

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 03-N-184 (MJW)

MAINSTREAM MARKETING SERVICES, INC., et al.

Plaintiffs,

v.

FEDERAL TRADE COMMISSION, et al.,

Defendants.

**DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION
TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

MATERIAL FACTS AS TO WHICH THERE IS NO ISSUE

1. Defendant Federal Trade Commission ("FTC") is an independent agency of the United States government. Pursuant to the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), which was enacted in 1994, the Commission was charged with promulgating rules to "prohibit[] deceptive telemarketing acts and practices and other abusive telemarketing acts or practices." Complaint ¶¶ 13, 24.

2. In 1995, the FTC promulgated its Telemarketing Sales Rule ("Rule") to implement the Telemarketing Act. 60 Fed. Reg. 43842, codified at 16 C.F.R. Part 310. The Rule, as originally promulgated, prohibits, inter alia, the following deceptive telemarketing practices: the failure to disclose, or misrepresenting, material provisions of a sales transaction; making unauthorized withdrawals from a consumer's checking account; and credit card laundering. 16 C.F.R. § 310.3. It also prohibits, inter alia, the following abusive practices: the use by a telemarketer of threats or

obscene language; causing a consumer's telephone to ring repeatedly or continuously with intent to annoy; calling a consumer who has stated that he or she does not wish to be called (the company-specific do-not-call provision); calling before 8:00 a.m. or after 9:00 p.m.; and failing promptly to disclose the seller's identity and the nature of the telemarketing call. 16 C.F.R. § 310.4.

3. On January 30, 2002, the FTC issued a Notice of Proposed Rulemaking ("NPRM") that proposed a series of amendments to the Rule. 67 Fed. Reg. 4492. During the consideration of these proposed amendments, the FTC received approximately 64,000 comments and conducted a three-day public forum. 68 Fed. Reg. 4582.

4. On January 29, 2003, the FTC promulgated the amended Rule, which, along with the Rule's Statement of Basis and Purpose, appears at 68 Fed. Reg. 4580, et seq. The amended Rule retains the original Rule's requirements, but includes several additions. Among these additions are the creation of a nationwide do-not-call registry, and a prohibition on abandoned outbound telemarketing calls. 16 C.F.R. §§ 310.4(b)(1)(iii)(B), (b)(1)(iv).

5. The FTC has filed an index of the rulemaking record with this Court. The entire administrative record of the rulemaking may be found on the internet at <http://www.ftc.gov/bcp/rulemaking/tsr/tsrrulemaking/>.

RESPONSE TO STATEMENT OF UNDISPUTED MATERIAL FACTS

Defendants do not dispute any of the material facts set forth in plaintiffs' Statement of Material Facts Not in Dispute. However, defendants do dispute plaintiffs' characterization of

certain of those facts, and also dispute certain facts that are not material to this Court's resolution of the cross-motions for summary judgment.

Plaintiffs' Fact No. 1 -- Admit

Plaintiffs' Fact No. 2 -- Plaintiffs mistakenly contend that paragraph 42 of the Answer states that the FTC lacks knowledge or information sufficient to assess whether the teleservices industry complied with the Rule as originally formulated. In fact, that paragraph states that the defendants lack knowledge or information as to whether "the teleservices industry supported the rule and overwhelmingly complied with it." See Defendants' Answer at ¶ 42.

Plaintiffs' Fact No. 3 -- Defendants dispute this fact to the extent that it implies that the FTC was required, within five years of the enactment of the Telemarketing Act, to file a formal report with Congress. See 15 U.S.C. § 6108.

Plaintiffs' Fact No. 4 -- Defendants dispute that paragraph 6 of their Answer states that the FTC adopted a "privacy agenda" in October 2001.

Plaintiffs' Fact No. 5 -- Defendants dispute that paragraph 3 of their Answer states that the "FTC lacks knowledge or information sufficient to assess whether consumers have multiple mutually-reinforcing alternatives to control incoming telephone calls * * *." In fact, paragraph 3 states that the FTC lacks knowledge or information as to whether the "multiple mutually-reinforcing alternatives" are a result of industry support of various public and private initiatives.

Plaintiffs' Fact No. 6 -- Defendants dispute that paragraph 69 of their Answer states that the Rule's Statement of Basis and Purpose "lacks a specific finding that means of enhancing consumer control over incoming telephone calls other than a national 'do-not-call registry' are

inadequate.” In fact, paragraph 69 states that the statement constitutes legal argument to which no response is required.

Plaintiffs’ Fact No. 7 -- Defendants dispute that paragraph 71 of their Answer states that the “FTC made no specific finding that market-based technologies * * * are inadequate.” In fact, paragraph 71 states that the statement constitutes plaintiffs’ legal characterization of the Rule’s Statement of Basis and Purpose, and no answer is required.

Plaintiffs’ Fact No. 8 -- Defendants dispute that paragraph 72 of their Answer states the FTC made no specific finding that means of enhancing consumer control over incoming telephone calls * * * could not be improved through consumer education.” In fact, paragraph 72 states that the statement constitutes plaintiffs’ legal characterization of the Rule’s Statement of Basis and Purpose, and no answer is required.

Plaintiffs’ Fact No. 9 -- Defendants dispute that paragraph 70 of their Answer states that the “FTC found that less restrictive alternatives than a national ‘do-not-call’ registry were sufficient” to protect consumer privacy from for-profit companies soliciting charitable contributions. In fact, paragraph 70 states that the statement constitutes plaintiffs’ legal characterization of the Rule’s Statement of Basis and Purpose, and no answer is required.

Plaintiffs’ Fact No. 10 -- Defendants dispute that paragraph 73 of their Answer states that the “FTC found that technological solutions such as Caller ID can help protect consumer privacy.” In fact, paragraph 73 states that the statement constitutes plaintiffs’ legal characterization of the Rule’s Statement of Basis and Purpose, and no answer is required.

Plaintiffs’ Fact No. 11 -- Admit

Plaintiffs' Fact No. 12 -- Admit

Plaintiffs' Fact No. 13 -- Admit

INTRODUCTION

Although telemarketing to consumers has become a multi-billion dollar business, see Memorandum Supporting Plaintiffs' Motion for Summary Judgment ("Memo") at 7, "certain telemarketing practices can be an intrusive nuisance for consumers, an invasion of privacy, and a source of consumer confusion." H.R. Rep. 108-8 (2003). In response and "[i]n order to assist consumers in dealing with telemarketing, Congress provided authority to the FTC and the Federal Communications Commission (FCC) to limit these intrusions into their homes." Id. To carry out the tasks given it by Congress, and to provide consumers with further protection against deceptive or abusive telemarketing practices, defendant FTC has recently promulgated amendments to its Rule. The Rule, as amended, seeks to prohibit or limit the most deceptive and abusive telemarketing practices. Some of those amendments took effect on March 31, 2003; the Rule's amendments will be fully effective by January 29, 2004.

This Court should reject plaintiffs' attempt to invalidate two of the most vital of these amendments. Plaintiffs challenge the Rule's national do-not-call registry, which, when fully implemented, will give consumers the option of limiting the telemarketing calls they receive. They also seek to have this Court prohibit the FTC from enforcing the Rule's prohibition of abandoned calls. According to the rulemaking record, abandoned calls are "one of the most invasive practices of the telemarketing industry." 68 Fed. Reg. 4642. There are no material issues of fact in dispute in this matter. There is also no merit to any of the arguments raised by

plaintiffs, and, as a matter of law this Court should reject all of the challenges made by plaintiffs, grant the FTC's motion for summary judgment, and dismiss the plaintiffs' complaint.¹

STATEMENT

When Congress passed the Telemarketing Act, it noted that “[i]nterstate telemarketing fraud has become a problem of such magnitude that the resources of the Federal Trade Commission are not sufficient to ensure adequate consumer protection from such fraud,” and that “[c]onsumers are victimized by other forms of telemarketing deception and abuse.” 15 U.S.C. § 6101. Accordingly, Congress ordered the FTC to “prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices,” 15 U.S.C. § 6102(a)(1), and further directed that the FTC “shall include in such rules respecting other abusive telemarketing acts or practices -- a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy,” 15 U.S.C. § 6102(a)(3)(A).

¹ The two Rule provisions challenged by plaintiffs, the do-not-call registry, and prohibition on abandoned calls, have also been challenged by another group of plaintiffs in the United States District Court for the Western District of Oklahoma. U.S. Security, et al. v. FTC, No. CIV-03-122-W (W.D. Okla.). The plaintiffs in that case filed their motion for summary judgment on April 22, 2003, and the Commission filed its opposition and cross-motion for summary judgment on May 19, 2003. In a third challenge to the Rule, Stonebridge Life Insurance Co. v. FTC, No. 1:03cv0739 (RJL) (D.D.C.), the plaintiff seeks an order prohibiting the Commission from enforcing the Rule against companies that telemarket on behalf of insurance companies. On May 7, 2003, the Commission filed a motion to dismiss the complaint in that case. Finally, in National Federation of the Blind, et al. v. FTC, No. JFM 03CV963 (D.Md.), the plaintiffs allege that the Commission exceeded its authority and violated the Constitution by applying certain provisions of the Rule to for-profit telemarketers who telemarket on behalf of charities.

The FTC promulgated its original Rule on August 23, 1995. 60 Fed. Reg. 43842. The original Rule prohibits, inter alia, the following deceptive telemarketing practices: misrepresenting or failing to disclose material provisions of a sales transaction; making unauthorized withdrawals from a consumer's checking account; and credit card laundering. 16 C.F.R. § 310.3. The original Rule also prohibits, inter alia, the following abusive practices: the use by a telemarketer of threats or obscene language; causing a consumer's telephone to ring repeatedly or continuously with intent to annoy; calling a consumer who has stated that he or she does not wish to be called (the company-specific do-not-call provision); calling before 8:00 a.m. or after 9:00 p.m.; and failing promptly to disclose the seller's identity and the nature of the telemarketing call. The Rule has proven to be one of the FTC's most significant consumer protection tools. See 68 Fed. Reg. 4627 n.551 (FTC has brought more than 139 cases under the Rule, resulting in judgments totaling more than \$200 million).

In 2000, the FTC commenced a review of the effect of the original Rule. 68 Fed. Reg. 4581. During the review, the FTC conducted two public forums and solicited comments. Id. Plaintiff American Teleservices Association ("ATA") participated in the forums and submitted a comment. 68 Fed. Reg. 4675. Based on the information it gathered, the FTC determined to retain the original Rule but to consider amendments that would address recurring abuses and reach emerging problem areas. 68 Fed. Reg. 4582.

On January 30, 2002, the FTC published its Notice of Proposed Rulemaking ("NPRM"). 67 Fed. Reg. 4492. The FTC noted that the company-specific do-not-call provision of the original rule had been widely criticized as inadequate to protect consumer privacy from unwanted

telemarketing calls. Accordingly, the NPRM proposed, inter alia, the establishment of a national “do-not-call” registry for consumers who want to limit the number of telemarketing calls they receive. 67 Fed. Reg. 4516-20.

The NPRM also solicited recommendations to address the problem of abandoned calls. 67 Fed. Reg. 4522-24. The NPRM explained that abandoned calls result from the use by telemarketers of “predictive dialers,” which are automatic dialing software programs that dial telephone numbers at a predetermined, but adjustable, rate so that, ideally, consumers will answer the phone at the same time that telemarketers are free to take the calls. However, when a consumer answers the phone but no telemarketer is available, the call is disconnected or “abandoned” and the consumer either hears nothing (“dead air”) or hears a click as the dialer hangs up. The NPRM recognized the economic benefits of predictive dialers to the telemarketing industry but noted that consumers on the receiving end of abandoned calls often feel frightened because there is no way to determine whether such calls are placed by a telemarketer or by a stalker or a burglar seeking to determine if someone is home. Accordingly, the NPRM sought recommendations regarding alternative approaches to the use of predictive dialers, and asked, inter alia, whether the Rule should mandate a maximum predictive dialer setting for abandoned calls.²

² The FTC received and considered more than 64,000 comments in response to the NPRM, including two lengthy comments from plaintiff ATA. 68 Fed. Reg. 4582, 4676-77. Also during the rulemaking, the FTC conducted a three-day public forum at which interested parties, including ATA, presented arguments regarding the proposed amendments, including possible solutions to the problem of abandoned calls. 68 Fed. Reg. 4582.

On December 18, 2002, the FTC announced that it had approved amendments to the Rule, and those amendments were formally promulgated on January 29, 2003. (The amended Rule and its Statement of Basis and Purpose appear at 68 Fed. Reg. 4580 et seq.) The amended Rule retains the original Rule's requirements, including the company-specific do-not-call provision, but includes several additions. Among those additions are two that have been challenged by plaintiffs: the amended Rule prohibits telemarketers from abandoning outbound telephone calls, and it establishes a national "do-not-call" registry for consumers who want to limit the number of telemarketing calls they receive. With respect to the Rule's prohibition of abandoned calls, the amended Rule provides a safe harbor. That is, a telemarketer is permitted to abandon calls if 1) the telemarketer employs a technology that ensures abandonment of no more than 3% of all calls answered by a person; 2) the telemarketer allows the phone to ring for at least 15 seconds (or four rings) before disconnecting the call; 3) whenever the telemarketer is not available to speak to the consumer within two seconds after the consumer answers the phone, the telemarketer plays a recorded greeting giving the name and phone number of the seller; and 4) the telemarketer retains records showing compliance with the other three requirements. 16 C.F.R. § 310.4(b)(4).

The Rule's do-not-call registry, when fully implemented, will have three components. First, consumers will be able to add their telephone numbers to the registry through either a toll-free telephone call, or through the internet. These consumers will enjoy a reduction in the amount of telemarketing that is directed to them because the Rule defines it as an abusive practice for a telemarketer to call a number that is on the registry. Of course, the decision to

place a number on the registry is voluntary, no consumer is required to participate. Consumers who do not participate in the registry remain free to invoke the Rule's company-specific do-not-call provision and thereby shield themselves from telemarketing calls from specific telemarketers. Further, even if a consumer has placed a phone number on the registry, the consumer may still receive calls from telemarketers with whom the consumer has an established business relationship, or from telemarketers to whom the consumer has given written authorization to call. Second, telemarketers and sellers who are prohibited by the Rule from calling numbers that have been placed on the registry will be able, for a charge, to gain access to the registry through a secure website. Companies that gain access to the registry will be assessed a charge based upon the number of area codes of data that the company desires.³ Third, law enforcement agencies that enforce the Rule will be able to gain access to the registry and to determine whether and when a particular telephone number was added to the registry, and whether and when a particular seller or telemarketer gained access to the registry.⁴ 68 Fed. Reg. 4628-41.

On February 20, 2003, Congress passed the Consolidated Appropriations Resolution, 2003. P.L. 108-7. This authorized the FTC to use, as part of its funding, up to \$18.1 million

³ On April 3, 2003, the FTC issued a notice of proposed rulemaking to establish fees for access to the registry. 68 Fed. Reg. 16238. It proposed that each seller covered by the Rule who engages in telemarketing must pay an annual fee for access to the registry -- \$29 per area code of data accessed, with maximum annual fee of \$7250. Sellers who obtain no more than five area codes of data pay no fee.

⁴ The Rule also contains a safe harbor for telemarketers who, inadvertently, telemarket to a consumer whose number is on the do-not-call registry. 16 C.F.R. § 310.4(b)(3).

derived from “fees sufficient to implement and enforce the do-not-call provisions of the Telemarketing Sales Rule.” 117 Stat. 96. On March 11, 2003, the Do-Not-Call Implementation Act, P.L. 108-10, was enacted. It gives the FTC, for a period of five years, authority to collect fees “sufficient to implement and enforce the provisions relating to the ‘do-not-call’ registry of the Telemarketing Sales Rule.” 117 Stat. 557.

Plaintiffs filed their complaint in this matter on January 29, 2003. On February 28, 2003, plaintiffs filed a motion for a preliminary injunction with respect to the Rule’s prohibition of abandoned calls, and its do-not-call registry. The abandoned call provision was scheduled to take effect on March 31, 2003; the do-not-call registry will take effect on October 1, 2003, 68 Fed. Reg. 16238. With respect to the prohibition of abandoned calls, plaintiffs argued that the FTC had exceeded its statutory authority, and that the Rule encroached upon the exclusive jurisdiction of the Federal Communications Commission (“FCC”). With respect to the do-not-call registry, plaintiffs argued that the provision violated the First Amendment and that the FTC exceeded its statutory authority. This Court scheduled a hearing on the preliminary injunction motion for April 9, 2003. However, prior to that date, and in response to petitions filed by plaintiff ATA and the Direct Marketing Association (another trade association), the FTC stayed until October 1, 2003, the date by which it would require compliance with the Rule’s abandoned call prohibition. 68 Fed. Reg. 16414 (April 4, 2003). Because, as a result of the FTC’s action, neither of the Rule provisions that plaintiffs challenged would take effect until October 1, it was no longer necessary for this Court to rule on plaintiffs’ motion for a preliminary injunction. As a result, the parties jointly moved this Court to hold a scheduling conference in lieu of a hearing on the motion for a

preliminary injunction. At that conference, this Court entered a Scheduling Order that set the schedule for filing the cross-motions for summary judgment.

ARGUMENT

I. THE STANDARD OF REVIEW COUNSELS DEFERENCE TO THE FTC'S DETERMINATIONS

Under Fed. R. Civ. P. 56, summary judgment is appropriate when the pleadings and other documents in the record “show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Selenke v. Medical Imaging of Colorado, 248 F.3d 1249, 1255 (10th Cir. 2001). This Court may not set aside any provision of the Rule unless it finds that provision to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A), or “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” 5 U.S.C. § 706(2)(C). This standard is a deferential one. Utahns for Better Transportation v. Department of Transportation, 305 F.3d 1152, 1164 (10th Cir. 2002). The scope of review under the arbitrary and capricious standard is narrow, and the reviewing court should not substitute its judgment for that of the agency. Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1983); Lamb v. Thompson, 265 F.3d 1038, 1046 (10th Cir. 2001). A reviewing court must consider whether the agency’s decision “was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971); see Davis v. Mineta, 302 F.3d 1104, 1114 (10th Cir. 2002). Although a reviewing court “may not supply a reasoned basis for the agency’s action that

the agency itself has not given,” the court should “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” MVMA v. State Farm, 463 U.S. at 43; Lamb v. Thompson, 265 F.3d at 1046.

All of the challenges to the FTC’s interpretation of the Telemarketing Act must be considered under the deferential standard articulated in Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). In that case, the Supreme Court mandated a two-step process for reviewing an agency’s construction of a statute it administers. First, a court considers whether Congress spoke directly to the question at issue; if so, “that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” Id. at 842-43. If, however, the statute is ambiguous, then “the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” Id. at 843. In resolving that question, “considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer” because the agency’s decision as to the meaning of the statute involves “reconciling conflicting policies * * * [and] more than ordinary knowledge respecting the matters subjected to agency regulations.” Id. at 844; NLRB v. Viola Industries-Elevator Division, Inc., 979 F.2d 1384, 1394 (10th Cir. 1992). A full measure of Chevron deference is also called for here because the FTC promulgated the Rule following notice and comment rulemaking procedures. See Christensen v. Harris County, 529 U.S. 576, 587 (2000).⁵

⁵ Plaintiffs mistakenly suggest that, because they have raised constitutional challenges to the Rule, the FTC’s interpretation of the Telemarketing Act is not entitled to deference. See

II. THIS COURT SHOULD UPHOLD THE RULE'S DO-NOT-CALL REGISTRY

There is no merit to any of the challenges that plaintiffs raise against the Rule's do-not-call registry. Creation of the registry is well within the FTC's statutory authority, it is consistent with the First and Fifth Amendments of the Constitution, and the registry is not arbitrary and capricious because the Rule's Statement of Basis and Purpose is well reasoned and provides a more than adequate basis for the provision.

A. The do-not-call registry is well within the FTC's authority under the Telemarketing Act

As a matter of law, there is absolutely no merit to plaintiffs' contention that the FTC lacks authority to promulgate the do-not-call registry or that the registry is inconsistent with the plain language of the Telemarketing Act. (Complaint count 6; see Memo at 2-4.) The FTC's authority to regulate telemarketing is clear. It comes from the Telemarketing Act, and was expanded by the USA PATRIOT Act, P.L. 107-56, § 1011, which gave the FTC authority to regulate certain telemarketing conducted on behalf of charities. The Telemarketing Act gives the FTC authority to prohibit telemarketers from engaging in abusive or deceptive telemarketing

Memo at 5. But, as U.S. West, Inc. v. FCC, 182 F.3d 1224, 1231 (10th Cir. 1999), makes clear, deference is denied only when a challenger raises "serious constitutional questions." Further, because a challenger can almost always find some constitutional challenge, courts must "scrutinize constitutional objections to a particular agency interpretation skeptically." Williams v. Babbitt, 115 F.3d 657, 662 (9th Cir. 1997). As explained below, none of the constitutional challenges rises even close to the serious level, and, as a result, there is no reason to deny deference to the FTC's interpretation of the Telemarketing Act. See Trans Union Corp. v. FTC, 245 F.3d 809, 814 (D.C. Cir. 2001) (no reason for not deferring to the FTC's statutory interpretation where challenger's constitutional arguments are without merit).

practices, 15 U.S.C. § 6102(a)(1), not just fraudulent practices as plaintiffs mistakenly contend. See Memo at 3, 14. The FTC relies on its “abusive practices” authority to prohibit calls to a person whose number is listed on the do-not-call registry.⁶

Plaintiffs focus on the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227, and contend that, because the TCPA gives the FCC authority to regulate telemarketing, including specific authority to create a do-not-call registry (authority the FCC has not invoked), Congress could not have intended to give the FTC authority to create such a registry. See Memo at 2-4. However, plaintiffs ignore that “this is an era of overlapping agency jurisdiction under different statutory mandates,” FTC v. Texaco, Inc., 555 F.2d 862, 881 (D.C. Cir. 1977), and aspects of the economy are often regulated by more than one agency. See also FTC v. Ken Roberts Co., 276 F.3d 583 (D.C. Cir. 2001) (allowing the FTC to investigate practices that also come within the jurisdiction of the Commodity Futures Trading Commission). Plainly, the mere fact that

⁶ Plaintiffs suggest that the FTC’s authority with respect to abusive practices is limited to prohibiting the three practices enumerated in the Telemarketing Act at 15 U.S.C. § 6102(a)(3) (pattern of unsolicited calls that is coercive or abusive; calls at an unreasonable hour; failing promptly to disclose the purpose of the call). In fact, however, the Telemarketing Act merely states that the Rule’s prohibitions of abusive practices “shall include” the three practices listed in § 6102(a)(3). When used in a statute, the word “include” is “generally used as a word of extension or enlargement rather than as one of limitation or enumeration.” American Surety Co. of New York v. Marotta, 287 U.S. 513, 517 (1933); see Citizens for Responsible Government v. Davidson, 236 F.3d 1174, 1190 (10th Cir. 2000) (“Colorado is among the overwhelming majority of jurisdictions that reads the word ‘includes’ as a term of extension or enlargement when used in a statutory definition” (quotation marks omitted)). In any event, § 6102(a)(3) directs the FTC to prohibit patterns of unsolicited calls that reasonable consumers would consider abusive, and the massive number of unsolicited calls that telemarketers place plainly constitute such a pattern, from the point of view of either the telemarketer or the recipient. See 68 Fed. Reg. 4629-30. Thus, even if § 6102(a)(3) were given a limited reading, that section provides statutory authority for the registry.

Congress gave the FCC authority to create a do-not-call registry in no way precludes Congress from also giving the FTC authority to create a registry. See Memo at 11-14.

To the extent that there was ever any question as to whether Congress actually did give the FTC authority to create the registry, that question was conclusively answered earlier this year, and it was answered in the affirmative. On February 20, 2003, Congress enacted the Consolidated Appropriations Resolution, 2003. P.L. 108-7. This provided a budget for the FTC and it authorized the FTC to use, as part of its funding, up to \$18.1 million derived from “fees sufficient to implement and enforce the do-not-call provisions of the Telemarketing Sales Rule.”

The conference report that accompanied the legislation stated that:

[t]he Conferees understand that the Commission has adopted, prior to enactment of this legislation, the Do-Not-Call initiative as an amendment to its Telemarketing Sales Rule. The Conferees further understand that the Commission has developed a spending plan for the Do-Not-Call initiative. The Conferees recognize that these additional funds and fee collection authority are needed to implement the Do-Not-Call initiative, which has received broad support from, and will provide significant benefits to, consumers throughout the United States.

H.R. Rep. 108-10 at 777 (2003).

Then, on March 11, 2003, Congress enacted the Do-Not-Call Implementation Act, P.L. 108-10. It gives the FTC, for a period of five years, authority to collect fees “sufficient to implement and enforce the provisions relating to the ‘do-not-call’ registry of the Telemarketing Sales Rule.” Id. at § 2. It further requires that, “[n]ot later than 180 days after the date of enactment of this Act, the [FCC] shall issue a final rule pursuant to the * * * [TCPA]. In issuing such rule, the [FCC] shall consult and coordinate with the [FTC] to maximize consistency with

the rule promulgated by the [FTC].” Id. at § 3. The report from the House of Representatives Committee on Energy and Commerce stated that, “[i]n order to assist consumers in dealing with telemarketing, Congress provided authority to the FTC and the [FCC] to limit these intrusions into their homes.” H.R. Rep. 108-8 at 2 (2003). The report further noted that the FTC had promulgated the registry pursuant to its authority under the Telemarketing Act. Id. at 3.

This recent legislation constitutes an express congressional recognition that the FTC had ample statutory authority under the Telemarketing Act to promulgate the do-not-call registry -- there is no “regulatory imperialism,” “bootstrap,” or “power-grab.” See Memo at 2, 4, 10. Indeed, “[w]here an agency’s statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.” North Haven Board of Education v. Bell, 456 U.S. 512, 535 (1982) (quotation marks omitted). Further, “Congress [is] at its most authoritative” when it adds “complex and sophisticated amendments to an already complex and sophisticated act.” Bell v. New Jersey, 461 U.S. 773, 785 n.12 (1983). Here, Congress was well aware that the FTC had promulgated the registry. When it provided for the necessary funding, it recognized that the registry was an appropriate exercise of the FTC’s authority. Thus, the FTC had ample statutory authority to promulgate the registry, and as a matter of law, complaint count 6 should be dismissed.

B. The do-not-call registry does not violate the First Amendment

This Court should reject plaintiffs’ First Amendment challenge to the do-not-call registry (complaint counts 1, 2, 3, 5). To the extent that the registry restricts speech at all, it restricts only

commercial speech. Indeed, by its terms, the Rule provides that the registry applies only to those telemarketers who use telemarketing “to induce the purchase of goods or services.”

§ 310.4(b)(1)(iii)(B). Accordingly, the telemarketing calls restricted by the registry fall within the core notion of commercial speech, “speech that does no more than propose a commercial transaction.” United States v. United Foods, Inc., 533 U.S. 405, 409 (2001). A restriction on commercial speech passes First Amendment muster if 1) the asserted government interest is substantial; 2) the regulation directly advances the asserted interest; and 3) the restriction is sufficiently tailored to serve that interest. Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 564 (1980). The do-not-call registry easily passes this test.⁷

Before applying those standards, however, this Court should consider several preliminary points. First is the minimal impact that the registry imposes on speech. To the extent that the do-not-call registry restricts commercial speech, the restrictions are imposed by the actions of individual consumers, not the government acting on its own. Indeed, the Supreme Court has upheld a similar regulatory regime that permits a consumer to have his or her name removed from the mailing list of any mailer who, in the consumer’s view, sends out sexually offensive material. Rowan v. United States Post Office Department, 397 U.S. 728 (1970); see Martin v. City of Struthers, 319 U.S. 141, 148 (1943) (acknowledging the right of homeowners to decide whether distributors of literature may call at their homes); Watchtower Bible & Tract Society of

⁷ Plaintiffs’ contention that the FTC ignored constitutional considerations, Memo at 4, 20, is simply wrong. See 68 Fed. Reg. 4634-37 (discussing the First Amendment).

New York, Inc. v. Village of Stratton, 536 U.S. 150 (2002) (acknowledging the right of the Village to make it illegal for a solicitor to solicit homes that post a “no solicitation” sign). In the present case, the only burden on speech imposed by the do-not-call registry itself (as opposed to the actions of individual consumers) is the modest administrative requirement that telemarketers consult the registry.

Second, there is no merit to plaintiffs’ contention that the registry is subject to strict scrutiny either because it operates as a prior restraint on speech, or because, in plaintiffs’ view, it is a content-based restriction. See Memo at 24-33. As the Supreme Court has explained, commercial speech (which is the only kind of speech affected by the registry) “is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it.” Central Hudson, 447 U.S. at 571 n.13 (suggesting that the Public Service Commission consider a system of previewing advertising campaigns “to insure they will not defeat conservation policy”). Moreover, even if, as a matter of law, the prior restraint doctrine applied to the regulation of commercial speech, the do-not-call registry does not impose such a restraint. Under the First Amendment, the mere fact that a regulation restricts speech in “advance of actual expression” does not render the regulation a “prior restraint.”⁸ See Memo at 24. Indeed, were it otherwise,

⁸ Plaintiffs try, but fail, to distinguish the restraint imposed by the registry from the restraint imposed by the Rule’s company-specific do-not-call provision. Plaintiffs mistakenly believe that consumers can request inclusion on a company’s do-not-call list only after they receive at least one call from the company. See Memo at 24. In fact, a consumer can request (in writing, for example) to be placed on a company’s do-not-call list at any time, even before the consumer receives any calls from the company. See 60 Fed. Reg. 43855. Thus, to the extent that either the national registry or the company-specific do-not-call lists restrain any speech, they do so to an equal degree. Neither, however, is a “prior restraint.”

virtually any regulation of speech would constitute a prior restraint. See, e.g., Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995) (applying the Central Hudson test and affirming a state bar rule that prohibited lawyers from soliciting accident victims within 30 days of the accident); United States v. Edge Broadcasting Co., 509 U.S. 418 (1993) (applying the Central Hudson test and upholding a statute that prohibited certain radio broadcasters from broadcasting lottery advertising). Instead, a regulation imposes a prior restraint on speech only where the speaker must obtain some sort of permit in advance of speaking and the permitting authority enjoys “too much discretion” over the permitting process. American Target Advertising, Inc. v. Giani, 199 F.3d 1241, 1250 (10th Cir. 2000); see MacDonald v. City of Chicago, 243 F.3d 1021, 1029-32 (7th Cir. 2001). The do-not-call registry involves no discretionary permitting process and, therefore, no prior restraint.⁹

Nor does the registry involve any content-based restriction on speech. See Memo at 27-33. A content-based restriction is one that is aimed at the content of the message conveyed by the speaker. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). Here, of course, the FTC created the registry, not to further or restrict any message, but to permit consumers to limit the

⁹ Plaintiffs contend that the “proposed fee structure adds another layer of prior restraint.” Memo at 25. As explained above, Congress has explicitly authorized the FTC to collect fees from sellers in order to offset the costs of operating the registry. However, the FTC has not yet promulgated its final rules regarding fees and any challenge to the fee structure is not ripe. See Mobil Exploration & Producing U.S., Inc. v. Department of Interior, 180 F.3d 1192, 1197 (10th Cir. 1999) (prior to the consummation of the administrative process, agency action is not final and thus not ripe for review). In any event, an administrative fee that “does no more than defray reasonable administrative costs” raises no constitutional problem. American Target Advertising v. Giani, 199 F.3d at 1249.

unwanted telemarketing calls they receive. Because the registry is “designed not to ‘suppress the expression of unpopular views’ but rather to control the ‘secondary’ effects of speech,” in this case the infringement of privacy caused by the constant ring of unwanted telemarketing calls, the regulation is content neutral. American Target Advertising, Inc. v. Giani, 199 F.3d at 1247, quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986). As noted above, moreover, if a consumer uses the mechanism created by the Rule to limit telemarketing based on its content, that choice is the consumer’s, not the government’s.¹⁰ Finally, “[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” Ward v. Rock Against Racism, 491 U.S. at 791.

In any event, because the commercial speech doctrine “creates a category of speech defined by content but afforded only qualified [First Amendment] protection, the fact that a restriction is content-based cannot alone trigger strict scrutiny.” Trans Union Corp. v. FTC, 267 F.3d 1138, 1141-42 (D.C. Cir. 2001). Indeed, restrictions on commercial speech are routinely content-based. That is, they impose a restriction on some, but not all, speech based on the content of that speech. Nonetheless, such restrictions are evaluated without a higher level of scrutiny. See, e.g., Greater New Orleans Broadcasting Assoc. v. United States, 527 U.S. 173

¹⁰ Plaintiffs claim that, in 1980, the FCC rejected a blanket do-not-call list for constitutional reasons. Memo at 27 & n.19. In fact, however, the FCC cited constitutional reasons for rejecting a total ban on interstate telemarketing, not a consumer controlled do-not-call list. 77 F.C.C.2d 1023, 1035 (1980). The FTC has never proposed a ban on telemarketing, which would, as the FCC recognized, raise a host of constitutional problems.

(1999) (evaluating restriction that applied only to the broadcast advertising of gambling); Missouri ex rel. Nixon v. American Blast Fax, Inc., 323 F.3d 649 (8th Cir. 2003) (evaluating ban on unsolicited faxes that applied only to certain commercial faxes); Trans Union Corp. v. FTC, supra (evaluating restriction that applied only to the dissemination of credit reports); Pearson v. Edgar, 153 F.3d 397 (7th Cir. 1998) (evaluating a restriction that applied only to sellers of real estate). Thus, the mere fact that, as plaintiffs note, the registry applies to some but not all telemarketing, see Memo at 28-29, does not trigger any stricter scrutiny.

Plaintiffs are not helped by the cases they cite at pages 29-30 of their memorandum. See, e.g., Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987); Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983); Regan v. Time, Inc., 468 U.S. 641 (1984); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972); News America Publishing, Inc. v. FCC, 844 F.2d 800 (D.C. Cir. 1988). All those cases involved regulatory schemes that distinguished among various types of fully protected speech. For example, in the Minneapolis Star case, the Court overturned a tax that applied to some newspapers but not others.¹¹ However, the Rule's do-not-call registry applies only to commercial speech. Plaintiffs have cited no case in which strict scrutiny is

¹¹ Similarly, in Carey v. Brown, 447 U.S. 455 (1980), see Memo at 32, the Court overturned a local ordinance that prohibited all picketing on neighborhood streets, but created an exception for labor picketing. A restriction on picketing is plainly a restriction on fully protected, not commercial, speech, and, as a result, the content-based exception for labor picketing gave rise to strict scrutiny. Here, the do-not-call registry applies only to commercial speech and no strict scrutiny is appropriate.

applied to a regulation that has an impact only on commercial speech.¹² Accordingly, this Court should evaluate the registry using the three-part test of Central Hudson.

1. The do-not-call registry passes the first part of the Central Hudson test because it furthers a substantial government interest

First, the do-not-call registry is intended to protect consumer privacy from unwanted commercial telemarketing calls, and protection of privacy is a substantial government interest. 68 Fed. Reg. 4635. “[I]ndividuals are not required to welcome unwanted speech into their own homes and the government may protect this freedom.” Frisby v. Schultz, 487 US 474, 485 (1988); see Edenfield v. Fane, 507 U.S. 761, 769 (1993) (protecting consumers from unwanted solicitation); Florida Bar v. Went For It, Inc., 515 U.S. 618, 625 (1995) (same); Bland v. Fessler, 88 F.3d 729, 734 (9th Cir. 1996) (state has significant interest in protecting consumers from unwanted telephone solicitation). Indeed, the Supreme Court has noted that “the privacy of the home * * * is accorded special consideration in our Constitution, laws, and traditions.” Department of Defense v. FLRA, 510 U.S. 487, 501 (1994) (protecting government employees’ home addresses from disclosure under the Freedom of Information Act). Plaintiffs do not dispute that protection of privacy is a substantial government interest.

Plaintiffs do not make it clear why they find the privacy interest protected by the registry “difficult to weigh against constitutional values.” See Memo at 35-37. Telemarketers are now

¹² Plaintiffs mistakenly suggest that strict scrutiny is appropriate because, in their view, there is no adequate justification for Congress’ decision to apply the Telemarketing Act to some, but not all, telemarketers. See Memo at 31-33. As explained infra in Part II.B.2, however, there are good reasons for the limits on the Act’s coverage and they relate to the purposes the Act is intended to serve.

placing calls at a rate of more than 16 billion per year. 68 Fed. Reg. 4630 n.591 (16 billion calls answered by consumers). Consumers have an interest in protecting the privacy of their homes from the interruptions that these calls impose. That is why at least 27 states have passed their own state do-not-call statutes. 68 Fed. Reg. 4630 n.592. The Supreme Court has also recognized this privacy interest in the context of an FOIA case. Department of Defense v. FLRA, *id.* In that case, two unions sought to get disclosure of employees' addresses. The Court held that the information was protected from disclosure under FOIA's exemption 6, 5 U.S.C. § 552(b)(6), which exempts information "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The Court found that the Defense Department employees have a privacy interest in nondisclosure of their addresses in order to avoid "the influx of union-related mail, and, perhaps, union-related telephone calls or visits, that would follow disclosure." 510 U.S. at 501. Here, consumers' privacy interest is even greater. Not only will the registry provide consumers with a return to a greater degree of tranquility in their homes, it will also give them control over who interrupts that tranquility. The "privacy of the home," Department of Defense v. FLRA, *id.*, includes not just tranquility, but also the ability to control that tranquility.¹³ Thus, it is not hard at all to weigh this interest against constitutional values.¹⁴

¹³ The interest furthered by the registry is very different from the interest asserted by the government in U.S. West, Inc. v. FCC, 182 F.3d 1224 (10th Cir. 1999). The regulation overturned in that case did not, as plaintiffs mistakenly contend, seek to protect residential privacy. See Memo at 42. Instead, it sought to protect the confidentiality of certain information that phone companies obtain regarding their customers. 182 F.3d at 1235.

¹⁴ The privacy interest protected by the registry is totally different from the interest asserted in Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980), see

2. The do-not-call registry passes the second part of the Central Hudson test because it materially advances the government’s interest in protecting privacy

Second, the Rule’s do-not-call registry directly advances the government’s interest by providing a mechanism whereby consumers can limit unwanted telemarketing calls. Because it is the calls that cause the invasion of privacy, the Rule works directly to further the government’s interest. Consumers who register their numbers on the do-not-call registry thereby indicate that they do not want to receive telemarketing calls from the telemarketers to whom the registry applies, and also indicate that calls from such telemarketers infringe their privacy. Thus, every telemarketing call that is prevented by the do-not-call registry automatically furthers the government’s interest in protecting the privacy interest that consumers assert when sign up for the registry.

There is no merit to plaintiffs’ suggestion that the registry is somehow constitutionally deficient merely because the Rule does not apply to all telemarketing. As plaintiffs note, pursuant to the Telemarketing Act, activity that is outside the FTC’s jurisdiction under the FTC Act is also outside its jurisdiction under the Rule. 15 U.S.C. § 6105(a). The FTC Act contains a number of exemptions. In particular, the FTC Act’s prohibitions do not apply to, inter alia, banks, savings and loan institutions, and federal credit unions. See 15 U.S.C. § 45(a)(2). Also,

Memo at 37. In that case, the PSC sought to prevent Consolidated Edison from including a discussion of the benefits of nuclear power in its billing envelopes. The PSC claimed the it was protecting individual privacy by shielding consumers from a discussion of an issue that might “inflame their sensibilities.” 447 U.S. at 541. This so-called privacy interest has nothing to do with protecting the tranquility of the home, the privacy interest advanced by the registry.

the FTC Act does not apply to not-for-profit corporations, see 15 U.S.C. § 44, or to activities that constitute the business of insurance, to the extent those activities are regulated by the states, 15 U.S.C. § 1012(b). Because these entities and activities are outside the reach of the FTC Act, they are also outside the reach of the Rule, and the Commission recognized this limitation in the Rule's Statement of Basis and Purpose. 68 Fed. Reg. 4598. Indeed, the Commission had no authority to apply the Rule to these entities and activities.¹⁵

However, the mere fact that the do-not-call registry does not restrict all unwanted telemarketing does not render the registry unconstitutional. See Memo at 28-29, 38. What is crucial for the purpose of First Amendment analysis is that the Rule allows consumers to shield themselves from a substantial amount of the telemarketing calls that they currently receive. See Fed. Reg. 4630-31. Because there is a direct and immediate connection between unwanted telemarketing calls and the infringement of consumer privacy, the reduction in those calls will sufficiently advance the government's interest and will therefore satisfy the second prong of the Central Hudson test. See United States v. Edge Broadcasting Co., 509 U.S. 418, 434 (1993) (the

¹⁵ Were this Court to accept plaintiffs' argument and hold the Telemarketing Act and the Rule unconstitutional merely because they do not apply to all telemarketing, this would, in effect, render unconstitutional the FTC Act, which is the source of the Telemarketing Act's jurisdictional limitations. Since 1938, the FTC Act has prohibited unfair or deceptive advertising, but the FTC Act's prohibitions do not apply to banks, savings and loans, federal credit unions, not-for-profit corporations, the business of insurance, etc. Thus, a deceptive advertisement placed by a commercial enterprise might be subject to prosecution by the FTC, while the same ad, placed by a not-for-profit corporation would escape scrutiny. To the extent that this Court finds such linedrawing unconstitutional in the context of the Telemarketing Act, it would presumably also be unconstitutional in the context of the FTC Act (and all the rules promulgated thereunder, see 16 C.F.R. Subchapter D).

Court upheld a restriction on lottery ads that applied only to a radio station that accounted for 11% of listening time in the affected area because “[i]f there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced”); Missouri ex rel. Nixon v. American Blast Fax, Inc., *supra* (finding no First Amendment violation in an FCC regulation that prohibited some, but not all, unsolicited faxes). In any event, there is no constitutional requirement that the government “make progress on every front before it can make progress on any front.”¹⁶ Edge, 509 U.S. at 434.

Further, in order to survive a challenge under the second prong of the Central Hudson test, the FTC need merely show that there is a rational basis for the classifications drawn by the Telemarketing Act and by the Rule, and that these classifications are related to the privacy interest. Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328, 344 n.9 (1986); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 428 (1993) (must

¹⁶ Thus, the First Amendment does not require the FTC to calculate the exact percentage of telemarketing calls that fall under the jurisdiction of the Telemarketing Act. *See* Memo at 39. Indeed, in Missouri v. American Blast Fax, Inc., *supra* the court upheld a prohibition of unsolicited faxes that applied only to commercial faxes based on a congressional determination “that commercial calls constitute the bulk of all telemarketing calls.” 323 F.3d at 658 (emphasis added). This congressional determination also supports the Rule. What is crucial is that the Rule directly advances the government’s interest. Thus, the situation here is very different from Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980). *See* Memo at 41. In that case, the Court found only the “most indirect” connection between the village’s asserted interest, the protection of privacy, and an ordinance that prohibited the solicitation of contributions by organizations that did not use at least 75% of contributions for charitable purposes. *Id.* at 638. Indeed, the Court noted that a provision of the same ordinance that enforced “no solicitors” signs posted by residents was a more effective means of protecting privacy. The do-not-call registry is the telephone equivalent of a “no solicitors” sign.

show “some basis”). It is was clearly rational for Congress to exempt from coverage under the Telemarketing Act entities and other activities that are exempt from the FTC Act (banks, savings and loan institutions, federal credit unions, common carriers, business of insurance, etc.) because all of those entities and activities are subject to regulation by other federal regulatory authorities. Congress could reasonably assume that additional regulation of their conduct was not necessary.¹⁷ Of course, third-party telemarketers who telemarket on behalf of exempt entities may not be subject to regulation by other federal authorities and, as a result, the third-party telemarketers are subject to the Rule.

With respect to not-for-profit corporations or political fundraising, Congress could rationally assume that, because not-for-profit corporations and political fundraisers do not have the same incentives as for-profit corporations, they are less likely to engage in the sorts of abusive or deceptive acts or practices prohibited by the Telemarketing Act.¹⁸ Finally, it was reasonable for Congress to assume that activities exempted by the McCarran-Ferguson Act need not be subject to regulation under the Telemarketing Act and Rule because those activities are

¹⁷ The mere fact that entities outside the FTC’s jurisdiction are engaged in telemarketing does not render the Rule irrational or unconstitutional. See Memo at 29 n.21, 39. Indeed, the FCC is currently engaged in rulemaking that may result in further restrictions on telemarketing by such entities. See 67 Fed. Reg. 62667 (FCC Notice of Proposed Rulemaking); see also H.R. Rep. 108-8 at 4 (2003) (directing the FCC to maximize consistency between any regulation it promulgates and the FTC’s Rule). This demonstrates that those agencies are perfectly able to police the conduct of entities subject to their jurisdiction and to craft appropriate responses.

¹⁸ When it passed the Telephone Consumer Protection Act, 47 U.S.C. § 227, which authorizes the FCC to regulate telemarketing, Congress found that non-commercial calls are less intrusive to consumers. H.R. Rep. 102-317 at 16 (1991).

regulated by the states and no additional regulation is necessary.

Plaintiffs are also mistaken in suggesting that there is no basis for the FTC's decision to exempt for-profit telemarketers who telemarket on behalf of charities from the do-not-call registry. See Memo at 28-29. In fact, the FTC was persuaded by industry comments, which explained that, when a telemarketer, even a for-profit telemarketer, solicits for a charity, the telemarketer is less likely to engage in abusive telemarketing practices that might alienate the consumer. In the context of a charitable solicitation the consumer is not only a potential donor, but also a voter and a potential advocate (or opponent) of the charity's cause. Accordingly, the FTC subjected such telemarketers only to the company-specific do-not-call provision. 68 Fed. Reg. 4637. This explanation is more than sufficient to satisfy the requirements of the Central Hudson test.¹⁹

Thus, the do-not-call registry is very different from the regulations at issue in Greater New Orleans Broadcasting v. United States, supra, Rubin v. Coors Brewing Co., 514 U.S. 476 (1995), or Utah Licensed Beverage Ass'n (ULBA) v. Leavitt, 256 F.3d 1061 (10th Cir. 2001). See Memo at 39-40. In Greater New Orleans, the government attempted to defend a restriction on broadcast advertising for casino gambling as a means of discouraging compulsive gambling. However, the Court was skeptical of this interest because the government simultaneously

¹⁹ The established business relationship exemption, see Memo at 28-29, which allows companies to telemarket to consumers with whom they have an established business relationship, even if those consumers' numbers are on the registry, is also rational. It was certainly rational for the Commission to conclude that consumers are more likely to desire contact with businesses with whom they have an existing relationship, and are less likely to find telephone calls from those businesses to be abusive.

supported and permitted advertising for casinos owned by Native Americans. The Court overturned the restriction because the government could not provide a justification for the distinction that was related to the interest it was seeking to further. Similarly, in Rubin v. Coors, the regulation at issue, which was supposed to discourage brewers from promoting malt beverages based on alcohol content, worked at cross-purposes -- it prohibited the disclosure of alcohol content on beer labels but allowed the disclosure in ads and required the disclosure of alcohol content on certain wine labels. 514 U.S. at 488-89. Again, the Court found that the government had no rational reason for the regulatory scheme that was related to the interest it was attempting to further.

Finally, ULBA v. Leavitt is similar to Rubin v. Coors. Utah banned wine advertising supposedly to promote temperance, but imposed no restriction on beer advertising. The state was unable to provide any reason related to its interest for the different treatment, and was unable to explain why the regulation's goals would not be completely vitiated by unfettered beer advertising. 256 F.3d at 1074. Here, consumers beleaguered by repeated telemarketing calls will derive direct and concrete relief if they invoke the do-not-call registry, even if some exempt entities can continue to call. Further, as explained above, there are rational reasons for the limits on the applicability of the do-not-call registry, and these reasons are related to the government's interest in protecting consumer privacy. The court in ULBA v. Leavitt also emphasized the poor fit of the Utah regulation -- it focused solely on speech instead of considering more direct means of fostering temperance. Id. at 1075. Here, where the communicative act itself (i.e., the telemarketing call) constitutes the intrusion on consumer privacy, restricting such calls is plainly

the most direct means of furthering privacy protection. See Trans Union Corp. v. FTC, 267 F.3d at 1142 (recognizing directness of benefit where “the speech itself * * * causes the very harm the government seeks to prevent”). Therefore, the registry does not suffer the failings of the regulations overturned in Greater New Orleans, Rubin v. Coors, and ULBA v. Leavitt.²⁰

3. The do-not-call registry passes the third part of the Central Hudson test because it is sufficiently tailored to serve the government’s interest

The Rule’s do-not-call registry also satisfies the third and final prong of the Central Hudson test. That is, the regulatory approach selected by the FTC does “not burden substantially more speech than is necessary to further the government’s legitimate interests. And we have been loath to second-guess the Government’s judgment to that effect.” Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 478 (1989) (citation and quotation marks omitted). Here, the registry is not more restrictive than necessary to achieve the government’s interest because it only limits telemarketing calls to those consumers who have indicated (by signing up for the registry) that they want such calls limited.

Plaintiffs mistakenly contend that the FTC “failed to analyze” the First Amendment impact of the registry. See Memo at 43. In fact, the FTC conducted a careful analysis. See 68 Fed. Reg. 4634-37. The crucial point in that analysis is the registry’s minimal impact on speech.

²⁰ Plaintiffs are not helped by City of Cincinnati v. Discovery Network, Inc., *supra*. See Memo at 32, 45 n.34. In that case, the city banned commercial newsracks but allowed non-commercial newsracks. The city claimed that the ban, which applied to no more than 4% of the city’s newsracks, was justified to prevent littering, but it could give no reason, related to the city’s stated goal, for the distinction between commercial and non-commercial newsracks. 507 U.S. at 424. This case does not apply here because there are good reasons for the exemptions from the Rule.

Indeed, the registry imposes no more restriction on speech than an on-off knob on a television set. All the registry does is create a mechanism allowing consumers to limit the number of telemarketing calls they receive. There is no requirement that any consumer sign up for the registry, and if none does, the registry limits no calls. Thus, consumers, not the government, control the extent to which the registry limits speech. The Rule's only impact on speech is to mandate that telemarketers check the registry on a regular basis and delete listed numbers from their calling lists. Where a rule merely "permits a citizen to erect a wall" against unwanted communication, there is no governmental restriction of speech, and the Supreme Court has held that such a rule raises no constitutional question. Rowan v. Post Office Department, 397 U.S. at 738; see Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. at 168 (recognizing the validity of an ordinance that enforced "no solicitation" signs posted by village residents).

The mere fact that the Rule requires telemarketers who solicit on behalf of charities to comply with the company-specific do-not-call provision, but not the registry, does not demonstrate any "uneven fit" between the registry and its goals. See Memo at 43-45. Plaintiffs' selective quotes from the Rule's Statement of Basis and Purpose fail to capture the FTC's careful consideration of the registry's coverage. Since the Rule first took effect in 1995, its company-specific do-not-call provision has applied to telemarketers for goods and services. Unfortunately, evidence collected during the current rulemaking showed that those telemarketers ignored consumers' requests to be put on company-specific lists, or even hampered their efforts to be placed on such lists. 68 Fed. Reg. 4628-29. The record also showed that the company-specific

provision is difficult to enforce. 68 Fed. Reg. 4629. Accordingly, after more than seven years of experience with the company-specific provision, telemarketers for goods and services will now be required to comply with the nationwide do-not-call registry.

The FTC has no such evidentiary track record with respect to telemarketers on behalf of charities because they were not covered by the Telemarketing Act until passage of the USA PATRIOT Act in 2001, and it is only since March 31, 2003, that the Rule and its company-specific do-not-call provision have applied to them. Moreover, as explained above, telemarketers soliciting on behalf of charities face different incentives from telemarketers who sell goods and services, making it more likely that the company-specific do-not-call provision will work as intended to protect consumer privacy. See 68 Fed. Reg. 4637. For these reasons, reasons that are based on the Rule's goal of protecting consumer privacy, the Rule accords different treatment to those who telemarket on behalf of charities. Thus, even though the FTC recognized that telemarketers on behalf of charities may be entitled to a different degree of First Amendment protection, see Memo at 44, that was most certainly not the "sole" reason for according them different treatment under the Rule.

There is no merit to plaintiffs' contention that, in implementing the do-not-call registry, the FTC somehow overlooked less restrictive alternatives. Memo at 45-48. Such alternatives will only render a regulation unconstitutional where the alternatives are "obvious and restrict substantially less speech." U.S. West, Inc. v. FCC, 182 F.3d at 1238. None of the alternatives suggested by plaintiffs is an obvious and less restrictive alternative because none achieves the same goal as the registry. See Thompson v. Western States Medical Center, 535 U.S. 357, 371

(2002) (alternative must achieve the government’s interest). First, as set forth above, the FTC explained why the company-specific do-not-call provision is inadequate to protect consumers from unwanted telemarketing calls placed by telemarketers selling goods or services. See Memo at 45-46. Moreover, there are now thousands of telemarketers placing billions of calls each year. 68 Fed. Reg. 4830. The company-specific do-not-call provision can, if companies comply with it, protect a consumer against unwanted calls from a small number of telemarketers, but it is hardly sufficient against the current onslaught of calls.

Second, none of the “technical options” touted by plaintiffs is an obvious alternative because none would achieve the same goal as the registry.²¹ The registry is easy to access for all consumers, registration is free, and once the consumer signs up, the consumer’s number remains on the registry for five years. The “No Solicitation Service” sold by some local phone companies, see Memo at 47, is a crude and costly option. It greets all calls (even calls from friends and family) with a message asking solicitors to hang up and place the consumer’s name on the caller’s do-not-call list. Consumers who purchase the Service must depend on the caller to place the consumer’s number on the caller’s company-specific do-not-call list. As explained above, the company-specific lists have not proven adequate to protect consumers from unwanted calls. Further, the “No Solicitation Service” is expensive -- it would cost more than \$500 for five

²¹ Plaintiffs cite paragraph 3 of defendants’ answer in support of what they contend is the “FTC’s acknowledgment” that it lacks information regarding alternatives to the registry. See Memo at 45. Paragraph 3 says nothing of the sort. It merely states that defendants lack knowledge or information as to whether the options for reducing calls that are currently available to consumers came about as a result of telemarketing industry efforts.

years of the service. See Attachment 4 to plaintiffs' Memo.

Nor is a Caller ID Service a substitute for the do-not-call registry. Again, Caller ID is an optional service that can be quite costly to consumers. See Attachment 4 to plaintiffs' Memo. Moreover, even if a consumer has Caller ID, the consumer still is required, every time a telemarketer calls, to screen the call. Unwanted calls, and the interruption necessary to screen out those calls, interfere with consumers' privacy even if the consumer does not ultimately answer the call. Thus, unlike the do-not-call registry, Caller ID service does nothing to diminish the number of unwanted calls that invade a consumer's household. The "TeleZapper" would be no better. See Memo at 47. The TeleZapper attempts to fool telemarketers who use automated dialing devices by sending a tone that indicates to the device that the consumer's phone has been disconnected. Again, consumers have to pay for a TeleZapper; the Rule's registry is free. Moreover, the TeleZapper does nothing to stop calls that originate from telemarketers who do not use automated dialing devices, and nothing precludes telemarketers from developing automated dialing devices that can fool the TeleZapper.

None of plaintiffs' "technical options" is an "obvious alternative" to the registry. To the contrary, these "options" merely show the extent to which consumers, and hence the market, are struggling to find a solution to the problem of unwanted telemarketing calls. None presents a viable alternative to the solution provided by the Rule's registry.²²

²² Plaintiffs get no support from United States v. Playboy Entertainment Group, 529 U.S. 803, 824 (2000), because nothing in that case suggests that a costly ineffective option is an obvious alternative to a regulation that is cost-free.

Finally, plaintiffs' contention that the Rule somehow deprives consumers of the choice of which telemarketing calls to receive falls far wide of the mark. See Memo at 48. To the contrary, the Rule is carefully crafted to accommodate consumer preferences. First, the Rule allows consumers to enroll their numbers on the registry, and those who do will be shielded against unwanted telemarketing from telemarketers within the FTC's jurisdiction. Second, the Rule accommodates those consumers who do not mind the intrusion of telemarketing calls and want to receive some, but not all, calls. Such consumers would simply bypass the do-not-call registry. They can then tailor the calls they would receive by availing themselves of the Rule's Caller ID provision (if they purchase the service from their phone company), which requires telemarketers to transmit Caller ID information, § 310.4(a)(7), and Rule's company-specific do-not-call provision, § 310.4(b)(1)(iii)(A). Using Caller ID, those consumers can choose not to answer some calls. Whenever they answer a call from a telemarketer with whom they want no further contact, they need merely inform the telemarketer that they do not wish to receive any more calls.²³ The Rule requires the telemarketer to respect that wish. Thus, it is quite clear that the Rule's do-not-call registry, company-specific do-not-call provision, and Caller ID requirements are tightly tailored to achieving the government's interest in protecting whatever degree of privacy consumers desire.

Because the do-not-call registry restricts only commercial speech, and because it satisfies

²³ In fact, the Rule gives consumers another option. Even if they sign up for the do-not-call registry, they may still receive telemarketing calls from any telemarketer to whom they have given permission. See § 310.4(b)(1)(iii)(B)(i).

all three parts of the Central Hudson test, as a matter of law the portions of the Rule creating the registry do not violate the First Amendment and counts 1, 2, 3, and 5 of plaintiffs' complaint should be dismissed.²⁴

C. The do-not-call registry does not violate the Equal Protection clause of the Constitution

This Court should reject plaintiffs' contention that, merely because the Rule's do-not-call registry does not restrict all telemarketing, the registry somehow violates the Constitution's Equal Protection clause. (Complaint count 4.)

It is well-established that the constitutional principle of equal protection prohibits governmental decisionmakers from enacting legislation that distinguishes between people who are, in all relevant respects, alike. This principle does not, however, forbid any and all legislative classifications; indeed, we are bound to accept the general rule that legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.

United States v. Phelps, 17 F.3d 1334, 1343 (10th Cir. 1994) (citations and quotation marks

²⁴ Counts 1 and 2 challenge only the registry and for the reasons set forth above, summary judgment is appropriate and those counts should be dismissed. Count 3 alleges that the entire Rule violates the First Amendment because it does not apply to charities but does apply to for-profit telemarketers who raise funds on the charities' behalf. However, the reasons for that distinction are discussed in Parts II.B.2 and II.B.3, supra, and the distinction results in no First Amendment violation. Accordingly, summary judgment is appropriate with respect to count 3 and it should be dismissed. Count 5 alleges that the entire Rule violates the First Amendment. Plaintiffs' memorandum raises a First Amendment challenge only with respect to the registry, and for the reasons set forth above, there is no merit to that challenge. Nor is any other part of the Rule constitutionally infirm. To the extent that any provision restricts speech, it does so to further the important government interest of preventing abusive and deceptive telemarketing. Because each provision works directly to further those goals, and because there are no obvious alternatives that restrict less speech, those provisions are sufficiently tailored to survive First Amendment scrutiny. Accordingly, summary judgment is appropriate with respect to count 5 and it should be dismissed.

omitted). As the Supreme Court has explained:

[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. Where there are ‘plausible reasons’ for Congress’ action, our inquiry is at an end.

FCC v. Beach Communications, Inc., 508 U.S. 307, 313-14 (1993) (citations and quotation marks omitted). Further, as the Supreme Court explained, “[i]f there is a sufficient ‘fit’ between the legislature’s means and ends to satisfy the concerns of the First Amendment, the same ‘fit’ is surely adequate under the applicable ‘rational basis’ equal protection analysis.” Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328, 344 n.9 (1986); see Anderson v. Treadwell, 294 F.3d 453, 464-65 (2d Cir. 2002).²⁵ As explained above, there is a sufficient fit between the do-not-call registry and the goal of protecting consumers’ privacy to satisfy the concerns of the First Amendment. See Parts II.B.2, II.B.3, supra. Accordingly, the registry does not violate the Equal Protection Clause of the Constitution and count 4 of plaintiffs’ complaint should be dismissed.²⁶

D. The do-not-call registry is not arbitrary and capricious

The do-not-call registry is not arbitrary and capricious because the FTC “examined the

²⁵ Plaintiffs recognize that the First Amendment and equal protection analyses are identical because they do not distinguish between the two in Part I of their Memorandum.

²⁶ Although plaintiffs’ Memorandum raises constitutional issues only regarding the registry, Count 4 of Plaintiffs’ complaint actually alleges that the entire Rule violates the Equal Protection clause. However, summary judgment is appropriate with respect to the entire count because the justification for the Rule’s classifications in connection with the registry apply as well to classifications with respect to other provisions of the Rule.

relevant data and articulated a rational connection between the facts found and the decision made.” Cliffs Synfuel Corp. v. Norton, 291 F.3d 1250, 1257 (10th Cir. 2002). Accordingly, this Court should dismiss count 8 of plaintiffs’ complaint.²⁷

There is no merit to any of the supposed deficiencies set forth in plaintiffs’ brief. See Memo at 61-68. First, plaintiffs are mistaken that the FTC failed to compile evidence that the status quo (including the company-specific do-not-call provision, industry self-regulatory efforts, and “technological solutions”) was not working. See Memo at 62-63. In fact, evidence on the rulemaking record showed that the company-specific do-not-call provision was not working as intended to protect consumers from abusive telemarketing. 68 Fed. Reg. 4629. This included the results of studies demonstrating that even consumers who attempted to put a halt to unwanted telemarketing using existing mechanisms had little success. See comments cited at 68 Fed. Reg. 4629 n.583, including Rulemaking Review comment of the National Consumers League at 13-14, <http://www.ftc.gov/bcp/rulemaking/tsr/comments/ncl.pdf> (Vermont Department of Public Service study showed that only 20% of consumers who attempted to put a halt to unwanted

²⁷ There is absolutely no basis for plaintiffs’ thrice-repeated insinuation that the FTC had somehow committed itself to creating a do-not-call registry even before it issued its Notice of Proposed Rulemaking. See Memo at 2, 4, 60. In fact, although FTC Chairman Muris announced in October 2001 that he was recommending an amendment to the Rule providing for the registry, he made clear that he had not prejudged the matter and would consider the record developed during the rulemaking prior to reaching any final decision. Remarks of FTC Chairman Timothy J. Muris, October 4, 2001 at 3 & n.9 (<http://www.ftc.gov/speeches/muris/privisp1002.htm>). In any event, Chairman Muris’ views were his own, not those of the FTC. Id. at 1.

telemarketing characterized their efforts as “very successful”).²⁸ The FTC also carefully considered the industry’s voluntary efforts, focusing on the Telephone Preference Service (“TPS”), a do-not-call registry created by the Direct Marketing Association, an industry trade association. The FTC explained that the TPS has several serious drawbacks -- it is voluntary, it only applies to DMA members, and the only sanction for non-compliance is expulsion from DMA. 68 Fed. Reg. 4631. Finally, as explained in Part II.B.3 above, the “technological solutions” simply fail to achieve the achieve the FTC’s goals.²⁹

Nor need the FTC quantify the number of calls that the registry will block. See Memo at 64-65. Indeed, any attempt at quantification of calls that will be blocked involves judgments of a “predictive nature” for which “complete factual support * * * is not possible or required * * *.” FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 813-14 (1978). In any event,

²⁸ Plaintiffs cite testimony given by FTC Associate Director Eileen Harrington, in which she stated that the FTC had received relatively few comments regarding unwanted telemarketing calls. Memo at 62 n.46; see Memo at 16. However, that testimony was given in 2000, prior to the commencement of the rulemaking. During the rulemaking, the FTC received nearly 45,000 comments (almost 70% of the total) supporting creation of the registry. 68 Fed. Reg. 4628 nn. 574-75.

²⁹ The Rule’s Statement of Basis and Purpose does not specifically discuss each of the “technological solutions” described in Attachment 4 to plaintiffs’ Memorandum. However, there is no requirement that the Statement address “every possible alternative.” Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 551 (1978). Further, given the obvious inadequacy of these “technological solutions” to accomplish the FTC’s goals (they impose expense, and in most cases substantial expense, on consumers; most do not block calls; most have limited effectiveness), plaintiffs’ contention the FTC “must quantify the effectiveness” of each and every such device and service is absurd. See Memo at 62-64. Nothing in the cases they cite, see Memo at 62-64 (Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985); McGregor Printing Corp. v. Kemp, 20 F.3d 1188 (D.C. Cir. 1994); California v. FCC, 905 F.2d 1217 (9th Cir. 1990)), is to the contrary.

the record shows that the registry will apply to a substantial number of telemarketing calls. 68 Fed. Reg. 4630-31. Moreover, plaintiffs should not be heard to question the effectiveness of the registry, see Memo at 65, given that plaintiff ATA has applauded the efficacy of the TPS, see Comment of the ATA, April 12, 2002, at 22, <http://www.ftc.gov/os/comments/dncpapercomments/04/ata.pdf> (“[t]he TPS accomplishes all the goals set forth by the Commission in its proposal to create a national Do-Not-Call registry”), which applies to only a fraction of the telemarketers who will be required to comply with the Rule’s do-not-call registry, compare 68 Fed. Reg. 16242 (registry will apply to approximately 7500 telemarketers) with Comment of DMA, May 1, 2002 at 3 <http://www.ftc.gov/bcp/rulemaking/tsr/tsrrulemaking/comments/dma.pdf> (1100 telemarketers subscribe to the TPS). Plainly, the registry will further the goal of reducing unwanted telemarketing.³⁰

Nor is there anything at all that is arbitrary and capricious regarding the Rule’s definition of an “established business relationship.” See Memo at 65-66; see also Memo at 19. Sellers who have an established business relationship with a consumer may telephone that consumer even if that consumer’s number is on the do-not-call registry. 16 C.F.R. § 310.4(b)(1)(iii)(B)(ii). There

³⁰ Although plaintiffs are concerned that the do-not-call registry “would likely have a devastating impact” on the telemarketing industry, Memo at 9-10, and they accuse the FTC of failing to consider that impact, Memo at 42, in fact, the Statement of Basis and Purpose does include a discussion of the registry’s impact. In particular, based on evidence in the record, the FTC noted that, despite the industry’s fears, the registry could actually benefit telemarketers “because telemarketers would reduce time spent calling consumers who do not want to receive telemarketing calls and would be able to focus their calls only on those who do not object to such calls.” 68 Fed. Reg. 4632.

is no basis for plaintiffs' contention that it was arbitrary for the Rule to limit the established business relationship to an 18-months period that commences after the consumer rents, leases, or purchases from the seller. The FTC examined thousands of comments and struck "a balance between industry's needs and consumers' privacy rights and reasonable expectations about who may call them and when." 68 Fed. Reg. 4592. Even if this balance is not to plaintiffs' liking (plaintiff ATA recommended a 24-month limit, see Supplemental Comment of ATA, at 8, <http://www.ftc.gov/os/comments/dncpapercomments/supplement/ata.pdf>), it is exactly the sort of predictive judgment based on a careful analysis of the record, see 68 Fed. Reg. 4591-94, to which this Court should defer.³¹ See FCC v. National Citizens Comm. for Broadcasting, 436 U.S. at 813-14.

Finally, the "internal inconsistencies" noted by plaintiffs simply do not exist. See Memo at 66-68. As set forth above, the Rule's Statement of Basis and Purpose fully explains how the company-specific do-not-call provision has failed to protect consumers' privacy from telemarketers of goods and services, but how charitable fundraisers face different incentives that would likely render the provision more effective. See Part II.B.2, supra; see also 68 Fed. Reg.

³¹ Plaintiffs mistakenly argue that the established business relationship is not affected by the nature of the consumer's relationship with the seller. See Memo at 65. In fact, they have simply ignored the subtlety of the Rule's definition, a subtlety that results from the careful balance struck by the FTC. If the consumer's relationship with the seller consists of nothing more than an inquiry, the established business relationship terminates in three months. 16 C.F.R. § 310.2(n)(2). Where a transaction involves a simple sale, the relationship lasts for 18 months after the sale. If the transaction involves multiple payments, the relationship lasts for 18 months after the final payment. 68 Fed. Reg. 4593. Where the consumer pays in advance for goods or services to be provided in the future (e.g., a magazine subscription), the relationship lasts for 18 months from the final shipment.

4637. Also, the mere fact that the Commission recognized that Caller ID can provide consumers with some level of privacy protection hardly indicates that Caller ID would be a substitute for, or provide consumers with the same degree of privacy protection afforded by the registry. See Memo at 67. Plaintiffs end their memo on a silly note with a claim that the Rule is arbitrary and capricious merely because the FTC adopted the registry, which was supported by 67% of commenters, but also adopted an established business relationship exemption, which was opposed by 60% of consumer commenters.³² Rulemaking is not bean counting. See U.S. Cellular Corp. v. FCC, 254 F.3d 78, 87 (D.C. Cir. 2001) (“the Commission has no obligation to take the approach advocated by the largest number of commenters * * *.”) When it adopted the established business relationship exemption, the FTC considered not only consumer comments, but also industry comments (plaintiff ATA supported the exemption, see supra), see 68 Fed. Reg. 4591, the experience of states that attempted to restrict telemarketing, 68 Fed. Reg. 4592, and the FCC’s experience in connection with its regulation of telemarketing, 68 Fed. Reg. 4591-92. Based on all this information, the FTC adopted an exemption that takes into account the interest of both consumers and industry and that is certainly not arbitrary and capricious. Accordingly, the registry is not arbitrary and capricious, and count 8 of the complaint should be dismissed.³³

³² In fact, a careful reading of the Rule’s Statement of Basis and Purpose shows that nearly 70% of commenters supported the registry, 68 Fed. Reg. 4628 n.575, and, although 60% of consumer e-mail commenters opposed an exemption for sellers with an established business relationship, more than 80% of all consumer commenters (e-mail and hard copy) favored the exemption, see 68 Fed. Reg. 4593 & n.141.

³³ Complaint count 8 actually alleges that both the Rule’s do-not-call registry and its prohibition of abandoned calls are arbitrary and capricious. As explained below, the prohibition

III. THIS COURT SHOULD UPHOLD THE RULE'S PROHIBITION OF ABANDONED CALLS

There is no merit to plaintiffs' contention that, because the FCC has authority to regulate predictive dialing systems,³⁴ the FTC lacks authority to prohibit abandoned calls (complaint count 7.) See Memo at 49-55. In making this argument, plaintiffs seek to recast the prohibition of abandoned calls as a regulation of predictive dialers. It is not. It is a restriction on abandoning calls, which is one of the most abusive practices of the telemarketing industry.³⁵ (Abandoned calls also violate § 6102(a)(3)(C) of the Telemarketing Act, which requires telemarketers to promptly disclose the purpose of the call. 15 U.S.C. § 6102(a)(3)(C).) Abandoned calls frighten some consumers, leading them to believe they are being monitored by stalkers or burglars. 67 Fed. Reg. 4523. At a minimum, such calls waste consumers' time, in order to save time for telemarketers. As the FTC recognized, abandoned calls result primarily from telemarketers' use

of abandoned calls is not arbitrary and capricious. See Part III, infra.

³⁴ Plaintiffs contend that predictive dialers are "customer premises equipment," subject to FCC regulation. See Memo at 52-55.

³⁵ The Rule prohibits abandoned calls but provides a safe harbor for telemarketers who 1) employ a technology ensuring abandonment of no more than 3% of all calls answered by a person; 2) allow the phone to ring for at least 15 seconds (or four rings) before disconnecting the call; 3) play a recorded greeting whenever the telemarketer is not available to speak to the consumer within two seconds after the consumer answers the phone; and 4) retain records showing compliance with the other three requirements. 16 C.F.R. § 310.4(b)(4). Plaintiffs mistakenly suggest that allowing a call to ring four times might violate the Rule's prohibition against causing a phone to ring "repeatedly or continuously with intent to annoy" the consumer, 16 C.F.R. § 310.4(b)(1)(i). See Memo at 18 n.4. However, when the FTC promulgated the original version of the Rule in 1995, it made clear that § 310.4(b)(1)(i) prohibits making repeated calls to a consumer, not just allowing a phone to ring four times. 60 Fed. Reg. 43854.

of predictive dialers:

Predictive dialers have become prevalent in the telemarketing industry because a dialer reputedly can significantly increase a telemarketer's productivity as measured by the amount of downtime between calls. Each telemarketing company can set its predictive dialer software for a predetermined abandonment rate, i.e., the percentage of hang-up calls the system will allow -- the higher the abandonment rate, the higher the number of hang-up calls. High abandonment rates can ensure that each telemarketing sales representative will spend the maximum possible number of minutes per hour talking with customers. However, the more rapidly the dialer places calls, the more probable it is that the telemarketers will still be on previously placed calls and not be available when the consumer picks up the phone. When no telemarketer is available, the predictive dialer disconnects the call.

67 Fed. Reg. 4523. Thus, just like an air carrier that overbooks flights to assure that no seat is empty, the telemarketers can set their predictive dialers to make sure that their sales representatives never sit idle. Because abandoned calls are a side effect of predictive dialers, the Rule's restriction on abandoned calls requires telemarketers to "govern" their use of predictive dialers if they wish to continue using those dialers to place calls. 68 Fed. Reg. 4642. However, the Rule is no more a regulation of predictive dialer technology than a state highway speed limit is a regulation of automotive technology.

There is no question that the FTC has ample statutory authority to regulate abusive telemarketer conduct, regardless of the technology telemarketers use to perpetrate that conduct. Congress directed the FTC to issue rules that prohibit abusive telemarketing practices, 15 U.S.C. § 6102(a), and that prohibit telemarketers from "undertak[ing] a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy," 15 U.S.C. § 6102(a)(3)(A). Plaintiffs do not even attempt to dispute the FTC's

determination that abandoned calls are abusive. Indeed, the rulemaking record shows that such calls frighten consumers, invade their privacy, and waste their time. 68 Fed. Reg. 4642. The record also shows that, as a result of the use of predictive dialers, telemarketers are undeniably engaged in a widespread pattern of making abandoned calls to consumers. Clearly, the FTC has the authority to restrict abandoned calls.

Although plaintiffs contend that the FCC should have exclusive jurisdiction over all regulation of customer premises equipment, and, therefore, predictive dialers, see Memo at 52-55, they point to no statutory authority, no regulation, and to no case law supporting their contention. Indeed, there is simply no merit to the argument that, merely because the FCC has authority over predictive dialers, the FTC's authority to pursue deceptive and abusive telemarketing practices is somehow repealed. Plaintiffs attempt to rely on Essential Communications Sys., Inc. v. AT&T, 610 F.2d 1114 (3d Cir. 1979). See Memo at 52. But that case merely expresses the FCC's exclusive jurisdiction over regulation of the connection of equipment to the telephone network. Regulation of "interconnection" is necessary to protect the network from harm. 610 F.2d at 1116. The prohibition of abandoned calls has nothing to do with the connection of predictive dialers to the phone network, and none of the cases cited by plaintiffs indicates that the FTC is somehow precluded from restricting abusive practices that result from the use of predictive dialers.³⁶

³⁶ Presumably, plaintiffs could also argue that the FTC lacks authority to impose calling time restrictions (no telemarketing prior to 8 a.m. or after 9 p.m., 16 C.F.R. § 310.4(c)) because this requires telemarketers to shut off their predictive dialers during certain hours. See Memo at 50 n.39 (noting that predictive dialers assist telemarketers in complying with time-of-day calling

As the Supreme Court has recognized, the same issues may be addressed and the same parties may be proceeded against simultaneously by more than one agency. See, e.g., FTC v. Cement Institute, 333 U.S. 683, 694 (1948); United States v. W.T. Grant Co., 345 U.S. 629, 631-32 (1953). Plainly, the mere fact that Congress gave the FCC authority to regulate the use of predictive dialers in no way precludes Congress from also giving the FTC authority to prohibit an abusive practice that is caused by telemarketers' use of predictive dialers.

If Congress had wanted to limit the FTC's jurisdiction in the way that plaintiffs clearly wish it had, Congress knows how to do so. Congress can expressly repeal some aspect of an agency's authority when it "overtly state[s] with specificity that the subsequent statute repeals a portion of the earlier statute." Patten v. United States, 116 F.3d 1029, 1033 (4th Cir. 1997). Plaintiffs have not pointed to any express repeal of the FTC's authority that would invalidate the Rule's prohibition of abandoned calls. Congress can also repeal by implication, but such repeals are not favored and such a repeal should be found only where Congress' intent is "clear and manifest." Elephant Butte Irrigation District of New Mexico v. Department of Interior, 269 F.3d 1158, 1164 (10th Cir. 2001), citing Posadas v. National City Bank of New York, 296 U.S. 497, 503 (1936). Repeal by implication occurs in only in two situations: where the two acts are irreconcilable, or where the later act covers the entire subject of the earlier and is clearly intended as a substitute. Elephant Butte, 269 F.3d at 1164. Here, of course, the Telemarketing Act, the basis for the FTC's authority, is the later act. Thus, repeal by implication of any portion could

restrictions).

only occur if there were an irreconcilable conflict between the Rule and some provision of the FCC's statutory authority or regulation. But plaintiffs have not shown any provision of an FCC statute or regulation that irreconcilably conflicts with the abandoned call provision of the Rule.

In fact, there is no conflict between the Rule's prohibition of abandoned calls and the FCC's authority because there is no provision of any FCC statute or regulation that requires a telemarketer to program its predictive dialer so that it abandons calls. Absent such a requirement, the Rule's restriction on abandoned calls creates no irreconcilable conflict. See Rice v. Norman Williams Co., 458 U.S. 654, 661 (1982). Similarly, there is no conflict between FCC rules and § 310.4(b)(4)(iii), the safe harbor provision that requires a telemarketer to avoid "dead air"³⁷ by playing a recorded greeting stating the seller's name and telephone number. See Memo at 18, 44 n.23. Plaintiffs wrongly contend that this requirement conflicts with 47 C.F.R. § 64.1200(a)(2), (c). Although FCC rules prohibit the use of a "prerecorded voice to deliver a message," FCC rules also specifically provide that the sort of recorded greeting contemplated by the Rule's abandoned call safe harbor is exempt from that prohibition. In particular, § 64.1200(c)(2) exempts from the prohibition calls that do not include "unsolicited advertising," and § 64.1200(f)(5) provides that, for a message to constitute "unsolicited advertising" it must include "material advertising the commercial availability or quality of any property, goods, or

³⁷ "Dead air" is the silence that occurs when a consumer answers a call and no telemarketer is immediately available to speak to the consumer.

services.”³⁸ The recorded greeting contemplated by the safe harbor provision merely requires a name and a telephone number, which does not constitute “unsolicited advertising.”³⁹

Accordingly, there is no conflict between the safe harbor and the FCC’s rules.⁴⁰

Because the Telemarketing Act gives the FTC authority to prohibit abusive telemarketing practices, and because abandoned telemarketing calls are abusive, the Rule’s prohibition of abandoned calls is well within the FTC’s authority. Accordingly, this Court should dismiss count 7 of plaintiffs’ complaint.⁴¹

³⁸ Although plaintiffs are concerned that a seller’s name might be considered an advertisement if painted on a bus stop bench, see Memo at 58, that is not relevant. The crucial question is whether the recorded greeting would conflict with FCC’s prohibition of prerecorded unsolicited advertising, and, as explained above, FCC regulations make clear that it would not. Plaintiffs are not helped by Schneider v. Susquehanna Radio Corp., 2003 Ga. App. LEXIS 358 (Ga. Ct. App. 2003). See Memo at 58-59. In that case, the radio station made unsolicited calls with a prerecorded message urging consumers to listen to the station. Such a message clearly falls within the definition of “unsolicited advertisement.” See 47 C.F.R. § 64.1200(f)(5). (Family Life Educational Foundation, 17 FCC Rcd 16317 (2002), see Memo at 59 & n.44, is irrelevant. It involved a noncommercial radio station that, in violation of its charter, broadcast advertisements, and the agency’s decision was governed by a different section of FCC’s regulations that has nothing to do with unsolicited telephone advertising.)

³⁹ Congress noted the industry’s argument that the prerecorded message requirement of 16 C.F.R. § 310.4(b)(4)(iii) might conflict with FCC’s statutory authority, H.R. Rep. 108-8 at 4, see Memo at 59-60, but commented that any such conflict would be addressed in a later administrative or legislative proceeding, id. In fact, as the FCC regulations cited above make clear, Congress’ concern was unwarranted -- there is no conflict.

⁴⁰ The mere fact that the FCC is in the process of revising its rules does not limit the FTC’s authority. See Memo at 55. Indeed, Congress has specifically instructed the FCC to make sure that its regulations are consistent with the FTC’s Rule. P.L. 108-10 (“the [FCC] shall consult and coordinate with the [FTC] to maximize consistency with the rule promulgated by the [FTC]”).

⁴¹ Count 8 of plaintiffs’ complaint alleges that the Rule’s do-not-call registry and prohibition of abandoned calls are arbitrary and capricious. As explained above, the do-not-call

CONCLUSION

For the reasons set forth above, this Court should deny plaintiffs' motion for summary judgment, grant the FTC's motion, and dismiss plaintiffs' complaint.

Respectfully submitted,

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registry is not arbitrary and capricious. See Part II.D, supra. Nor is the prohibition of abandoned calls. The FTC fully explained that such calls are abusive and that prohibition (with a safe harbor) is appropriate. 68 Fed. Reg. 4641-45. Although plaintiffs contend that the prohibition is arbitrary and capricious because telemarketers cannot comply with it, see Memo at 55 n.42, they misunderstand the prohibition. In particular, plaintiffs are concerned that, if a telemarketer forsakes automation and hand dials calls, the telemarketer will inevitably abandon calls in those situations where the telemarketer terminates a call because no one has answered, and, at that very moment, the consumer picks up and hears a click. However, the Rule makes clear that, if the telemarketer allows the call to ring for at least four rings or 15 seconds, the call will not be considered abandoned even if the consumer answers at the moment the telemarketer hangs up. See § 310.4(b)(4). Accordingly, the prohibition of abandoned calls is not arbitrary and capricious and complaint count 8 should be dismissed.

CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2003, I served a copy of Defendants' Memorandum of Points and Authorities in Support of Its Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment on plaintiffs by mailing that copy by first-class mail to:

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