in this case, the Penzer court correctly found "the vast majority of courts have approved the class certification of TCPA claims" when it certified a class of potentially 1.6 million members in a TCPA case. Penzer, 2003 TCPA Rep. 1142.

227(b)(1)(C). Congress defined "unsolicited advertisement" simply: "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(4).

Since nothing in the statute regulating junk fax advertising authorizes the creation of an exemption, the "established business relationship" argument ought to end here. The statutory test is clear, plain, and unambiguous: "prior express invitation or permission." The words do not authorize the executive branch (the FCC), private litigants, or the courts to tinker with the Congressional definition of unsolicited advertisement.

An established business relationship defense is available to causes of actions for certain telemarketing calls made actionable under a different section of the TCPA, but whether or not an established business relationship existed is irrelevant to a junk fax claim under the TCPA. Compare 47 U.S.C. § 227(a)(4) to 47 U.S.C. § 227(a)(3).

As junk faxers frequently do when faced with the prospect of having to answer for their illegal conduct, appellant cites to an FCC "interpretation" for the proposition that an "established business relationship" somehow implies the existence of "prior express permission or invitation." However, it is emphatically clear from the FCC's own words that "[i]n banning telephone facsimile advertisements, the TCPA leaves the Commission without

discretion to create exemptions from or limit the effects of the prohibition." In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 FCC Rec. 8752, 8779 n.87 (1992). (citation omitted, emphasis added).

The terms "prior express permission or invitation" and the term "established business relationship" are different terms and mean different things. This is demonstrated by the fact that Congress used these terms disjunctively in the portion of the TCPA that applies to telemarketing calls. The TCPA exempts live telemarketing calls that are made

> (A) to any person with that person's prior express invitation or permission,
>
> (B) to any person with whom the caller has an established business relationship, or
>
> (C) by a tax exempt nonprofit organization.

47 U.S.C. § 227(a)(3).

If the existence of an "established business relationship" constitutes "prior express invitation or permission" there would be no need for both exemptions to be codified separately in the section of the TCPA governing telemarketing calls; the inclusion of the "established business relationship" defense would be meaningless surplusage.

"[L]egislative enactments should not be construed to render their provisions mere surplusage." Dunn v. Commodity Futures Trading Comm'n, 519 U.S. 465 (1997). But that is exactly the

position appellant wants this Court to adopt.[10]

Although deference is generally afforded to the interpretations of an agency charged with administering a statute, "no deference is due to agency interpretations at odds with the plain language of the statute itself." Public Employee Retirement System v. Betts, 492 U.S. 158, 171 (1989); Heimmermann v. First Union Mortg. Corp., 305 F.3d 1257, 1261 (11th Cir. 2002). The TCPA expressly provides an established business relationship exclusion in the provisions of the TCPA dealing with telephone solicitations, but does not include the same exemption with respect to facsimile advertisements. Compare 47 U.S.C. § 227(a)(3) with 47 U.S.C. § 227(a)(4). Thus, the only logical conclusion that can be drawn is that Congress did not intend to

---

[10] In every case where a junk faxer has argued an "established business relationship" exculpates it from liability under the TCPA for sending junk faxes, the courts have refused to recognize that argument as valid. Because of the judicial rejection of the "established business relationship exemption" as a defense to TCPA junk fax liability, appellant and other junk faxers have recently taken to arguing that state courts are prohibited from rejecting it because The Hobbs Act, 28 U.S.C. § 2342, vests exclusive jurisdiction for challenges to final orders of the FCC in the federal courts of appeals. However,"it is necessary to characterize appropriately the FCC action" in order to determine whether 28 U.S.C. § 2342 applies. Miller v. FCC, 66 F.3d 1140, 1144 (1995) (emphasis added).

The "established business relationship exemption" asserted by appellant is not the end-product of a final order of the FCC. Therefore, this court is not obligated to follow commentary from the FCC which is contrary to the express terms of the TCPA. Because the FCC commentary on which appellant and its fellow junk faxers base its arguments is contrary to the express terms of the TCPA, this Court should reject it and follow the law as passed by Congress.

create an "established business relationship exemption to the TCPA's ban on the transmission of unsolicited fax advertisements. Rodriguez v. U.S., 480 U.S. 522, 525 (1987) (holding "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

Adding additional weight to this position is the fact that Congress considered and rejected an established business relationship exemption to TCPA liability for junk faxing. The draft bill passed by the House of Representatives contained a definition of "unsolicited advertisement" making it illegal to send faxes "(A) without that person's prior express invitation or permission, or (B) with whom the caller does not have an established business relationship." H.R. 1304, 102d Cong., 1st Sess. §3, §227(a)(4)(passed by House, Nov. 18, 1991) (emphasis supplied). Congress deleted the established business relationship exemption from the definition of "unsolicited advertisement" before it passed the TCPA. See 47 U.S.C. § 227(a)(3); 137 Cong.Rec. S18781 (Nov. 27, 1991) (Statement of Sen. Hollings) (stating amended version of S. 1462 incorporates principal provisions of H.R. 1304).

When Congress deletes language from a bill before enacting it, the deleted language cannot be penciled back in later by an administrative agency or the courts. See Gulf Oil Corp. v. Copp

Paving, Co., 419 U.S. 186, 200 (1974)(stating Congress's deletion of provisions from bill shows Congress does not intend result it expressly declined to enact).

The standard set by Congress for the sending of advertisements by fax transmission, "prior express permission or invitation," requires that permission or invitation be express. It is a fundamental rule of statutory construction that where the language of a statute is plain and unambiguous, the terms used therein should be given their common and ordinary meaning. Ray M. Wright, Inc. v. Jones, 239 Ga. App. 521 (1999). The common and ordinary meaning of "express" is "clearly and unmistakably communicated; directly stated." Black's Law Dictionary (8th ed. 2004). By contrast, "implied" means "not directly expressed; recognized by law as existing inferentially." Black's Law Dictionary (8th ed. 2004).

Even if some form of permission can be implied from a business relationship, it cannot rise to the level of express permission or invitation.[11] And important for the consideration

[11] There is "one secure guidepost: when Congress uses broad generalized language in a remedial statute, and that language is not contravened by authoritative legislative history, a court should interpret the provision generously so as to effectuate the important congressional goals." Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F.2d 404, 428 (1st Cir. 1985). This especially reliable and legitimate canon of construction has been endorsed repeatedly by the federal judiciary. Id., see Gomez v. Toledo, 446 U.S. 635, 639 (1980) (stating remedial legislation "is to be construed generously to further its primary purpose").

of this case is that appellant did not send its faxes because of any claimed "established business relationship" with any of the targets of its fax advertising campaign. Appellant was engaged in an indiscriminate junk faxing campaign that was designed to try to establish new business relationships.

Class certification cannot be defeated "by dreaming up a theoretical defense requiring individual inquiries for which there is little basis in fact." Bernard v. First Nat'l Bank, 550 P.2d 1203, 1211 (Or. 1976). But that is exactly what appellant wants this Court to do.

As Judge Learned Hand so eloquently said, courts must "remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.), aff'd, 326 U.S. 404 (1945). The purpose of the TCPA is to prevent advertisers from stealing others' paper and ink to print their advertisements.

As was pointed out at the opening of this brief, junk faxes are nothing more than junk mail sent postage due, and whether or not the recipient of the unsolicited advertisement had an established business relationship with the advertiser does not change this fact. And the mere theoretical possibility that some junk faxes may have been received by people who may have done business with the junk faxer at some point in recorded history is not a basis to deny class certification of TCPA claim.

Conclusion

Class actions are permitted unless Congress expressly provides otherwise. Califano v. Yamasaki, 442 U.S. 682, 699-700 (1979). The TCPA does not prohibit class action lawsuits.

Class certification cannot be defeated by dreaming up theoretical defenses requiring individual inquiries for which there is no basis in fact or law.

For consumer protection statues that provide small monetary awards, and the TCPA in particular, the class action is truly the superior form of action and should be viewed favorably.

This case has important not just to Michelle Hammond and Carnett's, Inc., but to all the consumers and small businesses who have been targeted with illegal junk faxing campaigns. It is also important to all those who desire to have meaningful, enforceable consumer protection laws. If this Court were to adopt the arguments of appellant, consumer protection statutes like the TCPA will be unenforceable, effectively repealing the protections enacted by Congress.

Respectfully submitted,

HILL, KERTSCHER & WHARTON, LLP

By: _____

Doug Kertscher
Georgia State Bar No. 416265
Attorney for Amici Curiae
Electronic Privacy Information
Center and Private Citizen, Inc.

3350 Riverwood Parkway
Suite 800
Atlanta, Georgia 30339
770-953-0995

CERTIFICATE OF SERVICE

I certify that I have served by U.S. mail a true and correct copy of the above and foregoing upon the following:

Roy E. Barnes, Esq.
The Barnes Law Group, L.L.C.
P.O. Box 489
Marietta, Georgia 30061

Marc B. Hershovitz, Esq.
Marc B. Hershovitz, P.C.
4060 Peachtree Road
Suite D-315
Atlanta, Georgia 30319

Michael Jablonski, Esq.
260 Brighton Road, N.E.
Atlanta, Georgia 30309

Ned Blumenthal, Esq.
Weissman, Nowack, Curry &
Wilco, P.C.
One Alliance Center, 4th Floor
3500 Lenox Road
Atlanta, Georgia 30326

Michael B. Terry, Esq.
Frank M. Lowrey, IV, Esq.
Bondurant, Mixson & Elmore, LLP
3900 One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309

Mark W. Wortham, Esq.
Richard C. Foster, Esq.
Hicks, Casey & Barber, P.C.
136 North Fairground Street
Suite 100
Marietta, Georgia 30060

This _____ day of _____, 2004.

HILL, KERTSCHER & WHARTON, LLP

By: _____
Doug Kertscher
Georgia State Bar No. 416265
Attorney for Amici Curiae
Electronic Privacy Information
Center and Private Citizen, Inc.

3350 Riverwood Parkway
Suite 800
Atlanta, Georgia 30339
770-953-0995