

call telemarketing calls received in their homes in the past 12 months. I found this astounding. Without a reason to doubt the IPI study, the numbers it reported would - if true - vastly alter the landscape.

As a degreed engineer, my first response to inconsistent data is to examine the source of those data. In this case, the original IPI study was made available on the IPI web site. The source of the inconsistency was quickly found in the study itself. The IPI study exhibited 1) misleadingly complex questions and ambiguous language, 2) a flawed survey methodology based on the context of the questions, and 3) high refusal rate.

Furthermore, the “citations” by commenters have been altered in improper ways. For example, some industry commenters talked about “outbound” calls studied by the IPI survey, but the term “outbound” is not found in the IPI study. The study actually uses the word “inbound” to describe the calls that were the subject of the survey. *IPI* at 5. The fact that the industry and IPI can’t keep those terms straight emphasizes the confusion such terms have on the average consumer. Indeed, the IPI study repeatedly uses ambiguous terms such as “acquired a product or service over the telephone.” Is that an “inbound” call *to* the home or an “outbound” call *from* the home?

I also note that buried in the details of the IPI study is some unexplained language that at least to me, indicates that they restricted the age and occupation of the survey participants to young business owners.¹ In my experience in this area, older people more likely to be settled with families, have greater objection to telemarketing calls to their homes.

1. Misleadingly complex questions and ambiguous language

Contrary to polling industry standards, the actual questions were not published in the IPI report or an appendix. I contacted IPI and obtained those questions independently. The relevant part of the question from the IPI study is :

To the best of your knowledge, how many times, if at all, over the past year have you personally ... :

¹ Terms describing the participant class as “Junior Achievers” and “Active Young Entrepreneurs” and that a number were disqualified because of “Age, Non-business owner.” *IPI* at 36.

READ AND ROTATE STATEMENTS - ALWAYS ROTATE ITEMS “a” AND “b” TOGETHER, AND ALWAYS ROTATE ITEMS “c” AND “d” TOGETHER - CODE ONE ONLY PER ACTIVITY

- a. Acquired a product or a service over the telephone from a national company with whom you currently do business
- b. Acquired a product or service over the telephone from a national company with whom you otherwise did not do business
- c. Acquired a product or service over the telephone from a local or community-based company with whom you currently do business
- d. Acquired a product or service over the telephone from a local or community-based company with whom you otherwise did not do business
- e. Given your voting support to a political campaign that sought your vote over the telephone
- f. Given financial support to a charity or not-for-profit agency that sought your financial support over the telephone

What immediately presents itself is the ambiguous phrase “Acquired a product or a service over the telephone...” What does this mean to the person who is answering the survey? Does this mean “acquired” a product or service from a telemarketer that called their home, or “acquired” it by the consumer calling the merchant to place an order? Regardless of any instructions or definitions given earlier in the survey (and easily forgotten by the subject) as to what “acquired over the telephone” means, this ambiguous language is fatal to the IPI survey’s credibility.

2. *Flawed survey methodology based on the context of the questions*

Simply put - you can’t conduct a survey to determine receptiveness of consumers to cold-call telemarketing by making cold-call survey calls. This would be like taking a survey of who likes chicken wings outside a Hooter’s restaurant and extrapolating that result to the rest of the population.

Telemarketing calls are considered an invasion of privacy by the vast majority of

Americans.² By the term “telemarketing” I use the common meaning understood by consumers of calls placed to the consumer’s home without invitation, and not calls initiated by the consumer where they call a merchant to place an order for merchandise “over the phone.”³ All too often, the ringing phone in the home is not a summons from a friend or relative, but in unwanted intruder, invading the quiet enjoyment of the home. The number and frequency of such unwanted interruptions has increased, dramatically evidenced by the industry’s revelation that the 105,456,124 million households⁴ in this country receive over 100 million telemarketing calls a day. A growing number of people consider telephone surveys - even though they may not be sales calls - to be an invasion of privacy. With busier, faster paced, and more hectic lives, time spent at home has decreased so that what time there is spent at home is more precious, and thus interruption to that time more intrusive. Now survey calls are as unwanted and objectionable as telemarketing calls to many. I have seen some survey industry publications expressing great concern over the high refusal rates for telemarketing surveys, and the subsequent impact in survey validity.

Nowhere was this demonstrated more readily than in the details of the IPI survey methodology. The IPI study was conducted by telephone, and is based on the responses of 1000 persons who fully participated in that telephone survey. However, IPI had to initiate over 24,000 calls to obtain those 1000 participants. 4,936 calls reached answering machines, which are used by many people to screen their incoming calls in order to avoid telemarketers

² A number of studies were cited in my original comments, (Biggerstaff comments at 34-5) such as the study published in *Telemarketing Magazine* by Walker Research, showing that 70% of people surveyed found telemarketing calls to be “an invasion of privacy” and 69% considered it “an offensive way to sell.”

³ The industry repeatedly lumps all “teleservices” calls together into the term “telemarketing” so as to include both calls made to consumers by marketers, as well as calls made by consumers to the merchant such as to make catalog and mail-order purchases. The industry also includes calls by consumers for “customer service” such as technical support or returns.

⁴ United States Bureau of Census, 2002 projection, U.S. Census Bureau website <<http://www.census.gov/population/projections/nation/hh-fam/table1n.txt>>.

and surveys. 6,778 calls⁵ reached people who refused to participate in the IPI survey. 3,214 were “no answer” but as with answering machines, many people do not answer the phone if the callerID data indicates a caller who they are not expecting (or wanting) a call from. 713 calls reached “Fax/Modem/Blocked Number” but without a breakdown on how many were “blocked” or what “blocked” means, it is possible that many of these were people with various privacy services from the LEC that block calls from unwanted callers in a dedicated effort to stem telemarketing calls.

3. *High refusal rate*

Even ignoring the blocked calls, answering machines, and other results that are likely to be people with an anathema to telemarketing calls, just the people who affirmatively refused to participate in IPI telephone survey (6,778) outnumbered participants (1,000) by nearly 7 to 1. Because of the nature of the reason people refuse to participate in a telephone survey may be closely related to the reasons people find telemarketing calls objectionable and are unlikely to make a purchase from a telemarketer, the entire IPI survey is flawed. Even the findings on DNC list awareness and usage are suspect, since the people most interested and likely to be the most aware of a state DNC list provisions are also those that are most likely to not welcome interruptions by telephones - including the IPI survey.

B. *An independent survey*

While the methodology of the IPI study is fundamentally flawed, I believed that one underlying question sought to be answered (what is the percentage of households that purchase goods or services from telemarketing calls placed to residences) had merit. At my urging, the TCPA Legal Resources Center and Privacy Citizen, Inc., constructed and executed a survey designed to determine this information in a clear, concise, and unambiguous manner.⁶ This survey was conducted in person, at several public locations

⁵ This is the sum of 2,153 “gatekeeper refusals” and 4625 “respondent refusals.” *IPI* at 35.

⁶The final results are expected to be published shortly by TCPA Legal Resources Center and Private Citizen, Inc.

between December 20-22, 2002. This survey was an attempt to obtain very specific information from the population on a limited topic. The sociological context of telemarketing and survey taking both being perceived by many as an intrusion or invasion of privacy, raises a catch-22 situation. A more thorough survey would provide more details, but may increase refusals, which by the nature of the reasons people refuse, would skew the results. Or stated conversely, the results from those that participate in a survey on telemarketing preferences can not be extrapolated to the population as a whole if any significant number of people refuse to participate.

Because resistance to intrusion will skew results of any survey on telemarketing receptiveness, the survey must be very short and as least intrusive as possible. For that reason, the number of survey questions was limited to three, and did not ask questions about demographics. Gender, race, or other information based on visual observation was also not recorded, as if this practice was observed by the subjects it could affect the responses of people with heightened senses of privacy. While this limits the ability to break down the results over age, gender, or economic categories, the increased accuracy by capturing results from people who may have otherwise refused participation is more valuable.

Prospective participants were selected from people walking on the sidewalk by a randomized method using a die to select a random color, and the next person approaching wearing that color was selected. Prospective participants were told the following:

I have a short 3 question survey about your opinions on telemarketing and telephone sales. Can I ask your opinions?

Refusals were not tabulated, but were estimated at approximately 10 percent. Across all locations, 810 persons participated by fully answering all three questions. Less than 100 persons refused to participate when asked.

The questions asked were as follows:

1. ***In the last 12 months, have you or anyone else in your household purchased any goods or services of any type, based on a telemarketing call that was received at your home?***
2. ***In the last 12 months, have you or anyone else in your household purchased***

any goods or services of any type based on a telephone call your placed from your home to a merchant, such as ordering something out of a catalog?

3. *If you received a telephone call at your home conducting a survey, would you participate in the survey?*

Ambiguous responses such as “Probably” or “Probably not” were followed up with a request for disambiguation.

Responses

Question 1:

In the last 12 months, have you or anyone else in your household purchased any goods or services of any type, based on a telemarketing call that was received at your home?

Number of respondents that responded “Yes”: **38**. (4.7%)

Number that responded “No”: **772**. (95.3%)

Question 2:

In the last 12 months, have you or anyone else in your household purchased any goods or services of any type based on a telephone call your placed from your home to a merchant, such as ordering something out of a catalog?

Number of respondents that responded “Yes”: **480**. (59.3%)

Number that responded “No”: **330**. (40.7%)

Question 3:

If you received a telephone call at your home conducting a survey, would you participate in the survey?

Number of respondents that responded “Yes”: **227**. (28.0%)

Number that responded “No”: **583**. (72.0%)

1. Analysis

The first analysis done, was to compare persons who indicated that they would not participate in a telephone survey, to those that indicated they would participate in a telephone survey, to see if their households had made purchases over the phone from a telemarketing call received at their homes. The results were remarkable:

Table 2.

Group	Population	Have made a purchase from telemarketing calls received at home	Have NOT made a purchase from telemarketing calls received at home
Persons who WOULD participate in a telephone survey	227	38 (16.7%)	189 (83.3%)
Persons who WOULD NOT participate in a telephone survey	583	0 (0%)	583 (100%)
TOTAL	810	38	772

The group that would not participate in a telephone survey is also the group **LEAST** likely to have made a purchase from a telemarketing call. The next analysis looked at households to see if those who indicated that they would not participate in a telephone survey, compared to those that indicated they would participate in a telephone survey, to see if there was a similar disparity in likelihood of using the telephone to purchase goods or services from merchants, where the consumer placed a call to the merchant.

Table 2.

Group	Population	Have made a purchase in a call placed to a merchant	Have NOT made a purchase in a call placed to a merchant
Persons who WOULD participate in a telephone survey	227	146 (64.3%)	81 (35.7%)
Persons who WOULD NOT participate in a telephone survey	583	334 (57.3%)	249 (42.7%)
TOTAL	810	480	330

Table 2 shows that those persons who would refuse to participate in a telephone survey, were only slightly less likely to have also made purchases over the phone from a merchant where the consumer called the merchant.

2. Conclusion

There are two conclusions clearly apparent from these data. When asked in a clear and unambiguous way, and when surveyed in person rather than over the phone, only a small percentage of households (4.7%) report they have made purchases in the last year from a telemarketing call received in their homes.

The second is that people who chose not to participate in telephone surveys are not receptive to sales pitches made by telemarketing calls into their homes. Stated conversely, people who would participate in telephone surveys, are much more likely to have made a purchase from a telemarketing call received in their homes.

II. RESPONSE TO FIRST AMENDMENT ARGUMENTS

A number of commenters have raised complex legal arguments with regard to various portions of the Commission's proposed rules. I want to encourage the Commission to not take those arguments at face value. *Central Hudson* is only **one** test of First Amendment doctrine, and it is the **wrong** one to apply to the TCPA and the Commission's regulations under the TCPA. I have attached my recent briefing before the Eight Circuit in this regard, as well as that of an associate, Max Margulis in another recent TCPA case.

In addition, I found every single NPRM comment from industry members that raised substantive legal arguments on First Amendment grounds to have cited inapposite and inapplicable case law. Most glaringly improper citations of law came from the largest industry commeters such as the ATA, that repeatedly cited court cases striking restrictions on "pure" speech (i.e. *United States v. Playboy Entertainment Group*, 529 US 803 (2000)). Pure speech activities are not covered by the TCPA, so any court decisiosn striking pure speech regulations are inapposite for the purposes which these commenters cite them.⁷

The ATA at 64, places great stock in the 1980 finding by the Commission in *Unsolicited Telephone Calls*, 77 FCC 2d at 1035, that "we have no information that subscribers would find an advertising message more offensive than a request for charitable contribution or a political message or solicitation." ATA claims this was never repudiated. However, Congress relied heavily in the Field Research Study in justifying exempting calls made by charities. *See* Senate Report No. 102-171 at 1. (Citing Field Research Corp., *The California Public's Experience with and Attitude Toward Unsolicited Telephone Calls*, at 9 (March 1978) (survey conducted for Pacific Telephone Co., on file in Cal. Pub. Util. Comm'n File No. OII12)). I have attached in the appendix hereto, Table II-1 from that study that emphatically provides the empirical support that indeed, sales calls are much more

⁷ Use of pure speech cases is only relevant where such restrictions were **upheld** since a restriction that passes muster under the strict scrutiny of pure speech doctrines will, as a matter of law, also pass the lesser scrutiny of commercial speech doctrines. The converse, however, is not true, and is why such cases are not instructional when proffered by the industry seeking to challenge the TCPA.

annoying that either political or charity calls. The ATA comments are without merit. *See, also,*

H. R. Rep. No. 102-317 at 16 (1991).

It is astounding that the ATA would cite *Hill v. Colorado*, 530 U.S. 703 (2000) for the proposition that the TCPA violates constitutional constraints. *Hill* **upheld** a restrictions on particular types of communications - not because of the content, but because of the “offensive method of delivery.” *Id.*, at 737 (citation omitted) (Souter, O’Connor, Ginsberg, Breyer, JJ, concurring). Once again, *Hill* is a case concerning pure speech, and the TCPA would be subject to even lesser scrutiny. The same comments apply *Kovacs v. Cooper*, 336 U.S. 77 (1949), which upheld the delivery method restrictions - using sound trucks in residential neighborhoods. As senator Hollings, author of the TCPA noted:

The bill I am introducing today falls well within the scope of the first amendment. The first amendment allows the government every right to place reasonable time, place and manner restrictions on speech when necessary to protect consumers from a nuisance and an invasion of their privacy. . . . ***The bill does not ban the message; it bans the means used to deliver that message.***

137 Cong.Rec. S9840 (daily ed. July 11, 1991) (statement of Sen. Hollings).

III. APPLICATIONS OF STATE LAWS TO INTERSTATE SALES CALLS

Comments of the ATA suggest the Commission hold that states have no authority to apply state laws to telemarketing calls that cross state lines, and basically rebuff those states that have applied their telemarketing laws to all sellers calling into that state. These comments and suggestions misapprehend the nature of the application of state laws to these activities.

For example, ATA cites the *OSPA Ruling*, 6 DCC Rcd. 4776, for this proposition. However, there is a huge difference in a state attempting to apply its laws to an interstate *service* itself, which is being provided across state lines, as opposed to application of the states laws to an act taking place anywhere which causes harm in the victim's state - in essence a "long-distance" tort. We are all aware of the law school example of a man shooting a gun across state lines and injuring someone in a neighboring state. Such long distance torts always find proper venue and jurisdiction where the injury is received.

But on a more basic level, states are not regulating interstate calls *per se*. They are regulating a sales practice, not a telecommunications service. For example, state laws that prohibit bait and switch sales practices will apply to any out-of-state seller if the bait and switch advertising is sent by that seller into the forum state. It is roundly accepted that a business which seeks to avail itself of customers in the forum state subjects itself to the consumer protection laws of that state in return for the privilege of doing business there.

Furthermore, one of the frequent challenges made to state laws that apply to interstate commerce is that they are often intended to give local businesses an unfair economic advantage over out of state businesses. Such a purpose is illegitimate. But when a state enacts such a regulation for the health and welfare of its citizens consistent with its traditional police powers, such a regulation is permissible. Restrictions on telephone sales practices are of the latter sort, and equally apply to all sales calls to consumers in the forum state.

The alternative would lead to an absurd result. While states are not permitted to give a preference to in-state businesses by improperly restricting interstate commerce, not

permitting reasonable state telephone sales restrictions to interstate calls would mean that state regulations would unfairly *favor* out-of-state sellers by exempting interstate calls from the restriction intrastate sales calls must comply with.

It also leads to another absurd result where the calling entity has a presence in the state, but is using an out-of-state telemarketing bureau. For example, Sears has retail stores in my state. But if I receive a telemarketing call from Sears, it may be made to my home from some other state. But in reality, I am receiving a call from a business that is in my state.... it is proposing a transaction between two citizens of my state.... of *course* my state's consumer protection laws should apply to that transaction. If the method of sale - be it bait-and-switch, negative-option, or a prohibited telemarketing practice - is used by that seller, it is subject to my state's laws and courts.

A. Preemption of less restrictive state laws

Congress expressly intended, in the savings clause in the TCPA itself, to permit states to enforce equal or more restrictive telemarketing regulations. However, it is also clear that less restrictive state laws would not be saved. In that regard, state laws which include exemptions not found in the Commission's rules are by definition "less restrictive" than the TCPA, and thus must be preempted. The Commission should clarify that provisions of any state telemarketing laws which are less restrictive by having exemptions or other provisions which purport to permit any acts proscribed under the TCPA and Commission's rules are invalid. State courts will then have to conduct severability analysis to determine the status of the remainder of the state legislation.

IV. THE TELESERVICES INDUSTRY ECONOMY AND EMPLOYMENT

A number of commenters make dire and gloomy predictions on the effects on the economy and employment if a national DNC list is implemented or even if the TCPA itself is simply enforced. I am reminded of what must have been the laments of the whale oil distillers at the dawn of the age of electricity - “woe to us that society is changing.”

But the most glaring misstatements have to do with misinformation perpetrated by the teleservices industry. Once again, when I use the term “telemarketing” I use the common meaning understood by consumers of calls placed to the consumer’s home without invitation, and not calls initiated by the consumer where they call a merchant to place an order for merchandise “over the phone.”⁸ I will use the term “teleservices” to indicate the entire service industry of both telemarketing calls, and other telephone related services such as catalog sales and customer service.

A. Revenue and sales by teleservices

Claims that sales of goods and services will be impacted by telemarketing restrictions assume that the dollars spent on a product or service marketed by a telemarketers would otherwise go unspent. That assumption is baseless. Most telemarketing is geared to disposable income or brand switching (such as to change long distance carriers). Those dollars are going to be spent by the consumer - the telemarketers are just fighting over who they are spent with. Indeed, this is the best argument for applying the national DNC list to existing business relationships and having no loopholes - put all merchants in the same level playing field with no telemarketing to the numbers on the national DNC list. That way, no one has an unfair telemarketing advantage.

Claims that ILECs have an unfair advantage by their monthly billing envelope communications with the consumers are easily addressed by mandating that competitors

⁸ The industry repeatedly lumps all “teleservices” calls together into the term “telemarketing” so as to include both calls made to consumers by marketers, as well as calls made by consumers to the merchant such as to make catalog and mail-order purchases. The industry also includes calls by consumers for “customer service” such as technical support or returns.

be allowed to have inserts in those envelopes.

B. Employment

Recently, the curtain was partially pulled back on the Oz-like machine that is the teleservices industry. See Caroline E. Mayer, *Cooling on the Cold Calling?*, Washington Post, Jan. 4, 2003; Page E01. In that story, the innards of the beast show that the protestations of dire employment calamity are simply scare tactics. At Baltimore-based Sitel Corp., for example, calls made to consumers accounted for 90 percent of the company's \$100 million in revenue in 1995. In 2001, those same operations accounted for only 15 percent of the firm's \$735 million business. Growth from \$100 million in revenue to \$735 million, while at the same time reducing the percentage of cold-calls from 90% to 15%. This demonstrates that telemarketers can adapt, and continue to prosper with other types of calls (such as customer service and catalog sales).

There was no similar consternation when the advent of the predictive dialer in the late 1980's doubled telemarketer efficiency so that telemarketers needed only half as many agents to make the same number of telemarketing calls. The loss of those jobs due to technological innovation of the predictive dialer did not give rise to a cry to outlaw those dialers lest jobs be lost.

In addition, the number one employment concern of the cold-call telemarketing industry is burn out and turnover:

“Outbound calling really hurts morale. You can make 25 calls an hour, get hung up on, sworn at, and maybe, if you're lucky, you might make one sale,” he said. As a result, turnover rates have skyrocketed, Palley said. For those employees making only outbound calls, one in five leave each month. By contrast, only about one in 20 employees handling inbound calls quit each month, he said.

Id. Any review of telemarketing industry publications such as *Call Center Solutions* (formerly *Telemarketing* magazine) reveals similar concerns.

As industries and markets evolve, some players rise and some sink. Some telemarketing locations may close or cut back - others will expand. But the dire claims that millions of “teleservices” employees will be thrown into the streets is manifestly false. TCPA’s restrictions will only apply to outbound cold-calls to residences - only a

tiny fraction of both the employment and the dollar volume of the teleservices industry is in this category. The consumers' dollars will still be spent on goods and services. The advertisers' dollars will still be spent on ads.... just fewer telemarketing ads.

C. Industry intent

The telemarketer's mantra has always been "we don't want to call anyone who doesn't want to be called." It was easy to pledge allegiance to that mantra while there was no easy, long-term way for a consumer to communicate the desire not to be called to telemarketers that had the force of law. A national DNC list simply lets the telemarketers do what they have long claimed they want to do - avoid calling someone who doesn't want to be called.

The other mantra, this time of the Direct Marketing Association, is that "The goal of the DMA is to discover and to thwart possible government regulation." Jonah Gitlitz, President of the DMA, *DM NEWS*, October 22, 1990. The protestations of the industry in response to the NPRM show which mantra is more dear to their hearts.

D. A new paradigm

Today, telemarketers generally look for a 1% positive response rate. So the average call to each of the 100 million households in this country would find about 1 million receptive consumers. What if 80% of people who are the most unreceptive to telemarketing calls were placed on a national DNC list? Now marketers will have only 20 million homes to call to find those 1 million receptive consumers. The other 80 million can live in peace and quiet. Isn't that a win-win situation?

V. HANG-UP CALLS AND SAFE HARBOR PROVISIONS.

With regard to hang-up or dead air calls made by predictive dialers, many commenters have asked for “safe harbor” provisions or a limit on the rate of such “abandoned” calls to 5%. I am reminded of a judge in Ohio that said this of hang-up calls: “There are times when I just want to take a shotgun and, if I could shoot them through the phone, I’d do it.” *State v. Wagner*, 608 N.E.2d 852, 80 Ohio App. 3d 88 (1992).

I encourage the Commission to pay close attention to the comments filed by Dr. Sticknoth with regard to spousal abuse and other reactions to anonymous hang-up calls. The industry that make 100 million calls a day and wants to keep making 5% as hangups - 5 million opportunities a day to trigger abuse or worsen a citizen’s mental injury.

Telemarketers making intentional hang-up calls are illegal and a nuisance. *See Irvine v. Akron Beacon Journal, Irvine v. Akron Beacon Journal*, 770 N.E.2d 1105 (Ohio App. May 8, 2002). **If they can not operate their equipment in compliance with the law, they need to use different equipment.** This is not rocket science. Calls made by telemarketers must identify the caller. Period. No exemptions.

The FTC has tentatively adopted a “safe harbor” provision if full identification is made in the call by a recorded message, then the telemarketer will have a safe harbor from action by the FTC. However, the ringing telephone interrupting the quiet enjoyment of the home is the bulk of the invasion of privacy. Regardless of what takes place in the content of the call, it is still an invasion of privacy to get calls from unwelcome entities. That is why Congress drafted the definition of “telephone solicitation” broadly so as to include calls made “for the purpose” of a solicitation, even if no solicitation takes place.

In the event that the Commission adopts a similar safe harbor provision, as called for by several commenters, the Commission **must make clear** that calls made by a predictive dialer are in fact “telephone solicitations” under the statute, and **any** violation of the rules or the statute taking place in such a call is actionable - such as if a predictive dialer call is made after a consumer’s do-not-call request, fails to provide complete identification, or is made to a phone number on the national DNC list. The Commission

must also require more specific identification requirements to be disclosed clearly and **at the beginning** of the call, such as the full legal name of the calling entity, the full legal name of the party on whose behalf the call is made, the state of incorporation of both, as well as their physical address or telephone number. Otherwise, confusing names, unregistered DBA names, and fictitious “operating” names will be given, making it impossible for a consumer to accurately identify the caller.

VI. NCOA AND DNC LIST REGISTRATIONS

At least one commentor has recommended that the national DNC list be scrubbed using the master change of address database used by the Post Office (NCOA). This is a bad idea.

First, the national list should be maintained by phone number only. There is absolutely no reason to invade anyone's privacy by including names or addresses. Indeed, automated registration by telephone would not have a way to even determine an accurate address for everyone.

Furthermore, the Commission and the courts have noted that a DNC request is intended to protect everyone at that household. *See Charvat v. AT&T*, No. 98CVH-12-9334 (Franklin Co. Ct. of Common Pleas, Ohio, Nov. 30, 1999) ; *In the Matter of Consumer.net v. AT&T*, 15 FCC Rcd. 281 (Dec. 28, 1999). Consider the converse of that argument - if names and addresses were the nexus of the DNC request, once John Smith at 123 Main Street had registered a do-not-call request with a company, a telemarketing call to that Mr. Smith at that address would be a violation of his DNC request, even at a different phone number. That simply doesn't make sense. Calls to the same household but via a different telephone number do not violate a do-not-call request made for the other phone number. The list must be kept by phone number only since violations are only made by calling a **number** on the national list.

Recording names and/or addresses along with phone numbers, will only open the door to bogus claims that a telemarketer was trying to reach a different individual at that number than the person on the national DNC list. Using the NCOA to remove numbers from the list when one household member files a change of address (such as a roommate moving out, or a child marrying or going away to college) simply subjects the remaining household members to undue torture from telemarketers pouncing on fresh number recently removed from the national list.⁹ Fresh removals would also be the best way,

⁹ It is anticipated that telemarketers and contractors will monitor list changes very closely to immediately identify numbers dropped from the list as those removals would likely indicate new subscribers or reassigned numbers. As list brokers know, the "fresh movers" or "recent home purchasers" are highly sought out telemarketing victims ...er.. I mean targets.

from a statistical standpoint, for telemarketers to reach people who had previously been on the national DNC list at their old number, and have not yet had time to get their new number on the national list. As my previous comments noted, the best way to address this problem is to require the LEC to notify all new subscribers of the status of their new number on the national list, and not to remove any reassigned number from the national list until 6 months after reassignment, in order to give the new assignee time to get it on the national list before the onslaught of calls begins.

Ultimately, someone who wants the calls to start sooner, they can affirmatively respond to the LEC notice by requesting removal of their newly assigned number from the national DNC list.

VII. EXEMPTIONS FOR CALLS MADE TO SET UP AN IN-PERSON SOLICITATION

Several commenters have made references to exemptions in the FTC rules for calls made to set up subsequent in-person sales calls, and for calls that are not finalized until an in-person agreement is made. This exemption is not warranted for the TCPA rules, because of the nature of the two differing mandates.

One of the core concepts of the FTC's mandate is fraudulent practices where people are duped by unscrupulous practices - scams and criminals defrauding people out of their money. For that reason, the FTC rules generally apply when the sale is consummated, and have traditionally regulated sales practices principally to address fraud.

The TCPA is based on a completely different concept - invasion of privacy and trespass into a person's home by the telemarketer. Whether the telemarketer is making calls to try to set up in-person visits, or is making a direct solicitation over the phone, or is making hang-up calls because his dialer is over dialing, is irrelevant to the intrusion cause by the call itself.

VIII. “LEGITIMATE” TELEMARKETING ACTIVITIES

Many commenters have parroted the ambiguous phrase “legitimate telemarketing activities” from the NPRM and attendant history. But what does that term mean?

Remember, the industry includes catalog sales calls, customer service calls, computer technical support calls, etc., in the rubric “telemarketing” so I suppose that “legitimate telemarketing activities” would include those activities without much debate.

Making otherwise permissible sales calls during reasonable hours of the day, making proper disclosures, training agents in the law and DNC policies - those seem to be “legitimate telemarketing activities” too.

Is continuing to call someone who has put a “no soliciting” sign on their phone a “legitimate telemarketing activity?” I think not.... no more than a solicitor knocking at the door of a home which displays a large “no soliciting” sign on the door is legitimate.

No court has ever held that a law which prohibits salesman from calling on a home with a “no soliciting” sign is an abridgement of speech. Indeed, such laws put the choice in the hands of the homeowner - “where it belongs.” Such “no soliciting” signs are a direct analogy to the proposed national DNC list.

If a telemarketer has a business relationship with a consumer, they can use that relationship to get express permission to call, and thus not be restricted by the number being on the national list. If a business relationship exists, there will generally be bills sent and paid, orders taken and delivered, etc. Plenty of paperwork is exchanged between merchants and their customers, and express permission to call can easily be requested from existing customers.

IX. THE CURRENT STATE OF THE INDUSTRY MUST BE CONSIDERED

One of the most telling facts revealed by the industry is that they now make over 100 million calls a day.... up from only a small fraction of that number several years ago. However, the ATA and other industry commenters repeatedly cite to outdated snippets of legislative history and early commission comments with regard to the level of unwanted telemarketing, volume of calls, and the degree of consumer dissatisfaction with the practices of the telemarketing industry. These must all be carefully scrutinized as the landscape has greatly changed since those prior pronouncements. Consider this piece of pop culture:

“Bin Ladin most hated in America, Telemarketers drop to #2.”

Jay Leno's headline segment Oct. 29, 2001.

As any comedienne will tell you, the secret to successful humor is a grounding in truth. The exaggerated “ski-slope “ nose in a caricature cartoon of Bob Hope would have no humor to it without the fact that the lovable Mr. Hope does indeed have a nose worthy of caricature as a ski slope. The humor found in derision of telemarketers is based on the truism that they are indeed despised nearly universally.

X. TECHNOLOGIES PROFFERED BY THE INDUSTRY ARE NOT REAL SOLUTIONS

Some commenters, such as the ATA at 56-7, suggest a number of technological offerings to address unwanted telemarketing calls. But as a threshold matter, this is improper. Women do not have to purchase rape prevention devices in order to walk public streets and expect to be free from rape. We should not have to purchase our privacy in our own homes.

But on a technological level, these proposals also fail. Privacy manager services where callers are greeted by a recorded prompt, and only if they respond appropriately is their call put through, prevent people from receiving critical emergency information. *See*, David Campbell, *Township's Phone-alert System Still Suffers from Bugs*, The Princeton Packet Jan. 3, 03/2003 (included in appendix hereto). That story outlines how the town uses an emergency notification service that can place up to 15,000 calls an hour to alert residences to emergencies or impending disasters. However the LEC (Verizon) privacy manager service, offered and used by people to cut out telemarketing calls, also prevents these emergency calls from coming through. Such systems also prevent other types of automated calls - such as reminder calls from doctors about upcoming appointments, shipments waiting for pickup at a local store, and even notification of overdue books from the library.

As for devices that make automatic DNC requests, many telemarketers ignore them as not “valid.” In a case where I was involved in South Carolina, the telemarketer has a policy that when a telemarketing agent gets a DNC request, they ask the consumer for their telephone number, since the telemarketer does not know the number the dialer has dialed. Unless the consumer gives the telemarketer their phone number, there is no way for the agent to record the DNC request.

A national DNC list does no more and no less than giving me the ability to prophylactically place a “no soliciting” sign on my phone, just like the one on the door. It give me, the homeowner, the right to chose. It give me the control to decide for myself if I want that sign there or not. It gives me back my piece and quiet.

XI. SOLICITATION CALLS PLACED TO ANSWERING MACHINES

Some commenters have argued that calls placed to, or received by, answering machines are not covered by the TCPA. The Commission must make an unambiguous statement rejecting this flawed logic.

Many “persons” screen their calls with an answering machine. They “receive” all their calls this way. For them to be precluded from enjoying the protections of the TCPA because they have a need to screen their calls this way (such as a victim of stalking or obscene calls) is a travesty of the intent of the statute to protect consumers.

In addition, one of the identified evils of unrestricted telemarketing calls to homes was the using up the consumer’s answering machine tape so that other callers could not leave messages, and wasting the time of the consumer who then had to wade through several minutes of answering machine messages filled with solicitations. *See*, S. Rep. No. 178, 102ND Cong., 1ST Sess. 1991, 1991 U.S.C.C.A.N. 1968 (calls “fill the entire tape of an answering machine, preventing other callers from leaving messages”).

CONCLUSION

I thank the Commission for its time in considering my comments. I remain,

Sincerely,

Robert Biggerstaff

Appendix to Reply Comments of Robert Biggerstaff, CG Docket 02-278.

No. 02-2705
No. 02-2707

Civil

In The United States Court of Appeals
For The Eighth Circuit

STATE OF MISSOURI, ex rel., Jeremiah W. (Jay) Nixon, Attorney General,

Plaintiff - Appellant,

UNITED STATES OF AMERICA,

Intervenor - Appellant,

v.

AMERICAN BLAST FAX, INC. and FAX.COM, INC.

Defendants - Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri (Limbaugh, J.)

Brief of *Amicus Curiae* Robert Biggerstaff

Filed in Support of Appellants, Supporting Reversal

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**Concise Statement of Identity of *Amicus Curiae*, Interest in the Case, and
Source of Authority to File**

Amicus Robert Biggerstaff, is widely recognized as one of the foremost authorities on the application of the Telephone Consumer Protection Act (“TCPA”) and has appeared as *amicus curiae* in several TCPA cases, including before the Supreme Court of Ohio in the case of *Charvat, v. Dispatch Consumer Svcs., Inc.*, 769 N.E.2d 829, 95 Ohio St.3d 505 (Ohio, 2002) and the Missouri Court of Appeals in *Reynolds v. Diamond Foods & Poultry, Inc.*, -- S.W.3d --, 2002 WL 171438, 2002 Mo. App. LEXIS 231 (Mo. App. E.D. Feb. 5,2002). *Amicus* publishes a slip reporter service on TCPA litigation, and is an author of seminal law review articles and other publications on construction and application of the statute. *See, e.g., Application of the Telephone Consumer Protection Act To Intrastate Telemarketing Calls and Faxes*, 52 FED. COMM. L.J. 667 (2000); *State Courts and the Telephone Consumer Protection Act of 1991: Must States Opt-In? Can States Opt-Out?*, 33 CONN. L.REV. 407 (2001). He is also a nationally recognized expert in the area of consumer protections of the type the TCPA is intended to preserve, and has served as interim president of the consumer rights group, the National Association Mandating Equitable Databases.

Amicus files this brief to alert the Court to arguments not raised by Appellants

which are an integral part of the issue presented on appeal. Specifically that sending unsolicited advertisements via facsimile is properly analyzed as an act of trespass and theft to which First Amendment guarantees of free speech do not apply. The second argument is in the form of an alternative, that the TCPA should be considered “content-neutral” for purposes of First Amendment analysis, and not subjected to the *Central Hudson* test which is only applicable to content-based restrictions on commercial speech.

Amicus submits that because the court below was in error to find that unsolicited fax advertising transmissions are protected speech, and also in error to hold that the statute is content-based for First Amendment purposes, it consequently applied an incorrect standard of review. Despite these arguments being made below, Appellants have not fully addressed these critical arguments in their opening briefs, having instead addressed only the elements of the *Central Hudson* test.

Amicus has a direct and vital interest in the correct application of the Constitution to the interpretation of this federal statute, to ensure availability of the substantive rights sought to be guaranteed by Congress with this statute.

Accordingly, *Amicus* submits this brief in support of Appellants, urging reversal.

Introduction to Argument

Unsolicited fax advertising presents a unique advertising delivery mechanism - it uses the recipient's fax machine without permission, and it shifts the cost of paying for the receipt of the advertisement to the recipients without their consent.¹

These unique aspects of this mechanism requires that this medium of advertising must be carefully scrutinized.

The uniqueness of each medium of expression has been a frequent refrain: *See, e.g., Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) (“Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems”); *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978) (“We have long recognized that each medium of expression presents special First Amendment problems”); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952) (“Each method tends to present its own peculiar problems”).

Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981).

“[C]onsideration of a forum's special attributes is relevant to the constitutionality of

1. The only other commercial methods of communications with similar attributes are telemarketing calls with the charges reversed, calls and messages to cellular phones and pagers where the recipient pays to receive the message (both of which are also proscribed by the TCPA), and unsolicited e-mail advertisements (already prohibited by many states and under increasing scrutiny at the federal level).

One may think of television and radio as mediums where the sender has such control over what material comes out of the box, but in actuality, the recipient voluntarily consents to receipt of the television and radio programming (and the advertisements therein) by tuning in to that station. A more proper analogy would be if television or radio stations could reach out and turn on your receiver without consent, and change the channel to one of their choosing - not yours.

a regulation, since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved.”

Heffron v. Int'l Soc. for Krishna Consc., 452 U.S. 640, 650-51 (1981). While unsolicited advertisements may be “suited” to the postal mails as a communications medium, *Amicus* suggests that unsolicited advertisements are not suited to the unique medium of facsimile transmissions.

Unsolicited fax advertising couples speech activities (the content of the advertisements) with non-speech activities (use of the recipient’s property without permission and consumption of the recipient’s supplies without consent). Rather than analyze this distinction, the parties in the seminal case addressing a First Amendment challenge to the Telephone Consumer Protection Act (“TCPA”) stipulated that the statute’s restriction on unsolicited fax advertisements was a content-based restriction on protected commercial speech, subjecting it to the *Central Hudson* analysis. *Destination Ventures Ltd. v. FCC*, 844 F.Supp. 632, 635 (D. Or. 1994):

The parties agree that the restriction upon unsolicited fax advertisements is content-based, and that, as a restriction on commercial speech, the statute would pass constitutional muster if it directly advances a substantial governmental interest in a manner that is no more extensive than necessary to serve that interest.

That fateful decision by the litigants in *Destination Ventures* created a fiction that

the TCPA is content-based, and must be analyzed under the elements of *Central Hudson*. However, the court did not make that determination - it was simply presupposed by the litigants. Because the *Destination Ventures* court ultimately held that the statute passed the *Central Hudson* analysis, this error was harmless, since in satisfying the *Central Hudson* standard, the statute would, as a matter of law, also satisfy any less rigorous standard, such as a “time, place, and manner.”

In the matter *sub judice*, however, the court below held that the statute **failed** the *Central Hudson* test. It is now critically important to determine if the *Central Hudson* test, which only applies to content-based restrictions, is the proper one to apply to the TCPA. For example, the federal district court for the Western District of Texas instead found that the TCPA was “content-neutral” for First Amendment purposes. *State of Texas v. Am. Blast Fax, Inc.*, 159 F.Supp.2d 936 (W.D.Tex., 2001). The Arizona Court of Appeals noted that unsolicited fax advertising “involves taking or using the property of the recipients” even if only a small amount individually. *ESI Ergonomic Solutions, LLC v. United Artists*, -- P.3d --, 378 Ariz. Adv. Rep. 90, 2002 WL 1539494, ¶ 35 (Ariz. App. July 16, 2002) (dicta). A number of other state courts have expressly held that unsolicited fax advertising “is theft and a trespass - not a speech right.” *See, e.g., Micro Engineering, Inc. v. St. Louis Assoc. of Credit Management, Inc.*, No. 02AC-0082338 slip op. at 2 (Mo.

Cir. Aug 13, 2002)(Appendix “A”) and cases cited therein.²

Before any First Amendment test can be applied, a court must first determine that the activity being regulated is in fact protected by the First Amendment. “It has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). The burden to prove that conduct genuinely protected by the Constitution is at issue, is on the party wishing to engage in that conduct. “Although it is common to place the burden upon the Government to justify impingements on First Amendment interests, it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies.” *Clark v. Community for Creative Non-violence*, 468 U.S. 288, 293, note 5 (1984); *Walker v. City of Kansas City, Missouri*, 911 F.2d 80, 85 (8th Cir. 1990). Absent this showing, there is no further First Amendment question to answer and no test to apply.

Amicus suggests that existence of a First Amendment infirmity in the

2. While respecting the general rule regarding citation of unpublished decisions, *Amicus* presents the existence of these cases not as persuasive authority suggesting this Court follow those decisions, but merely to demonstrate that the question has been decided differently, underscoring the need to consider all theories in this *de novo* constitutional review. *United States v. Crawford*, 115 F.3d 1397, 1400 (8th Cir.), *cert. denied*, 522 U.S. 934 (1997).

proscription of sending unsolicited commercial facsimile advertisements presupposes that a speaker has a constitutional right to use and consume another person's property for commercial speech purposes, without permission of the property owner. To make this a speech case, is to insist on a constitutionally guaranteed right to use someone else's paper, ink, and printing press to print and distribute a message, all without the permission of the owner of that printing press. This is not speech - it is tortious, culpable conduct. "To permit the thief to thus misuse the [First] Amendment would be to prostitute the salutary purposes of the First Amendment." *United States v. Morrison*, 844 F.2d 1057, 1069-70 (4th Cir. 1988), *cert. denied*, 488 U.S. 908 (1988) (First Amendment was not implicated in prosecution of stolen information, even though information was used for protected speech purposes). There is a constitutional right to speak - not a constitutional right to free paper, free ink, and free use of someone else's printing press to print that speech.

I. THE TCPA IS NOT SUBJECT TO SCRUTINY UNDER THE FIRST AMENDMENT

One can not examine any regulation that is claimed to inhibit free speech rights without first asking the threshold question of whether or not the conduct regulated is actually protected by the First Amendment in the first place. The fact that speech or words are involved does not automatically invoke First Amendment scrutiny. Picketing, almost by definition, contains protected speech, yet it has been long established that picketing on private property without the property owner's permission is not subject to First Amendment protection. "[U]nder the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this." *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976) (trespass on private property for picketing purposes is not subject to First Amendment protection). Consider if someone erected a billboard on your private property, or painted their advertisement on the side of your vehicle without permission. The *contents* of the messages distributed by such activities clearly involve protected speech, yet it is incomprehensible that someone could claim that trespass and graffiti laws unconstitutionally inhibit those acts. Imagine if a salesman on the street corner could reach into your pocket without consent, take ten cents to subsidize his printing cost, then hand you his sales flyer and run.... and expect the First Amendment to protect his conduct.

When an advertiser sends a unsolicited advertisement to a fax machine owner, the advertiser is publishing their advertisement using the recipient's paper, using the recipient's ink, and printing on the recipient's printing presses and doing so without the recipient's consent. Under the TCPA, a speaker is in no way restricted from publishing their speech on their own paper, with their own ink, and on their own printing press. There is no restriction of speech here - only a restriction of tortious conduct.

A. The TCPA is not a regulation of speech

As a threshold matter, *Amicus* suggests that the TCPA is no more a regulation of speech than a graffiti or trespassing statute. It proscribes a class of nonconsensual conversion and trespass of another person's property for commercial purposes. The burden is not to get the recipient's prior express consent to be exposed to the content of the message - the obligation is for the advertiser to get consent to use someone else's supplies and equipment to deliver the sender's cost-shifted commercial advertising.³ It is a regulation of *commercial conduct*, not

3. The importance of this distinction is made apparent by in the event that appellees cite dicta from Chief Justice Rehnquist's lone concurrence in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). The dicta in the Chief Justice's concurrence (in which no other justice joined) only runs to viewpoint-based restrictions that impose a requirement for prior permission to be exposed to "*particular* viewpoints." *Id.*, at 80 (The statute in *Bolger* only restricted speech promoting contraceptives, and not speech opposing them). The TCPA is not by any stretch of the imagination viewpoint-based, so not subject to the Chief Justice's admonition. In

speech. It applies to private property, not a public forum.⁴ A restaurant owner does not have a First Amendment right to walk into a Kinko's copy shop, make a copy of the restaurant's advertisement on Kinko's copy machine and paper without paying for it, then hand the advertisement to a Kinko's employee and solicit them to come to the restaurant to buy lunch. Yet this is precisely what happens when an advertiser sends unsolicited advertising faxes to the same copy shop. It is equivalent to a telemarketing call with the charges reversed, or "getting junk mail with the postage due" - except that you have no chance to decline the charges.

Telemarketing Practices: Hearings on H.R. 628, 2131, and 2184 Before the Subcomm. On Telecommunications and Finance of the House Comm. On Energy

addition, information about contraceptives by definition concerns fundamental reproductive rights, and thus was scrutinized in *Bolger* as pure speech, not the lesser scrutiny of commercial speech.

4. While the "non-public" forum cases have mostly concerned restrictions on government owned forums that are non-public (*See, e.g., Greer v. Spock*, 424 U.S. 828 (1976) (prohibiting political speeches or the distribution of leaflets in areas of government property otherwise open to the general public)), various courts have applied it to non-government owned property as well. *See, e.g., State v. Migliorino*, 442 N.W.2d 36 (Wis. 1989) *cert. denied sub nom.* 493 U.S. 1004 (1989) (private medical facility was a nonpublic forum for First Amendment analysis purposes.)

As many commentators have noted, "the forum counts" in speech cases. "Furthermore, consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." *Heffron*, 452 U.S. at 651. What is an impermissible restriction in a traditional public forum long used for public discourse such as the sidewalks and parks, can on the other hand be a perfectly permissible restriction in a non-public forum.

and Commerce, 101st Cong. 1st Sess. at 20 (1989) at 2 (hereinafter “*House Subcomm. Hrg. on Telemarketing Practices*”)⁵ (Rep. Markey). “The Court never intimated that the visitor could insert a foot in the door and insist on a hearing.” *Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949) (upholding prohibition on use of sound trucks as delivery method of protected speech).⁶

B. There is no First Amendment right to access private property to engage in speech.

Even a cursory review of case law shows emphatically that there is simply no First Amendment right to access another person’s private property. *Hudgens v. NLRB*, 424 U.S. 507 (1976) (trespass not protected by First Amendment); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568 (1972) (“[T]his Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only.”) There simply is no federal constitutional “right” to use another person’s property for speech without consent. For example in *State v. Nye*, 943 P.2d 96 (Mt. 1997), the

5. This hearing testimony is included in the appendix to the Brief of Appellant State of Missouri.

6. It is the nature of fax transmissions that the recipient must generally pay for the supplies and allow his fax machine to be “tied up” to receive the message *before* he knows who the sender is, and thus decide if he wishes to decline the publication. The damage however, is already done. The fax recipient is truly an “unwilling listener” as contemplated in *Kovacs*.

Supreme Court of Montana considered a case where a man claimed a “free speech” right to put bumper stickers on other peoples’ private property - without the consent of the owners:

Nye points out that many others in the Gardiner community have similar stickers affixed to their vehicles or in their windows as a protest against what they perceive to be objectionable practices of CUT. However, Nye fails to recognize that the difference between his conduct and that of others in the Gardiner community is that the others he refers to placed the stickers on their own property while Nye placed the stickers on other people’s property without their permission. As the State asserts in its brief, if Nye had limited his attack on CUT to the display of a bumper sticker on his car or living room window, the First Amendment would have protected his right to do so. Nye lost his First Amendment protection when he coupled the message on the bumper sticker with defacement of the property of others.

Id., at 101. The *contents* of Nye’s bumper stickers were not hate speech - they were fully protected by the First Amendment as the above quotation shows. But the non-consensual use of other peoples’ bumpers to publish his message was *not* protected by the First Amendment. *See, also, N.O.W. v. Operation Rescue*, 37 F. 3d 646, 655 (D.C. Cir. 1994) (“Appellants have no general First Amendment right to trespass on private property.”); *Cincinnati v. Thompson*, 643 N.E.2d 1157 (Ohio App. 1994) (protesters not entitled to First Amendment protection for protesting on private property). “Under the present state of the law, freedom of speech does not entitle one to come upon the property of another and commit a trespass...” *Hood v. Stafford*, 378 S.W.2d 766, 772 (Tenn. 1964) (upholding ordinance that prohibited

use of business property without consent for speech purposes). “[I]t is untenable that conduct such as vandalism is protected by the First Amendment merely because those engaged in such conduct intend thereby to express an idea.” *In re Michael M.*, 86 Cal.App.4th 718, 729 (2001) citing *Texas v. Johnson*, 491 U.S. 397, 404 (1989). “The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another person’s home or office.” *Dietmann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971).

Nor does the “ease of use” of the facsimile medium by fax advertisers confer constitutional protection. “[T]he First Amendment does not guarantee the right to communicate one’s views at all times and places or in any manner that may be desired.” *Heffron*, 452 U.S. at 647. “That more people may be more easily and cheaply reached . . . is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open.” *Kovacs v. Cooper*, 336 U.S. 77, 88-89 (1949). “There is simply no First Amendment right to trespass upon private property, even when access to that property may be the only, or most effective, way to reach the intended audience.” *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F.Supp. 1417, 1434 (W.D.N.Y.1992) *aff’d in relevant part, & rev’d in part, sub nom.*, 519 U.S. 357 (1997).

Like Nye, fax advertisers lose any First Amendment protection for their content when they steal and trespass without permission to subsidize their advertising distribution mechanism. “To permit the thief to thus misuse the [First] Amendment would be to prostitute the salutary purposes of the First Amendment.” *United States v. Morrison*, 844 F.2d 1057, 1069-70 (4th Cir. 1988) (no right to steal information even for speech purposes). A thief or trespasser can not excuse his trespass by espousing political discourse while he steals or trespasses. “An armed robber cannot escape responsibility for his or her conduct by pointing out that ‘stick ‘em up’ is speech or by reciting the Gettysburg address during the robbery.” *Huffman and Wright Logging Co. v. Wade*, 857 P.2d 101, 108, n. 9 (Or. 1993) (en banc).

Unsolicited fax advertising is a combination of speech and nonspeech activities. “[W]hen ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.” *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 702-3 (1986). Tying up the recipients’ fax machines and the shifting of advertising cost of untold numbers of flyers to the unwilling recipients are “nonspeech elements” of the commercial practice of non-consensual broadcast fax advertising. These are in fact, not only crimes but

common law torts, and the statute at issue here is a proper step by a government which has protection of individual property rights as one of its compelling duties. It is these nonspeech elements that are the evils the statute addresses - not the speech itself. “[L]aw must reflect the ‘differing natures, values, abuses and dangers’ of each method [of communication].” *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) (regulation of billboards allowed because of unique harms caused by billboards, such as visual clutter, not manifest by other forms of advertising).

C. The burden to demonstrate that the First Amendment protects their conduct is on fax broadcasters.

Simply because some speech is involved, does not automatically invoke First Amendment scrutiny. In applying this axiom, the Supreme Court requires that any party wishing to challenge a statute must bear the burden of demonstrating First Amendment protection applies. “Although it is common to place the burden upon the Government to justify impingements on First Amendment interests, it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies.” *Clark v. Community for Creative Non-violence*, 468 U.S. 288, 293, note 5 (1984) (overnight camping prohibition not a First Amendment violation). Persons engaging in unsolicited fax advertising have not meet this burden, and the court below failed to require them to

do so. Once the distinction between speech and non-speech elements are illuminated with regard to unsolicited advertising faxes, the regulation of the latter is clearly not a First Amendment issue. Theft and trespass are non-speech elements that are not protected by the First Amendment. A speaker can't steal a ream of paper at Office Depot and demand theft laws be justified by the government under First Amendment doctrine. Otherwise "any government action that had some conceivable speech-inhibiting consequences, such as the arrest of a newscaster for a traffic violation, would require analysis under the First Amendment." *Arcara*, 478 U.S. at 708 (O'Connor, Stevens, JJ, concurring).

D. Unsolicited faxing constitutes a common law tort.

The TCPA finds its roots in tort law - trespass and conversion - and in particular, trespass to chattels. The Supreme Court has offered guidance in tort cases of *sic utere tuo ut alienum non laedas* (use your property so that other people's property is not damaged). *Brendale v. Confederated Yakima Indian Nation*, 492 U.S. 408, 434 (1989). That maxim is violated by indiscriminate unsolicited faxing and there is no First Amendment infringement in this principle.

While the direct pecuniary costs of a single fax can vary⁷, trespass rights are

7. Intangible costs can also vary. To drive home the problem of interference, even from a single junk fax, the Circuit Administrator for the Eleventh Circuit asked that the court's fax number be stricken from directories out of fear that fax advertisement would interfere with death penalty appeals. *National Law Journal*, Mar.

not contingent on any monetary value. Appropriating the property of another without that person's consent is inconsistent with the fundamental view of property rights as significant, regardless of how much of it is at stake. The Supreme Court described this maxim in *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 170 (1998), in addressing the question of whether taking property that had no economic value was still a taking of property. The Court reiterated:

our longstanding recognition that property is more than economic value. . . ; it also consists of the group of rights which the so-called owner exercises in his dominion of the physical thing, such as the right to possess, use, and dispose of it . . . possession, control, and disposition are nonetheless valuable rights that inhere in the property.

Id. (internal quotations and citations omitted). Advertisers clearly have a right to speak, but they do not have the right to appropriate someone else's property or interfere with the possession and control of it. Quantification of the injury is simply not a valid argument. *See, United States v. Turoff*, 701 F. Supp. 981, 987 (E.D.N.Y. 1988) (rejecting the notion of "a *de minimis* qualification to the tort of conversion or the crime of larceny"). Congress had specific testimony which underscored this principle. *House Subcomm. Hrg. on Telemarketing Practices at 97-8* (direct testimony of Prof. Ellis) ("3 or 10 cents is not the issue. The issue is the intrusiveness, ... It is not the cost. It is the fact that even if it is 3 cents,

6, 1989, at 1.

somebody has forced me to spend it.”) Even absent the TCPA, a victim could seek damages under common law trespass to chattels for unsolicited faxes. *See, Chair King v. Houston Cellular*, 1995 W.L. 1693093 at *2 (denying a motion to dismiss with respect to plaintiff’s trespass to chattels claim for unsolicited faxes) (S.D. Tex. Nov. 7, 1995), *vacated on other grounds* 131 F.3d 507 (5th Cir.1997). The TCPA simply recognizes and codifies into statutory law a common law tort, and sets liquidated damages.

Nor are unsolicited fax broadcasters trespassing for an “innocent” purpose as contemplated by *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 148 (1943). Their underlying “purpose” is to appropriate to their own use, the paper, ink, and use of a printing press without the consent of the owner. Entering a man’s land so as to ring his doorbell is quite a different purpose than entering his land to take his property or scrawl graffiti on his walls.

Justice Marshal’s famous quote with respect to unwanted mail is that the “short, though regular, journey from mail box to trash can . . . is an acceptable burden.” *Bolger*, 463 U.S. at 72. However this analogy does not extend to junk faxes. With junk faxes, the recipient is *throwing away his own paper and toner*. Would Justice Marshal make the same statement if we all had to feed blank paper and supplies into the mailbox like a fax machine, or while junk mail was being

received, our personal and business correspondence was unable to come through our mailbox?

II. THE TCPA IS CONTENT NEUTRAL

A. The TCPA easily meets the test for content neutrality

The Court has recently reiterated the test for content neutrality:

As we explained in *Ward*: “The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”

Hill v. Colorado, 503 U.S. 730, 719 (2000) citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). “The correct rule, rather, is captured in the formulation that a restriction is content based only if it is imposed because of the content of the speech and not because of *offensive behavior identified with its delivery*.” *Id.*, at 737 (citation omitted) (emphasis added) (Souter, O’Connor, Ginsberg, Breyer, JJ, concurring).

This Court has previously noted that *Hill* articulates a clarified standard for content neutrality. In *Thorburn v. Austin*, 231 F.3d 1114 (8th Cir. 2000), this Court addressed the question of content neutrality of a picketing ordinance. A prior ordinance was held to be content-based “because it was impossible to tell whether a person was engaged in picketing without analyzing his message, we held that the limitation was not justified without reference to content.” *Id.*, at 1118. This Court

then recognized that “*Hill* [*v. Colorado*] rejected this sort of analysis.” *Id.* As a result, the ordinance in *Thorburn* was found to be content-neutral, even though prior to *Hill* it would have been held to be content-based.

“Thus, the essence of time, place, or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals.” *Consolidated Edison Co. v. Public Serv. Comm’n*, 447 U.S. 530, 535 (1980) (applying “time, place, and manner” tests to commercial speech).

The junk fax “method of speech” fits that description. Said more directly:

The essence of time, place, and manner restrictions is content neutrality. The disregard of content is why such restrictions are given more deferential review than are other speech restraints. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 928, 89 L. Ed. 2d 29 (1986). ***Their intent is not to influence what a speaker has to say, only when, where, or how he says it.*** Their focus is on the effects of the act of speaking, not on the information conveyed by the speech. *Id.* at 930. In one sense, the restrictions in question do not regulate the content of appellant’s solicitation -- it may make any sales pitch it pleases -- they merely dictate where and how appellant may make its pitch.

Nat’l Funderal Svcs., Inc. v. Ruckerfeller, 870 F.2d 136, 145 (4th Cir. 1989) *cert. denied* 493 U.S. 966 (1989) (emphasis added).

Furthermore, Congress expressly intended the TCPA as regulation of the “means used to deliver the message” and not the content:

The bill I am introducing today falls well within the scope of the first amendment. The first amendment allows the government every right to place reasonable time, place and manner restrictions on speech when

necessary to protect consumers from a nuisance and an invasion of their privacy. . . . ***The bill does not ban the message; it bans the means used to deliver that message.*** ... Advertisements today are sent for cruises, home products, investments, and all kinds of products and services without the consent of the person receiving them. These unsolicited advertisements prevent the owners from using their own fax machines for business purposes.

137 Cong.Rec. S9840 (daily ed. July 11, 1991) (statement of Sen. Hollings)

(emphasis added).

“Even solicitation that is neither fraudulent nor deceptive may be pressed with such frequency or vehemence as to intimidate, vex, or harass the recipient. In *Ohralik*, we made explicit that protection of the public from these aspects of solicitation is a legitimate and important state interest.” *Edenfield v. Fane*, 507 U.S. 761, 769 (1993) (in-person solicitations). That “offensive delivery” is the evil addressed by the TCPA, and thus it is a content-neutral purpose.⁸ Congress received testimony that the “vehemence” of shoving their advertising into your own fax machine using your own ink and paper without permission is clearly vexing. *House Subcomm. Hrg. on Telemarketing Practices* at 97-8 (direct testimony of Prof. Ellis); *Id.*, at 82 (direct testimony of John M. Glynn, Maryland People’s Counsel, that “[J]unk fax not only interferes with the use of your fax machine but

8. Indeed, the term “content neutral” is shorthand for “content neutral *purpose*” and not a “content neutral *statute*.” This is often lost on casual observers of First Amendment doctrines announced by the U.S. Supreme Court.

makes you pay for it, which adds insult to injury.”) There is no indication that Congress enacted the TCPA because of any “disagreement with the message” any advertiser is making, nor does the record indicate any party below even alleged such a motive. It is thus content-neutral under the *Ward/Hill* analysis.⁹

B. The example of *Hill v. Colorado*

The fact that the TCPA only applies to commercial solicitation faxes does not make the statute content-based. This is amply demonstrated by *Hill v. Colorado*. The statute in *Hill* only applied to, *inter alia*, speech containing “oral protest, education, or counseling.” *Hill* 530 U.S. at 703 (citing Colorado Rev. Stat. §18-9-122(3)). The content of the speech thus determined whether the statute applied or not. But the Court held:

It is common in the law to examine the content of a communication to determine the speaker’s purpose. Whether a particular statement constitutes a threat, blackmail, an agreement to fix prices, a copyright

9. One of the best tests for content-neutrality taught to law students, is the “language” test articulated by Professor John Hart Ely, “[h]ad his audience been unable to read English, there would have been no occasion for the regulation.” John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1498 (1975) (discussing *Cohen v. California*, 403 U.S. 15 (1971)). This is what Professor Tribe calls “track two” analysis: is the regulation “aim[ed] at ideas or information?” *See, generally*, Lawrence Tribe, *American Constitutional Law: A Textbook*, MacMillan Publ., 5th Ed. 1995 at 791-92 (citing *Kovacs v. Cooper*, 336 U.S. 77 (1949)). Even if the recipient of the junk fax does not speak English, their paper and ink is still consumed for someone else’s advertisement, and the fax machine is used without consent. The harms still exist.

violation, a public offering of securities, or an offer to sell goods often depends on the precise content of the statement. We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct.

Hill, 530 U.S. at 721. As explained by the Court in *Hill*, this type of statute is not content-based merely because the content of the message determines if it is subject to the statute or not.

Only one other federal decision interpreting the TCPA has issued since the standards for content-neutrality were clarified in *Hill*. In a case brought by the Texas Attorney General, the district court for the Western District of Texas held the junk fax provision of the TCPA were “not a ‘content-based’ regulation for purposes of the First Amendment.” *State of Texas v. Am. Blast Fax, Inc.*, 159 F.Supp.2d 936 (W.D.Tex., 2001). This is true even though the statute only applies to advertising faxes. 47 U.S.C. § 227(b)(1)(c). The same conclusion is warranted here.

C. The TCPA addresses a “secondary effect” of an illegal delivery method.

While the TCPA is clearly content-neutral under the *Ward/Hill* analysis, another independent prong of content neutrality doctrine is the regulation of secondary-effects, meaning “regulations that apply to a particular category of speech because the regulatory targets happen to be associated with that type of speech.” *Boos v. Barry*, 485 U.S. 312, 320 (1988). It was argued below that the

junk fax provision of the TCPA is content-based simply because it applies only to “material advertising the commercial availability, or quality, of property, goods, or services.” 47 U.S.C. § 227(a)(4). But the TCPA does not address any harm *from the content* of the advertising itself (such as offensive language in the advertisement). The “regulatory target” is a harmful secondary effect - the electronic trespass into private property and theft of materials for commercial purposes. It is an unacceptable delivery method like the sound trucks in *Kovacs*. The Supreme Court has noted that when addressing the secondary effects of conduct that is related to speech, it is not considered content-based regulation:

In *Renton* [475 U.S. 41], the regulation explicitly treated “adult” movie theaters differently from other theaters, and defined “adult” theaters solely by reference to the content of their movies. 475 U.S., at 44. We nonetheless treated the zoning regulation as content neutral because the ordinance was aimed at the secondary effects of adult theaters, a justification unrelated to the content of the adult movies themselves. *Id.*, at 48.

Erie v. Pap’s A. M., 529 U.S. 277, 295 (2000). “[W]hile the regulation in *Renton* applied only to a particular category of speech, its justification had nothing to do with that speech.” *Boos*, 485 U.S. at 320. The actual content of the fax is not the evil.

D. Elements of the “time, place, and manner” test

The most significant difference between the *Central Hudson* test and the

time, place, and manner test, is that all prongs of the time, place, and manner test are subject to less rigorous “reasonable” scrutiny (“Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions.” *Clark*, 468 U.S. at 293; “[G]overnment may impose reasonable restrictions on the time, place, or manner of protected speech.” *Ward*, 491 U.S. at 791), and greater deference is given to judgments of the drafters when analyzing time, place, and manner restrictions. *Clark*, 468 U.S. at 299; *Metromedia*, 453 U.S. at 509 (“[We] hesitate to disagree with the accumulated, commonsense judgments of local lawmakers...”).

The elements of permissible time, place, and manner restrictions are 1) content neutrality, 2) serving a significant government interest, 3) narrowly tailored, but not least restrictive means, and 4) leaving open ample opportunity for speech in alternative fora. Another often overlooked aspect of time, place, and manner tests is that the Court has adopted an implicit balancing approach. (“Particularized inquiry” in *Metromedia*, 453 U.S. at 503). The same restriction can be valid for commercial speech but invalid for non-commercial speech. *Id.*

With regard to a significant state interest, the Court has held as a matter of law “solicitation that is neither fraudulent nor deceptive may be pressed with such frequency or vehemence as to intimidate, vex, or harass the recipient. In *Ohralik*,

we made explicit that protection of the public from these aspects of solicitation is a legitimate and important state interest.” *Edenfield v. Fane*, 507 U.S. 761, 769 (1993). Any review of the legislative history reveals that victims of the nonconsensual use of their supplies and fax machine by unsolicited faxes find it undisputedly vexatious and harassing. *See, e.g., House Subcomm. Hrg. on Telemarketing Practices* at 97-8 (direct testimony of Prof. Ellis); *Id.*, at 82 (direct testimony of John M. Glynn). This easily satisfies the significant government interest prong of the time, place, and manner doctrine.

“[T]he requirement of narrow tailoring is satisfied ‘so long as the . . . regulation promotes a substantial government interest that would be achieved *less effectively absent the regulation.*’” *Ward*, 491 U.S. at 799 (emphasis added). Although alternatives can be considered, alternatives that are “less effective” simply don’t count. What is required is “a ‘fit’ between the legislature’s ends and the means chosen to accomplish those ends - a fit that is not necessarily perfect, but reasonable.” *Ward*, 491 U.S. at 797.

Congress itself concluded that the only way to stop the non-consensual cost shifting of commercial advertising and hijacking of fax machines is to require the advertiser to obtain the recipient’s consent before using the recipient’s machine, paper, and toner. “[S]uch a responsibility, is the *minimum necessary* to protect

unwilling recipients from receiving fax messages that are detrimental to the owner's uses of his or her fax machine." S. Rpt. No. 178, 102nd Cong., 1st Sess. (1991) (emphasis added).

As for the TCPA's restrictions being reasonable, the Supreme Court pointed out in *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 50-51 (1983), that a restriction on speech is "reasonable" when it is "consistent with the [state's] legitimate interest in preserving the property for the use to which it is lawfully dedicated." Preventing nonconsensual hijacking of the recipient's printing press, so it can be preserved for use by the owner and his invitees clearly fits this reasonableness test.

CONCLUSION

There is a constitutional right to speak - not a constitutional right to free paper, free ink, and free use of someone else's printing press to print that speech. The issue of unsolicited fax advertising should not be subsumed in heated differences over how many pennies worth of paper and toner are used by an unsolicited fax, or the invocation of a theoretical Constitutional protection for consuming those pennies without consent. The substantial evidentiary record below is in fact a red herring, as the need for such a record depends on a deception of "littles:"

[T]he constant recurrence of small expenses in time eats up a fortune. The expense does not take place at once, and therefore is not observed; the mind is deceived, as in the fallacy which says that 'if each part is little, then the whole is little.' this is true in one way, but not in another, for the whole and the all are not little, although they are made up of littles.

Aristotle, *Politics*, Bk. 5, Ch. 8 (Jowett trans.) A man who steals a dollar from a million persons has stolen the same amount as a man who steals one million dollars from one person. In the same way, unsolicited faxing, even at pennies per page, when measured by the billions of unsolicited faxes that can be sent each year, constitutes much more than a "little." This Court has noted that a government action is judged "on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interest in

an individual case.” *Assoc. of Community Organizations for Reform Now, v. St. Louis County*, 930 F.2d 591 (8th Cir. 1991). When viewed as a whole, this cost-shifted, tortious advertising delivery method is an appropriate target of government regulation. If allowed to stand, the decision below creates a constitutional right to use another mans printing press, without his consent.

Respectfully Submitted,

Robert Biggerstaff
POB 614
Mt. Pleasant, SC 29465
(843) 740-4525
Amicus Curiae

**IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI**

MARILYN MARGULIS,)	
)	Cause No. 02AC-1268
Plaintiff,)	
)	
v.)	Division 39 - Tuesday
)	
P&M CONSULTING, INC.,)	Over \$3,000
)	
Defendant.)	
_____)	

**PLAINTIFF’S MEMORANDUM IN OPPOSITION TO DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT**

COMES NOW PLAINTIFF in answer to Defendant’s Motion for Summary Judgment, and submits this memorandum in opposition to that motion.

I. Defendant’s Motion Is Improperly Cast

Defendant’s motion is improperly cast, and not in a recognizable format required by Mo.R.RCP Rule 74.04. Defendant’s motion contains no set of alleged facts set out in numbered paragraphs with citation to the evidentiary record to which Plaintiff can respond. Any “facts” set out in Defendant’s motion lack any citation to the record, evidentiary support, and are hereby denied. Defendant’s motion contains no set of alleged facts to which Plaintiff can respond.

Rather than seek to strike the motion as procedurally defective, Plaintiff will address Defendant’s motion based on the stipulated facts agreed by the parties. (Exhibit “A” hereto). Any “facts” set out in Defendant’s motion lack any citation to the record, evidentiary support, and are expressly denied.

II. Damages Are Set by the Statute.

As a preliminary matter, Defendant complains that “Plaintiff [has not] alleged trespass, petty

theft, or any other definable expense cause by her voluntary participation in the call.” Def, Memo. at P 24. This misapprehends the nature of the remedial damages provision of the statute. Plaintiff need allege no injury or damages. The statute mandates fixed statutory damages in lieu of actual damages. “Congress may enact statutes creating legal rights, the invasion of which creates standing, even though **no** injury would exist without the statute.” Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3, (1973) (emphasis added). Indeed, the purpose behind this statute was made clear by its author, Senator Hollings:

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

137 Cong.Rec. S16206 (Nov. 7, 1991) (statement of Sen. Hollings).

III. The Call Is Not an Exempted “Survey”

Defendant believes that a blanket exemption to the TCPA exists for calls that ask questions like a survey. Whether such an exemption exists is an issue of statutory construction. The statute and applicable regulations prohibit calls delivering a pre-recorded messages to residences unless the caller obtains the “prior express permission or invitation” of the called party or qualifies for the narrow exemption permitted by the statute.¹ That exemption permits the FCC to exempt calls made for a commercial purpose, only if they, inter alia, do not “adversely affect the privacy rights that this section is intended to protect.” 47 U.S.C. § 227(b)(92)(B)(ii)(I). Indeed, the statute originally did not have such an exemption - all unsolicited prerecorded calls of **any** nature were flatly prohibited. A late amendment was made at the request of Congressman Bryant of Texas to permit his constituent, MessagePhone, to continue offering its service of letting callers from pay phones record a personal

¹ There are technical exceptions such as for calls made for an “emergency purpose” and by non-profit entities that are not at issue in the case at bar.

message to be delivered in the event the person they were calling was not available.

Take for instance the scenario where you are at an airport, you missed your flight and only have a few minutes to call your spouse with the updated flight information. The line is busy and you have to leave. With my constituent's service, you could record a message; they would attempt to deliver a few minutes later, even if you were completely removed from a telephone. * * * The broadness of the Senat[e]'s original definition of an autodialer would have prevented the telemessaging services I have described.

137 Cong. Rec 11,311-12 (Nov. 26, 1991) (statement of Mr. Bryant)

Some telephone companies are beginning to offer a voice messaging service which delivers personal messages to one or more persons. A person calling from a pay telephone at an airport, for instance, may call and leave a recorded message to be delivered later if the called line is busy or no one answers the call. Some debt collection agencies also use automated or prerecorded messages to notify consumers of outstanding bills. The FCC should consider whether these types of prerecorded calls should be exempted and under what conditions such an exemption should be granted either as a noncommercial call or as a category of calls that does not invade the privacy rights of consumers. In considering whether to exempt certain calls, however, the bill states that the FCC may not exempt telephone solicitations. These calls are certainly commercial calls and the evidence before the Congress leaves no doubt that these types of calls are an invasion of privacy and a nuisance.

137 Cong. Rec 18,784 (Nov. 27, 1991) (statement of Mr. Hollings). This shows exactly what Congress intended and was considering.

One of the foundational principles of statutory construction is set forth in the very first paragraph of the Missouri Revised Statutes, that “all acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof.” R.S.Mo. § 1.010. This conclusion is reinforced by the fact that the TCPA is a remedial consumer protection statute and “should be liberally construed and interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers.” Scarborough v. Atlantic Coast Line R. Co., 178 F.2d 253, 258 (4th Cir. 1950). Exemptions from provisions of remedial federal statutes “are to be

construed narrowly to limit exemption eligibility.” Hogar v. Suarez-Medina, 36 F3d 177, 182 (1st Cir 1994); See, also, 3 N. Singer, Sutherland Statutory Construction § 60.01. To adopt Defendant's argument would be to effectively gut the TCPA, so telemarketers would be free to engage in unlimited prerecorded calling if they simply prefaced their missive with a couple of bogus “survey” questions. Such a construction would clearly conflict with the intent of the statute, and violate one of the oldest canons of construction:

[T]he office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico.

Heydon's Case, 3 Co. Rep. 7a, 7b; 76 Eng. Rep. 637, 638 (1584) (cited in Cummins v. Kansas City Public Service Co., 334 Mo. 672, 698-99 (Mo. banc 1933)).

Defendant points to, indeed rests practically his entire argument on, a snippet of language from a FCC publication that Defendant claims exempts “calls conducting research, market survey, political polling, or similar activities which do not involve solicitation as defined by our rules.” However, Defendant is playing hide the ball, and fails to cite the footnote to that very same quote:

See para. 45, infra., emphasizing that market research or surveys would be prohibited under § 227 of the TCPA and § 64.1200(a)(1) if the called party were charged for the call without the party's prior express consent or if such calls contain unsolicited advertisements.

The legislature expressly contemplated that telemarketers would try this loophole with “pretext” surveys, and made clear:

A call encouraging a purchase, rental or investment would fall within the definition, however, even though the caller purports to be conducting a survey.

S. Rep. No. 102-177, p. 5, Oct. 8, 1991. The reasoning for this is clear. Consumers found such

pretextual calls offensive. The watershed statistical analysis which Congress had in front of it in drafting the TCPA was the Field Research Study. See S. Rep. 102-177 at 2, n1 (1991) citing Field Research Corp., The California Public's Experience with and Attitude Toward Unsolicited Telephone Calls, at 9 (March 1978) (survey conducted for Pacific Telephone Co., on file in Cal. Pub. Util. Comm'n File No. OII12); cited in Susan Burnett Luten, Give Me a Home Where No Salesmen Phone: Telephone Solicitation and the First Amendment, 7 HASTINGS CONST. L.Q. 129-164; see, also, Mark S. Nadel, Rings of Privacy: Unsolicited Telephone Calls and the Right of Privacy, 4 YALE J. ON REG. 99, 128.

Table II-1 of the Field Research Study is attached as Exhibit “B” and shows that calls purporting to be conducting a survey as a pretext for selling something were even **more** objectionable than prerecorded solicitations! Only crank and obscene calls were more objectionable. Id. Even calls from bill collectors were less annoying. Id.

In drafting the statute, Congress permitted only a narrow range of calls to be exempted from the prerecorded message prohibition. One of the conditions set out by Congress is that any rule the FCC adopted is prohibited by the statute itself from exempting any call that “adversely affect the privacy rights that this section is intended to protect.” 47 U.S.C. § 227(b)(2)(B)(ii)(I). Because these “fake” survey calls are considered in the very study Congress referenced, to be more intrusive than straightforward prerecorded sales calls, they can not - as a matter of law - have been exempted by the FCC. This also demonstrates Defendant’s reliance on dicta in Stinson v United States, 508 U.S. 36, 45 (1993) is misplaced. That quotation itself (Def. Memo. at 12) sets out that no agency rule or interpretation of that rule is to be accorded deference if it violates the statute. If the FCC’s rule were to be interpreted in the way Defendant proposes, it violates the statute by exempting something that the FCC was not empowered to exempt. Such an interpretation can not be valid as

it violates the TCPA itself.

The ultimate question is whether the call in question a legitimate survey entitled to the exemption in the statute, or whether it is a ruse and subterfuge attempting to evade the statute. This is a pristine example of where the application of the time honored “duck test” is appropriate - “If it walks like a duck, quacks like a duck, and looks like a duck, then it's a duck.” BMC Industries, Inc. v. Barth Industries, Inc., 160 F.3d 1322, 1337 (11th Cir., 1998). Indeed, this very Court applied the test in Davis, Keller, Wiggins, LLC. v. JTH Tax, Inc., No. 00AC-023289 (Mo. Cir. Ct. Aug. 28, 2001). Defendant is not a survey company - it is a telemarketing company.

Defendant engages in some linguistic misdirection arguing that the text of the call does not meet the definition of “telephone solicitation” in the statute. Instructive here is the recent case of Irvine v. Akron Beacon Journal, 770 N.E.2d 1105 (Ohio App. 2002). That case concerned computer made telemarketing calls made to a consumer’s home where no solicitation was actually made in the calls, but they were made as part of a process to determine if a future solicitation should be made.²

The fact that these particular calls were one step removed from the actual sales pitch does not mean that the purpose of the calls was not to, ultimately, attempt to sell a subscription to the Beacon Journal. This court is not persuaded by Beacon Journal's argument that the calls it generated by the autodialer, with no intention of connecting them to a telephone solicitor, did not qualify as “telephone solicitations.” Whether a solicitor is at the other end of the phone or not, when the telephone rings, the intrusion into the home and the seizing of the telephone line is the same. In fact, an argument can be made that when the telephone rings and no one is on the other end, the recipient is even more disturbed and inconvenienced than if a sales person is at the other end of the line.

Id. at 1118-19. This reasoning is sound and the Ohio Supreme Court denied certiorari.

Furthermore, the definition of “unsolicited advertisement” includes not only solicitations, but

² The newspaper was calling to see if the number called was a working phone where someone lived who could purchase the newspaper.

also mere “advertisements” that property, goods, or services are available:

(4) The term “unsolicited advertisement” means 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.

As this very Court has previously held, “advertise” in the context of the TCPA means “to make something known to : notify.” Davis, Keller, Wiggins, LLC. v. JTH Tax, Inc., No. 00AC-023289 (Mo. Cir. Ct. Aug. 28, 2001), citing Webster’s dictionary. The text of the call itself announces:

[A] complimentary vacation package including round trip airfare for two and two nights hotel accommodations to your choice of either Orlando Florida or Las Vegas Nevada. There is absolutely no obligation to purchase or join anything to receive your vacation.

Were this phrase in a magazine or newspaper, it would undoubtedly be considered an “advertisement.”

Defendant’s example of a legitimate survey where the participant is compensated for providing their opinions is a far cry from the deceptive advertising scheme being perpetrated by Defendant. A legitimate survey seeks to tabulate public opinions or facts.... not to identify individuals for solicitation.

IV. I Plaintiff Did Not Give “Express Consent” to Receive Prerecorded Messages.

Defendant argues that Plaintiff voluntarily “participated” in the call. But nowhere does Defendant claim that Plaintiff gave “prior express consent” to receive the call, which is required by the statute. 47 U.S.C. § 227(b)(1)(B). Congress did not allow “implied” consent - it required “express” consent. A simple review of Black’s Dictionary reveals that “express” means:

Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference. Minneapolis Steel & Machinery Co. v. Federal Surety Co., 34 F.2d 270, 274 (8th Cir). Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The

word is usually contrasted with “implied.”

Black's Law Dictionary (Revised 6th ed.). This court has adopted the same definition in other TCPA cases.

As with other waivers of rights, the laws require such waivers to be “express” or they are not valid. That is why attorneys drawing contracts that include things like waivers of liability will place those clauses in large, bold print. If they are buried in small type, such waivers are not “express.” To be “express” the person giving consent must be completely informed about what he is consenting to. If a caller asks “may we deliver an message with an advertisement to you by prerecorded message?” then an affirmative response is express consent to do just that. If a caller merely asks “press ‘1’ for more information” such a request does not inform the other party that the subsequent “information” will be an advertisement, nor that it will be delivered by a prerecorded message.

Furthermore, the FCC (on whom Defendant relies) has explicitly stated that when a telemarketer calls a person’s home “to determine whether a subscriber wishes to receive a telephone solicitation is, in effect, a solicitation from that telemarketer,” Memorandum Opinion and Order, ¶ 15, 10 FCC Rcd 12391 (1995). So to the extent that Defendant seeks to frame his call as obtaining permission to make a subsequent solicitation, it is simply not possible to conduct permission-based telemarketing calls in that manner.

The final nail in the coffin of Defendant’s argument is provided by the FCC:

Although the term “express permission or invitation” is not defined in statutory language or legislative history, there is no indication that Congress intended that calls be excepted from telephone solicitation restrictions unless the residential subscriber has (a) clearly stated that the telemarketer may call, and (b) clearly expressed an understanding that the telemarketer's subsequent call will be made for the purpose of encouraging the purchase or rental of, or investment in, property, goods or services.

In the Matter of the Telephone Consumer Protection Act of 1991, Memorandum Opinion and Order,

¶ 11, 10 FCC Rcd 12391 (1995). This emphatically rejects Defendant’s argument and shows that merely “participating” in the call is insufficient to constitute prior “express” permission to make a prerecorded call.

The lone and unpublished authorities cited by Defendant for this proposition are not persuasive. The first, Charvat v. Integrity Ind., No.: 00CVH-05-4795 (Ohio C.P. Jan. 25, 2001) was argued and lost by a non-attorney pro se consumer, and that court’s order reached improper conclusions of fact and law. That court clearly substituted its own opinions about what should - or should not - be actionable, in clear contravention of the statute’s language. Defendant’s citation to Charvat v. Crawford, No.: 01CVH04-3376 (Ohio C.P., July 26, 2002) is even more problematic. It relies substantially on the Integrity Ind. decision. In a further example of hiding the ball, Defendant has failed to disclose that Crawford is under appeal. See Docket No. 02APE09-1086 in the Ohio Court of Appeals, Tenth Appellate District.

V. Disclosures Required by the Statute and FCC Rules.

With regard to the disclosures required to be made, the tape recording of the call by Plaintiff did not clearly disclose that the caller gave the identification. Because Plaintiff’s tape was not clear enough to rebut the transcript of the call provided by Defendant, Plaintiff accepted that transcript in the interest of efficient resolution of the matter. Plaintiff voluntarily dismisses Count 1 paragraphs 4 and 5 .

VI. Vagueness Challenge

Defendant’s vagueness arguments fails for a host of reasons. Here, Defendant’s burden is high, having to overcome the foundational principle that acts of Congress are presumed valid against such challenges. United States v. National Dairy Corp., 372 U.S. 29, 32-3 (1963).

Defendant was well aware that this type of subterfuge of a bogus “survey” in an attempt to

evade the TCPA's proscription was without merit. Defendant was previously involved in a TCPA case in South Carolina, regarding a prerecorded call:

The material facts of this case are essentially undisputed. On May 7, 1999, Defendant placed a telephone call to Plaintiff's home, using a recorded message. A transcript of the message was entered into evidence, which showed that the message, inter alia, asked the called party "if 6 days and 5 nights in Florida for only \$97 sounds good to you, press '1' now to hear all the details." Defendant characterized this message as a survey and not a solicitation.

Biggerstaff v. SBS Resort Promotions, Inc., No. 99-SC-86-3267 (Magis. Ct. S.C., Dec. 15, 1999).

That court rejected Defendant's arguments, and went on to find that the message in that case was an "unsolicited advertisement" and that "Defendant carefully crafted the content of the recorded message, not in an attempt at compliance with the law, but in a calculated attempt at evasion of the statute's prohibitions."

Defendant need do nothing more than read the statute, and refrain from making prerecorded messages that announce property, goods, or services are available. The claim that the TCPA's definition of "unsolicited advertisement" is somehow vague is simply rhetoric of someone "intent on finding fault at any cost." "There are limitations on the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973); United States Civil Svc. Comm. v. Nat. Assoc. of Letter Carriers, 413 U.S. 548, 578-79 (1973) (Hatch Act's ban on "political activity" by federal employees was not unconstitutionally vague). Nor is a heightened scrutiny applicable here because the TCPA is not a speech restriction - it is a restriction of a delivery practice. A speaker can still make his speech by other methods. The cases relied upon by Defendant, such as Cantwell v. Connecticut, 310 U.S. 296

(1940) (criminal statute prohibiting soliciting for charities unless approved as “bona fide” charity) regarded penalties for **pure** speech, not commercial speech. City of Chicago v. Morales, 527 U.S. 41 (1999) regarded criminal loitering ordinance, also not commercial speech. “[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression.” Board of Trustees of State University of N. Y. v. Fox, 492 U.S. 469, 477 (1989), quoting Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 456 (1978)

VII. There Is No Chilling Effect on Speech Here.

There is no “chilling” of protected speech here. As a threshold matter, the “chilling effect” argument can only be raised in a facial challenge, because this Defendant was not “chilled” from making prerecorded calls. Therefore Defendant’s argument is inapposite in this “as applied” challenge.

Only when the content of the speech is restricted in all venues is a speaker faced with the sole choices of either 1) altering his content in order to steer clear of the law, or 2) possibly violating the statute. The TCPA leaves *other* options. The speaker is immune from the TCPA’s proscriptions if he simply obtains consent of the recipient, or sends his message by any of a plethora of other delivery methods.

Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982), is instructive in vagueness cases:

These standards [for vagueness] should not, of course, be mechanically applied. The degree of vagueness that the Constitution tolerates - as well as the relative importance of fair notice and fair enforcement - depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action.

Id., at 498-99 (internal footnotes omitted). These elements of the analysis are present here, and all run against Defendant. The TCPA is an economic regulation of advertising conduct. The TCPA is a civil statute, and not criminal.

The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language. Indeed, we have consistently sought an interpretation which supports the constitutionality of legislation.

Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged.

United States v. National Dairy Corp., 372 U.S. 29, 32-3 (1963).

Nor is a “more stringent” standard due here simply because speech is involved. Any heightened vagueness review is only applicable to “pure” speech cases, and **not** commercial speech.

VIII. First Amendment

Defendant raises an “as applied” challenge to the TCPA. As a threshold matter, the court must determine whether the statute’s prohibition on placing unsolicited advertising calls with a prerecorded message to persons’ homes is “content-based” or “content-neutral” for First Amendment purposes. It is not disputed that Defendant’s purported “speech “ is of a commercial character, so any decisions regarding “core” speech are inapposite for Defendant’s arguments.

In a classic case of putting the cart before the horse, Defendant has skipped several First Amendment doctrines and leapt headfirst into an analysis of the TCPA under Central Hudson Gas and Electric Corp. v. Public Service Comm’n of New York, 447 U.S. 557 (1980). This standard only applies to content-based restrictions of commercial speech, that are “truthful and nonmisleading” Because this is an “as applied” challenge, we only consider Defendant’s conduct, and not that of

others covered by the statute. This statute is not content-based for First Amendment purposes, and in this case, Defendant’s message is misleading. Both of which disqualify the TCPA from scrutiny under Central Hudson.

Because this is an as-applied challenge, the facts of this particular call quickly dispose of any First Amendment challenge. To receive First Amendment protection, commercial speech must be truthful and non-misleading. In re R.M.J., 455 U.S. 191, 203 (1982) (“Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. . . . Misleading advertising may be prohibited entirely.”) Conducting a bogus “survey” as a pretext for time share promotions is deceitful and misleading. The First Amendment does not protect such speech.

Nor does the “ease of use” of prerecorded calls by advertisers confer constitutional protection. “[T]he First Amendment does not guarantee the right to communicate one’s views at all times and places or in any manner that may be desired.” Heffron v. Int’l Soc. For Krishna Consc., 452 U.S. 640, 647 (1981) “That more people may be more easily and cheaply reached . . . is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open.” Kovacs v. Cooper, 336 U.S. 77, 88-89 (1949). “There is simply no First Amendment right to trespass upon private property, even when access to that property may be the only, or most effective, way to reach the intended audience.” Pro-Choice Network of Western New York v. Project Rescue Western New York, 799 F.Supp. 1417, 1434 (W.D.N.Y.1992) aff’d in relevant part, & rev’d in part, sub nom., 519 U.S. 357 (1997).

A. The TCPA Is Content Neutral and a Time, Place, and Manner Restriction

1. Other Courts have held the TCPA and other prerecorded telemarketing restrictions are valid time, place, and manner restrictions

This question has come before the courts before. The leading case on the TCPA’s restrictions

on prerecorded calls is Moser v. FCC, 46 F.3d 970 (9th Cir. 1995), cert. denied, 115 S. Ct. 2615 (1995). The Ninth Circuit unanimously concluded:

The provision in the Telephone Consumer Protection Act of 1991 banning automated, prerecorded calls to residences is content-neutral. Congress adequately demonstrated that such calls pose a threat to residential privacy. The ban is narrowly tailored to advance that interest, and leaves open ample alternative channels of communication. Thus, it does not violate the First Amendment.

Id. at 975. In fact, in making this finding, the Ninth Circuit expressly rejected the exact same arguments advanced by Defendant here. Other courts have reached the same conclusion with regards to state laws nearly identical to the TCPA. Van Bergen v. Minnesota, 59 F.3d 1541 (8th Cir.1995); Bland v. Fessler, 88 F.3d 729 (9th Cir. 1996). This court should follow these well reasoned, unanimous appellate courts.

2. The TCPA Easily Meets the Test for Content Neutrality

Even if this Court was to reach a First Amendment analysis, the aforementioned decisions on restrictions on prerecorded telemarketing calls have all held they are content-neutral time, place and manner restrictions. The Supreme Court has recently reiterated the test for content neutrality:

As we explained in Ward: “The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.

Hill v. Colorado, 530 U.S. 703, 719 (2000) citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). “The correct rule, rather, is captured in the formulation that a restriction is content based only if it is imposed because of the content of the speech and not because of offensive behavior identified with its delivery.” Id., at 737 (citation omitted) (Souter, O’Connor, Ginsberg, Breyer, JJ, concurring).

“Thus, the essence of time, place, or manner regulation lies in the recognition that various

methods of speech, regardless of their content, may frustrate legitimate governmental goals.” Consolidated Edison Co. v. Public Serv. Comm’n, 447 U.S. 530, 535 (1980) (applying “time, place, and manner” tests to commercial speech) (emphasis added). The prerecorded call “method of speech” fits that description. Said more directly, time, place, and manner restrictions are those unconcerned with influencing the speaker’s message:

The essence of time, place, and manner restrictions is content neutrality. The disregard of content is why such restrictions are given more deferential review than are other speech restraints. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S. Ct. 925, 928, 89 L. Ed. 2d 29 (1986). Their intent is not to influence what a speaker has to say, only when, where, or how he says it. Their focus is on the effects of the act of speaking, not on the information conveyed by the speech. Id. at 930. In one sense, the restrictions in question do not regulate the content of appellant’s solicitation -- it may make any sales pitch it pleases – they merely dictate where and how appellant may make its pitch.

Nat’l Funeral Svcs., Inc. v. Rockerfeller, 870 F.2d 136, 145 (4th Cir. 1989) cert. denied 493 U.S. 966 (1989). Furthermore, Congress expressly intended the TCPA as regulation of the “means used to deliver the message” and not the content:

The bill I am introducing today falls well within the scope of the first amendment. The first amendment allows the government every right to place reasonable time, place and manner restrictions on speech when necessary to protect consumers from a nuisance and an invasion of their privacy. . . . The bill does not ban the message; it bans the means used to deliver that message. ... Advertisements today are sent for cruises, home products, investments, and all kinds of products and services without the consent of the person receiving them. These unsolicited advertisements prevent the owners from using their own fax machines for business purposes.

137 Cong.Rec. S9840 (daily ed. July 11, 1991) (statement of Sen. Hollings).

“Even solicitation that is neither fraudulent nor deceptive may be pressed with such frequency or vehemence as to intimidate, vex, or harass the recipient. In Ohralik, we made explicit that protection of the public from these aspects of solicitation is a legitimate and important state interest.”

Edenfield v. Fane, 507 U.S. 761, 769 (1993) (in-person solicitations). That “offensive delivery” is the evil addressed by the TCPA, and thus it is a content-neutral purpose.³ There is no indication that Congress enacted the TCPA because of any “disagreement with the message.” It is thus content-neutral under the Ward/Hill analysis.⁴

3. Analysis Under *Hill v. Colorado*

The fact that the TCPA only applies to commercial calls does not make the statute content-based. This is amply demonstrated by Hill v. Colorado. The statute in Hill only applied to, *inter alia*, speech containing “oral protest, education, or counseling.” Hill, 530 U.S. at 703 (citing Colorado Rev. Stat. §18-9-122(3)). The content of the speech thus determined whether the statute applied or not. But the Court held:

It is common in the law to examine the content of a communication to determine the speaker’s purpose. Whether a particular statement constitutes a threat, blackmail, an agreement to fix prices, a copyright violation, a public offering of securities, or an offer to sell goods often depends on the precise content of the statement. We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct.

Hill, 530 U.S. at 721. As explained by the Court in Hill, this type of statute is not content-based

³ Indeed, the term “content neutral” in First Amendment contexts is shorthand for “content neutral *purpose*” and not a “content neutral *statute*.” This nuance was apparently overlooked by Defendant.

⁴One of the best tests for content-neutrality taught to law students, is the “language” test articulated by Professor John Hart Ely, “[h]ad his audience been unable to read English, there would have been no occasion for the regulation.” John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1498 (1975) (discussing Cohen v. California, 403 U.S. 15 (1971)). This is what Professor Tribe calls “track two” analysis: is the regulation “aim[ed] at ideas or information?” See, generally, Lawrence Tribe, *American Constitutional Law: A Textbook*, MacMillan Publ., 5th Ed. 1995 at 791-92 (citing Kovacs v. Cooper, 336 U.S. 77 (1949)). Even if the recipient of the junk fax does not speak English, their paper and ink is still consumed for someone else’s advertisement, and the fax machine is used without consent. The harms still exist.

merely because the content of the message determines if it is subject to the statute or not.

B. The TCPA Meets the Requirements of the “Time, Place and Manner” Test

The most significant difference between the Central Hudson test and the time, place, and manner test, is that all prongs of the time, place, and manner test are subject to less rigorous “reasonable” scrutiny (“Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions.” Clark v. Community for Creative Non-violence, 468 U.S. 288, 293 (1984); “[G]overnment may impose reasonable restrictions on the time, place, or manner of protected speech.” Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)), and greater deference is given to judgments of the drafters when analyzing time, place, and manner restrictions. Clark, 468 U.S. at 299; Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 509 (1981) (“[We] hesitate to disagree with the accumulated, commonsense judgments of local lawmakers...”).

1. Elements of Time, Place, and Manner Restrictions

The elements of permissible time, place, and manner restrictions are 1) content neutrality, 2) serving a significant government interest, 3) narrowly tailored, but not least restrictive means, and 4) leaving open ample opportunity for speech in alternative fora. Another often overlooked aspect of time, place, and manner tests is that the Court has adopted an implicit balancing approach. (“Particularized inquiry” in Metromedia, 453 U.S. at 503). The same restriction can be valid for commercial speech but invalid for non-commercial speech. Id.

2. Significant State Interest

With regard to a significant state interest, the Court has held as a matter of law “solicitation that is neither fraudulent nor deceptive may be pressed with such frequency or vehemence as to intimidate, vex, or harass the recipient. In Ohrlik, we made explicit that protection of the public from these aspects of solicitation is a legitimate and important state interest.” Edenfield v. Fane, 507

U.S. 761, 769 (1993). Review of the legislative history of the TCPA reveals that victims prerecorded calls undisputedly vexatious and harassing. This easily satisfies the significant government interest prong of the time, place, and manner doctrine.

Independently, it is black letter law that protection of residential privacy is not only important, but a compelling government interest. “Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different.... [A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions.” Frisby v. Schultz, 487 U.S. 474, 484-85 (1988). ““The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.”” Id. at 484 (quoting Carey v. Brown, 447 U.S. 455, 471 (1980)).

3. Narrow Tailoring

“[T]he requirement of narrow tailoring is satisfied ‘so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.’” Ward, 491 U.S. at 799. Although alternatives can be considered, alternatives that are “less effective” are not relevant to this prong of the time, place, and manner analysis. What is required is “a ‘fit’ between the legislature’s ends and the means chosen to accomplish those ends - a fit that is not necessarily perfect, but reasonable.” Ward, 491 U.S. at 797. Congress did not ban all prerecorded messages. Based on the thorough research before it, Congress only directed the TCPA at the most problematic calls. This is very narrowly tailored.

As for the TCPA’s restrictions being reasonable, the Supreme Court pointed out in Perry Ed. Assn. v. Perry Local Educators’ Assn., 460 U.S. 37, 50-51 (1983), that a restriction on speech is “reasonable” when it is “consistent with the [state’s] legitimate interest in preserving the property for the use to which it is lawfully dedicated.”

4. Availability of Other Fora

As for the availability of other fora, there can be no serious debate that ample other fora for commercial solicitations are present, and have been used for decades. Indeed, advertisers can continue to use prerecorded messages if they simply get permission from the resident of the home they want to target.

Intermediate scrutiny of commercial speech does not require scientific studies; rather, it approves the use of “any evidence that is reasonably believed to be relevant for demonstrating a connection between speech and a substantial, independent government interest.” City of Los Angeles v. Alameda Books, Inc., 122 S.Ct. 1728, 1736 (2002). That evidence may include “history, consensus, and ‘simple common sense.’” Florida Bar v. Went For It, Inc., 155 U.S. 618, 628 (1995). There is no need for “[e]mpirical data,” and “certainly not without actual and convincing evidence . . . to the contrary.” Alameda Books, 122 S.Ct. at 1736. As the court stated in Van Bergen, “we do not believe that external evidence of the disruption . . . is necessary: It is evident to anyone who has received such unsolicited calls” 59 F.3d at 1554. See, also, Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 508-09 (1981) (plurality op.) (giving weight to “accumulated, common-sense judgments of . . . lawmakers” that billboards may adversely impact traffic safety); Central Hudson, 447 U.S. at 569 (accepting without external evidence the direct connection between advertising and demand).

Furthermore, government action is judged “on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government’s interest in an individual case.” Assoc. of Community Organizations for Reform Now, v. St. Louis County, 930 F.2d 591 (8th Cir. 1991). When viewed as a whole, automated prerecorded calls can invade millions of homes at a time and is an appropriate target of government regulation.

Despite Defendant wishing it weren't so, "the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved **less effectively absent the regulation.**" Ward, 491 U.S. at 799 (emphasis added). Although alternatives can be considered, alternatives that are "less effective" are not sufficient to be considered as a matter of law, because - by definition - they would promote the government interest less effectively. Furthermore "laws restricting commercial speech, unlike laws burdening other forms of protected expression, need only be tailored in a **reasonable** manner to serve a substantial state interest in order to survive First Amendment scrutiny." Edenfield v. Fane, 507 U.S. 761, 767 (1993) (emphasis added).

As a general matter, the Constitution does not compel Congress to address either an entire problem or no piece of it at all. "Nor do we require that the Government make progress on every front before it can make progress on any front"); Metromedia, Inc. v. San Diego, 453 U.S. 490, 511 (1981) (plurality opinion); United States v. Edge Broadcasting, 509 U.S. 418, 434 (1993). "The First Amendment does not require Congress to forgo addressing the problem at all unless it completely eliminates cost shifting." Destination Ventures, 46 F.3d at 56. In this case, the benefit conferred by the TCPA's restrictions is considerable.

IX. Conclusion

A government action is judged "on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interest in an individual case." Assoc. of Community Organizations for Reform Now, v. St. Louis County, 930 F.2d 591 (8th Cir. 1991). When viewed as a whole, the TCPA stands as a bullwark against an invasion of nightly robot-calls into everyman's home. Any lesser scheme would be less effective, and this is insufficient to be considered. The fit is reasonable, which is all that is required.

For the reasons stated herein, Defendant's Motion for Summary Judgment should be DENIED.

Respectfully Submitted,

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Table II-1
 ATTITUDE TOWARD RECEIVING UNSOLICITED
 CALLS - AMONG ALL PERSONS WITH TELEPHONE SERVICE

Type of call:	Attitude Toward Receiving --				
	Very Annoying	Somewhat Annoying	A little annoying	Don't mind these calls	Like these calls
Obscene, threatening calls	84.8%	2.7	2.7	1.3	.3
Crank calls that are not obscene or threatening	68.6%	12.3	7.0	3.5	.4
Calls where people claim they are conducting a survey and then try to sell you something	62.0%	14.3	11.5	6.2	.1
Calls that dial numbers at random and deliver a recorded sales message	60.9%	11.5	6.0	5.1	.1
Calls made by sales people to sell you products or services	53.9%	17.7	15.3	9.1	.1
Calls from bill collectors	39.8%	7.4	8.6	12.4	.2
Calls encouraging you to attend religious services	34.1%	13.6	16.8	22.0	1.1
Calls soliciting money for charitable purposes	27.7%	19.4	18.3	27.1	.2
Wrong number calls	23.7%	14.5	21.2	38.4	.1
Calls asking for your vote or support of a political candidate.	16.8%	13.2	16.3	43.4	1.7
Calls made by interviewers on authentic public opinion surveys	13.3%	8.2	15.6	50.2	3.7

(Base: Households with telephone service) (948)

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Township's phone-alert system still suffers from bugs

By: David Campbell , Staff Writer

01/03/2003

Verizon's call-screening service blocks emergency notification calls

Princeton Township is still working out the bugs in its emergency phone alert system that block emergency messages to residents who screen calls through Verizon's telephone service.

The township discovered the glitch during tests begun more than a year ago, and the problem persists with at least 30 township residences, said Theodore Cashel, the township's fire official and emergency management coordinator.

In tests, some emergency calls were blocked by caller ID, a problem easily solved, but others were blocked by Verizon's call-screening service, which has proved a bit trickier.

Caller ID boxes that display the name and phone number of a caller registered the emergency calls as "out of area" because they could not identify Community Action Network, the Albany, N.Y.-based high-speed telephone company that provides the township's emergency phone service and operates 256 outgoing phone lines.

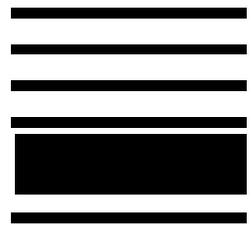
That problem was solved with a phone call to Community Action Network. The company agreed to register its calls under "CAN emergency," which will now appear on caller ID screens.

But working around the Verizon screening function was not so easy because the phone company's electronic system cannot distinguish the emergency calls from telemarketing calls, and after a year the problem persists.

Community Action Network is working with Verizon, but according to Mr. Cashel, "We can't actually see the light at the end of the tunnel just yet. There's not much we can do on our end here except alert known people of the problem."

To that end, Mr. Cashel's office has contacted the households known to be affected by the problem and offered to give them CAN's number so their answering service can identify emergency calls if they come in. Only one of those contacted asked for the number, Mr. Cashel said.

He said the CAN system is not intended as a cure-all, even without the problems with Verizon. Cable television, radio and e-mail are also part of the emergency-alert "toolbox," and can be used to alert affected households. Mr. Cashel said.



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It is up to new residents to register for the emergency-phone service. To alert them to the service, application forms usually are provided during smoke-detector compliance reviews and when the township Building Department issues certificates of occupancy for new dwellings, Mr. Cashel said.

The CAN service is able to call up to 15,000 numbers an hour, and a software mapping package enables the township to issue a blanket alert or limit it to affected areas.

Should an emergency such as a water-main break occur, a township official can call the network from work, home or a cellular phone, provide a password, then record a short message to be phoned to residences and businesses advising of the incident, with instructions.

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