

IN THE MISSOURI SUPREME COURT

DAVID L. HARJOE,)	
)	
Respondent,)	
)	
v.)	Supreme Court No. SC 84858
)	
HERZ FINANCIAL,)	
)	
Appellant.)	

Appeal from the Associate Circuit Court of St. Louis County
Twenty-First Judicial Circuit
Division 31
Honorable Barbara Ann Crancer

APPELLANT’S REPLY BRIEF

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INTRODUCTION

The blanket ban on fax advertising imposed by the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (hereinafter “the TCPA” or “the Act”), has created a cottage industry that allows plaintiffs and their attorneys to plunder legitimate businesses which utilize a unique and timely method of disseminating truthful, valuable commercial information. In a desperate attempt to keep this cottage industry alive, Respondent invokes inapplicable legal doctrines and distorts much of the case law and legislative history on which he relies. Respondent eschews reasoned analysis for shrill and extreme rhetoric in an effort to justify a wholly irrational statutory scheme which, when carefully assessed, clearly violates the First Amendment, is void for vagueness and imposes a grossly excessive punishment.

REPLY ARGUMENT

I. The TCPA Violates The First And Fourteenth Amendments.

To circumvent the commercial speech analysis which the TCPA cannot survive, Respondent contends the TCPA is either immune from First Amendment scrutiny altogether or is a content-neutral restriction of speech subject only to minimal scrutiny to determine whether it is a valid “time, place and manner” restriction. (Respondent’s Brief, 35-56.) Plaintiff is wrong.

A. The TCPA Is A Content-Based Restriction Subject to First Amendment Constraints.

Commercial speech qualifies for First Amendment protection if it concerns “lawful activity” and “is not misleading.” Central Hudson, 447 U.S. at 557, 566 (1980). Ignoring this test, and virtually every federal court to have considered the issue, Respondent contends that the commercial speech at issue is not entitled to First Amendment protection. Even *Amicus Curiae* United States (“*Amicus* U.S.”) concedes that “[t]he applicable legal standard is not in dispute.” (*Amicus* U.S. Brief, 15)(citing Central Hudson).

Respondent’s argument that fax advertising does not enjoy First Amendment protection rests on his fundamentally flawed premise that the TCPA regulates conduct not expression.¹ This argument should be rejected in view of the communicative aspects of fax advertising. As the United States Supreme Court has noted:

¹ Respondent’s “conduct” argument ignores the TCPA’s distinction between commercial and non-commercial faxes. The TCPA does not apply to all conduct, only commercial conduct. Respondent’s far-fetched analogies to graffiti and vandalism, which are prohibited in all forms, fail for this reason. Using Respondent’s analogies, the TCPA would prohibit commercial graffiti or vandalism, but would allow other forms.

[T]he government has legitimate interests in controlling the noncommunicative aspects of the medium, but the First and Fourteenth Amendments foreclose a similar interest in controlling the communicative aspects. Because regulation of the noncommunicative aspects of a medium often impinges to some degree on the communicative aspects, it has been necessary for the courts to reconcile the government's regulatory interest with the individual's right to expression. A court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation.

Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 504 (1981) (applying Central Hudson to regulation of billboards containing commercial speech) (internal quotation marks and citations omitted).

When weighing those competing interests, it is critical to note that Appellant does not contend that Respondent must be permitted to continue to transmit fax advertisements to a person after the person notifies it that he objects to receiving fax advertisements. To the contrary, Appellant argues fax advertisers must at

minimum be treated in the same way that the TCPA treats telemarketers.² For telemarketers, the TCPA, to quote an early free speech decision, leaves the decision as to whether the solicitor “may lawfully call at a home where it belongs—with the homeowner himself.” Martin v. City of Struthers, Ohio, 319 U.S. 141, 148 (1943). For fax advertisers, however, the TCPA usurps the prerogative of each fax machine owner to decide for himself whether he is willing or unwilling to bear the *de minimis* cost of receiving an unsolicited fax.

On this score, Martin teaches volumes. In striking down that city ordinance as violative of the constitutional guarantee of freedom of speech, the Court observed that the constitutional challenge presented the Court

with the necessity of weighing the conflicting interests of the appellant in the [free speech] rights she claims, as well as the right of the individual householder to determine whether he is willing to receive her message, against the interest of the community which by this ordinance offers to protect the interests of all of its citizens, whether particular citizens want

² FCC regulations require that telemarketers maintain and use a “do-not-call” list. See 47 C.F.R. 64.1200(c). If a telemarketer does not comply, it is subject to damages liability. See 47 U.S.C. § 227(a)(5).

that protection or not. The ordinance does not control anything but the distribution of literature, and in that respect it substitutes the judgment of the community for the judgment of the individual householder.

Id. at 143-44. This Court is presented with precisely the same necessity, in that it must balance the conflicting First Amendment rights of fax advertisers to distribute commercial information, as well as the First Amendment rights of the individual fax machine owners to determine whether they are willing to assume the minimal cost of receiving that commercial information, against the governmental interest of protecting all fax machine owners, whether they want that protection or not.

In striking this balance, the Court in Martin noted that:

[f]reedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no

purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.

Id. at 146-47. The Court then noted that “[t]raditionally, the American law punishes persons who enter onto the property of another *after* having been warned by the owner to keep off.” Id. at 147. “We know of no state which ... makes a person a criminal trespasser if he enters the property of another for an innocent purpose without an explicit command from the owners to stay away.” Id. at 147-48. Ultimately, because the challenged ordinance imposed a blanket ban on such solicitation regardless of whether the solicitor was acting “in defiance of the *previously expressed* will of the occupant,” the Court struck down the statute for failing to safeguard the constitutional rights of both the solicitor and the person who welcomes his message. Id. at 149 (emphasis added).

These principles were reaffirmed in Turner Broadcasting v. FCC, 512 U.S. 622 (1994), in which three members of the Court invoked them to assess the constitutionality of the must-carry provisions of a 1992 statute that required cable systems to carry local broadcast stations. Concurring in part with that decision, Justice O'Connor, joined by Justice Scalia and Justice Ginsburg, stated that:

[i]f the government wants to avoid littering, it may ban littering, but it may not ban all leafleting. [Citation omitted.]

If the government wants to avoid fraudulent political

fundraising, it may bar the fraud, but it may not in the process prohibit legitimate fundraising. [Citation omitted.] *If the government wants to protect householders from unwanted solicitors, it may enforce “No Soliciting” signs that the householders put up, but it may not cut off access to homes whose residents are willing to hear what the solicitors have to say.* [Citation omitted.] ‘Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone....’ [Citation omitted.]

512 U.S. 682-83 (emphasis added).

The TCPA suffers from precisely the same constitutional infirmity as the ordinance struck down in Martin. Under these principles, if the government wants to protect fax owners from unwanted fax advertising, it may enforce the right of a fax owner to post the technological equivalent of a “No Soliciting” sign by, for instance, imposing liability once the recipient has objected either by calling a toll-free number stating his objection or by placing his fax number in a “do-not-fax” database; but it may not cut off access to fax recipients who are willing to hear what the fax advertisers have to say. By banning all unsolicited fax advertisements, the TCPA impermissibly deprives persons who would welcome that commercial information of the opportunity to receive it. In the same stroke, it

deprives the advertiser of its constitutional right to communicate that information to the willing recipient. It does all this because Congress, in sharp contrast to its approach with the TCPA's telemarketing regulations, enacted a blanket prohibition on that practice which snatched from the fax owner the power to decide for himself whether he is willing to receive the message.

Those who welcome fax advertising enjoy a First Amendment right to the receipt of commercial information. Edenfield v. Fane, 507 U.S. 761, 766 (1993) (recognizing "societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard."), citing Virginia State Bd. of Pharmacy v. Virginia Consumer Council, Inc., 425 U.S. 748, 763 (1976); Martin, 319 U.S. at 143 (freedom of speech "embraces the right to distribute literature and necessarily protects the right to receive it.") Respondent would deprive willing recipients of their constitutional right simply because acutely sensitive fax recipients (or those who simply seek a windfall under the TCPA's damages scheme) cannot be bothered to make a simple toll-free telephone call advising a fax advertiser or data bank of their wish not to receive future fax advertisements, push the delete key on their computer keyboard, or activate a fax blocking feature.

Respondent contends that the TCPA merely requires the sender of a fax to obtain the permission of the recipient prior to sending the fax. (Respondent's Brief

38.) In reality, the TCPA's requirement of express prior consent would for all practical purposes legislate fax advertising out of existence. Requiring prior consent would destroy the timely method of disseminating valuable commercial information such as urgent notices about the quality or characteristics of, for example, a harmful or defective product. In any event, "[o]ne need not, as a condition precedent to his right of free speech under the First Amendment, secure the permission of his auditor." Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 79-80 (1983).

Respondent also contends that, without prior consent, the objecting recipients have necessarily been deprived of something of value, *i.e.*, the pennies it costs to print the fax advertisement. Indeed, as discussed more fully *infra*, this alleged cost-shifting could be avoided by a state or national do-not-call database, or at least could be a one-time event if a recipient who objects to receiving commercial information by fax would simply opt-out of the process by calling the advertiser's "do-not-fax" number that takes his fax number out of circulation. Furthermore, this argument ignores the fact that much protected expression imposes some burden on unwilling listeners. For example, there are very real and indeed more substantial costs imposed by telemarketing calls, which the TCPA allows to be made until the recipients asks that they cease.

In pressing his position that the First Amendment is wholly inapplicable, Respondent distorts the relevant legal principles by ripping judicial language out of context and cobbling together a string of quotations no longer anchored to the precise holdings of the cases from which they are culled. For example, Respondent cites Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986)(Respondent’s Brief, 43-44), in which the Court upheld over a First Amendment challenge the closure of an adult bookstore which countenanced prostitution. After first acknowledging the rule that conduct having an expressive element enjoys First Amendment protection, the Court refused to apply it because “the sexual activity carried on in this case manifests absolutely no element of protected expression.” Id. at 705. It is beyond serious dispute that, unlike prostitution, truthful fax advertising has a significant expressive element.

Montana v. Nye, 943 P.2d 96 (Mont. 1997), is similarly distinguishable. (Respondent’s Brief, 40-41.) In that case, the court refused to apply the First Amendment to circumscribe the state’s power to punish Nye for engaging in a hate crime. Nye argued that his act of affixing bumper stickers to state and private property was expressive conduct entitled to First Amendment protection. In rejecting this argument, the court determined that when Nye affixed his speech to the property of another thereby defacing the property, the speech lost the protected status it enjoyed. Id. at 101. In re Michael M., 86 Cal. App. 4th 718 (2001), also

cited by Respondent to support his misguided contention that speech coupled with unlawful conduct loses its First Amendment protection, is likewise distinguishable. (Respondent's Brief, 42.) Receipt of an unwanted fax does not deface, damage or alter the recipient's fax machine in any way. Thus, Nye and Michael are inapposite.

Respondent also turns to Chair King, Inc. v. Houston Cellular, 1995 WL 1693093 (S.D. Tex. Nov. 7, 1995)(Respondent's Brief, 46), an unpublished, half-page decision, in an attempt to avoid all First Amendment scrutiny. Respondent cites Chair King for the proposition that one trespass to chattels claim possibly arising from unsolicited faxing survived a Rule 12(b)(6) motion. The language on which Respondent relies is a mere sentence long and contains no legal citation or analysis. The court never identifies the grounds of the motion to dismiss or the factual basis for the claim, such that it is impossible to draw any conclusions from this opinion about the merits of a "trespass to chattels" claim. Chair King is of no import.

B. The TCPA Is Not Content Neutral.

Respondent next argues that the TCPA is content neutral, such that its ban on fax advertising is a permissible time, place and manner restriction. (Respondent's Brief, 47.) *Amicus* U.S. does not support this theory, either. (*Amicus* U.S. Brief, 15.) The TCPA prohibits the sending of only commercial

unsolicited faxes. Because the commercial content of the speech determines whether or not it is prohibited, the TCPA is a content-based restriction on free speech. In Moser v. FCC, 46 F.3d 970 9th Cir. 1995), the court upheld a sister provision of the TCPA as a legitimate time, place, manner restriction only “[b]ecause nothing in the statute requires the [FCC] to distinguish between commercial and non-commercial speech.” Id. at 973. In sharp contrast, the TCPA’s prohibition on unsolicited fax advertising undeniably requires such a distinction. As such, that prohibition is content-based. Id. See also Lysaght v. New Jersey, 837 F.Supp. 646 (D. N.J. 1993) (state statute similar to TCPA was content based because it “explicitly distinguishes between commercial and noncommercial speech.”)

Notwithstanding this unequivocal precedent, Respondent fashions a so-called “Ward/Hill analysis” for content-neutrality which purportedly renders a statute content-neutral unless Congress enacted the statute because of a disagreement with the message conveyed. (Respondent’s Brief, 47-52.) Respondent argues that content neutrality hinges on the justification for the regulation and the *mens rea* of the legislature. When analyzed in light of their precise holdings, however, the line of cases on which Respondent relies simply does not support his position.

In Hill v. Colorado, 530 U.S. 703 (2000), for example, the Court determined that the challenged statute was content-neutral because “the statutory language makes no reference to the content of the speech.” Id. at 719. As such, the statute, [i]nstead of drawing distinctions based on the subject that the approaching speaker may wish to address, ... applies equally to used car salesman, animal rights activists, fundraisers, environmentalists, and missionaries.” Id. at 723.

In sharp contrast, the TCPA makes an express reference to the content of the speech, such that, to track the Hill Court’s list of speakers, it applies only to the used car salesman. In addition, the Hill Court found the challenged statute to be content neutral because it did “not distinguish among speech instances that are similarly likely to raise the legitimate concerns to which it responds.” Id. at 724. Again, the TCPA’s blanket ban on unsolicited fax advertising makes such a content-based distinction, for it does not apply to non-commercial faxes that are similarly likely to raise the cost-shifting and occupation concerns to which the

TCPA purports to respond. Respondent's reliance on Hill, therefore, is unavailing.³

It is thus not surprising that a nearly identical argument was made and rejected in the commercial speech context in City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993). In that case, the City of Cincinnati enacted an ordinance prohibiting distribution of commercial publications through freestanding newsracks which exempted noncommercial publications such as newspapers. Id. at 413. The city argued that the ordinance was content-neutral "because the interests in safety and aesthetics that it serves are entirely unrelated to the content of respondents' publications. Thus, the argument goes, the *justification* for the regulation is content neutral." Id. at 428. The Court, however, flatly rejected that argument.

In so doing, the Court first cited the case law on which Respondent now relies in acknowledging that "government may impose reasonable restrictions on the time, place or manner of engaging in protected speech provided that they are

³ Respondent's reliance on Thornburn v. Austin, 231 F.3d 1114 (8th Cir. 2000), is equally unavailing. (Respondent's Brief, 48.) Thornburn involved a public forum picketing ordinance which the Eighth Circuit held was content neutral because "the ordinance applies equally to anyone engaged in focused picketing without regard to his message." Thornburn, 231 F.3d at 1117.

adequately justified “without reference to the content of the regulated speech.” Id., citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). To illustrate this doctrine, the Court noted that “a prohibition against the use of sound trucks emitting ‘loud and raucous’ noise in residential neighborhoods is permissible *if it applies equally to music, political speech, and advertising.*” Id., citing Kovacs v. Cooper, 336 U.S. 77 (1949) (emphasis added). The Court then dismissed the city’s content-neutrality argument, which Respondent parrots here, as defying both First Amendment principles and common sense because the very basis for the regulation was the difference in content between ordinary newspapers and commercial speech. Id. Under the TCPA, whether any particular unsolicited fax falls within the ban is determined by the content of the fax resting in the fax machine. Under Discovery Network, then, the TCPA’s ban is content based.

Contrary to Respondent’s suggestion, a content-based purpose is not necessary to a showing that a regulation is content based. Turner Broadcasting, 512 U.S. at 643 See also Simon & Schuster, Inc. v. Members of State Crime Victims Bd., 502 U.S. 105, 117 (1991) (rejecting the argument that discriminatory treatment “is suspect under the First Amendment only when the legislature intends to suppress certain ideas” because “illicit legislative intent is not the *sine qua non* of a violation of the First Amendment”). “Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on

content.” Turner Broadcasting, 512 U.S. at 643. By its very terms, the TCPA discriminates based on content. As such, it is a content based regulation.

Respondents advance yet another argument squarely rejected in Discovery Network. Relying on Boos v. Barry, 485 U.S. 312 (1987), and Renton v. Playtime Theatres, 475 U.S. 41 (1986), Respondent advances a so-called “secondary effects” argument in which he claims that the TCPA is not subject to First Amendment scrutiny because it merely regulates a “harmful delivery practice” or the secondary effects, not the content, of the prohibited speech. (Respondent’s Brief, 53-54.) Respondent’s reliance on this doctrine is entirely misplaced.

In Renton, the Court upheld a regulation that applied only to a particular category of speech; *i.e.*, adult films, because it was only that type of speech, and not the exempted speech; *i.e.*, non-adult films, that engendered the secondary effects the regulation was designed to ameliorate; *i.e.*, crime and residential blight. 475 U.S. at 47. In Boos, the Court again limited this doctrine to instances when “regulations ... apply to a particular category of speech because the regulatory targets happen to be associated with that type of speech” and not the exempted type of speech 485 U.S. at 320. Stated differently, the doctrine applies only when the secondary effects are “unique” to a particular type of speech. Id.

This doctrine is inapplicable here because the purported cost-shifting and machine occupation targeted by the TCPA are not unique to unsolicited

commercial faxes. Unsolicited non-commercial faxes involve the very same cost-shifting and occupation, as evidenced by comments made during a 1989 hearing on an unsuccessful predecessor to the TCPA. See statement of facts contained in Appellant’s opinion brief. Because the purported harms of unsolicited faxing that are targeted by the TCPA are equally associated with non-commercial faxes, Respondent’s secondary effects argument is meritless. See Discovery Network, 507 U.S. at 430 (rejecting Renton-based argument identical to that pressed by Respondent because “[i]n contrast to the speech at issue in Renton, there are no secondary effects attributable to respondent publishers’ newsracks that distinguish them from the newsracks Cincinnati permits to remain on the sidewalks.”).

In an attempt to rebut this unassailable conclusion, Respondent turns to Texas v. American Blast Fax, Inc., 159 F. Supp. 2d 936 (W.D. Tex. 2001), in which a federal district court in Texas held in conclusory fashion that the TCPA was not content based because it “applies exclusively to commercial speech.” Id. at 937 and n. 4. (Respondent’s Brief, 52.) This holding is self-evidently preposterous and Appellant trusts that the Court will recognize it as such. More important, however, is what Respondent fails to tell this Court about the history of that case. In Texas v. American Blast Fax, 121 F. Supp. 2d 1085 (W.D. Tex. 2000), the very same federal district court nonetheless applied the Central Hudson test in (wrongly) affirming the constitutionality of the TCPA. That case history

demolishes Respondent's contention that American Blast Fax somehow stands for the proposition that the TCPA should be scrutinized as a content neutral time, place and manner restriction.

In his quest to dodge Central Hudson scrutiny, Respondent also advances the novel assertion that the TCPA's regulation of fax advertising does not violate the First Amendment because the statute merely regulates activities in a nonpublic forum. (Respondent's Brief, 38-39.) This argument warrants little discussion, however, as Respondent has yet again simply distorted a free speech doctrine that is inapplicable to the case at bar.

Courts use forum analysis when "assessing restrictions that the government seeks to place on the use of its property." Int'l Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992). The TCPA, however, does not apply solely to government-owned fax machines, but rather to all fax machines. Because it is not a mere restriction on the use of government property, the forum analysis advanced by Respondent is inapplicable.

For the foregoing reasons, the TCPA is subject to Central Hudson analysis.

C. The TCPA Fails Under Central Hudson.

As *Amicus* U.S. concedes, regulations of commercial speech like the TCPA are valid under the First Amendment only if they satisfy the Central Hudson test. In this case, because the commercial speech at issue is truthful and concerns lawful

activity, as admitted by Respondent, only the latter three of Central Hudson's four requirements are at issue. (LF 572.) Thus, to withstand First Amendment challenge, the TCPA's ban on unsolicited fax advertising must:

(1) be "not more extensive than is necessary to serve" the interests asserted by the government,

(2) "directly advance the governmental interest asserted," and

(3) serve a government interest that is "substantial."

Id. at 566.

1. The Governmental Interests Asserted Here Are Not Substantial.

When Congress banned unsolicited fax advertising, it was ostensibly trying to prevent two kinds of perceived harm: (1) the harm caused when unwanted faxes occupy recipients' machines, preventing users from sending or receiving other faxes; and (2) the harm caused by the cost to the recipient of the paper and toner used to print unwanted faxes. (Respondent's Brief, 61; *Amicus* U.S. Brief, 16-17.) These are the only two government interests identified in the legislative history. Under Central Hudson, a reviewing court may not supplant these interests with others. Edenfield, 507 U.S. at 768.

Respondent and *Amicus* U.S. have failed to demonstrate beyond speculation or conjecture that these purported harms are real and that the TCPA will alleviate them to a material degree. All Respondent and *Amicus* U.S. do is reiterate the

stated interests. Appellant does not dispute the stated interests, only that they are substantial. The government could always conjure up some interest; however, this case requires something more, something substantial.

In conclusory fashion, Respondent and *Amicus U.S.* cite Van Bergen v. Minnesota for the proposition that the “efficient conduct of business operations ... is a significant government interest.” Van Bergen, 59 F.3d at 1554 (Respondent’s Brief, 61; *Amicus U.S.*, 20). However, they fail to demonstrate that unsolicited fax advertisements substantially impede the efficient conduct of business operations. Furthermore, Van Bergen does not apply because it dealt with a content-neutral statute narrowly tailored to prohibit automated telephone messages, regardless of the caller or content, during certain hours of the day. Van Bergen at 1550-1551.

Respondent simply concludes that “sending a fax costs the recipient some quantity of time and money.” (Respondent’s Brief, 61.) Lacking any credible evidence to substantiate the prevalence of the purported harm, Respondent and

Amicus U.S. simply urge this Court to apply “simple common sense.” (Respondent’s Brief, 64; *Amicus* U.S., 19.)⁴

Respondent advances no competent evidence to counter Appellant’s fax technology evidence which demonstrates that receiving a fax is, at the very least, *de minimus*, not substantial. (LF 81.) Rather, Respondent relies on inadmissible hearsay, irrelevant propositions, and the speculation of witnesses who have no personal knowledge regarding the subject matter of their testimony. Indeed, it is apparent from the declarations Respondent submitted in opposition to Appellant’s motion for summary judgment, as discussed in Point Relied On VIII of Appellant’s Opening Brief, that the collective personal knowledge of Respondent’s witnesses regarding fax technology amounts to no more than McKenna’s knowledge

⁴ Respondent incredibly contends that Van Bergen also stands for the proposition that, contrary to Central Hudson, evidence of a substantial interest is not necessary. (Respondent’s Brief, 64.) Respondent takes out of context the Van Bergen court’s statement that “we do not believe that external evidence of the disruption ... is necessary.” Van Bergen at 1554. (Respondent’s Brief, 64.) The court was only referencing the lack of a need for external evidence because the government had presented evidence regarding the high volume of automated telephone message complaints received at the Attorney General’s office from both residential and business sources. Van Bergen at 1554.

regarding the capability and use of his antiquated, decade-old thermal fax machine, and Shields' observation that the Johnson Space Center has fax machines which receive faxes. This is hardly sufficient to support a governmental interest substantial enough to justify a ban of all unsolicited fax advertising.

2. The TCPA Does Not Directly Advance The Asserted Governmental Interests.

The TCPA does not directly and materially advance the government's interest in shielding persons from the alleged cost and inconvenience of receiving unwanted faxes. Respondent has not, and cannot, explain how the TCPA, which treats telemarketers differently than fax advertisers, and which bans only commercial faxes, directly advances the government's interest in curtailing the purported cost-shifting of all fax messages. Perhaps this is why Respondent uses the phrase "effectively advances" rather than "directly advances." (Respondent's Brief, 65.) *Amicus* U.S.'s explanation is twofold. The United States first claims that commercial faxes are the bulk of the problem that Congress sought to address. (*Amicus* U.S., 23-24.) There is no evidentiary support for this assertion, however, and it flies in the face of the anecdotal evidence of non-commercial fax problems presented at the TCPA hearings. The United States next contends that commercial speech transmitted via fax machines should be treated differently than commercial speech conveyed by human telemarketers. (*Amicus* U.S., 24.) This criticism,

which relies on the content-neutral case of Van Bergen, distinguished *supra*, relates to the manner of the communication and has no place in a First Amendment commercial speech analysis.

Respondent's reliance on Metromedia, Inc. v. City of San Diego, 453, U.S. 490, 511 (1981) is misplaced. In that case, decided just one year after Central Hudson, the U.S. Supreme Court upheld a prohibition of offsite billboards, but not onsite billboards, because "offsite advertising, with its periodically changing content, presents a more acute problem than does onsite advertising," in that it is more likely to distract drivers. Such is not the case here, as neither Respondent nor *Amicus* U.S. presented any evidence that commercial faxes are a more acute problem than non-commercial faxes.

3. The TCPA's Restrictions Are More Extensive Than Necessary.

The TCPA's blanket ban on unsolicited fax advertisements also fails the fourth prong of the Central Hudson test; *i.e.*, that the regulation is no more extensive than necessary to serve the asserted governmental interest. Central Hudson, 447 U.S. at 566. As the Court noted in Discovery Network, this prong of the Central Hudson test requires that the TCPA's restrictions be "narrowly tailored" to the harm sought to be alleviated and the result of a "careful calculation of the costs and benefits associated with the burden on speech imposed by the prohibition." Discovery Network, 507 U.S. at 417. The burden of satisfying the

fourth prong of the Central Hudson test rests with Respondent. Edenfield v. Fane, 507 U.S. 761, 770 (1993).

Respondent and *Amicus* U.S. incorrectly state that Appellant advocates the “least restrictive means” standard. (Respondent’s Brief, 68-68; *Amicus* U.S. at 26.) Respondent also incorrectly criticizes the Court in Missouri ex rel. Nixon v. American Blast Fax, Inc., 196 F. Supp. 2d 920 (E.D. Mo. 2002), for properly finding that “less restrictive means” exist. (Respondent’s Brief, 68.) A determination that *less* restrictive means exist does not equate to *least* restrictive means. Appellant only advocates and cites existing alternatives which restrict less commercial speech than the TCPA, and which balance the interests of the government with the First Amendment rights of senders and recipients.

While it was not its burden to do so, Appellant nonetheless proffered numerous *less* restrictive means available to Congress to deal with any perceived harm of cost-shifting or occupation of a recipient’s fax machine. For example, Appellant identified numerous state statutes which contain significantly less

restrictive measures than the TCPA's blanket ban.⁵ Respondent incredibly seems to imply that the already-existing fax technology and less restrictive alternatives enacted by various states and even contained within the TCPA itself with respect to telemarketers are merely imaginable alternatives to the blanket ban at issue herein.

Congress should not have enacted the TCPA's blanket ban on fax advertising without considering that it was outlawing a form of advertising that allows retailers to propose a transaction in a way that prior consent would destroy and that alternative forms of advertising would not allow. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001). Fax advertising - unlike television, newspapers and billboards - allows businesses to advertise with unique immediacy. When time is critical, fax advertising enables businesses to communicate more quickly than other media, permitting a broad array of businesses with rapid and inexpensive delivery of information regarding product and pharmaceutical recalls and warnings, perishable goods, and changes in market supply and pricing. On short

⁵ *Amicus* U.S. contends that Van Bergen v. Minnesota rejected the database approach. Again, Van Bergen addressed a content-neutral statute dealing with all automated telephone messages, regardless of the caller or content. Furthermore, Van Bergen's content-neutral prohibition was not a complete ban, but was narrowly tailored to only limit automated messages to certain hours of the day. Van Bergen at 1550-1551.

timeframes and with limited resources, fax advertising may provide the only feasible method of communicating time sensitive information.

Respondent has not met his burden to justify the TCPA under Central Hudson.

II. The TCPA Is Unconstitutionally Vague.

As Respondent concedes, “[t]he [TCPA] does not specify whether a multi-page fax is a single violation or whether each page should be considered a separate violation. **It is thus ambiguous.**” (Respondent’s Brief, 118). [Emphasis added.] For this reason alone, the statute’s damages provision must be struck down.

The no-fax provisions of the TCPA similarly are ambiguous and must be struck down under the void for vagueness doctrine. Respondent and *Amicus* U.S. do not seriously challenge the TCPA’s vagueness, but rather contend that Appellant lacks standing to mount a vagueness challenge.

Respondent and *Amicus* U.S. contend that the Court should disregard Appellant’s vagueness challenge as the faxes at issue fall within the “hard core” of the statute’s proscriptions. (Respondent’s Brief, 77; *Amicus* U.S., 31.) In support of this contention, they erroneously rely on Broadrick v. Oklahoma, 413 U.S. 601 (1973) and Parker v. Levy, 417 U.S. 733 (1974), in which the Court was presented with “as applied” challenges to statutes that did not regulate speech. Broadrick and

Parker are inapposite to the instant case, in which Appellant is *facially* challenging the TCPA under the First Amendment.

Vagueness claims are subject to different requirements depending on the nature of the statute or rule under attack. When, as here, the vagueness claim *facially* challenges a statute based on the First Amendment, the standing requirement is different than that articulated in the Parker and Broadrick cases, both of which were decided nearly 30 years ago. Even a defendant whose conduct is at the core of the activities clearly covered by a statute's terms may raise a *facial* vagueness defense if the statute is one that is likely to chill the exercise of constitutionally-protected conduct. United States v. Loy, 237 F.3d 251, 259 (3d Cir. 2001), citing United States v. Mazurie, 419 U.S. 544, 550 (1975) (holding that “[i]t is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand.”).

Indeed, a defendant being prosecuted for speech or expressive conduct may challenge the law on its face if it reaches protected expression, even when that person's activities are not protected by the First Amendment. R.A.V. v. City of St. Paul, 505 U.S. 377, 411 (1992) (J. White, concurring). This is because “the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted.”

Id. at 411. [Citations omitted.] Additionally, when a statute’s deterrent effect on legitimate expression is real and substantial, such as here, parties may challenge the statute even if there is no uncertainty about the impact on their own rights. Young v. American Mini-Theaters, Inc., 427 U.S. 50, 59-60 (1976). See also FCC v. League of Women Voters, 468 U.S. 364, 401 n.27 (1984) (striking down prohibition on editorializing by public broadcasting companies).

Respondent also contends that Appellant’s vagueness challenge has no merit because, in his view, the TCPA is an economic regulation, and Appellant theoretically can avail itself of administrative clarification from the Federal Communications Commission (“FCC”), and the TCPA provides for a civil rather than criminal remedy. None of these assertions has any merit. It is well-settled that the void-for-vagueness doctrine applies to civil as well as criminal statutes. See A.B. Small Co. v. American Sugar Refining Co., 267 U.S. 233, 238-39 (1925) (rejecting a proposed doctrinal distinction between criminal and civil cases). Moreover, the TCPA clearly is not an economic regulation. It clearly regulates speech. As such, the vagueness doctrine applies with particular rigor. Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. at 499 (“If . . . the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.”).

Nor is Respondent's contention that Appellant can seek administrative clarification from the FCC availing. It is an absurd notion to expect a fax advertiser or advertising agency to submit to the FCC for clarification each intended fax to assure that it will not run afoul of the TCPA in the limited view of the FCC. In any event, even if such clarification was obtained, that would not prevent zealous plaintiffs and their equally zealous attorneys from bringing private causes of actions.

For these reasons, and the reasons stated in Appellant's Opening Brief, the TCPA is facially defective under the void-for-vagueness doctrine.

III. The TCPA's Damages Provision Violates The Due Process Clauses And The Eighth Amendment.

The damages provided for in the TCPA; *i.e.*, \$1,500 in the case of a knowing or willing fax transmission, are unconstitutionally disproportionate to the few pennies in cost shifted to the unwilling recipient of the sender's commercial message. Respondent contends that this argument must fail as Appellant only accounts for the cost of paper and toner and not for other costs such as tying up the fax machine. (Respondent's Brief, 84.) Appellant does cite the purported "cost in time." (Opening Brief, 89.) However, Respondent has offered no evidence to quantify this "cost." As discussed in Appellant's Opening Brief, the only evidence in the record is that, due to the technological advances of fax machines, such a

“cost” is, at the very least, *de minimus*. Therefore, if Congress designed a remedy, as Respondent and *Amicus* U.S. contend, to take into account business interruption, and to account for the difficulty in proving losses associated with such, such a basis no longer exists.⁶

Even the district court in Texas v. American Blast Fax, 159 F. Supp. 2d 936 (W.D. Tex. 2001) (“Blast Fax III”), recognized this constitutional infirmity when it found that “[a]lthough the TCPA provides for liquidated damages of \$500 for each violation, ... it would be inequitable and unreasonable to award \$500 for each of these violations[,]” which would “amount to an award of \$2.34 billion (937,500 [faxes] multiplied by 5 months and then by \$500).” Id. at *22-23 and n.8. The court thus “interpret[ed] the provision as providing for ‘*up to*’ \$500 per violation” and elected to award only “*seven cents* per violation.” Id. at *22 (emphasis added). In rewriting the TCPA’s damages provision in this fashion, the court recognized how wildly out of proportion that \$500 figure sits in relation to the actual harm to the fax recipients, notwithstanding its holding to the contrary in an earlier decision. See American Blast Fax, 121 F. Supp. 2d at 1090-91. It is

⁶ Respondent also alleges purported costs of “nuisance, inconvenience, and the trespass to the recipient’s chattel.” (Respondent’s Brief, 84.) This is nonsense. Respondent cannot point to any evidence in the record supporting any of these so-called costs.

puzzling why the court chose to rewrite the statute rather than declare it unconstitutional. Nonetheless, without such a revision, the TCPA's mandatory damages remedy called for unconscionable damages of \$2.34 billion. Respondent also contends that small losses on a large number of persons supports the harsh penalty the TCPA provides. (Respondents Brief, 87.) Citing Perez v. United States, 402 U.S. 146, 155 (1971), Respondent contends that, in setting the \$500 penalty, "Congress was free to consider the overall gravity of the cumulative impact of persons engaging in wrongful conduct." Once again, Respondent twists the holding of a case beyond all recognition. That case presented the sole issue of "whether Title II of the Consumer Credit Protection Act ..., as construed and applied to [loansharking], is a permissible exercise by Congress of its powers under the Commerce Clause ..." Id. at 146-47. The Court never uttered a syllable about the constitutionality of statutory penalties under the Fifth Amendment. In any event, if courts were free to take into account the aggregate financial harm engendered by the particular conduct that is the subject of a statutory damages clause, that principle would allow for a multi-million dollar penalty to be imposed on, for example, a shoplifter. Such an approach is preposterous.

In arguing that the TCPA's damages scheme does not run afoul of the Fifth Amendment, Respondent relies heavily on St. Louis, I.M. & S Ry. Co. v. Williams, 251 U.S. 63 (1919) ("Williams"). Respondent maintains that Williams

overruled Missouri Pacific Ry. v. Tucker, 230 U.S. 340 (1913), on which Appellant relies, even though Williams never cited that earlier decision. In any event, Respondent misstates the quantity of the actual harm, the size of the statutory damages provision and the size of the award in Williams when he characterizes the decision as upholding “a statute with a \$300 liquidated damage provision for overcharges of only a few cents” In reality, the statute at issue in Williams provided for statutory damages of “not less than fifty dollars nor more than three hundred dollars” Williams, 251 U.S. at 72. The actual overcharge was 66 cents and the court imposed a penalty of \$75, at a ratio of roughly 75:1. Even a \$300 penalty would only put the ratio at 300:1 based on that overcharge, in sharp contrast to the 10,000:1 ratio of a typical TCPA penalty. And unlike the TCPA’s damages provision, provisions like the one in Williams provide courts with flexibility to adjust the penalty within a statutorily prescribed range so that it would stand in proportion to the actual harm. That sliding scale flexibility is precisely what the court in Blast Fax III was looking for when it engrafted the phrase “up to” on the mandatory \$500 penalty provision so it could impose a constitutionally proportional penalty of *seven cents* per violation.

Respondent also suggests that a mathematical approach was rejected in BMW of North America v. Gore, 517 U.S. 559 (1996). While BMW rejected a *categorical* ratio approach, it affirmed that a mathematical ratio remains a factor in

determining the reasonableness of an award. BMW, 517 U.S. at 574-75. See also, Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 23-24 (1991). Furthermore, “The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: the amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.” United States v. Bajakajian, 424 U.S. 321, 334 (1998). “If the amount of the forfeiture is grossly disproportional to the gravity of the . . . offense, it is unconstitutional.” Bajakajian, at 337 (35:1 forfeiture ratio violated the Eighth Amendment.)

In the end, the TCPA’s draconian remedial provisions are unconstitutional because they threaten to drive legitimate businesses out of existence or into bankruptcy by imposing damages that are wildly disproportionate to the few pennies in cost and any momentary disturbance incurred by the fax recipient. By imposing damages equal to approximately 10,000 times the minimal cost of receiving a single unsolicited fax advertisement, the Act violates the Fifth Amendment’s due process guarantees against exorbitant penalties and the Eighth Amendment’s prohibition against excessive fines.

POINTS RELIED ON IV THROUGH VIII

As the standard of review is *de novo*, Appellant stands on its Opening Brief and the Record on Appeal.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Appellant's Opening Brief, the trial court should be reversed, and summary judgment should be entered in favor of Appellant Herz Financial and against Respondent Harjoe.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Reply Brief complies with Supreme Court Rule 84.06 and, according to the word count function of Microsoft Word 97 by which it was prepared, contains 7,500 words, exclusive of the cover, Certificate of Service, and this Certificate and signature block.

The undersigned further certifies that the diskette filed herewith containing this brief in electronic form has been scanned for viruses and is virus free.

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CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing Reply Brief of Appellant Herz Financial and one diskette containing the foregoing Brief were served by regular U.S. Mail, postage prepaid, to Max G. Margulis, Esq., Margulis Law Group, 14236 Cedar Springs Drive, Chesterfield, Missouri 63017 and Karl W. Dickhaus, Dickhaus and Associates, LC, 1750 S. Brentwood Blvd., Suite 300, St. Louis, Missouri 63144 (counsel for Respondent), and to Eric D. Miller, U.S. Department of Justice, 601 "D" Street, N.W., Washington, D.C. 20530 (counsel for *Amicus Curiae* United States), this 9th day of December, 2002.

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