Nos. 02-2705 & 02-2707

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., et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI (LIMBAUGH, J.)

BRIEF FOR APPELLANT UNITED STATES OF AMERICA

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STATEMENT REGARDING ORAL ARGUMENT

The State of Missouri brought this action, alleging that defendants have violated the provisions of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(b), that require advertisers to obtain the consent of the recipient before sending advertisements by telephone facsimile. Defendants challenged the fax advertising provisions on First Amendment grounds, and the United States intervened to defend the constitutionality of the federal statute.

The district court invalidated the fax advertising provisions on First Amendment grounds. The United States and the State of Missouri filed separate appeals, which have been consolidated. Given the importance of the issue presented and the need for appellants to share argument time, the United States respectfully requests that the Court allocate 25 minutes per side for oral argument.

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STATEMENT OF JURISDICTION

The State of Missouri brought this action, alleging violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227. The district court had jurisdiction pursuant to 47 U.S.C. § 227(f).

The district court entered final judgment on March 13, 2002. The State filed a motion to alter or amend the judgment, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, on March 25, 2002, which the district court denied on April 30, 2002. The State filed a timely notice of appeal on June 20, 2002. The United States filed a timely notice of

appeal on June 24, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether Congress may require advertisers to obtain the consent of the recipient before sending advertisements by telephone facsimile ("fax").

Authorities: City of Los Angeles v. Alameda Books, Inc., 122 S. Ct. 1728 (2002)

Van Bergen v. State of Minnesota, 59 F.3d 1541 (8th Cir. 1995)

Destination Ventures, Ltd. v. F.C.C., 46 F.3d 54 (9th Cir. 1995)

STANDARD OF REVIEW

The constitutionality of a statute is a question of law that is reviewed de novo by this Court. See, e.g., United States v. Crawford, 115 F.3d 1397, 1400 (8th Cir.), cert. denied, 522 U.S. 934 (1997). An order granting summary judgment is likewise subject to de novo review. See, e.g., Donovan v. Harrah's Maryland Heights Corp., 289 F.3d 527, 528 (8th Cir. 2002).

STATEMENT OF THE CASE

This case presents a constitutional challenge to the provisions of the Telephone Consumer Protection Act of 1991 ("TCPA") that regulate fax advertising. Under these provisions, an advertiser must obtain the consent of the

called party before sending an advertisement by fax. See 47 U.S.C. § 227(b).

The State of Missouri brought this action, alleging that defendants have violated the TCPA's restrictions on fax advertising. Defendants argued that the restrictions violate the First Amendment. The United States intervened to defend the constitutionality of the federal statute.[1]

The district court entered summary judgment for defendants, ruling that the TCPA's restrictions on fax advertising violate the First Amendment.

STATEMENT OF FACTS

A. Statutory Background.

From 1989 to 1991, Congress considered several bills addressing telemarketing practices made possible by technological innovations, including the transmission of advertisements by fax. In the process, Congress held three hearings and produced three committee reports.[2] Congress

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[1] Counsel for defendant American Blast Fax withdrew on March 7, 2001, and no counsel subsequently appeared for that defendant. See 196 F. Supp. 2d 920, 923 n.4 (E.D. Mo. 2002). American Blast Fax may no longer be in business. See id. at 922 n.3.

[2] In the 101st Congress, from 1989 to 1990, Congress introduced four bills and held one hearing: See H.R. 628, 2131, 2184 and 2921; Hearing on H.R. 628, 2131 and 2184 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 101st Cong. (1989).

(continued...)

ultimately passed S. 1462 (with its accompanying bill in the House, H.R. 1305) in November 1991. The measure was signed into law as the Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, in December 1991.

In the TCPA provisions at issue here, Congress responded to the dramatic rise in the use of fax machines and the concomitant phenomenon of unsolicited fax advertisements. "An office oddity during the mid-1980's, the facsimile machine has become a primary tool for business to relay instantaneously written communications and transactions." Report To Accompany H.R. 1304, H.R. Rep. No. 102-317, at 10 (1991) (App. 36). By 1991, millions of offices were sending more than 30 billion pages of information each year by fax in an effort to speed communications and cut overnight delivery costs. See ibid.

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[2](...continued)
In the 102d Congress, which passed the TCPA in 1991, Congress introduced six bills, held two hearings and produced three committee reports: See H.R. 1304, 1305 and 1589 and S. 1410, 1442 and 1462; Hearing on S. 1462 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation, 102d Cong. (1991); Hearing on H.R. 1304 and 1305 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 102d Cong. (1991). The legislative history includes several committee reports that accompanied the various bills. See Report on S. 1462, S. Rep. No. 102-178 (1991); Report on S. 1410, S. Rep. No. 102-261 (1991); Report To Accompany H.R. 1304, H. Rep. No. 102-317 (1991).

The final bill that became the TCPA combined features of H.R. 1305, S. 1410 and S. 1462.

The increasing prevalence of fax machines has been accompanied by an "explosive growth in unsolicited facsimile advertising, or 'junk fax.'" Ibid. Because fax machines are "designed to accept, process and print all messages," ibid., they may be used by unwelcome advertisers as readily as by business clients. Fax machine owners generally have no practical means of restricting access to their machines.

As Congress observed, the exploitation of fax machines by advertisers creates two problems distinct from unsolicited advertisements through traditional media such as leafleting or mail. The recipient of junk mail pays nothing for its solicitations. See id. at 25 (App. 37). By contrast, the recipient of fax advertisements "assumes both the cost associated with the use of the facsimile machine, and the cost of the expensive paper used to print out facsimile messages." Ibid. Moreover, because "[o]nly the most sophisticated and expensive facsimile machines can process and print more than one message at a time," the transmission of unsolicited advertisements preempts the fax machine owner from receiving or sending fax messages. Ibid. Such interruptions can last for several minutes or more at a time. See ibid.

To address the problems associated with the developing fax technology, Congress enacted limited restrictions on the

use of fax machines for advertising purposes. Congress did not bar advertisers from using fax transmissions. Instead, Congress required advertisers to obtain the consent of fax machine owners before using their fax lines and shifting advertising costs onto fax recipients.

Section 227(b) of the TCPA, 47 U.S.C. § 227(b)(1)(C), makes it "unlawful for any person within the United States * * * to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." The statute defines "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(4). See also 47 U.S.C. § 227(a)(2) (defining "facsimile machine").

B. Factual Background And Proceedings Below.

The State of Missouri brought suit against American Blast Fax and Fax.com, Inc., alleging that defendants have violated the TCPA by sending fax advertisements without obtaining the consent of the recipients. Defendants moved to dismiss the complaint, urging that the TCPA provision on which the State relied violates the First Amendment.

The district court (Limbaugh, J.) believed that it could not sustain the TCPA's fax advertising restriction based on the evidence in the legislative record, and thus ordered an evidentiary hearing. See 196 F. Supp. 2d 920, 922 (E.D. Mo. 2002). Rejecting the reasoning of all of the other courts to address the issue, the district court subsequently granted summary judgment for defendants, invalidating the fax advertising restriction on its face. See id. at 934.

The district court recognized that the fax advertising restriction must be sustained if it satisfies the standard of "intermediate scrutiny" set out in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563-66 (1980). See 196 F. Supp. 2d at 927. Under that standard, a restriction on commercial speech is consistent with the First Amendment if it directly advances a substantial government interest and is not more extensive than necessary to serve that interest. See Central Hudson, 447 U.S. at 566.

Applying that standard, the district court first questioned whether the government has a substantial interest in requiring advertisers to obtain consent before sending a fax. See 196 F. Supp. 2d at 931. The court recognized that "'there were repeated, uncontradicted references made before Congress describing how facsimile advertising shifts economic

burdens from the advertiser to the consumer.'" Id. at 930 (quoting Destination Ventures, Ltd. v. F.C.C., 844 F. Supp. 632, 637 (D. Or. 1994)). The court believed that such testimony before Congress could not establish a significant problem, however, without "statistical data" to support it. Id. at 931.

Even assuming that unsolicited faxes shift economic burdens from the advertiser to the consumer, the court questioned whether the TCPA would "alleviate the harm to a material degree." Ibid. The court observed that the TCPA applies to fax advertisements but not to faxes that convey political messages or other forms of non-commercial speech. See ibid. The court suggested that, as in City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993), this distinction between commercial and non-commercial speech renders insignificant any benefits that might flow from the TCPA. See 196 F. Supp. 2d at 933. For support, the court noted that two state officials had testified that the number of complaints they received about unsolicited faxes had increased after the TCPA was enacted. See id. at 932, 933. The court believed that "complaints regarding this problem should have decreased" if the TCPA advanced the government's interests. Id. at 933.

Although the court questioned whether the TCPA advances the government's interests at all, it also ruled that the TCPA is more restrictive than necessary to accomplish the government's objectives. Without citation, the court declared that "there is no practical way for companies to gain permission" to send a fax. See id. at 933 n.26. The court thus believed that "for all practical purposes the language of the TCPA is a complete ban on facsimile advertising." Ibid. The court observed that Congress might instead have established "a national 'no-fax' database," under which consumers would bear the burden of registering their objections to fax advertising. See id. at 932-33. The court speculated that this alternative would be equally effective at promoting the government's interests, and declared that there was thus an inadequate "fit" between the TCPA's restriction and Congress's goals. See ibid.[3]

SUMMARY OF ARGUMENT

The premises underlying the challenged legislation are simple and uncontradicted, and the scope of Congress's regulation is carefully crafted to address the problems at

[3] The State filed a motion under Rule 59(e) of the Federal Rules of Civil Procedure, noting that the district court had not addressed Count II of its complaint although it had dismissed the entire action with prejudice. The district court denied the State's motion by order dated April 30, 2002.

which the Act was directed. As the Ninth Circuit held in rejecting the same First Amendment challenge made here, the TCPA's restriction on fax advertising is narrowly tailored to advance a substantial government interest and therefore must be sustained. Destination Ventures, Ltd. v. F.C.C., 46 F.3d 54 (9th Cir. 1995). Indeed, other than the district court in this case, all of the courts to address the issue have sustained Congress's regulation of fax advertising.

As Congress recognized, advertisements by fax pose two significant problems not presented in traditional advertising by mail or leaflet. First, fax transmissions shift part of the advertising costs to the recipient, who picks up the bill for the fax paper, ink and machine maintenance. The process is much the same as if a leafleter requisitioned paper and copying facilities at each house he solicited. Second, each fax advertisement preempts the recipient's fax line for the duration of the advertisement. Thus, the recipient is simultaneously prevented from using his fax machine while being forced to pay to receive an unsolicited ad.

The twin premises of the legislation are supported without contradiction by the legislative record, which includes testimony from state utility regulators, consumer groups, and the ACLU. The simple fact is that the use of fax

machines to deliver advertisements shifts advertising costs and preempts fax lines. This fact is confirmed by defendant's own submissions.

The district court nonetheless questioned whether the problem addressed by Congress was real, apparently because it believed that testimony before Congress cannot establish a real problem unless it is supported by statistical data. But as the Supreme Court and this Court have held, the government may rely on any evidence reasonably believed to be relevant in justifying restrictions on commercial speech, including simple common sense.

There likewise can be no question that the TCPA is properly tailored to advance the government's interests. The TCPA does not ban fax advertising. Instead, Congress has simply required that advertisers obtain consent before shifting their costs to fax recipients and preempting the use of their fax lines. The district court declared, without citation, that there is no practical way for companies to gain consent and that the restriction is thus tantamount to a ban. But companies plainly may rely on bulk mailings or live telephone calls to obtain consent – mechanisms that, as this Court has recognized, are inexpensive and effective channels of communication.

The district court's principal objection to the TCPA was not that it regulates too much speech, but that it does not sweep broadly enough. The court observed that the TCPA applies to fax advertising, but not to faxes that convey political messages or other forms of noncommercial speech. And the court speculated that, as in City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993), this distinction between commercial and noncommercial speech might render insignificant the benefits that flow from the TCPA.

But as the Ninth Circuit held in Destination Ventures, this analysis is based on a fundamental misreading of Discovery Network. That decision does not require Congress to accord equal latitude to commercial and noncommercial speech, which would be flatly at odds with the lesser protection afforded commercial speech under the First Amendment. Discovery Network held only that the government may not ban commercial speech when the regulation bears "no relationship whatsoever" to the interests that the government asserted. 507 U.S. at 424. In Discovery Network, it was established that the regulation at issue would remove only 62 newsracks from city streets, while 1,500-2000 would remain in place – a "minute" and "paltry" benefit that could not justify the restriction. Id. at 417-18. By contrast, defendants have

offered no evidence to refute Congress's finding that the increasing prevalence of fax machines has been accompanied by an explosive growth in unsolicited fax advertising.

The district court was likewise wrong to question the means that Congress chose to mitigate the harms caused by unsolicited fax advertising. The district court speculated that alternatives to the TCPA might have worked just as well. Congress, however, determined that the protections it enacted in the TCPA were the minimum necessary to prevent fax advertisers from shifting their advertising costs and preempting the fax lines of unwilling recipients. The district court had no constitutional basis for second-guessing this legislative determination. The judgment of the district court should therefore be reversed.

ARGUMENT

CONGRESS MAY REQUIRE ADVERTISERS TO OBTAIN THE CONSENT OF THE CALLED PARTY BEFORE SENDING AN ADVERTISEMENT BY FAX

A. The Statute Must Be Upheld If It Is Narrowly Tailored To Directly Advance A Substantial Government Interest.

The applicable legal standard is not in dispute. "[C]ommensurate with [the] subordinate position [of commercial speech] in the scale of First Amendment values," Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978), regulations of commercial speech are valid as long as they implement a substantial governmental interest, directly advance that interest, and are narrowly tailored to serve that interest. See Board of Trustees v. Fox, 492 U.S. 469, 475-80 (1989); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563-66 (1980). As the Supreme Court has stressed, this standard does not require the legislature to employ "the least restrictive means" of regulation or to achieve a perfect fit between means and ends. Fox, 492 U.S. at 480. It is sufficient that the legislature achieve a "reasonable" fit by adopting regulations "'in proportion to the interest served.'" Ibid. (quoting In re R.M.J., 455 U.S. 191, 203 (1982)).

As the Ninth Circuit held in Destination Ventures, Ltd. v. F.C.C., 46 F.3d 54 (9th Cir. 1995), the TCPA's regulation

of fax advertising meets this standard and therefore must be sustained. Indeed, apart from the district court in this case, all of the courts to address the issue have sustained the TCPA's fax advertising provisions against the same First Amendment challenge made here. See Texas v. American BlastFax, 121 F. Supp. 2d 1085, 1091-92 (W.D. Tex. 2000); Kenro, Inc. v. Fax Daily, Inc., 962 F. Supp. 1162, 1167-69 (S.D. Ind. 1997); Destination Ventures, Ltd. v. F.C.C., 844 F. Supp. 632, 634-40 (D. Or. 1994).

B. Congress Properly Concluded That There Is A Substantial Public Interest In Regulating Unsolicited Fax Advertisements That Shift Advertising Costs To The Recipient While Preempting Fax Lines.

Congress properly concluded that there is a substantial public interest in ensuring that fax advertisers do not shift costs of unwanted advertisements to recipients while preempting use of their fax lines.

1. As Congress recognized, solicitations by fax differ from mail solicitations in two important respects. "[W]hen an advertiser sends marketing material to a potential customer through regular mail, the recipient pays nothing to receive the letter." H.R. Rep. No. 102-317, at 25 (App. 37). All costs are borne by the advertiser. By contrast, when an advertiser sends a solicitation by fax it shifts part of its

costs to the recipient, who "assumes both the cost associated with the use of the facsimile machine, and the cost of the expensive paper used to print out facsimile messages." Ibid. As the House Report emphasized, "these costs are borne by the recipient of the fax advertisement regardless of their interest in the product or service being advertised." Ibid. See also S. Rep. No. 102-178, at 2 (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1969 ("unsolicited calls placed to fax machines * * * often impose a cost on the called party" because "fax messages require the called party to pay for the paper used"); 135 Cong. Rec. 7886 (1989) (remarks of Rep. Shays) (noting constituent complaints regarding junk faxes).

The second distinction between fax solicitation and mail advertisements is that the fax machine is rendered inoperable while the unwanted fax is being transmitted. As the House Report explained, "[o]nly the most sophisticated and expensive facsimile machines can process and print more than one message at a time." H.R. Rep. No. 317 at 25 (App. 37). See also S. Rep. No. 102-177, at 20 (1991) (additional views of Sen. Pressler) ("[u]nsolicited facsimile advertising ties up fax machines and uses the called party's fax paper); 137 Cong. Rec. S9874 (July 11, 1991) (remarks of Sen. Hollings)

("[t]hese junk fax advertisements can be a severe impediment to carrying out legitimate business practices").

Numerous witnesses before Congress testified to the need for regulation of fax advertising. Thomas Beard, Chairman of the Florida Public Service Commission, testified on behalf of the National Association of Regulatory Utility Commissioners (NARUC), the front-line regulators in this area. Mr. Beard explained that "[t]he junk fax advertiser is a nuisance who wants to print [its] ad on your paper." Hearing on H.R. 1304 and 1305 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Commerce, Science, and Transportation, 102d Cong., 1st Sess. 31 (1991) (App. 41). He observed that the "call also seizes your fax machine so that it is not available for calls you want or need," and urged Congress to enact legislation establishing penalties for unsolicited fax advertising. Ibid.[4]

Michael Jacobsen of the Center for the Study of Commercialism testified that unwanted "faxes not only use the

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[4] As the district court noted, see 196 F. Supp. 2d at 930 n.22, NARUC passed a resolution in 1989 expressing support for H.R. 2921, which would have prohibited advertisers from sending unsolicited fax ads to persons who specifically object. See Hearing Before Subcomm. on Telecommunications and Finance, 102d Cong., 1st Sess. 74 (1991) (App. 45). But contrary to the district court's apparent inference, there was nothing in this 1989 resolution or in Mr. Beard's 1991 testimony to suggest that NARUC's support was limited to such a measure.

recipient's paper, but also prevent faxes from being sent out and prevent legitimate faxes from coming in." Hearing on S. 1462 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation, 102d Cong., 1st Sess. 41 (1991) (App. 39). Janlori Goldman, representing the American Civil Liberties Union, likewise urged that the proposed restrictions on unsolicited fax advertisements were justified "because of the burden that is placed on the individual who has to pay for the cost of the communication." Hearing on H.R. 1304 and 1305 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Commerce, Science, and Transportation at 47 (App. 44). See also id. at 38 (statement of Mark N. Cooper, Research Director, Consumer Federation of America supporting restriction on unsolicited faxes); id. at 53 (statement of Jack Shreve, Public Counsel for State of Florida supporting restriction on unsolicited faxes); Hearing on H.R. 628, 2131 and 2184 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 101st Cong., 1st Sess. 54-55 & n.35 (1989) (statement of Professor Robert L. Ellis) ("business owners are virtually unanimous in their view that they do not want their fax lines tied up by advertisers trying to send messages" and "[e]xtensive research has revealed no case of a company (other

than those advertising via fax) which opposes legislation restricting advertising via fax") (App. 47).[5]

The legislative record contains no evidence suggesting that the problems that Congress associated with fax advertising were in any sense illusory. Indeed, the district court recognized that the descriptions of how fax advertising shifts economic burdens from the advertiser to the consumer were "repeated" and "uncontradicted." 196 F. Supp. 2d at 930 (quotation marks and citation omitted).

2. a. The district court nonetheless questioned whether the problem addressed by Congress was real, apparently because it believed that testimony before Congress cannot establish a real problem unless it is supported by "statistical data." 196 F. Supp. 2d at 931. For that reason, the court ordered an evidentiary hearing. See id. at 922.

The Supreme Court, however, has held that the government may justify restrictions on commercial speech "based solely on history, consensus, and 'simple common sense.'" Florida Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995). As the Court recently stressed in a directly analogous context, the

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[5] Congress was also aware that, in response to concerns about junk faxes, two states had already acted to preclude unsolicited fax advertising, while similar bills were pending in approximately half the state legislatures. See H.R. Rep. No. 102-317, at 25 (App. 37).

government "may rely on 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) (quotation marks and citation omitted) (emphasis added).[6] The uncontradicted testimony in the legislative record plainly suffices to support the TCPA's fax advertising restriction, and no hearing was needed to confirm Congress's findings.

The evidentiary requirements that the district court imposed on Congress were likewise inconsistent with this Court's decision in Van Bergen v. State of Minnesota, 59 F.3d 1541 (8th Cir. 1995). In that case, the Court rejected a First Amendment challenge to a state statute requiring callers to obtain the consent of the called party before sending a

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[6] Alameda Books addressed the validity of a time, place or manner regulation on noncommercial speech. As the Supreme Court has made clear, however, "the validity of time, place or manner restrictions is determined under standards very similar to those applicable in the commercial speech context[.]" United States v. Edge Broadcasting Co., 509 U.S. 418, 430 (1993). See also id. at 429 ("the validity of restrictions on commercial speech should not be judged by standards more stringent than those applied to * * * time, place, or manner restrictions"); Van Bergen v. State of Minnesota, 59 F.3d 1541, 1553 n.11 (8th Cir. 1995) (the "intermediate level of scrutiny applied in" the time, place, or manner cases "closely resembles the test applied to regulations that restrict solely commercial speech"); Alameda Books, 122 S. Ct. at 1733-34, 1736-37 (restrictions on noncommercial speech are subject to "intermediate scrutiny" if they are aimed at the secondary effects of such speech).

prerecorded telephone message. The plaintiff urged that the government had failed to provide affidavits demonstrating that such calls created disruption in the home. See id. at 1554. This Court explained that it did not "believe that external evidence of the disruption [such] calls can cause in a residence is necessary: It is evident to anyone who has received such unsolicited calls when busy with other activities." Ibid. See also Texas v. American BlastFax, 121 F. Supp. 2d at 1091-92 ("'Congress legitimately relied upon the testimony from authorities, as well as the contemporaneous state laws and media reports.' Blastfax's argument that Congress' hearings were not based on sufficient statistical evidence is unpersuasive.") (quoting Destination Ventures, 844 F. Supp. at 637).

b. The district court's objection to the legislative record before Congress is thus baseless. In any event, the conservative estimates offered by defendant's own witnesses confirm that fax advertisements shift advertising costs to recipients and tie up their phone lines.[7]

The cost of printing a one-page fax varies, depending on (among other things) the amount of coverage (i.e., print) per

[7] As noted above, counsel for American Blast Fax withdrew in March 2001. American Blast Fax did not participate in the evidentiary hearing. See 196 F. Supp. 2d at 923 n.4.

page. See App. 51-52 (Tr. v.1, at 21-22) (testimony of Greg Hauser); App. 65-66 (Tr. v.2, at 158-59) (testimony of Maury Kauffman). As in Destination Ventures, Fax.com's expert witness testified that a fax with only five percent coverage costs the recipient two to three cents per page. See App. 65 (Tr. v.2, at 158) (Kauffman testimony); Destination Ventures, 46 F.3d at 56 (witness for the fax advertiser similarly testified that "'the cost of one page of paper used by the typical fax machine in use today is two and one-half cents'"). Fax.com's expert likewise conceded that, "if there's more black on the page it takes longer, it uses more ink," and costs more. App. 65-66 (Tr. v.2, at 158-59) (Kauffman testimony). And another Fax.com witness acknowledged that his own company receives up to fifteen unsolicited fax advertisements each day. See App. 57, 60 (Tr. v.2, at 79, 89) (testimony of Tony Takjarimi). Thus, even accepting Fax.com's figures of fifteen faxes per day at two to three cents per page, unsolicited fax advertisements can shift direct costs of more than one hundred dollars per year onto recipients – more than the price of a low-end fax machine itself. See App. 61 (Tr. v.2, at 107) (Kauffman testimony) (fax machine can be purchased for fifty dollars). The quantity of unsolicited fax advertising would undoubtedly be greater without the TCPA,

which makes it unlawful to send a fax advertisement without obtaining the recipient's consent.[8]

Nor did defendant dispute that recipients' fax machines are rendered inoperable while the unwanted fax is being transmitted. To the contrary, Fax.com's witness acknowledged that a fax machine can receive only one fax at a time unless it has "dual line" capability, and conceded that such dual line fax machines are uncommon. See App. 58-59 (Tr. v.2, at 87-88) (Takjarimi testimony). As in Destination Ventures, its expert admitted that an average fax ties up the recipient's machine for thirty seconds. See App. 62 (Tr. v.2, at 135) (Kauffman testimony); Destination Ventures, 46 F.3d at 56 (witness for fax advertiser acknowledged that it takes between thirty and forty-five seconds for a fax machine to print a single-page fax). And, despite advances in technology that allow faxes to be sent to e-mail accounts, Fax.com's witness

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[8] The State's witness testified that a fax with five percent coverage to an ink jet printer would cost the recipient approximately four cents per page, and a fax to a thermal transfer machine would cost the recipient approximately six and a half cents per page. See App. 51-52 (Tr. v.1, at 21-22) (testimony of Greg Hauser). A fax with twenty percent coverage, like the fax advertisement reproduced as Exhibit 29 (App. 49), would cost the owner of an ink jet fax machine approximately seventeen cents per page, and would cost the owner of a laser fax machine approximately eight and one half cents per page. See App. 53, 54-55 (Tr. v.1, at 23, 24-25) (Hauser testimony).

conceded that eighty percent of all faxes are still printed out on paper. See App. 63-64 (Tr. v.2, at 155-56) (Kauffman testimony).

Thus, as in Destination Ventures, the fax advertiser's "own figures do not rebut the admitted facts that unsolicited fax advertisements shift significant advertising costs to consumers." 46 F.3d at 57.

3. The governmental interest in preventing the shifting of advertising costs and preemption of fax lines is clearly substantial and is comparable to the wide range of interests that have satisfied this aspect of the Central Hudson inquiry.

For example, in Van Bergen, this Court rejected a First Amendment challenge to a state statute requiring callers to obtain the consent of the called party before sending a prerecorded telephone message. The Court explained that the interests advanced by the statute – the "efficient conduct of business operations" and "residential privacy" are both "significant government interest[s]." Van Bergen, 59 F.3d at 1554.[9] See also United States v. Edge Broadcasting Co., 509

[9] As the court noted in Van Bergen, the TCPA includes a virtually identical provision that prohibits the use of prerecorded telephone calls unless the caller first obtains the consent of the called party. 59 F.3d at 1548 (discussing 47 U.S.C. § 227(b)). See also Moser v. F.C.C., 46 F.3d 970 (9th Cir.) (rejecting a First Amendment challenge to the TCPA provision regulating prerecorded telephone (continued...)

U.S. 418, 426 (1993) (Congress has substantial interest in regulating lottery advertisements to balance the policies of some states to prohibit lotteries and other states to allow them); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507-08 (1981) (city has substantial interest in regulating billboard advertisements to promote aesthetics and traffic safety).

It is thus clear that Congress's "interests in passing the TCPA – preventing 'unwitting customers' from bearing the brunt of advertising costs and preventing unwanted fax machine interference – are substantial and real." Texas v. American BlastFax, 121 F. Supp. 2d at 1092. Indeed, one of Fax.com's own witnesses likely typified the reaction of most consumers when she testified that, if junk mail came to her home with postage due, even if that postage were merely pennies, she "wouldn't pay it." See App. 67-68 (Tr. v.2, at 200-01) (testimony of Debbie Getz).

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[9](...continued)
calls), cert. denied, 515 U.S. 1161 (1995).

C. The Requirement That Advertisers Obtain Consent For Transmission Of Fax Advertisements Is Narrowly Tailored To Directly Advance The Interests Identified By Congress.

1. There can be no serious dispute that the TCPA directly advances the substantial interests identified by Congress. Congress sought to prevent the shifting of advertising costs and preemption of fax lines. As the Ninth Circuit held in Destination Ventures, the requirement that advertisers send their faxes only to willing recipients directly advances both of these concerns. See 46 F.3d at 56.

Similarly, there can be no serious question that the statute is "narrowly tailored" to achieve Congress's objective. As the Supreme Court has emphasized, in regulating commercial speech Congress need not employ the "least restrictive means." Fox, 492 U.S. at 477. A law must be upheld if it "'promotes a substantial government interest that would be achieved less effectively absent the regulation,'" whether or not it is the "least intrusive" means of serving the government's interests. Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

The scope of the TCPA conforms closely to the problem at which the Act was directed. The TCPA does not ban fax advertisements. Instead, Congress has required only that fax

advertisers obtain consent before shifting their costs and preempting fax lines.

To comply with this provision, advertisers need not obtain the consent of recipients for each separate transmission. A company seeking to advertise by fax can simply ascertain which businesses and individuals are willing to be placed on its transmission list. Individuals and businesses interested in receiving solicitations can consent. Those who wish to keep their lines open, or to avoid cost-shifting, may decline. (For example, a court clerk would likely decide that the court's emergency fax line should not receive word of daily luncheon specials.)

The district court declared that "there is no practical way for companies to gain permission" to send a fax and that "for all practical purposes the language of the TCPA is a complete ban on facsimile advertising." 196 F. Supp. 2d at 933 n.26. The court offered no evidence to support this assertion, however, and it is inexplicable. There is nothing to stop prospective fax advertisers from seeking consent through bulk mailings or live telephone calls, for example. As this Court has observed, live telephone calls and bulk mailings are "inexpensive and effective" channels of communication. Van Bergen, 59 F.3d at 1556.

2. The district court's principal objection to the TCPA was not that it burdens more speech than necessary, but that the Act does not sweep broadly enough. The court observed that the TCPA's restriction applies to fax advertising, but not to faxes that convey political messages or other forms of noncommercial speech. See 196 F. Supp. 2d at 931. The court speculated that, as in City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993), this distinction between commercial and noncommercial speech might render insignificant the benefits that flow from the TCPA. See 196 F. Supp. 2d at 933.

This case is nothing like Discovery Network, however. In Discovery Network, the City of Cincinnati, motivated by aesthetic and safety considerations, prohibited newsracks that dispensed commercial handbills but allowed all other types of newsracks. See 507 U.S. at 414. It was established that, as a result of this distinction, only 62 newsracks would be removed and 1,500 to 2,000 would remain. See id. at 414, 418. In invalidating the City's action, the Supreme Court stressed that "[t]he benefit to be derived from the removal of 62 newsracks while about 1,500-2,000 remain in place" was "'minute'" and "'paltry.'" Id. at 417-18. The Court ruled that the City's distinction between commercial and

noncommercial speech thus bore "no relationship whatsoever" to the interests that the City had asserted. Id. at 424.

The Court in Discovery Network did not bar the government from according greater latitude to noncommercial speech than commercial speech. Indeed, that result would be flatly at odds with the "subordinate position [of commercial speech] in the scale of First Amendment values." Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). See also Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 122 S. Ct. 2080, 2089 (2002) (invalidating permit requirement for door-to-door canvassing because it was not limited to commercial solicitation, but also applied to advocacy for political and religious causes). And the Supreme Court has repeatedly emphasized that government may "address some offensive instances and leave other, equally offensive, instances alone." R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2547 (1992). As the Court explained in R.A.V., "the First Amendment imposes not an 'underinclusiveness' limitation but a 'content discrimination' limitation upon a State's prohibition of proscribable speech." 112 S. Ct. at 2545. Thus, as the Court declared in United States v. Edge Broadcasting Co., 509 U.S. at 434, the First Amendment does

not "require that the Government make progress on every front before it can make progress on any front."[10]

Discovery Network held only that bans on commercial speech will not be tolerated when they bear no discernible relation whatsoever to a statute's purpose. Defendants have offered no evidence to refute Congress's finding that the increasing prevalence of fax machines has been accompanied by an "explosive growth in unsolicited facsimile advertising, or 'junk fax.'" Report To Accompany H.R. 1304, H.R. Rep. No. 102-317, at 10 (1991). See also Destination Ventures, 46 F.3d at 56 ("[t]he plaintiffs have not disputed that unsolicited commercial fax solicitations are responsible for the bulk of advertising cost shifting"). They therefore have provided no basis for questioning Congress's judgment that the TCPA's restriction on fax advertising will advance the government's interests.

The district court apparently believed that the government was required "to demonstrate, not merely by appeal to common sense, but also with empirical data, that its [regulation] will successfully" achieve its objectives. Alameda Books, 122 S. Ct. at 1736. But as the Supreme Court

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[10] See also Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 510-12 (1981) (City could prohibit offsite billboards and allow onsite billboards).

recently stressed, its cases have "never required" the government to "make such a showing, certainly not without actual and convincing evidence from plaintiffs to the contrary." Ibid.

The only "evidence" cited by the district court was the testimony of two state officials that the number of complaints they received about unsolicited faxes had increased after the TCPA was enacted. See 196 F. Supp. 2d at 932, 933. The court hypothesized that "complaints regarding this problem should have decreased" if the TCPA advanced the government's interests. Id. at 933. But the testimony cited by the district court plainly does not constitute "actual and convincing evidence" that Congress was wrong to conclude that the TCPA's restriction on fax advertising would materially reduce the economic burdens that unsolicited faxes impose on recipients. Alameda Books, 122 S. Ct. at 1736. Assuming that any inference about the TCPA's effectiveness can be drawn from this testimony, it is much more plausible to infer that the increase in complaints reflects consumer awareness of the TCPA's protections, and that unsolicited fax advertising would be far more prevalent if it were not restricted by federal law.

3. Finally, the district court noted that Congress might have chosen other mechanisms for regulating unsolicited fax advertising, such as by restricting the hours that unsolicited faxes may be sent, or by establishing a "a national 'no-fax' database" under which consumers would bear the burden of registering their objections to fax advertising. See 196 F. Supp. 2d at 932, 933 n.25. The court apparently believed that the alternatives it described would be equally effective at promoting the government's objectives. See id. at 932-33.

Congress, however, made a different determination. Congress recognized that, under the TCPA, "telemarketers will be responsible for determining whether a potential recipient of an advertisement, in fact, has invited or given permission to receive such fax messages." S. Rep. No. 102-178, at 8, reprinted in 1991 U.S.C.C.A.N. at 1975. Congress determined that "such 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." Ibid. That determination was plainly reasonable, when the uncontradicted testimony before Congress revealed that "business owners are virtually unanimous in their view that they do not want their fax lines tied up by advertisers trying to send messages." Hearing on H.R. 628, 2131, and 2184

before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 101st Cong., at 54-55 (1989) (statement of Professor Robert L. Ellis) (App. 47). Indeed, "[e]xtensive research has revealed no case of a company (other than those advertising via fax) which opposes legislation restricting advertising via fax." Id. at 54 n.35.[11]

The district court had no constitutional basis for second-guessing Congress's judgment. To the contrary, the Supreme Court has repeatedly rejected the notion that the government must "provide evidence that not only supports the claim that its [regulation] serves an important government interest, but also does not provide support for any other approach to serve that interest." Alameda Books, 122 S. Ct. at 1736. Consistent with this principle, this Court in Van Bergen expressly rejected the argument that the possibility of establishing a "database of persons who do not wish to receive" prerecorded telephone calls could provide a basis for invalidating a state statute that, like the TCPA, placed the burden on the entity initiating the call to obtain the

[11] Many states similarly have prohibited unsolicited fax advertising outright or where the recipient has no prior contractual or business relationship with the sender. See, e.g., Conn. Gen. Stat. Ann. § 52-570c; Fla. Stat. Ann. §§ 365.1657; Ga. Code Ann. 46-5-25(b); Idaho Code § 48-1003(i); La. Rev. Stat. § 51:1746; 10 Maine Rev. Stat. § 1496; Wis. Stat. § 134.72; Utah Code Ann. § 13-25a-104.

recipient's consent. 59 F.3d at 1555 n.13. The district court made no effort to distinguish this ruling, which applies equally here. See also Texas v. American BlastFax, 121 F. Supp. 2d at 1092 ("possible alternatives do not show the TCPA's ban on unsolicited fax advertisements is an unreasonable 'fit' for the interests directly advanced by the ban"); Kenro, 962 F. Supp. at 1168-69 (the mere existence of "'some imaginable alternative'" does not establish that the TCPA is improperly tailored to achieve Congress's purposes) (quoting Ward, 491 U.S. at 797); Destination Ventures, 844 F. Supp. at 639 (same). The judgment of the district court should therefore be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

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JULY 2002

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. Rule 32(a)(7)(C). The brief contains 7,065 words, according to the count of Corel WordPerfect 9.

I also certify that the computer diskette containing the full text of the foregoing brief has been scanned for viruses and, to the best of our ability and technology, is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July, 2002, I filed and served the foregoing brief and accompanying appendix by causing ten paper copies and one electronic copy of the brief and three copies of the appendix to be sent to this Court by regular mail, and by causing two paper copies and one electronic copy of the brief and one copy of the appendix to be sent by federal express overnight mail to counsel listed below:

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