UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MASSACHUSETTS ASSOCIATION OF PRIVATE CAREER SCHOOLS (MAPCS), Plaintiff, v. MAURA HEALEY, IN HER OFFICIAL CAPACITY AS MASSACHUSETTS ATTORNEY GENERAL Defendant.	C.A. No. 14-cv-13706-FDS

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

In its zeal to regulate private sector schools, the Massachusetts Attorney General ("AG") has enacted regulations that contradict federal law, Supreme Court precedent, and the United States Constitution. Accordingly, the AG's 2014 Regulations governing "For Profit and Occupational Schools" (the "Regulations") are invalid for at least three reasons. ***First***, the Regulations impose content-based restrictions that target disfavored speech from disfavored speakers, compel schools to make inaccurate and non-factual statements, and violate the First Amendment. ***Second***, the Regulations' unconstitutionally vague standards fail to provide fair notice of prohibited conduct, and grant the AG unbridled discretion for selective enforcement. ***Third***, the Regulations are preempted, because they bar conduct that federal law protects, and frustrate Congress' will.

This is not a case of a party seeking to avoid reasonable regulations. For Profit and Occupational Schools ("Proprietary Schools") are *already* subject to federal regulation, accreditors' rules, state licensing agencies' rules for post-secondary institutions, Massachusetts Chapter 93A, and the state's 1978 industry regulations. This is a case where the AG publicly demonized ***all*** Proprietary Schools, then overreached in regulating them. The AG overreached when it banned truthful consensual communications, forced schools to falsely under-report both graduation rates and the availability of transfer credits, and contravened Congressional goals. The Regulations did not narrowly target unlawful conduct; they instead aimed to curb the "proliferation" of Proprietary Schools by piling on an array of additional regulations. That is exactly what they will do, and more. Rather than bear the profound costs of compliance, small businesses that operate Proprietary Schools will shut their doors or leave the Commonwealth; prospective students will have to navigate a maze of conflicting state and federal disclosures or abandon their education and career plans; and communities facing a shortage of skilled labor will

see the problem worsen. The Court should enjoin, vacate, and set aside the Regulations on Proprietary Schools.

I. APPLICABLE FACTS

The Regulations cover almost every aspect of a school's operations, from recruitment to graduation and beyond, but target just one *type* of school—those in the private sector. The Regulations leave untouched the "public" and "non-profit" schools that receive state subsidies, even though those schools cost the public and taxpayers far more than Proprietary Schools.[1] As the AG admits, "[t]he Regulations are not generally aimed . . . but [are aimed] at a specific industry—the for-profit school industry." (AG Mot. to Dism. Br. at 9, Dkt. No. 11.) The AG first singled out Proprietary Schools in a disparaging public campaign, and has now made these schools—and only these schools—subject to the burdens of a novel and unnecessary regime.[2]

A. MAPCS Schools Play a Vital Role in Massachusetts Education.

Since MAPCS' founding nearly 70 years ago, MAPCS has helped member schools provide professional training for Massachusetts students eager to advance their careers. (http://www.mapcs.org/.) These Proprietary Schools serve a diverse population, including members of groups traditionally underrepresented in higher education, such as women, African-American students, Hispanic and Latino students, and military veterans.[3] Operating under a fully-developed, detailed framework of federal and state regulations and the standards of

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[1] *See* Ex.3, Bob Kerrey & Jeffrey T. Leeds. A Federal Anti-Education Plan, Wall St. J., Nov. 19, 2013 (criticizing regulations aimed at Proprietary Schools, noting that the government calls these schools "'for-profit' in order to disparage them," and asking "[s]ince when did being a business land you in the penalty box?"). All exhibits cited herein are exhibits to Ex. 1, Declaration of Adam S. Gershenson ("Gershenson Decl.").

[2] Not surprisingly, the Regulations aimed at Proprietary Schools have caused concrete, particularized, actual and imminent harm to MAPCS itself, critical interests germane to MAPCS' organization purpose, and the related interests of MAPCS' member schools. Rather than allow questions of standing and justiciability to distract from a discussion of the merits here, MAPCS has preemptively filed declarations to address these issues. Ex. 4, Declaration on Catherine Flaherty on behalf of MAPCS ("Flaherty Decl.") and Ex. 5, Declaration of James Bologa on behalf of MAPCS Member School Porter and Chester Institute ("Bologa Decl.").

[3] *See* Ex.6, Association of Private Sector Colleges and Universities, Massachusetts Fact Sheet (2010-2011), available at https://docs.google.com/file/d/0B361_6vooFy_WEFneEtsRW1sYjg/edit.

numerous accreditors', Proprietary Schools have trained and graduated the electricians, medical and dental assistants, chefs, machinists, heating and cooling specialists, cosmetologists, and computer technicians that sustain communities across Massachusetts. (*See* Ex. 7, http://mapcs.org/members.html; Ex. 8, http://mapcs.org/careers.html.)

As Secretary of the Department of Education Arne Duncan has made clear, such "for-profit institutions play a vital role in training young people and adults for jobs . . . They are helping us meet the explosive demand for skills the public institutions cannot always meet." (Ex. 9 , *U.S. Education Secretary Arne Duncan Keynotes DeVry Policy Forum*, Business Wire, May 11, 2010, http://www.businesswire.com/news/home/20100511007302/en/U.S.-Education-Secretary-Arne-Duncan-Keynotes-DeVry#.VTbmdyFViko; *see also* (75 Fed. Reg. 66,665, 66, 671 (Oct. 29, 2010) (recognizing that Proprietary Schools have "long played an important role in [our] system of postsecondary education.").

B. The AG Publicly Demonstrates Bias Against For-Profit Schools.

In recent years, the AG eschewed any pretense of being a neutral arbiter in the regulatory process. Instead, the AG repeatedly demonstrated—and highlighted in press releases—animus toward all Proprietary Schools. In 2012, then-Attorney General Martha Coakley alleged that Proprietary Schools delivered "less value" than non-profits.[4] A year later, Attorney General Coakley again launched an *ad hominem* attack on Proprietary Schools by asserting they were "more focused on making a profit than assisting students."[5] In November 2013, during Attorney General Coakley's campaign to become Governor of Massachusetts, the AG channeled anti-Proprietary School bias into draft regulations.

[4] Ex. 10, Press Release, *AG Coakley Testifies at Boston City Council Regarding For-Profit Schools and Excessive Student Loan Debt* (May 30, 2012) http://www.mass.gov/ago/news-and-updates/press-releases/2012/2012-05-30-for-profit-testimony.html.)

[5] Ex. 11, Press Release, *AG Coakley Supports Federal Law to Curb For-Profit College Recruiting Abuses* (March 18, 2013) http://www.mass.gov/ago/news-and-updates/press-releases/2013/2013-03-18-for-profit-colleges.html.

To be clear, as the AG launched this public campaign against Proprietary Schools, and funneled that sentiment into the Regulations, the schools were not un-regulated entities, and the AG was not lacking for enforcement mechanisms. Proprietary Schools were already operating under and subject to Chapter 93A generally and 1978 state regulations specifically promulgated to "ensure that the private career school industry was operating fairly and honestly." (940 Mass. Code. Regs. 31.01 (2015); Ex. 2 at 3 (AR 3)). Moreover, Proprietary Schools were, and are, subject to a detailed, fully-developed regulatory scheme devised and enforced by experts in the field, including the United States Department of Education, the Massachusetts Division of Professional Licensure, the Office of Private Occupational School Education, and the Massachusetts Board of Higher Education.[6] (*See* Ex. 17 at 2 (AR 38).) These institutions remain in place, and their regulations remain in force, regardless of the fate of the AG's new Regulations.

Nonetheless, the AG pitched its new Regulations as a way to confront the "proliferation" of Proprietary Schools, and to address unidentified "consumer harms." (*Id.*) During the notice-and-comment period designed to elicit public response to these proposed regulations, the AG again vilified Proprietary Schools. Current Attorney-General Maura Healey, who was then Assistant Attorney General and a "Democratic candidate for attorney general," drafted a *Boston Globe* opinion article that likened Proprietary Schools to the "predators who helped tank our housing market," made oblique references to a "financial shell game," declared that "[t]aking on these schools is a moral issue," and on those bases urged enactment of the Regulations.[7]

[6] Ex. 12, The Board of Higher Education governs institutions that grant degrees (*see http://www.mass.edu/bhe/powers.asp*); the Office of Private Occupational School Education governs those institutions that do not grant degrees (*see* Ex. 16, *http://license.reg.state.ma.us/public/schools/about.html*).

[7] Ex. 13, Maura Healy, *Stopping student loan predators*, Boston Globe, Feb. 20, 2014, http://www.bostonglobe.com/opinion/2014/02/20/podium-forprofit/pASUrWlOZBKVKQQY50wYlL/story.html.

C. The Regulations Impose Novel Burdens on Proprietary Schools.

Despite testimonials from the students and employers of graduates from Proprietary Schools' demonstrating the schools' value (*E.g.*, Ex. 18 at 1-2; Ex.19 at 1-2; Ex. 20 at 1; Ex. 21 at 1; Ex. 22 at 1; Ex. 23 at 1-2; Ex. 24 at 1 (AR 133-34, 666-67, 670, 672, 686, 694-95, 698)), the AG promulgated the Regulations with the same purpose as the original draft: to confront the schools' "proliferation." (940 Mass. Code. Regs. 31.01; "Purpose," Ex 2. at 3 (AR 3).) The asserted Purpose for the new Regulations did not focus on misleading conduct. Indeed, the Regulations stated that the Purpose of the *pre-existing* 1978 regulations was to target "unfair [and] deceptive" practices, whereas the new Regulations were aimed merely at practices that in some undefined way, "unfairly harm consumers." (940 Mass. Code. Regs. 31.01; "Purpose," Ex. 2 at 3 (AR 3).) The Regulations attacked schools' "intensive[] market[ing]," without indicating how intensive marketing of career education was, or could be, unlawful. (940 Mass. Code. Regs. 31.01; "Purpose," Ex. 2 at 3 (AR 3).) To curtail Proprietary Schools' marketing, the AG enacted a litany of burdensome rules, including provisions that:

- Bar Proprietary Schools from initiating "communication with a prospective student prior to enrollment" more than twice in seven days—even where the prospective student's telephone numbers were "provided by the student." (the **"Communication Restraint"**) (940 Mass. Code. Regs. 31.06(9); Ex. 2 at 9 (AR 9); *see infra* Sections III(A), III(C));

- Prohibit Proprietary Schools from disclosing the mathematical truth that some students can complete the program in less than the "median completion time." (the "**Completion Time Prohibition**") (940 Mass. Code. Regs. 31.04(9); Ex. 2 at 7 (AR 7); *see infra* Section III(A));

- Define as "Deceptive Language" any communication with the "tendency or capacity to mislead or deceive" (the "**Tendency or Capacity Definition"**) (940 Mass. Code. Regs. 31.04(2); Ex. 2 at 6 (AR 6); *see infra* Section III(A));

- Compel Proprietary Schools to (falsely) tell students that they are aware of no schools that will accept their transfer credits, other than those specifically-identified schools with which a school has a written credit-transfer agreement.

(the "**Credit Transfer Assertion"**) (940 Mass. Code Regs 31.05 (7); Ex. 2 at 8 (AR 8); *see infra* Section III(A));

- Force Proprietary Schools to make non-factual statements to students voicing the Attorney-General's opinion that "[f]ailure to repay student loans is likely to have a serious negative effect on your credit, ***future earnings***, and your ability to obtain future student loans." (the "**Negative Effect Prediction"**) (940 Mass. Code Regs 31.05 (3)(a); Ex. 2 at 8 (AR 8) (emphasis added); *see infra* Section III(A));

- Mandate disclosure of a misleading "Graduation Rate" calculated in a manner contrary to federal law. (the **"Graduation Rate Calculus"**) (940 Mass. Code. Regs. 31.03; 31.05(2)(b); Ex. 2 at 4, 8 (AR 4, AR 8); *see infra* Section III(A));

- Mandate disclosure of an inaccurate "Total Placement Rate" that is not a "rate" in any recognizable sense of the term, as it expresses no ratio whatsoever, but rather provides only "the product of the [program's] graduate placement rate and the graduation rate" (the **"Total Placement Rate Calculus"**) (940 Mass. Code. Regs. 31.03; 31.05(4)(b)(2); Ex. 2 at 4, 8 (AR 4, AR 8); *see infra* Section III(A);

- Dictate that Proprietary Schools may not fail to inform a prospective student of "any fact … disclosure of which is likely to influence the prospective student not to enter into a transaction with the school" (the **"Any Fact Requirement"**); (Mass. Code. Regs. 31.05(1); Ex. 2 at 6 (AR 7); *see infra* Section III(B); and

- Forbid Proprietary Schools to enroll or retain a student whom the school "knows or should know" is unlikely to graduate or meet requirements for employment in her chosen field based on the student's "education level, training, experience, physical condition, or other material disqualification," (the **"Disqualification Obligation"**) (Mass. Code. Regs. 31.06(6); Ex. 2 at 9 (AR 9); *see infra* Section III(B)).

The AG admits that the Regulations will provide no fiscal benefit for the public sector, and will impose private sector "compliance costs" on hundreds of small businesses operating in the Commonwealth. Ex. 2 at 2 (AR 2.) The AG dismisses these costs as "nominal," (*id.*) or "insignificant" (Small Business Impact, Ex. 17 at 1 (AR 37), but nothing in the record supports such claims. Instead, testimony shows that the Regulations would impose burdens so great that some Proprietary Schools would have to shut their doors on the students and communities they have served.

II. BACKGROUND LAW

"Where agency action is taken upon an administrative record, it must ... be reviewed based on that record." *Massachusetts ex rel. Div. of Marine Fisheries v. Daley*, 170 F.3d 23, 28 n. 4 (1st Cir. 1999); *Little Bay Lobster Co. v. Evans*, 352 F.3d 462, 466 (1st Cir. 2003) (same); *Olsen v. United States*, 414 F.3d 144, 155 (1st Cir. 2005) ("[F]ocal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.") An agency cannot justify promulgated Regulations with after-the-fact rationales. *Daley*, 170 F.3d at 31 (setting aside regulation and rejecting post-hoc rationales that had not been explicitly adopted by the agency but were merely "argued by counsel").

A movant is entitled to summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Cases challenging regulations as unconstitutional or preempted are matters of law routinely resolved at the summary judgment stage. *See, e.g.*, *Edenfield v. Fane*, 507 U.S. 761,765 (1993) (affirming summary judgment of First Amendment violation); *SPGGC, LLC v. Ayotte*, 488 F.3d 525, 527 (1st Cir. 2007) (affirming summary judgment of preemption).

III. ARGUMENT

Under the Supremacy Clause, "[t]he Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." (U.S. Const., art. 6.) The Regulations flout this commandment. They (1) contravene the First Amendment by restraining and compelling speech; (2) violate Due Process by enacting vague regulations that grant the AG unbridled discretion; and (3) pose obstacles to objectives set forth by Congress in federal law.

A. The Regulations Violate The First Amendment.

The Supreme Court's decision in *Sorrell* dictates the inescapable conclusion that the Regulations violate the First Amendment. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011).

Under *Sorrell*, ***restraints on "[s]peech in aid of [an industry's] marketing . . . must be subjected to heightened judicial scrutiny***," and ***laws that "burden[] disfavored speech by disfavored speakers" cannot stand***. *Id*. at 2659, 2663 (emphasis added). The Regulations, aimed specifically at restraining and compelling speech in Proprietary Schools' marketing, are invalid.

1. Strict Scrutiny Applies.

Content-based regulations that restrain or compel speech are "subject to strict or exacting scrutiny." *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 244-45 (2d Cir. 2014) (collecting Supreme Court precedents). Though "commercial speech" has at times been subjected instead to intermediate scrutiny, *Sorrell* made clear that "strict scrutiny" applies to all content-based regulations, and that "commercial speech is no exception." 131 S. Ct. at 2664.

In any event, the Regulations demand strict scrutiny because they sweep far beyond "commercial speech," which the Supreme Court defines as "speech that does no more than propose a commercial transaction." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 (1983); *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473-74 (1989) (the proposal of a commercial transaction is "*the* test for identifying commercial speech") (emphasis added); *see also International Dairy Foods Ass'n v. Amesto*y, 92 F.3d 67, 71-72 (1996) (intermediate scrutiny may apply where a law seeks to compel "*purely* commercial speech") (emphasis added).

Communications between Proprietary Schools and prospective students go far beyond a mere proposal for a transaction. As the Regulations themselves envision, discussions may touch on "the student's education level . . . physical condition . . . disabilities . . . criminal record," and fitness for her future education and career path. (940 Mass Regs. 31.06(6)-(7).) Such speech regarding how an individual's personal history intersects with her educational opportunities cannot be dismissed as low value, particularly where Supreme Court cases "have consistently

recognized the importance of education to the professional and personal development of the individual." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 437 (1993) (Blackmun, J., concurring) (invalidating ban on sidewalk racks containing handbills advertising adult education). Using the Communication Restraint to ban such communications with potential counselors or advisors is no more justified than banning, for example, communications with a therapist, where initial discussions might address a mixture of payment information, scheduling, and personal goals. As the Supreme Court held in applying strict scrutiny to solicitations by professional fundraisers, where "the component parts are inextricably intertwined, we cannot parcel out the speech, apply one test to one phrase and another test to another phrase [which] would be artificial and impractical. Therefore, we apply our test for fully protected expression." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988).

2. The Regulations Cannot Survive *Sorrell*.

"Speech in aid of [an industry's] marketing . . . is a form of expression protected by the Free Speech Clause of the First Amendment [that] must be subjected to heightened judicial scrutiny." *Sorrell*, 131 S. Ct. at 2659. In striking down a statute that targeted unwanted marketing practices by Vermont pharmaceutical companies, the Supreme Court in *Sorrell* spoke directly to the issue at hand: regulations that "burden[] disfavored speech by disfavored speakers" violate the First Amendment. *Id*. at 2663.

On their face, the Regulations (a) burden disfavored speech—the Communication Restraint on communications and the Completion Time prohibition actually go further and *silence* the disfavored speech, and (b) target disfavored speakers—Proprietary Schools. The Regulations' asserted Purpose is to target "for-profit and occupational post-secondary schools that intensively market [their] programs to students." (940 Mass. Code. Regs. 31.01; Ex. 2 at 3 (AR 3).) But this is precisely what *Sorrell* forbids: laws that "disfavor[] marketing, that is

speech with a particular content," and "disfavor[] specific speakers" like Proprietary Schools. *Sorrell*, 131 S. Ct. at 2663.

Neither the state's purported interests nor the means adopted can justify the Communication Restraint or the Completion Time Prohibition. The AG has publicly spotlighted the supposed deleterious effects of Proprietary Schools, but "[t]hose who seek to censor or burden free expression often assert that disfavored speech has adverse effects," and such claims do not grant license to stifle the schools' expression. *Id*. at 2670. Nor does the "proliferation" of Proprietary Schools empower the AG to stamp out their message. Though the schools' marketing of education and career advancement may resonate with consumers to the AG's displeasure, "fear that speech might persuade provides no lawful basis for quieting it." *Id.* at 2670-72.

Nor can the AG justify the Communication Restraint by claiming it alleviates "High-Pressure Sales Tactics," particularly because community colleges or other schools with viewpoints embraced by the AG have no restrictions on their frequency of communication with interested students.[8] Such laws that burden disfavored speech from disfavored speakers cannot be justified by purported concerns about "an undesired increase in the aggressiveness of [] sales representatives," or even legislative findings—not present here—that showed "disruptive and repeated marketing visits tantamount to harassment." *Id.* at 2661, 2669; s*ee also Edenfield*, 507 U.S. at 765-67 (striking down ban on "overreaching and vexatious" solicitation by Certified

[8] Even if the Communication Restraint were treated as a mere burden rather than a ban—which it should not be, because it precludes *all* speech on all topics beyond two contacts—the analysis remains unchanged. The "[g]overnment's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *Sorrell*, 131 S. Ct. at 2664 ("Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content."). Nor is there any credible argument that the Communication Restraint is a time, place, or manner restriction, given that other parties can communicate in the same time, place or manner without restraint, and the only theoretical justification here is content-based and focused on Careers Schools' marketing. *See id.* a 2671 ("To reverse a disfavored trend . . . a State could not ban campaigning with slogans, picketing with signs, or marching during the daytime.")

Public Accountants because "the general rule is that the speaker and the audience, not the government, assess the value of the information presented."). Moreover, as a practical matter, consumers "can, and often do, simply decline" to communicate with aggressive salespeople. *Sorrell*, 131 S. Ct. at 2669. Here, the case for restraining speech is even less compelling than in *Sorrell* or *Edenfield*. Those cases involved in-person solicitations, whereas the school representative restrained by the Communication Restraint is in all likelihood merely reaching out to a prospective student via a "telephone number *provided by the student*." Declining such a call is easily done and prospective students who wish to prevent future calls need only make a do not call request under the federal telemarketing laws.

Where prospective students accept schools' calls on the very phone numbers the students provided, barring such consensual communications violates the rights of consenting listeners to hear the schools' message. As the Supreme Court has held, where "there is a right to advertise, there is a reciprocal right to receive the advertising." *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 758, n. 15 (1976) (citing "the independent right of the listener to receive the information sought to be communicated."); *see also Riley*, 487 U.S. at 871 ("[T]he government. . . may not substitute its judgment as to how best to speak for that of speakers and listeners"). The right of the listener to receive the speech should not be ignored, particularly where the listeners are seeking to make informed decisions about their education and careers. Here, as in *Sorrell*, "the defect in [the Regulations] is made clear by the fact that many listeners find [the restrained speech] instructive." *Sorrell*, 131 S.Ct at 2671

Regulators like the AG have repeatedly attempted to target speech by industries they disfavored, including drug salesmen, alcohol merchants, tobacco dealers, and over-aggressive accountants—and the First Amendment has repeatedly foreclosed those efforts. *See, e.g.*,

Thompson v. Western States Medical Ctr., 535 U.S. 357, 374 (2002) (invalidating ban on marketing of particular drug compounds because the Government has no legitimate interest in restricting commercial speech "to prevent members of the public from making bad decisions"); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 502 (1996) (invalidating ban on outdoor alcohol advertisement because "[t]he First Amendment directs us to be especially skeptical of regulations that keep people in the dark for what the government perceives to be their own good."); *National Ass'n of Tobacco Outlets, Inc. v. City of Worcester*, 851 F. Supp. 2d 311, 319 (D. Mass. 2012) (striking down ban on outdoor advertising for tobacco products because the government "may not promote its policy preferences by keeping the public in ignorance."). The Regulations use the same impermissible means to meet the same impermissible ends, and are equally invalid.

3. The Regulations Broadly Impact Truthful Speech.

The AG cannot evade *Sorrell* by claiming the Regulations merely target *misleading* communications that may be more readily controlled by the State. As discussed more fully below in Section III(A)(4)(a), the AG cannot credibly claim that the challenged regulations are squarely aimed at such communications because (a) that was not the stated Purpose of the new Regulations; (b) the Communication Restraint bans *all* communications from Proprietary Schools beyond two conversations a week; and (c) the Completion Time Prohibition bans speech that is irrefutably true. Mathematically, if a median completion time exists, by necessity a *range* of completion times exist, and many students *must* be able to complete the program in less than the median time. In their broad sweep, the Regulations capture and silence "truthful, nonmisleading" speech, and this they cannot do. *Sorrell*, 131 S. Ct. at 2671.

4. The Regulations Would Not Survive *Central Hudson*.

Even if this Court failed to recognize that the Regulations burden non-commercial speech and failed to apply *Sorrell*'s "heightened scrutiny," the Challenged Regulations would *still* fail under the "intermediate review" afforded purely commercial speech under *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980). This is no surprise. Content-based, viewpoint-discriminatory regulations fundamentally offend the First Amendment, so "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied." *Sorrell*, 131 S. Ct. at 2667; *Evergreen*, 740 F.3d at 245 ("[C]onclusions are the same under either intermediate scrutiny (which looks to whether a law is no more extensive than necessary to serve a substantial interest") or strict scrutiny (which looks to whether a law is narrowly drawn to serve a compelling governmental interest.")).

Central Hudson asks (1) whether the commercial speech being restricted concerns lawful activities and is not misleading; and (2), whether the asserted government interest is substantial. *Central Hudson*, 447 U.S. at 566. If the answer to both questions is yes, courts analyze (3) whether the regulation directly advances the asserted governmental interest, and (4) whether the regulation is not more extensive than in necessary to serve that interest. *Id*. "It is well established that the party seeking to uphold a restriction on commercial speech carries the burden of justifying it," and the AG cannot do so here. *Edenfield*, 507 U.S. at 770.

a. <u>The Restricted Speech is Lawful and Not Misleading</u>.

Providing an education is unquestionably a lawful activity. Similarly, *Central Hudson* makes clear that the government may only ban "forms of communication *more likely to deceive the public than to inform it*." 447 U.S. at 563. Doctrinally, the case law has evolved to hold that under *Central Hudson*, only speech that "is *actually* misleading" may be banned—a state cannot bar "*potentially* misleading information." *F.T.C. v. Direct Mktg. Concepts, Inc.*, 569 F. Supp.

285, 307 (D. Mass. 2008) (holding that under Supreme Court and First Circuit precedent, infomercials that were "deceptive, that is *likely* to mislead," could not be suppressed because they had not been proven to be "*actually misleading*.").[9]

Here, the Regulations sweep far beyond these legal strictures established in *Central Hudson* and articulated in *Direct Marketing*, and purport to bar speech that merely "has *the tendency or capacity to mislead* or deceive." (940 Mass. Reg. 31.04(2), Ex. 2 at 6 (AR 6) (emphasis added).) This broad standard governing the Regulations, as well as specific provisions like the Communication Restraint and the Completion Time Prohibition, would unconstitutionally silence vast streams of communications that are not misleading.

b. The AG Asserted No Substantial State Interest.

The government has no legitimate interest in curtailing speech "about a category of disfavored products in order to prevent members of the public from making the [purportedly] bad decision to use those products." *Tobacco Outlets*, 851 F. Supp. 2d at 317. "It is precisely this kind of choice, between the dangers of suppressing information and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Thompson*, 535 U.S. at 375. Accordingly, the AG cannot justify silencing Proprietary Schools' truthful speech based on vague references to purported "consumer harm." That is the sole Purpose asserted in the draft regulations that survived the notice-and-comment period, and the sole Purpose asserted in the promulgated Regulations. (940 Mass Code Regs 31.01, Purpose, Ex. 2 at 3 (AR 3).) Such a vague basis as alleged "consumer harm" is simply not enough, and, the AG cannot belatedly manufacture other purported interests for the sake of litigation. *Daley*, 170 F.3d at 31.

[9] A subsequent decision in the case reaffirmed this principle, holding that the First Amendment was not implicated so long as the disputed regulations prohibited *only* the dissemination of specifically-identified "deceptive representations" and did *not* reach advertising that was *not* misleading. *F.T.C. v. Direct Marketing Concepts, Inc.*, 648 F. Supp. 2d 202, 217 (D. Mass. 2009).

c. The Regulations Do Not Directly Advance the Asserted Interest.

Because state action must *directly* advance the state's interest, the state may not "achieve its policy objectives through the indirect means of restraining certain speech by certain speakers." *Sorrell*, 131 S. Ct. at 2670-71 (state displeased by a product's marketing "can express that view through its own speech" but cannot "hamstring the opposition [or] burden the speech of others in order to tilt public debate in a preferred direction."). Moreover, the regulations must directly advance the state's asserted interest "to a material degree." *44 Liquormart, Inc.*, 57 U.S. at 505. Regulations will not survive absent *proof* of direct, material advancement; "speculation or conjecture" will not suffice. *Edenfield*, 507 U.S. at 770-71; *see also 44 Liquormart, Inc.*, 57 U.S. at 505 (invalidating regulations where "common sense" suggested they would tend to meet the state's goal but the record held insufficient evidence to support a factual finding that they would "significantly advance the State's interest"). The record nowhere proves that the Completion Time Prohibition or the Communication Restraint would directly and significantly help customers. The restriction on communications more than twice a week appears to be wholly arbitrary, with no basis at all to indicate that two calls a week is somehow the only appropriate number. "Without any findings of fact, or indeed any evidentiary support whatsoever," there is no basis to find that the Regulations directly and materially advance the state's interest. *Id*. at 505.

d. The Regulations Restrict More Speech Than Necessary.

Speech restrictions cannot survive *Central Hudson* unless the state proves they are "not more extensive than is necessary to serve [the State's] interest[s]." *Thompson*, 535 U.S. at 371. Put simply, "***if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so.***" *Id.* (emphasis added) (invalidating statute targeting advertising where the Government could have instead directly

regulated the marketed product, because "regulating speech must be a last—not first—resort"); *see Linmark Assoc, Inc. v. Willingboro Twp.*, 431 U.S. 85, 97 (denying citizens information is a "highly paternalistic approach" that violates the First Amendment because governments can instead "open the channels of communication, give "widespread publicity" to its preferences, and "create inducements" for citizens to pursue the state's preferred course). The AG cannot show it used the least restrictive means because the record contains "no evidence" that less restrictive means would fail. *Sable Commc'ns v. FCC*, 492 U.S. 115, 128-32 (1989).

Narrow tailoring ensures that regulations ensnare *only* misleading marketing, because "the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful. " *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 645-49 (1985) (rejecting attorney advertising ban as an unacceptable "broad prophylactic rule"). Proper "tailoring would involve targeting those practices [that directly advance the state's interests] while permitting others . . . so as not unduly to burden the plaintiffs' free speech rights." *Tobacco Outlets, Inc.*, 851 F. Supp. 2d at 320.

The Regulations are not tailored; they eliminate speech whole cloth. The Completion Time Prohibition forbids Proprietary Schools from uttering an undeniable fact. The Communication Restraint forecloses all communications beyond the first two in a week, including all communications occurring "in person" or by phone. (940 Mass. Code. Regs. 31.06(9); Ex. 2 at 9 (AR 9).) This leads to absurd results where, for example, a school representative who greets a student at a School Fair (Communication #1) and receives the student's number cannot follow up a call (Communication #2) with a text message for at least a week—even though classes frequently begin on a rolling basis. This rule shows no awareness of

how parties actually communicate in today's world. As a result of this arbitrary ban, "legitimate commercial speech is suppressed." *Edenfield*, 507 U.S. at 777. Such "broad prophylactic rules may not be so lightly justified" by "unsupported assertions that "the public will be misled, manipulated, or confused." *Zauderer*, 471 U.S. at 648-49. Just as the speech restraints cannot survive *Sorrell*, they fail the *Central Hudson* test.

5. The Required Disclosures Are Similarly Invalid.

Compelled disclosures, like "content-based" restrictions, are subject to strict scrutiny. *Riley*, 487 U.S. at 796-97 ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech," so the difference between compelled speech and compelled silence "is without constitutional significance."); *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 906 (1st Cir. 1988) (The First Amendment equally guarantees "'freedom of speech' . . . [in] both what to say and what *not* to say.").

Here, the compelled disclosures are content-based restrictions that target disfavored speakers—Proprietary Schools. They force Proprietary Schools to (a) falsely report the extent to which students can transfer credits; (b) publish misleading Graduation Rates and Total Placement Rates that use unsound methodologies; and (c) dissuade prospective students by parroting the AG's dire view that a student's future earnings will suffer is she fails to repay a loan.

The burdensome disclosures are <u>not</u> merely providing "purely factual and uncontroversial" information to cure false or misleading speech, which would call for rational basis review. *Zauderer*, 471 U.S. at 651. Instead, the disclosures themselves are misleading and controversial, because they compel Proprietary Schools to present inaccurate information that undermines the schools' message to students. Compelling such disclosures advances no compelling state interest, or even any legitimate state interest, and violates the First Amendment.

See id.; *see also Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 12-15 (1986) (when compelled disclosures do not contain "purely factual and uncontroversial information," strict scrutiny applies).

a. The Transfer Credit Assertion Compels False Speech.

Here, the only false statement regarding credit transfers is the disclosure itself, which pretends that transferee schools without written agreements will not accept Proprietary Schools' credits. (940 Mass. Code Regs. 31.05(7); Ex. 2 at 8 (AR 8).) In reality, transferee schools elect whether to accept transfer credits, no written agreement is required for such acceptance, and Proprietary Schools are well aware of other schools that, even in the absence of such an agreement, routinely accept their transfer credits. (*Id.*) This false Credit Transfer Assertion helps no one. If a student forsakes enrollment based on this assertion, she has bypassed a legitimate opportunity to further her education and advance her career—all in reliance on an untrue "fact." If a student enrolls in school despite the Credit Transfer Assertion and later wants to transfer, she will be unduly constrained because she has a false understanding of her actual exit opportunities. The Credit Transfer Assertion thus embodies flaws that run throughout the Regulations. Where expertise and precision are the touchstone of legitimate regulation, the Regulations instead offer posturing without insight, and wind up hurting not only the schools, but also the students they claim to protect.

b. The Graduation Rate Calculus Is Misleading.

The Graduation Rate Calculus forces Proprietary Schools to make misleading, non-factual statements that contradict federal standards and make schools appear less effective than they are. The critical error—and the resulting non-factual disclosures—stem from the Regulations' failure to acknowledge the importance of a statistical cohort. Standard practice among federal and state regulators, accreditors, and institutions, is to measure student outcomes

by tracking student cohorts. Cohorts are students who started a program at the same time and have been enrolled long enough to graduate. (*See, e.g.*, the Student Right to Know Act, 20 U.S.C. §§ 1092(a)(1)(L); (a)(3) (Congress requiring institutions to report graduation rates by cohort, measuring "first-time, full time students" through "150% of the normal time of completion" to arrive at a school's graduation rate).)

By contrast, the Regulations adopt a unique and puzzling methodology that makes little sense if the goal is to provide accurate information about academic programs. Rather than follow a cohort to see what percentage of those students graduate, the Graduation Rate Calculus measures the number of students who received certificates, diplomas, or degrees during "the latest two calendar years *divided by the number of students who enrolled in the program during the latest two calendar years*." (940 Mass. Code Regs. 31.03; 31.05(2)(b); Ex. 2 at 4, 8 (AR 4, 8).). This approach engenders at least three fatal flaws.

First, because the Regulations fail to employ a cohort, any fluctuation in enrollment will compel disclosure of a misleading rate. For example, any school that experiences an uptick in enrollment will be forced to publish a factually incorrect, unduly low Graduation Rate. Consider a program that takes two years to complete, in which 100 students enrolled in Year 1 and every single one graduated on time at the end of Year 2. The program's true graduation rate is 100%. All students eligible to graduate did so. But if 200 students enrolled in Year 2, because 300 students were "enrolled in the program during the last two calendar years," a Proprietary School would instead have to publish the mandated but false Graduation Rate of 33%.

Second, because the Graduation Rate Calculus includes in the denominator *all* enrolled students—rather than *only* first-time enrollees as under the federal Right to Know Act—the mandated Graduation Rate disclosure will be artificially low for every program that takes longer

than two years to complete. For example, consider a nursing program takes four years to complete. If 100 students enrolled in Years 1, 2, 3, and 4, and all 100 of the Year 1 enrollees graduate at the end of Year 4, the program's true graduation rate is 100%. But while all 100 students graduated on time, because 400 students were enrolled in the program "during the past two calendar years," the Regulations mandate that the school would have to publish a false Graduation Rate of 25%. As a result, Proprietary Schools with programs lasting more than two years are unduly compelled to disclose a misleading, non-factual statistic.

Third, Proprietary Schools that enroll students on more than one date per year will be forced to include in the Graduation Rate Calculus students that have simply not had time to finish their program. For example, consider a program that requires one year to finish, and which enrolls students twice a year, on January 1 and July 1. Suppose 50 students enroll in January of Years 1 and 2, and 50 students enroll in July of Years 1 and 2. If every student completes the program on time then in January of Year 3, 150 of the eligible 150 students would have graduated. The school should thus be able to publish its true graduation rate of 100%. But under the Regulations, even though the final 50 students have not had time to complete the program, the Proprietary School would still have to include them in its calculation, and publish a false Graduation Rate of 75%.

The state has no legitimate interest in compelling schools to provide these inaccurate, non-factual disclosures, which undermine the schools' successes and mislead prospective students.

c. The Total Placement Rate Is Fatally Flawed.

The Total Placement Rate similarly mandates a non-factual disclosure, because it is based on the fatally flawed Graduation Rate Calculus. Rates, by their very definition, are *ratios*—a mathematical expression of *division* that tracks "the number of times something happens or is

done during a particular time." (Ex. 14, Definition of Rate, Merriam-Webster, http://www.merriam-webster.com/dictionary/rate.) A factual total placement rate might, for example, track a student cohort over time and measure what percentage of that cohort obtained work in the relevant field. For reasons unclear, however, the Total Placement Rate mandated by the Regulations depends instead on *multiplication*, such that schools must disclose "the product of the [program's] graduate placement rate and the graduation rate." (940 Mass. Code. Regs. 31.03; 31.05(4)(b)(1) Ex. 2 at 5, 8 (AR 5, 8). Because the Graduation Rate Calculus is misleading for all the reasons stated above, the Total Placement Rate cannot multiply that misleading number by another number and obtain anything but a misleading result.

d. The Negative Effect Prediction Compels Controversial Speech Regarding Students' Future Earnings.

The Negative Effect Prediction expresses the AG's subjective view, and represents a controversial, unconstitutional attempt to make the schools "state the [government's] preferred message." *Evergreen*, 740 F.3d at 245 (invalidating compelled disclosure); *see also International Dairy Foods Ass'n*, 92 F.3d 67 at 73 (holding that "strong consumer interest and the public's 'right to know'" are "insufficient" interests to justify a compelled disclosure).

The Negative Effect Prediction regarding a student's "future earnings" is particularly toxic, because it lacks foundation, chills enrollment, and strikes at the very reason students apply to Proprietary Schools in the first place. A school representative "will not likely be given a chance to explain the [disclosure]; the disclosure will be the last words spoken as the [prospective student] closes the door or hangs up the phone." *Riley*, 487 U.S. at 799-80. Hampering Proprietary Schools' operations in this manner is the predictable but impermissible result of the compelled disclosures. *Id.* (invalidating requirement that compelled only professional fundraisers, as opposed to volunteers or charities, to disclose the percentage of

donations turned over to charity, because the "predictable result is that professional fundraisers will be encouraged to quit the State or refrain from engaging in solicitations that result in an unfavorable disclosure").

The AG can spread its message through press releases and public campaigns, but forcing schools to speak on the AG's behalf is anathema to First Amendment guarantees.

B. The Challenged Regulations Are Void For Vagueness.

Due Process requires "clarity of regulation" and "invalidation" of any law that (1) fails to "provide a person of ordinary intelligence fair notice of what is prohibited" or (2) lacks clear standards to prevent "arbitrary or discriminatory" enforcement. *F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (a law violates due process where people of "common intelligence must necessarily guess at [its] meaning and differ as to its application"). "When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *Fox Television Stations, Inc.*, 132 S. Ct. at 2317; *see also Van Wagner Bos., LLC v. Davey*, 770 F.3d 33, 41 (2014) (recognizing that "general and amorphous" standards "provide easy cover for decisions that are actually content-based.")

The Any Fact Disclosure and the Disqualification Obligation both fail to give fair notice of what is required, and both grant the AG—the Regulations' proponent and enforcer—unbridled discretion for arbitrary enforcement. The Any Fact Disclosure punishes any Proprietary School that fails to disclose "*any fact*. . . disclosure of which is likely to influence the prospective student not to enter into a transaction with the school." (Mass Code Regs. 31.05(1); Ex. 2 at 7 (AR 7).) This is, quite simply, a catch-all. Elsewhere, the Regulations mandate disclosures on *inter alia* fees, loans, placement rates, employment statistics, use of student information, costs of examinations, and transfer credits. (*Id.* at § 31.05.) The "Any Fact" disclosure opens the door to

liability on grounds that the AG could not even identify, and for which the schools could only guess. "If the [AG] cannot anticipate what will be considered [unfair or deceptive] under its policy, then it can hardly expect [schools] to do so." *Fox Television Stations, Inc. v. F.C.C.*, 613 F.3d 317, 331 (2d Cir. 2010) *vacated on other grounds*, 132 S. Ct. 2307 (2012).[10]

Similarly, the Disqualification Obligation bars enrollment or retention where a school "knows or should know" a student is unlikely to graduate or satisfy requirements in her chosen field based on her "education level, training, experience, physical condition, *or other material disqualification.*" (Mass Code Regs. § 31.06 (6) Ex. 2 at 9 (AR 9) (emphasis added).) Schools cannot reasonably be held responsible if they fail to predict such outcomes for every individual applicant.[11] Plus, the list of apparently disqualifying traits is neither exhaustive nor exemplary—enrolling a student who may later be shown to be underqualified for essentially *any* reason would subject schools to the AG's enforcement powers, 93A liability, money damages, and reputational harm. Just last year, the First Circuit warned of these dangers lurking in vague laws that leave their subjects vulnerable. *Van Wagner Bos.*, 770 F.3d at 40 ("It is not merely the sporadic abuse of power by the censor *but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.*") (*quoting City of Lakewood*, 486 U.S. 750, 757 (1988).)

The Challenged Regulations ignore those warnings, and invite precisely what black-letter law forbids: "a standardless sweep that allows [government officials] to pursue their personal predilections." *Kolender v. Lawson*, 461 U.S. 352, 358-60 (1983) (affirming that statute failing to define what qualified as a "credible and reliable" form of identification was facially void for

[10] The vacatur had no impact on this proposition. The Supreme Court held that the standards at issue were vague as applied, and therefore did not address the Second Circuit's holding that the statute was vague on its face. *See Fox Television Stations*, 132 S. Ct. at 2320.

[11] Nor is it clear how schools would gather such voluminous information on every applicant with classes starting on a rolling basis, and schools barred from initiating more than two communications a week with prospective students.

vagueness). Granting the AG such carte-blanche is both unlawfully vague and unwise, as it would give the AG and its staff unfettered discretion over schools they already vowed to target.

C. Federal telemarketing Laws Preempt the regulations.

Under the Supremacy Clause, conflict preemption invalidates state laws that "would frustrate the purposes of the federal scheme." *SPGGC*, 488 F.3d at 531 (1st Cir. 2007). Accordingly, a state law that creates an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress" cannot stand. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000); *In re Celexa and Lexapro Mktg. and Sales Practices Litig.*, 779 F.3d 34, 40 (1st Cir 2015) (same).

Here, the Regulations conflict with, and are preempted by, the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 ("TCPA"), the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994, 15 U.S.C. §§ 6101-6108 ("Telemarketing Act"), and their respective implementing regulations. In passing the TCPA and the Telemarketing Act, Congress sought to (1) provide uniform rules for *interstate* telephone solicitation, and (2) protect consensual telemarketing. The Regulations, however, restrict both interstate calls and consensual communications, and frustrate both the goals of Congress and the Federal Communications Commission ("FCC") that implements the telemarketing laws.

Although in certain realms a presumption against preemption may apply, no such presumption applies "when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000). Given the history of a significant federal presence in the telemarketing realm, multiple courts addressing interstate telemarketing have declined to apply any presumption against preemption. *E.g.*, *Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003) (refusing to apply presumption in favor of state consumer protection laws with regard to preemption by the Telecommunications Act "because of

the long history of federal presence in regulating long-distance communications"); *Farina v. Nokia*, 578 F.Supp.2d 740, 756 (E.D. Pa. 2008) (declining to apply a presumption against preemption, given Congress "establishment of the FCC" and the fact that the "telecommunications industry . . . is an instrumentality of commerce that has been subject to consistent national regulation"). The Regulations should not be presumed valid, and indeed they are not. They overstep state boundaries, obstruct interstate commerce, undermine Congress' goal for unified rules, and impermissibly bar consensual calls that federal law protects.

1. Regulating *Interstate* Telemarketing Contravenes the TCPA.

The Regulations purport to restrict all communications, including interstate calls to Massachusetts students from schools that maintain no "campus, facility, or physical presence in Massachusetts." (Mass. Code Regs. 31.02 Ex. 2 at 3 (AR 3.) But "Congress enacted the TCPA . . . because states do not have jurisdiction over interstate calls." *Klein v. Vision Lab Telecomms., Inc.*, 399 F. Supp. 2d 528, 542 (S.D.N.Y. 2005) (collecting cases and summarizing the TCPA's legislative history, where Congress recognized that "federal law [was] needed to control [interstate] telemarketing").

The TCPA includes a saving clause that explicitly excludes from preemption those State laws "that impose[] more restrictive *intrastate* requirements or regulations," (47 U.S.C. § 227(f)(1) (emphasis added)). But here, the Regulations would impose more restrictive *interstate* requirements, which the statute forbids. *Chamber of Commerce of U.S. v. Lockyer*, No. 2:05-CV-2257MCEKJM, 2006 WL 462482, *8 (E.D. Cal. Feb. 27, 2006) (holding that where state law "attempts to regulate the interstate transmission" of unsolicited advertisements, "it has exceeded its jurisdiction" and violated the Supremacy Clause.) This is a straightforward application of the fundamental canon of statutory construction that courts must "give effect, if

possible, to every clause and word." *Lockyer*, 2006 WL 462482, at *7 (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). Admittedly, another court faced with other circumstances held otherwise. *See Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1054 (2013) (holding that a state law barring unsolicited robocalls was not preempted, while remanding "for an evaluation of whether [the] statute violates" the First Amendment). But after Congress enacted the TCPA and explicitly saved from preemption only "intrastate" requirements, sustaining the Regulations over *interstate* calls would require a willingness to rewrite the federal statute, ignore its purpose, and subvert the federal regime.

The FCC's view of the TCPA strongly supports the case for preemption. As the agency implementing the act, the FCC is "uniquely qualified to comprehend the likely impact of state requirements," and its statements on the statute's preemptive effect must be given "some weight." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 863, 883 (2000). As the FCC recognized, the TCPA advances "the clear intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations." *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 18 F.C.C. Record 14014, 14064 (2003) ("2003 TCPA Order"). (2003 TCPA Order, at ¶ 83.)[12] Creating such a uniform scheme is crucial to preserving interstate

[12] A history of court decisions and FCC rulings further demonstrate that Section 2(a) of the federal Communications Act grants the FCC exclusive jurisdiction over interstate telemarketing calls. (*See* 47 U.S.C. § 152(a) (granting the FCC jurisdiction over "all interstate and foreign communication" and over "all persons engaged . . . in such communication"; 47 U.S.C. § 152(a) (reserving to the states jurisdiction only "with respect to . . . intrastate communication service."); *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) (holding that interstate communications are "totally entrusted to the FCC"); *see also State Corp. Comm'n of Kansas v. FCC*, 787 F.2d 1421, 1426 (10th Cir. 1986) (noting that it is the FCC's "basic function under the Act" to govern "'all interstate and foreign communication by radio or wire'"); *AT&T Commc'ns v. Public Serv. Comm'n*, 625 F. Supp. 1204, 1208 (D. Wyo. 1985) ("It is beyond dispute that interstate telecommunications service is normally outside the reach of state commissions and within the exclusive jurisdiction of the FCC."); *see also In re Am. Telephone and Telegraph Co. and the Assoc. Bell Sys. Cos. Interconnection With Specialized Carriers in Furnishing Interstate Foreign Exchange (FX) Service and Common Control Switching Arrangements (CCSA)* , Memorandum Opinion and Order, 56 FCC 2d 14 ¶ 21(1975) ("The States do not have jurisdiction over interstate communications").)

commerce. Accordingly, allowing states to enact "inconsistent interstate rules frustrate[s] the federal objective of creating uniform national rules, to avoid burdensome compliance costs for telemarketers and potential consumer confusion." *Id.* The Regulations create exactly what Congress sought to avoid: myriad state rules multiplying compliance costs and consumer confusion.

2. The Regulations Conflict with the Federal Telemarketing Laws that Permit Telemarketing with The Consumer's Consent.

Where the Regulations restrict *consensual* telecommunications, they forbid what federal law intentionally permits, and thus "interfere with the careful balance struck by Congress." *Arizona v. U.S.*, 132 S. Ct. 2492, 2505 (2012) (holding that where a "a comprehensive federal scheme intentionally leaves a portion of the regulated field without controls, *then* the pre-emptive inference can be drawn" against state laws that would bar what Congress allowed). Federal telemarketing laws have created a comprehensive scheme, and are not exempt from this rule. Accordingly, where Congress left a telemarketing activity immune from regulation, a state law prohibiting the federally-protected activity "frustrates this federal objective and is, therefore, conflict-preempted." *Teltech Sys., Inc. v. Bryant*, 702 F.3d 232, 238 (5th Cir. 2012) (holding that where Congress barred the manipulation of caller identification displays "with the intent to defraud, cause harm, or wrongfully obtain anything of value," state law could not go further and prohibit manipulation undertaken merely "with the intent to deceive, defraud, or mislead.")

In enacting the federal telemarketing laws, Congress struck a precise balance that turns on whether the calls are consensual. This calibration makes sense, because it (a) protects those consumers that seek protection, while (b) recognizing that telemarketing has a huge economic value for the nation and for many industries operating in interstate commerce. Indeed, it would be both unconstitutional and bad policy to restrict communications welcomed by both parties.

Accordingly, in each statute, Congress protected consensual communications, and the FCC implemented rules to ensure that protection.

a. The Regulations Interference with Consensual Communications Upsets The Balance Congress Struck.

Under the TCPA, states may impose more restrictive intrastate requirements on "telephone solicitations"—but "telephone solicitations" are defined to *exclude* the kinds of consensual calls that the Regulations seek to restrict. (*See* 47 U.S.C. § 227(f) (allowing states to craft intrastate requirements for "telephone solicitations"); 47 U.S.C. § 227(a)(4) ("The term 'telephone solicitation' does not include a call or message (A) to any person with that person's prior express invitation or permission, [or] (B) to any person with whom the caller has an established business relationship.") FCC rules, addressed below, defined an "established business relationship" to mean the parties had a "voluntary two-way communication" based on a consumer's purchase of, inquiry into, or application for the product or service provided. (47 C.F.R. 64.1200(f)(5).) The TCPA thus allows for intrastate requirements on solicitations—but does not allow states to impose such requirements on the calls at issue here: calls made to "a prospective student" who has given his phone number to a school as part of an inquiry or application to enroll in the school.

Similarly, in the Telemarketing Act, Congress targeted only non-consensual communications. *See* 15 U.S.C.A. § 6102 (authorizing the FCC to prescribe rules that telemarketers may not undertake "*unsolicited* telephone calls" that a reasonable consumer would consider coercive or abusive of the customer's right to privacy) (emphasis added). The Regulations are not restricting unsolicited, coercive, or abusive phone calls—they bar *all* calls beyond two in a week to prospective students who have invited a dialogue when they provided the school their phone number.

As in *Teltech*, the telemarketing laws used "measured" statutory language showing Congress' careful "calibration" that made these calls "worthy of protection from more restrictive state regulation." *Teltech*, 702 F.3d at 238. The Regulations are preempted, because they cannot strip from consensual calls the protection that Congress provides.

b. Regulating Consensual Telemarketing also Conflicts with FCC Regulations.

Federal regulations and federal statutes have "equal preemptive effect." *SPGGC*, 488 F.3d at 530; *see Fidel. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes.").

Here, the FCC has recognized that "any state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted." *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 F.C.C. Record 14014, ¶ 84 (2003). Such FCC pronouncements regarding the preemptive effect of agency rules merit *Chevron* deference. *See New York v. FCC*, 486 U.S. 57, 64 (1988) ("[I]n the area of preemption, if the agency's choice to pre-empt 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'") (*quoting United States v. Shimer*, 367 U.S. 374, 383 (1961)); *see also Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698 (1984) (deferring to FCC view that its regulations were "intended to pre-empt state law").

FCC rules provide ample protection for consensual telemarketing. The TCPA's implementing regulations protect telephone solicitations related to an "established business relationship" based on a consumer's purchase of, inquiry into, or application for the relevant

product or service. (47 C.F.R. 64.1200(f)(5); *see also* 47 C.F.R. 64.1200(a)(1) (exempting from telemarketing restrictions calls made with the "prior express consent of the called party").) Similarly, in implementing the Telemarketing Act, the FCC limited the times that calls could be placed, but exempted from the restriction calls made with the recipient's "prior consent." (16 C.F.R. 310.4(c).)

The FCC rules place no limit whatsoever on the frequency of calls that a marketer can make to a consenting consumer like the prospective students interested in a Proprietary School. To the contrary, the FCC has set up a specific mechanism that addresses unwanted solicitations—the ability to make a company-specific do-not-call request, which must be promptly recorded and honored by a telemarketer. (47 C.F.R. § 64.1200(d)(3).) Making a do-not-call request has the effect of revoking any prior consent to receive solicitation calls and ends an established business relationship.[13] Prospective students have the same rights to make a company-specific do-not-call request under the Federal Trade Commission's Telemarketing Sales Rule, and calling someone after they have asked not to be called again by a particular seller potentially exposes the telephone solicitor to a civil penalty of $16,000 per violation. (16 C.F.R. § 310.4(b)(iii)(A).) Where federal law provides that any student who wishes to can easily opt-out of all further discussions of any program, the state has no cause to preempt consensual calls under the Communication Restraint.

The Regulations "differ" from the federal telemarketing rules sharply and impermissibly, and frustrate the federal scheme by restricting consensual interstate telemarketing calls. The Communication Restraint reaches *all* communications with a prospective student including "via

[13] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 F.C.C. Record 14014 (2003) para. 124(A "consumer's do-not-call request terminates the EBR [established business relationship] for purposes of telemarketing calls even if the consumer continues to do business with the seller."); *SoundBite Commc'ns, Inc.*, CG Docket No. 02-278, FCC 12-143, 27 FCC Rcd. 15391, 15398 (Nov. 26, 2012), para. 13 (noting that a consumer may opt out of receiving voice calls after prior consent has been given).

telephone" more than twice in a seven-day period, and makes no exception for a student's consent or the school's established relationship with the student. (Mass. Code Regs. 31.06(9) Ex. 2 at 9 (AR 9).) This failure is not merely one of sloppy draftsmanship; it goes to the heart of the communications at issue, because the calls that the Regulations would forbid are consensual and arise in the context of an established business relationship—the schools are calling a "prospective student" who has supplied his own phone number for the very purpose of being contacted by the school. *Id.* The Regulations are preempted, because they attack precisely the calls that Congress and the FCC protect.

IV. CONCLUSION

Myriad provisions in the Regulations violate the United States Constitution, contravene Supreme Court precedent, and contravene the will of Congress. This Court should invalidate the Regulations, either in relevant part under the Severability clause in § 31.08, or in toto.

Respectfully submitted,

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RULE 7.1 CERTIFICATION

Pursuant to L.R. 7.1(a)(2), I hereby certify that counsel for MAPCS and the AG conferred on May 6, 2015. The parties attempted in good faith to resolve or narrow the issues that are the subject of this Motion for Summary Judgment. The parties were unable to resolve or narrow the issues, and accordingly MAPCS filed this motion.

/s/ Adam S. Gershenson
ADAM S. GERSHENSON

CERTIFICATE OF SERVICE

I, Robert B. Lovett, certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on May 8, 2015.

/s/ *Robert B. Lovett*
Robert B. Lovett