S. HRG. 108–982

THE DO-NOT-CALL REGISTRY

HEARING

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

SEPTEMBER 30, 2003

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

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THE DO-NOT-CALL REGISTRY

TUESDAY, SEPTEMBER 30, 2003

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Committee met, pursuant to notice, at 10:10 a.m. in room SR–253, Russell Senate Office Building, Hon. John McCain, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. JOHN MCCAIN, U.S. SENATOR FROM ARIZONA

The CHAIRMAN. Good morning, and I would, of course, as always, allow my colleagues to make opening statements. I would strongly request that they make them brief, as I will make my opening statement brief. We have a lot of ground to cover and a lot of things are changing almost as we speak. And I want to especially thank our first two witnesses, Chairman Muris and Chairman Powell, for taking the time to visit with us this morning.

I know of no event, perhaps spamming is one of these issues that affect millions and millions of Americans, but this issue attracted the attention, the ire of millions of Americans as well. And I want to thank both chairmen for their rapid response to an ever-changing situation dictated by court decisions. And we've gone in a very short period of time from what we thought was an issue that was largely resolved to one which is somewhat confusing to say the least. And that's why not only do we—like to hear from both chairmen as to what they intend to do, but what they think the various scenarios that can take place.

For example, I understand that the Tenth Circuit court has been asked to stay this decision, and later on we'll have witnesses that will give a, perhaps a constitutional view of this issue. Having said that, I want to thank them and remind my colleagues that just a week ago a decision by a Federal court in Oklahoma started a dramatic series of events that have called into question the implementation of a national do-not-call registry, which is scheduled to go into effect tomorrow. The Oklahoma court ruled that Congress had not granted the Federal Trade Commission authority to create the registry. With almost unprecedented speed, Congress passed a bill ratifying the FTC's authority, and yesterday the President signed that measure into law.

Regrettably, however, the registry, for which 50 million phone numbers have been signed up, is still in legal limbo. Last Thursday a Federal district court in Colorado found that the FTC's do-not-call registry was unconstitutional. The court determined that the

registry violated the First Amendment because it allowed consumers to keep commercial telemarketers out of their homes while enabling political and charitable telemarketers to operate as usual. We certainly wouldn't ever want to prevent political operatives from operating as usual. Although the FTC's request to stay this order was denied yesterday by the same court, the FTC has appealed to the Tenth Circuit Court of Appeals.

The Federal Communications Commission has also weighed in by asserting its authority to enforce the do-not-call registry. Just when it appeared that the registry would be stopped in its track, on Friday a Tenth Circuit decision allowed the FCC to move with its implementation. As it stands, the FCC, not the FTC, appears to have the exclusive right to enforce the registry. The current legal frenzy surrounding the registry has left American consumers in the dark about what to expect tomorrow after the registry opens for business. Before these legal challenges it appeared that October 1, 2003, would mark the day when unsolicited telemarketing calls would finally cease. Now it is unclear whether American families gathering at the dinner table will be bombarded tomorrow with the same unwanted calls that they receive today.

As anyone who has kept up with the news over the past week knows, a concept that to most people is as simple as "do not call me" has become tremendously complex. So today we've asked various interested parties and experts to join us in taking a step back to survey the current status of the do-not-call registry, how we got here and the prospects for the registry in the appellate process. I want to thank again chairmen Muris and Powell for joining us today and for their extraordinary efforts to respond to the public demand for this registry. Chairman Muris and the FTC have shown an unflagging commitment to adopting and defending a national do-not-call list, and I believe that will prevail in the end. In the meantime, Chairman Powell and the FTC are to be commended for stepping into the breach to cover certain telemarketers outside of the FTC's reach and begin enforcing the law as scheduled.

I look forward to an informative hearing this morning. I thank all the witnesses. I received a call from my wife an hour ago who said last night she received six telemarketing calls, four during dinner. So I hope you will take and consider my own domestic problems as we proceed here today.

[Laughter.]

The CHAIRMAN. Senator Wyden.

STATEMENT OF HON. RON WYDEN, U.S. SENATOR FROM OREGON

Senator WYDEN. Thank you, Mr. Chairman. I just want to make two points here very briefly. As you've stated, the public wants the right to be able to say no to incessant interruptions at home, and instead 50 million Americans are being taken on a ride on a legal roller coaster, where it's not clear where it's going to end. And I think the first question we want to get out today is why does it have to be so hard and so complicated to put in place a process that lets the public say no? And hopefully we will hear from our two witnesses. I share your view about their very useful work, about

what it's going to take, so that this doesn't turn into a multi-year process of legal petitions and appeals.

Second point that I'd like to make, Mr. Chairman, is that some in the telemarketing industry have said that legal opinion or no legal opinion, they'd rather not call people whose names are on the list, but that means that the industry is going to need to be able to get the list from the Federal Trade Commission. But apparently, some parties have argued in court that if the Federal Trade Commission shares the list, it should be held in contempt of court. Obviously, if the Federal Trade Commission can't share the list then even voluntary compliance becomes impossible.

So I hope that we will hear today from the industry that they are willing to work with the two agencies that are here today, the Federal Trade Commission and the Federal Communications Commission, to make sure that the telemarketers can get the list from the Federal Trade Commission. Again, this goes to the point of whether there is just going to be Byzantine legal maneuvering or is there going to be an effort to release this list to those who request it. I think the Federal Trade Commission is doing the right thing in this area and I hope that we will hear from the industry that they are willing to meet the agency half-way and I look forward to hearing from our witnesses.

Senator ALLEN [presiding]. Thank you, Senator Wyden. Next we'll hear from Senator Nelson. If members can make their statements as short as practicable so that we can hear from our witnesses, we'd appreciate it. Senator Nelson?

STATEMENT OF HON. BILL NELSON,
U.S. SENATOR FROM FLORIDA

Senator NELSON. Thank you, Mr. Chairman. Over the past few months, an incredible 3 million people in my state responded by saying that they wanted to be let alone. They just don't want this barrage of unwanted calls which is an invasion of their personal and private space. The courts' decision to enjoin the enforcement of this regulation on First Amendment grounds may be well-meaning, but it's simply wrong. Would this court, for example, grant sign-waving protestors a constitutional right to walk freely and uninvited into the family home and circle the dinner table? Yet with this decision, the courts have granted marketers the right to do the same thing even though they haven't been invited.

And, Mr. Chairman, I'll close by one of the great respected jurists in American history, Justice Louis Brandeis. I want to quote something that he said regarding the framers of our Constitution. He said they conferred as against the government the right to be let alone, the most comprehensive of rights and the right most valued by civilized man, end of quote. That was Justice Brandeis. Thank you, Mr. Chairman.

Senator ALLEN. Thank you, Senator Nelson. Senator Lautenberg.

STATEMENT OF FRANK R. LAUTENBERG,
U.S. SENATOR FROM NEW JERSEY

Senator LAUTENBERG. Yes, Mr. Chairman, thank you. Very briefly, isn't it interesting to see how quickly Congress can jump to the task when some 50 million people agree about something they don't

like? It's the first precipitous action that I've seen that stimulates movement here and it's good to see it. Frankly, I commend the chairmen, Chairman Muris and Chairman Powell, for trying to do what you can to help us get through this dilemma. The constituents have spoken very clearly, very loudly, and we see organization after organization carrying the case as well.

I am a firm believer in the First Amendment, but I don't think the First Amendment gives people the right to disturb somebody's personal life as it happens now with the telemarketing assaults. I was away from here a couple days over the weekend and when I got back, my phone light on call waiting was lit and I got a couple of people who were, once again, espousing the cause of their particular telemarketing agency, and it's a darn nuisance.

So what we want to do is work hard to get to the bottom line here and see if we can fashion something that doesn't violate people's rights to deliver a message but at the same time protect the privacy of those who don't want to have to hear it, and I am anxious to hear from our witnesses, Mr. Chairman, and I hope that we'll be able to come to some conclusion after hearing the full array of witnesses that we have.

[The prepared statement of Senator Lautenberg follows:]

PREPARED STATEMENT OF HON. FRANK R. LAUTENBERG,
U.S. SENATOR FROM NEW JERSEY

Mr. Chairman:

It's not too often that nearly *all* Democrats and Republicans in the House and in the Senate can agree on something. But that's what happened last week when the House passed the "Do-Not-Call" bill by a vote of 412 to 8, and the Senate followed suit with a vote of 95–0.

It seems even rarer that we can muster the will to do something at least *50 million Americans* want us to do—and to do it quickly. But that's what happened last week.

Our constituents have spoken and it's clear that they *want* a "do-not-call" registry to protect them from intrusive telemarketers. And we in Congress are committed to getting this registry up and running.

I am a strong believer in the First Amendment, but Idon't think the First Amendment gives you the right to disturb someone's dinner or tie up their phone line. We have the right to hang "Do Not Disturb" signs on our hotel room doors; we should also have the right to put a "do not disturb" on our home phone.

The telemarketing industry can file all of the lawsuits it wants; the "bottom line" is that Congress and the FTC are going to find a way to make this registry a reality.

I am anxious to hear from our witnesses on how we can do that. Our constituents are demanding no less. They deserve no less.

Thank you, Mr. Chair.

Senator ALLEN. Thank you, Senator Lautenberg. Senator Sununu.

STATEMENT OF HON. JOHN SUNUNU, U.S. SENATOR FROM NEW HAMPSHIRE

Senator SUNUNU. Thank you, Mr. Chairman. I certainly welcome our witnesses and would put three thoughts in front of them and the Committee members as we work through this issue. First is whether or not in writing the legislation in the first place we've put the responsibility for overseeing the do-not-call list in the right place. And I'm glad to see we have both Mr. Muris and Mr. Powell here because I think it's an important question moving forward once the court issues are dealt with, if we're going to have a do-

not-call list that we burden the right regulatory agency and conversely protect our regulators so that they can focus on their core missions.

Second, is that we remain cognizant of the free speech issues here. While Senator Nelson described a scenario of political protestors coming into a living room and we wouldn't be for that, we have in all reality established just that in writing this law, because even if the law is implemented, while those marketers wouldn't be allowed to come into your living room, there is an exception for charitable organizations and for politicians, those very political protestors that we might be concerned about coming into the living room are allowed into the living room. That may or may not be the right decision. We have to be cognizant that while the Constitution in the Supreme Court has made some distinction between commercial speech and political speech, commercial speech is protected at some level and we have to decide whether or not we want in these regulations to continue to try to make a distinction between the activity of a charitable organization, a political organization, and someone trying to sell a product.

And third, and maybe most importantly today, we want to make sure that the public knows what is happening today and tomorrow in moving forward, to what extent will this list be put into effect as a matter of practice by the regulators, and to what extent will this do-not-call list be utilized by telemarketers to protect the public. We want to make sure that the public understands how this process works, because confusion doesn't serve us as policymakers and it certainly doesn't serve the public. Thank you, Mr. Chairman.

STATEMENT OF HON. GEORGE ALLEN,
U.S. SENATOR FROM VIRGINIA

Senator ALLEN. Thank you, Senator Sununu. I'll make a few comments here. I'm one who's generally not in favor of government regulations. However, it strikes me that these regulations, the do-not-call registry is simple and it provides individuals with the empowerment to not be bothered in their homes, and as much as I don't like regulations, I certainly don't want to impinge upon the ability of individuals to stop unwanted commercial calls into their homes.

This *donotcall.gov* website that the FTC launched was the fastest growing website in history, over 50 million phone numbers were registered, 1.3 million of those in the Commonwealth of Virginia. I would also note this: the 50 million across the country is more than the votes that either President Bush or Vice President Gore received in the 2000 election. So the courts are going to debate this, we'll get insight from these two chairmen and our esteemed witnesses, but I think that you'll see that the Senate, which is sometimes likened to a hobbled mule in its ability to move at any sort of speed, actually that hobbled mule jumped and voted 95 to nothing last week to effectuate the will and desires on a bipartisan basis of the Senate, as well as obviously the will of people and families across this country not to be pestered with commercial calls.

So we look forward to our witnesses here today and see how we can continue to be supportive of the desires in this common sense solution to empower individuals. With that, we'll first hear from

the Chairman of the Federal Trade Commission, then we'll hear from the Chairman of the Federal Communications Commission. Mr. Muris.

STATEMENT OF HON. TIMOTHY MURIS, CHAIRMAN, FEDERAL TRADE COMMISSION

Mr. MURIS. Thank you very much, Senator. It's a pleasure to be here with Chairman Powell. This registry is a partnership and it will not be as fully effective in protecting consumers unless we're both allowed to enforce it.

I want to thank this Committee and its members very much, particularly absent Chairman McCain and Senator Hollings, for their support of us. When the telemarketers tried to stop us earlier this year, you quickly acted in passing the Do-Not-Call Implementation Act. When the Oklahoma judge last week read that statute to not authorize the registry, in lightning speed and with unanimous Senate you passed the authorization the President signed yesterday, which one member called the "We Really Meant It Act."

I wanted to emphasize three points. One is the importance of the registry, second is the registry's constitutionality, and spend most of my time on the necessity for both consumers and telemarketers of the FTC, the FCC, and the states all being able to enforce the national registry, and as I said, it's necessary for both consumers and telemarketers.

I think the importance of the registry is obvious. Our sole mission at the Federal Trade Commission is to protect consumers. In the nearly 28 months since I've been Chairman, there is nothing that we have spent more time and energy on. There is nothing that's more important than the establishment of this registry, for a very simple but important reason: We believe the consumers ought to have a choice to choose whether those unsolicited commercial telemarketing calls go into their homes.

The response, as you've all mentioned, was enormous. There are now over 51 million people on the registry. It's hard to imagine a more graphic expression of public interest than how you reacted last week.

My second point is the legality. The judge ruled that the registry does not, "advance the FTC's interest in protecting privacy or curbing abusive telemarketing practices." I would submit, with all respect, that the tens of millions of Americans who have registered more than 51 million phone numbers disagree. I'm not sure I've ever seen such resounding empirical refutation of a statement in a court.

Second, the point that we have to treat charities and commercial telemarketers the same puts the FTC and the FCC, if it's applied to them, in a hopeless catch-22. The Supreme Court has repeatedly said that charitable solicitation has greater constitutional protection. We will ultimately be in much more danger constitutionally if we did what or if we do what the Denver judge wanted.

Now, we've asked the judge for——

Senator ALLEN. Chairman Muris, just for the record, could you restate that again, what you just said, the distinction between commercial versus——

Mr. MURIS. Versus charitable.

Senator ALLEN. Right.

Mr. MURIS. If we equated commercial and charitable speech, we would be in much greater danger constitutionally ultimately than we than the registry that we in fact have implemented. And the reason is that the Supreme Court has repeatedly said charitable solicitation enjoys much greater constitutional protection, in part because the solicitation itself is intertwined with the fully protected speech, and that's a principle that the Court again has widely recognized.

Now, we've asked the judge for a stay. Last night he denied it, in part because he found that the interests of the telemarketers outweighed the interest of consumers. We're appealing this this morning, the Tenth Circuit opens soon. Given the Federal Communications the ruling on the FCC last Friday, which some of you have mentioned we have considerable optimism.

Now, let me turn to address in more length this last point about where we are and why, from even the standpoint of telemarketers, given the FCC's rule as to going in operation tomorrow, it is much better for the states, for telemarketers, for consumers, for the FCC, for the FTC, that our registry be allowed to go into enforcement. The current situation is both confusing and chaotic. In the months since the Commission promulgated its do-not-call rule, the FCC and numerous states have acted in reliance on the FTC's registry. The FTC promulgated its own do-not-call list, which relies on the registry.

For now, the FCC rule remains in effect. The states have adjusted their laws, many states, to use the FTC's registry rather than maintaining a registry of their own. It obviously makes no sense to maintain two registries, and that's where the states are headed and many are already there. Moreover, under the FCC statute, any state with its own do-not-call requirements may and I'm sure the telemarketers will argue this may have to download names on the national registry to enforce the state requirement. The situation is further complicated by the fact that some telemarketers have already downloaded the list, which they've been able to do since September 2, but others have not.

As a result, there are at least four serious problems that we hope the Tenth Circuit will resolve. The first problem is access to the list. With the FCC's rule in effect, telemarketers in states need the list to comply. After the judge's decision, we decided this was last week we decided not to share the list with anyone. Telemarketers, moreover, based on what they told the judge yesterday, will apparently seek to hold us in contempt if we do virtually anything with the list.

Indeed, the telemarketers made clear yesterday, despite their statements about requesting voluntary cooperation or at least leaving it up to the telemarketers, that they want us to stop from continuing to accept consumer registrations. We had shut the list down entirely except for the enforcement parts of it, the complaint processing parts of it, the sharing parts of it, except for accepting registrations. Because of the judge ruling last night, this morning we are evaluating what steps are necessary to shut down this part of the system.

Given the technology involved, particularly in the phone system, it's considerably more complicated than turning off a light. This system is set up to be entirely automated, to receive phone calls from all over the country, and with more than 50 million numbers you can imagine you can't do this on index cards. We cannot at present, moreover, allow voluntary access to the list to telemarketers. The list was set up for paid access. When we began exploring the issue of voluntary access, we realized it would take 7 to 10 days to reconfigure the system and actually make the data available, and in fact we've been working on that, on the mechanics of doing that in the interim.

Moreover, without a stay, as I've just mentioned, we are concerned that the telemarketers would argue that allowing access without paying might violate the order. This is a real issue given the position that they took in court yesterday.

We also have refused to allow those who have the list and there are over 400 that have the whole list and there are thousands who have parts of the list, sellers and telemarketers we've refused to allow them to share the list with others. As part of their sign-up process they have to pledge that they will only use the list for the purpose of complying with the do-not-call requirements. Now that promise is no longer enforceable through our rule, but it is enforceable through the criminal statutes that prohibit lying to the Government.

If we allow firms that have the list to trade it or to share it, there will be no enforceable promise. The do-not-call list could quickly become a do-call list in the hands of unscrupulous telemarketers and we simply will take steps to prevent that.

The second of the four problems I mentioned is that telemarketers face the threat of inconsistent State and FCC positions regarding those who have the list and those who do not. The FCC has said it will enforce its rule against companies that already have the list, and some states appear to be saying that they will enforce the requirement against sellers who use telemarketers who do not have the list and can not comply, which is a more aggressive position.

Third, at least some State laws are in jeopardy. Many states have made our list the State list. Enforcement requires access to the list and that access is currently unavailable. Finally, for the system to work well, our complaint system is a key component for the FCC, for us, and the states. The way the complaint system was going to work was using the same mechanisms, which we've shut down, using the same mechanisms by which people registered, people were going to be able to give us complaints. Since we're expecting complaints in an extraordinary large volume again, it was an automated system, and that system is now unavailable, hampering enforcement.

Now, Mr. Chairman and Members of this Committee, telemarketers have said repeatedly that they want voluntary compliance or at least the option of voluntary compliance with the do-not-call registry, but they apparently do not want customers to add their names to the list, and they apparently do not want us to be able to provide the list. A voluntary system with no names and no

access looks a lot like the current problem. Telemarketers can call whoever they want whenever they want.

Finally, let me conclude with a prediction. This is the right thing to do, the law is on our side, there will ultimately be a list, it will be maintained by the Federal Trade Commission, and because of the publicity and the frustration with the telemarketers, there will be many millions of more consumers on that list than there would have been otherwise. Thank you very much.

[The prepared statement of Mr. Muris follows:]

PREPARED STATEMENT OF THE FEDERAL TRADE COMMISSION

Mr. Chairman, thank you for the opportunity to present testimony on the status of the FTC's National Do Not Call Registry.[1]

As you know, the Commission adopted the Registry as one of the amendments to the Telemarketing Sales Rule (TSR) announced December 18, 2003, and formally promulgated in the Federal Register on January 29, 2003. On March 11, 2003, President Bush signed into law the Do Not Call Implementation Act (DNCIA), which provides for the FTC to collect fees from sellers and telemarketers to fund the establishment and maintenance of the National Do Not Call Registry. Congress enacted this legislation, and provided complementary appropriations,[2] to support the FTC's decision to establish such a Registry (conditioned on funding) as part of its amendment of the TSR.[3] The DNCIA also set a short deadline for the FCC to finish a rulemaking proceeding, already in progress, reviewing that agency's telemarketing regulations (originally promulgated in 1992) pursuant to the Telephone Consumer Protection Act (TCPA), and required the FCC to maximize consistency with the FTC's Do Not Call rules. Accordingly, the FCC announced its adoption of complementary do not call regulations on June 27, 2003, and formally promulgated them in the Federal Register on July 25, 2003.

Both sets of regulations prohibit companies subject to the respective agencies' jurisdiction from calling consumers who enter their phone numbers on the National Do Not Call Registry database established and maintained by the FTC. Both agencies set October 1, 2003 as the date when they would begin enforcing the Do Not Call Registry provisions, and when telemarketers and sellers would be required to refrain from calling consumers who had placed their numbers in the Registry.

The Registry opened to accept consumer registrations on June 27, 2003, and within three days more than 10 million phone numbers had been registered. Fourteen states have shared the contents of their registries with the National Do Not Call Registry, contributing over nine million phone numbers.[4] As of September 28, 2003, there were more than 51.5 million phone numbers in the Registry.

On September 2, 2003, the Registry became available to telemarketers who wished to gain access to the database so that they could refrain from calling consumers who had expressed a preference not to receive telemarketing calls. Since then, over 13,000 organizations have subscribed, and of those, more than 400 have accessed and paid for the entire Registry.

Shortly after the FTC promulgated the amended TSR, two telemarketing trade associations filed separate legal challenges to various provisions of the amended Rule, including the National Do Not Call Registry provisions. The Direct Marketing Association and several of its members brought suit in Federal district court in Oklahoma City,[5] and the American Teleservices Association and several of its members sued in the Federal district court in Denver.[6] The American Teleservices Association also challenged the FCC's revised telemarketing rules in a separate lawsuit.[7] Regrettably, a decision in the American Telemarketing Association's challenge to the

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[1] The views expressed in this statement represent the views of the Commission. My oral statements and responses to any questions are my views, not necessarily the views of the Commission or any other Commissioner.

[2] The Omnibus Appropriations Act, Public Law 108–7, enacted Feb. 21, 2003.

[3] 16 C.F.R. Part 310.

[4] The states are Alabama, Arkansas, California, Colorado, Connecticut, Florida, Kansas, Kentucky, Maine, Massachusetts, Minnesota, New York, North Dakota, and Oklahoma.

[5] *U S. Security* v. *FTC,* No. CIV 03–122–W (W.D. Okla. 2003).

[6] *Mainstream Marketing* v. *FTC,* No. 03–N–0184(MJW) (D. Col. 2003).

[7] *Mainstream Marketing* v. *FCC,* No. 03–9571 (D. Col. 2003).

FTC's Rule may leave the FTC unable to put into effect the Registry, even though it has received overwhelming support from consumers and from Congress.

On September 23, 2003, Judge West in Oklahoma City issued a summary judgment order invalidating the Registry provisions on the grounds that the FTC lacked statutory authority to establish such a Registry. Congress acted with unprecedented speed to pass a new law eliminating the problem that Judge West had perceived. We are grateful to Chairman McCain, Senator Hollings, Chairman Tauzin and Congressman Dingell, and all the other members of Congress who acted so fast and so overwhelmingly to demonstrate their support for the Registry. The President signed this legislation into law on Monday, September 29.

Nevertheless, Congress had barely finished its work when U.S. District Judge Nottingham in Denver ruled that the Do Not Call Registry offends the First Amendment because it makes a content-based distinction between its treatment of commercial telemarketing calls to sell goods or services and noncommercial calls soliciting charitable contributions. We believe that as a matter of law this decision is incorrect, and are therefore confident of ultimate success on appeal. Nevertheless, this legal dispute could take years to resolve. In the meantime, the status of the Registry is unsettled.

The Commission is acting to comply with Judge Nottingham's order "enjoining the FTC from enforcing the amended Rules (issued in December 2002) creating and implementing a Federal Do Not Call Registry." This is not a simple or straightforward matter, because the decision may have far reaching repercussions beyond its impact on the FTC.

As noted, the FCC has revised its TCPA regulations to prohibit any company under that agency's jurisdiction from calling consumers' numbers that appear on the National Do Not Call Registry. Chairman Powell of the FCC has announced that the FCC will enforce its do-not-call rules against telemarketers that have obtained the Do-Not-Call list from the FTC, beginning October 1.[8] He noted that the recent court cases have not disturbed the FCC rules, and that the 10th Circuit Court of Appeals had refused to block the FCC's rules pending review-as the telemarketing industry had urged—citing the strong public interest of leaving the rules in place. Chairman Powell stated that the FCC intends to continue to administer and enforce its rules to the fullest extent possible as the litigation proceeds. These steps are made more difficult because it is unclear the extent to which Judge Nottingham's decision permits the FCC to access the Registry for enforcement or companies under FCC jurisdiction to access the Registry for compliance with the FCC's rules.

Similarly, Judge Nottingham's ruling threatens the ability of the states with do not call laws to enforce them. The TCPA prohibits any state that has a do not call registry from enforcing its do not call law unless its registry includes the phone numbers of consumers from that state who are on the National Do Not Call Registry, which the FCC has established as a single national do not call database as part of its revised TCPA regulations.[9] Because it is unclear the extent to which Judge Nottingham's decision permits the states to access the Registry for purposes of enforcement of state law, the decision casts doubt on the ability of states to enforce their do not call laws.

We believe that the FTC is likely to succeed on the merits of its appeal because the district court's decision reached an unprecedented conclusion that telemarketers have a constitutional right to continue telemarketing calls to consumers who have indicated that they do not want these calls. This holding is at odds with the relevant Supreme Court cases. Specifically, the court erred in its application of *Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York.*[10] Under *Central Hudson,* a regulation of truthful nondeceptive commercial speech will survive First Amendment scrutiny if: (1) the government asserts a substantial interest; (2) the regulation directly advances that interest; and (3) the regulation is reasonably tailored to serve that interest.

With respect to the first prong of the *Central Hudson* test, the Denver court recognized that the interest the Registry is designed to advance, protecting consumers from unwanted telemarketing calls, is a substantial one. Millions of consumers have signed up for the Registry in the hope that it would shield them from unwanted telemarketing calls. As the district court noted, "[t]he government's interest in protecting the well-being, tranquility, and privacy of the home is of the highest order in a free and civilized society."[11]

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[8] See press release at *http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-239219A1.pdf.*

[9] 47 U.S.C. § 227(e)(2).

[10] 447 U.S. 557, 564 (1980)

[11] Order at 19–20, citing *Frisby* v. *Schultz,* 487 U.S. 474, 484 (1988).

We disagree, however, with the court's analysis of the second prong of the *Central Hudson* test, the requirement that the Registry must materially advance the government's interest in protecting consumers from unwanted telemarketing calls. The court conceded that the Registry "might eliminate anywhere from forty to sixty percent of all telemarketing calls for those who subscribe, a substantial amount of unwanted calls."[12] Indeed, as a result of the FCC's complementary TCPA regulations, the Registry will likely shield consumers from as many as eighty percent of unwanted calls. Because the Registry would put a halt to a substantial percentage of unwanted telemarketing calls, it materially advances the government's interest.[13]

Nevertheless, the court ruled that the Registry could not pass muster under *Central Hudson* because the Registry does not also apply to charitable solicitations—even though charitable solicitation constitutes fully protected speech.[14] The court criticized the TSR's accommodation of protected charitable solicitation as "content based," and therefore—in its view—as impermissible under *City of Cincinnati* v. *Discovery Network, Inc.*[15] The court appears to have ruled out any distinction between commercial and non-commercial speech in the regulation of telemarketing. In fact, the court's decision puts the FTC in an awkward position—in order to protect consumers from unwanted commercial calls, the FTC would run the risk of creating an impermissible infringement on fully protected speech. The court's reasoning is erroneous, for three reasons.

First, the court erred in supposing that there is "no doubt" that calls soliciting charitable contributions are equally as invasive as commercial calls.[16] On the contrary, as the Eighth Circuit recognized in *Missouri v. American Blast Fax, Inc.,* Congress itself, in enacting the TCPA, concluded that "non-commercial cal1s . . . are less intrusive to consumers because they are more expected."[17]

In this regard, the Court also failed to note that reasons directly related to the abuses the Do Not Call rules seek to remedy compelled the FTC's determination to exempt charitable solicitation calls from the National Do Not Call Registry Requirements (while subjecting them to the company-specific do not call provisions). For eight years, the Rule has contained a company-specific do-not-call provision, which was intended to shield consumers from unwanted telemarketing calls, but until March 31, 2003, this provision applied only to commercial telemarketers.[18] Although the record shows that this provision failed to achieve its goal with respect to commercial telemarketing calls because those telemarketers frequently ignored consumers' requests to be put on company-specific lists, there was no comparable evidence that for-profit telemarketers who solicit on behalf of charities will ignore the company-specific provision. There is also no record evidence that, with respect to charitable solicitors, the company-specific provision will not achieve the FTC's goal of protecting consumers from unwanted telemarketing. In fact, evidence on the record indicates that the different incentives that govern charitable solicitations as compared to commercial solicitations may make the company-specific approach more workable and effective with respect to charitable solicitations. Accordingly, the record provides ample reason, directly related to the abuses the Registry is aimed at, for treating charitable solicitations differently.

Second, the district court ignored the context in which the Supreme Court addressed the issue in *Discovery Network.* In that case, the ordinance's exception for non-commercial newsracks made the ordinance ineffective in addressing the public purpose in question preventing the clutter and disruption on city sidewalks engendered by newsracks—because commercial newsracks comprised only a very small proportion of newsracks overall.[19] By contrast, the TSR's Do Not Call Registry provisions cover the vast majority of telephone solicitations, especially in light of the FCC's complementary rule. This fact distinguishes *Discovery Network.*[20]

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[12] Order at 22.

[13] *See United States* v. *Edge Broadcasting Co.,* 509 U.S. 418,431 (upholding regulation that restricted lottery ads from only 11 percent of radio listening time in the affected area).

[14] *See Riley* v. *National Federation of the Blind of North Carolina, Inc.,* 487 U.S. 781, 787–88 (1988).

[15] 507 U.S. 410 (1993).

[16] Order at 24.

[17] 323 F.3d 655 (8th Cir. 2003) (quoting H.R. Rep. No. 102–317, at 16 (1991).

[18] On October 25,2001, the USA PATRIOT Act, Pub. L. 107–56, 115 Stat. 272 (Oct. 26, 2001), became effective, which, in relevant part, expanded the coverage of the TSR to reach not only calls to solicit sales of goods and services, but also calls soliciting charitable contributions.

[19] 507 U.S. at 418.

[20] *See Destination Ventures, Ltd.* v. *FCC,* 46 F.3d 54 (9th Cir. 1995). In that case, the court upheld a prohibition on unsolicited faxes that applied only to commercial faxes. The court held that *Discovery Network* did not require the FCC to distinguish the harm caused by commercial

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Third, in assessing the "fit" of the Do Not Call Registry under *Central Hudson,* the court failed to take into account the minimal nature of any governmental intrusion on speech. Unlike the ordinance in *Discovery Network,* the National Do Not Call Registry does not ban any speech; it only facilitates *consumer choice* whether particular speech is welcome. Even assuming the district court was correct in concluding that the Registry nevertheless imposes some level of burden on speech, the degree of any such restriction is relevant to an assessment of whether the measure is "narrowly tailored to achieve the desired objective."[21] The Do Not Call Registry has been carefully tailored, allowing commercial telemarketing to be directed at all consumers except those who have specifically requested that they be spared such intrusions. Such a system is consonant with the underlying purpose of the commercial speech doctrine—*i.e.,* enhancing consumer welfare by ensuring the availability of information consumers value.[22]

More than 50 million telephone numbers are now in the Registry. All these consumers have stated that they want an end to telemarketing calls. The Rule's Do Not Call Registry provisions that protect consumers were scheduled to take effect on October 1, 2003. The FTC has moved for a stay of the district court's order, but if the stay is not granted, tens of millions of consumers will continue, after that date, to receive those telemarketing calls.[23] By contrast, if a stay is granted, telemarketers will be restrained from calling only those consumers who have signed up for the registry and who have declared their lack of interest in telemarketing sales calls. Indeed, the Direct Marketing Association, a telemarketing industry trade association, has recently stated that it "remains committed to respecting * * * the wishes of all consumers no matter how those wishes have been expressed."[24] We believe we have a strong argument for success in our motion for a stay, and we are hopeful that a stay will be granted.

It is hard to imagine a more graphic expression of public interest than the Congressional response to Judge West's September 23, 2003, decision holding that the FTC lacked statutory authority to create the registry. Within only 48 hours of that decision, both houses of Congress passed legislation expressly ratifying the registry. We hope that the strong public interest embodied in Congress's recent enactment will not be thwarted.

For over two years, the highest priority of the FTC has been simple: to allow consumers to choose whether to accepted unsolicited telemarketing calls in their homes. Even before the National Do Not Call Registry was to become effective, Americans registered more than *50* million phone numbers with the FTC. Millions have also registered with similar state lists.

This simple concept has been surprisingly difficult to implement. The FTC spent a year reviewing the rule and another year soliciting and considering comment from sellers, telemarketers, and consumers. Every effort was made to accommodate the industry's concerns about the original proposal, refining and revising it, for example, to permit a company to call consumers on the registry if they have an established business relationship with that company.

Despite our efforts, the telemarketers have used every weapon in their formidable arsenal to deprive consumers of choice. The FTC will continue to make every effort to give consumers an effective choice about stopping unwanted and intrusive telemarketing calls.

The CHAIRMAN [presiding]. Well, that's a very uplifting message, Chairman Muris. We appreciate it.

Mr. MURIS. I'm an optimist.

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and noncommercial faxes because it was undisputed that commercial faxes caused the bulk of the problem. 46 F.3d at 55. Whereas, as here, the regulation furthers the government's goal, *Discovery Network* does not prevent the government from regulating commercial speech merely because it has not also regulated fully protected speech. This is what the Supreme Court meant in *United States* v. *Edge Broadcasting Co.,* 509 U.S. 418,434 (1993), when it said that there is no constitutional requirement that the government "make progress on every front before it can make progress on any front."

[21] *Board of Trustees of the State University of New York* v. *Fox,* 492 U.S. 469,480 (1989); *cf. Lanphere & Urbaniak* v. *Colorado,* 21 F.3d 1508, 1515–16 (10th Cir. 1994) (where restriction entails "an indirect barrier to commercial speech," "the 'reasonable fit' test of *Fox* is more easily satisfied").

[22] *See Rubin* v. *Coors Brewing Co.,* 514 U.S. 476, 481–82 (1995).

[23] *See Mainstream Marketing* v. *FCC,* No. 03–9571(10th Cir., Sept. 26, 2003) (Order denying stay, recognizing "the strong expectation interest of the many millions of Americans who have registered" on the do-not-call Registry).

[24] *See www.the-dma.org/cgi/dispnewsstand?article=1494.*

The CHAIRMAN. Chairman Powell.

STATEMENT OF HON. MICHAEL K. POWELL, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION

Mr. POWELL. Thank you, Senator McCain, good morning, Mr. Chairman, distinguished Members of the Committee. It's always a pleasure to come before you today and particularly honorable to come before you on such a critical issue to our consumers and sit with my colleague and partner in this endeavor, Chairman Muris, who's been a great leader on the do-not-call registry issue.

First and foremost, I want to state unequivocally and ensure the American consumers and Congress that the FCC will continue to devote its full resources, it will exhaust every legal remedy possible to ensure that national do-not-call list survives. More than 10 years ago, Congress vested the FCC with broad authority to protect consumers from unwanted calls, and in our June order we expanded on that effort. Last week, in fact, when these rules were challenged in the Tenth Circuit Court of Appeals, the court specifically refused to block our rules. It held, and I quote, that "on the record presented, the telemarketing industry had failed to establish a likelihood of success on the merits."

Citing further the strong public interest in leaving these rules in place, the court made clear that rules should go forward. Most recently, the Supreme Court of the United States yesterday declined to disturb the lower court's rulings, so the FCC continues to put its rules into effect beginning tomorrow.

It is important, however, to understand as a practical matter that the legal challenges to the FTC rules affect the enforcement of our rules because the congressional statute instructed the two agencies to work in partnership with one another to achieve our common consumer protection goals. Over the past week we have been through the circular mill of three district court decisions, the most recent issued late last night addressing the FTC's rules, and they have introduced a great deal of confusion with regard to the implementation and enforcement of the registry.

The Colorado District Court's order last night has raised questions about the FCC's ability to enforce the list. Most directly, to the extent the court ruling prevents the FCC from accessing the FCC data base, our enforcement efforts could be hampered. However, the Commission continues to explore ways to make sure that its enforcement is effective and will continue to do so.

We continue to study the court's decision last night and are working hard to clarify that landscape for ourselves, for Congress, and for consumers. And in the meantime, as I have said, I commit to you that to the extent legally permissible, the FCC will enforce the rules against telemarketers, period.

If consumers on the list receive a prohibited call, they may file a complaint. I would urge them to call 1–888–CALL–FCC, or by visiting our website at *www.fcc.gov*. The Commission will evaluate all complaint data so that to the extent legally permissible it can target enforcement in the most aggressive way possible to protect consumers.

I also want to take a final second to emphasize that while the do-not-call list, which has captured most of the attention, the FCC's

comprehensive telemarketing rules protect consumers in many other ways that are completely unaffected by the court challenges. For example, consumers still have the right to be placed on companies' specific do-not-call lists. Second, they have the right to be protected from all calls between 9 p.m. and 8 a.m.—and Senator, if that call at dinner occurred in that timeframe, you let us know and we'll take care of it right away to be free from excessive hang-ups or dead air calls. These rules are clearly in effect and they will be rigorously enforced. Notwithstanding how the court challenges resolve themselves, telemarketers have important and ongoing responsibilities under our rules to protect consumers.

Finally, to defend the consumer's choice about telemarketing calls, the Government has marshaled all of its resources. The Federal Communications Commission, the Federal Trade Commission, the Department of Justice, all working together to vigorously defend the rules in a number of courts around the country. In the face of an adverse court ruling, this Congress showed decisive leadership and commitment, by acting with dispatch over the past week to cure jurisdictional questions, and the President of the United States with haste signed the legislation and has lent his full support to our efforts to protect consumers.

I stand ready to work with Congress to find that path to effectuating the will of the American people and with the team we have assembled, I remain confident we will prevail. I believe ultimately our rules will stand constitutional challenge. In the end, I'm simply unwilling to accept that the notion of the First Amendment unavoidably bars the American people from deciding who calls them in the privacy of their own homes. The First Amendment protects a willing speaker to talk to a willing listener, not to an unwilling listener, and I assure you that the full resources of the FCC are committed to defending our rules, taking any steps necessary to effectively implement and enforce them, and to the full extent permissible by law.

Thank you, Mr. Chairman, and distinguished Members of the Committee. I'm happy to take your questions.

[The prepared statement of Mr. Powell follows:]

PREPARED STATEMENT OF HON. MICHAEL K. POWELL, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION

Good morning, Mr. Chairman and distinguished members of the Committee. It is my pleasure to come before you today with my colleague Federal Trade Commission Chairman Tim Muris to discuss the implementation of the national Do-Not-Call Registry.

First and foremost, let me assure every American consumer and the Congress that the FCC will continue to devote its full resources and exhaust every legal remedy to ensure that the national Do-Not-Call list survives.

More than ten years ago, Congress vested the Federal Communications Commission with broad authority to protect consumers from unwanted calls. In our June order, we expanded on that effort. Last week, when these rules were challenged in the 10th Circuit Court of Appeals, the Court specifically refused to block our rules. It held that "on the record presented . . . [the telemarketing industry] ha[d] failed to establish a likelihood of success on the merits." Citing the strong public interest in leaving these rules in place, the Court made clear that the rules should go forward. Most recently, the Supreme Court yesterday declined to disturb the Court's ruling.

However, as a practical matter, challenges to the FTC's rules affect the enforcement of our rules because the statute instructed the two agencies to work in partnership with one another to achieve our common consumer protection goals. Over

the past week, three district court decisions (the most recent issued last night) addressing the FTC's rules have introduced confusion with regard to the implementation and enforcement of the national Do-Not-Call Registry. The Colorado district court's order last night has raised questions about the FCC's ability to enforce the list. Most directly, to the extent the court's ruling prevents the FCC from accessing the FTC's database, our enforcement efforts may be hampered.

We are still studying the court's latest order and working hard to clarify the legal landscape. In the meantime, I commit to you that, to the extent legally permissible, the Federal Communications Commission will enforce its National Do-Not-Call rules against telemarketers that have obtained the Do-Not-Call Registry from the Federal Trade Commission.

If consumers on the list receive a prohibited call, they may file a complaint by calling 1–888–CALL–FCC or by visiting our website at *www.fcc.gov*. The Commission will evaluate all complaint data so that, to the extent legally permissible, it can target enforcement to most aggressively protect consumers.

I also want to emphasize that while the Do-not-Call List has captured the most attention, the FCC's comprehensive telemarketing rules protect consumers in many ways that are completely unaffected by court challenges. For example, consumers have the right (1) to be placed on a company-specific do-not-call list; (2) to be protected from all calls between 9 p.m. and 8 a.m.; and (3) to be free from excessive hang ups or dead air calls. These rules clearly are in effect and enforceable. Notwithstanding how the court challenges resolve themselves, telemarketers have important and ongoing responsibilities to protect consumers.

Finally, to defend the consumer's choice about telemarketing calls, the government has marshaled all its resources. The Federal Communications Commission, the Federal Trade Commission and the Department of Justice are working together to vigorously defend the Do-Not-Call rules in a number of courts around the country. In the face of an adverse court ruling, this Congress showed decisive leadership and commitment by acting with dispatch over the past week to cure any possible jurisdictional questions. And the President without haste signed the legislation and has lent his full support to our efforts to protect consumers. I stand ready to work with Congress to find a path to effectuating the will of the American people. With this team, I remain confident that we will prevail.

I believe our rules will withstand Constitutional challenge. In the end, I am simply unwilling to accept the notion that the First Amendment unavoidably bars the American people from deciding who calls them in the privacy of their own homes. I assure you that the full resources of the FCC are committed to defending our rules and taking any steps necessary to effectively implement and enforce them, to the full extent permissible by law.

Thank you Mr. Chairman and distinguished members of the Committee. I will be happy to take your questions.

The CHAIRMAN. I thank you very much. To go back to the beginning of this problem, isn't it correct that the court ruled the way it did, not that Congress doesn't have the right to have a do-not-call list, but it doesn't have the right to exempt certain aspects of it such as charitable or political? In other words, if a do-not-call list had been blanket then the court wouldn't have decided the way that it did? Is that a correct assessment?

Mr. MURIS. Well, I believe so, reading the judge's opinion, but I believe that we'd be in much more constitutional danger if the list was if the list equated commercial telemarketing with charitable and politicians.

The CHAIRMAN. Well, I was going to get to that, but isn't that correct, the basis of the court decision in your view?

Mr. MURIS. Yes.

The CHAIRMAN. Chairman Powell also? Go ahead.

Mr. POWELL. Senator, I think there's an important caveat, at least today. What the court ruled was that the FCC, who exempted charitable organizations and non-commercial speech, was doing so at its initiative and it challenged that, but it pointed out that in the context of our rules we have a Congressional finding that distinguishes between commercial and non-commercial speech, and it

even suggested that that Congressional finding in the TCPA might be an acceptable basis for making the decision, citing an Eighth Circuit case in which the facts rules were upheld against a constitutional challenge that made the same distinction because Congress had so found. So there's still a possibility that the rules will prevail on the basis that Congress has made a thoughtful finding distinguishing.

The CHAIRMAN. But isn't it. I thank you, but my point is, hasn't Congress passed laws regularly, as regulatory bodies have also passed regulations with great frequency, that separate and draw distinction between for-profit and charitable? We give tax benefits to charitable organizations. Isn't there a clear precedent that we do differentiate between charitable and non-charitable activities in a broad variety of ways? I'll ask both of you.

Mr. MURIS. Well, absolutely, indeed both of us have statutes that make that distinction. Our more general statute, section 5 of the Federal Trade Commission Act, prohibits us from regulating nonprofits in most circumstances and this is ubiquitous.

The CHAIRMAN. And very appropriately, we want to encourage charitable activities. I mean, that's part of what America and what we're all about. So this brings me, Chairman Powell, to last night and this ever-evolving last night, plaintiffs also claimed that the FTC is attempting to sidestep the order by providing its register to the FCC for the implementation on October 1. The court regards the terms of its injunctions and judgment as reasonably clear and specific. The FTC is prohibited from creating and implementing its do-not-call registry. Now how do you interpret that, Chairman Powell? It seems to me this judge is saying that Chairman Muris can't give you that list.

Mr. POWELL. Well, I think the fair reading of the court's order is that, as against the FTC it's instructing them that they can't provide that list and I think Chairman Muris has acted completely appropriately in limiting the availability of the list. However, that does not shut off every avenue for the FCC to prosecute its rules that will go into effect pursuant to the Tenth Circuit's refusal to stay them.

If we can have in the context of an enforcement, if we can breach the evidentiary question of whether a telemarketer knew that somebody was on the do-not-call list and nonetheless violated our rules in calling them, it is our position that we think we have other venues to potentially prosecute that as an enforcement matter. What I'm forbidden to do is what would have been easy, which is going to our computer and accessing the list as it has been maintained by the FTC, but I don't think that that necessarily means we have no other venues for potentially getting that list.

The CHAIRMAN. So the short-term solution is that you will exercise what you believe is your authority to prosecute those who violate the do-not-call list. And you, Chairman Muris, intend to, as quickly as possible, challenge this and seek a stay of this decision so that you can proceed with the do-not-call list enforcement. Is that a correct assessment as to the status as it exists at this moment?

Mr. MURIS. Yes, and there's a third player in this, of course, which is the States, which have their do-not-call lists, and they are

hampered in a similar way that the FCC is, but the court opinions don't stop them. And one of the points we've made to the Tenth Circuit is this chaos and confusion and hampering that's caused by treating the two agencies differently.

Mr. POWELL. One other point I'd make just for the record. The FCC, too, will have to defend the merits of its decision against constitutional challenge in the Tenth Circuit, and the court has granted, I think wisely, a very expedited schedule for briefing and hearing of those merits through the fall with, I think, oral argument on January 12 of this year, of next year.

The CHAIRMAN. This could be in limbo until January unless you get a stay?

Mr. MURIS. Oh, it would be much past, or at least somewhat past January. January is the oral argument just for the FCC. We will, if a stay is denied, will seek every other if a stay is ultimately denied, we will seek to try to get the most expedited schedule. It might make sense for the Tenth Circuit to combine us all. If they do that, however, it will take them some time to write an opinion and then there may be further appeals.

The CHAIRMAN. It would seem to me that the court, that our first effort should be to try to get the court to issue a stay.

Mr. MURIS. Absolutely. And that's what we're doing. We are we got the opinion last night. The court opens in 14 minutes and we'll be there in 14 minutes.

The CHAIRMAN. Well, I want to say again, quite often and probably with legitimacy bureaucracies of government are accused of being slow to react to the public interest or to difficulties in problems that arise, I would like to commend both of you in the strongest terms for a very rapid reaction on a very important issue to the American people and I thank you for it. Senator Wyden.

But wait, Congress can do nothing at this moment.

Mr. MURIS. Do you have any suggestions?

[Laughter.]

The CHAIRMAN. Besides demagogue the issue I mean.

Mr. MURIS. Well, I hardly think this is demagoguery.

Mr. POWELL. Possibly not, but I think it's important to understand on what basis the court is holding constitutional infirmity. It is a basis that potentially could be fixed, that is, Congress potentially could strengthen the distinction between commercial and non-commercial——

The CHAIRMAN. Could we on the Committee do an amicus brief?

Mr. MURIS. Well, we would hope that there would be amicus briefs from many places, including from the Congress.

The CHAIRMAN. Well, I think it would be important to come from us who——

Mr. MURIS. Yes, sir.

The CHAIRMAN.—wrote the law.

Mr. MURIS. Absolutely.

The CHAIRMAN. Well, I think we'll go see about that. Senator Wyden.

Senator BURNS. Mr. Chairman.

Senator WYDEN. Thank you.

The CHAIRMAN. Senator Burns.

STATEMENT OF HON. CONRAD BURNS, U.S. SENATOR FROM MONTANA

Senator BURNS. Can I interrupt just for a second now?

Senator WYDEN. Sure.

Senator BURNS. May I put my statement in the record, Mr. Chairman?

The CHAIRMAN. Absolutely.

Senator BURNS. We're in the middle of a mark-up over on the supplemental and I know that there's enough talent around this table to bring more light to this subject than probably needs to come, but I would like to submit my record and I thank this chairman for holding the hearing.

[The prepared statement of Senator Burns follows:]

PREPARED STATEMENT OF HON. CONRAD BURNS, U.S. SENATOR FROM MONTANA

Mr. Chairman, Today's hearing concerns a topic of very high interest to the American people—the right to privacy from intrusive, aggressive telemarketing in their own homes. I commend the Chairman and many of my colleagues on the Committee for acting with unprecedented speed last week in pushing forward legislation that reaffirmed Congressional intent in authorizing the Do-Not-Call list, which the President signed into law just yesterday. I am also pleased that the Chairman called for today's hearing, which is extraordinarily timely given that the Do-Not-Call list is scheduled to go forward tomorrow and over 50 million Americans are expecting it to work.

I also commend Chairman Muris of the Federal Trade Commission and Chairman Powell of the Federal Communications Commission for using every resource at their disposal to implement the list. In particular, I note the critical move yesterday by Chairman Powell to enforce the list given that recent court actions do not impact the authority of the FCC in this area.

I was extremely disappointed at last week's Oklahoma Federal District Court decision preventing the Federal Trade Commission from going forward on implementing the Do-Not-Call list. The Do-Not-Call list has proven to be one of the most popular and necessary consumer initiatives in history. From the day consumers have been able to sign up for the Do-Not-Call list on June 26, over 50 million Americans have registered, including 139,000 in Montana. So urgent was the public's need to stop intrusive telemarketers that in the first 14 hours of enrollment on June 26, over 650,000 citizens added their numbers to the list.

Last week's ill-considered decision by the Federal District Court in Oklahoma would have prevented the Do-Not-Call list from going into effect tomorrow. The decision was dead wrong in its core assumption that the FTC acted without statutory authority in creating and administering the Do-Not-Call list. In fact, Congress clearly granted the FTC the authority to setup the Do Not-Call list by passing the "Do-Not-Call Implementation Act" in February of this year. This Act gave the agency authority to collect fees from telemarketers to establish and enforce the list. The "Omnibus Appropriations Act" in February also authorized the FTC to enforce the do not-call provisions.

Rather than waiting for an appeals court to overturn this wrongheaded decision, Congress acted quickly to once again reaffirm its commitment to protecting Americans from needless and unwarranted intrusions into their lives by aggressive telemarketing. Unwanted telemarketing calls have reached unacceptable levels in our country. By one estimate, telemarketers attempt almost 105 million calls daily; implementation of the do not-call list would reduce these calls by almost 80 percent.

Some Americans are sick and tired of these endless interruptions in their private lives, which often take place at most unhandy times. By responding rapidly to overturn this reckless and sloppy decision by the Oklahoma District Court, Congress sent a clear message that this destructive hyper-marketing will no longer be tolerated. In the wake of the following decision against the FTC by the District Court in Denver on different grounds, I again fully support the action of the FCC to move forward in enforcing the list so that American consumers are not left to suffer while lawyers argue.

While the flurry of legal activity over the past few days has at least temporarily cast the future of the Do-Not-Call list into doubt, I remain committed to protecting this commonsense, basic protection for the American consumer. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. We'd like you to stay. There are less damages done when you are here than over there.

[Laughter.]

The CHAIRMAN. Senator Wyden.

Senator WYDEN. Thank you, Mr. Chairman. Let me go right on this last point the Chairman made about immediate help for the public. People are sitting out there and they're in effect running around this legal mulberry bush, waiting for some immediate relief.

I said in my opening statement, Mr. Muris, that I'm going to push the telemarketing industry very hard to meet you all halfway with respect to working out the provisions for getting access to the list, because it seems to me then you could at least give some measure of relief immediately to the public that is so frustrated as they go up and down this legal roller coaster.

What exactly do you need the industry to do now in this effort to work with them to try to get the public some relief?

Mr. MURIS. Well, obviously the easiest thing would be to withdraw the lawsuits, but that won't happen. But I think with the telemarketers—it's in their interest to try to get themselves—and if I could explain for a minute that the position that they're in—some of the telemarketers have the list, some of them do not. And given what some states have said and what Chairman Powell has said, the telemarketers are in a difficult position. They're almost damned if they do, damned if they don't.

The most important thing for us is to get the stay. If we don't get the stay, we will move to try to set up a voluntary system, but given what the telemarketers said in court yesterday I fully expect that they would regard that as in contempt of the judge's order, and if they take that position they may well prevail.

Senator WYDEN. Making the argument that this is an act that's regarded as contempt, that really sort of guts the whole spirit of trying to do anything voluntary, doesn't it?

Mr. MURIS. Well, I agree. It appears that the telemarketers are saying one thing in public and another thing in court.

Senator WYDEN. What's your advice to the two areas of consumers that are following this? I mean, you've got consumers who have signed up and they want to know what's going to happen, you've got consumers who are watching all of this and trying to make sense of it. Gentlemen, what would you advise the public in those two groups?

Mr. POWELL. I think number one, it's important to give the consuming public a sense that its government is fully committed to effectuating the list, and while it's wrangling with legalese it's difficult for them to appreciate that we ultimately do believe and I believe this in the strongest terms it's all fixable. Whether it's all fixable to perfection by tomorrow or each day as we deal with each court case, I am quite confident that it's all fixable through the partnership of the Congress and the regulatory agencies, number one.

Number two, I think we are going to consider very seriously providing consumer information that will help people understand what they really can expect and what they really can't expect to the extent that we can nail that down about the court cases. There is ambiguity here. For those consumers who get called by people who got to access the list before it was enjoined, they may have every right to seek enforcement protection. If they got called from people who don't have the list and those people are not permitted by law to get the list, it may be difficult to enforce. They're not poor consumers are not going to know the difference. That's going to be for us to help them sort out.

If I could, Senator, you invited a question a moment ago and I want to suggest something else. It would be enormously helpful if the industry would commit to voluntarily providing the list to the FCC when it needs it for purposes of enforcement. I can't get the list from Chairman Muris right now because of a court order, but there are people who have gotten it, and to the extent that we receive complaints, if I'm able to have evidentiary proof as to disputes then we can certainly advance enforcement with respect to those who are entitled to it.

Senator WYDEN. One last question for this round. If you buy the reasoning by the Denver court, how do you uphold the junk fax law, for example? I mean, the junk fax law relates only to commercial faxes. Aren't we really headed, if you buy that kind of reasoning, for a variety of areas that are going to certainly not go over well with the consuming public? Mr. Powell?

Mr. POWELL. Senator, I think it's very interesting you say that because in the opinion last night the judge himself cited the junk fax law, in some sense almost favorably. In that case, he was citing—the fax laws are solely FCC rules and they flow from Congress' TCPA statute in which Congress made findings distinguishing the charitable and political speech from commercial speech, and the judge cited a case in the Eighth Circuit in which the constitutionality of those rules was upheld, upheld because it found that Congress had adequately made those distinctions.

I would argue that the rules under the TCPA have been challenged constitutionally before and have been upheld, because the congressional findings were given deference. That's why we continue to be optimistic that our rules that do flow from the congressional statute have a fair chance of prevailing on a First Amendment basis.

Senator WYDEN. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Allen.

Senator ALLEN. Thank you, Mr. Chairman. I thank both these chairmen for their leadership on this issue and also their articulate knowledge of the law. You've become lawyers and counsel here.

It strikes me as one of the key reasons and one of the things we can do other than write an amicus brief, which I think would be very important in answering the Chairman's question, what can we do. We've passed laws. You get frustrated when people who are appointed for life to the bench make decisions that can't understand plain law passed by the House and the Senate and signed by the President.

Now, we can file an amicus brief. You mentioned, Chairman Powell, in the situation of the faxes, and there is a distinction. There's a, as I recollect in the fax situation, there is a difference for non-profits, there's a difference if somebody's a member of an organization and a business relationship and all the rest, which is a different situation in my view, a distinction with this situation as far as the do-not-call where these are completely unsolicited calls from folks that have no relationship whatsoever to the household that they're calling.

Do you, in your estimation and reading of these court decisions, believe that we may need to, as a Congress, pass this law again with greater Congressional findings differentiating or explaining why we feel that commercial speech is different than that of charitable or non-profit calls?

Mr. POWELL. Yes, sir. I think there are three points. One, you may have done enough, stay tuned, we may win in the Tenth Circuit just on that point that Congress did make those findings and they're entitled to deference. By the way, I'll even read you a quick passage from the Eighth Circuit case. When Congress enacted the TCPA, it had found that non-commercial calls are less intrusive to consumers because they are more expected. The Supreme Court has indicated Congress can rely on various forms of effort to distinguish between different types of speech. The legislative history shows the TCPA's distinction between commercial and non-commercial. Fax advertising is relevant to the goal of reducing the costs and interference associated with unwanted faxes. We might win already because Congress made those faxes.

Second, if they are inadequate, I think that is one of Congress' responses. It can make those findings more explicit, more distinct, consistent with Supreme Court law, and probably cure that infirmity.

And third, I think something Senator McCain mentioned, I suppose if this is the basis for unconstitutionality, Congress would be always free to eliminate the exemptions, which are the source of the constitutional infirmity, that there are no exceptions for these other purposes. But I don't think we'd want to do that, but I think that certainly would be an option available to you.

Senator ALLEN. Thank you. Chairman Muris and Chairman Powell, with all the legal actions taking place, and we're talking about amicus briefs and Congressional findings, insofar as the general public is concerned, could you share for the people of America, the 51 million who have signed up on this do-not-call registry, what can they do now to stop these unwanted calls?

Mr. MURIS. Well, there is the glass is half-full here. Because we created the registry and have 51 million phone numbers on it, and because it appears that most and perhaps almost all of the large telemarketers have the list, and because of what Chairman Powell is doing, they can expect starting tomorrow some significant diminution in phone calls, assuming that the telemarketers comply with the law, and there are some other things that they can do.

They can obviously complain to the FCC and their state attorney general if they receive calls and they can ask to be placed in addition on the company-specific do-not-call list, which we can still enforce as well as Chairman Powell as well as the States. That's a

much more cumbersome way to avoid the calls than the registry because you have to opt out seller by seller, but there are steps that they can take, and because we created the registry, because Chairman Powell has taken the aggressive steps that he's taken, I do believe that there will be some significant reduction.

Senator ALLEN. What's the website for the, if you could, can they do this online?

Mr. MURIS. Can you complain?

Senator ALLEN. No, obviously complain online, but insofar as the company by company?

Mr. MURIS. Well you have to—two things have to happen. You have to ask the company, you have to say please put me on your company-specific do-not-call list, then they have to call you back again. We have given advice, and if the stay is upheld we will probably try to do this more aggressively to have consumers in fact take those two steps, which is to write down when they asked to be placed on the company-specific list, who the seller was, and then if they're called again to do that and they can complain to us and to the FCC and they can do it online. They can go to *ftc.gov,* and file a complaint.

Senator ALLEN. Thank you.

Mr. POWELL. Senator, I would say it the way I would say to a consumer. I think there are four things you ought to be cognizant of because I think consumers can be our partners in this effort. Chairman Muris already mentioned, if I was called, immediately request to be put on the company-specific list. Two, if called, inform them that you're on the national do-not-call list and ask if they have it. That can be an important source of deterring those who have it and nonetheless violating it. It will also be important evidentiary information if they exercise their third right, which is to let the FCC know and potentially file a complaint.

And I think four, also as Chairman Muris mentioned, they should explore what State-specific lists they have. I think if consumers are vigilant and are well-informed, they will be an important part of deterring the worst instincts of the commercial entities who may attempt to circumvent the regulation.

Senator ALLEN. Well they may do all of that. Thanks for the advice, but their food will be cold by the time they go through that, but thank you for that advice.

The CHAIRMAN. How do you get that information out to people?

Mr. POWELL. Well, we're going to explore that. We do something at the FCC called consumer alerts. We try to put together a very simply speaking informational. We'll put it on the Web, we'll circulate it to news organizations, we'll speak publicly——

The CHAIRMAN. Maybe we could get some——

Mr. POWELL. We'll get you copies.

The CHAIRMAN.—consumer groups to be involved with their mailing lists.

Mr. MURIS. Yes, Senator. One very important form of information, which I believe virtually all of your offices with us and I assume with the FCC, are very good about containing links on your website to the sorts of things that we do.

The CHAIRMAN. We'll try and get that information on every Senator's website.

Senator ALLEN. The reason I asked the question, Mr. Chairman, that hopefully newspapers, for example, will publish the answers of these two gentlemen on how consumers can be at least vigilant and protected while this court bumbles through their decisions.

The CHAIRMAN. Senator Nelson? Thank you.

Senator NELSON. Thank you, Mr. Chairman. You know, this Committee, along with you all, have grappled with the problem of spam and there are very similar issues here of invasion of privacy, of in some cases making your ability to use the Internet almost non-existent because it's loaded up with so much spam. Either one of you want to draw some parallels here?

Mr. MURIS. Well, we have talked repeatedly about spam. We've testified. We've brought over 50 cases involving spam. We're the only people in the world that like spam. You can go to our website and send us spam. We get over 100,000 a day. We've collected millions of spam. We use it to understand spam, the patterns in it. We've brought over 50 cases.

I think, unfortunately, the distinction is that the spammers are mostly already violating, I mean overwhelmingly already violating lots of laws, including our own, where the telemarketers are mostly not doing that, at least I hope that continues through tomorrow. Now, Senators, this Committee, Senators Wyden and Burns have a bill that, although we would write some changes in it, we think the bill would be helpful. We think technology would be helpful.

At the end of the day, however, unlike the telemarketing problem, the spam problem is a much tougher problem, and although legislation would be helpful, I don't think it would solve the problem. Now, I believe I have as much standing as anyone in the country to comment on a do-not-spam list and I do not think a do-not-spam list would be a useful idea. I would advise consumers not to waste their time to put their name on it because, again, the overwhelming majority of spammers are already violating laws. The problem is we can't find them because of the anonymity of the Internet. I believe the legislation that you are working on and they're working on in the House would be helpful, but it will not solve the spam problem.

Senator NELSON. Understandably, but there are certain types of spam that according to normal standards are egregious, and I think that's going to be the intent of the legislation coming out.

Mr. MURIS. Yes, absolutely.

Senator NELSON. And when that legislation gets to the floor, since they wanted to keep the Committee bill clean coming out of the Judiciary Committee on the penalties, the most egregious types, I will be offering an amendment to make this one element of the RICO Act, the Racketeering Influenced Corrupt Organization Act, so you can go after the criminal enterprise, for example, the child pornography spam that's going on.

Mr. MURIS. We are working right now with the United States attorneys using current laws, current criminal laws, to go after spammers, including the kind that you mentioned. There are criminal enforcement provisions, I believe, in the Committee's bill. The Justice Department has made some suggestions that I think would improve them. I understand the Committee is working with the

Justice Department. I think probably the most important part of the bill would be to make appropriate criminal enforcement easier.

Senator NELSON. Well, this is a whole new day of invasion of folks' privacy. Let me ask you this, Mr. Chairman Muris, does this Colorado court's decision impact your ability to enforce your FTC rules on deceptive and abusive calls?

Mr. MURIS. Well, absolutely, it shuts us down in terms of the do-not-call registry. If you take the logic of the judge, and this is what Chairman McCain was going at, the logic of what the judge has said, given the non-profit distinction in our statute, calls into question an enormous amount of what we do. On the other hand, we would argue there's a sharp distinction because deceptive practices and fraudulent practices should have no constitutional protection.

But there are wide ramifications from the argument that he made and I would hope the judge, for example, would defer to the findings of the Congress, but reading his opinions, even though he made that argument in the context of the Eighth Circuit opinion, that's hardly a model of consistency with other statements that he made.

Senator NELSON. Would you expand on your comments earlier about if this decision stood, whether or not the states would be able to enforce their do-not-call lists?

Mr. MURIS. There are several problems that the states have. The logic of this decision eliminates virtually all the State lists because they make various distinctions, most of them in terms of charities, but there are other distinctions that they make. The practical problem, many of the states, 13 or 14, have adopted our rule as theirs and they can't get it now.

There's also a potential problem, and I believe the telemarketers will argue this, that their failure to be able to get our registry read with the FCC statute, and this would be an extraordinarily unfortunate combination, would prohibit them from enforcing their laws.

The CHAIRMAN. Senator Ensign.

STATEMENT OF HON. JOHN ENSIGN,
U.S. SENATOR FROM NEVADA

Senator ENSIGN. Thank you, Mr. Chairman. Just a couple of comments on the whole idea of free speech and what is free speech. Chairman Powell, you mentioned a willing audience. I would even take that, you know, we've discussed the difference between commercial and charity speech I mean, I don't know, it seems to me that if somebody didn't want the charitable speech coming into their house they shouldn't have to listen to that as well, same thing with political speech.

I understand that Congress' intent was simply because sometimes you try to get something done and there would be a lot of opposition to have included the charitable and the political speech in this, but as far as if a person doesn't want to be bothered, just like a person doesn't want to go vote, they don't have to go vote. If they don't want to participate and donate to charities, they don't have to. I mean, that is part of freedom. That seems to me that that is their right to be able to do that. It would seem to me even constitutionally that that should be able to be structured regardless of how we do it.

But also, if Congress just wants to limit the commercial, then Congress has the right to be able to do that. It just seems another one of these court decisions where you just scratch your head and you wonder what some of these judges are thinking when they're making some of these rulings. I don't understand how somebody can say that you're limiting free speech by somebody voluntarily signing up on a list that says, please don't call me. That just makes no sense, I think, to people, and I think that's the reason Congress responded so quickly and in such a bipartisan way to, when the first ruling came out, to make sure that it was clear that Congress was authorizing the do-not-call list.

You mentioned, Chairman Muris, until we get all this straightened out in the courts, you know, companies have this do-not-call list that you can sign up with, but like you said, then they have to call you back and the problem is that there are 5,000 companies. I don't think that anybody wants to make 5,000 phone calls out there to make sure that they are off of every list.

Mr. MURIS. Well, the way they would have to do this—I agree completely with your opening remarks—but they way they would have to do this is not to call everybody, they would have to make notes as people call them. It is more cumbersome. It's why that rule has existed for a long time—it's why we proposed this national rule. When I, two years ago I spent time, for example, with Senators Wyden and Lansdowne talking about privacy, Congress wanted the Federal Trade Commission to be the privacy agency. We looked at the privacy issues and decided that this was the single most important step we could take that would practically affect Americans.

There are more Americans interested in this than practically everything I know of since the Seabiscuit-War Admiral match race in 1938, when during working hours a third of Americans stopped and listened to it on the radio. There aren't very many things that touch the average person the way this has, and it's because the company-specific list is cumbersome.

We believe that people are aroused so much that we could do more enforcement, but Chairman Powell has rightly and aggressively said, if you have the list, we're not talking voluntary here, we're talking under his rules, you have to comply.

Senator ENSIGN. Chairman Powell, could you maybe comment on what we can do; what do you see over the next several months? I know that you're going to be doing what you can enforcement-wise. Do you see at the end of the day though if this particular judgment held up where you couldn't make the distinction, so then would Congress I mean, it would seem to me if that held up through the courts, Congress' only choice then, if we really wanted a do-not-call list would be to include the political and the charitable speech. Isn't that—wouldn't that be a logical assumption?

Mr. POWELL. It could be. I think that it's important again to emphasize the fluid nature of the litigation. Each day we learn another piece, and I think there are a few more shoes to drop before we're sure what the full range of cards we have to play are. One of them is, if the FTC is successful in getting the Third Circuit to stay this, it's a different ball game. If we don't, it's a different kind of ball game.

I think there are three potential scenarios here: both of our rules are struck down as unconstitutional; the FTC's are and ours are not, but then we just have a mechanical administrative problem of how we have the list operational with one agency with constitutional rules, one without; or ultimately both are sustained and we can go back to doing it the way we designed it.

I think what I'm encouraged by, at least so far in the court opinions, is the reasons that they are asserting for finding constitutional infirmity are reasons that need not necessarily be unfixable, which is, if there is the possibility for either the regulatory agency or Congress to more clearly explain the distinction between commercial and non-commercial, it may be able to pass constitutional muster. And I think ultimately your point, which is, I think, that under that under the logic of the district court's decision, if those exemptions were not there the ruling would have gone another way.

So it's not for me to tell Congress which of those it would choose, but I do think ultimately that is one option it will have, whether to not allow those exemptions in order to cure the finding of the court. But my caution here is we're going to have to see what are the full range of cards we can play, and I think that will happen quick. I think in the next several days we'll basically know the parameters.

Senator ENSIGN. Mr. Chairman, I have to leave, but could I just ask a followup? It's a very quick question and it has to do with the relationship with someone, a consumer walks in, whether it's a hotel, let's use a real simple example. Somebody comes in, as a veterinarian, comes into my animal hospital. Now they're a client. Do you think that under the do-not-call list that that relationship is protected? Let's say that I happen to be running a geriatric special for check-ups for animals as they get older and we want to be able to call our clients and offer it. That's something that they want to hear about. Do you think that that relationship is protected under the do-not-call list?

Mr. POWELL. Within very careful limits. I mean, I think one of the things that Chairman Muris and I both worked on in our rules is to have a narrowly defined zone of existing business relationships in which calls are permitted within certain parameters if there are certain indicia of an existing relationship and it's not allowed to last forever in the context of the telemarketing rules. It's an 18 and 3 rule, we could get into the details of it, but I think that's a scenario that we contemplated.

I mean, I think it's important that we went after protecting consumers but we were cautious to protect legitimate business relationships as well. This isn't a jihad for its own sake. I think it's to protect consumers within the parameters of fair business and legal practice, and one of them is, sometimes you have a business relationship with a consumer or citizen and we shouldn't stop communications between people who have established relationships within limits. And I think the scenario you're describing is probably one of them.

Mr. POWELL. And indeed that, just to add a quick comment, that relationship is in the consumer's interest to know.

Senator ENSIGN. Correct, right, and that's what I want to make sure that as we go forward, if we are able to implement the do-not-call list, that that kind of relationship is protected. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. I want to thank both of you, as I said before, for your remarkable reactions to this difficult situation, which is obviously of enormous importance to most Americans. Chairman Powell, we'd like to get that four-point list from you and try and get as wide a dissemination as possible so Americans at least have some recourse, and of course we can all hope that the Court of Appeals will issue a stay and this hearing will have been rendered a pleasant exercise. Thank you very much for being here.

Mr. MURIS. Thank you.

Mr. POWELL. Thank you, Mr. Chairman.

The CHAIRMAN. Our next panel is Dean Rodney Smolla of the University of Richmond School of Law at the University of Richmond; Mr. Gerald Cerasale, who is the Senior Vice President of Government Affairs for the Direct Marketing Association; Mr. Tim Searcy of the American Teleservices Association; Mr. James Guest is the President of the Consumers Union; and Mr. Lee Hammond, a Member of the Board of Directors, American Association of Retired Persons.

Welcome to all of the witnesses. Thank you for joining us here today, and Dean Smolla, is that the proper pronunciation?

Mr. SMOLLA. It is, Senator, thank you.

The CHAIRMAN. Thank you for joining us today and please proceed.

STATEMENT OF RODNEY A. SMOLLA, DEAN, UNIVERSITY OF RICHMOND SCHOOL OF LAW

Mr. SMOLLA. Thank you, Mr. Chairman and Members of the Committee. It's my pleasure to have this opportunity to address the Committee. I've submitted substantial written testimony, but I'd like to focus primarily on the constitutional conflicts that various members have focused upon.

I think at the outset it's important to acknowledge that there are two constitutional values here that are deeply cherished by the American people: the right to privacy, particularly in the home and freedom of speech. And we always struggle in our society to accommodate those two values when they are in conflict and it's not always easy to do so.

It's important, I think, for us to understand, as many people have observed, that as technology increases the capacity for various people to invade our privacy in American life, the law has got to have a kind of a cost-of-living increase sort of index. You have to be able to escalate the legal tools that government can bring to bear so that the average person can keep some measure of human dignity and some measure of privacy, notwithstanding the technological ingenuity of those who use devices to invade it.

The district court's decision in Denver, I think it's important to emphasize, absolutely did not say that any form of do-not-call list registry would be unconstitutional. As the chairman has focused upon, the district judge's opinion is actually relatively narrow. It is not that you can not have a do-not-call list. What the district judge

is concerned about are the distinctions that reside in the list between the commercial callers and the non-commercial callers.

So really I think the key is whether that's right or wrong as a matter of constitutional law, whether it's likely to prevail or not prevail in the Tenth Circuit and conceivably in the Supreme Court, and also to ask the question whether there are any fixes, either administrative fixes or Congressional fixes that might take the oxygen out of the argument and provide a quick rescue, perhaps a rescue even before this reaches the Tenth Circuit. And I do have a suggestion as to a possible fix that might moot the controversy and I'll get to that in a second.

Let me first very quickly talk about the merits of the district judge's opinion. I think that the district judge did undervalue one of the Supreme Court precedents that's the backdrop of this, the Rowan case, which is a relatively old case from the 1960s involving the primitive old world of bulk mail, you know, the LL Bean catalogs and all the things that we all get in the mailbox. In that decision in Rowan, the U.S. Supreme Court very powerfully endorsed the notion of privacy, and if you read that opinion by Chief Justice Burger, you see the Court unequivocally rejects the notion that freedom of speech carries with it the right to go into someone's home and engage in speech conduct that they do not wish to receive.

Now, the district judge says, yes, Rowan is precedent and it looks a lot like a controlling precedent, but the district court in Denver said there's a distinction, and the distinction is that Rowan was a neutral statute. All Rowan did was give you the power to block senders, whereas in this one, Congress and the agencies have put their thumb on the scale by singling out commercial speech and treating it disfavorably.

But that overlooks a key element in Rowan. There was a content-based distinction in Rowan. Rowan dealt only with sexually explicit speech. It was only lewd or lascivious speech that you had a right to block, so there is a precedent involving content discrimination even in Rowan that the district court never addressed, and I think it makes that decision arguably vulnerable when the case goes to the Tenth Circuit on that ground.

Now let's give the district court its due. I know it's a very unpopular decision and it's easy to attack it, but there is an important Supreme Court precedent on the other side of this that I think has to be contended with, and it's a more modern decision. It's the *Discovery Network* case and it's a very simple case to understand. It involved the City of Cincinnati's effort to keep newspaper kiosks, news racks, off the streets in Cincinnati, to reduce the clutter that comes when you come around the corner and there are 9 or 10 news racks there.

So the city said, we're going to not allow news racks, but we're going to have an exception for true newspapers, USA Today, Wall Street Journal, Cincinnati Post or Cincinnati Inquirer, they get to stay but the commercial handbill news racks, the real estate——

The CHAIRMAN. It was a way of getting around at the sexually explicit stuff too, right?

Mr. SMOLLA. Well, it was commercial and there often would be, that is to say the commercial handbills might be for adult stores and that sort of thing, exactly, Senator.

The U.S. Supreme Court said you can't do this, and the reason you can't draw this commercial/non-commercial distinction is that clutter is clutter, that the same news rack was going to bother your eyes or bother your traffic flow no matter what was in it, so the distinction in that case between commercial speech and non-commercial speech didn't cut it, the Supreme Court said, because there was nothing in the character of the speech as commercial or non-commercial that connected to the harms.

Now, just to give the district judge in Denver his due, so you understand what you're up against, all right, the district judge said essentially the same logic applies here. What's the real problem? The problem is you're sitting down at dinner and the phone rings and then you get up and you can't get rid of the person and you've got to deal with it and then you go back, and it's just an invasion of your privacy, it's an intrusion.

Or maybe there's this other problem. Somebody's on the phone with you and they're trying to mess with you, they're trying to trick you, there's fraud, there's overbearing, and there's another element of annoyance. And what the district court said is, really it doesn't matter whether that's a credit card vendor that's called you or a political fundraiser that's called you, or my alma mater, the University of Richmond, trying to raise money, or a charity trying to raise money. It's still a phone call. A phone call at 6 in the evening is a phone call and they hit on privacies the same and the district judge says there's no evidence really to prove that the commercial callers are worse, that they're more vexatious, that they're more overbearing and so on, and so he said that's a lot like the news rack issue and that's the kind of distinction that the First Amendment forbids.

Now that may not be right. That could get reversed in the Tenth Circuit. It could get reversed in the Supreme Court. But objectively, someone that's not here representing any interest group or any vested economic interest, I have to say it could win, that is to say it's not some outlying, ridiculous application of these Supreme Court precedents. And the *Discovery Network* case is a more recent case, a more modern case that brings to bear all of the new protections for advertising that the Supreme Court has adopted over the last 20 years, whereas Rowan is an older case.

So let me end with a possible creative solution. If you look at this from the point of view of the big picture, not how will the stay work out in the next 24 hours and so on, but the long picture, one option would be to just give up on the do-not-call registry. That's not tenable, we don't want to do that in our society, it's not appropriate. People want this protection and in some way or another undoubtedly they will get it.

A second would be to go for the full blanket do-not-call list, just everything is activated. That would eliminate the First Amendment problem that the district judge identified, but as the Chairman of the FTC has pointed out, even that's tricky because it has the bad effect of squelching more speech, including speech that's clearly at the core of the First Amendment, political speech, charitable

speech, and so on. So that's not necessarily the most appealing solution, though it's probably a fairly safe one from a First Amendment perspective, though I think there would be some argument from some groups.

Third possibility is just to hold the line, argue vociferously that this distinction is tenable and that the cases like *Discovery Network* ought not apply in this situation.

A fourth possibility, and there has been a hint of it already, would be to adopt a kind of hybrid, and this is my creative suggestion. Congress could amend the empowerment statutes here to say every consumer can do any of the following: can block all the calls; can block only the commercial calls but let the charitable calls and political calls come through; can block the political calls and charitable calls, block those but allow the commercial calls I mean there are some people that like *Home Shopping Network* better than *C–SPAN*, you know, so let the people that want to do that do that and essentially you create a kind of menu. You can block as much or as little as you want.

There are parallels to this. We do something like this with the V-chip. We do something like this with filtering software. This would be the true ultimate empowerment. It would place in the hands of every family the decision as to how much to block or how much not to block and I think it would eliminate this content-based distinction argument that has been troublesome and vexatious no matter how you play it.

So that's the gist of my comments on the constitutional issue and of course later I'll be happy to take questions.

[The prepared statement of Mr. Smolla follows:]

PREPARED STATEMENT OF RODNEY A. SMOLLA, DEAN, UNIVERSITY OF RICHMOND SCHOOL OF LAW

I. Introduction

I wish to thank the Committee for this opportunity to present testimony on the issues implicated by recent judicial rulings concerning the national telemarketing "Do Not Call" registry, developed by both the Federal Trade Commission and Federal Communications Commission.

The purpose of this testimony is to (1) briefly summarize the legislative and administrative history of the registry; (2) review the current legal status of the registry in light of recent litigation developments; (3) explain the First Amendment doctrines that place the constitutionality of the registry in doubt, (4) offer a prediction as to the likelihood that the registry will survive constitutional challenge in its current form; and (5) offer suggestions as to legislative "fixes" that could substantially improve the probability that the registry will survive judicial review.

II. Legislative and Administrative History of "Do Not Call"

Congress in 1991 passed the Telephone Consumer Protection Act, 47 U.S. § 227 ("TCPA"). The law was enacted "to protect residential telephone subscribers' privacy rights to avoid telephone solicitations to which they object." *Id.* § 227(c)(l). The Federal Communications Commission was directed to promulgate regulations that restricted the use of automatic telephone dialing systems. *Id.* § 227(b)(1).

In 1992, the FCC adopted rules pursuant to the TCPA, but declined to create a national "do-not-call" list. The FCC instead required telemarketers to adopt company-specific do-not-call lists. Under this system a consumer who did not wish to receive telephone solicitations from a particular company could request that the telemarketer remove that consumer's telephone number from the telemarketer's list.

By 2002, however, the FCC appeared to realize that its company-specific approach had failed to provide adequate privacy protection to consumers, and the Commission issued a Notice of Proposed Rulemaking requesting comment on whether the Commission should revisit its decision regarding the establishment of a national do-not-call list.

Three years after the enactment of the TCPA, Congress in 1994 enacted a second important piece of legislation, the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101–6108 ("TCFAP"). The law instructed the Commission to promulgate rules prohibiting deceptive and other abusive telemarketing acts or practices and to include in such rules a definition of deceptive telemarketing acts or practices. *Id.* § 6102(a) (1) and (2). The TCFAP, enforced by the FTC, did not apply to activities that were outside of the jurisdiction of the FTC, such as certain financial institutions, common carriers, air carriers and nonprofit organizations, or insurance companies. In 1995 the FTC adopted rules implementing this legislation, rules that did not contain any national do-not-call registry.

In January 2002, the FTC issued a Notice of Proposed Rulemaking that recommended the creation of a national do-not-call registry, to be maintained by the FTC, as well as rules that addressed the problem of "abandoned calls" resulting from the use of predictive dialers by telemarketers. In January 2003, the FTC promulgated final rules establishing a nationwide do-not-call registry and specified requirements for the use of "predictive dialers." The FTC found that the previous company-specific do-not-call rules, which permitted a consumer to request that his name be removed from a company's call list, were insufficient to protect consumers from unwanted calls. The FTC found that telemarketers interfered with consumers' attempts to be placed on company-specific lists by hanging up on them or ignoring their request. The FTC noted that the prior practice placed too much burden on consumers who had to repeat their do-not-call request with every telemarketer who called, that the company-specific list continually exposed consumers to unwanted initial calls which had significantly increased in numbers since adoption of the original FTC rules, and that consumers had no method to verify that their name had been removed from the company's list. In a move that has proven enormously significant in subsequent litigation, the FTC exempted charitable organizations from the do-not-call requirements. The FTC made this exception partly in deference to the heightened First Amendment protection afforded charitable speech. The FTC also found that abusive telemarketing practices of the sort the registry sought to combat were more likely to be undertaken by commercial telemarketers than those soliciting charitable and political contributions. In an important concession, however, the FTC admitted that the interest of protecting privacy did not justify a distinction between commercial and charitable telemarketing calls, on the reasoning that consumer privacy was equally invaded by both types of calls. The FCC followed suit, ultimately adopting rules that paralleled those of the FTC.

Congress strongly endorsed this movement in 2003, enacting the Do-Not-Call Implementation Act, Pub. L. No. 108–10, 7 Stat. 577. ("Implementation Act"). The Implementation Act provided, among other things, that the FTC could promulgate regulations establishing fees sufficient to implement and enforce the provisions of its national do-not-call registry.

The first significant judicial setback to this momentum was a decision on September 23,2003 by the United States District Court for the Western District of Oklahoma, *U.S. Security* v. *Federal Trade Commission,*—F.Supp.2d-, 2003 WL 22003719 (W.D. Okla. 2003). In *U.S. Security* the District Court held that the FTC lacked the statutory authority to create its national registry. Whereas Congress had clearly given the FCC the green light to adopt a national registry in acting the TCPA, the District Court reasoned, no similar explicit authority existed under the TCFAP granting parallel authority to the FTC. In reaching this judgment, the District Court was unmoved by the fact that the Implementation Act appeared to tacitly endorse the FTC's national registry, holding that Congress' appropriation and fee-authorizing legislation was not a "ratification" of the FTC's actions sufficient to constitute statutory authorization for the registry.

A more significant judicial blow to the national registry carne two days later when the United States District Court for the District of Colorado held, in *Mainstream Marketing Services, Inc.,* v. *Federal Trade Commission,*—F.Supp.2d-, 2003 WL 2213517 (D. Colo. 2003), held that the national do-not-call registry violated the First Amendment. The District Court in *Mainstream Marketing* held, however, that the FTC did have statutory authority to promulgate its "abandoned calls" regulations. (The abandon calls regulations were not challenged on First Amendment grounds, but merely on statutory authority grounds.) The Colorado District Court in *Mainstream Marketing* did not specifically address the issue that had been decided by the Oklahoma District Court in *U.S. Security*—the question of whether the FTC had statutory authority to create the do-not-call registry. Generally, however, the reasoning of the Colorado District Court on the statutory authority question was in tension with the reasoning of the Oklahoma District Court, with the Colorado District Court taking a far more generous view of the authority of both the FCC and FTC

to enact telemarketing rules in a coordinated inter-agency effort to deal with the privacy issues posed by telemarketing practices.

III. Statutory and Constitutional Issues Posed by Do-Not-Call

A. Statutory Authorization

In the long run the question of statutory authority is relatively trivial. It is plain that this Congress intends to grant to both the FTC and FCC the authority to establish a national registry, and to the extent that the alleged defect found by the Oklahoma District Court in the FTC's statutory authority is at all sound, that defect was easily cured by additional legislation passed on September 29 flatly granting such authority to the FTC. It is my view that under the Implementation Act adequate statutory authority already existed, and there was no mistaking congressional intent on this point. The problem, however, has now been mooted by the new additional legislation that unequivocally authorizes the FTC to enforce the national registry.

B. Constitutional Issues

1. The Protection of Privacy

The do-not-call registry poses a conflict between two sacred American values, both of constitutional dimension, the right of privacy and freedom of speech. Privacy may be the most important emerging right of this new century. As technologies make it increasingly difficult for Americans to maintain their privacy, evolution in administrative, statutory, and constitutional law is necessary to keep pace, preserving privacy as an essential element of human dignity. Just as we make adjustments for inflation in cost-of-living indexes, we may need to think of "escalation clauses" in our legal protection for privacy. As the power to impinge on privacy increases, legal principles must escalate to meet the challenge, preserving the power of the average person to fight back against unwelcome intrusions. *See, e.g., Katz* v. *United States,* 389 U.S. 347, 351 (1967) (holding that the Fourth Amendment's guarantee against unreasonable searches extended to cover electronic eavesdropping, even though the framers of the Constitution could not have contemplated such an electronic search, because the Fourth Amendment was intended to protect "people, not places.")

The privacy of the home has always been at the core of English and American conceptions of privacy. The sacredness of the home as a "castle," a fortress of privacy surrounded with moats of constitutional and common-law protection, is legendary and centuries old. *See Semayne's Case,* 77 Eng. Rep. 194, 195 (K.B. 1604) ("[T]he house of every one is to him as his castle and fortress . . ."); William Cuddihy & B. Carmon Hardy, *A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution,* 37 Wm. & Mary Q. 371, 400 (1980) (noting that the belief that "a man's house is his castle" found expression at least as early as the sixteenth century in English jurisprudence). William Pitt, in a speech before Parliament, declared the home a sanctuary against the force of government, demarking the line at which the brute power of the state must yield to the principle of privacy: "The poorest man may, in his cottage, bid defiance to all the forces of the crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the king of England may not enter; all his force dares not cross the threshold of the ruined tenement." *Id.* at 386 (quoting Thomas M. Cooley, *Constitutional Limitations* 299 n.3 (1868)); *see also* 4 William Blackstone, *Commentaries* 223 (photo. reprint 1967) (1769) ("And the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity. . . . For this reason no doors can in general be broken open to execute any civil process; though, in criminal cases, the public safety supersedes the private.").

This tradition was the backdrop of the Fourth Amendment, and its guarantee of the right of the people to be secure in their "persons, houses, papers, and effects" against unreasonable searches and seizures. U.S. Const. amend. IV; *see also Silverman* v. *United States,* 365 U.S. 505, 511 (1961) ("The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.") *(citing Boyd* v. *United States,* 116 U.S. 616, 626–30 *(1886); Entick* v. *Carrington,* 19 Howell's State Trials 1029, 1065 (C.P. 1765)).

This solicitude for the home, originally conceptualized as a bulwark against the force of the state, has evolved into a broader concept, in which the home is seen as an essential to one's autonomy and privacy, a place of respite from the cruel world. In the words of Judge Jerome Frank: "A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That

is still a sizable hunk of liberty—worth protecting from encroachment A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle." *United States* v. *On Lee,* 193 F.2d 306, 315–16 (2d Cir. 1951) (Frank, J., dissenting). Virtually everyone engaged in the debate over the do-not-call registry will concede that powerful privacy interests are stake. Uninvited telephone solicitations are highly intrusive, particularly when they come during family time such as dinner and early evenings in the home.

Indeed, in a decision with many parallels to the do-not-call registry, decided in a simpler time in our history and dealing with old-fashioned land mail, the Supreme Court acknowledged the right of the consumer to reject unwanted mail. In *Rowan* v. *United States Post Office Department,* 397 U.S. 728, (1970), the Court upheld a statute that allowed an addressee to refuse mail from any sender of "erotically arousing or sexually provocative" material by notifying the local postmaster, who then instructed the sender to remove the addressee's name and address from its mailing list under penalty of law. Noting that the purpose of the statute was to eliminate governmental involvement in any determination concerning the content of the materials, allowing the addressee complete and unfettered discretion in electing what speech he or she desired to receive, the Court sustained the law. The First Amendment right to speak, the Court reasoned, was only circumscribed by the addressee's affirmative act in giving notice that he or she no longer wished to receive mail from the sender. Most importantly, the Court categorically rejected the argument that a vendor has the right to send unwanted material into the home of another.

2. Protection of Commercial Speech

The vital privacy interests that animate the do-not-call registry must be balanced against the competing First Amendment protection for freedom of speech, a protection that often is dependent upon the ability of the speaker to initiate the message, making a preliminary attempt to engage the listener or reader even though the message may not have been invited.

Commercial telemarketing is a form of "commercial speech." Contemporary commercial speech doctrine is governed by the four-part test first articulated in *Central Hudson Gas & Electric Corp.* 3v. *Public Service Commission,* 447 U.S. 557 (1980):

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than Is necessary to serve that interest.

Id. at 563–64. The arc of modern commercial speech jurisprudence is unmistakable: in decision after decision the Supreme Court has advanced protection for advertising, repeatedly striking down regulations grounded in paternalistic motivations. *See, e.g., Thompson* v. *Western States Medical Center,* 122 S.Ct. 1497, 1505 (2002) (striking down restrictions on pharmaceutical advertising); *Lorillard Tobacco Co.* v. *Reilly,* 533 U.S. 525,554–555 (2001) (striking down some and sustaining some restrictions on tobacco advertising); *Greater New Orleans Inc.* v. *United States,* 527 U.S. 173 (1999) (striking down casino gambling advertising limitations); *44 Liquormart, Inc.* v. *Rhode Island,* 517 U.S. 484 (1996) (striking down liquor advertisement restrictions); *Rubin* v. *Coors Brewing Company,* 514 U.S. 476 (1995) (striking down beer advertising regulations); *Ibanez* v. *Florida Dep't of Business and Professional Regulation,* 512 U.S. 136, 147 (1994) (striking down restrictions on accountancy advertising); *Edenfield* v. *Fane,* 507 U.S. 761 (1993) (striking down commercial speech limitations on accountants); *Cincinnati* v. *Discovery Network, Inc.,*507 U.S. 410 (1993) (striking down restrictions on newsracks for commercial flyers and publications); *Peel* v. *Attorney Registration and Disciplinary Commission of Illinois,* 496 U.S. 91(1990) (regulation banning lawyer advertisement of certification by the National Board ofTrial Advocacy as misleading unconstitutional); *Shapero* v. *Kentucky Bar Ass 'n,* 486 U.S. 466 (1988) (regulation banning solicitation for legal business mailed on a personalized or targeted basis to prevent potential clients from feeling undue duress to hire the attorney unconstitutional); *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court of Ohio,* 471 U.S. 626 (1985) (striking down some and upholding some restrictions on lawyer advertising); *Bolger* v. *Youngs Drug Product Corp.,*463 U.S. 60 (1983) (statute banning unsolicited mailings advertising contraceptives to aid parental authority over teaching their children about birth control unconstitutional); *In re R.M.J.,* 455 U.S. 191 (1982) (regulations lim-

iting the precise names of practice areas lawyers can use in ads and identifying the jurisdictions lawyer is licensed in as misleadingly unconstitutional); *Central Hudson Gas & Electric Corp.* v. *Public Service Commission,* 447 U.S. 557 (1980) (striking down restrictions on advertising statements by public utilities); *In re Primus,* 436 U.S. 412 (1978) (striking down restrictions on solicitation of legal business on behalf of ACLU); *Bates* v. *State Bar of Ariz.,* 433 U.S. 350 (1977) (regulation banning lawyer advertisement of prices for routine legal services as misleadingly unconstitutional); *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85 (1977); (regulation banning placement of "for sale"signs in the front lawns ofhouses in order to prevent the town from losing its integrated racial status unconstitutional);· *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976) (striking down restrictions on pharmaceutical advertising); *Bigelow* v. *Virginia,* 421 U.S. 809 (1975) (striking down restrictions on abortion advertising).

3. Content-Based Distinctions and the Charitable Speech Exception

The District Court in *Mainstream Marketing* did *not* hold that *any* form of do-not-call registry would be unconstitutional. Indeed the District Court explicitly acknowledged that the protection of privacy was a substantial government interest sufficient to satisfy the second prong of *Central Hudson,* and also acknowledged that the registry directly and materially advanced that interest, satisfying the third prong ofthe test. Rather, the District Court rested its decision on a non discrimination principle that cuts across many First Amendment areas, a principle that generally looks with great skepticism at content-based distinctions. *See, e.g, R.A.V.* v. *City of St. Paul,* 505 U.S. 377 (1992).

This antipathy toward content-based discrimination applies to commercial speech regulation. In a key precedent, *Cincinnati* v. *Discovery Network, Inc.* 507 U.S. 410 (1993), the Supreme Court struck down an ordinance that engaged in content-based distinctions similar to those in the do-not-call registry. In *Discovery Network* the City of Cincinnati enacted an ordinance prohibiting the distribution of commercial handbills on public property. The ordinance effectively granted distributors of traditional "newspapers," such as the *Cincinnati Post, USA Today,* or *The Wall Street Journal,* access to public sidewalks through newsracks, while denying equivalent newsrack access to the distributors of commercial magazines and handbills, such as publications for apartment or house rentals or sales. The ordinance was designed to reduce the visual and spacial clutter of newsracks. The constitutional difficulty, however, was that no principled distinction could be drawn between the clutter caused by a *USA Today* newsrack and one caused by a real estate magazine. Clutter was clutter, and a newsrack was a newsrack, and the content of the speech inside the rack bore no relation to the city's environmental or aesthetic interests. The Supreme Court pointedly rejected the notion that government could simply "pick on" commercial speech, making such speech bear a disproportionate burden, *merely* because the *Central Hudson* test contemplates somewhat reduced constitutional protection for commercial speech. The harm the government sought to address simply had nothing to do with the commercial or non-commercial character of the speech that was regulated.

The District Court in *Mainstream Marketing* applied similar logic. An unwanted telephone call during dinner is an unwanted telephone call during dinner. An abusive or overbearing or fraudulent call is an abusive or overbearing or fraudulent call. Whether the caller is a commercial vendor, a solicitor for a charity, or a political fundraiser, the essential hit on privacy interests remains the same. Similarly, the District Court could find nothing in the record before it to support the supposition that commercial telemarketers are as a class are more prone to abuse or fraudulent practices than non-commercial telemarketers. Following the straightforward logic of *Discovery Network,* the District Court thus struck down the do-not-call registry.

The District Court distinguished *Rowan* largely on the ground that in *Rowan* Congress left to the addressee the power to make the content judgments to block mail from senders. As the District Court was careful to note: "Were the do-not-call registry to apply without regard to the content of the speech, or to leave autonomy in the hands of the individual, as in *Rowan,* it might be a different matter. As the amended Rules are currently formulated, however, the FTC has chosen to entangle itself too much in the consumer's decision by manipulating consumer choice and favoring speech by charitable over commercial speech. The First Amendment prohibits the government from enacting laws creating a preference for certain types of speech based on content, without asserting a valid interest, premised on content, to justify its discrimination. Because the do-not-call registry distinguishes between the indistinct, it is unconstitutional under the First Amendment."

IV. The Future of Do-Not-Call in its Present Form

The do-not-call registry is enormously popular with the American people and with Members of Congress, and it is firmly grounded in the enormously important and ongoing American battle to preserve human privacy and dignity. It is a concept worth saving.

Nevertheless, the analysis of the District Court in *Mainstream Marketing* is, if one will indulge the pun, within the mainstream. *Mainstream Marketing* is not a radical extension of existing law, not a "stretch" in which existing doctrines are applied in some exotic or implausible manner, not an aggressive exercise in inappropriate judicial activism.

This is not to say that the District Court's opinion in *Mainstream Marketing* would certainly withstand analysis on appeal. Although the District Court distinguished *Rowan,* for example, it is worth noting that even in *Rowan* the law was not entirely content-neutral. Congress had singled out sexually explicit messages for special treatment. At the same time, *Rowan* itself is a relatively old case by First Amendment standards, decided before modem commercial speech doctrines evolved, decided before *Discovery Network,* and decided before the strong current First Amendment doctrines heavily disfavoring content-based distinctions were well-developed.

The First Amendment principles forbidding content-discrimination, and the specific commercial speech principles that forbid discriminating against commercial speech on grounds that are unrelated to the commercial content of the speech, are well-entrenched and laudable components of our current constitutional jurisprudence. There are sound reasons why courts look with great skepticism at content-based distinctions, and sound reasons why these principles apply to advertising and commercial speech. There is probably no principle more central to our First Amendment tradition than the notion that the government ought not "pick and choose" among messages, particularly when the values it seeks to vindicate bear no demonstrable relationship to the content of those messages.

In short, modem First Amendment doctrine tends to favor an "all or nothing" form of regulation. There is, admittedly, an irony here, and a heavy social cost. To eliminate the distinction between non-commercial and commercial telemarketing would actually burden *more* speech. One might plausibly argue that the current form of the do-not-call registry is thus actually preferable to a complete ban. Reinforcing this argument, one might argue that given the especially high place that charitable and political speech enjoy inour constitutional constellation, there is *positive* constitutional value in carving out an exception for those categories. Seen this way, the current do not-call registry regime does not discriminate *against* commercial speech so much as it discriminates *in favor* of political or charitable solicitations. While these arguments do have some appeal, in the end they appear to be in tension with current First Amendment doctrines, especially decisions such as *Discovery Network.*

No one, of course, can predict with complete confidence what the United Stated Court of Appeals for the Tenth Circuit, or possibly the Supreme Court, will do when the *Mainstream Marketing* decision is reviewed on the merits. Congress would be prudent not to proceed, however, on the supposition that *Mainstream Marketing* is some kind of "outlying" decision that is obviously wrong and heading for certain reversal. To the contrary, the decision appears consistent with emerging constitutional principles. While the District Court's application of *Discovery Network* and *Rowan* is not free from dispute, there is certainly a substantial possibility that the District Court's holding would be sustained on appeal.

V. Legislative Solutions

Admittedly, it may well be painful to extend the reach of the do-not-call registry to non commercial solicitations. It is my view, however, that the simplest and cleanest way to maximize the probability that the do-not-call registry will withstand constitutional attack is to pattern the registry after the postal rules upheld in *Rowan,* permitting consumers to block all unsolicited calls, from whatever source.

There are other somewhat more creative (and perhaps less certain) possibilities. Congress might authorize the promulgation of agency rules that would allow consumers to block all solicitations, or choose between blocking only commercial or non-commercial solicitations. This would be a "hybrid" model, somewhere between the current FTC and FCC approach and the approach in *Rowan.* Because it would empower consumers to make the choice, it would largely mitigate the content-based discrimination found unconstitutional by the District Court in *Mainstream Marketing.* At the same time, it would operate, somewhat like television "V-Chips" or computer filtering software, to allow some consumers to selectively permit some messages in while keeping others out. For those consumers to who do not mind receiving non-commercial telemarketing calls but object to commercial solicitations (or

the reverse, those who do not mind receiving commercial calls but dislike charitable or political calls), the option would be available to block one category but not the other.

VI. Conclusion

I appreciate the opportunity to address the Committee on this important issue. In the short time and space available I have not attempted to canvass every nuance of the issues posed, or every aspect of the decisional law, but I do hope my testimony will assist the Committee in looking at this dispute with additional perspective as it considers possible action responsive to the ongoing judicial developments.

The CHAIRMAN. Thank you very much, Dean, and that's a remarkable idea. We thank you. Mr. Cerasale.

STATEMENT OF JERRY CERASALE, SENIOR VICE PRESIDENT, THE DIRECT MARKETING ASSOCIATION, INC.

Mr. CERASALE. Thank you, Mr. Chairman, thank you, Members of the Committee, for giving me the opportunity to be here.

I represent the Direct Marketing Association, been around since 1917. We have marketers that use every channel of communication to try and reach individuals, including the telephone, and we've been in this space for quite a while.

In 1985, we started our own national do-not-call list and it has 8 million phone numbers on it and our survey has shown that it stops about 80 percent of the phone calls.

But let me start on this—what we've been saying for an entire week now since the first court decision came down we want our members to respect the wishes of American consumers. They, millions of them, have put 50 million numbers on the list and they don't want to be called. It makes business sense to treat our customers the way they want to be treated and not call them, but we continue, on the other side we continue to believe that we have to settle the constitutional issues here. If they're not settled, then anytime there's enforcement, those constitutional issues come up and it's going to hinder enforcement.

So the court cases must go on and we must find a solution, a constitutional solution to this issue, but we do want to respect the wishes of the American public. Now last week we said we were asking all our members to voluntarily use the list, and that was before these latest court decisions and the determination of the Federal Trade Commission that we can not use the list, we can not share the list with anyone, and based on contract, even people that have the list can't use it for others. For example, a teleservice bureau that has the list, has downloaded it, paid for it, can not use it for its members for its clients, excuse me that it does not know have already paid for it, have permission to use the list.

So that's a problem we have and we're willing to work with the Government to try and see if we can fix that problem. At the moment, according to what Chairman Powell has said, most of our members, our large members, do have the list and will use the list so that a vast majority of the telephone calls from our members will be covered by FCC enforcement. Also, there are certain states that are not part of many states that are not part of the FTC list and those enforcements will remain in place.

We do have a problem with those members of ours who do not have the list and the problem of them wanting not to call these

people, but you cannot find they cannot legally use those numbers. And we have the problem with members who don't have the list making phone calls and still potentially being liable even though they can't find out who they're not supposed to call from the situation of the private right of action in the TCPA and enforcements by the States.

So we're in a conundrum ourselves and we need this confusion to be settled, but it has to be settled in a constitutional way. Otherwise, any list, any attempt of American consumers to say they do not want to receive information will be—could eventually be thwarted.

Now, telemarketing is big in the economy. It's $106 billion a year from outbound telemarketing to consumers. There are millions of Americans that are employed and even voluntary compliance is going to clearly have some effect on our members, where there are going to be loss of jobs and loss of sales. But whatever the case, our view is that we should be listening to the American public.

Now, we also raised issues and went to court ourselves for issues other than just the constitutional issues that we've been talking about. We believe that if there's going to be any list it should be a list that is authenticated, and we think that the Internet sign-up that the Federal Trade Commission has put into place and we've told them this before as well—is not authenticated. You can put any number on this list, it can be a business number, it can be someone else's number, it can be your neighbor's number, and there's no check whatsoever. So we think that there needs to be some authentication. Now, if you call by phone on the list that the Trade Commission has put together, that is authenticated, so we think that's a problem.

And the other thing that we are concerned about is what the two Chairmen talked about, the proliferation of lists that we think that we need as a telemarketing industry, if there's going to be a list there be one, not a national list plus 50 State lists and so forth, so that's the other area that we had raised, other reasons that we went to court on.

So in conclusion, I want to thank you very much for giving me the opportunity to be here and reiterate again that if we can, we'd like to work with the Government during this period of trying to figure out the constitutional question of seeing if we can voluntarily find out how to satisfy the wishes of the American consumers. Thank you very much.

[The prepared statement of Mr. Cerasale follows:]

PREPARED STATEMENT OF JERRY CERASALE, SENIOR VICE PRESIDENT, THE DIRECT MARKETING ASSOCIATION, INC.

I. Introduction

Good morning, Mr. Chairman and members of the Committee. I thank you for the opportunity to appear before your Committee as it examines the issues surrounding the national Do-Not-Call Registry. I am Jerry Cerasale, Senior Vice President for The Direct Marketing Association, Inc. ("The DMA").

The DMA is the largest trade association for businesses interested in direct, database, and interactive marketing and electronic commerce. The DMA represents more than 4,500 companies in the United States and 54 foreign nations. Founded in 1917, its members include direct marketers from 50 different industry segments, as well as the non-profit sector. Included are catalogers, financial services, book and magazine publishers, retail stores, industrial manufacturers, Internet-based busi-

nesses, and a host of other segments, as well as the service industries that support them.

Let me begin by stating what we have stated all week: The DMA respects the wishes of all Americans who desire not to be called by telemarketers. This is evidenced by the fact that The DMA has had its national do-not-call registry, the Telephone Preference Service ("TPS"), in place since 1985. Any consumer who wants to reduce the amount of unwanted national telemarketing calls they receive can have their name placed on the TPS for that purpose free of charge. We estimate that the TPS applies to more than 80 percent of all telemarketing calls. The TPS currently contains the telephone numbers of 8 million consumers.

We continue to believe that the FTC list is fatally flawed by important constitutional defects. We continue to strongly support the resolution of these issues in court.

In response to the court decisions last week, and further supporting our commitment not to call individuals who have expressed their interest not to be called, The DMA had called for all members to voluntarily comply with the registry. We were subsequently informed by the FTC staff that The DMA could not distribute the registry to its members for voluntary compliance because of legal requirements under the FTC's rule that prohibit such distribution. Since then there have been additional developments in the courts regarding the FCC implementation of the registry.

Our current understanding is that the FCC rule remains m effect and that those telemarketers which have already obtained the registry must not call numbers on the list. As a result of the court rulings last week, telemarketers are no longer able to obtain the registry. The effect of this is that there are telemarketers in the contradictory situation of not being able to access the registry while being subject to enforcement and private causes of action. We hope to work with the FCC and FTC to resolve this dilemma and establish a means for all telemarketers to obtain the registry, so that no telemarketers will be locked out of honoring consumer requests.

II. Telemarketing is a Critical Component of the U.S. Economy

While we respect the requests of consumers not to be called and are working hard towards that goal, it is important to keep in perspective that many American consumers respond favorably to telemarketing. Consumers respond to telephone service offerings, credit card offerings, magazine subscriptions, travel discount and many other businesses that are the mainstay ofthe economy. This fact is evident in the dollar amounts consumers spend purchasing products through telemarketing sales. The DMA estimates that outbound telemarketing sales result in 106 billion dollars annually.

Similarly, telemarketing provides employment to many Americans. Employment and employment growth rate in the telemarketing industry are equally impressive. In 2001, the telemarketing industry that markets to consumers was estimated to employ 4.1 million workers. A large percentage of telemarketing employment is female, working mothers, students, minorities and handicapped—all critical employment categories.

Telemarketing also adds competitiveness to the U.S. economy. It provides information on new products and services and on prices, and clearly sparks consumers' interests to buy. As one example, telemarketing is a valuable resource to rural families and others without access to certain products or services. Also, by making information about prices widely available, it promotes price competition in the marketplace. Likewise, telemarketing provides access to goods and services not generally sold in the retail market. As a means of advertising, telemarketing is a cost-effective means of introducing new products into the marketplace.

III. Steps Must Be Taken to Help Ensure the Accuracy of a Do-Not-Call List

In addition to the significant constitutional and regulatory issues, The DMA filed its legal challenge in part based on concerns that we believe are fundamental to the implementation and operation of a national registry. We believe that it is imperative that the registration process ensures the accuracy of telephone numbers that are placed on the do-not-call registry. Internet registration is subject to abuse. It is our understanding and belief that there are not sufficient protections in place in connection with Internet registration to: (1) verify that the numbers were submitted by the persons to whom the numbers are assigned; (2) determine whether the individual submitting the number has permission to submit the numbers; or (3) determine that the numbers are not business numbers (which are not candidates for inclusion on the registry).

The FTC registration process does not allow numbers to be removed from the registry via the Internet. The FTC's rationale for not allowing removal via the Internet is that there is the potential for abuse and that the FTC cannot authenticate indi-

viduals that removal of telephone numbers. This same rationale and potential for abuse exists for submitting numbers to the registry. We believe that the FTC should apply the same authentication standard to submission and removal.

IV. There Should Exist One Uniform National Do-Not-Call Registry

The DMA also believes that there should exist one uniform national registry. The FTC and FCC registry does not create one uniform list. Rather, it leaves in place dozens of state do-not-call lists, resulting in a complex compliance task for the many legitimate industries that rely on telemarketing as a means to contact consumers.

The current framework, in which telemarketers are required to comply with numerous registries, creates significant economic and operational burdens on businesses. A preferable approach. would limit these burdens by creating one registry. We believe that such an approach would in no way limit the consumer protections of individuals on the registry, but would provide a workable system for both businesses and consumers.

V. Conclusion

Again, we want to reiterate our commitment to the American people not to call those who have expressed their desire not to be called. We thank the Chairman and the Committee for the opportunity to express the views of The DMA. We know that Congress and this Committee will continue to monitor this issue closely and we look forward to working with you.

JERRY CERASALE

Jerry joined The DMA in January 1995, as Senior Vice President, Government Affairs. He is in charge of The DMA's contact with the Congress, all Federal agencies and state and local governments. Prior to joining The DMA he was the Deputy General Counsel for the Committee on Post Office and Civil Service, United States House of Representatives. He served for 12 years at the Postal Rate Commission as Legal Advisor to Chairman Steiger and most recently as Special Assistant to the Commission. He was an attorney advisor to Federal Trade Commission Chairman Steiger. Prior to the PRC he was employed in the Law Department of the Postal Service. He received his B.A. in Government and Economics from Wesleyan University, Middletown Connecticut and his J.D. from the University of Virginia School of Law. He served in the U.S. Army from 1970 to 1972.

He is a Vice Chair of the Postal Matters Subsection of the Administrative Law and Regulatory Practice Section of the American Bar Association. He serves on the Board of Directors of the Mailers Council. He was a member of the Federal Trade Commission Advisory Committee on On-Line Access and Security.

The CHAIRMAN. Thank you, sir. Mr. Searcy, welcome.

STATEMENT OF TIM SEARCY, EXECUTIVE DIRECTOR, AMERICAN TELESERVICES ASSOCIATION (ATA)

Mr. SEARCY. Thank you, Mr. Chairman, Senators, thank you for giving us the opportunity to testify before you today on a matter of great importance to both U.S. consumers and business alike, the formation of a Federal do-not-call registry.

I'm the Executive Director of the American Teleservices Association, known as the ATA, which is the largest and only association dedicated exclusively to the interests of the teleservices industry. We are enjoying our 20th anniversary this year and represent firms involved in the industry in a wide variety of means.

As elected officials, I'm certain you know how difficult it is to get a complete message delivered in a sound bite through the media. Of course my recent time in the media has not improved my self-esteem very much as I was recently told by a Bloomberg reporter that I had become America's pinata, so I certainly understand what you folks must go through on an occasional basis.

Teleservices enjoys a unique role in providing competition in the United States marketplace for goods and services. Long-distance

cable and the recent boom of refinancing in the mortgage arena can in part give thanks to teleservices for spreading the competitive message and cost-effectively to millions of consumers throughout the United States. Our industry has grown because it is extremely effective. If consumers are not purchasing we would not be calling, and thankfully we would not be here today.

However, in addition to the consumer choice and competition, teleservices has also provided jobs. In the U.S. today, 6.5 million people make a living either making calls to or taking calls from U.S. consumers. Although we know that not all jobs in our industry are concerned with calling consumers at home, we know the symbiotic nature of teleservices means that every employee in our industry is impacted by legislation and regulation.

Mr. Chairman, in your home state of Arizona, it has been reported that 126,000 men and women make all or part of their living on the telephone. We know that individuals employed by our industry will be hard-pressed to find alternative employment if the volume of calls were to be significantly decreased by a national do-not-call registry. We employ primarily ethnic minorities, the physically handicapped, single mothers, students, seniors, disabled combat veterans, and others, that are not likely to quickly find gainful employment somewhere else. By our estimate, 2 million people will lose their jobs if the Federal do-not-call list is enforced.

If you examine the people that use teleservices, it is all our neighbors, not just the big call centers that you see in newspaper pictures. The people that will be decimated by these regulations are also the real estate agent seeking new listings, the insurance agent calling the client referral, or even the local handyman looking to fix your gutters. Imagine how our fragile economy will react to much higher unemployment, the loss of tax revenue, and the inability of consumers to purchase goods and services. Even a percentage of the impact we anticipate could be crippling to our already fragile economy.

In terms of the ATA's Federal case, we have always strongly believed that there are important constitutional issues to be considered as we contemplate the Federal Government's involvement in the teleservices industry. I believe that experts are in attendance today that are equipped to address this issue, so I will only state the ATA's position as a matter for the record.

We believe that both the FTC and FCC promulgated rules that are unconstitutional because they unfairly restrict legitimate commercial speech and seek to make a distinction between two kinds of speech. In essence, because a ringing phone can not distinguish who is calling, when the Federal Government restricts who the appropriate caller is and the content of the message, it violates the First Amendment. By including the exemption for charities and politicians, the FTC and FCC have created two classes of speech, which history tells us is clearly unconstitutional.

For a long time, the ATA, as the voice of the industry, has attempted to engage proper regulatory agencies and other policymakers to find appropriate means to address consumer and business interests. Our comments to the FTC and FCC have been ignored completely. Even more importantly, the congressional requirements for an economic impact study, including the potential

effects on small business regarding new regulations and the necessary regulatory paperwork assessments have also been ignored. Of course, if you would like to see copies of the comments that we have made to those organizations, we would be happy to send them to you. [Editor's note: Comments were sent and are retained in Committee files as part of the official record of this hearing.]

Thank you, sir. In a rush to judgment, the regulatory agencies have pushed through the kind of policy that creates confusion without true relief. Additionally, there are numerous operational problems with the list. Not only is the list prone to fraudulent additions of phone numbers from people without legal authority, it lacks fundamental verification allowing for abuse as well. Although it is easy to get on the list, enforcement agencies have made little to no provision for interested individuals to take their names off the list. If that is not enough, because no cellular database itself, as well as no national disconnect data base, it is virtually impossible to keep the list current and accurate.

Behind all the media, they hype, and the emotion rhetoric sits a real problem, a problem that we acknowledge and recognize. How do we bring relief to the U.S. consumers that are not interested in unsolicited phone calls? Although I can not propose today a comprehensive set of self-regulation guidelines, I can outline areas in which all interested parties should begin to dialogue toward policy that makes sense.

Clearly as a practical matter we need to enforce the laws that have already been written and educate consumers to make use of the company-specific do-not-call lists. Senator, in particular I noticed that Chairman Powell had identified a number of areas that would provide relief immediately and I encourage you to provide the educatory means by which that can be disseminated, because we are in agreement with those. Those are current laws and we support them.

Second, it is only fair to seek voluntary and publicized use of existing rules by bodies that are currently exempted in regulations, like charities and politicians. Any voluntary or legislative action should be supported by sufficient economic impact studies that weigh the interests of all involved.

Finally, we should apply intelligence to other issues like calling frequency and persistence beyond someone's adamant statements of disinterest to create a healthier environment for the productive calling that does take place.

In conclusion, I recognize that as Senators you are engaged in truly important issues related to our men and women overseas, our economy, and our domestic security. It is gratifying to know that you are willing to adjust your schedules to listen to the important issues related to this segment of the U.S. commerce. Thank you for your time, and Mr. Chairman, thank you for letting me share with you the views of the telemarketing industry.

[The prepared statement of Mr. Searcy follows:]

PREPARED STATEMENT OF TIM SEARCY, EXECUTIVE DIRECTOR, AMERICAN TELESERVICES ASSOCIATION (ATA)

Senators, thank you for giving me this opportunity to testify before you today, on a matter of great importance to U.S. consumers, and business alike: the formation

of a Federal Do-Not-Call Registry. I am the Executive Director of the American Teleservices Association (ATA), which is the largest and only association dedicated exclusively to the interests of the teleservices industry. We are enjoying our 20th anniversary this year, and represent approximately 650 firms involved in the teleservices industry. Our membership is tremendously diverse, and encompasses all aspects of telemarketing, customer service, market research, political calling, non-profit fundraising and technical product support.

We also represent the firms that provide long distance, equipment providers, outsourced teleservices firms, consultants and in-house teleservices operations like banks, major retailers, cable television, local telephone service, etc.

As elected officials, I am certain you know how difficult it is to get a complete message delivered in a sound bite through the media. For that reason, at times the ATA's opposition to the Do-Not-Call Registry has been mischaracterized, and I truly appreciate the opportunity to set the record straight Of course, my recent time in the media limelight has not improved my self-esteem, as I was recently told by a Bloomberg reporter that I had become America's Pinata.

Setting the Record Straight

Since the inception of the Federal Trade Commission's (FTC) Telemarketing Sales Rule and the Federal Communication Commission's (FCC) Telephone Consumer Protection Act, over a decade ago, the ATA has worked with its members to educate them on issues related to compliance with Federal laws. Additionally, we are often the source for understanding the many state laws that impact our member's business interests.

Teleservices enjoys a unique role in providing competition in the U.S. marketplace for goods and services. When the break-up of the long distance monopoly occurred, it was teleservices that lead the way in rapidly opening the marketplace to lower priced alternatives. When cable television moved from its infancy, teleservices was one of the main advertising mediums that delivered the benefits of more channel selection to U.S. consumers. The recent boom of refinancing in the home mortgage arena can in part give thanks to teleservices for spreading the competitive message quickly, and cost effectively to millions of consumers throughout the United States.

Teleservices provides entrepreneurs and new market entrants alike, the opportunity to compete effectively against entrenched incumbents. Everyone recognizes that advertising is an embedded cost in the price of a product. Therefore it is logical that lower cost marketing alternatives would also yield lower prices for consumers. In an increasingly challenged economy, and with advertising costs escalating, lower cost marketing alternatives like teleservices have greatly increased over the last few years. But more importantly, our industry has grown because it is extremely effective. If consumers were not purchasing, we would not be calling, nor be here today.

Indeed, the current marketplace coupled with the decreasing cost of long distance, have created a situation under which Americans are experiencing more calls now than in the past. However, it is important to remember that all forms of traditional and alternative advertising have experienced similar growth, as companies struggle to bring products to market, and continually develop creative means to do so.

In addition to consumer choice and competition, teleservices has also provided jobs. In the U.S. today, 6.5 million people make a living either making to or taking phones calls from U.S. consumers. Although we know that not all jobs in our industry are concerned with calling consumers at home, we know that the symbiotic nature of teleservices means that every employee in our industry is impacted by legislation and regulation. Mr. Chairman, in your home state it has been reported that 126,000 men and women make all or part of their living on the telephone. We know that individuals employed by our industry will be hard pressed to find alternative employment if the volume of calls were to be significantly decreased by a national Do-Not-Call Registry.

We employ primarily ethnic minorities, the physically handicapped, single mothers, students, seniors, disabled combat veterans and others that are not likely to quickly find gainful employment somewhere else. By our estimate, 2 million people will lose their jobs if Federal DNC list is enforced.

Teleservices is a pervasive channel of marketing in the United States, and it has been difficult for government agencies to use arcane business classifications to get a handle on the appropriate size of our business. But it only makes sense that you must include everyone that makes phone calls to consumers as a primary form of marketing in the projected impact. If you examine the people that use teleservices, it is all of our neighbors, not just the big call centers shown in newspaper pictures. The people that will be decimated by these regulations are also the real estate agent seeking new listings, the insurance agent calling the client referral, or even the local handyman looking to fix your gutters.

Certainly, the large outsourced call centers make up an important fraction of our business, and account for 7–8 percent of the industry, but the rest of the industry is made up of employees that would not be classified as telemarketers, but as bank employees, insurance agents, cable representatives and the like. The immediate impact is 2 million jobs lost of the 6.5 million people employed in the industry, but the downstream impact would be much greater. Imagine how our fragile economy will react to much higher unemployment, the loss of tax revenue, and the inability of consumers to afford to purchase goods and services. Even a percentage of the impact we anticipate could be crippling to our economy.

Constitutionality

In terms of ATA's Federal case, we have always strongly believed that there are important constitutional issues to be considered as we contemplate the Federal government's involvement in the teleservices industry. I believe that experts are in attendance today that are equipped to address this issue, so I will only state the ATA's position as a matter for the record. We believe that both the FTC and FCC promulgated rules that are unconstitutional because they unfairly restrict legitimate commercial speech, and seek to make a distinction between two kinds of speech. In essence, because a ringing phone cannot distinguish who is calling, when the Federal government restricts who the appropriate caller is, and the content of the message, it violates the 1st Amendment. By including the exemption for charities and politicians, the FTC and FCC have created two classes of speech, which history tells us is clearly unconstitutional.

What Does This Mean?

Despite the extraordinary benefits that teleservices provides, and the clear constitutional considerations, the last year has been a flurry of regulation, litigation and now legislation and further litigation. In advance of Federal action, we already had 37 state Do-Not-Call Registry laws that come in a wide variety of shapes and sizes. It is not surprising that the regulatory and legislative bodies have tried to craft policy to address the legitimate needs of consumers. Unfortunately, an unconstitutional and one-size-fits all approach is not the answer.

For a long time, the ATA as the voice of industry has attempted to engage proper regulatory agencies and other policy makers to find the appropriate means to address consumer and business interests. Our comments to the FTC and FCC have been ignored. Even more importantly, the Congressional requirements for an economic impact study, including the potential effects on small business of new regulations, and the necessary regulatory paperwork assessments have also been ignored. In a rush to judgment, the regulatory agencies have pushed through the kind of policy that creates confusion without true relief.

The current standings in court have also created confusion for all parties involved. The FTC has a list that it continues to take names for, although a Federal judge has deemed that unconstitutional. The FCC was prepared to enforce with fines, based on a list that the same judge ruled was unconstitutional. Fortunately, Judge Nottingham further clarified his ruling in response to an FTC request for a 'stay', and has again made it clear that the FCC is not to use the FTC list for the purpose of enforcement. Again the court has made it clear that neither direct nor indirect violation of the U.S. Constitution will be allowed.

Operational Problems With The List

Additionally, there are numerous operational problems with the list. Not only is the list prone to fraudulent additions of phone numbers from people without legal authority; it lacks fundamental verification allowing for abuse as well. Although it is easy to get on the list, enforcement agencies have made little to no provision for interested individuals to take their names off the list. Clear enforcement guidelines and standards have not been communicated to the state agencies that are required to participate to make the list effective. If that is not enough, because no cellular database exists, as well as no national disconnect database, it is virtually impossible to keep the list current and accurate. As the Eagles' song says, "You can check in any time you like, but you can never leave." For a list supposedly designed to provide citizens with choice, the ultimate choice to 'opt out' is effectively denied to them.

Enforcement of Current Law

The ATA strongly believes that much of the current situation could have been avoided. The original rules were designed to address concerns arising from fraud and abuse. At no point has this argument been about fraud or abuse, but rather it has centered on convenience. We have heard from time to time that seniors are disproportionately targeted for fraudulent offers, or that teleservices is full of scams.

In all recorded cases, legitimate teleservices providers are not the perpetrators of the crimes described. In fact, we are in active support of the original intent of the TSR and TCPA in their efforts to eliminate fraud. We continue to provide assistance to state law enforcement agencies whenever possible to identify the bad actors that use the telephone, and bring them to justice.

A welcome addition to the body of regulations that were originally promulgated dealt with company specific do-not-call lists. Current law requires that every firm create a list of individuals that do not want to be called by that company. If a company violated that law, suits could be filed by the individual, and collected fines would be returned to the conswner. This proved to be effective when used. However, both regulations about fraud, and regulations about the company specific rule have failed to receive proper education, and proper enforcement resources. Therefore, we believe that before new law is needed, the existing laws need to be vigorously enforced.

What's Next?

Behind all of the media, the hype, the emotional rhetoric sits a real problem: How do we bring real relief to the U.S. consumers that are not interested in unsolicited calls? As an association, and a member of industry, I can assure you that we have wrestled with this question a great deal. Like most others that come before this Committee, I am going to say that we would like to work with both Congress and the Federal agencies involved to craft an intelligent framework for going forward. And like most others that come before this Committee, I expect that you would like me to be specific.

Although I cannot propose today a comprehensive set of self-regulation guidelines, I can outline areas in which all interested parties should begin to dialog towards policy that makes sense. Although the emotions are running high, and there is pressure to move quickly, we owe it to all interested parties to take our time, and move appropriately instead of in haste. The industry is in enthusiastic favor of good policy, and doubts that such policy for a complicated issue can be developed overnight. We do not want to be party to falsely creating unfair consumer expectations again, as has occurred in the recent past through poorly developed regulatory agency policy.

Clearly as a practical matter, we need to enforce the laws that have already been written, and educate consumers to make use of the company specific do-not-call lists. Secondly, it is only fair to seek voluntary and publicized use of the existing rules by bodies that are currently exempted in the regulations like charities and politicians. Any voluntary or legislative actions should be supported by sufficient economic impact studies that weigh the interests of all involved. Finally, we should apply intelligence to other issues like calling frequency and persistence beyond someone's adamant statements of disinterest to create a healthier environment for the productive calling that takes place. We should all recognize that a complicated issue such as this requires study, consideration, and active participation as opposed to autocratic and capricious policy. Vilifying the hardworking people of the teleservices industry is not the right solution, but with your help we are interested in finding a better way.

In conclusion, I recognize that as Senators you are engaged in truly important issues related to our men and women overseas, our economy, and our domestic security. It is gratifying to know that you are willing to adjust your schedules to listen to the important issues related to this segment of U.S. commerce. Thank you for your time, and Mr. Chairman, thank you for letting me share with you the views of the telemarketing industry.

The CHAIRMAN. Thank you, sir. Mr. Guest.

STATEMENT OF JAMES GUEST, PRESIDENT, CONSUMERS UNION

Mr. GUEST. Mr. Chairman and Members of the Committee, thanks very much for the chance to be here today to be heard on behalf of the millions of consumers who are frustrated by the deluge of telemarketing calls.

My name is Jim Guest. I am President of Consumers Union, the independent, non-profit publisher of *Consumer Reports* magazine and *consumerreports.org,* with over 5 million subscribers. We strongly support Consumers Union strongly supports the do-not-

call registry. We believe that American consumers have a right to stop telemarketers from intruding into their homes to hawk their wares.

Consumers have a right to privacy in their home, free from the high-pressure sale pitches from the typical telemarketing calls. We actually wrote about this in *Consumer Reports* magazine back in 1993. Then, as today, consumers were looking for relief from these incessant, annoying, unwanted phone calls, and in the last decade since we wrote that article, things have gotten even worse.

Telemarketing is assault by telephone on millions of consumers who have the right to be free from harassment in the privacy of their homes. The message from Congress, Federal regulators, and more than 50 million consumers has been delivered loud and clear, and we think telemarketers ought to heed and be bound by their call, which is "do not call."

Consumers Union believes the FTC and the FCC have the statutory and constitutional authority to create and enforce a do-not-call registry, but I don't purport to be a legal expert and I know that you and Congress and the courts will be trying to figure out how this all is going to play out. What I'm here to do is to represent consumers and to thank Congress, Chairman Muris, Chairman Powell, the FTC, and the FCC, for their vigorous defense of this important consumer right.

And the last several days certainly have been a roller coaster for all of us who are concerned about the issue and especially for the millions, the over 50 million consumers who did sign up for the registry. They were expecting that starting tomorrow the dinner hour would be a little more peaceful than it has been in the past without the inconvenient and unwanted telemarketing interruptions that we've unfortunately grown to expect and that your wife had the pleasure of just last night, and now consumers don't know what to expect.

Telemarketers every day make over 100 million phone calls, 100 million telemarketing intrusions every single day. We believe consumers who don't want those intrusions, who don't want those phone calls shouldn't have to receive them. It's a matter of consumer choice as has been discussed here earlier today. Companies nationwide should honor that choice.

We've also talked about the experience of trying to get on the individuals companies, get on the do-not-call registry of individual companies, which is a piecemeal approach, as it has been described, that doesn't work, and even with the telemarketing associations there are some similar pitfalls there. And in any event, these are voluntary lists which are not in any way enforceable.

The registry, the do-not-call registry, created by the FTC and FCC, takes care of these shortcomings. Millions of consumers flocked to it, believing they were finally going to get relief and now we've got the recent court ruling in Denver which throws all of that into doubt, at least temporarily. So I fear, you fear, I think we all fear that coming tomorrow the calls will continue, it may be an avalanche, it may be a trickle, but it will surely be hugely upsetting to the tens of millions of vulnerable consumers who thought the calls would stop.

I appreciate that the Direct Marketing Association is advising its members to respect the wishes of consumers who have asked not to be called. Other trade associations have not given that same respect, in our view, to the consumer interests, suggesting that their members continue to call names on the list. I would hope, we would hope, Consumers Union would hope that telemarketers and the companies on whose behalf they're paid to make the phone calls would in fact show restraint, and until this matter is resolved by the courts, and by Congress, if further action by you is needed, that telemarketers respect, to the extent that it's possible to do it, the wishes of consumers who have made their choice known.

I would also note that throughout the debate on the do- not-call registry telemarketers have said that they don't want to call consumers who don't want to take their calls. They say they support a do-not-call list but just not this version of it. That sentiment in fact, I would suggest, rings hollow for a consumer whose phone rings constantly.

The consumer marketplace has spoken and industry should heed the call of "do not call" and we urge Congress to do we ask you, Mr. Chairman and your committee and Congress to do whatever it takes to make the do-not-call list enforceable, consistent with the Constitution. Thanks very much.

[The prepared statement of Mr. Guest follows:]

PREPARED STATEMENT OF JAMES GUEST, PRESIDENT, CONSUMERS UNION

Mr. Chairman, members of the Committee, thank you for the opportunity to be here with you today. My name is Jim Guest, and I am President of Consumers Union, the independent, non-profit publisher of *Consumer Reports* magazine and ConsumerReports.org, with over five million subscribers.

Consumers Union strongly supports the Do-Not-Call registry. We believe that American consumers have a right to stop telemarketers from intruding into their homes to hawk their wares. We're talking about privacy—consumers have a right to privacy in their own home, free from the high pressure sales pitch that accompanies the typical telemarketing call. *Consumer Reports* wrote about this issue as early as 1993. Consumers then, like consumers today, were looking for some relief from the constant and frequently annoying phone calls.

While we at Consumers Union believe that the Federal Trade Commission (FTC) and the Federal Communications Commission (FCC) have the statutory and constitutional authority to create and enforce a Do-Not-Call registry, I'm not here to offer my legal opinion about what will happen next in the courts, or how Congress should respond to the recent court ruling. However, I am here to represent consumers and commend Congress, the FTC, the FCC, Chairman Muris and Chairman Powell for vigorously defending this important consumer right.

The last several days have been a bit of a rollercoaster for all of us concerned about this issue, and I'm sure it has been confusing for the tens of millions of consumers who placed their phone numbers on the Do-Not-Call registry. They were expecting the dinner hour to become a little more peaceful starting tomorrow night, without any of the inconvenient and unwanted telemarketing interruptions that we have all unfortunately grown accustomed to. Now they don't know what to expect.

Every day, telemarketers make over 100 million phone calls. *100 million.* That's astounding. While some consumers welcome these calls, many others obviously do not. Simply put, we believe that those consumers who do not want to receive telemarketing calls shouldn't have to.

It's a matter of consumer choice, and companies nationwide should honor that choice.

The Do-Not-Call registry was borne out of the mounting frustration that so many consumers have been feeling over the years. They'd like to be able to sit down to an uninterrupted dinner, or spend a quiet evening with their kids, but too often that becomes impossible because of a ringing telephone and a persistent, hard sell sales pitch. Many have tried putting their numbers on the do-not-call lists that individual companies keep, but that piecemeal approach doesn't stop the phone calls from com-

ing in the first instance, doesn't prevent other companies from calling, and doesn't always work. Lists kept by the telemarketing associations have the same pitfalls. And none of these voluntary lists are in any way enforceable.

The Do-Not-Call registry that the FTC and FCC have created was supposed to take care of these shortcomings. And millions of consumers flocked to it, believing that they were finally going to be getting some relief.

Unfortunately, the recent court ruling in Denver throws all of that into doubt, at least temporarily. Three courts have had something to say about the list in the last week, and Congress and the President have weighed in as well. So much has happened so quickly that it is understandable if consumers have become confused.

I fear that come tomorrow, the calls will continue—it may be an avalanche, it may be a trickle, but it will surely be upsetting to many people who thought the calls would stop. I appreciate the fact that the Direct Marketing Association is advising its members to respect the wishes of consumers who have asked not to be called. Unfortunately, other trade associations haven't been as respectful, suggesting that their members should continue to use the list. Some have even wondered if telemarketers will now take the opportunity to turn this into a "Do Call" list, targeting people who have signed up.

I would hope that telemarketers, and the companies on whose behalf they are calling, would show some restraint. Until this is resolved by the courts—and by Congress if further legislative action is needed—all telemarketers should respect the wishes of the consumers who've made their choice known.

Throughout the debate over the Do-Not-Call registry, telemarketers have said that they don't want to call consumers who don't want to take their calls. They say they support a do-not-call list, it's just not this do-not-call list.

That's a distinction without much of a difference for the consumer whose phone is ringing. Whatever the ultimate outcome of the court challenges, tens of millions of consumers have spoken loudly and clearly. Telemarketers should heed the call for peace and quiet, and Congress should do whatever it takes to make this list enforceable, consistent with our Constitution.

That sentiment rings very hollow for a consumer whose phone rings constantly. The consumer marketplace has spoken and the industry should heed the call of DO NOT CALL.

Thank you.

The CHAIRMAN. Thank you very much. Welcome, Mr. Hammond.

STATEMENT OF LEE HAMMOND, MEMBER, BOARD OF DIRECTORS, AMERICAN ASSOCIATION OF RETIRED PERSONS (AARP)

Mr. HAMMOND. Thank you, Mr. Chairman. My name is Lee Hammond and I'm a member of AARP's Board of Directors. On behalf of AARP and its 35 million members, thank you for inviting us here this morning to discuss the importance of implementing and enforcing the FTC national do-not-call registry.

AARP's members have been among the millions of Americans who have taken the initiative to place their phone numbers into the registry in an effort to reduce the amount of unwanted telemarketing calls. We share your indignation over recent court decisions to stymie this effort and we're here today to offer our assistance in doing what we can to make the registry and its necessary enforcement a reality.

AARP's interest in telemarketing sales rule and concerns about telemarketing abuses are longstanding. Seven years ago we were active participants in the original rulemaking proceeding. Since the adoption of the rule in 1995, AARP has dedicated significant resources to educating consumers about telemarketing fraud and to work with Federal, State, and local law enforcement agencies to combat it.

We have also worked with State legislatures to enact State telemarketing legislation. Telemarketing fraud is a major concern for

AARP because of the severe effects it has on older Americans, who are victimized in disproportionate numbers. In 1996, we launched a campaign against telemarketing fraud that involved research examining older victims and their behavior, partnerships with enforcement and consumer protection agencies, and repeated delivery of consistent, research-based messages, that is, fraudulent telemarketers are criminals, don't fall for the telephone line.

AARP has repeated this warning to consumers through public service announcements, educational workshops, and program activities since that time. Due in large part to these concerns, AARP became involved in all facets of telemarketing laws and regulations, participating in workshops held by the FCC and FTC, and providing comments and testimony at every opportunity. Our support for a do-not-call registry has been consistent and long-standing.

Mr. Chairman, following our active involvement in the various proceedings, AARP was front and center in applauding the FTC, following its announcement of the creation of a national do-not-call registry. Our executive director and CEO, William Novelli, commended the Commission for its aggressive action, saying that the registry, "will go a long way toward eliminating unwanted telephone calls and return the control of the telephone where it belongs, to the consumer."

Since that day we've devoted time and resources to ensuring that the registry move forward as anticipated, despite a series of road blocks along the way. We made certain that AARP's members and the general public were properly educated and made aware of the list. We provided information through our website, publications, and State offices to inform consumers how to sign up for the list and to explain some of the exemptions. Additionally, we worked with the FCC to ensure that their amendments to the Telephone Consumer Protection Act mirrored the fine work of the FTC.

Implementation of a national do-not-call registry that does not preempt the existing laws of some 36 states has been a benchmark of AARP's advocacy efforts in this area. The recognition of the need for the registry by the Commission late last year was a marvelous holiday present for consumers over the age of 50 who have long lamented the nuisance created by unwanted telemarketing calls and have been frightened by the danger of telemarketing fraud. Unfortunately, it could become an early Halloween nightmare.

Despite the wishes of some 50 million persons who have placed their number on the list, we're expecting to see it go into full effect tomorrow and the fine work of Congress to overturn the ruling of one Federal judge. Another Federal judge has seen fit to bring the enforcement of the registry to a grinding halt. Fortunately, the FCC has assured the American people that they will exercise their enforcement authority under the law, mitigating the blow to some extent.

We know that we won't be able to completely resolve this problem in the next 24 hours. However, we do hope that when tomorrow arrives the telemarketing industry will heed the resounding voices of millions of consumer who have expressed their desire not to receive telemarketing calls and cease making them.

Mr. Chairman, AARP appreciates having the opportunity to testify here in support of the FTC's efforts to protect consumers by implementing and enforcing the national do-not-call registry. Thank you for the opportunity for providing us to voice our views and we look forward to working with you and your colleagues to resolve this problem. Thank you.

[The prepared statement of Mr. Hammond follows:]

PREPARED STATEMENT OF LEE HAMMOND, MEMBER, BOARD OF DIRECTORS, AMERICAN ASSOCIATION OF RETIRED PERSONS (AARP)

Chairman McCain:

My name is Lee Hammond and I am a member of AARP's Board of Directors. On behalf of AARP and its 35 million members, thank you for inviting us here this morning to discuss the importance of implementing and enforcing the Federal Trade Commission's (FTC) national Do Not Call registry. AARP's members have been among the millions of Americans who have taken the initiative to place their phone numbers into the Registry in an effort to reduce the amount of unwanted telemarketing calls. We share your indignation over recent court decisions to stymie this effort and we are here today to offer our assistance in doing what we can to make the Registry and its necessary enforcement, a reality.

AARP's interest in the Telemarketing Sales Rule and concerns about telemarketing abuses are long-standing. Seven years ago we were active participants in the original rulemaking proceeding. Since the adoption of the Rule in 1995, AARP has dedicated significant resources to educating consumers about telemarketing fraud and to working with federal, state and local law enforcement agencies to combat it. We have also worked with state legislatures to enact state telemarketing legislation.

Telemarketing fraud is a major concern for AARP because of the severe effects it has on older Americans, who are victimized in disproportionate numbers. In 1996, we launched a campaign against telemarketing fraud that involved research examining older victims and their behavior, partnerships with enforcement and consumer protection agencies, and repeated delivery of a consistent research-based message. That is: "Fraudulent telemarketers are criminals. Don't fall for a telephone line." AARP has repeated this warning to consumers through public service announcements, educational workshops and program activities since that time.

Due in large part to these concerns, AARP became involved in all facets of telemarketing laws and regulations, participating in workshops held by the FCC and FTC and providing comments and testimony at every opportunity. Our support for a Do Not Call registry has been consistent and long-standing.

Mr. Chairman, following our active involvement in the various proceedings, AARP was front and center in applauding the Federal Trade Commission following its announcement of the creation of the national Do Not Call registry. Our Executive Director and CEO William Novelli commended the Commission for its aggressive action saying that the Registry "will go a long way toward eliminating unwanted telephone calls and return the control of the telephone where it belongs, with the consumer."

Since that day, we have devoted time and resources to ensuring not only that the Registry, moved forward as anticipated, despite a series of roadblocks along the way. We have made certain that AARP's members and the general public were properly educated and made aware of the list. We provided information through our website, publications, and state offices to inform consumers how to sign up for the list and to explain some of the exemptions. Additionally, we worked with the Federal Communications Commission to ensure that their amendments to the Telephone Consumer Protection Act mirrored the fine work of the FTC.

The implementation of a National Do Not Call Registry—that does not preempt the existing laws of some 36 states—has been a benchmark of AARP's advocacy efforts in this area. The recognition of the need for the Registry by the Commission late last year was a marvelous holiday present for consumers over the age of 50, who have long lamented the nuisance created by unwanted telemarketing calls and have been frightened by the danger of telemarketing fraud. Unfortunately, it could become an early Halloween nightmare.

Despite the wishes the some 50 million Americans who have already signed up for the list and were expecting to see it go into effect tomorrow, and the fine work of Congress to overturn the ruling of one Federal judge, another Federal judge has

seen fit to bring the enforcement of the Registry to a grinding halt. Fortunately, the FCC has assured the American people that they will exercise their enforcement authority under the law mitigating the blow to some extent.

We know that we won't be able to completely resolve this problem in the next 24 hours. However, we do hope that when tomorrow arrives, the telemarketing industry will heed the resounding voices of millions of consumers who have expressed their desire not to receive telemarketing calls and cease making them.

Mr. Chairman, AARP appreciates having the opportunity to testify today in support of the FTC's efforts to protect consumers by implementing and enforcing the national Do Not Call registry.

Thank you for providing us with the opportunity to voice our views and we look forward to working with you and your colleagues to resolve this problem.

The CHAIRMAN. Thank you very much, Mr. Hammond, and thank you for all that your organization has done, and I'd like to work with you in helping disseminate Chairman Powell's recommendations as you heard in the earlier hearing. You can, I think, play a significant role, as can you, Mr. Guest, with your millions of subscribers and online participants, which brings me to Dean Smolla's proposal, which I like.

Mr. Guest, in your opinion, if that menu were offered, what percentage of consumers would say, I don't want to hear from any of them?

Mr. GUEST. Gosh, I can't really give you an informed opinion about that, but I think, you know——

The CHAIRMAN. After all these years of being involved in this issue?

[Laughter.]

Mr. GUEST. My crystal ball doesn't work on this one, but I think there would be a substantial number who would say that they didn't want any calls. I think there would be a significant number who would choose certain calls over others. What we would urge the Committee and Congress, if you do have to come back and take legislative action, we certainly would like a solution that's going to stand constitutional muster, because consumers obviously you're hearing it everywhere you're going consumer are hugely upset.

The CHAIRMAN. That's why I bring it up. Dean Smolla's proposal, I think, resolves any constitutional questions, don't you think really?

Mr. GUEST. I beg your pardon?

The CHAIRMAN. I think Dean Smolla's proposal really eliminates certainly the objections that the court raised.

Mr. GUEST. It would sound like that would eliminate constitutional problems. Again, I don't care to, I'm not an expert, and I'm not sure Chairman Muris indicated there might be some difficulties there that ought to be explored at least, but again, consumers want relief.

The CHAIRMAN. Thank you. Mr. Hammond, how many members of the AARP would say, I'm tired of being called by a pollster who keeps me on the phone for 15 minutes while he asks me 50 questions about politicians, none of which I care much for anyway?

Mr. HAMMOND. We share the same crystal ball, which is not working well at this moment, but I would suspect also that there would probably be a number of folks who would subscribe to a no-call list, just as there would be others who would pick and choose.

The CHAIRMAN. Thank you, thank you both. Mr. Cerasale, I understand that DMA spent a significant amount of time yesterday

alleging the Members of Congress at the FTC as unfairly impeding DMA's ability to obtain the registry list, but in your brief to the Denver court, you argue that the FTC would be in contempt if the agency disseminated the list. Will DMA be willing to go to the court in Colorado and ask that the FTC be allowed to maintain the do-not-call registry list for use by telemarketers on a voluntary basis?

Mr. CERASALE. First, we're not in the Denver court, the DMA.

The Chairman: I know, but you are free to go to the Denver court.

Mr. CERASALE. No, no, the DMA did not file that brief. We are not a party in the case in the Denver court. That's the American Teleservices Association. We wanted to have our members voluntarily use it. We did not raise the contempt issue.

The CHAIRMAN. Let me ask you a simple marketing question. You're willing to abide by the do-not-call list, right? That's your organization's position, right?

Mr. CERASALE. Yes.

The CHAIRMAN. Voluntarily, right?

Mr. CERASALE. That's correct.

The CHAIRMAN. Only Mr. Searcy's organization is not, right, Mr. Searcy?

Mr. SEARCY. Not exactly, Senator. We have strongly advocated that the companies who are members of our association should make choices on their own and that as the association it is not either our responsibility or our right to dictate business practice where the court has already ruled.

The CHAIRMAN. I understand. You don't have the same position as Mr. Cerasale, is that pretty accurate?

Mr. SEARCY. We have a slight difference of opinion.

The CHAIRMAN. Well, I think it's pretty significant. One thing's different when one commits to voluntarily abiding by a do-not-call list and the other position is that we ask our members to exercise their best judgment. I think that's a significant difference, but maybe you don't view it as a significant difference. Mr. Cerasale, do you view it as a significant difference?

Mr. CERASALE. Well, it's a difference. I think it's best judgment you should follow the wishes of the American public.

The CHAIRMAN. OK, I'm a head of a company that wants to sell a product, OK, by telemarketing. Why wouldn't I just go to Mr. Searcy's organization instead of yours, Mr. Cerasale?

Mr. CERASALE. That is a problem, that is an issue that the DMA faces as an association, but our view is we have consistently, not just in telephone.

The CHAIRMAN. Because I'd contact one of Mr. Searcy's outfit, who he recommends to take their own independent judgment, their independent judgment we're not going to abide by the no-call list, and so I'd rather do business with them because I'm not cut out of 50 million homes.

Mr. CERASALE. We may lose membership over that and that's a decision that we have made.

The CHAIRMAN. I think there's a practical implication of your generosity here. Mr. Searcy, is the ATA prepared to make the same

pledge? I asked you that before. You're leaving it up to your individual members, right?

Mr. SEARCY. We've never been opposed to a do-not-call program. We're just opposed to the Federal Government creating an unconstitutional and one-size-fits-all program, so in no way have we ever advocated that people don't use company-specific do-not-call lists or other regulatory opportunities created by the FCC. We just think that this program is both unconstitutional, poorly founded, and the list is inappropriately gathered.

The CHAIRMAN. And you are perfectly entitled to that opinion, Mr. Searcy, and I respect that opinion.

Mr. SEARCY. Thank you, Mr. Chairman.

The CHAIRMAN. But I believe very strongly that that means that you are not going to, as an organization, comply with the do-not-call list, and that's your right to do that. And that's why obviously we are exploring other options and trying to get action taken by a stay in the court, so——

Mr. SEARCY. Well, Mr. Chairman, if I may——

The CHAIRMAN. Go ahead.

Mr. SEARCY.—for just a moment. The only comment I would make is that neither Mr. Cerasale or myself make calls to consumers. Neither one of our associations make calls. It is our members that we advise about their legal rights and responsibilities, so nobody can contract with me.

The CHAIRMAN. I understand that. Mr. Cerasale is advising his organization to comply with the do-not-call list. You are advising your organization to make their own independent judgment, isn't that an accurate depiction of the situation?

Mr. SEARCY. Well stated, sir.

The CHAIRMAN. Thank you very much. I thank the witnesses, and Dean, thank you for an innovative idea. I will be hearing from my political friends very soon on your proposal.

[Laughter.]

The CHAIRMAN. But it seems to me that if we don't get the remedy that we've got to explore what we want, we've got to explore other options. And it seems to me yours, at least on the face of it, resolves at least the concerns that the court raised. It may cause other concerns, but at least that reason for the court decision as it was.

Senator Wyden.

Senator WYDEN. Thank you, Mr. Chairman. Gentlemen, let me ask you with respect to more litigation ahead, your two associations representing, you know, the marketers, I'm concerned what happened in Denver is just the beginning and that we're going to have a variety of challenges to the State programs and that could begin immediately. Can you commit both of your organizations today that this is not just going to set off a wave of litigation around the country and that you will agree today in the interim to commit to the Committee that you're not going to file any actions at the State level to try to exploit what's happened already. Mr. Cerasale?

Mr. CERASALE. I'll go first. The DMA, Senator Wyden, the DMA's position is that if there's going to be a national registry that there be a national registry, that it preempt the State laws, at least as

far as interstate calls are concerned, so that national marketers just have to deal with one list. So under that, we would like to have the constitutional issues on a do-not-call list settled, and we're not going to at this point it's not in our plan, we've had no discussions of taking any action against any State do-not-call list. We are looking at and waiting for to see what is the issue, how the constitutional issue is settled on a national do-not-call list.

Senator WYDEN. So you'll tell the Committee that you have no plans to go forward to with any State challenges?

Mr. CERASALE. That is correct at this time.

Senator WYDEN. Mr. Searcy, will you make the same commitment?

Mr. SEARCY. Litigation right now is extremely fluid, Senator and the only comment I would make is that we have not contemplated beyond challenging the Federal do-not-call list at this point, but I would comment that the State laws, certainly there are implications from what happens in the Federal constitutionality issues that will and can be applied to the states ultimately. But at this time, as of today as per your request, we are not contemplating any State litigation.

Senator WYDEN. Mr. Searcy, did you something like 72 hours ago advise your members to continue calling numbers on the do-not-call list?

Mr. SEARCY. No, Senator, we did not.

Senator WYDEN. The *Washington Post* is wrong?

Mr. SEARCY. Papers can make mistakes.

Senator WYDEN. Well, were they mistaken in that? I'm looking at a story from Monday, September 29, and it quotes you, well, it states Mr. Searcy advised his members to continue calling the numbers on the do-not-call list. You did not do that?

Mr. SEARCY. No, we, as I said before, informed our members that they would have the choice themselves to make the decision as to whether they should go ahead and make calls or not, that the courts had given them the relief that we had sought. And Senators, you might imagine it would be counterintuitive for us to apply and build a lawsuit around constitutionality only to reject it at the moment in which we start the victorious path.

Senator WYDEN. I just was struck by what seemed to be a change in your position between Friday and today, but you're saying there has been no change in your position?

Mr. SEARCY. No, there hasn't, and in other substantial press organs that statement has been consistent throughout, from the 29th and beyond.

Senator WYDEN. Mr. Searcy, when I talk to people at home about this, they see this as very straightforward stuff. I mean, at a time when you are calling for dialogues and studies and the like, they want action and what they want is based essentially on a very simple proposition. They want to be able to say no. Do you believe that people ought to have that right?

Mr. SEARCY. Senator, I absolutely believe that people should have a right to control their phone and that there are legitimate means that are already protected through the FCC's own laws that allow them to do so, items that have already been put into the record by Chairman Powell that give the necessary relief. I do not

believe that the Federal Government has a right to dictate the type of speech that should be done, nor to restrict in such a way as to create an unemployment loss of 2 million jobs.

Senator WYDEN. Why do you think the public's going to be satisfied with the voluntary system that you're advocating, Mr. Searcy? Clearly, problems do not come to the desks of Senators and I have been stunned at a time when there's so much concern about terrorism how concerned people are about this issue, that the current system doesn't work. Now you have advocated basically a continuation of the current system, more dialogues, more studies, more voluntary programs. What basis do you have for demonstrating to the Congress that something like that will work?

Mr. SEARCY. Senator, I would be very excited if we could enter into dialogue. We have been trying to do that for 3 years. The FCC and FTC have shown no interest in reviewing the comments that were provided or providing a means by which we can discuss intelligently with policymakers, other trade associations, and interested parties, how we make a policy or plan that works for everyone. So this would not be a continuation of business as usual, but rather we have been at the table asking for help and support. It would be exciting if Congress would ask others to join us.

Senator WYDEN. Well, I will tell you, having been party to some of these discussions, that the Congress and the agencies have in my view involved the private sector in an unprecedented kind of fashion, to some extent I've tried to specialize in these issues, been supportive of a number of the positions your organization and Mr. Cerasale's has taken in the past. The problem here is that you all really don't agree when it comes down to it to making it possible for the public in a straightforward fashion to say no, and I think that is essentially what is at issue here.

And I think the last question I have—I'm not clear who is involved in these various processes to say that the Federal Trade Commission would be in contempt if they're involved in voluntary compliance kinds of efforts. Mr. Cerasale, to your credit, you said you're not going to be a party to it in the future and you're not a party to it now. Mr. Searcy, what about your organization? I mean, this goes right to the heart of what it is you've said you wanted, which is voluntary programs, the Government and the private sector working together, and yet it seems when the Federal Trade Commission tries to work with the industry to meet them half-way on a voluntary program, all we hear are shouts of contempt and the like, so will you.

Mr. SEARCY. But it's hardly a voluntary program when you have to spend $7,375 to be in compliance. That's a purchased program and all of our members who have purchased the list, as well as Mr. Cerasale's members, have had to make that expenditure, which is, I might also add, in the court case an unlawful tax upon their business.

But as a separate note, it is not our decision to decide whether or not someone is in contempt of court. The court makes that decision on their own. However, the court has been very clear that if directly or indirectly the FTC should choose to try to bypass the court's ruling, the court will have serious consequences that they

will go ahead and dole out to those institutions. In essence, we don't have to do anything but let the court do its job.

Senator WYDEN. Well, I'm sympathetic to the question of costs of voluntary kinds of programs and that's why I've talked today about the Government meeting you all half-way, but it's pretty hard to do that when the first thing you do is punch them with a contempt allegation. That doesn't breed a lot of good faith when you're trying to bring the parties together, and I would only just say to this panel and my friends at AARP and the Consumers Union, we've worked with you all often in the past and appreciate your leadership here.

And Professor Dean I hadn't followed your scholarship in this area but I think Chairman McCain speaks for a lot of us—it's an attractive idea. But the ball is really in the court of the two associations here, and I would just urge you to understand the kind of damage that is being done to your organizations and to your members by what I think is very significant stonewalling on this issue.

And Mr. Searcy, when you say, for example, we don't make calls, so you're kind of an innocent bystander in all of this, while you call for dialogues and studies and things of this nature, the fact of the matter is that organizations provide counsel to your members, that's what you all do. And it's pretty clear to me if you didn't tell them explicitly, crank up the calls again, you basically said, look, you don't have to be reluctant right now, and I think that's unfortunate. I don't think that's the kind of good faith that the public wants to see from businesses, particularly at a time when I and others would like to meet you half-way.

So I hope that your two associations in the days ahead will do everything you can to resolve this expeditiously. I'll say as a Member of the Senate I continue to be anxious to meet you half-way. When you have good ideas we'll be very eager to have them, but the days of dialogues and studies and more of what I think the public sees as stonewalling here have got to end. People want action. They want action around the proposition that they've got a right to say no, and I started this off I think two-and-a-half hours ago saying 50 million people are on a legal roller coaster. Your two organizations can do a lot to bring that ride to an end and I would urge you in the strongest kind of fashion to work with us, to work with Senators on a bipartisan basis to do it.

Do any of you have anything further that you'd like to add? With that, the Committee is adjourned.

[Whereupon, at 12:07 p.m., the hearing was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF HON. OLYMPIA J. SNOWE, U.S. SENATOR FROM MAINE

Mr. Chairman, thank you for calling this timely hearing today. As you know, late last week, the United States District Court for the Western District of Oklahoma declared the Federal Trade Commission's national "Do-Not-Call" Registry invalid after concluding that the Commission lacked the authority to implement the rule. The next day, Congress set the record straight by passing, H.R. 3161, which empowers the Federal Trade Commission to create, implement and enforce the national "Do-Not-Call" Registry. Later the same day in Denver, U.S. District Judge Edward Nottingham, blocked implementation of the registry, ruling that it violated a telemarketer's constitutional right to free speech. Where do we go from here?

The "Do-Not-Call" Registry provides a very important service—it provides people an opportunity to stop those annoying telephone solicitations from marketers. I believe that citizens should have the right not to be disturbed by unsolicited phone calls in their own homes and the "Do-Not-Call" registry empowers citizens to stop these calls.

Support for the registry is unprecedented. To date, after only four months, the registry contains over 50 million phone numbers. In Maine alone, over 241,000 phone numbers have been registered and this number is growing everyday. Ultimately, the Federal Trade Commission expects sixty percent of the Nation's households to sign onto the registry potentially blocking eighty percent of telemarketing calls.

Specifically, the Federal registry will supplement State "Do-Not-Call" lists. It works by requiring telemarketers to search the registry every three months and synchronize their call lists with the phone numbers on the registry. If you don't want to be disturbed by marketing calls, you simply register online with the FTC or call a toll free number and request that your telephone number be added to the registry. More importantly, this law has enforcement power-a telemarketer who disregards the national "Do-Not-Call" Registry could potentially be fined up to $11,000 for each call.

Mr. Chairman, I commend the Federal Trade Commission, the Federal Communications Commission, and Congress for their work in the creation and implementation of the "Do-Not-Call" registry. Again, I thank you for holding this most timely hearing and I look forward to hearing from our witnesses about ways we can ensure that the Federal registry is implemented and enforced so that the hopes and expectations of the fifty million people already registered are upheld.

Thank you, Mr. Chairman.