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JURISDICTIONAL STATEMENT

Respondent accepts the Jurisdictional Statement of Appellant.

STATEMENT OF FACTS

Respondent objects to Appellant's Statement of Facts as unsatisfactory. They are neither fair nor concise, and are presented as argument in direct contravention of Rule 84.04(c). To the extent that they present unsupported facts without citation to the record they should be stricken.

Substantial facts were stipulated by the parties. (LF 222). Appellant sent the faxes at issue, knew it was sending the faxes at issue, and stipulated copies of the faxes are before the court. (LF 222, 225-242). While the parties differ on the amount of cost which is foisted upon an unwilling junk fax recipient, it is not disputed that junk faxes cost recipients some amount of consumable supplies and/or use of their equipment. Appellant's expert testified that for some fax machines the paper and toner cost per page to receive them can be less than 2 cents per page. (LF 81, Tajkarimi affidavit ¶ 9). Respondent's expert testified that the majority of fax machines use more expensive printing mechanisms, (LF 652, McKenna affidavit ¶ 33) and a more accurate estimate based on all fax machines in use (taking into account their market share) is eight to ten cents per page. (LF 662, McKenna ¶36).

Some fax broadcasters can send between 2 and 3 million junk faxes **per day**. (LF 653, McKenna ¶ 39). There are approximately 30 million fax machines in the country. (LF 654, McKenna ¶ 40). If each fax machine in the United States received only 2 junk faxes per week, at eight cents per page this would be over \$250 million annually taken from fax machine owners without their permission. (LF 654, McKenna ¶ 40).

Legitimate business communications can get lost in the stack of unwanted junk faxes. (LF 647, McKenna ¶¶15,16). Some businesses, and government agencies, have many fax machines. (LF 656, Shields affidavit ¶ 6). Losses to these companies from even a single junk fax campaign is amplified. (LF

657, Shields ¶¶ 9-10).

The facsimile machine “has become a primary tool for business to relay instantaneously written communications and transactions.” H.R. Rep. No. 102-317, at 10 (1991) (Appx. A47). The Telephone Consumer Protection Act, 47 U.S.C. § 227, (“TCPA”) was in part, a response to an “explosive growth in unsolicited facsimile advertising, or ‘junk fax.’” Id. The recipient of junk mail pays nothing for its solicitations. See id. at 25 (App. 37). By contrast, the recipient of fax advertisements “assumes both the cost associated with the use of the facsimile machine, and the cost of the expensive paper used to print out facsimile messages.” Id.

While accepting the testimony of Appellant’s expert about capabilities of some advanced fax machines for the purposes of summary judgment, Respondent’s expert, Mr. McKenna, demonstrated that the vast majority of fax machines lack such features. (LF 651, McKenna ¶ 32). Only a small percentage of fax machines are of the type Appellant’s expert Mr. Tajkarimi describes, as 86% of fax machines use printing technologies which are generally “much more expensive on a per-page basis.” (LF 651, McKenna ¶32). In order to even take advantage of some advanced features described by Appellant’s expert, a user must go to significant expense for a second dedicated phone line. (LF 650, McKenna ¶ 28). Technology to receive faxes on computer does exist, but it is “only a small fraction of the facsimile market.” (LF 653, McKenna ¶ 38). The devices to do so are expensive. Id. Some manufacturers of this equipment have forsaken it, leaving users “abandoned.” Id.

Congress received testimony and documents into evidence in considering the TCPA. The hearing transcripts of the first hearing, Hearing on H.R. 628, 2131 and 2184 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 101st Cong. (1989),

is 120 pages long and has a number of witnesses and documents regarding junk faxing. (Appx. A73).

In addition to the facts evidenced in the record, judicial notice provides additional evidentiary support that junk faxes are pervasive, commercial abuse of private property.¹ In the First Amendment context, the Eighth Circuit in an analogous case of Van Bergen v. Minnesota, 59 F.3d 1541 (8th Cir.1995), held that “we do not believe that external evidence of the disruption [automated] calls can cause in a residence is necessary: It is evident to anyone who has received such unsolicited calls when busy with other activities.” The United States Supreme Court similarly took judicial notice of the prevalence of unwanted junk mail in Rowan v. United States Post Office Dept., 397 U.S. 728, 736 (1970). “It places no strain on the doctrine of judicial notice to observe that whether measured by pieces or pounds, Everyman’s mail today is made up overwhelmingly of material he did not seek from persons he does not know.” The deluge of junk faxes to anyone with a fax machine is likewise sufficient to invoke judicial notice of their volume and character.²

¹ Respondent specifically argued for judicial notice of such facts in the court below, but the court’s order does not disclose what facts it took notice of. Plaintiff’s Memorandum Of Law in Opposition to Defendant’s Motion to Dismiss. (LF 537). The term “judicial notice” is broadly used to denote “both judicial knowledge (which courts possess) and common knowledge (which every informed individual possesses); and matters of common knowledge may be declared applicable to the case without proof.” Bone v. General Motors Corp., 322 S.W.2d 916, 924 (Mo.1959). “[A] court is not limited to the evidence the parties see fit to offer, but may consider matters of common knowledge under the doctrine of judicial notice.” Borden Co. v. Thomason, 353 S.W.2d 735, 766 (Mo. Banc 1962).

² This Court, like any common fax machine owner, is already in possession of the common

POINTS RELIED ON

Respondent addresses the Points Relied On identified by Appellant, and raises no additional points on appeal.

knowledge like the Supreme Court in Rowan and the Eighth Circuit in Van Bergen, to provide the common sense conclusions that sending millions of junk faxes is nothing more than theft and trespass, and those faxes consist primarily of commercial solicitations.

ARGUMENT

Introduction

Appellant has raised eight separate points on appeal. Three consist of constitutional challenges to the statute (alleging inter alia that the TCPA is unconstitutional under the First Amendment because it purports to impermissibly restrain Appellant's commercial speech rights, that the TCPA is void for vagueness, and that the TCPA's remunerative process constitutes an excessive fine under the Eighth Amendment and Excessive Fines Clause³). The remaining five points seek to raise procedural defects in the granting of summary judgment by the trial court.

A. Constitutional Issues

In a classic case of putting the cart before the horse, Appellant has skipped several First Amendment doctrines and leapt headfirst into an analysis of the TCPA under Central Hudson Gas and Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980).

This inappropriate shortcut was incorrectly taken by following an error made by the participants in a 1994 case addressing a First Amendment challenge to the fax provisions of the TCPA, Destination Ventures Ltd. v. FCC, 844 F.Supp. 632 (D. Or. 1994). The parties in that case stipulated that the restriction on unsolicited fax advertisements was a content-based restriction on protected commercial speech, subjecting it to analysis under Central Hudson:

The parties agree that the restriction upon unsolicited fax advertisements is

³ All references are to the amendments to the United States Constitution. Appellants have correctly not asserted any claims based upon Missouri's constitution.

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

Id. at 635. However, the court did not make that determination - it was simply presupposed by the litigants.⁴

There is no such stipulation here. Respondent argued specifically that the TCPA is properly analyzed as a theft and trespass restriction of tortious conduct, and not a restriction on speech. Many courts have agreed. See, e.g., Micro Eng. v. St. Louis Ass'n of Credit Mgmt., Inc., No. 02AC-008238 XCV, slip op. at 2 (St. Louis County, Div 39, Aug. 13, 2002) (Appx. A23).

Leaping directly to a Central Hudson analysis ignores the fact that the United States Supreme Court has made clear that simply because speech or words are involved does not automatically invoke First Amendment scrutiny. Picketing, almost by definition, contains protected speech, yet it has been long established that picketing on private property without the property owner's permission is not subject to First Amendment protection. "[U]nder the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this." Hudgens v. NLRB, 424 U.S. 507, 521 (1976) (trespass on private property for picketing purposes is not subject to First Amendment protection). Sending junk faxes without permission is nothing more than theft and trespass. Indeed, a number of

⁴ Because the Destination Ventures court ultimately held that the statute passed the Central Hudson analysis, this error was harmless, since in satisfying the Central Hudson standard, the statute would, as a matter of law, also satisfy any less rigorous standard, such as a "time, place, and manner" restriction.

Missouri courts have agreed that “[s]ending unsolicited facsimile advertisements without the recipient’s permission is simply not a form of conduct protected by the First Amendment, any more than graffiti on someone else’s property is protected speech.” (Micro Eng., slip op at 3) (Appx. at A24). This was the principal argument of Respondent at the hearing on the Motion for Summary Judgment out of which this appeal arises. There is a constitutional right to speak - not a constitutional right to free paper, free ink, and free use of someone else’s printing press to print that speech.

Appellant also ignores its burden under First Amendment doctrine “to demonstrate that the First Amendment even applies” to their conduct. Clark v. Community for Creative Non-violence, 468 U.S. 288, 293, note 5 (1984); Walker v. City of Kansas City, Missouri, 911 F.2d 80, 85 (8th Cir. 1990). This important step cannot be ignored or assumed. As a threshold showing, Appellant must prove that the First Amendment of the Constitution guarantees a right to use another person’s paper, ink, and printing press, without their permission. Unless such a right exists in the first place, there is no constitutional “right” being infringed by a statute restricting that practice.⁵ Absent this necessary showing by Appellant, there is no First Amendment issue to address.

Eight separate federal judges in four different federal circuits have all unanimously held that the TCPA presents no First Amendment infirmity. See, cases cited infra. Such unanimity militates strongly against Appellant’s proposition that those judges have all collectively reached the exact same conclusion

⁵ At least not under the First Amendment. A statute that was blatantly discriminatory would run afoul of equal protection guarantees. Carey v. Brown, 447 U.S. 455, 459-63 (1980). Appellant has raised no Equal Protection Clause challenge here.

in error. Appellant is suggesting as a necessary premise to its argument, an epidemic of unchecked judicial errors of constitutional magnitude, spanning several states and four federal circuits.

Appellant can fare no better under its vagueness or due process arguments. Here, Appellant's burden is even higher, having to overcome the foundational principle that acts of Congress are presumed valid against such challenges. United States v. National Dairy Corp., 372 U.S. 29, 32-3 (1963). Due process and vagueness challenges to this statute have been rejected by every single court to hear them. This Court should reach a similar conclusion. Appellant's argument also ignores several elements of vagueness doctrine, including the status of the TCPA as an economic regulation, the ability of Appellant to avail itself of administrative clarification from the FCC, and the TCPA's civil remedy classification.

Under Broadrick v. Oklahoma, 413 U.S. 601 (1973), Appellant lacks standing to challenge the TCPA on vagueness, as Appellant's advertisements lie well within the ambit of the statute. "[E]ven if the outermost boundaries of [the statute] may be imprecise, any such uncertainty has little relevance here, where appellant's conduct falls squarely within the 'hard core' of the statute's proscriptions . . ." Id., at 608 (1973) (Appellant could not raise a vagueness challenge to a restriction on political speech when his conduct was clearly within the statute).

B. Procedural Arguments

Respondent's procedural arguments chiefly concern allegations that genuine issues of material fact exist sufficient to prevent summary judgment. However, a close examination of those "factual" issues reveals that they are instead, issues of law and properly adjudicated in summary judgment, or factual issues that are not "material." For example, Point VII raised by Appellant (whether each page of an illegal junk fax transmitted is a separately compensable violation, or whether a multi-page fax constitutes only a single

violation of the statute) is purely a question of statutory interpretation, and by definition, appropriate for summary judgment.

Respondent's final argument is evidentiary, but as Missouri law shows, the affidavits in support of summary judgment were proper, and the affiants are qualified to make the statements in those affidavits. Evidentiary rulings are reviewed on an abuse of discretion standard, and Appellant has presented no argument sufficient to meet that high standard.

Standard of Review

This is an appeal from a motion for summary judgment. In reviewing a motion for summary judgment, the reviewing court reviews the record in the light most favorable to the party against whom judgment was entered and accords such party the benefit of all inferences reasonably drawn from the record. ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. 1993). The review is de novo, with the reviewing court applying the same criteria as the trial court; that there are no genuine issues of material fact in dispute. *Id.* All facts asserted in testimony or by affidavit are taken as true unless contradicted on the record. *Id.*

POINT I. THE TCPA DOES NOT VIOLATE THE FIRST OR FOURTEENTH AMENDMENTS

Point Relied On: **The Trial Court Was Correct In Granting Harjoe’s Motion For Summary Judgment And In Denying Herz Financial’s Motion For Summary Judgment, Because The TCPA Does Not Violate Either The First Or Fourteenth Amendments To The United States Constitution.**

The applicable standard of review of this point is de novo.

A. The TCPA Regulates Conduct of Conversion, Trespass, and Nuisance – Not Speech.

1. Legislative History.

From 1989 to 1991, Congress considered several bills addressing commercial marketing practices made possible by the increasing use of telephones and fax machines for solicitations, including the transmission of unsolicited commercial advertisements by fax. In the process, Congress considered a number of bills, held hearings, and produced committee reports.⁶ Congress ultimately passed the TCPA

⁶ The 101st Congress introduced at least four bills and held one hearing: See H.R. 628, 101st Cong. (1989), H.R. 2131, 101st Cong. (1989), H.R. 2184, 101st Cong. (1989) and H.R. 2921, 101st Cong. (1989); Hearing on H.R. 628, 2131 and 2184 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 101st Cong. (1989). (Appx. A73).

The 102d Congress, which passed the TCPA in 1991, introduced at least six bills, held three hearings and produced three committee reports: See H.R. 1304, 102st Cong. (1991), H.R. 1305, 102st

in November 1991. The measure was signed into law as the Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, in December 1991. In the TCPA provisions at issue here, Congress responded to the dramatic rise in the use of fax machines and the concomitant phenomenon of unsolicited fax advertisements. “An office oddity during the mid-1980’s, the facsimile machine has become a primary tool for business to relay instantaneously written communications and transactions.” H.R. Rep. No. 102-317, at 10 (1991) (Appx. A47). By 1991, millions of offices were sending more than 30 billion pages of information each year by fax in an effort to speed communications and cut overnight delivery costs. *Id.* The increasing prevalence of fax machines has been accompanied by an “explosive growth in unsolicited facsimile advertising, or ‘junk fax.’” *Id.* Because fax machines are “designed to accept, process and print

Cong. (1991), and H.R. 1589, 102st Cong. (1991); S. 1410, 102st Cong. (1991), S. 1442, 102st Cong. (1991), and S. 1462, 102st Cong. (1991); Hearing on S. 1462 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation, 102d Cong. (1991); Hearing on H.R. 1304 and 1305 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 102d Cong. (1991); S. 1462, The Automated Telephone Consumer Protection Act of 1991: S.1410, The Telephone Consumer Protection Act; and S. 857, Equal Billing for Long Distance Charges: Hearings on S. 875, 1410, and 1462 Before the Subcomm. on Communications of the Senate Committee on Commerce, Science, and Transportation, 102nd Cong. at 27 (1991). The legislative history includes several committee reports that accompanied the various bills. See S. Rep. No. 102-178 (1991); S. Rep. No. 102-177 (1991); H.R. Rep. No. 102-317 (1991). The final bill that became the TCPA combined features of H.R. 1305, S. 1410 and S. 1462.

all messages,” Id., they may be used by unwelcome advertisers as readily as by business clients.

As Congress observed, the exploitation of fax machines by advertisers creates problems distinct from unsolicited advertisements through traditional media such as leafleting or mail. The recipient of junk mail pays nothing for the solicitations. Id. at 25 (Appx. A47). By contrast, the recipient of fax advertisements “assumes both the cost associated with the use of the facsimile machine, and the cost of the expensive paper used to print out facsimile messages.” Id. Moreover, because “[o]nly the most sophisticated and expensive facsimile machines can process and print more than one message at a time,” the transmission of unsolicited advertisements preempts the fax machine owner from receiving or sending fax messages. Id. Interference with interstate commerce is by definition an important and substantial government interest. “The efficient conduct of business operations . . . is a significant government interest.” (Van Bergen, 59 F.3d at 1554.) To address the problems associated with the developing fax technology, Congress enacted limited restrictions on the use of fax machines for commercial advertising purposes. Congress did not bar advertisers from using fax transmissions. Instead, Congress merely required commercial advertisers to obtain the consent of fax machine owners before using their fax lines and shifting advertising costs onto fax recipients.

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

227(a)(4). See, also, 47 U.S.C. § 227(a)(2) (defining “facsimile machine”).

B. Conduct Restrictions Such as the TCPA Are Not Subject to First Amendment Scrutiny Merely Because Someone Communicates with That Method of Conduct.

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

Appellant’s suggestion of the existence of a First Amendment infirmity in the regulation of the sending of unsolicited commercial facsimile advertisements, presupposes that a speaker has a constitutional right to use and consume another person’s property for commercial speech purposes, without permission of the property owner. To make this a speech case is to insist on a constitutionally guaranteed right to use someone else’s paper, ink, and printing press to print and distribute a message, all without the permission of the owner of that printing press. This is not speech - it is tortious conduct. “To permit the thief to thus

misuse the [First] Amendment would be to prostitute the salutary purposes of the First Amendment.” United States v. Morrison, 844 F.2d 1057, 1069-70 (4th Cir. 1988), cert. denied, 488 U.S. 908 (1988) (First Amendment was not implicated in prosecution of stolen information, even though information was used for protected speech purposes). There is a constitutional right to speak - not a constitutional right to free paper, free ink, and free use of someone else’s printing press to print that speech.

C. The TCPA does not Regulate Speech – It Regulates an Abusive Delivery Method.

One cannot examine any regulation that is claimed to inhibit free speech rights without first asking the threshold question of whether or not the conduct regulated is protected by the First Amendment in the first place. The fact that speech or words are involved does not automatically invoke First Amendment scrutiny. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949). Picketing, almost by definition, contains protected speech, yet it has long been established that picketing on private property without the property owner’s permission is not subject to First Amendment protection. “[U]nder the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this.” Hudgens v. NLRB, 424 U.S. 507, 521 (1976) (trespass on private property for picketing purposes is not subject to First Amendment protection). Consider if someone erected a billboard on your private property, or painted their advertisement on the side of your vehicle without permission. The contents of the messages distributed by such activities may involve protected speech, yet it is incomprehensible that someone could claim that trespass and graffiti laws unconstitutionally inhibit those acts. Imagine if a salesman on the street corner could reach into your pocket without consent, take ten cents to subsidize his printing cost, then hand you his sales flyer and run – and expect the First Amendment

to protect his conduct.

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

In the event that Appellant would try to analogize junk fax broadcasting with television or radio broadcasts, or pop-up ads on Internet web sites that also “consume” the recipient's electricity and tie up the receiving machine, that analogy is fatally flawed. In actuality, the recipient of radio or TV signals, or an Internet site, voluntarily consents to receipt of the broadcaster's programming (and the advertisements therein) by voluntarily **selecting** that station or web site. A more proper analogy would be if television or radio stations could reach out and turn on your receiver without consent, and change the channel to one of their choosing - not yours.

1. The TCPA is not a Regulation of Speech

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

commercial conduct, not speech. It applies to private property, not a public forum.⁷ A restaurant owner does not have a First Amendment right to walk into a Kinko's copy shop, make a copy of the restaurant's advertisement on Kinko's copy machine and paper without paying for it, then hand the advertisement to a Kinko's employee and solicit them to come to the restaurant to buy lunch. Yet this is precisely what happens when an advertiser sends unsolicited advertising faxes to the same copy shop.

It is equivalent to a telemarketing call with the charges reversed, or "getting junk mail with the postage due" - except that you have no chance to decline the charges. Telemarketing Practices: Hearings on H.R. 628, 2131, and 2184 Before the Subcomm. On Telecommunications and Finance of the House

⁷ While the "non-public" forum cases have mostly concerned restrictions on government owned forums that are non-public (See, e.g., Greer v. Spock, 424 U.S. 828 (1976) (prohibiting political speeches or the distribution of leaflets in areas of government property otherwise open to the general public)), various courts have applied it to non-government owned property as well. See, e.g., State v. Migliorino, 442 N.W.2d 36 (Wis. 1989) cert. denied sub nom. 493 U.S. 1004 (1989) (private medical facility was a nonpublic forum for First Amendment analysis purposes.) As many commentators have noted, "the forum counts" in speech cases. "Furthermore, consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." Heffron v. Int'l Soc. For Krishna Consc., 452 U.S. 640, 651 (1981). What is an impermissible restriction in a traditional public forum long used for public discourse such as the sidewalks and parks, can on the other hand be a perfectly permissible restriction in a non-public forum.

Comm. On Energy. and Commerce, 101st Cong. 1st Sess. at 2 (1989) (hereinafter “House Subcomm. Hrg. on Telemarketing Practices”) (Rep. Markey). (Appx. A73). “The Court never intimated that the visitor could insert a foot in the door and insist on a hearing.” Kovacs v. Cooper, 336 U.S. 77, 86-87 (1949) (upholding prohibition on use of sound trucks as delivery method of protected speech).⁸

D. There is no First Amendment Right to Access Private Property to Engage in Speech

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

⁸ It is the nature of fax transmissions that the recipient must generally pay for the supplies and allow his fax machine to be “tied up” to receive the message before he knows who the sender is, and thus decide if he wishes to decline the publication. 135 Cong.Rec. E1462-02 (May 2, 1989) (Statement of Mr. Markey). The damage however, is already done. The fax recipient is truly an “unwilling listener” as contemplated in Kovacs.

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

Id., at 101. The contents of Nye's bumper stickers were not hate speech – they were fully protected by the First Amendment as the above quotation shows had Nye put them on his *own* car. But the non-consensual use of other peoples' bumpers to publish his message was not protected by the First Amendment. See, also, N.O.W. v. Operation Rescue, 37 F. 3d 646, 655 (D.C. Cir. 1994) (“Appellants have no general First Amendment right to trespass on private property.”); Cincinnati v. Thompson, 643 N.E.2d 1157 (Ohio App. 1994) (protesters not entitled to First Amendment protection for protesting on private property). “Under the present state of the law, freedom of speech does not entitle one to come upon the property of another and commit a trespass. . .” Hood v. Stafford, 378 S.W.2d 766, 772 (Tenn. 1964) (upholding ordinance that prohibited use of business property without consent for speech purposes). “[I]t is untenable that conduct such as vandalism is protected by the First Amendment merely because those engaged in such conduct intend thereby to express an idea.” In re Michael M., 86 Cal.App.4th 718, 729

(2001) citing Texas v. Johnson, 491 U.S. 397, 404 (1989). “The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another person’s home or office.” Dietmann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971).

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

Like Nye, fax advertisers lose any First Amendment protection for their content when they trespass and convert the recipients’ supplies without permission to subsidize their advertising distribution mechanism.

Unsolicited fax advertising is a combination of speech and non-speech activities. “[W]hen ‘speech’ and ‘non-speech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms.” Arcara v. Cloud Books, Inc., 478 U.S. 697, 702-3 (1986). A thief or trespasser cannot excuse his trespass by espousing political discourse while he steals or trespasses. “An armed robber cannot escape responsibility for his or her conduct by pointing out that ‘stick’em up’ is speech or by reciting the Gettysburg address during the robbery.” Huffman and Wright Logging Co. v. Wade, 857 P.2d 101,

108, n. 9 (Or. 1993) (en banc). Tying up the recipients' fax machines and the shifting of advertising cost of untold numbers of flyers to the unwilling recipients are "non-speech elements" of the commercial practice of nonconsensual broadcast fax advertising.

The TCPA is a proper step by a government which has protection of individual property rights as one of its compelling duties. It is these non-speech elements that are the evils the statute addresses - not the speech itself. "[L]aw must reflect the 'differing natures, values, abuses and dangers' of each method [of communication]." Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981) (regulation of billboards allowed because of unique harms caused by billboards) (plurality op.)

E. The Burden to Demonstrate That the First Amendment Protects Their Conduct is on Appellants

Simply because some speech is involved, does not automatically invoke First Amendment scrutiny. In applying this axiom, the Supreme Court requires that any party wishing to challenge a statute must bear the burden of demonstrating that the First Amendment protection applies. "Although it is common to place the burden upon the Government to justify impingements on First Amendment interests, it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies." Clark v. Community for Creative Non-violence, 468 U.S. 288, 293, note 5 (1984) (overnight camping prohibition not a First Amendment violation). Appellants have not met this burden, and therefore their entire First Amendment challenge should be rejected.

Once the distinction between speech and non-speech elements are illuminated with regard to unsolicited advertising faxes, the regulation of the latter is clearly not a First Amendment issue. Conversion and trespass are non-speech elements that are not protected by the First Amendment. A speaker cannot

take a ream of paper from Office Depot that he intends to use to disseminate protected speech and then demand that the government justify the theft laws under the First Amendment. Otherwise “any government action that had some conceivable speech-inhibiting consequences, such as the arrest of a newscaster for a traffic violation, would require analysis under the First Amendment.” Arcara, 478 U.S. at 708 (O’Connor, Stevens, JJ, concurring).

F. Unsolicited Faxing Constitutes a Common Law Tort.

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

While the direct pecuniary costs of a single fax can vary⁹, trespass rights are not contingent on any monetary value. Appropriating the property of another without that person’s consent is inconsistent with the fundamental view of property rights as significant, regardless of how much of it is at stake.

The Supreme Court described this maxim in Phillips v. Washington Legal Foundation, 524 U.S. 156, 170 (1998), in addressing the question of whether taking property that had no economic value was

⁹ Intangible costs can also vary. To drive home the problem of interference, even from a single junk fax, the Circuit Administrator for the Eleventh Circuit asked that the court’s fax number be stricken from directories out of fear that fax advertisement would interfere with death penalty appeals. House Subcomm. Hrg. on Telemarketing Practices at note 40 (testimony of Professor Ellis). (Appx. A73).

still a taking of property. The Court reiterated:

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

Id. (internal quotations and citations omitted). Advertisers clearly have a right to speak, but they do not have the right to appropriate someone else's property or interfere with the possession and control of it. Quantification of the injury is simply not a valid argument. *See, United States v. Turoff*, 701 F. Supp. 981, 987 (E.D.N.Y. 1988) (rejecting the notion of "a de minimis qualification to the tort of conversion or the crime of larceny"). Congress had specific testimony that underscored this principle. House Subcomm. Hrg. on Telemarketing Practices at 97-8 (direct testimony of Prof. Ellis) ("3 or 10 cents a page is not the issue. The issue is the intrusiveness, . . . It is not the cost. It is the fact that even if it is 3 cents, somebody has forced me to spend it.") (Appx. A73). Even absent the TCPA, a victim could seek damages under common law trespass to chattels for unsolicited faxes. *See, Chair King v. Houston Cellular*, 1995 W.L. 1693093 at *2 (denying a motion to dismiss with respect to plaintiff's trespass to chattels claim for unsolicited faxes) (S.D. Tex. Nov. 7, 1995), vacated on other grounds 131 F.3d 507 (5th Cir.1997). The TCPA simply recognizes and codifies into statutory law a common law tort, and sets liquidated damages.

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

or scrawl graffiti on his walls.

Justice Marshall’s famous quote with respect to unwanted mail is that the “short, though regular, journey from mail box to trash can . . . is an acceptable burden.” Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 72 (1983). However this conclusion does not apply to junk faxes. With junk faxes, the recipient is throwing away his own paper and toner. Would Justice Marshall make the same statement if we all had to feed blank paper and supplies into the mailbox like a fax machine, or while junk mail was being received, our personal and business correspondence was unable to come through our mailbox? Would he make the same statement if to avoid having to expend your own paper and toner, you had to purchase an expensive new mailbox that displayed your mail on a computer screen instead of printing it?

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

1. The TCPA Easily Meets the Test for Content Neutrality

Even were this Court to reach a First Amendment analysis, the Supreme Court has recently reiterated the test for content neutrality:

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

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

The Eighth Circuit, on whom Appellant would have this Court rely, has previously noted that Hill articulates a clarified standard for content neutrality. In Thorburn v. Austin, 231 F.3d 1114 (8th Cir. 2000), the Eighth Circuit addressed the question of content neutrality of a picketing ordinance. A prior ordinance was held to be content-based “because it was impossible to tell whether a person was engaged in picketing [as defined by the ordinance] without analyzing his message, we held that the limitation was not justified without reference to content.” Id., at 1118. The court then recognized that “Hill rejected this sort of analysis.” Id. As a result, the ordinance in Thorburn was found to be content-neutral, even though prior to Hill it would have been held to be content-based. This rejected rationale is precisely what Appellant relies on, and thus its entire content-based argument fails. Since Central Hudson requires the regulation to be content-based, Central Hudson is simply inapposite.

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

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

restrictions in question do not regulate the content of appellant’s solicitation -- it may make any sales pitch it pleases – they merely dictate where and how appellant may make its pitch.

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

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

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

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

“Even solicitation that is neither fraudulent nor deceptive may be pressed with such frequency or vehemence as to intimidate, vex, or harass the recipient. In [Ohralik v. Ohio State Bar Assn., 436 U.S. 447 (1978)], we made explicit that protection of the public from these aspects of solicitation is a legitimate and important state interest.” Edenfield v. Fane, 507 U.S. 761, 769 (1993) (in-person solicitations). That

“offensive delivery” is the evil addressed by the TCPA, and thus it is a content-neutral purpose.¹⁰ Congress received testimony that the “vehemence” of shoving their advertising into your own fax machine using your own ink and paper without permission is clearly vexing. House Subcomm. Hrg. on Telemarketing Practices at 97-8 (direct testimony of Prof. Ellis) (Appx. A73); Id., at 82 (direct testimony of John M. Glynn, Maryland People’s Counsel, that “[J]unk fax not only interferes with the use of your fax machine but makes you pay for it, which adds insult to injury.”)

This knows no partisan line. This is not a Democrat or Republican issue, this is not a liberal or conservative issue. When those junk faxes start coming over your machine, you do not think like a Republican or a Democrat, you just think how are you going to be able to get your hands around the neck of the person making you pay with your paper for whatever message they are trying to send you.

137 Cong. Rec. H11307-01 (Nov. 26, 1991) (Statement of Mr. Markey). There is no indication that Congress enacted the TCPA because of any “disagreement with the message.” It is thus content-neutral under the Ward/Hill analysis.¹¹

¹⁰ Indeed, the term “content neutral” in First Amendment contexts is shorthand for “content neutral *purpose*” and not a “content neutral *statute*.” This nuance was apparently overlooked by Appellant.

¹¹ One of the best tests for content-neutrality taught to law students, is the “language” test articulated by Professor John Hart Ely, “[h]ad his audience been unable to read English, there would have been no occasion for the regulation.” John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1498 (1975)

2. Analysis Under *Hill v. Colorado*

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

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

Hill, 530 U.S. at 721. This type of statute is not content-based merely because the content of the message determines if it is subject to the statute or not.

(discussing Cohen v. California, 403 U.S. 15 (1971)). This is what Professor Tribe calls “track two” analysis: is the regulation “aim[ed] at ideas or information?” See, generally, Lawrence Tribe, *American Constitutional Law: A Textbook*, MacMillan Publ., 5th Ed. 1995 at 791-92 (citing Kovacs v. Cooper, 336 U.S. 77 (1949)). Even if the recipient of the junk fax does not speak English, their paper and ink is still consumed for someone else’s advertisement, and the fax machine is used without consent. The harms still exist.

Only one other federal decision interpreting the TCPA has issued since the standards for content-neutrality were clarified in Hill. In a case brought by the Texas Attorney General, the district court for the Western District of Texas held the junk fax provision of the TCPA was “not a ‘content-based’ regulation for purposes of the First Amendment.” State of Texas v. Am. Blast Fax, Inc., 159 F.Supp.2d 936 (W.D.Tex. 2001). The same conclusion is warranted here.

3. The TCPA Addresses a “Secondary Effect” of an Abusive Delivery Method.

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

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

In Renton, the regulation explicitly treated “adult” movie theaters differently from other theaters, and defined “adult” theaters solely by reference to the content of their movies.

475 U.S., at 44. We nonetheless treated the zoning regulation as content neutral because the ordinance was aimed at the secondary effects of adult theaters, a justification unrelated to the content of the adult movies themselves. *Id.*, at 48.

Erie v. Pap's A. M., 529 U.S. 277, 295 (2000). “[W]hile the regulation in *Renton* applied only to a particular category of speech, its justification had nothing to do with that speech.” *Boos*, 485 U.S. at 320.

The actual content of the fax is not the evil.

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

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

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

non-commercial speech. Id.

With regard to a significant state interest, the Court has held as a matter of law protecting consumers from vexatious solicitation is an important state interest. Edenfield v. Fane, 507 U.S. 761, 769 (1993). Review of the legislative history of the TCPA reveals that victims of the nonconsensual use of their supplies and fax machine by unsolicited faxes found those unsolicited faxes undisputedly vexatious and harassing. See, e.g., House Subcomm. Hrg. On Telemarketing Practices at 97-8 (direct testimony of Prof. Ellis) (Appx. A73); Id., at 82 (direct testimony of John M. Glynn). “[Y]ou just think how are you going to be able to get your hands around the neck of the person making you pay with your paper for whatever message they are trying to send you.” 137 Cong. Rec. H11307-01 (Nov. 26, 1991) (Statement of Mr. Markey). This easily satisfies the significant government interest prong of the time, place, and manner doctrine.

Independently, protection of interstate commerce is also by definition, a substantial government interest. “The efficient conduct of business operations . . . is a significant government interest.” (Van Bergen, 59 F.3d at 1554.) “The First Amendment . . . does not prohibit the state from insuring that the stream of commercial information flow cleanly as well as freely.” Virginia Pharmacy Bd v. Virginia Citizens Consumer Council, 425 U.S. 748, 772 (1976). The TCPA is an economic regulation of advertising conduct because, inter alia, these activities present an impediment to interstate commerce. This independently satisfies the significant government interest prong of the time, place, and manner doctrine.

“[T]he requirement of narrow tailoring is satisfied ‘so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.’” Ward, 491 U.S. at 799. Although alternatives can be considered, alternatives that are “less effective” are not relevant

to this prong of the time, place and manner analysis. What is required is “a ‘fit’ between the legislature’s ends and the means chosen to accomplish those ends - a fit that is not necessarily perfect, but reasonable.” Ward, 491 U.S. at 797.

Congress concluded that the only way to stop the non-consensual cost shifting of commercial advertising and hijacking of fax machines is to require the commercial advertiser to obtain the recipient’s consent before using the recipient’s machine, paper, and toner. “[S]uch a responsibility, is the minimum necessary to protect unwilling recipients from receiving fax messages that are detrimental to the owner’s uses of his or her fax machine.” S. Rpt. No. 178 (1991).

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

As for the availability of other fora, there can be no serious debate that ample other fora for commercial solicitation are present, and have been used for decades. Indeed, junk faxers can continue to send their missives if they simply get permission from the owner of the printing press, to use that printing press and its supplies.

H. The TCPA is Constitutional Even When Considered Under the Requirements of Central Hudson

Were this Court to determine that Appellant’s junk faxes were entitled to First Amendment protection and the TCPA constituted a content-based restriction on speech, it would still pass constitutional

muster under the test set forth in Central Hudson. “The Constitution . . . accords a lesser protection to commercial speech than to other Constitutionally guaranteed expression.” Central Hudson, 447 U.S. at 562-63. Accordingly, in order to satisfy the requirements of the First Amendment, a restriction on truthful, non-misleading commercial speech need only (1) manifest a governmental interest that is “substantial,” (2) “directly advance[] the governmental interest asserted,” and (3) represent a reasonable fit with the government’s stated ends. Id. at 566; Board of Trustees v. Fox, 492 U.S. 469, 480 (1989). The fax provisions of the TCPA readily meet this standard.

The elements of the content-based Central Hudson standard are similar to those employed in analyzing “time, place and manner” restrictions on “core” speech under the First Amendment. (Moser v. FCC, 46 F.3d 970, 973 (9th Cir. 1995); see Fox, 492 U.S. at 477; Van Bergen, 59 F.3d at 1553 n.11 (8th Cir.1995)) Accordingly, decisions employing the latter standard are useful in analyzing the commercial speech regulation at issue here. These cases corroborate the conclusion that the TCPA’s restrictions on junk faxes do not violate the First Amendment.

Appellant’s Reliance on Nixon v. ABF is misplaced.

Before addressing the substantive Central Hudson argument, it must be noted that Appellant’s reliance on the decision in State of Missouri ex rel. Nixon v. American Blast Fax, Inc., 196 F.Supp 2d 920 (E.D. Mo. 2002) (hereinafter “Nixon v. ABF”), is misplaced. The Nixon v. ABF case is a decision from a federal district court, which has no binding effect on the courts of this state. Reynolds v. Diamond Foods, 79 S.W.3d 907 (Mo. 2002). The fact that a federal district court happens to sit in Missouri is of no consequence. There is simply no support for the proposition that geographic proximity of a federal trial court relates in any manner to the value or weight of its decisions in state courts. Indeed, if any hierarchy

exists, it is the decisions of the federal Courts of Appeal that command greater authority, and in this case that authority supports Respondent, not Appellant. In fact the only federal appeals court to consider the constitutionality of the TCPA as applied to faxes thus far, the Ninth Circuit in Destination Ventures, Ltd. v. FCC, 46 F.3d 54 (9th Cir. 1995) unanimously found the statute constitutional.

In addition, the rest of the federal judiciary that has reviewed the TCPA disagrees with the holding in Nixon v. ABF, in decisions rendered both before and after the decision in the Nixon v. ABF case.¹² Another federal district court from the Eighth Circuit (Minnesota District), judge Lancaster in Minnesota v. Sunbelt Communications and Marketing, 2002 WL 31017503 (D.Minn., Sep 4, 2002), recently upheld the TCPA's fax provisions against an identical First Amendment challenge (indeed, argued by the same counsel as represents Appellant here.) Every Missouri trial division to consider the matter has concurred.¹³

¹² State of Texas v. American Blast Fax, Inc., 121 F.Supp.2nd 1085 (W.D. Texas, 2000), Destination Ventures, Ltd. v. FCC, 844 F.Supp 632 (D. Oregon 1994), aff'd 46 F.3d 54 (9th Cir. 1995), Kenro, Inc. v. Fax Daily, Inc., 962 F.Supp. 1162 (S.D. Indiana 1997), State of Minnesota v. Sunbelt Communications and Marketing, 2002 WL 31017503 (Sep 4, 2002, D.Minn.) .

¹³ Demonstrating the independence of Missouri courts, and the acceptance of Respondent's arguments, the following cases from St. Louis County constitute but a partial list of the decisions on this issue both before and after the decision in Nixon: Zeid v. The Redding Law Firm, P.C., 01AC-013005 (St. Louis County, Div. 39, March 19, 2002) (Appx. A1); Brentwood Travel Service, Inc. v. Lorie A. Ewing, 01AC-022171 (St. Louis County, Div. 39, April 3, 2002) (Appx. A15); Brentwood Travel Service, Inc. v. Advanced Cellular Communications, Inc., 01AC-011580 (St. Louis County, Div. 35, May 10, 2002)(Appx. A17); Franklin County Express v. Global Communications, Inc., No. 02AC-13274 (St.

The fact that one federal trial court out of the many to consider the issue, has come to the opposite conclusion, does not render the statute unconstitutional. In fact, the Nixon v. ABF decision is not final but is on appeal to the Eighth Circuit Court of Appeals. And while Appellant might hope that the Eighth Circuit will grant it the right to steal by fax, despite the clear prohibition enacted by Congress, even such an unlikely decision would not bind this Court, which is bound only by the decisions of the United States Supreme Court on federal questions. Reynolds, at 904 and n4.

The Nixon v. ABF decision reached its flawed result based on that court's conclusion that there was inadequate evidence to support the TCPA under a Central Hudson analysis. However, that court overlooked the doctrine of judicial notice, and did not have some of the evidence or arguments available in this case. In the First Amendment context, the Eighth Circuit (which will hear the appeal of the Nixon v. ABF case) is familiar with the TCPA, and in an analogous case of Van Bergen v. Minnesota, 59 F.3d 1541 (8th Cir.1995), held that "we do not believe that external evidence of the disruption [automated] calls can cause in a residence is necessary: It is evident to anyone who has received such unsolicited calls when busy with other activities." The United States Supreme Court similarly took judicial notice of the prevalence of unwanted junk mail in Rowan v. United States Post Office Dept., 397 U.S. 728, 736 (1970). "It places no strain on the doctrine of judicial notice to observe that whether measured by pieces or pounds, Everyman's mail today is made up overwhelmingly of material he did not seek from persons he does not know." The deluge of junk faxes to anyone with a fax machine is likewise sufficient to invoke judicial notice of their volume and character. When coupled with the additional evidentiary record here, such as the

Louis County, Div. 41, Oct. 15, 2002) (Appx. A46).

affidavits of Respondent's experts, this case does not suffer from the evidentiary shortages of the Nixon v. ABF decision.

1. The Government's Asserted Interests Are Substantial

In passing the TCPA, Congress acted to ameliorate real problems caused by unsolicited commercial faxes: the commandeering of recipients' toner, paper, and communication time for the printing of advertisements. See, e.g., H.R. Rep. No. 102-317, at 25 (Appx. A47); S. Rep. No. 102-178, at 2 (1991 U.S.S.C.A.N. 1968, 1969). Though Appellant questions whether the government's interest was (or remains) "substantial," commercial speech jurisprudence and the facts of this case leave little room for such doubts. However much it may cost to receive a fax, and however long a fax machine's operation may be interrupted in order to receive it, the evidence remains uncontroverted: sending a fax costs the recipient some quantity of time and money. Moreover, the fax advertiser's use of a business's telephone line to transmit a fax may prevent the business from receiving a product order or otherwise from communicating with customers; as a result, unsolicited fax advertising transmissions may cost businesses valuable economic opportunities. Legitimate business communications can get lost in the stack of unwanted missives. (LP 647, McKenna ¶¶15,16). The TCPA is an economic regulation of advertising conduct to restrict this impediment to interstate commerce.

The Eighth Circuit has held that the government's interest in avoiding business interruption is itself sufficient to meet the requirements of intermediate scrutiny under the First Amendment: "The efficient conduct of business operations . . . is a significant government interest." (Van Bergen, 59 F.3d at 1554.) As a matter of law, this interest behind restricting nonconsensual commercial faxes meets the first prong of Central Hudson test.

Similarly, assertions about the percentage of faxes that may now be received without being printed ignore the problem caused when any appreciable number of businesses or consumers must pay to receive an advertisement. No reasonable advertiser would claim that it has the constitutional right to send junk mail C.O.D. and require the recipient pay the cost - or even a \$0.01 portion of the costs - yet the sending of unsolicited fax advertisements is tantamount to the same practice. Appellant's own expert conceded that there is some quantity of cost to the unwilling recipient. (LF 81, Tajkarimi ¶ 9).

Businesses and consumers of this country who receive junk faxes consider the problem substantial. Recent Federal Communications Commission actions against fax broadcasting companies have been based on complaints detailing hundreds of violations of the TCPA. See, e.g., In the Matter of Fax.com, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd. 15927 ¶¶ 1, 7, 15 (2002) (Appx. A27) (citing 489 separate, reported violations by a single company); In the Matter of 21st Century Fax(es), Ltd., Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 1384 ¶ 1 (2000) (citing 152 separate, reported violations by a single company). The frequency and substantiality of the disruption to businesses and consumers cannot seriously be gainsaid. See, e.g., In the Matter of Fax.com, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd. 15927 ¶ 9 (2002) (collecting examples that offer a “snapshot of the disruption, expense, and inconvenience caused by Fax.com’s unwanted fax transmissions”).

Courts have recognized that this sort of invasive disruption, in the analogous context of unsolicited electronic mail, can constitute the common law tort of trespass to chattels. See, e.g., America Online, Inc. v. NationalHealthCare Discount, Inc., 174 F.Supp.2d 890, 900 (N.D. Iowa, 2001); America Online, Inc. v. IMS, 24 F.Supp.2d 548, 550 (E.D.Va. 1998); CompuServe, Inc. v. Cyber Promotions, Inc., 962 F.Supp. 1015, 1021 (S.D. Ohio 1997); Thrifty-Tel, Inc. v. Bezenek (1996) 46 Cal.App.4th 1559, 1566,

fn. 6. (Cal. App. 1996); Mark D. Robins, *Electronic Trespass: An Old Theory in a New Context*, 15 Computer Law 1 (1998); Restatement (Second) of Torts §§ 217(b), 218(b). If the transmission of intangible e-mail “spam” can amount to a trespass, then surely the junk faxer’s exaction of physical supplies like toner and paper can as well – and the prevention of such a tort constitutes a substantial reason for the government to regulate the activity.¹⁴

Despite the wealth of information corroborating Congress’s findings and statements of purpose, the Nixon v. ABF court “question[ed] whether the government has met its burden in showing that there was a substantial interest at the time of enacting the TCPA, and whether there is a substantial interest at the present time.” Nixon, 196 F.Supp.2d 920, 931 (E.D.Mo. 2002). The Nixon v. ABF court’s determination apparently turned on the lack “of any studies or empirical data” specifying the impact of junk faxes on businesses. Id. at 929. But intermediate scrutiny of commercial speech does not require scientific studies; rather, it approves the use of “any evidence that is reasonably believed to be relevant for demonstrating a connection between speech and a substantial, independent government interest.” City of Los Angeles v. Alameda Books, Inc., 122 S.Ct. 1728, 1736 (2002). That evidence may include “history, consensus, and ‘simple common sense.’” Florida Bar v. Went For It, Inc., 155 U.S. 618, 628 (1995). There is no need for “[e]mpirical data,” and “certainly not without actual and convincing evidence . . . to the contrary.”

¹⁴ This reality also demonstrates the fallacy of Appellant’s argument that some faxes can be received by computers via e-mail, thus not consuming paper or toner. The above citations amply show that sending such junk e-mail is itself actionable. Converting a junk fax to a junk e-mail does not provide safe harbor for Appellant.

Alameda Books, 122 S.Ct. at 1736. As the court stated in Van Bergen, “we do not believe that external evidence of the disruption . . . is necessary: It is evident to anyone who has received such unsolicited calls” 59 F.3d at 1554. See, also, Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 508-09 (1981) (plurality op.) (giving weight to “accumulated, common-sense judgments of . . . lawmakers” that billboards may adversely impact traffic safety); Central Hudson, 447 U.S. at 569 (accepting without external evidence the direct connection between advertising and demand).

Furthermore, government action is judged “on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government’s interest in an individual case.” Assoc. of Community Organizations for Reform Now, v. St. Louis County, 930 F.2d 591 (8th Cir. 1991). When viewed as a whole, this cost-shifted, tortious advertising delivery method is stealing hundreds of millions of dollars from fax machine owners (LF 653, McKenna ¶ 39) and is an appropriate target of government regulation.

The Nixon v. ABF court also improperly relied on cases that questioned not the continued accuracy of congressional factual findings but rather the consistency of federal *policy*. Thus, the Supreme Court has found reason to suspect the substantiality of the governmental interest where congressional assertions of motivating purpose were undercut by other congressional actions furthering an apparently contradictory aim. See, e.g., Rubin v. Coors Brewing Co. 514 U.S. 476, 488 (1995) (holding government interest “undermine[d]” where statute prohibited disclosing alcohol content in labeling but not in advertising, and applied to beer but not to wines and spirits); Greater New Orleans Broadcasting Ass’n v. United States, 527 U.S. 173, 187 (1999) (finding that “[w]hatever its character in 1934 when [the statute] was adopted, the federal policy of discouraging gambling in general, and casino gambling in particular, is now

decidedly equivocal”). Absent clear “irrationality,” Rubin, 514 U.S. at 488, challenges to the substantiality of an asserted government interest cannot be sustained.

2. The TCPA’s Fax Restrictions Effectively Advance the Government’s Interests

Because the government’s interest in protecting consumers and businesses from the cumulative harms in the interference with commerce and nonconsensual theft and trespass is substantial, it takes nothing more than common sense to see proscribing that very conduct clearly advances the government’s interest. “If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them.” Metromedia, 453 U.S. at 507. Therefore the TCPA also satisfies the next element of the Central Hudson test. Requiring that senders of faxes obtain the permission of potential recipients effectively addresses the problem of unsolicited commercial faxes, thereby furthering Congress’s goals of preventing the commandeering of resources and fax capacity.

Appellant’s reliance on the Nixon v. ABF court here is misplaced. That court’s only finding with regard to this prong of Central Hudson, was made without citation and based on flawed logic and faulty assumptions: “The Court questions whether the TCPA actually advances the government’s interest. If it did, the Court would assume that the [number of] complaints [about blast-faxers] would decrease rather than increase.” Nixon, 196 F.Supp.2d at 932. However, to the extent that the number of complaints reflects a continued high volume of unsolicited commercial faxes, the reason for the ongoing profusion of illegal faxes likely lies in measures taken by fax broadcasting companies to evade the strictures of the law. These companies have deceived their advertising clients into believing that the broadcast activities do not violate

the law, see Minnesota v. Sunbelt Communications and Marketing, 2002 WL 31017503 at *3 (D.Minn., Sep 4, 2002); In the Matter of Fax.com, ¶ 24 (Appx. A27); located their operations overseas in an attempt to evade prosecution, see In the Matter of 21st Century Fax(es), 17 FCC Rcd at 1385; and threatened to file lawsuits against those who complain about receiving unsolicited faxes; see In the Matter of Fax.com, ¶ 23.

Appellants raise the Nicholson v. Hooters case as an ominous hobgoblin in their due process arguments, but that case also underscores the landscape of public knowledge about the TCPA. Recent TCPA cases like Nicholson with large verdicts have garnered press coverage in recent years, which is much more likely the reason complaints have increased - people are learning about an otherwise obscure law, and reporting violators to the FCC and their state authorities. Of course the number of complaints is on the rise.

3. The TCPA's Restrictions On Fax Broadcasting Are Narrowly Tailored To Effect Congress' Stated Purposes

The final prong of the Central Hudson test inquires whether the restrictions on speech are “narrowly drawn.” Central Hudson, 447 U.S. at 565. As the Supreme Court has established:

What our decisions require is a ‘fit’ between the legislature’s ends and the means chosen to accomplish those ends -- a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective. *Within those bounds we leave it to governmental decision makers to judge what*

manner of regulation may best be employed.

Fox, 492 U.S. at 480 (citations and internal quotation marks omitted) (emphasis added). In other words, “the ‘least restrictive means’ test has no role in the commercial speech context.” Florida Bar, 515 U.S. at 632. The Eighth Circuit, too, has held that “[t]o be narrowly tailored, . . . restrictions need not apply the least restrictive means of achieving the government interest.” Van Bergen, 59 F.3d at 1555 n.13. In spite of these explicit teachings, the court in Nixon v. ABF found that “a variety of alternatives, including a national ‘no-fax’ database,” constituted “less restrictive means” of promoting the government’s interest. Nixon, 196 F.Supp.2d at 932-33. Because such “less restrictive means” existed, the Nixon v. ABF court apparently held that the TCPA fails to provide the “fit” required by the Central Hudson regime. Id.

Because the Nixon v. ABF court applied the wrong standard (a “least restrictive means” test) it failed to determine whether a “reasonable fit” existed between Congress’s objectives and the means chosen by Congress to accomplish those goals. Instead, the court substituted its own judgment for that of Congress, holding that a “no-fax” database was a preferable means of achieving the aim of curbing unsolicited commercial faxes. But, as noted, in applying intermediate scrutiny it is a reversible error to “sift[] through all the available or imagined alternative means . . . in order to determine whether the [government’s] solution was the ‘least intrusive means’ of achieving the desired end.” Ward, 491 U.S. at 797

The Nixon v. ABF court’s decision suffers from further infirmities. None of the proffered alternatives to the TCPA would satisfy congressional objectives as well as the means chosen by Congress in current law. Faxing at night, for example, is not a satisfactory option because people with fax machines in their homes would be – and are – awakened by the practice. In the Matter of Fax.com, ¶ 9; see, also,

id. at ¶25 and n.68 (describing practice of “war dialing” *all* telephone numbers, not just those known to be fax lines, in order to determine which are attached to fax machines). Obviously, we live in a global economy, and faxing at night can actually have a greater interference with companies that do business overseas, and who may be receiving critical business documents from countries where “business hours” are in the middle of the night here.

Despite Appellant wishing it weren’t so, “the requirement of narrow tailoring is satisfied ‘so long as the . . . regulation promotes a substantial government interest that would be achieved **less effectively absent the regulation.**” Ward, 491 U.S. at 799 (emphasis added). Although alternatives can be considered, alternatives that are “less effective” are not sufficient to be considered as a matter of law, because - by definition - they would promote the government interest less effectively. Furthermore “laws restricting commercial speech, unlike laws burdening other forms of protected expression, need only be tailored in a **reasonable** manner to serve a substantial state interest in order to survive First Amendment scrutiny.” Edenfield v. Fane, 507 U.S. 761, 767 (1993) (emphasis added). The option apparently preferred by the Nixon v. ABF court — a national “no-fax” list—also would not accomplish Congress’s purposes as effectively. First, a “no-fax” list places the burden on businesses and consumers to avoid receiving and paying for unwanted fax advertisements rather than on advertisers to obtain permission to use the recipients’ property. If cost-shifting is to be curtailed — as it is under the TCPA — the senders of faxes must have the burden, and the incentive, to maintain accurate lists of willing recipients. An “opt-out” scheme would leave as a default a regime in which consumers “pay for th[e] privilege” of receiving advertisements. In the Matter of Fax.com, 17 FCC Rcd. at *15945 (sep. statement of Commissioner Kathleen Q. Abernathy). Further, opt-out lists constitute “an administratively daunting and costly burden.”

Jonathan Coopersmith, *Creating the Commons: Establishing a Civic Space for a New Form of Communication*, Bus. & Econ. Hist. (Oct. 1, 1999), [available in](#) 1999 WL 32438534. Such burdens should be borne by those seeking to take advantage of the system, not those who, if they do not act, will remain its victims.

Moreover, whether to have an “opt-in” or “opt-out” system for protecting consumers is a policy choice - inherently the realm of the legislature. See, e.g., Trans Union Corp. v. FTC, 267 F.3d 1138 (D.C. Cir. 2001) (“Although the opt-in scheme may limit more [of Appellant’s] speech than would the opt-out scheme the company prefers, intermediate scrutiny does not obligate courts to invalidate a ‘remedial scheme because some alternative solution is marginally less intrusive on a speaker’s First Amendment interests.’”)(quoting Turner Broad. System, Inc. v. FCC, 520 U.S. 180, 217-18 (1997)). To arbitrarily decide that an “opt-out” scheme would be better, is to substitute the court’s judgment for that of the drafters. As an institution, Congress is far better equipped than the judiciary to “amass and evaluate the vast amounts of data” bearing upon this type of policy decision. Walters v. National Assn. of Radiation Survivors, 473 U.S. 305, 331 n. 12 (1985); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 665-66 (1994).

Finally, junk fax broadcaster’s management of their own private opt-out systems underscores the inefficacy of the no-fax list approach. See, e.g., In the Matter of Fax.com, ¶ 10 and n. 25. (collecting examples of complaints and concluding that “[i]nformation provided by consumers indicates that Fax.com continued to send faxes even after receiving opt-out calls. . . . It is clear that a call to one Fax.com opt-out line does not end all fax transmissions from the company.”) By contrast, the regime selected by Congress effectively advances the prevention of cost-shifting, business interruption, and consumer disturbance, and

is reasonably crafted to restrict no more speech than necessary to achieve that goal.

The TCPA does not impose a ban on fax advertising. Rather, the statute permits such transmissions as long as the recipient has expressed his willingness to donate his supplies and printing press to the sender. 47 U.S.C. § 227(a)(4) (excepting fax transmissions that are made with recipient’s “prior express invitation or permission”). This is reasonable, and all that is required under this prong of Central Hudson.

Conditioning the sending of fax advertisements on the permission of the recipient who has to pay for them is not the functional equivalent of a ban, as the Nixon v. ABE court concluded without citation. 196 F.Supp.2d 933 n.26 (“there is no practical way for companies to gain permission”). Indeed, collecting the fax numbers of those who agree or “opt in” to receiving fax advertisements is not only feasible, but also already an acknowledged part of junk fax broadcasters’ practices. See In the Matter of Fax.com, ¶ 5 (recognizing Fax.com’s statements to the FCC that one of three ways in which the company collects fax numbers is by “recording fax numbers provided by individuals who have asked, through an automated process, to be included in Fax.com’s database”).

Finally, the Nixon v. ABE court took issue with the distinction Congress drew in the TCPA between commercial and noncommercial broadcast faxes. Relying on City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993), the district court held that where the benefit to be gained by restricting only commercial speech rather than all speech is “minute” or “paltry,” id. at 418, the requisite “fit” was not present. 196 F.Supp.2d at 933. Curiously, the court then concluded that the TCPA is unconstitutional because it *might* be true that restricting unsolicited commercial faxes would eliminate only a small portion of all unsolicited faxes. Id. The court misread both Discovery Network and the record in that case.

In Discovery Network, a straightforward and obvious disparity existed between the government's stated purpose and the *actual effect* of its prohibition. Though designed to eliminate the waste and litter associated with newspaper vending machines, the statute's exclusive focus on commercial publications would have resulted in the removal of only 62 of the city's 1500-2000 machines – a “minute” and “paltry” benefit. Discovery Networks at 417-18, 424. Here, by contrast, commercial faxes make up the *majority* of the unsolicited transmissions about which Congress expressed concern. See Destination Ventures, 46 F.3d at 56 (“unsolicited commercial fax solicitations are responsible for the bulk of advertising cost shifting”). This simple observation is apparent to anyone with a fax machine and, like the quantity and quality of junk mail, properly the subject of judicial notice. See, Rowan v. United States Post Office Dept., 397 U.S. 728, 736 (1970). “It places no strain on the doctrine of judicial notice to observe that whether measured by pieces or pounds, Everyman's mail today is made up overwhelmingly of material he did not seek from persons he does not know.”

Indeed, the Court in Discovery Networks itself, limited its decision to the specific facts, such as the paltry effect, presented in that particular case:

Our holding, however, is narrow. As should be clear from the above discussion, we do not reach the question whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial newsracks. We simply hold that on this record Cincinnati has failed to make such a showing

Discovery Network, Inc., 507 U.S. 410, 428 (1993).

As a general matter, the Constitution does not compel Congress to address either an entire problem

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

As the FCC’s record makes clear, businesses and consumers have been “bombarded” (In the Matter of Fax.com, at n.21) with unsolicited commercial faxes, subject to the TCPA, on a daily basis. See, also, In the Matter of 21st Century Fax(es), Ltd., 17 FCC Rcd 1384; In the Matter of US Notary, Inc., Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 16999 (2000); In the Matter of Carolina Liquidators, Inc., Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 16837 (2000); In the Matter of Tri-Star Marketing, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 11295 (2000); In the Matter of Get-Aways, Inc., Notice of Apparent Liability For Forfeiture, 15 FCC Rcd 1805 (1999). Restricting this practice confers a benefit that is anything but “paltry.” In sum, the problem of unsolicited commercial faxes is neither “paltry” nor “minute,” and the fax-restriction provisions of the TCPA were designed carefully and specifically to address this issue.

A government action is judged “on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government’s interest in an individual case.” Assoc. of Community Organizations for Reform Now, v. St. Louis County, 930 F.2d 591 (8th Cir. 1991). When viewed as a whole, this cost-shifted, tortious advertising delivery method is stealing hundreds of millions of dollars from fax machine owners (LF 653, McKenna ¶ 39) and is an appropriate target of government

regulation.

Appellant also displays a fundamental misunderstanding of the TCPA itself. In trying to prove the statute unjustly treats junk faxers differently than telemarketers. Appellant claims “the statute imposes liability on telemarketers only when they call a person a *second* time in twelve months.” (Appellant’s Br. at 30) (emphasis in original). This is false. The portion of the statute prohibiting prerecorded telemarketing calls (automated prerecorded calls being much more akin to junk faxes than live two-way communications of a live telemarketing call) permit an individual to sue for a *single* violation. 47 U.S.C. 227(b)(2)(B). They are treated no differently from faxes in that regard.¹⁵ The “automated” one-way communications being imposed on consumers without prior consent (faxes and prerecorded telemarketing calls) are all treated the same - they are prohibited unless the caller has express prior permission.

Summary

There can be no dispute that the “harms recite[d] are real” - Appellant’s own expert admitted that there are real pecuniary costs to junk faxes, and Respondent’s expert provided unrebutted testimony of the millions of dollars that this practice cumulatively misappropriates from unwitting fax machine owners. Protection of interstate commerce from interference is a substantial and important government interest. Restricting commercial advertisers from engaging in this tortious, nonconsensual hijacking of fax machines and nonconsensual use of supplies clearly advances the government’s goal of protecting businesses from

¹⁵ While with certain “live” telemarketing calls standing to sue accrues to *an individual* upon receipt of a second violative call, state attorneys general and the FCC can bring an action after a single violation. Live, two-way communications, have lesser restrictions than junk faxes and “prerecorded” solicitations.

those injuries by commercial advertisers. Appellant's alternatives such as faxing at night, or allowing nonconsensual fax advertising until being told to stop, are facially less effective than the government's policy of requiring prior express consent before using someone else's printing press and ink to print your message. Any lesser scheme would be less effective, and this is insufficient to be considered. The fit is reasonable, which is all that is required.

POINT II. THE TCPA IS NOT UNCONSTITUTIONALLY VAGUE

Point Relied On: **The Trial Court Was Correct In Granting Harjoe’s Motion For Summary Judgment And In Denying Herz Financial’s Motion For Summary Judgment, Because The TCPA Does Not Violate The Fifth and Fourteenth Amendments To The United States Constitution As The Act Is Constitutional Under the Void-For-Vagueness Doctrine.**

The applicable standard of review of this point is de novo.

As a preliminary matter, the 18 faxes at issue in this case (LF 225 - 242) lie squarely within the core of the practices which TCPA addresses. There is no uncertainty as to whether the faxes in this case are covered by the TCPA. Appellant’s vagueness challenge therefore seeks to advance arguments of how the TCPA pertains to others in other situations. This Court should follow the United States Supreme Court’s holding in Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973), in reviewing such an argument in speech contexts: “Moreover, even if the outermost boundaries of [the statute] may be imprecise, any such uncertainty has little relevance here, where appellants’ conduct falls squarely within the ‘hard core’ of the statute’s proscriptions . . .” (Political activity of government employees regulated by the Hatch act). See, also, Parker v. Levy, 417 U.S. 733, 757 (1974) (because defendant had “no reasonable doubt” his statements were covered by the regulation, he could not challenge the regulation as vague.)

In addition, in contrast with the First Amendment arguments in Point I, Appellant must meet a high burden to overcome the “presumptive validity” against a vagueness challenge that attaches to an act of Congress. United States v. National Dairy Corp., 372 U.S. 29, 32-3 (1963).

The claim that the TCPA's definition of "unsolicited advertisement" is somehow vague is simply rhetoric of someone "intent on finding fault at any cost." "There are limitations on the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973); United States Civil Svc. Comm. v. Nat. Assoc. of Letter Carriers, 413 U.S. 548, 578-79 (1973) (Hatch Act's ban on "political activity" by federal employees was not unconstitutionally vague). Nor is a heightened scrutiny applicable here which Appellant argues is due a "speech" restriction, because the TCPA is not a speech restriction - it is a restriction of a delivery practice. A speaker can still make his speech by other methods. The cases relied upon by Appellant, such as Gertz v. Welch, Inc., 418 U.S. 323 (1974), regarded penalties for speech regardless of the manner in which it was made. Only when the content of the speech is restricted in all venues is a speaker faced with the sole choices of either 1) altering the content of his speech in order to steer clear of the law, or 2) possibly violating the statute. The TCPA leaves *other* options. The speaker is immune from the TCPA's proscriptions if he simply obtains consent of the owner, or sends his message by any of a plethora of other delivery methods.

Appellant cites Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982), for one snippet of dicta from that decision, but ignore the sentences preceding their quotation, that note:

These standards [for vagueness] should not, of course, be mechanically applied. The degree of vagueness that the Constitution tolerates - as well as the relative importance of fair notice and fair enforcement - depends in part on the nature of the enactment.

Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.

Id., at 498-99 (internal footnotes omitted). These elements of the analysis are present here, and all run against Appellant. The TCPA is an economic regulation of advertising conduct because, inter alia, indiscriminate junk faxing presents an impediment to interstate commerce. The TCPA is a civil statute, and not criminal. Appellant has the ability to request clarifications from the Federal Communications Commission (as others have done) through the FCC's administrative processes. See 47 C.F.R. 0.91; 47 C.F.R. 0.291. See, also, Order on Further Reconsideration, 12 FCC Rcd. 4609 (FCC clarification of the TCPA in response to September 14, 1995 MCI Telecommunications Corporation petition for clarification). They can refer to various promulgations and interpretations from the FCC. See CSC v. Letter Carriers, 413 U.S. at 580 (reliance on clarifying publications of the Civil Service Commission to interpret allegedly vague Hatch Act prohibitions on political activity.)

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

the constitutionality of legislation.

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

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

Nor is a “more stringent” standard due here as Appellant argues, simply because speech is involved. Any heightened vagueness review is only applicable to “pure” speech cases, and **not** commercial speech. The vagueness doctrine cases cited by Appellant such as Grayned v City of Rockford, 408 U.S. 104 (1972) and Smith v Goguen, 415 U.S. 566 (1974) concern such **pure** speech. Indeed, economic regulations such as the TCPA get **lesser** scrutiny for vagueness. Hoffman, 455 U.S. at 498-99.

Appellant’s proposition that “it is often difficult to distinguish between commercial and non-commercial content” is simply self serving rhetoric. Appellant’s Br. at 82. Notably, Appellant presents no case law to support this astounding proposition. A review of Supreme Court cases finds that the Court has little difficulty in distinguishing commercial from non-commercial speech. Indeed, the Court will look at the motive, i.e. the “economic interests” of the speaker, to reinforce such conclusions:

The Supreme Court has discussed the distinction between commercial and noncommercial speech in a number of recent cases. Commercial speech has been defined as speech which “does no more than propose a commercial transaction,” Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762, 96 S.Ct. 1817, 1825, 48 L.Ed.2d 346 (1976), “is confined to the

promotion of specific goods or services,” Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 505 n. 12, 101 S.Ct. 2882, 2891, n. 12, 69 L.Ed.2d 800 (1981), or “is related solely to the economic interests of the speaker and its audience,” In re R.M.J., 455 U.S. 191, 204 n. 17, 102 S.Ct. 929, 938 n. 17, 71 L.Ed.2d 64 (1982), quoting Central Hudson Gas & Electric v. Public Service Comm’n, 447 U.S. 557, 561, 100 S.Ct. 2343, 2348, 65 L.Ed.2d 341 (1980).

Briggs & Stratton Corp. v. Baldrige, 728 F.2d 915, 917 (7th Cir.1984) cert. denied, 469 U.S. 826 (1984). “The hallmark of commercial speech is that it pertains to commercial transactions, whether those proposed through product advertising, as in Virginia State Board of Pharmacy, supra, or facilitated through the use of a trademark, as in Friedman v. Rogers, 440 U.S. 1 (1979), or implicated in some other manner.” Id., at 917-18. Indeed, a “well-settled common-law meaning” through such court opinions is sufficient to remove vagueness. Connally v. General Const. Co., 269 U.S. 385, 391 (1926).

Because the Supreme Court’s standards for distinguishing between commercial and non-commercial speech are clear, Appellant’s claim of vagueness must fail. Appellant had ample opportunity to seek clarification from the FCC. Appellant had ample opportunity to consult attorneys experienced in this area (which a business is expected to do). Appellant could have even consulted a dictionary.

Finally, a court can interpret out vagueness (thus following the canon of construction that a statute must be construed in a way that permits it to comply with the Constitution if possible) permitting even an otherwise vague statute to stand. Winters v. People of State of New York, 333 U.S. 507, 514 (1948) (“The interpretation by the Court of Appeals puts these words in the statute as definitely as if it had been so amended by the legislature.”)

Appellant mis-characterizes the recent FCC citation of 21st Century Fax(es), Ltd. Those faxes were not “opinion poll” faxes. . . they were in actuality solicitations for people to use pay-per-call 900 number services. In the Matter of 21st Century Fax(es), ¶2. They were commercial solicitations for the sender’s commercial 900 number service, where callers were billed \$2.95 per minute to participate. Id.

Appellant finally complains that the TCPA will be subject to “different expression in various judicial jurisdictions around the nation” and that is somehow related to its vagueness challenge. (Appellant’s Br. at 84). Such an argument is baffling. Any differing interpretations of the statute can be corrected on appeal, ultimately to the United States Supreme Court if required. The existence of over a dozen federal circuits and 50 states presents the same challenge to any federal statute. Indeed, the doctrine that has evolved is that each jurisdiction gives great weight to the decisions of sister states and circuits when interpreting federal laws, to promote uniformity. “[W]e appreciate the legitimate concerns that inconsistent interpretations may create for telephone subscribers and solicitors alike. Accordingly, in an effort to seek consistency, we shall give substantial weight to persuasive interpretations of the TCPA by both the FCC and our sister states. Worsham v. Nationwide Ins., 772 A.2d 868, 874 (Md. App. 2001).

POINT III. THE TCPA’S PROVISION FOR LIQUIDATED DAMAGES OF \$500
DOES NOT VIOLATE DUE PROCESS OR THE EXCESSIVE FINES
CLAUSES

Point **The Trial Court Was Correct In Granting Harjoe’s Motion For**
Relied **Summary Judgment And In Denying Herz Financial’s Motion For**
On: **Summary Judgment, Because The TCPA Does Not Violate**
Constitutional Due Process Guarantees Or The Eighth Amendment, In
That The TCPA Does Not Impose A Grossly Excessive Punishment On
Persons Alleged To Have Violated Its Prohibition On Unsolicited Fax
Advertising.

The applicable standard of review of this point is de novo.

Appellant argues that the \$500 statutory damage provision of the TCPA violates the Constitution because it offends the Due Process and Excessive Fines clauses. The gravamen to such an argument can only be the assumption that junk faxes cause a harm of a few cents and therefore the TCPA’s liquidated damages are unreasonable. Appellant’s argument rests on an unstated assumption that the **only** harm suffered is the cost of the fax paper, toner, and other tangible, pecuniary costs. This is in error. There are numerous other “costs” to the unwilling recipient of unsolicited fax broadcasting. There is the tying up of the fax machine itself, the nuisance, inconvenience, and the trespass to the recipient’s chattel. These are difficult to quantify - hence the reason that Congress established \$500 as liquidated damages, in lieu of actual damages. “Congress was concerned with **more than the cost of fax paper** when it established

the \$500 statutory damages remedy. Congress designed a remedy that would take into account the difficult to quantify business interruption costs imposed upon recipients of unsolicited fax advertisements, . . .” Kenro, Inc. v. Fax Daily, Inc., 962 F.Supp. 1162, 1166 (S.D.Ind. 1997) (emphasis added). It was specifically noted by Congress that “[t]he amount of damages in this legislation is set to be fair to both the consumer and the telemarketer.” 137 Cong.Rec. S16204-01 (daily ed. Nov. 7, 1991, statement of Senator Hollings). See, also, House Subcomm. Hrg. on Telemarketing Practices, at 97-8 (direct testimony of Prof. Ellis) (Appx. A73). (“3 or 10 cents is not the issue. The issue is the intrusiveness, . . . It is not the cost. It is the fact that even if it is 3 cents, somebody has forced me to spend it.”)

The \$500 floor is part of the statute’s compensatory scheme. The only punitive provision is the trebling provision that requires a finding of a willful or knowing violation by the court. Molzof v. United States, 502 U.S. 301 (1992) (holding that damages qualify as “punitive” under federal law only when their availability depends upon proof that the defendant engaged in intentional or egregious misconduct).

A. Liquidated Damages Are Not Unconstitutional

The TCPA’s provision of liquidated compensatory damages is not unique. Similar provisions are contained in many other federal statutes: the Copyright Act, 17 U.S.C. § 504 (\$500 floor); the Truth in Lending Act, 15 U.S.C. § 1640 (\$100 floor); the Expedited Funds Availability Act, 12 U.S.C. § 4010 (\$100 floor); the Truth in Savings Act, 12 U.S.C. § 4310 (\$100 floor); the Omnibus Crime Control Act, 18 U.S.C. § 2520 (floor of \$100 per day of illegal wiretapping or \$10,000, whichever is greater); the Cable Television Consumer Protection and Competition Act, 47 U.S.C. § 553 (\$250 floor); the Financial Right of Privacy Act, 12 U.S.C. § 3417 (\$100 floor); the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248 (\$5000 floor); and the Wiretapping and Electronic Surveillance Act, 47 U.S.C.

§ 605 (\$1000 floor).

Why has Congress so often employed compensatory liquidated damages provisions? The reasons have been clear to the Supreme Court for at least one hundred years. They include the desire to free persons with meritorious claims from burdens of proof that are inherently difficult to meet and the desire to stimulate private enforcement of public laws by creating incentives to sue.

In Brady v. Daly, 175 U.S. 148 (1899), the Supreme Court upheld a provision in the Copyright Act requiring the payment of the greater of actual damages or one hundred dollars for the first performance of an infringing dramatic work and fifty dollars for every subsequent performance. The Justices opined that “[t]he minimum amount appears to us to have been fixed because of the inherent difficulty of always proving by satisfactory evidence what the amount [of the loss] is that has been actually sustained.” Id. at 157. The same reason met with the Justices’ approval in Chicago, Burlington & Quincy R.R. Co. v. Cram, 228 U.S. 70 (1913). There, the Supreme Court upheld a liquidated damages provision requiring a transporter of livestock to pay \$10 per hour of unlawful delay in transit. The difficulty of proving the extent of harm to the animals justified the state’s decision to provide for liquidated damages. Id. at 82-84.

Damages floors are especially important when statutes seek to prevent wrongdoers from imposing small losses on each of a large numbers of persons. Which is worse: steal a million dollars from a single person, or steal one dollar from each of a million people? The latter is much worse to society, since small thefts often go unnoticed, or even if noticed, aren’t worth the time and energy necessary to stop the violator. But a million dollars is stolen in both cases. When the cost to any individual is small, victims are unlikely to sue, even though the cost to the entire population of victims may be quite large. Consumer protection laws, like the TCPA, attempt to remedy this problem by authorizing liquidated damages in lieu of having

to prove difficult to quantify actual losses. D. LAYCOCK, MODERN AMERICAN REMEDIES 703-704 (2d ed. 1994) (observing that liquidated damages “encourage enforcement by creating a minimum recovery that is worth suing for”).

Both the difficulty of proving losses in full and the need to encourage litigation of individually small, but collectively large losses justify the decision to put the \$500 floor in the TCPA. Recipients of junk faxes often find it difficult to prove their losses in full, even though *all* have valid claims under the TCPA. Junk faxes entail different kinds of costs: printing costs, including paper, ink, electricity, and wear-and-tear on fax machines; and indirect business costs, including lost and delayed business opportunities and wasted employee time. Indirect business costs can be exceedingly difficult to document, even though they may be, and, in the opinion of Congress often are, substantial. How can one document the value of a business opportunity one never learned of because one’s fax machine was tied up? How can one quantify the cost of delay in hearing from one’s customers or value the goodwill lost in being slow to reply? How can one quantify employee time spent reading, circulating, discussing, disposing of, and complaining about junk faxes when time-records are not kept? See McKenna Affidavit ¶ 17 (LF 647).

If the TCPA is to be enforced, and if wrongdoers like Appellant are to be deterred from imposing small injuries on large numbers of recipients, victims must have incentives to sue. Congress created such incentives by putting the \$500 floor into the TCPA. The floor enables recipients to recover non-trivial damage awards they can use to pay attorneys and to cover the time, energy, and resources they devote to litigation.

When one appreciates the need to compensate victims and deter the practice of junk faxing, one immediately sees that Congress did not set the \$500 floor excessively high. To the contrary, the floor

appears to be too low. Under-enforcement of the TCPA is a serious problem, despite the \$500 floor. Although the TCPA took effect in 1991, junk fax businesses have flouted this law. The logical conclusion is that the \$500 floor is too low to promote conventional litigation, so that generally only litigation brought as a class action can proceed economically.

As mentioned, the Supreme Court long ago answered any questions that existed about the permissibility of compensatory liquidated damages provisions under the Due Process Clause. Brady, Cram, and Williams established that such provisions are constitutional when used to obviate the need to prove actual loss amounts, and to encourage private enforcement. The longstanding, continuing, and widespread use of liquidated remedies in federal and state legislation is compelling evidence of the lawfulness of these remedies under the Due Process Clause.¹⁶

Furthermore, when Congress decides the appropriate sanctions for an act against public policy, that determination is due substantial deference. “[T]he reviewing court must accord ‘substantial deference’ to legislative judgments concerning appropriate sanctions for the conduct at issue.” Browning-Ferris Industries v. Kelco Disposal, 492 U.S. 257, 301 (1989) (Brennan, Marshall, JJ., concurring).

In considering a statute providing a specific dollar amount of civil damages in lieu of actual damages, the Supreme Court has spoken very clearly:

It is in reparation of a private injury, not in punishment of ‘an offense against the public

¹⁶ The Supreme Court is increasingly prone to reject due process challenges to traditional practices. Connecticut v. Doehr, 509 U.S. 1 (1991); Burnham v. Superior Court of California, 495 U.S. 604 (1990).

justice of the state.’ Its reparation is in a fixed amount, it is true, but it is in an amount that has been fixed by a consideration of the determining factors, they necessarily having a certain similarity in all cases. It was the legislative judgment, therefore, that the interests of the state would best be served by an exact definition of the measure of responsibility and relief when the circumstances were such as are represented in the law. It is not less reparative because so defined.

Atchison v. Nichols, 264 U.S. 348, 352 (1924). This reasoning is sound and applicable.

B. “Mathematical Ratio” Arguments Were Rejected Almost a Century Ago.

A mathematical “ratio” test was at one time a legitimate argument. See, Missouri Pacific Ry. v. Tucker, 230 U.S. 340 (1913). But this superficial mathematical approach was discarded in application to statutory damage awards by St. Louis I.M. & S. RY. Co. v. Williams, 251 U.S. 63 (1919), which upheld a statute with a \$300 liquidated damage provision for overcharges of only a few cents, and was decided by the U.S. Supreme Court six years **after** Tucker:

When the penalty is contrasted with the overcharge possible in any instance it of course seems large, but, as we have said, **its validity is not to be tested in that way.**

When it is considered with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates, we think it properly cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.

Id. at 67 (emphasis added) (statute with liquidated damages award of up to \$300 plus attorneys’ fees where actual harm was only a few cents did not violate due process). Appellant’s argument is further

impugned by the realization that the TCPA's \$500 damages provision would equate to a mere \$30 in 1913, when Tucker was decided.¹⁷ The modern Court reiterated its rejection of this categorical mathematical approach in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996):

Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and potential damages to the punitive award. TXO, 509 U.S., at 458. Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. It is appropriate, therefore, to **reiterate our rejection of a categorical approach.**

Id. at 589 (emphasis added).

Cases that have scrutinized large damage awards are inapposite as they deal with excessive **jury** awards, not statutory damages. For example, Kenro, Inc. v. Fax Daily, Inc., 962 F. Supp. 1162 (S.D. Ind. 1997), distinguished Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415 (1994), and related cases, from

¹⁷ Standard inflation tables indicate that one dollar in 1913 would equate to an inflation adjusted 16.7 dollars today. See Ford v. Rigidply Rafters, Inc., 984 F.Supp. 386, 391-92 (D. Md. 1997) (the court took notice of the average rate of inflation citing *The World Almanac & Book of Facts* 131-32 (1997))

the TCPA:

[In Honda] the Supreme Court focused on the “acute danger of arbitrary deprivation of property” posed by the jury’s “wide discretion in choosing amounts,” the “potential that juries will use their verdicts to express biases against big businesses,” and the possibility of “partiality” or “passion and prejudice” influencing the jury’s award of punitive damages. Id., at 424-28, 430-33, 114 S.Ct. at 2337-38, 2340-41. In other words, the Honda Motors’ holding that judicial review was necessary for punitive damage awards set by juries was based largely on its concerns regarding the possible motivations and the broad discretion of juries. We decline to extend the holding of Honda Motor to require judicial review of statutorily prescribed damage awards that may exceed the amount of actual loss proven at trial.

Kenro, 962 F.Sup. at 1165. Congress is a diverse and deliberative body, that does not exhibit the bias or animus that can lead a jury to an improper award.

If Appellant’s argument were correct, a simple trespasser could never be subjected to civil damages since he would cause no actual “monetary” loss. A petty theft penalty could never exceed three times the value of the item stolen. What shoplifter would be deterred by a \$10 consequence for stealing a pack of cigarettes? This situation was perfectly summarized by Lord Halifax: “Men are not hang’d for stealing Horses, but that Horses may not be stolen.” United States v. Barker, 771 F.2d 1362, note 13 (9th Cir. 1985) quoting George Savile, First Marquess of Halifax, Political, Moral, and Miscellaneous Thoughts and Reflections, p. 114, reprinted in The Complete Works of George Savile, First Marquis of Halifax, Walter A Raleigh, ed. 1912.

Appellant would have this Court believe the proportionality must be in relation to the amount of actual pecuniary cost of a single junk fax. That is not what the case law says. A ratio to the actual pecuniary harm is not the standard. Congress was free to consider the overall gravity of the cumulative impact of persons engaging in the wrongful conduct. Congress thus considers the pervasiveness and cumulative harms of Appellant's illegal junk faxing enterprise in total. See, e.g., Perez v. United States, 402 U.S. 146, 155 (1971) (upholding federal regulation of loan sharking activity based in part on the cumulative nationwide impact of \$350 million in losses to victims); Clark v. Community for Creative Non-violence, 468 U.S. 288, 297-98 (1984) (cumulative impact on the park of others wanting to repeat the activities considered relevant).

Furthermore, the \$500 damages in the TCPA is not "criminal punishment". . . it is intended as compensation to the victim for both the cost involved, and for his time and energy needed to take action under such a private attorney general statute. The TCPA does not provide for attorney fees. Like the \$50 statutory damages in the Price Control Act, the \$500 in the TCPA is intended as a form of liquidated total compensation to the victim. The treble damages provision for "willful or knowing" violations, is the only "punishment" and is clearly in proportion to the \$500 in compensatory damages. Congress made that deliberative judgment in establishing \$500 statutory damages in the TCPA, and a court should not substitute its own judgment for that of Congress.

C. Federal Court Decisions on the TCPA and Similar Statutes Directly Contradict Appellant's Arguments.

Specifically on point, is Kenro, Inc. v. Fax Daily, Inc., 962 F. Supp. 1162 (S.D. Ind. 1997), which specifically held that the TCPA's damage provisions do not violate due process. The Kenro court held

that “a \$500 penalty for violation of the TCPA is not so high in relation to actual damages as to violate the Due Process clause.” Id. at 1166. The court reasoned as follows:

The fact that the TCPA establishes as a remedy a damages award of \$500, even when actual monetary damages is less than \$500, does not itself make the award excessive and unreasonable. See Williams, 251 U.S. at 66, 40 S.Ct. 73 (no requirement that a statutory penalty “be confined or proportioned to his loss or damages; for, as it is imposed as a punishment for the violation of a public law, the Legislature may adjust its amount to the public wrong rather than the private injury. . .”) (citations omitted); Franklin v. First Money, Inc., 427 F. Supp. 66, 72 n. 14 (E.D.La.1976) (noting that “Congress has not flinched, in other areas of the law, from exacting damages that do not necessarily reflect actual damages”), aff’d, 599 F.2d 615 (5th Cir. 1979). In fact, statutorily-prescribed minimum damage awards are permissible even where there is no proof of any actual damages Scofield v. Telecable of Overland Park, Inc., 751 F. Supp. 1499, 1521 (D. Kan. 1990) (“liquidated damages are properly awardable even without a showing of actual damages” - upholding Cable Communications Policy Act provision for liquidated damages of \$100/day per violation or \$1,000, whichever is higher), reversed on other grounds, 973 F.2d 874 (10th Cir. 1992). The success of Huntington’s due process challenge, therefore, depends on whether the \$500 amount of damages prescribed by the TCPA is “so sever and oppressive as to be wholly disproportional to the offense and obviously unreasonable.” We hold that it is not.

Id. at 1165. This reasoning is sound. More recently, in Texas v. Am. Blast Fax, 121 F.Supp. 2d 1085 (W.D. Tex. 2000) that federal court in Texas expressly noted:

What Blastfax appears to overlook is that the TCPA damages provision was not designed solely to compensate each private injury caused by unsolicited fax advertisements, but also to address and deter the overall public harm caused by such conduct. . . .

The Court finds the TCPA's \$500 minimum damages provision, when measured against the **overall harms of unsolicited fax advertising** and the public interest in deterring such conduct, is not "so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable." Accordingly, Blastfax's federal due process argument fails.

Id. at 1091 (emphasis added).

Furthermore, even though there are real harms caused by junk faxes, "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though **no** injury would exist without the statute." Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3, (1973) (emphasis added). This is reinforced by the fact that the TCPA is a consumer protection statute, and in accord with similar provisions in other consumer protection statutes:

Congress foresaw that the task of enforcing the Act against retailers would be too vast for the Administrator to accomplish without the help of consumers. The plain purpose of the \$50 clause is to enlist the help of consumers in discouraging violations. The plain meaning of its language need not be, but is, confirmed by its legislative history. The

report of the Senate Committee said of this section: ‘To discourage initial violations, the committee substitute provides for actions at law to recover \$50 or three times the amount of the illegal overcharges.

* * *

The filing and prosecution of a small suit may or may not cost the plaintiff a substantial amount of money, but any suit takes time and effort. Most people have little time or taste for this sort of effort. Congress made \$50 a floor and not a ceiling in order to give overcharged consumers the necessary incentive to sue. The Municipal Court of Appeals says the judgment for \$5 ‘served the purpose of adequately compensating the consumer for the overcharge * * *.’ This may be true, but **consumers will not sue upon a small overcharge if they are compensated for nothing but the overcharge.**

Bowles v. American Stores, 139 F.2d 377 (D.C. Cir. 1943) cert. denied 322 U.S. 730 (1944) (upholding mandatory \$50 damage award (equal to \$500 today, adjusted for inflation) for 4 cent overcharge) (emphasis added). Providing an incentive for victims to enforce the TCPA to the benefit of everyone, is necessary to the TCPA. See S. 1462, The Automated Telephone Consumer Protection Act of 1991; S.1410, The Telephone Consumer Protection Act; and S. 857, Equal Billing for Long Distance Charges: Hearings on S. 875, 1410, and 1462 Before the Subcomm. on Communications of the Senate Committee on Commerce, Science, and Transportation, 102nd Cong. at 27 (1991) (statement of Steven Hamm, Administrator of the South Carolina Department of Consumer Affairs, stating “If there is not credible enforcement, we are wasting our breath, and I think that would be a great shame.”), microformed on Sup.

Docs. No. Y4.C73/7:S.hrg.102-960 (U.S. Gov't Printing Office). **Civil damages must be “significant enough that it is not simply a cost of doing business.”** *Id.* at 30. “We are definitely in favor of civil sanctions, and I think that the law does, indeed, have to have enforcement mechanisms.” *Id.* at 47 (statement of Thomas Stroup, President, Telocator.).

In Erienet, Inc. v. Velocity Net, Inc., 156 F. 3d 513 (3rd Cir. 1998), the Second Circuit Court of Appeals recognized that the liquidated damages provision of the TCPA “puts teeth into the statute” and is a basic necessity based on the “sheer number” of violations. The modest statutory damages provided by the TCPA is simply a necessary part of the enforcement mechanism. See also the statutory damage provisions of statutes such as the Fair Credit Reporting Act (15 U.S.C. § 1681n), Cable Communications Policy Act (47 U.S.C. § 551), and Migrant and Seasonal Agricultural Worker Protection Act, (29 U.S.C. § 1854).

As discussed supra, each year this unconscionable practice is stealing **hundreds of millions of dollars** annually from unwilling recipients today. (LF 654, McKenna ¶ 40) (over \$250 million). Without sufficient liability, a defendant will simply chalk it up as a cost of doing business. “Plainly, it ought not to be cheaper to violate the Act and be sued than to comply with the statutory requirements.” Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1332 (5th Cir 1985).

Nor is the tale of the Nicholson v. Hooters a case to be held up to support a finding otherwise. Any business that uses unlicensed contractors, fly-by-night agents, maintains insufficient liability insurance, or takes other “cost cutting” measures, has cast chickens to the wind that one day will come home to roost. As are many bankruptcy filings, Hooters’ bankruptcy was as much litigation strategy as anything else. Notably the restaurant is still in operation, has settled with Nicholson for the value of Hooters’ insurance

policies, extricated itself from further liability, and dismissed its appeal.

POINT IV. APPELLANT’S AFFIRMATIVE DEFENSES FAILED AS A MATTER OF LAW.

Point Relied On: **The Trial Court Was Correct In Granting Harjoe’s Motion For Summary Judgment, It Correctly Applied the Summary Judgment Standard, Harjoe Demonstrated That Herz Financial’s Affirmative Defenses Of Lack Of Standing, Failure To Mitigate, And The Unconstitutionality Of The TCPA Fail As A Matter Of Law, And The Trial Court Correctly Determined That There Were No Genuine Issues Of Material Fact Related To Herz Financial’s Affirmative Defenses.**

The applicable standard of review of this point is de novo.

Appellant’s fourth point of error sets out three affirmative defenses that instead, actually raise three issues of law, not of fact.

(a) The TCPA is unconstitutionally vague, unconstitutionally restricts protected commercial speech, and creates a damages remedy that unconstitutionally imposes a grossly excessive punishment. (LF 33.)

(b) Harjoe lacks standing as he received the alleged facsimiles while in the course and scope of his employment with Northwestern Mutual Life. (LF 34.)

(c) Harjoe failed to mitigate his damages by failing to request to be placed on Herz Financial’s no-fax list or by taking any other action. Rather, Harjoe allowed the

facsimiles to continue in an effort to build rather than mitigate his damages. (LF 34.)

Appellant's Br. at 94. All are manifestly matters of law proper for summary judgment. Item (a) regards the constitutional challenges already addressed herein. Item (b) is a question of statutory construction even if facts sufficient to make such an interpretation were present (which they are not). Item (c) is inapplicable to the TCPA.

A. Constitutional Challenges

Constitutionality of a statute is a question of law. Stating it as an affirmative defense in the context of summary judgment does not change the standard of review of a constitutional question.

B. Standing

The facts relevant to standing are undisputed. The affidavit of the plaintiff demonstrates, and stands unrebutted, that he owns the fax machine and is the subscriber of the phone number. (LF 55, Harjoe Affidavit ¶¶ 2-4.) Appellant stipulated that it sent the faxes to "(314) 878-7277" which is undisputedly Plaintiff's fax number. Regardless of the "capacity" in which he was sent the fax, regardless of the header on the fax,¹⁸ regardless of who Respondent (an independent insurance agent)¹⁹ does business with, regardless of any intent of Appellant, Respondent's personal property was trespassed upon and stolen by

¹⁸ To the extent that the statements on the fax are sought to be used by Appellant for the purposes of the truth of what they assert, they are inadmissible hearsay. The entire "employee" argument is premised only on hearsay use of those statements.

¹⁹ Despite the conclusory allegation in Appellant's memo that Respondent is an "employee" of Northwestern Mutual Life, this is not true, and no factual basis exists for such a statement. He is an independent insurance agent, and not employed by anyone but himself.

Appellant. The “capacity” in which he was sent the faxes is irrelevant.

Appellant cites to nothing sufficient to raise a fact question of the “employment” of Respondent Harjoe by Northwestern Mutual Life. Nowhere does Appellant make any factual, admissible statement making such an allegation.

Appellant’s claim that to hold otherwise would mean “any employee, secretary, or clerk would have standing to bring a TCPA action in lieu of his employer” is incorrect as a matter of law. (Appellant’s Br. at 95). If an employee drives his personal car on company business and it is damaged by another driver, the employee is the one with the cause of action against the person who injured his property - not the employer for whom the employee was working. Appellant’s claim to the contrary is illogical.

Furthermore, even if Harjoe were “employed” by Northwestern (which he is not, nor was *any* evidence of such a relationship put forth by Appellant), it is irrelevant. As the affidavits clearly show, Harjoe owns the fax machine, the paper, and the telephone line. (LF 55, Harjoe ¶¶ 2-4.) Appellant stipulated that it sent the fax to Harjoe’s fax machine’s number. These facts are true regardless of whom he has any employment relationship with. Simply put, Appellant has not set out anything to raise a question of fact that is *material* to the issue of standing.

C. Mitigation of Damages

Appellant has also raised the issue of mitigation of damages. What Appellant argues is that Respondent is somehow limited in his recovery if he failed to avail himself of the removal number placed on the unsolicited junk fax, and that he should be barred from recovering on faxes subsequent to the first fax. Appellant ignores the well-developed body of law on the issue of mitigation, and misapplies the doctrine in a disingenuous attempt to shift the focus of this inquiry from Appellant’s illegal conduct to the

victim's innocent conduct instead. This defense has already been rejected in TCPA cases as a matter of law by trial courts. Nat. Ed. Acceptance, Inc. v. Smartforce, Inc., No. 01AC-2849 (S. Louis County, Div. 41, June 21, 2002). A simple review of the law of mitigation should quickly end this inquiry.

Mitigation holds that one can not, once injured, ignore an opportunity to act so as to stem the continuing increase in damages from that injury, and recover the same from the wrongdoer. Cline v. City of St. Joseph, 245 S.W.2d 695 (Mo.App. 1952). Mitigation of damages is a bar to further recovery of *damages*. It is not an element of fault, applying only to the amount of damages. Id., at 702. Mitigation applies only once an injury is sustained, and the issue of mitigation can only be raised in the context of damages. Prior to the assessment of liability, consideration of mitigation is improper. Evinger v. Thompson, 265 S.W.2d 726 (Mo. Banc 1954).

In addition, mitigation is not an affirmative defense, since it is not a defense to liability - it only affects the determination of the amount of damages. A defendant bears the burden of proof in establishing plaintiff should have mitigated of damages. Braun v. Lorenz, 585 S.W.2d 102 (Mo. App. 1979). It is not a defense to liability since even if mitigation is established, it goes *solely* to damages, not to liability. And unlike affirmative defenses, mitigation does not have to be overcome to prevail on a motion for summary judgment as to liability, since mitigation presupposes liability. Even if mitigation of damages applied in this case, and even if Appellant could avail itself of that doctrine, it cannot affect liability; hence cannot affect the granting of the Motion for Summary Judgment by the trial court. Appellant must concede liability under the TCPA in order to present evidence of mitigation. Absent liability, there are no damages, and absent damages, the issue of mitigation is hypothetical, not justiciable. But in the context of the TCPA, damages are set, indeed mandated, absolutely by the statute. 47 U.S.C. § 227(b). As a matter of law and

logic, no argument of mitigation can even be relevant in a TCPA case. It cannot be raised before liability is established, and it is mooted by the statutory language mandating fixed statutory damages after liability is established.

Appellant is arguing that the Court should ignore its subsequent violations because those violations might have been prevented if Respondent had been clairvoyant and cynical enough to presume that Appellant would violate federal law at some unknown time in the future, and take an affirmative step to avoid Appellant's future illegal conduct. This is akin to requiring residents on a street with frequent gang violence to wear bullet-proof vests - or otherwise be barred from civil recovery for gunshot injuries. This is not a reduction in damages, it is a reduction in liability.

Mitigation of damages in the case sub judice is also improper because Appellant is applying the concept of mitigation to the commission of a series of *independently* wrongful acts. This represents a seemingly new form of mitigation - one that stands for the proposition that a plaintiff must presume that a defendant will commit an unlawful act, and must take steps before that act is done. No case, in Missouri or anywhere else that Respondent could find, has ever taken this novel approach to the issue of mitigation. In fact, the law in Missouri generally does not permit mitigation to be asserted as a defense to intentional conduct, such as an intentional trespass. Fletcher v. City of Independence, 708 S.W.2d 158 (Mo. App. W.D. 1986). Mitigation does not excuse the consequences of a harm intentionally inflicted merely because the person injured neglected to take precautions to avoid or mitigate the damages. The law so roundly condemns such conduct as to refuse to allow such a tortfeasor to assert the simple neglect of the victim to allay the damages so flagrantly incurred. Prosser and Keeton, The Law of Torts § 65 p. 462; § 67, p. 467 (5th ed. 1984); Restatement (Second) of Torts, § 918(2) (1977). Each fax is independently actionable,

and like the serial commission of torts, not the proper subject of the defense of mitigation. Under Missouri law, mitigation of damages simply does not apply to an intentional act such as sending illegal junk faxes. Fletcher v. City of Independence, 708 S.W.2d 158 (Mo. App. W.D. 1986).

In a classic mitigation case, a party is injured but fails to “stop the bleeding.” Upon examination by the trier of fact, it is determined that after a certain point, the injured party’s failure to act stopped being the fault of the defendant, and that the plaintiff must bear the costs from that point. For example, a defendant throws a rock through a plaintiff’s window, breaking it. Respondent is aware of the broken window, but does nothing to fix it, even though he could do so easily and at nominal cost. A storm ensues, and plaintiff’s property is damaged by the resulting water infiltration through the broken window. Mitigation stands for the proposition that while the plaintiff may recover for the broken window, he may not recover for the water damage, as he could have avoided it.

The situation presented in this case is dramatically different. Appellant is sending unsolicited faxes, at Appellant’s leisure, and in violation of a federal law, to Respondent’s fax machine. Appellant may do this once, or twenty times. This is in the exclusive control of Appellant. Respondent has no knowledge of Appellant’s motive or intent. Appellant may indeed violate the law repeatedly. Appellant may stop after a single violation. It is entirely up to the Appellant and Respondent has no way to be privy to any knowledge of that intent.

Every defendant is presumed to know the law. Ignorance of the law is not a defense, and may not be the basis for asserting one. State of Missouri v. Bridges, 398 S.W.2d 1 (Mo. 1966). Just like the rock thrower, Appellant here is hurling its unwanted missives into Respondent’s premises via Respondent’s fax machine, and on Respondent’s paper, using Respondent’s toner. The “rocks” it throws are stolen from

Respondent. Appellant cannot now be heard to argue that unless Respondent tells Appellant to stop throwing those stolen rocks through Respondent's window, Appellant is only liable for the first window broken. This is not the law of mitigation.

Each fax, like each rock thrown, is independently wrongful. Respondent could sue for the first broken window, the last broken window, or every broken window. If a plaintiff were only motivated to sue after a defendant had broken five windows, a defendant could not be heard to complain that such a plaintiff should have told him to stop throwing rocks earlier. Appellant is presumed to know that throwing rocks, particularly rocks stolen from Respondent, through Respondent's window, constitutes a trespass to chattel, and is wrongful in and of itself. The fact that Respondent did not sue immediately is *not* failure to mitigate. And any requirement that a plaintiff tell a defendant to stop throwing rocks suddenly shifts a defendant's duty to know and obey the law onto a plaintiff's shoulders, because of the failure of that plaintiff to educate the rock thrower, deprives that plaintiff, who is innocent of any wrong doing, of compensation for the torts of the rock thrower.

POINT V. HARJOE COMPLIED WITH SUPREME COURT RULE 74.04.

Point] **The Trial Court Was Correct In Granting Harjoe’s Motion For**
Relied] **Summary Judgment Because, The Motion And Supporting Testimony**
On:] **Complied With Missouri Supreme Court Rule 74.04.**

The applicable standard of review of this point is de novo.

Appellant complains about a lack of support in Respondent’s motion for Summary Judgment, however that motion was amply supported by the exhibits and evidence before the court.

For example, “[e]ach of the faxes at issue contains material advertising the commercial availability or quality of property, goods, or services.” (LF 43 at ¶14). This is amply demonstrated by the faxes that make up the cause of action, to which Appellant stipulated (LF 222-223, ¶¶ 1-9). Furthermore, whether those faxes constitute “material advertising the commercial availability or quality of property, goods, or services” is a mixed question of law and fact to be determined by the court after looking at the fax. (LF 225-242). Indeed, all of the statements complained of by Appellant constitute questions of law, whose recitation in the pleadings, motion, and affidavit are mere formalities.

Respondent did not “rest upon the allegations or denials of the party’s pleading” as Appellant suggests.²⁰ Ample facts and allegations proving Respondent’s entitlement to summary judgment, were

²⁰ Appellant’s argument here appears to stand for the proposition that a party cannot restate the allegations in the petition in a sworn affidavit, or else they are “resting upon the allegations” of that pleading. It is clear that the admonition against resting on the allegations of the pleading means failure to file any sworn testimony or other evidence, and leaving the pleadings to stand alone.

made as sworn testimony. See Affidavit of David Harjoe. (LF 55.)

Respondent's Affidavit

Appellant complains that Respondent's affidavit is merely conclusory. However, the English language only leaves so many ways to state "I did not give Herz Financial prior permission or invitation to send junk faxes to my fax machine." How can one prove a negative except by a direct statement that what is in question was categorically not done?

! I have never given my fax telephone number to Herz Financial or www.Just DI.com. (LF 56, Harjoe ¶ 16.)

! I have never requested or consented to receive advertisements or any other faxes from Herz Financial or www.Just DI.com. (LF 56 Harjoe ¶ 17.)

! I have never given Herz Financial or www.Just DI.com permission to send me any fax transmissions. (LF 56, Harjoe ¶ 18.)

Accepting Mr. Herz's affidavit as true for the purposes of summary judgment, Mr. Herz's affidavit does not conflict with these statements. As Mr. Herz admits, someone other than Respondent could have give out Respondent's fax number. (LF 496, Herz Affidavit ¶ 3.) Mr. Herz simply took no steps to verify it - and that laxity is clearly his own choosing. The non-moving party has the burden of refuting the facts asserted under oath by the movant. ITT Commercial Fin. Corp. v. Mid-America Marine, 854 S.W.2d 371, 376 (1993). An affidavit in opposition to summary judgment must state specific facts and not conclusions. First Community Bank v. Western Sur. Co., 878 S.W.2d 887 (Mo.App. S.D. 1994). An affidavit that fails to aver specific facts and relies only upon mere doubt and speculation fails to raise any issues of material fact. J.S. DeWeese Co. v. Hughes Treitler Mfg. Corp., 881 S.W.2d 638, 646

(Mo.App. E.D. 1994); see, also, Morely v. Ward, 726 S.W.2d 799, 805 (Mo.App. E.D. 1987); ITT Commercial Fin. Corp. 854 S.W.2d at 378.

In sum, Mr. Herz affidavit was insufficient to rebut and did not contradict the facts set forth my Mr. Harjoe's affidavit, and thus was insufficient to resist summary judgment.

POINT VI. THERE WERE NO MATERIAL FACTS IN DISPUTE

**Point The Trial Court Was Correct In Granting Harjoe’s Motion For
Relied Summary Judgment, Because Harjoe Satisfied The Summary
On: Judgment Standard, In That Herz Financial Did Not Adequately Rebut
 the Factual Testimony Presented By Harjoe, Did Not Demonstrate The
 Existence Of Genuine Issues Of Material Fact With Respect To
 Whether Harjoe Had Given Express Invitation Or Permission To, And
 Whether Harjoe Had An Established Business Relationship With Herz
 Financial Is Irrelevant.**

The applicable standard of review of this point is de novo.

They only “facts” identified by Appellant in its sixth assignment of error are 1) and alleged existence of an established business relationship and 2) alleged existence of “prior express permission or invitation” to send junk faxes to Mr. Harjoe. These defenses fail as a matter of law.

A. There Is No “Established Business Relationship” Defense to This Cause of Action

Whether or not a “business relationship” existed is wholly and completely irrelevant to a junk fax claim under the TCPA. That defense is available to certain telemarketing calls, actionable under a different section of the statute. Compare 47 U.S.C. § 227(a)(4) to 47 U.S.C. § 227(a)(3). Raising this “defense” in a junk fax case is irrelevant, and every court to address that issue has so concluded. For example:

Plaintiffs’ Motion for Summary and Declaratory Judgment Against the Claimed

“Established Business Relationship Defense” is in all things GRANTED; accordingly, the court holds and declares that there is no established business relationship exemption, exception or defense to unsolicited fax advertising under the Telephone Consumer Protection Act, 47 U.S.C. § 227, et seq.

Girards v. Inter-Continental Hotels Corp., No. 01-3456-K (Tex. Dist. Ct., Apr. 20, 2002) (Appx. A44).

Appellant cites to an FCC “interpretation” (Appellant’s Br. at 61, citing In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 1992 FCC Lexis 7019, § 54) that an “established business relationship” somehow implies the existence of “prior express permission or invitation.” However, it is emphatically clear from the FCC’s own words that:

“In banning telephone facsimile advertisements, the TCPA leaves the Commission **without discretion to create exemptions** from or limit the effects of the prohibition (see § 227(b)(1)(c));”

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 7 FCC Rec. 8752, n.87 (1992). (emphasis added). The terms “prior express permission or invitation” and the term “established business relationship” are different terms, **and mean different things**. This is clearly demonstrated by the fact that Congress uses both those terms disjunctively in the portion of the TCPA that applies to telemarketing calls. That TCPA exempts live telemarketing calls that are made:

- A) to any person with that person’s prior express invitation or permission,
- (B) to any person with whom the caller has an established business relationship, or
- (C) by a tax exempt nonprofit organization.

47 U.S.C. § 227(a)(3). If the existence of an “established business relationship” satisfied the term “prior express invitation or permission” there would be no need for both terms to be in the statute. It would be a surplusage. It is axiomatic that Congress does not inject surplus and unnecessary words into its statutes. “[L]egislative enactments should not be construed to render their provisions mere surplusage.” Dunn v. Commodity Futures Trading Comm’n, 519 U.S. 465 (1997).

The “interpretation” that Appellant wants this Court to adopt, “would make either the first or the second condition redundant or largely superfluous, in violation of the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.” Colautti v. Franklin, 439 U.S. 379, 392 (1979).

In addition, “prior express permission or invitation” plainly requires that permission or invitation be **express**. The term “prior express invitation or consent” is not defined in the statute, but Black’s Law Dictionary defines “express” as:

Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference. Minneapolis Steel & Machinery Co. v. Federal Surety Co., C.C.A.Minn., 34 F.2d 270, 274. Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. **The word is usually contrasted with “implied.”**

Black’s Law Dictionary (Revised 6th ed.) (emphasis added). Webster’s dictionary provides a similar definition. This is the proper definition to use within the context of the TCPA. Even if some form of permission can be **implied** from a business relationship, it cannot rise to the level of **express** permission

or invitation. Appellant’s argument fails by simple application of the dictionary to the words of the statute.

B. Congress Explicitly Rejected an “Established Business Relationship” Exemption for Faxes.

Furthermore, because Congress did include an exemption for “established business relationship” in the TCPA, but limited that exemption to telemarketing calls, the exclusion of that exemption from the junk fax provisions is dispositive. The legal maxim casus omissus pro omisso habendus est instructs us that such an exclusion is intentional. “Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” Rodriguez v. United States, 480 U.S. 522, 525 (1987).

Congress did at one time, include an exemption for both “established business relationship” and “prior express invitation or permission” in the junk fax provisions of the TCPA’s precursor bills. For example the House version of the TCPA included an “established business relationship” exemption for unsolicited fax ads:

The term ‘unsolicited advertisement’ means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person (A) without that person’s prior express invitation or permission, or (B) with whom the caller does not have an established business relationship.

H.R. 1304, 102d Cong., 1st Sess. § 3, § 227(a)(4), (Passed by the House, Nov. 18, 1991). This version was rejected by the Senate, and Congress adopted the Senate’s language in the final version of the TCPA passed a month later. See 137 Cong. Rec. S18781-02 (Nov. 27, 1991) (Statement of Senator Hollings) (“Mr. President, I am pleased to report that we have come to an agreement with the House on a bill to

restrict invasive uses of telephone equipment. The amended version before the Senate today of S. 1462 . . . incorporates the principal provisions of . . . H.R. 1304, which passed the House on November 18.”). When Congress deletes language from a bill before enacting a statute, the deleted language is not to be “penciled back in” later by an administrative agency or the courts:

The Conference Committee, however, deleted this “effects on commerce” provision, leaving only the “in commerce” language of 2 (a). [footnote omitted] Whether Congress took this action because it wanted to reach only price discrimination in interstate markets or because of its then understanding of the reach of the commerce power, its action strongly militates against a judgment that Congress intended a result that it expressly declined to enact.

Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200 (1974).

Congress’ intent is crystal clear. Although an administrative agency is able to set out its interpretations of ambiguous statutes, it cannot alter the statute itself, or adopt an interpretation that is contrary to the plain intent of Congress. The United State Supreme Court has held that with clear language and history such as this, there is no room for an administrative agency to make such expansions of the exemptions.

But this deference [to agency interpretation] is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history. On a number of occasions in recent years this Court has found it necessary to reject the SEC’s interpretation of various provisions of the Securities Act.

Int’l Brotherhood of Teamsters v. Daniel, 439 U.S. 551, 566 n. 20 (1979) (citations omitted.)

C. There Was No Evidence of Prior Express Permission or Invitation.

Harjoe's affidavit sets out in certain and unambiguous terms that he did not grant express permission to anyone to send the faxes at issue to him. A defendant's burden to refute such unambiguous allegations is clear. ITT Commercial Fin. Corp. v. Mid-America Marine, 854 S.W.2d 371, 376 (1993). Rather than refute Harjoe's sworn testimony, Mr. Herz speculated only that "someone" provided the information, including Harjoe's fax number, to Herz. (LF 496, Herz ¶ 3.) An affidavit that fails to aver specific facts and relies only upon mere doubt and speculation fails to raise any issues of material fact. J.S. DeWeese Co. v. Hughes Treitler Mfg. Corp., 881 S.W.2d 638, 646 (Mo.App. E.D. 1994). A court considering summary judgment does not evaluate the credibility of an affiant's testimony. New Prime, Inc. v. Professional Logistics, 28 S.W.3d 898, 904 (Mo. App. S.D. 2000). But in this case, the affidavits did not conflict - both can be true. Harjoe did not give permission, and Herz admits that someone else could have entered Harjoe's information. There is no conflict, and Herz was in the superior evidentiary position here. Accepting his claim that the information was provided to Herz, Herz could have implemented verifications or other record keeping procedures to verify the information. He could have sent a confirmation letter, or even called on the phone. He made a business decision to cut corners and save costs, and now must bear the liability for that business decision.

In addition, even if Respondent did give the information to Herz himself, there is no evidence whatsoever that there was any statement that constituted "express permission or invitation" to receive junk faxes. Merely distributing your fax number does not constitute such express permission. In the Matter of the Telephone Consumer Protection Act of 1991, Memorandum Opinion and Order, ¶ 37, 10 FCC Rcd 12391 (1995) ("We [the FCC] do not believe that the intent of the TCPA is to equate mere distribution or

publication of a telephone facsimile number with prior express permission or invitation to receive such advertisements.”) In the face of the explicit affidavit of Mr. Harjue that no such consent was given, the nonmoving party must come forth with something sufficient to directly rebut that fact in order to survive summary judgment. Nor can permission be implied, since the statute mandates that it be “express.” See Black’s Law Dictionary citation of “express” supra. Webster’s dictionary provides a similar definition. This is the proper definition to use within the context of the TCPA. There is no evidence whatsoever that any text on the web site, or any disclosures made over the phone, rise to the level of obtaining “express” consent to receive junk faxes.

POINT VII. APPLICATION OF THE TCPA DAMAGES TO EACH FACSIMILE
PAGE TRANSMITTED IS A QUESTION OF LAW

Point **The Trial Court Was Correct In Granting Harjoe’s Motion For**
Relied **Summary Judgment, Because The Damages Awarded Were In The**
On: **Statutory Amount, In That Each Faxed Page of Unsolicited Advertising**
Material Is a Separate Violation Of The TCPA.

The applicable standard of review of this point is de novo.

Whether the TCPA imposed damages for each page transmitted, or only a single violation regardless of how many pages are transmitted, is a question of statutory interpretation, and properly adjudicated at summary judgment.

To reformat the statute for clarity, the relevant portion provides:

It shall be unlawful for any person within the United States to use any telephone facsimile machine, computer, or other device to send [any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission] to a telephone facsimile machine.

47 U.S.C. § 227(b)(1)(C) with definition from § (a)(4) incorporated. The statute 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.

To determine whether liability should apply to each page of junk faxes received, or whether a fax

of many pages should only constitute a single violation, one need only observe the result of the following illustration and consider congressional intent.

If a businessman comes in and finds 18 pages of commercial junk faxes sitting in the hopper on his fax machine, 18 pages of paper were used, 18 pages worth of toner or storage were consumed, and his machine was occupied for the time to transmit 18 pages of material, all by a commercial advertiser illegally subsidizing his commercial enterprise. The exact same harms have been visited upon him whether each page was transmitted an hour apart over an 18 hour period in 18 separate phone calls, or whether all were received in the same phone call. The number of phone calls made is irrelevant to junk faxes harms. Why should 18 separate junk fax calls be treated differently than a single phone call that pours out the same 18 pages of junk from the same commercial advertiser? The most logical treatment is clearly for each page to be treated as an independent violation.

Respondent deceptively cites to the definition of “telephone solicitation” from the statute (Appellant’s Br. at note 20) for the proposition that the individual “call” is what is actionable, but that definition (“telephone solicitation”) is only relevant in *telemarketing* causes of action where the interruption of the privacy of the home by the call is the primary concern of the statute and is independent of the length of time of the call. The term “telephone solicitation” in the statute has no relevance in a junk fax action.

**POINT VIII. OBJECTIONS TO RESPONDENT’S EXPERTS ARE WITHOUT
MERIT.**

Point Relied On: **The Trial Court Was Correct In Denying Herz Financial’s Motion For Summary Judgment, And The Opposing Affidavits Complied With Supreme Court Rule 74.04(e), Were Not Made On Personal Knowledge, Had Adequate Foundation, And Did Not Rely On Or Incorporate Irrelevant Hearsay.**

The applicable standard of review of this point is abuse of discretion.

In the eighth and final point relied on, Appellant attacks the affidavits of Respondent’s experts, Douglas McKenna and Joe Shields. Those objections were heard, and rejected by the trial court. As evidentiary objections, the standard of review is an abuse of discretion standard. “The trial court is vested with broad discretion regarding rulings on the admission of evidence.” Giddens v. Kansas City S. Ry. Co., 29 S.W.3d 813 (2000).

In the trial court, Appellant moved to strike the affidavits of Doug McKenna and Joe Shields. However, nowhere in Appellant’s motion is a citation to the applicable standard of Section 490.065.1 R.S.Mo. Appellant avoids this necessary citation, likely because it is fatal to Appellant’s motion, as both Mr. McKenna and Mr. Shields both meet the liberal requirements of that section. Section 490.065.1 R.S.Mo. provides that:

In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an

expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

There is no shortage of clear precedents interpreting this code section, and all demonstrate the liberal interpretation of the statute. “A witness may testify as an expert when, by reason of education, experience or training, the witness possesses superior knowledge to that of the average juror on the subject matter of the testimony. Section 490.065.1 R.S.Mo Cum.Supp.1990.” Warren v. London & Sons, Inc., 883 S.W.2d 570, 572 (Mo. App. E.D. 1994).

While Mr. McKenna and Mr. Shields have gained their expertise by personal experience and independent study, the extent of their study and experience is irrelevant in determining their qualifications as an expert. “The issue in determining whether a witness is an expert is not a determination of whether there is another better qualified witness; rather, the question is whether this witness possesses a ‘peculiar knowledge, wisdom or skill regarding the subject of inquiry, acquired by study, investigation, observation, practice or *experience*.’ Section 490.065.1 R.S.Mo (1994).” Emerson Electric Co. v. Crawford & Co., 963 S.W.2d 268 (Mo. App. E.D. 1998) (emphasis added). Both Mr. McKenna and Mr. Shields set out direct factual information about their practical experience and independent study of the junk fax issues to which they testify.²¹

Substantial practical experience in the area in which the witness is testifying is a permissible source of expertise. Donjon v. Black & Decker (U.S.), Inc., 825 S.W.2d 31, 32 (Mo.App. E.D.1992). The extent of the witness’ experience goes to the weight

²¹ Mr. McKenna’s affidavit is found at LF 642. Mr. Shields’ affidavit is found at LF 655.

of the evidence and does not render the testimony incompetent. In the Interest of C.L.M., 625 S.W.2d 613, 615 (Mo. banc 1981).

Emerson Electric Co. v. Crawford & Co., 963 S.W.2d 268 (Mo. App. E.D. 1998). Indeed, drug users have been admitted as experts on the quality and effects of illegal drugs in court.²²

Mr. McKenna and Mr. Shields both meet the requirements to satisfy Section 490.065.1 as expert witnesses in the area of unsolicited fax advertisers practices, and impact on recipients. They both have “[s]ubstantial practical experience in the area in which the expert is testifying.” Donjon, 825 S.W.2d at 32, citing McCutcheon, 796 S.W.2d at 906. These witnesses know much more about junk faxing than the “average juror” and that is all that is required. Appellant’s objections are not sufficient to exclude the testimony of a qualified expert witness. Experts may give opinion testimony, and rely on trade publications in their area of expertise. The citations to the Gartner Group industry studies by Mr. McKenna are clearly such publications. The trade journal exception is a black letter exception to the hearsay rule. See Fitzgibbon Discount Corp. v. Windisch, 271 S.W.2d 226, 230 (Mo. App. 1954); Baker v. Atkins, 258 S.W.2d 16

²² See, e.g., United States v. Paiva, 892 F.2d 148, 156–57 (1st Cir. 1989) (a cocaine user permitted to testify that the substance looked and tasted like cocaine, and that in her opinion it was cocaine; court admitted the testimony under Rule 701). See, also, United States v. Zielie, 734 F.2d 1447, 1456 (11th Cir. 1984) (two experienced marijuana dealers permitted to testify that the substance at issue was marijuana), cert. denied, 469 U.S. 1189 (1985); United States v. Sweeney, 688 F.2d 1131, 1145 (7th Cir. 1982) (prior use, knowledge, and sampling of drug identified sufficient to qualify witness to testify as to identity of a drug under Rule 701).

(Mo.App. 1953); Garvis v. K Mart Discount Store, 461 S.W.2d 317, 321 (Mo. App. 1970) (citing 29 Am.Jur.2d, Sec. 892).

Nor do the journals and industry publication Mr. McKenna referenced lack credibility.²³ They are published by Gartner - an industry analysis firm often looked to by Congress itself for critical data and testimony on technological issues before Congress. Gartner has been a leader in this area for 20 years, and has been cited by Congress itself many times. See, e.g., 143 Cong. Rec. S9981-01 (Sep. 25, 1997).

McKenna is in fact a more studied and informed expert on the fax machine issues than Appellant's expert Tony Tajkarimi. Mr. Tajkarimi presented the court below no information about the number of fax machines in the United States, the types of fax machines sold, how many junk faxes are sent a year, or how

²³ Though an oversight, copies of the journal articles cited by McKenna were apparently omitted from the court record. Respondent only became aware of this omission in reading Appellant's brief, as the absence of those documents was not raised in the trial court, nor was any objection made by Appellant based on their absence. Because any complaint about the absence of these documents from the affidavits of Mr. McKenna is an evidentiary objection that was not preserved at the trial court, Appellants have waived the right to object to their absence in this appeal, especially since a timely objection in the court below would have resulted in the deficiency being quickly corrected. "A party who fails to object to testimony at trial fails to preserve the issue for appellate review. Williams v. Enochs, 742 S.W.2d 165, 168 (Mo. banc 1987). A party is not permitted to advance on appeal an objection different from that stated at trial. Wilson v. Shanks, 785 S.W.2d 282, 285 (Mo. banc 1990)." State ex rel. McHaffie v. Bunch, 891 S.W.2d 822 (1995).

many of what type of fax machines are sold each year.²⁴

Mr Shields sets forth a very telling analytical example of the amplified harms at a government office - The Johnson Space Center in Houston - that junk faxes cause to businesses and government institutions with large numbers of fax machines. This insight and analysis applies to other offices and government institutions across the country.

Finally, Appellant claims that in Kaufman v. ACS, that the testimony of Mr. McKenna and Mr. Shields was rejected.²⁵ This is false. Only portions of that testimony was excluded, with the rest sustained over objections. Evidentiary decisions from other states with differing standards for expert testimony qualification are not helpful in determining an abuse of discretion here.

²⁴ In fact, almost the entirety of Mr. Tajkarimi's testimony is about capabilities of only *some* fax machines. As an analogy, consider if an expert on cars testified that some cars get 150 miles per gallon and produce no pollution. This does not mean that the average car on the highway meets those standards. Appellant's expert produced no numbers or independent data about *what percentage* of fax machines have those advanced features. Thus his testimony sheds little relevant light on the overall cumulative costs to all victims.

²⁵ While Appellant cites Kaufman v. ACS Systems, Inc., No BC22258 (Super Ct. Ca., Oct 30, 2001) in an attempt to discredit Respondent's experts, Appellant fails to tell this Court that the Kaufman court rejected the exact same constitutional defenses raised here.

CONCLUSION

For the reasons set forth herein, The judgement of the trial Court should in all respects be affirmed.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with Supreme Court Rule 84.06 and, according to the word count function of Corel Wordperfect by which it was prepared, contains 27,890 words, exclusive of the cover, signature block, Certificate of Service, and this Certificate..

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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I hereby certify that a copy of the foregoing was sent to the Attorney for Defendant, Mary Ann L. Wymore, Kevin Hormuth, Greensfelder, Hemker & Gale, P.C., 2000 Equitable Building, 10 S. Broadway, St. Louis, MO 63102, by regular mail this the 25th day of November, 2002.

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Appendix to Brief of Respondent

<u>Zeid v. The Redding Law Firm, P.C.,</u> No. 01AC-013005 (St. Louis County, Div. 39, March 19, 2002).	A1-14
<u>Brentwood Travel Service, Inc. v. Lorie A. Ewing,</u> No. 01AC-022171 (St. Louis County, Div. 39, April 3, 2002).	A15-16
<u>Brentwood Travel Service, Inc. v. Advanced Cellular Communications, Inc.,</u> No. 01AC-011580 (St. Louis County, Div. 35, May 10, 2002).	A17
<u>Nat. Ed. Acceptance, Inc. v. Smartforce, Inc.,</u> No. 01AC-2849 (St. Louis County, Div 41, June 21, 2002).	A18-21
<u>Micro Eng. v. St. Lousi Ass'n of Credit Mgmt., Inc.,</u> No. 02AC-008238 XCV, (St. Louis County, Div 39, Aug. 13, 2002).	A22 -26
<u>In the Matter of Fax.com, Notice of Apparent Liability for Forfeiture,</u> 17 FCC Rcd. 15927 (2002).	A27-43
<u>Girards v. Inter-Continental Hotels Corp.,</u> No. 01-3456-K (Tex. Dist. Ct., Apr. 20, 2002).	A44-45
<u>Franklin County Express v. Global Communications, Inc.,</u> No. 02AC-13274 (St. Louis County, Div. 41, Oct. 15, 2002)	A46
H.R. Rep. No. 102-317 (1991).	A47-72
<u>Hearing on H.R. 628, 2131 and 2184 Before the Subcomm. on</u> <u>Telecommunications and Finance of the House Comm. on Energy and</u> <u>Commerce, 101st Cong. (1989).</u>	A73-135