

NOTES

CAN THOSE TELEMARKETING MACHINES KEEP CALLING ME?—THE TELEPHONE CONSUMER PROTECTION ACT OF 1991 AFTER *MOSER V. FCC*

Scenario: Ring. Ring. You get up from the family dinner table and pick up the phone—a prerecorded voice comes on: "Hello. You were selected at random to receive a 30% discount on a luxury cruise to the Bahamas. . . ." Click. You hang up the phone in disgust and return to your meal, muttering under your breath.

Besides slamming down the phone and swearing, believe it or not, you can sue.¹ The Telephone Consumer Protection Act of 1991 ("TCPA" or "the Act") makes unlawful the initiation of any telephone call to any residential telephone line by an artificial or prerecorded voice ("automatic dialing-announcing devices" or "ADADs") without the prior express consent of the called party, unless the call is for emergency purposes or is exempted under another part of the Act.² Receipt of one of these annoying phone calls now entitles you to bring a private action, in which you can recover a minimum of \$500.³

Fortunately for businesses that employ such devices, as with most of the offers in these prerecorded messages, there is a catch.⁴ A careful analysis of the permissible scope of commercial speech regulation reveals that the Act may violate the First Amendment rights of companies or individuals who use this modern technology to reach millions of consumers each day.⁵ The Act makes a content-based distinction predicated on whether ADAD messages are commercial or noncom-

¹ See 47 U.S.C. § 227(b)(3) (Supp. 1992).

² See *id.* § 227(b)(1)(B).

³ *Id.* § 227(b)(3).

⁴ See *infra* notes 157–81, 235–343 and accompanying text for a discussion of the constitutionality of 42 U.S.C. § 227(b)(1)(B), which bans the use of ADADs to contact residences.

⁵ See *Moser v. FCC*, 826 F. Supp. 360, 367 (D. Or. 1993), *appeal docketed*, No. 93–35686 (9th Cir. 1994).

mercial, prohibiting only the former.⁶ In addition, no "reasonable fit" appears to exist between the means of restriction in the regulation and the ends the Act seeks to achieve.⁷ The Act seeks to protect residential privacy from the invasions of telemarketing, but does so by completely banning only one small aspect of the telemarketing industry.⁸ In 1993, in *Moser v. FCC*, the United States District Court for the District of Oregon, applying such reasoning, held the Telephone Consumer Protection Act unconstitutional.⁹ This decision is currently being appealed.¹⁰

This Note contends that certain provisions of the Act violate the First Amendment of the United States Constitution, based on Congress's intent, recent cases and the existence of alternatives to those provisions of the Act.¹¹ Section I discusses the general constitutional considerations raised by commercial speech.¹² Section II describes the legislative background and pertinent components of the TCPA.¹³ Section III presents the facts and reasoning underlying the decision of the District Court of Oregon in *Moser*, as well as other pertinent cases regarding state ADAD statutes.¹⁴ Finally, Section IV analyzes the constitutionality of certain provisions of the Act and suggests possible alternative solutions to the problems Congress sought to alleviate through the Act.¹⁵ Section V concludes that the Telephone Consumer Protection Act of 1991 is, in part, unconstitutional.

I. COMMERCIAL SPEECH AND THE FIRST AMENDMENT

A. *The Origins of Commercial Speech Protection*

The First Amendment of the United States Constitution prevents Congress and state legislative bodies from proscribing speech.¹⁶ Regulations based on the content of speech are presumptively invalid.¹⁷

⁶ See *id.* at 363.

⁷ See *id.* at 365.

⁸ See *id.* at 366-67.

⁹ See *id.* at 367.

¹⁰ *Moser*, 826 F. Supp. 360 (D. Or. 1993), *appeal docketed*, No. 93-35686 (9th Cir. 1994).

¹¹ See *infra* notes 235-343 and accompanying text.

¹² See *infra* notes 16-84 and accompanying text.

¹³ See *infra* notes 85-151 and accompanying text.

¹⁴ See *infra* notes 152-234 and accompanying text.

¹⁵ See *infra* notes 235-343 and accompanying text.

¹⁶ See U.S. CONST. amend. I, providing in pertinent part, "Congress shall make no law . . . abridging the freedom of speech"

¹⁷ See Mark S. Nadel, *Rings of Privacy: Unsolicited Telephone Calls and the Right of Privacy*, 4 YALE J. ON REG. 99, 103 (1986); see also *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 112 S. Ct. 501, 508 (1991). With respect to noncommercial speech, content-based restrictions are allowed only in extraordi-

Reasonable regulations of the time, place or manner of speech, however, may be permissible, if justified without reference to the content of the regulated speech.¹⁸

Case law has defined commercial speech as speech that does no more than propose a commercial transaction.¹⁹ State or federal governments may regulate the content of commercial speech when it fails to accurately inform the public about lawful activity or relates to illegal activity.²⁰ No consensus emerges from the contentious debate over how to treat commercial speech.²¹ Some commentators would grant commercial speech the same First Amendment protection as any other type of speech, while others would offer commercial speech only limited protection.²²

nary circumstances. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (libel); *Miller v. California*, 413 U.S. 15, 23 (1973) (obscenity); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (fighting words).

¹⁸ See, e.g., *Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1516 (1993); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); see also Nadel, *supra* note 17, at 103; Susan Burnett Luten, *Give Me a Home Where No Salesmen Phone: Telephone Solicitation and the First Amendment*, 7 HASTINGS CONST. L.Q. 129, 133 (1979).

¹⁹ See, e.g., *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973). This definition is neither precise nor consistently applied. See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 16.26, at 1011 (4th ed. 1991). This definition has also been debated by commentators. See Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech*, 76 VA. L. REV. 627, 639-48 (1990). This Note assumes that telemarketing by private profit-seeking companies advertising goods or services is commercial speech.

Prior to 1942, the United States Supreme Court had never heard a commercial speech case regarding the First Amendment of the Constitution. See W. John Moore, *1st Amendment's Stepchild Is Getting More Attention*, NAT'L J., Aug. 21, 1993, at 2074. In that year, in *Valentine v. Chrestensen*, the Court held that the Constitution does not restrain the government with respect to purely commercial advertising. See 316 U.S. 52, 54 (1942). The city of New York passed an ordinance forbidding distribution in the streets of commercial and business advertising matter. *Id.* at 53 & n.1. Chrestensen owned a former United States Navy submarine and distributed handbills advertising that visitors could see the submarine for a fee. *Id.* at 52-53. The Court, with no reasoning or citations, concluded that the Constitution imposed no restraint on government concerning purely commercial advertising. See *id.* at 54. The Court therefore reversed an injunction that had enjoined the city police from interfering with Chrestensen's distribution. See *id.* at 54-55.

²⁰ *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980); see also NOWAK & ROTUNDA, *supra* note 19, at 1011; Kozinski & Banner, *supra* note 19, at 651-52. Although in favor of extending full protection to commercial speech, Kozinski and Banner agree that there must be some protection from consumer fraud. See Kozinski & Banner, *supra* note 19, at 651.

²¹ Compare Kozinski & Banner, *supra* note 19, at 628, 634-38 (commercial speech should be treated the same as other types of speech because commercial speech is not clearly more objective or durable) with Edward J. Eberle, *Practical Reason: The Commercial Speech Paradigm*, 42 CASE W. RES. L. REV. 411, 469-75 (1992) (commercial speech may be treated differently because it is verifiable and durable, and because regulation can be more socially beneficial than detrimental).

²² Compare Kozinski & Banner, *supra* note 19, at 628 (arguing that the distinction between commercial and noncommercial speech "makes no sense") with Eberle, *supra* note 21, at 471

In 1976, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the United States Supreme Court held that purely commercial speech fell within the scope of First Amendment protection.²³ Consumers of prescription drugs challenged the validity of a Virginia statute that barred prescription drug advertisements.²⁴ The Court defined commercial speech as speech that did no more than propose a commercial transaction.²⁵ According to the Court, a purely economic interest, such as a proposed commercial advertisement or transaction, did not disqualify an individual's speech from First Amendment protection.²⁶ The Court observed that a consumer's interest in the free flow of commercial information may equal, if not exceed, his or her interest in more traditionally protected speech such as political debate.²⁷ In this regard, the Court determined that the free flow of commercial information is indispensable to the public interest in intelligent and well-informed economic decisions.²⁸ The Court weighed this public interest against Virginia's interest in maintaining a high degree of professionalism among licensed pharmacists.²⁹ The Court concluded that the advertising ban did not directly affect professional standards and that the public had a substantial need to be well-informed when choosing pharmacists.³⁰ Therefore, the Court struck down the statute under the First Amendment.³¹

In 1978, in *Ohralik v. Ohio State Bar Ass'n*, the United States Supreme Court upheld a restriction on commercial speech, limiting *Virginia Pharmacy* by distinguishing commercial speech from other varieties of more traditionally protected speech.³² The Ohio State Bar

(arguing that because commercial speech is a "second-order" category of speech, a greater degree of regulation may be tolerable as compared to "core" speech). See generally Ronald K.L. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697 (1993) (debating merits of treating commercial speech differently from other types of speech).

²³ 425 U.S. 748, 762 (1975).

²⁴ *Id.* at 749-50, 753.

²⁵ *Id.* at 762 (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)).

²⁶ *Id.* at 762.

²⁷ See *id.* at 763; see also Kozinski & Banner, *supra* note 19, at 652. The *Virginia Pharmacy* Court described commercial information as who was producing and selling what product, for what reason and at what price. 425 U.S. at 765. The Court also remarked, "Even an individual advertisement, though entirely 'commercial,' may be of general public interest." *Id.* at 764.

²⁸ *Virginia Pharmacy*, 425 U.S. at 765.

²⁹ See *id.* at 766.

³⁰ *Id.* at 769-70.

³¹ See *id.* at 770. The Court explicitly left open the possibility of permissible restrictions on commercial speech that were not presented in this case, such as those based on time, place or manner, as well as restrictions on false or misleading speech. *Id.* at 770-71.

³² See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56, 467 (1978). The Court, however,

Association sought to discipline an attorney who personally contacted accident victims in order to represent them on a contingent-fee basis.³³ According to the Court, the subordinate position of commercial speech in the scale of First Amendment values afforded it a limited measure of protection.³⁴ The Court stated that, unlike a public advertisement, which merely presents information and leaves the reader or listener free to act upon it or not, in-person solicitation may exert pressure and, consequently, demand an immediate response without providing an opportunity for comparison or reflection.³⁵ The Court concluded that the furtherance of the important state interest in preventing intimidation and undue influence justified discipline of the attorney by the Bar Association.³⁶

B. *The Central Hudson Test for Restriction of Commercial Speech*

In 1980, in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the United States Supreme Court established a four-part test to determine whether or not the restrictions on commercial speech in a particular case were constitutional.³⁷ An electric utility challenged the constitutionality of a regulation that banned promotional advertising by the utility.³⁸ In approaching the constitutional issue, the Court first noted that the Constitution afforded a lesser protection to commercial speech than to other types of speech and that the degree of protection depended on the nature of both the expression itself and the governmental interests served by the regulations.³⁹ The Court articulated a four-part test to analyze commercial speech cases:⁴⁰ (1) the Court will determine whether the speech misleads or relates to an unlawful activity and therefore does not merit First Amendment pro-

distinguished the in-person solicitations in *Ohrlik* from other forms of "truthful, 'restrained' advertising" about the availability and terms of routine legal services. Compare *Ohrlik*, 436 U.S. at 454-55 (disciplinary rule barring in-person solicitation permissible) with *Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977) (disciplinary rule barring advertisement of availability and price of routine legal services struck down under First Amendment).

³³ *Ohrlik*, 436 U.S. at 449-53; see also Brian J. King, Note, *Ambulance-Chasing Accountants?: In-Person Solicitation and the Professions*, 34 B.C. L. REV. 561 (1993) for a discussion of the constitutionality of in-person solicitation by attorneys and other professionals.

³⁴ *Ohrlik*, 436 U.S. at 456.

³⁵ *Id.* at 457. One can argue that telephone solicitations are analogous to in-person solicitations and create the same kind of pressures.

³⁶ *Id.* at 459, 462.

³⁷ 447 U.S. 557, 566 (1980).

³⁸ *Id.* at 558-59.

³⁹ *Id.* at 563.

⁴⁰ *Id.* at 566.

tection;⁴¹ (2) the restriction must serve a substantial governmental interest;⁴² (3) the restriction must directly advance that substantial interest;⁴³ and (4) the restriction cannot be more extensive than necessary to serve that governmental interest.⁴⁴ Given the facts of *Central Hudson*, the Court concluded that the regulation of advertising by utility companies was more extensive than necessary to further the state's interest in energy conservation.⁴⁵

In 1981, in *Metromedia, Inc. v. City of San Diego*, the United States Supreme Court upheld a ban on outdoor, offsite advertising billboards.⁴⁶ San Diego enacted an ordinance that prohibited offsite commercial billboards, but permitted onsite advertising signs identifying the owner of the premises and the goods sold or manufactured on the site.⁴⁷ Several companies engaged in the outdoor advertising business brought suit to enjoin enforcement of the ordinance.⁴⁸ The Court applied the *Central Hudson* test, discussing in detail only the third part of the test, advancement of government interests.⁴⁹

The Court asserted that the restriction must directly advance the government's interests in aesthetics and traffic safety.⁵⁰ According to the Court, the city may have believed that offsite advertising, with its periodically changing content, presented a more serious problem than onsite advertising.⁵¹ In addition, the Court stated that the city could have reasonably concluded that the interests in identifying a business's location, or its products or services, were stronger on the part of a commercial enterprise and the public than their interests in an enterprise's ability to lease its advertising space to commercial companies located elsewhere.⁵² The Court concluded that the ordinance directly advanced the government interests and, thus, upheld the ordinance's constitutionality.⁵³

⁴¹ *Id.*, 447 U.S. at 566. In light of the greater potential for deception or confusion in advertising, as opposed to noncommercial speech, some content-based restrictions on commercial speech may be permissible. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983); *In re R.M.J.*, 455 U.S. 191, 203 (1982).

⁴² *Central Hudson*, 447 U.S. at 566.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 570-71.

⁴⁶ 453 U.S. 490, 493, 512 (1981).

⁴⁷ *Id.* at 494 n.1.

⁴⁸ *Id.* at 496-97.

⁴⁹ *Id.* at 507-08. The Court stated that, in this case, "[t]here can be little controversy over the application of the first, second, and fourth criteria." *Id.* at 507.

⁵⁰ *Id.* at 508.

⁵¹ *Metromedia*, 453 U.S. at 511.

⁵² *Id.* at 512.

⁵³ *Id.* The Court held the ordinance to be unconstitutional on other grounds, namely that it banned signs carrying noncommercial advertising. *Id.* at 512, 521.

Similarly, in 1986, in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, the United States Supreme Court held Puerto Rico's ban on casino advertising constitutional.⁵⁴ A casino prohibited from advertising its gambling facilities inside Puerto Rico sought a declaratory judgment that the advertising restriction impermissibly suppressed commercial speech, in violation of the First Amendment.⁵⁵ The Court rejected the casino's argument under the third part of the *Central Hudson* test, concluding that the exemption of other kinds of gambling such as horse racing, cockfighting and the lottery from the advertising restriction did not render it underinclusive.⁵⁶ The Court observed that the restriction directly advanced the legislature's interest in reducing demand for games of chance, regardless of whether or not other forms of gambling were regulated.⁵⁷ In addition, the Court stated that because the exempted forms of gambling were traditionally parts of the Puerto Rican culture, they did not present risks as great as those associated with casino gambling.⁵⁸ The Court also stated that the restrictions were no more extensive than necessary, because they only applied to advertising directed at Puerto Rican residents and not tourists.⁵⁹ Finally, the Court asserted that the greater power of the Puerto Rico legislature to ban casino gambling altogether necessarily included the "lesser" power to ban the advertising of casino gambling.⁶⁰ Thus, the Court held that because the restriction passed the *Central Hudson* test, it did not violate the First Amendment.⁶¹

In 1989, in *Board of Trustees of the State University of New York v. Fox*, the United States Supreme Court modified the final part of the *Central Hudson* test, holding that a restriction on commercial speech may be more extensive than necessary, as long as a reasonable fit exists between the ends promoted by the regulation and the means chosen by the regulation for that promotion.⁶² University students challenged

⁵⁴ 478 U.S. 328, 330, 344 (1986).

⁵⁵ *Id.* at 330-31.

⁵⁶ *Id.* at 342-43. The Court first noted that the commercial speech was not misleading and did not concern unlawful activity. *Id.* at 340-41. Second, according to the Court, Puerto Rico's interest in reducing the demand for casino gambling in order to protect the health, safety and welfare of Puerto Rican residents was substantial. *Id.* at 341.

⁵⁷ *Id.* at 342.

⁵⁸ *See id.* at 342-43.

⁵⁹ *Posadas*, 478 U.S. at 343.

⁶⁰ *Id.* at 345-46.

⁶¹ *Id.* at 344.

⁶² *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989); *see also Posadas*, 478 U.S. at 341 (analysis of state's commercial speech regulation under last two steps of *Central Hudson* test involves consideration of "fit" between legislature's ends and means chosen to accomplish those ends); *In re R.M.J.*, 455 U.S. 191, 203 (1982) (state's interference with speech must be proportional to substantial interest served).

a university resolution that prohibited the carrying out of product demonstrations similar to "Tupperware parties."⁶³ According to the Court, restrictions by the government, here the state university, on free speech need not employ the least restrictive means, provided they are narrowly tailored to achieve the desired goals of the regulations.⁶⁴ The Court declared that the lower courts had not properly applied the new reasonable fit test and had not considered the impact of the resolution on noncommercial speech.⁶⁵

In 1993, in *City of Cincinnati v. Discovery Network, Inc.*, the United States Supreme Court applied the *Central Hudson-Fox* test, and failed to find a reasonable fit.⁶⁶ Cincinnati passed an ordinance that banned the distribution of commercial handbills on public property.⁶⁷ When the city construed this ordinance to include a ban of newsracks belonging to commercial handbill distributors, but not newsracks belonging to newspapers, commercial publishers challenged the ordinance's constitutionality.⁶⁸ The Court determined that the city failed to establish a reasonable fit between the restrictions placed on commercial speech through the ban on commercial newsracks and the goals of safety and aesthetics that the city sought to serve through the ban.⁶⁹ The Court reasoned that the city's distinction between types of speech had no bearing on its asserted interests, and further noted the existence of reasonable, less restrictive alternatives to the ban, which the city could have implemented in order to achieve its goals.⁷⁰ The Court reiterated that a regulation of commercial speech need not be the least restrictive means to achieve legitimate ends, but added that the presence of "numerous and obvious less-burdensome alternatives" to the restriction was "relevant" to the determination of whether a reasonable fit existed.⁷¹

⁶³ *Fox*, 492 U.S. at 471-72.

⁶⁴ *Id.* at 478, 480; *Ward v. Rock Against Racism*, 491 U.S. 781, 797 (1989). In previous cases, the Court had indicated in dicta that the final stage of the *Central Hudson* test required protection of the state interest only by the least restrictive means possible. *See, e.g., Zauderer v. Office of Disciplinary Council*, 471 U.S. 626, 644 (1985); *Central Hudson*, 447 U.S. at 564.

⁶⁵ *See Fox*, 492 U.S. at 485-86.

⁶⁶ *Discovery Network*, 113 S. Ct. 1505, 1510 (1993).

⁶⁷ *Id.* at 1508 nn.2-3.

⁶⁸ *Id.* at 1508.

⁶⁹ *Id.* at 1510.

⁷⁰ *Id.* at 1510, 1514.

⁷¹ *Discovery Network*, 113 S. Ct. at 1510 n.13. According to the Court, the city failed to address its concern about the newsracks by regulating their size, shape, appearance or number, indicating that the city did not carefully calculate the costs and benefits of its prohibition. *Id.* at 1510; *see also Ward v. Rock Against Racism*, 491 U.S. 781, 805 (1989) (Marshall, J., dissenting) (arguing that narrow tailoring of regulation to its ends mandates both examination of alternative methods

The Court observed that, because commercial and noncommercial publications shared equal responsibility for the safety and aesthetic problems that motivated the city, distinguishing between them based on content bore no relationship whatsoever to the legitimate interests asserted by the city.⁷² Unlike *Metromedia*, which involved disparate treatment of two types of commercial speech, this case involved discrimination between commercial and noncommercial speech.⁷³ The Court held that the city's assertion of the relatively low First Amendment value of commercial speech did not by itself justify a "selective and categorical ban" on newsracks containing commercial handbills.⁷⁴ The Court concluded that, because the city's interests were unrelated to the distinction between commercial and noncommercial speech, and because this distinction was based on content, the city's ban did not comply with the First Amendment.⁷⁵

In a dissenting opinion, Chief Justice Rehnquist argued that the city's prohibition of commercial newsracks related directly to its goals, because every newsrack removed from public sidewalks marginally enhanced the safety and the aesthetics of the city.⁷⁶ According to Chief Justice Rehnquist, governments may stop short of fully accomplishing their goals without violating the First Amendment.⁷⁷ Justice Rehnquist

of serving asserted governmental interest and determination whether greater efficacy of challenged regulation outweighs increased burden it places on protected speech). The prohibition would have resulted in the removal of only 62 newsracks out of approximately 1500 to 2000 on public property. *Discovery Network*, 113 S. Ct. at 1510; see also *Bolger v. Youngs Drug Prods.*, 463 U.S. 60, 73 (1983) (regulation providing only for the most limited marginal support for the interest asserted held invalid).

⁷² *Discovery Network*, 113 S. Ct. at 1514. Both types of newsracks are "equally unattractive" regardless of what type of publication is inside. *Id.*

⁷³ See *id.* at 1514 n.20.

⁷⁴ *Id.* at 1516. Justice Blackmun would have held truthful, noncoercive commercial speech concerning lawful activities entitled to full First Amendment protection. See *id.* at 1520 (Blackmun, J., concurring). In a case similar to *Discovery Network* in New York, the Supreme Court of New York, Appellate Division, First Department, held that a regulation prohibiting the installation of sidewalk structures for the purpose of distributing commercial speech was unconstitutional. See *City of New York v. Learning Annex*, 589 N.Y.S.2d 28, 28 (N.Y. App. Div. 1992), *appeal dismissed*, 613 N.E.2d 972, *dismissal vacated*, 613 N.E.2d 961 (N.Y. 1993).

⁷⁵ See *Discovery Network*, 113 S. Ct. at 1517.

⁷⁶ *Id.* at 1523 (Rehnquist, C.J., dissenting).

⁷⁷ *Id.* (Rehnquist, C.J., dissenting); see also *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 343 (1986) (ban on promotional advertising of casino gambling aimed at Puerto Rico residents upheld, even though advertising of other forms of gambling were permitted); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512 (1981) (ban of offsite billboards containing commercial speech upheld, even though onsite billboards identifying owner of premises and goods produced thereon were permitted). Although the *Discovery Network* dissent cites *Posadas*, it is important to note that the *Posadas* Court specifically stated that the legislature believed that the risks associated with casino gambling were greater than those associated with

therefore concluded that burdening less speech than necessary to achieve the prohibition's desired goals sufficiently created a reasonable fit between the prohibition and the city's interests.⁷⁸

In summary, an analysis of a restriction on commercial speech focuses on whether the restriction is impermissibly content-based and whether the restriction represents a constitutional limitation on commercial speech under the *Central Hudson-Fox* test.⁷⁹ In both areas, a restriction must be narrowly tailored to serve the government's goal in enacting the restriction.⁸⁰ To pass constitutional muster under the four-part *Central Hudson* test, commercial speech must not mislead or relate to unlawful activity, the state must have a substantial interest, the restriction must advance that interest and the restriction must be no more extensive than necessary to fulfill that interest.⁸¹ The Court has modified the last element of the test to permit restrictions more extensive than necessary, provided a reasonable fit exists between the interests promoted by the restriction and the means chosen in the restriction to promote the interests.⁸² The existence of numerous alternatives to a restriction on commercial speech is relevant to the determination of a reasonable fit.⁸³ Finally, the low value of commercial speech will not, by itself, justify a distinction between commercial and noncommercial speech.⁸⁴

other types of gambling in Puerto Rico. See *Posadas*, 478 U.S. at 342-43. In *Discovery Network*, by contrast, there is no indication that the legislature considered the newsracks containing commercial materials to pose a greater threat to safety or aesthetics than those containing newspapers. See 113 S. Ct. at 1514.

⁷⁸ *Discovery Network*, 113 S. Ct. at 1525 (Rehnquist, C.J., dissenting).

⁷⁹ See, e.g., Barbara M. Mack, *Commercial Speech: A Historical Overview of Its First Amendment Protections and an Analysis of Its Future Constitutional Safeguards*, 38 *DRAKE L. REV.* 59, 65 (1989); James E. Meadows, *The Telephone Consumer Protection Act of 1991: Consumer Salvation or Unconstitutional Restraint?*, 9 *COMPUTER LAW.* 13, 16 (1992); see also *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

⁸⁰ See Appellees' Brief at 10, *Moser v. FCC*, No. 93-35686 (9th Cir. filed Jan. 20, 1994); Mack, *supra* note 79, at 65; Nadel, *supra* note 17, at 127; see also *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (a restriction on commercial speech must be "narrowly tailored to achieve the desired objective"); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (a time, place and manner restriction must be "narrowly tailored to serve a significant governmental interest").

⁸¹ See *Central Hudson*, 447 U.S. at 566.

⁸² See *Fox*, 492 U.S. at 478, 480.

⁸³ See *Discovery Network*, 113 S. Ct. at 1510 n.13.

⁸⁴ See *id.* at 1516.

II. THE TELEPHONE CONSUMER PROTECTION ACT OF 1991

A. Background to the TCPA

Telemarketing—soliciting by businesses, individuals and organizations over telephone lines—began in the 1920s when stockbrokers used their telephones to give investors frequent information updates.⁸⁵ In the 1930s and '40s, when much of the male-dominated workforce was drafted into the military, businesses developed telephone sales operations as an alternative to door-to-door sales.⁸⁶ Magazine and newspaper publishers in the 1950s began to use telemarketing to increase their subscription rates.⁸⁷ Later in the '50s and beyond, new innovations, from the Yellow Pages and 800 numbers, to ADADs in the early 1980s, were developed to augment the level of business conducted by telephone.⁸⁸ In 1980, the Federal Communications Commission ("FCC") determined that it should refrain from regulating unsolicited calls and ADAD equipment.⁸⁹ At that time, ADADs were not widely used interstate, and the FCC observed that an outright ban of ADADs would appear to violate the Constitution.⁹⁰

According to Representative Edward J. Markey of Massachusetts, one of the Act's framers, the Telephone Consumer Protection Act of 1991 represented an attempt by Congress to balance an individual's right to privacy in his or her home with technological advances in telemarketing.⁹¹ According to the Act's other primary framers, Senators Larry Pressler of South Dakota and Ernest Hollings of South Carolina, the Act represented Congress's response to numerous complaints from constituents about disruptive, annoying and dangerous telephone calls by ADADs.⁹² These calls consumed tape and time on answering machines, did not disconnect when the called party hung up, and increased the quantity of intrusions into the home.⁹³ In addi-

⁸⁵ See Connie Lauerma, *Hype Tech: Now It's Death and Taxes . . . and Unsolicited Commercial Phone Calls*, CHI. TRIB., Nov. 24, 1991, Sunday Magazine, at 20.

⁸⁶ See *id.*

⁸⁷ See *id.*

⁸⁸ See *id.*; Edmund L. Andrews, *Curbing the Telephone Robots*, N.Y. TIMES, Oct. 30, 1991, at D1.

⁸⁹ Unsolicited Telephone Calls, 77 F.C.C.2d 1023, 1024 (1980).

⁹⁰ See *id.* at 1024.

⁹¹ See 137 CONG. REC. E793 (daily ed. Mar. 6, 1991) (statement of Rep. Markey).

⁹² See, e.g., *id.*; 137 CONG. REC. S18,317 (daily ed. Nov. 26, 1991) (statement of Sen. Pressler); 137 CONG. REC. S9,874 (daily ed. July 11, 1991) (statement of Sen. Hollings).

⁹³ See S. REP. NO. 178, 102d Cong., 1st Sess. 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. at 1969; 137 CONG. REC. E793 (daily ed. March 6, 1991) (statement of Rep. Markey).

tion, they created a potential danger of occupying a phone line that an individual may need in an emergency.⁹⁴ ADADs could tie up hospital switchboards, and activate pagers, cellular phones and other devices by which the receiver is charged for calls.⁹⁵ Many states began to regulate ADADs as a result of such problems, but interstate companies could evade such regulations.⁹⁶ Congress responded by enacting the TCPA.⁹⁷

The TCPA regulates automated telephone equipment, fax machines and live telemarketing.⁹⁸ The Act outlaws the use of ADADs to call emergency telephone lines, hospital rooms, pagers, residential telephone lines (without prior consent of the recipient) or multiple telephone lines of the same business.⁹⁹ The Act also outlaws the sending of unsolicited fax advertisements.¹⁰⁰ In directing the FCC to use its regulatory power to prescribe regulations to implement its requirements, the Act permits the FCC to exempt from these bans certain types of calls, including those not made for commercial purposes.¹⁰¹ Moreover, the Act establishes technical and procedural standards for permitted faxes and ADAD messages.¹⁰² The Act also directs the FCC to consider compiling a national database of residential subscribers who object to receiving telephone solicitations.¹⁰³ The TCPA creates private rights of action as recourse for violations of the ADAD and fax bans and for repeated calls over objections.¹⁰⁴

B. *The Legislative History of the TCPA*

The Act is actually a compilation of several separate bills, primarily one from the United States House of Representatives and two from the United States Senate.¹⁰⁵ The invasion of privacy of the home by unso-

⁹⁴ See, e.g., 137 CONG. REC. S16,205 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings).

⁹⁵ See H.R. REP. NO. 317, 102d Cong., 1st Sess. 10 (1991); S. REP. NO. 177, 102d Cong., 1st Sess. 2 (1991).

⁹⁶ See S. 1462, 102d Cong., 1st Sess. § 2(7) (1991), as reported in 137 CONG. REC. H11,307 (daily ed. Nov. 26, 1991); H.R. REP. NO. 317, 102d Cong., 1st Sess. 2 (1991).

⁹⁷ See generally 47 U.S.C. § 227.

⁹⁸ *Id.*

⁹⁹ 47 U.S.C. § 227(b)(1)(A), (B), (D).

¹⁰⁰ *Id.* § 227(b)(1)(C).

¹⁰¹ *Id.* § 227(b)(2).

¹⁰² *Id.* § 227(d).

¹⁰³ *Id.* § 227(c)(3).

¹⁰⁴ 47 U.S.C. § 227(b)(3), (c)(5).

¹⁰⁵ See Meadows, *supra* note 79, at 13. Senate Bill 1442, the Telephone Advertising Consumer Rights Act, and H.R. 1589, the Telephone Privacy Act, which contributed to the final Telephone Consumer Protection Act (TCPA), are not discussed in detail here. See Meadows, *supra* note 79, at 13, for a discussion of these Acts. The Telephone Privacy Act first introduced the idea of banning all ADADs. 137 CONG. REC. H1,918 (daily ed. Mar. 21, 1991) (statement of Rep. Unsoeld).

lited telephone advertising motivated the creation of each of these bills.¹⁰⁶ The telephone demands immediate attention—when it rings, people instinctively answer it.¹⁰⁷ The problem, according to Representative Markey, chief sponsor of the House bill, is that when people get home from work, they deserve some peace and quiet.¹⁰⁸

In the House, Representative Markey introduced H.R. 1304, the Telephone Advertising Consumer Rights Act, on March 6, 1991.¹⁰⁹ His purpose was to free individuals and businesses from the intrusive, costly and dangerous consequences of unsolicited telephone advertising.¹¹⁰ According to Markey, ADADs not only called residences, but reached hospitals, fire stations, pagers and unlisted numbers, making them dangerous as well as annoying.¹¹¹ Representative Markey also sought to address problems caused by unsolicited or "junk" faxes, such as tying up fax lines and driving up the recipient's paper costs.¹¹² In the Senate, Senator Pressler introduced S. 1410, the Telephone Advertising Consumer Rights Act, embracing many of the same ideas as Representative Markey's bill.¹¹³

Both bills sought to eliminate unsolicited calls to emergency and public safety telephone numbers and to paging and cellular equipment.¹¹⁴ Both H.R. 1304 and S. 1410 proposed the establishment of technical and procedural regulations to be followed by individuals or businesses engaging in live or recorded telephone or fax solicitation.¹¹⁵ For example, the message would have had to state clearly the identity of the solicitor at the beginning of the message, and later provide a phone number or address at which the solicitor could be contacted.¹¹⁶ Senator Pressler's bill would have made unlawful the sending of any unsolicited advertisement by fax.¹¹⁷ Representative Markey's and Sena-

¹⁰⁶ See 137 CONG. REC. S16,208 (daily ed. Nov. 7, 1991) (statement of Sen. Bentsen); 137 CONG. REC. S9,874 (daily ed. July 11, 1991) (statement of Sen. Hollings); 137 CONG. REC. E793 (daily ed. Mar. 6, 1991) (statement of Rep. Markey).

¹⁰⁷ 137 CONG. REC. S18,317 (daily ed. Nov. 26, 1991) (statement of Sen. Pressler); 137 CONG. REC. E793 (daily ed. Mar. 6, 1991) (statement of Rep. Markey).

¹⁰⁸ Cindy Skrzycki, *House Votes to Restrict Calls By Telemarketers*, WASH. POST, Nov. 19, 1991, at B1 (quoting Rep. Edward J. Markey).

¹⁰⁹ See 137 CONG. REC. E793 (daily ed. Mar. 6, 1991) (statement of Rep. Markey).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See 137 CONG. REC. S8,991 (daily ed. July 27, 1991) (statement of Sen. Pressler).

¹¹⁴ See S. 1410, 102d Cong., 1st Sess. § 3(b)(4) (1991); 137 CONG. REC. E793 (daily ed. Mar. 6, 1991) (statement of Rep. Markey).

¹¹⁵ See H.R. 1304, 102d Cong., 1st Sess. § 3(d) (1991), as reported in H.R. REP. NO. 317, 102d Cong., 1st Sess. 4-5 (1991); S. 1410, 102d Cong., 1st Sess. § 3(b)(2), (d) (1991).

¹¹⁶ H.R. 1304, 102d Cong., 1st Sess. § 3(d)(2)(A), as reported in H.R. REP. NO. 317, 102d Cong., 1st Sess. 5 (1991).

¹¹⁷ See S. 1410, 102d Cong., 1st Sess. § 3(b)(3), (e) (1991).

tor Pressler's bills would have directed the FCC to protect privacy rights by evaluating possible alternative technologies, including an electronic database through which objecting individuals and business subscribers could free themselves from unwanted telephone solicitations.¹¹⁸ If a consumer put his or her name on the national "do-not-call" database, advertisers would be required to honor this choice by not calling.¹¹⁹

On July 11, 1991, shortly after Senator Pressler introduced his bill, Senator Hollings introduced S. 1462, the Automated Telephone Consumer Protection Act.¹²⁰ Senate Bill 1462 called for banning the use of ADADs to call homes and also prohibited all junk faxes.¹²¹ Referring to computerized calls as "the scourge of modern civilization," Senator Hollings echoed many of the complaints of Representative Markey.¹²² As introduced, S. 1462 banned all calls by ADADs, regardless of whether commercial, charitable or political.¹²³ Simply put, this legislation required that when a person was phoned at home, a live operator had to be on the other end of the line.¹²⁴

Senator Hollings shared Representative Markey's concern about safety risks resulting from computerized callers that did not hang up and thus tied up the lines.¹²⁵ As a result, Senator Hollings' bill required that ADADs hang up within five seconds of the discontinuation of the call by the recipient.¹²⁶ Later changes to S. 1462 created a private right

¹¹⁸ See *id.* § 3(c)(3) (1991); 137 CONG. REC. E793 (daily ed. Mar. 6, 1991) (statement of Rep. Markey).

¹¹⁹ See H.R. 1304, 102d Cong., 1st Sess. § 3(c)(3)(F) (1991), as reported in H.R. REP. NO. 317, 102d Cong., 1st Sess. 4 (1991).

¹²⁰ 137 CONG. REC. S9,874 (daily ed. July 11, 1991) (statement of Sen. Hollings).

¹²¹ *Id.*

¹²² *Id.* Senator Hollings termed such calls "assault[s]" and "telephone terrorism," and his comments decrying their ruinous effect on consumers' lives were even stronger than Representative Markey's. *Id.*; 137 CONG. REC. S16,205 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings).

¹²³ 137 CONG. REC. S16,206 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings); 137 CONG. REC. S9,874 (daily ed. July 11, 1991) (statement of Sen. Hollings).

¹²⁴ 137 CONG. REC. S16,206 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings). Based on the assumption that people do not have the same expectation of privacy at work as they do in the home, Senator Hollings' bill banned only automated calls to residences. 137 CONG. REC. S9,874 (daily ed. July 11, 1991) (statement of Sen. Hollings).

¹²⁵ 137 CONG. REC. S9,874 (daily ed. July 11, 1991) (statement of Sen. Hollings). For example, Senator Hollings described one case in which a family was unable to call 911 in response to an emergency because a computerized message was transmitting on the phone line and would not hang up. 137 CONG. REC. S16,205 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings). In another example, an elderly woman confined to bed in a hospital after surgery was constantly interrupted by computerized telephone solicitations. *Id.* Senator Hollings listed further complaints from business people with multiple telephone lines and ambulance dispatchers that had their switchboards tied up by ADADs. *Id.*

¹²⁶ 137 CONG. REC. S9,874 (daily ed. July 11, 1991) (statement of Sen. Hollings).

of action so consumers who received computerized calls had some recourse.¹²⁷ Finally, Senator Hollings' bill recognized the authority of the FCC to promulgate further rules, such as additional exemptions from the ADAD prohibitions.¹²⁸

In November of 1991, the House and Senate agreed upon the provisions of S. 1462 and passed it.¹²⁹ The first section of the bill contained a series of congressional findings.¹³⁰ Congress estimated that more than 300,000 solicitors called more than 18 million Americans every day, an increase from Representative Markey's original figures.¹³¹ Congress also found that residential telephone subscribers considered automated telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.¹³² In the final version of the bill, Congress attempted to protect small businesses by directing the FCC to examine whether the provisions of the Act should apply to such businesses.¹³³ In addition, the bill then contained an exemption from the ban of ADAD calls to residences for businesses that had an established business relationship with their customers.¹³⁴ Notably, the bill then permitted the FCC to exempt calls not made for a commercial purpose from the general ban of prerecorded solicitations to residences.¹³⁵ Representative Markey claimed that such an exception was "common sense," and that consumers do not mind certain classes and categories of calls, presumably charitable, political, research and other noncommercial calls.¹³⁶ Senator Hollings stated that noncommercial automated calls may not be as invasive of privacy as those made for commercial purposes.¹³⁷ On December 20, 1991,

¹²⁷ 137 CONG. REC. S16,205 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings).

¹²⁸ 137 CONG. REC. S16,206 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings). For example, Senator Hollings stated that this provision responded to concerns expressed by companies that used machines to place calls for debt-collection purposes. *Id.*

¹²⁹ See 137 CONG. REC. S18,781, S18,784 (daily ed. Nov. 27, 1991); 137 CONG. REC. H11,307 (daily ed. Nov. 26, 1991).

¹³⁰ See S. 1462, 102d Cong., 1st Sess. § 2 (1991), as reported in 137 CONG. REC. H11,307-08 (daily ed. Nov. 26, 1991).

¹³¹ Compare S. 1462, 102d Cong., 1st Sess. § 2(3) (1991), as reported in 137 CONG. REC. H11,307 (daily ed. Nov. 26, 1991) (300,000 solicitors making 18 million calls) with 137 CONG. REC. E793 (daily ed. Mar. 6, 1991) (statement of Rep. Markey) (180,000 solicitors making 7,000,000 calls).

¹³² See S. 1462, 102d Cong., 1st Sess. § 2(10) (1991), as reported in 137 CONG. REC. H11,307 (daily ed. Nov. 26, 1991).

¹³³ 137 CONG. REC. S18,317 (daily ed. Nov. 26, 1991) (statement of Sen. Pressler).

¹³⁴ *Id.*

¹³⁵ S. 1462, 102d Cong., 1st Sess. § 3(b)(2)(B)(i) (1991), as reported in 137 CONG. REC. H11,308 (daily ed. Nov. 26, 1991).

¹³⁶ 137 CONG. REC. H11,312 (daily ed. Nov. 26, 1991) (statement of Rep. Markey).

¹³⁷ 137 CONG. REC. S18,784 (daily ed. Nov. 27, 1991) (statement of Sen. Hollings). Senator

President Bush signed the TCPA into law, praising the purpose of protecting residential privacy, but cautioning that the Act might curtail legitimate business activity.¹³⁸

C. *The TCPA as Enacted*

The Act as enacted became an amendment to Title II of the Communications Act of 1934, and encompassed many different provisions with regard to unsolicited telephone calls.¹³⁹ In § 227(a), the Act defined relevant terms such as automatic telephone dialing system, telephone facsimile machine and unsolicited advertisement.¹⁴⁰ The Act then created some blanket restrictions on the use of automated telephone equipment.¹⁴¹ Under § 227(b)(1)(A), calls, other than for emergency use, using any automated telephone dialing system or prerecorded voice were unlawful if made to any emergency line, any health care facility room, or any pager or cellular phone for which the called party is charged.¹⁴² Furthermore, § 227(b)(1)(B) outlawed the initiation of any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the recipient.¹⁴³ Section 227(b)(1)(C) places a similar ban on unsolicited faxes.¹⁴⁴

Under § 227(b)(2), the Act directed the FCC to consider further regulations and exemptions, including prohibiting ADAD calls to businesses and exempting noncommercial calls and certain commercial calls that do not affect privacy rights or contain unsolicited advertisements.¹⁴⁵ If a party violated any of the prohibitions, the Act provided

Hollings stated that "[t]he phrase 'calls that are not made for a commercial purpose' is intended in the constitutional sense and is intended to be consistent with the court decisions which recognize that noncommercial speech can receive less protection than commercial speech." *Id.* I believe Senator Hollings meant that commercial speech should receive less protection than noncommercial speech. In any case, this represented a change from Senator Hollings' earlier support of a complete ban on autodialers, regardless of content. See *supra* notes 123-24 and accompanying text; see also *infra* notes 256-58 and accompanying text.

¹³⁸ See *Press Release From the Office of the Press Secretary, The White House*, Statement of President Bush, FED. NEWS SERV., Dec. 20, 1991, reprinted in 1991 U.S.C.C.A.N. 1979, 1979. Nonetheless, President Bush believed the Act gave the FCC ample power to preserve legitimate business practices, such as preexisting business relationships, according to changing market conditions. *Id.*

¹³⁹ See generally 47 U.S.C. § 227 (Supp. 1992).

¹⁴⁰ *Id.* § 227(a).

¹⁴¹ *Id.* § 227(b)(1).

¹⁴² *Id.* § 227(b)(1)(A).

¹⁴³ *Id.* § 227(b)(1)(B). The Act makes an exception to this ban for emergency situations. *Id.*

¹⁴⁴ 47 U.S.C. § 227(b)(1)(C).

¹⁴⁵ *Id.* § 227(b)(2). Under this authority, the FCC subsequently exempted calls not made for

for recovery under § 227(b)(3) of a minimum of \$500 by the called consumer.¹⁴⁶ Section 227(c)(3) further permitted the FCC to develop a national database that listed numbers of individuals who did not wish to be called by telemarketers.¹⁴⁷ The Act also included Representative Markey's technical and procedural standards covering safety issues and identification of solicitors using faxes and ADADs.¹⁴⁸

Most of the provisions of the Act have not been challenged.¹⁴⁹ The main problems with the Act have arisen with regard to the provision making unlawful all unsolicited, commercial, automatically-dialed, pre-recorded messages to residences.¹⁵⁰ One observer has noted that the TCPA is a prohibition on a manner of speech that, for some people, is essential.¹⁵¹

III. THE TCPA AND THE FIRST AMENDMENT: *MOSER v. FCC*

The TCPA and similar state statutes have come under attack for allegedly violating the First Amendment.¹⁵² Plaintiffs have successfully argued that such acts make impermissible content-based distinctions between commercial and noncommercial ADAD messages.¹⁵³ In addition, courts have held that these distinctions do not reasonably fit with state interests in protecting residential privacy, because both types of ADAD calls raise equal privacy concerns.¹⁵⁴ Further, courts have noted that no reasonable fit exists between state interests and the distinction between recorded and live commercial speech, especially because commercial ADAD messages make up such a small percentage of all telemarketing calls.¹⁵⁵ One court, however, has upheld a state statutory ban

a commercial purpose and calls made by tax-exempt organizations. See 47 C.F.R. § 64.1200(c)(1), (c)(4) (1993); Appellees' Brief at 23, *Moser v. FCC*, No. 93-35686 (9th Cir. filed Jan. 20, 1994).

¹⁴⁶ 47 U.S.C. § 227(b)(3).

¹⁴⁷ *Id.* § 227(c)(3).

¹⁴⁸ See *id.* § 227(d); see also *supra* note 116 and accompanying text.

¹⁴⁹ Of the five decided cases in which the constitutionality of the TCPA has been challenged, four have dealt with the ban on sending commercial ADAD messages to residences, 42 U.S.C. § 227(b)(1)(B) in conjunction with (b)(2)(B)(i), and one dealt with the prohibition of junk faxes, 42 U.S.C. § 227(b)(1)(C). See *infra* notes 157-239 and accompanying text for discussions of these cases.

¹⁵⁰ See 42 U.S.C. § 227(b)(1)(B); see also *infra* notes 157-239 and accompanying text for a discussion of the cases that deal with this challenge.

¹⁵¹ *Nightline: Computerized Auto-Dial Phone Selling* (ABC television broadcast, Nov. 11, 1991) (statement of Charles Hinkle), available in LEXIS, Nexis Library, OMNI File.

¹⁵² See, e.g., *Lysaght v. New Jersey*, 837 F. Supp. 646, 648 (D.N.J. 1993); *Moser v. FCC*, 811 F. Supp. 541, 543 (D. Or. 1992); *State v. Casino Mktg. Group*, 491 N.W.2d 882, 883-84 (Minn. 1992), *cert. denied*, Hall v. Minnesota, 113 S. Ct. 1648 (1993).

¹⁵³ See *Lysaght*, 837 F. Supp. at 648-49; *Moser v. FCC*, 826 F. Supp. 360, 363 (D. Or. 1993).

¹⁵⁴ See *Lysaght*, 837 F. Supp. at 651; *Moser*, 826 F. Supp. at 365.

¹⁵⁵ See *Lysaght*, 837 F. Supp. at 653; *Moser*, 826 F. Supp. at 366-67.

on commercial ADAD messages as narrowly tailored to fit the state's desired objectives.¹⁵⁶

A. *The TCPA Is Declared Unconstitutional*

In 1993, in *Moser v. FCC*, the United States District Court for the District of Oregon held that § 227(b)(1)(B) of the TCPA, banning the sending of ADAD messages to residential telephone lines, violated the First Amendment of the Constitution.¹⁵⁷ Kathryn Moser and her husband operated a small, local chimney sweep company, which used ADADs to generate business.¹⁵⁸ Moser sought to enjoin the FCC's enforcement of the TCPA against her company.¹⁵⁹ The court reasoned that the TCPA drew a distinction between commercial and noncommercial ADAD messages and determined that this distinction was based solely on content.¹⁶⁰ In addition, the court observed that no reasonable fit existed between Congress's interest in protecting residential privacy and the restrictions of the TCPA.¹⁶¹ The court reasoned that both commercial and noncommercial ADAD calls caused the same invasion of privacy.¹⁶² Furthermore, the court stated that the ban on ADAD messages only slightly reduced the invasion of privacy caused by all telemarketing techniques when considered together, including live calls.¹⁶³ The court held that the total ban of commercial ADAD calls was content-based, did not reasonably fit with the goals of the Act, and therefore, violated the First Amendment.¹⁶⁴ Thus, the court granted Moser's request for summary judgment on the injunction issue.¹⁶⁵

The court initially determined that the TCPA was not content-neutral, because the Act drew distinctions between commercial and non-commercial messages.¹⁶⁶ Furthermore, because the Act distinguished solely based on the content of the speech, it could not be classified as a legitimate time, place or manner restriction on protected speech.¹⁶⁷

¹⁵⁶ See *Casino Mktg.*, 491 N.W.2d at 891.

¹⁵⁷ *Moser v. FCC*, 826 F. Supp. 360, 367 (D. Or. 1993), *appeal docketed*, No. 93-35686 (9th Cir. 1994).

¹⁵⁸ See *Moser*, 811 F. Supp. at 542. Kathryn Moser was also the president of the National Association of Telephone Operators (NATO), also a plaintiff in the case. *Id.*

¹⁵⁹ See *Moser*, 826 F. Supp. at 361.

¹⁶⁰ See *id.* at 363.

¹⁶¹ See *id.* at 365.

¹⁶² See *id.*

¹⁶³ See *id.* at 366-67.

¹⁶⁴ See *Moser*, 826 F. Supp. at 367.

¹⁶⁵ *Id.* at 361, 367. The Mosers and NATO had been granted a preliminary injunction preventing enforcement of the TCPA. *Moser*, 811 F. Supp. at 546.

¹⁶⁶ *Moser*, 826 F. Supp. at 363.

¹⁶⁷ *Id.*

The court then determined that the TCPA constituted an invalid restriction on commercial speech under the *Central Hudson-Fox* test.¹⁶⁸

First, according to the court, distinguishing between commercial and noncommercial speech failed to further the protection of privacy.¹⁶⁹ The court reasoned that both commercial and noncommercial ADAD calls triggered the same ring of the telephone, and both equally invaded the home and risked interrupting the recipient's privacy.¹⁷⁰ Further, the court observed that both types of speech raised the same privacy issues that concerned Congress—depriving the recipient of “human interplay,” filling answering machines and interfering with emergency telephone numbers.¹⁷¹ The court concluded that, as in *City of Cincinnati v. Discovery Network, Inc.*, a distinction based solely on commercial speech's presumed low value in First Amendment tradition failed to justify a restriction of commercial speech.¹⁷²

Second, the court determined that no reasonable fit existed between the stated goals of the TCPA and the distinction between recorded and live commercial speech.¹⁷³ The court recognized the government's substantial interest in promoting residential privacy.¹⁷⁴ According to the court, the “shrill ring” of the telephone was uniquely intrusive, because it demanded to be answered.¹⁷⁵ The court concluded, however, that no reasonable fit existed between the interest in privacy the government sought to further by the enactment of the TCPA and the means chosen to promote that end.¹⁷⁶ The court based this conclusion on the fact that recorded messages composed less than three percent of all telemarketing calls received by Americans.¹⁷⁷ The court stated that the end targeted by the TCPA would have been a slight reduction in the number of unsolicited, invasive commercial calls placed to

¹⁶⁸ *Id.* at 364.

¹⁶⁹ *Id.* at 365.

¹⁷⁰ *Id.* The district court noted that House committee reports, which suggested that nonprofit solicitations are less intrusive than commercial solicitations, were made with regard to a version of H.R. 1304 that did not contain a ban on ADAD messages, and did nothing more than suggest telemarketing legislation was needed because of the overall increase in volume of unsolicited calls. *Id.*

¹⁷¹ See *Moser*, 826 F. Supp. at 365.

¹⁷² See *id.*

¹⁷³ *Id.* at 365, 367. A House Report prepared by the Committee on Energy and Commerce found that in a survey 70% of respondents found calls from a computer trying to sell something very annoying, while only 67% found phone calls from people trying to sell things more annoying. H.R. REP. NO. 317, 102d Cong., 1st Sess. 9 (1991). The *Moser* court held that a total ban on one form of commercial speech based on a statistical distinction of 3% fails the reasonable fit test. 826 F. Supp. at 366.

¹⁷⁴ *Moser*, 826 F. Supp. at 364.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 365.

¹⁷⁷ *Id.* at 366–67.

residential telephone owners.¹⁷⁸ The court observed, however, that the means of accomplishing this was the total suppression of commercial speech of businesses that used ADADs, while noncommercial and nonprofit ADAD messages and commercial speech delivered by live operators were permitted.¹⁷⁹ The court further noted that the government failed to consider less burdensome alternatives to achieve its ends.¹⁸⁰ Based on all of these reasons, the court concluded that the TCPA placed an unconstitutional restriction on protected commercial speech in violation of the First Amendment.¹⁸¹

B. State Challenges to ADAD Regulation

In the earlier case of *Moser v. Frohnmayer*, the Mosers won a challenge in the Supreme Court of Oregon to the state constitutionality of a statute dealing with ADADs.¹⁸² The Mosers sought a declaratory judgment that a statute making ADAD commercial messages unlawful violated the freedom of speech provision in the Oregon Constitution.¹⁸³ In applying state case law as precedent, the Supreme Court of Oregon held that the ban did not fit into any established historical exception to its protection of free speech.¹⁸⁴ In addition, the court stated that the ban aimed at the speech itself, rather than the prevention of an identified actual harm or effect.¹⁸⁵ Therefore, the Supreme Court of Oregon declared the statute unconstitutional.¹⁸⁶

State statutes similar to the TCPA have been challenged thus far in only two additional states.¹⁸⁷ In 1993, in *State v. Casino Marketing Group*, the Supreme Court of Minnesota upheld, on interlocutory appeal, the constitutionality of a state statute that banned ADAD messages.¹⁸⁸ The regulations included prohibitions of ADADs unless the

¹⁷⁸ See *id.* at 367.

¹⁷⁹ See *Moser*, 826 F. Supp. at 367.

¹⁸⁰ *Id.* Congress had found that banning ADAD calls was "the only effective means of protecting telephone consumers from this nuisance and privacy invasion." S. 1462, 102d Cong., 1st Sess. § 2(12), as reported in 137 CONG. REC. H11,307 (daily ed. Nov. 26, 1991).

¹⁸¹ See *Moser*, 826 F. Supp. at 367.

¹⁸² *Moser v. Frohnmayer*, 845 P.2d 1284, 1285, 1288 (Or. 1993).

¹⁸³ *Id.* at 1285. Article I, section 8, of the Oregon Constitution provides that "[no] law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever." OR. CONST. art. I, § 8.

¹⁸⁴ *Frohnmayer*, 845 P.2d at 1287.

¹⁸⁵ *Id.* at 1288. Although presumably directed at invasion of privacy, the statute did not identify, expressly or by clear implication, a substantial harm that the law sought to ameliorate. See *id.* at 1291 (Graber, J., concurring in part and specially concurring in part).

¹⁸⁶ See *id.* at 1288.

¹⁸⁷ See *Lysaght v. New Jersey*, 837 F. Supp. 646, 648 (D.N.J. 1993); *State v. Casino Mktg. Group*, 491 N.W.2d 882, 884-85 (Minn. 1992), cert. denied, Hall v. Minnesota, 113 S. Ct. 1648 (1993).

¹⁸⁸ See *Casino Mktg.*, 491 N.W.2d at 884, 891-92.

caller had the prior consent of the recipient or if the message had been immediately preceded by a live operator who had obtained the consent of the recipient.¹⁸⁹ A telephone solicitor enjoined from using ADADs appealed, claiming that the statute violated the First Amendment.¹⁹⁰ The court observed that although the ADAD statute regulated a type of commercial speech, it did not ban ADAD messages completely, because a company or individual could still use an ADAD if it obtained consent through an operator.¹⁹¹ In addition, in applying the *Central Hudson-Fox* test, the court reasoned that commercial ADAD calls intolerably invaded residential privacy because they were more efficient and less discriminating than calls by live operators.¹⁹² Thus, the court concluded that a reasonable fit existed between the state's interest in protecting privacy and the means by which the state sought to achieve that goal.¹⁹³ The court therefore upheld the constitutionality of the ADAD statute.¹⁹⁴

In applying the *Central Hudson-Fox* test, the court assumed both the lawfulness of the messages conveyed by ADADs, and the legitimacy of the state's substantial interest in protection of residential privacy underlying its statute.¹⁹⁵ Proceeding to the third part of the test, the court determined that the ADAD statute directly advanced this privacy interest.¹⁹⁶ The problem, according to the court, was not solely with the offensiveness of the content of the message.¹⁹⁷ Rather, the coupling of commercial telephone solicitation with a surprisingly efficient and indiscriminate method of distribution resulted in a method of conveying commercial speech that intolerably invaded residential privacy.¹⁹⁸ ADADs, according to the court, forced the consumer to listen to at

¹⁸⁹ MINN. STAT. ANN. § 325E.27 (West 1994).

¹⁹⁰ See *Lysaght*, 837 F. Supp. at 883-84.

¹⁹¹ See *id.* at 886-87. The court characterized this statute as a reasonable time, place and manner restriction. *Id.* at 886. The time consideration resulted in a limit on the hours of permissible use of ADADs. See MINN. STAT. ANN. § 325E.30. The statute is a result of a place consideration, because no place is immune from the intrusion of an ADAD. *Casino Mktg.*, 491 N.W.2d at 886. The court stated that the need for consent in advance or by an operator is justified as a manner restriction. *Id.* at 887.

¹⁹² See *Casino Mktg.*, 491 N.W.2d at 887-88.

¹⁹³ See *id.* at 891.

¹⁹⁴ See *id.* at 891-92.

¹⁹⁵ *Id.* at 887-88. Minnesota also advanced the substantial interest of prevention of telemarketing fraud, but the court found that requiring live operators did not directly advance this interest. See *id.*

¹⁹⁶ *Id.* at 888.

¹⁹⁷ *Casino Mktg.*, 491 N.W.2d at 888.

¹⁹⁸ *Id.* The court rejected the defendants' argument that a consumer could decline an ADAD call simply by hanging up. *Id.* at 889.

least some of the message in the privacy of his or her own non-public home.¹⁹⁹

The court pointed out what it identified as two fundamental differences between ADAD-generated calls and calls generated by live operators—ADADs reach more households more quickly and select households randomly.²⁰⁰ The court reasoned that live operators balanced this efficiency and indiscriminate calling, reducing the number of calls, and therefore increasing residential privacy.²⁰¹ Furthermore, the court characterized the contention that the ADAD statute failed to directly advance the state's interest because commercial solicitations by live operators or by ADADs equally invade residential privacy as "overly simplistic."²⁰²

The court concluded that a regulation of commercial speech did not fail to directly advance the state's substantial interest merely because it did not completely eliminate the problems the regulations sought to address.²⁰³ The court used this reasoning to dismiss the contention that the ADAD statute failed to directly advance the state's interest because of its statutory exception of noncommercial solicitations.²⁰⁴ The court then concluded, under the final part of the *Central Hudson-Fox* test, that because Minnesota neither completely banned ADADs nor restricted solicitations by live operators, the statute was narrowly tailored and constituted a reasonable fit with the statute's desired objectives.²⁰⁵

Concurring in part and dissenting in part, Justice Tomljanovich argued that the statute's restriction of commercial speech did not directly advance the state's interests.²⁰⁶ According to Justice Tomljanovich, the live operator requirement advanced the interest in freedom from the

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at 890.

²⁰² *Casino Mktg.*, 491 N.W.2d at 890. This was a major point in *Moser v. FCC* and *Lysaght v. New Jersey*. *Lysaght*, 837 F. Supp. 646, 653 (D.N.J. 1993); *Moser*, 826 F. Supp. 360, 367 (D. Or. 1993), *appeal docketed*, No. 93-35686 (9th Cir. 1994). The *Casino Marketing* court somewhat confusingly asserted that the quality of the intrusion of a live solicitation versus an ADAD message is different, although the degree to which privacy is invaded by any particular call may be the same. 491 N.W.2d at 890.

²⁰³ See *Casino Mktg.*, 491 N.W.2d at 890 (citing *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 342-43 (1986); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510-12 (1981)).

²⁰⁴ *Id.* The Supreme Court of Minnesota read the regulatory scope of this statute to be limited to commercial speech, and to not include calls made by charitable, religious and educational organizations. *Id.* at 886. The court reasoned that the state is free to believe that commercial calls pose a more acute threat to privacy than other types of calls to which the community may attribute more value. *Id.* at 890-91.

²⁰⁵ *Id.* at 891.

²⁰⁶ *Id.* at 892 (Tomljanovich, J., concurring in part and dissenting in part).

ring of the telephone only incidentally, if at all.²⁰⁷ Justice Tomljanovich reasoned that, once the called person picked up the telephone, the invasion of privacy has already occurred, regardless of whether the caller was an ADAD or a live person.²⁰⁸ Additionally, Justice Tomljanovich suggested that people may be able to hang up on machines more easily than they could on live operators.²⁰⁹

The Supreme Court of Minnesota held that a statutory ban on unIntroduced commercial ADAD messages was constitutional.²¹⁰ The court reasoned that having live operators introduce ADAD calls balanced efficiency with residential privacy, thus creating a narrowly tailored regulation carefully calculated to advance the state's substantial interest.²¹¹ As a result, the court upheld the state prohibition on the use of unIntroduced ADAD messages.²¹²

In 1993, in *Lysaght v. New Jersey*, the United States District Court for the District of New Jersey struck down a New Jersey statute that banned commercial ADAD solicitations without the consent of the called party.²¹³ The plaintiffs, two self-employed independent contractors, sought to enjoin the state of New Jersey from enforcing its ban as a violation of the First Amendment.²¹⁴ The court first reasoned that the distinction, based solely on the commercial or noncommercial nature of the speech, was content-based.²¹⁵ The court then reasoned that, because commercial and noncommercial ADAD messages invaded the home equally, the perceived low value of commercial speech provided the only basis for the distinction.²¹⁶ The court concluded that this did not comprise a sufficient justification for the ban on commercial ADAD messages.²¹⁷ In addition, the court determined that the statute failed the *Central Hudson-Fox* test because no reasonable fit existed between the state's interest in privacy, and the distinctions between commercial

²⁰⁷ *Id.* (Tomljanovich, J., concurring in part and dissenting in part).

²⁰⁸ *Casino Mktg.*, 491 N.W.2d at 892 (Tomljanovich, J., concurring in part and dissenting in part).

²⁰⁹ *Id.* (Tomljanovich, J., concurring in part and dissenting in part).

²¹⁰ *Id.* at 891-92.

²¹¹ *See id.* at 890-91.

²¹² *See id.* at 891-92. The *Casino Marketing* court remanded the case for a determination of whether the prerecorded messages were accurate or false and misleading. *Id.* at 892.

²¹³ 837 F. Supp. 646, 648, 654 (D.N.J. 1993).

²¹⁴ *Id.* at 647-48. Dennis Lysaght and Michael Berardi were described as independent contractors who marketed memorial services for certain cemeteries. *See* Paul M. Alberta, *New Jersey Telemarketers Contesting Constitutionality of Autodialer*, DM NEWS, Nov. 8, 1993, at 3. The National Association of Telephone Operators, a plaintiff in *Moser*, was also a plaintiff in *Lysaght*. *Id.*

²¹⁵ *Lysaght*, 837 F. Supp. at 648-49. The court rejected arguments that the statute was a content-neutral, reasonable time, place or manner restriction. *Id.* at 649.

²¹⁶ *Id.* at 651.

²¹⁷ *Id.*

and noncommercial ADAD messages and between live and recorded commercial speech.²¹⁸ Thus, the court enjoined New Jersey from enforcing its statute.²¹⁹

The court determined that, like the distinction between newsracks in *City of Cincinnati v. Discovery Network, Inc.*, the distinction based solely on whether the ADAD message was commercial or noncommercial was content-based.²²⁰ Because the state could not justify the statute as a reasonable restriction based on time, place or manner, the court next analyzed the restriction on commercial speech under the *Central Hudson Gas & Electric Corp. v. Public Service Commission* test.²²¹ Conceding that the final stage was a close question, the court concluded that the distinction between commercial and noncommercial speech did not reasonably fit with the state interest in protecting residential privacy.²²² The court observed, as the *Moser v. Frohnmayer* court had, that both commercial and noncommercial ADAD messages equally disrupted privacy in the home with the same rings and interruptions.²²³ Therefore, as in *Discovery Network*, the *Lysaght* court observed that the perceived low value of commercial speech provided the only basis for distinguishing between commercial and noncommercial ADAD messages, an impermissible justification for a complete ban on the commercial messages.²²⁴ The court concluded that more complaints about commercial calls did not necessarily mean a greater frequency of such calls.²²⁵ According to the court, the mere offensiveness or annoyance of commercial calls did not, by itself, sufficiently justify a prohibition of commercial speech.²²⁶ The court observed that this statute did not make merely a distinction among different types of commercial speech, as in *Metromedia, Inc. v. City of San Diego* or *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, but a discrimination between commercial and noncommercial speech.²²⁷

Echoing *Moser*, the court observed that the distinction between ADAD-delivered messages and messages delivered or introduced by live persons bore little relation to the interests asserted by the state,

²¹⁸ See *id.*

²¹⁹ See *id.* at 654.

²²⁰ *Lysaght*, 837 F. Supp. at 648-49.

²²¹ *Id.* at 649. The parties did not dispute the state's asserted interest in the promotion of residential privacy. *Id.*

²²² *Id.* at 651.

²²³ *Id.* (citing *Moser v. FCC*, 826 F. Supp. 360, 366 (D. Or. 1993)).

²²⁴ *Id.* (citing *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1516 (1993)).

²²⁵ *Lysaght*, 837 F. Supp. at 651.

²²⁶ See *id.* at 652; *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71-72 (1983).

²²⁷ *Lysaght*, 837 F. Supp. at 652 (quoting *Discovery Network*, 113 S. Ct. at 1514 n.20).

and that, therefore, no reasonable fit existed.²²⁸ The court reasoned that all telemarketing calls, whether live or by machine, threatened the privacy of the home, because once the person being called picked up the phone, the invasion of privacy had already occurred.²²⁹

The court held that the New Jersey ADAD statute violated the First Amendment.²³⁰ According to the court, the statute, similar to the TCPA, was content-based, and therefore, did not constitute a legitimate restriction on the time, place or manner of protected speech.²³¹ The distinction it made between commercial and noncommercial speech did not sufficiently justify the ADAD ban.²³² The court also reasoned that the distinctions between commercial and noncommercial ADAD messages and between live and recorded calls did not relate to the goals of the statute, because all telemarketing calls were invasive.²³³ Therefore, the court enjoined the state from enforcing its law.²³⁴

IV. ANALYSIS OF THE *MOSER v. FCC* DECISION AND ALTERNATIVES TO THE TCPA

The protection of residential privacy is a legitimate state interest.²³⁵ The two primary distinctions made by the TCPA, however, bear little relation to that interest. First, the distinction between commercial and noncommercial ADAD messages is based on content, unconstitutionally relying on a perceived lower value of commercial speech.²³⁶ In actuality, both types of ADAD messages cause the same problems and the same invasion of privacy.²³⁷ Second, no reasonable fit exists between the distinction between live and recorded solicitations and the goal of protecting privacy.²³⁸ Again, both types of calls disturb the tranquillity of the home. In addition, ADADs account for only about three percent of all telemarketing calls.²³⁹ In fact, the TCPA fails to regulate most of

²²⁸ *Id.* at 653.

²²⁹ *Id.*

²³⁰ *See id.* at 648, 654.

²³¹ *Id.* at 648-49.

²³² *See Lysaght*, 837 F. Supp. at 651.

²³³ *See id.* at 651, 653.

²³⁴ *Id.* at 654.

²³⁵ *See Nadel*, *supra* note 17, at 102; *see also Lysaght v. New Jersey*, 837 F. Supp. 646, 649 (D.N.J. 1993); *Moser v. FCC*, 826 F. Supp. 360, 364 (D. Or. 1993), *appeal docketed*, No. 93-35686 (9th Cir. 1994); *State v. Casino Mktg. Group*, 491 N.W.2d 882, 888 (Minn. 1992).

²³⁶ *See, e.g., City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1516 (1993); *Lysaght*, 837 F. Supp. at 651; *Moser*, 826 F. Supp. at 365.

²³⁷ *See Lysaght*, 837 F. Supp. at 651; *Moser*, 826 F. Supp. at 365.

²³⁸ *See Lysaght*, 837 F. Supp. at 653; *Moser*, 826 F. Supp. at 366.

²³⁹ *See Moser*, 826 F. Supp. at 366-67.

the calls that invade residential privacy. In reality, the TCPA has the hardest impact on small businesses who cannot afford live operators and prefer cost-efficient ADADs. Finally, many new technologies provide alternatives to a complete ban, indicating that Congress has not chosen a solution that fairly balances consumers' interest in privacy with ADAD users' rights to free speech.

A. *The TCPA as a Content-Based Distinction*

Governmental interest in protecting the tranquillity of the home has always been "of the highest order."²⁴⁰ The United States Supreme Court has recognized that government may properly act to prohibit intrusion into the privacy of the home, where people are often "captives" of unwelcome views and ideas.²⁴¹ An individual, however, can avoid an ADAD message simply and quickly by hanging up, just as he or she can avoid a printed advertisement by averting his or her eyes.²⁴²

The Mosers concede that ADAD messages are annoying, but they point out that most advertising is a nuisance, and that just as the Mosers have a right to call, consumers have the right to hang up.²⁴³ In addition, the FCC, in a study conducted in 1980, observed that, although many people find telemarketing annoying, many people also purchase the goods offered.²⁴⁴ According to Joan Mullen, President of the American Telemarketing Association, telemarketing provides a service to housebound people, allowing them to conduct business, make purchases and obtain information.²⁴⁵ Ms. Mullen also insists that, with better education of telemarketers regarding courtesy and targeting of consumer interests, telemarketing will continue to be a service, rather than an intrusion.²⁴⁶ An organization trying to sell something has an incentive to direct calls to those likely to be interested, limit its calls to reasonable hours, and to conduct its calls, live or prerecorded,

²⁴⁰ See *Carey v. Brown*, 447 U.S. 455, 471 (1980).

²⁴¹ See *Rowan v. United States Post Office Dept.*, 397 U.S. 728, 737-38 (1970).

²⁴² Compare *Cohen v. California*, 403 U.S. 15, 21 (1971) (holding that persons confronted with offensive words on jacket could avert their eyes to avoid further bombardment of their sensibilities) with *State v. Casino Mktg. Group*, 491 N.W.2d 882, 889 (Minn. 1992) (holding that subscriber confronted with ADAD message would be "forced to answer the telephone and receive at least part of the message before he or she can hang up"). Even in the case of offensive printed materials, there must be some limited exposure to determine that the message or words are offensive. But, in either case, that exposure can be terminated very quickly, either by averting the eyes or hanging up the phone.

²⁴³ *Nightline*, *supra* note 151 (statement of Kathy Moser).

²⁴⁴ *Unsolicited Telephone Calls*, 77 F.C.C.2d 1023, 1036 (1980).

²⁴⁵ See *Lauerman*, *supra* note 85, at 20.

²⁴⁶ See *id.*

in an ethical and courteous manner.²⁴⁷ In addition, the Direct Marketing Association and some insurers have implemented private guidelines, not subject to First Amendment challenges.²⁴⁸

The *Moser* decision highlighted several problems with the TCPA. First, the TCPA distinguishes between forms of solicitation based on content. Almost fifteen years ago, the Department of Health, Education and Welfare, as well as many business and industry associations, began questioning the lawfulness of distinguishing between unsolicited commercial calls and those of a nonprofit or political nature.²⁴⁹ The TCPA exempts charities, politicians, research organizations and other nonprofit groups from the ban on ADAD messages to residences.²⁵⁰ While it is understandable that emergency numbers should be kept open for public safety concerns, or that cellular phones which charge the call receiver should not be called because they impose involuntary payments, no clear public concern requires the inclusion of commercial calls to residences among the prohibitions of ADAD use.²⁵¹ Commercial calls do not pose safety threats or impose unsolicited expenses on consumers. Moreover, commercial and noncommercial calls inflict the same disturbance upon residential privacy.²⁵² They present the same concerns with filling answering machines and interfering with emergency and health-related phone numbers.²⁵³ Even in 1980, the FCC, in a report on unsolicited telemarketing, recognized that all solicitation calling—whether for charitable, political or business purposes—implicates similar concerns regarding privacy.²⁵⁴ In short, although the state interest in protecting privacy is compelling, the distinction between commercial ADAD messages and noncommercial ADAD messages does not facilitate the achievement of that objective.²⁵⁵

²⁴⁷ See *Unsolicited Telephone Calls*, 77 F.C.C.2d at 1037.

²⁴⁸ See Carole King, *Marketers Debate Automated Dialing Equipment*, NAT'L UNDERWRITER, July 29, 1991, at 15.

²⁴⁹ See *Unsolicited Telephone Calls*, 77 F.C.C.2d at 1025, 1027.

²⁵⁰ See 47 U.S.C. § 227(b)(2)(B)(i), as enacted by 47 C.F.R. § 62.1200(c)(1), (c)(4) (1993).

²⁵¹ See Ann Marie Arcadi, Note, *What About the Lucky Leprechaun?: An Argument Against "The Telephone Consumer Protection Act of 1991,"* 1991 COLUM. BUS. L. REV. 417, 429 (1991) ("Even the manufacturers of the [ADADs] agree and recommend that the FCC regulate the usage of such machines by requiring the machines to quickly disconnect, omit dialing emergency telephone numbers and refrain from internally generating random or sequential numbers to be dialed.").

²⁵² *Moser v. FCC*, 811 F. Supp. 541, 545 (D. Or. 1992).

²⁵³ *Id.*

²⁵⁴ *Unsolicited Telephone Calls*, 77 F.C.C.2d 1023, 1035 (1980).

²⁵⁵ See Luten, *supra* note 18, at 153. Like ADAD messages, faxes are also banned by the TCPA. See 42 U.S.C. § 227(b)(1)(C) (Supp. 1992). Unlike ADADs, however, faxes impose costs on the recipient. This is similar to ADADs that call cellular phones. Junk faxes use the recipient's fax

As the *Moser* court concluded, no reasonable time, place or manner restriction justifies the distinction of commercial versus noncommercial ADAD calls. In fact, Senator Hollings did not distinguish, and carefully avoided drawing any distinctions based on content, between commercial and noncommercial ADAD calls in his original bill.²⁵⁶ In the committee report on S. 1462, Senator Hollings wrote that S. 1462 was an example of a reasonable time, place and manner restriction on speech because (at that time) it applied equally to all automated messages whether of a commercial, political, charitable or other nature.²⁵⁷ Among the findings listed in Senator Hollings' bill was that evidence compiled by Congress indicated that residential telephone subscribers considered ADAD calls, *regardless of content or the initiator of the message*, a nuisance and an invasion of privacy.²⁵⁸ By only banning ADADs used in commercial speech, Congress made a judgment about the content of the message, rather than the use of the ADADs.²⁵⁹

Often noncommercial recordings are as offensive as for-profit calls, if not more so. The FCC, in its 1980 report on telemarketing, stated that no evidence existed that a telephone subscriber would find an advertising message more offensive than a request for a charitable

machine to print material on the recipient's own paper and own time. The costs of the paper, due to a large number of solicitors, build up over time. See Jim Fisher, *Shifting Costs Behind the Mask of Free Speech*, LEWISTON MORNING TRIB., Dec. 29, 1993, at 4A. One estimate prices fax paper at \$10 per roll. See *Telephone Calls From Computers May Be Curbed By Lawmakers*, INVESTOR'S DAILY, Aug. 15, 1991, at 25. In effect, companies are actually trying to shift some of the costs of their promotional materials to consumers, without consumers' permission. See Fisher, *supra*, at 4A; Reuters, *Ban Is Upheld on Fax Ads*, N.Y. TIMES, Dec. 25, 1993, at 50.

In 1994, the United States District Court for the District of Oregon upheld the constitutionality of the Act's ban of unsolicited faxes. *Destination Ventures, Ltd. v. FCC*, 844 F. Supp. 632, 634, 640 (D. Or. 1994). Five companies in Oregon sought an injunction against the FCC to enjoin enforcement of the TCPA's fax provisions. *Id.* The court listed the shifting of costs and the unwanted occupation of recipient's fax machines as substantial interests that Congress sought to address with its ban. See *id.* at 636-37. In addition, the court explained that the statute was narrowly tailored to serve these interests because it banned all messages that advertised the *commercial availability* or quality of property, goods or services, without distinguishing between commercial and nonprofit messengers. *Id.* at 637. The court therefore granted the defendant's motion to dismiss the companies' case. *Id.* at 634, 640.

Even when courts uphold the fax ban, they have not construed it liberally. See *Lutz Appellate Servs. v. Curry*, No. 94-3985, 1994 WL 395304, at *1 (E.D. Pa. July 28, 1994) (holding that unsolicited help-wanted faxes did not fall within ban because they advertise employment opportunities, not property, goods or services).

²⁵⁶ See 137 CONG. REC. S16,206 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings); S. REP. NO. 178, 102d Cong., 1st Sess. 4 (1991), reprinted in 1992 U.S.C.C.A.N. 1968, 1971.

²⁵⁷ S. REP. NO. 178, 102d Cong., 1st Sess. 4, 6 (1991), reprinted in 1992 U.S.C.C.A.N. at 1971, 1974; see also 137 CONG. REC. S18,784 (daily ed. Nov. 27, 1991) (statement of Sen. Hollings).

²⁵⁸ S. 1462, 102d Cong., 1st Sess. § 2(10) (1991), as reported in 137 CONG. REC. H11,307 (daily ed. Nov. 26, 1991).

²⁵⁹ See Andrews, *supra* note 88, at D1.

contribution or a political message or solicitation.²⁶⁰ For example, a recording from a public interest group might more subtly reach out to the sympathies of a potential donor than would a straightforward advertisement for a product or service. A politician's permissible ADAD messages disturb the home to solicit funds for his or her campaign just as do commercial ADADs (this makes it more apparent why this exception was included in the Act passed by a Congress that frequently needs to solicit reelection contributions).²⁶¹ While charities certainly serve the public good, nothing supports the assumption that all noncommercial calls inherently serve the public good (a politician's ADAD call more than likely serves the politician). In addition, the TCPA makes the complementary assumption that all commercial speech is inherently of less value to the public good than noncommercial speech. Yet, the United States Supreme Court has repeatedly stated that consumers' interest in the free flow of commercial information may equal, if not exceed, their interest in other sorts of speech.²⁶² Like the differentiation between varieties of newsmagazines in *City of Cincinnati v. Discovery Network, Inc.*, the distinction among types of ADAD calls "bears no relationship *whatsoever*" to Congress's interest in protecting privacy.²⁶³ If a telemarketing call is intrusive, it is no less intrusive if it is a non-commercial ADAD message than if it is a commercial ADAD message.²⁶⁴

In *State v. Casino Marketing Group*, the Supreme Court of Minnesota relied on the perceived greater value to the public good of charitable contributions, as compared to profits derived from commercial messages.²⁶⁵ The FCC has written that activities of market research or polling organizations are not invasive of residential privacy rights.²⁶⁶ Congress relied on the assumption that unsolicited calls for the purpose of obtaining the called party's business are regarded by consumers as inherently more intrusive and objectionable than unsolicited

²⁶⁰ Unsolicited Telephone Calls, 77 F.C.C.2d 1023, 1035 (1980).

²⁶¹ See Arcadi, *supra* note 251, at 426. According to Jeff Travis, a California-based ADAD manufacturer, he sells ADADs to politicians to get themselves reelected, and they then exclude themselves from what they call "intrusive" calls banned by the Act. See King, *supra* note 248, at 15.

²⁶² See *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1975).

²⁶³ See *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1514 (1993); Appellees' Brief at 26, *Moser v. FCC*, No. 93-35686 (9th Cir. filed Jan. 20, 1994).

²⁶⁴ See Luten, *supra* note 18, at 153.

²⁶⁵ 491 N.W.2d 882, 890 (Minn. 1992); see also *Lysaght v. New Jersey*, 837 F. Supp. 646, 652 n.9 (D.N.J. 1993) (*Casino Marketing* court "relied in part on the perceived greater value of charitable contributions as contrasted with profit generated through commercial messages.").

²⁶⁶ See Diane K. Bowers, *The Telephone Consumer Protection Act*, MARKETING RESEARCH: A MAGAZINE OF MANAGEMENT & APPLICATIONS TM, June 1993, at 44.

calls seeking the called party's support for a political or not-for-profit cause.²⁶⁷ This type of justification—assigning a greater value to non-commercial speech than commercial speech—has been directly undermined by *Discovery Network*, in which the United States Supreme Court held that this content distinction fails to justify suppressing only commercial speech.²⁶⁸ If the governmental purpose in regulating ADADs is to protect residential privacy, no rational reason exists to suggest that limiting only commercial calls (or ADAD calls) will achieve that goal to any greater degree than limiting all ADAD messages.²⁶⁹

B. *The TCPA's Arbitrary Distinction Between Live and Recorded Calls*

1. The Lack of a Reasonable Fit

According to *Moser v. FCC*, in addition to content-based distinctions, the TCPA also makes an arbitrary division between live and prerecorded calls. Though the distinction between prerecorded messages and live people may be justified as a reasonable restriction on the manner of delivery, no reasonable fit exists between protecting privacy and banning all commercial ADAD messages.²⁷⁰ As the *Moser* court observed, the Act raises serious questions as to whether such a heavy burden on this one kind of constitutionally-protected commercial speech is a reasonable fit with the reduction of such a small percentage of the invasive calls targeted by Congress.²⁷¹ Banning ADADs does not protect privacy, but makes commercial speech more expensive for companies that will continue to invade the home through live operators.²⁷² In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the United States Supreme Court stated that it carefully reviews regulations that completely suppress commercial speech in order to pursue a non-speech related policy.²⁷³ By totally outlawing only this one ADAD technology, Congress has banned a form of commercial

²⁶⁷ Allan R. Adler, *Tight Rein on Unwanted Calls*, TEXAS LAW., May 24, 1993, at 16.

²⁶⁸ *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1516 (1993); see also Appellees' Brief at 25–26, *Moser v. FCC*, No. 93–35686 (9th Cir. filed Jan. 20, 1994).

²⁶⁹ See Luten, *supra* note 18, at 153.

²⁷⁰ See *Moser v. FCC*, 826 F. Supp. 360, 363–64, 367 (D. Or. 1993), *appeal docketed*, No. 93–35686 (9th Cir. 1994).

²⁷¹ *Moser v. FCC*, 811 F. Supp. 541, 545 (D. Or. 1992); Appellees' Brief at 11–12, *Moser* (No. 93–35686).

²⁷² See *State v. Casino Mktg. Group*, 491 N.W.2d 882, 892 (Minn. 1992) (Tomljanovich, J., concurring in part and dissenting in part).

²⁷³ *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 n.9 (1980).

speech for the sake of slightly reducing the number of telephone solicitations.²⁷⁴

The *Moser* court pointed out that both types of calls trigger the same ring and equally disturb the peacefulness and privacy of the home.²⁷⁵ As the Mosers contended in their Appellee's Brief, "a ringing phone is a ringing phone is a ringing phone."²⁷⁶ In his dissent in *State v. Casino Marketing Group*, Justice Tomljanovich argued that once the person being called picks up the telephone, his or her privacy has already been interrupted, regardless of whether the caller is a person or an ADAD.²⁷⁷ Senator Hollings suggested that ADAD calls clearly are a greater nuisance and invasion of privacy than calls by live persons.²⁷⁸ He claimed that automated calls cannot interact with the consumer, except in preprogrammed ways; consequently, they do not allow the caller to feel the frustration of the called party.²⁷⁹ They are also annoying in that they do not disconnect the line after the consumer hangs up the telephone, and when no one is available to answer the automated call, they may fill entire answering machine tapes with their messages.²⁸⁰ Technology, however, has since provided for disconnection after the customer hangs up.²⁸¹ Also, answering machines can now limit the length of an individual caller's message. As for the complaint that there is no interaction, Senator Hollings is a bit behind the times. Money and banking, transportation scheduling and other daily activities are universally conducted by person-to-computer interaction, often more efficiently than person-to-person dealings. The fact that these events do not cause unbearable, widespread frustration provides support for the proposition that people are not necessarily bothered by a lack of interaction.

In addition, residential privacy, not avoidance of frustration with ADAD calls, was the interest Congress put forward in support of its ban on ADADs.²⁸² Senator Hollings mysteriously derived the notion that not being allowed to vent one's frustration constitutes a nuisance that warrants regulation. Senator Hollings quotes Steve Hamm, Administrator of the South Carolina Department of Consumer Affairs, for

²⁷⁴ See *Moser*, 811 F. Supp. at 545.

²⁷⁵ See *Moser*, 826 F. Supp. at 365.

²⁷⁶ Appellees' Brief at 16, *Moser* (No. 93-35686).

²⁷⁷ 491 N.W.2d 882, 892 (Minn. 1992) (Tomljanovich, J., concurring in part and dissenting in part).

²⁷⁸ S. REP. NO. 178, 102d Cong., 1st Sess. 4 (1991), reprinted in 1992 U.S.C.C.A.N. 1968, 1972.

²⁷⁹ *Id.* at 4-5, reprinted in 1992 U.S.C.C.A.N. at 1972.

²⁸⁰ *Id.*

²⁸¹ See *Nightline*, *supra* note 151 (statement of Ray Kolker).

²⁸² Appellees' Brief at 17, *Moser*, No. 93-35686 (9th Cir. filed Jan. 20, 1994).

support that consumers complain of the irritation they experience due to their inability to show their frustration and anger from ADAD calls.²⁸³ In effect, Senator Hollings expounded the irrational justification for distinguishing among telemarketing calls that people receiving ADAD messages cannot get the same "sense of relief" that they obtain by slamming down their telephones in innocent operators' ears when they receive live calls.²⁸⁴ One Representative believed that somehow an individual can hold a live person more accountable than an automated voice, if he or she interrupts your dinner.²⁸⁵ If anything, the impersonality of the recording should make such a rejection easier.²⁸⁶ The called party need not concern itself with how to make a polite rejection or with hurting the feelings of the caller, who is probably just trying to do his or her job to the best of his or her ability.²⁸⁷ Robert Bulmash, founder of Private Citizen, a group that crusades against telemarketers, stated that the main concern of consumers is the fact that telemarketers "barge" into homes, not the method by which they do so.²⁸⁸

No one has demonstrated that less restrictive, better fitting measures are not available to alleviate the problems of telemarketing.²⁸⁹ As the *City of Cincinnati v. Discovery Network, Inc.* Court noted, reasonable alternatives to a regulation directly relate to the issue of reasonable fit.²⁹⁰ Congress simply concluded that prohibiting ADAD calls to the home poses the only effective way of protecting telephone consumers' privacy.²⁹¹ Banning the use of ADADs for all commercial purposes creates a much more severe measure than any of the technical and procedural restrictions applicable to noncommercial ADAD calls or live calls that equally invade residential privacy.²⁹²

²⁸³ S. REP. NO. 178, 102d Cong., 1st Sess. 4 n.3 (1991), *reprinted in* 1992 U.S.C.A.N. at 1972.

²⁸⁴ *See id.*

²⁸⁵ 137 CONG. REC. H11,312 (daily ed. Nov. 26, 1991) (statement of Rep. Cooper).

²⁸⁶ *See Casino Mktg.*, 491 N.W.2d at 892 (Tomljanovich, J., concurring in part and dissenting in part).

²⁸⁷ *See Appellees' Brief* at 19, *Moser*, No. 93-35686 (9th Cir. filed Jan. 20, 1994).

²⁸⁸ *See Nightline*, *supra* note 151 (statement of Robert Bulmash). Private Citizen sends to telemarketers a list of names of consumers who agree they can be contacted by telemarketers if they are paid one hundred dollars. *Id.*

²⁸⁹ *See Arcadi*, *supra* note 251, at 426.

²⁹⁰ *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.13 (1993).

²⁹¹ S. 1462, 102d Cong., 1st Sess. § 2(12) (1991), *as reported in* 137 CONG. REC. H11,307 (daily ed. Nov. 26, 1991).

²⁹² *See Arcadi*, *supra* note 251, at 425.

2. Incidental Decrease of the Invasion of Privacy

Testimony at the *Moser* trial showed that the TCPA would not affect the vast majority of telemarketing calls currently being placed.²⁹³ Predictive-dialer systems, which use computers to dial many telephone lines at the same time and connect the calls to live operators who either deliver live messages or ask the recipient to listen to prerecorded messages, place at least ninety percent of all telemarketing calls.²⁹⁴ According to Ray Kolker, president of Kolker Systems, an ADAD manufacturer, ADADs comprise only about three percent of all telemarketing calls.²⁹⁵ Yet, despite these statistics, the TCPA does not regulate predictive dialers.²⁹⁶ As with the commercial newsracks in *Discovery Network*, the benefit derived from the banning of commercial ADAD messages can be considered "minute" and "paltry."²⁹⁷ Like the permitted newsracks in *Discovery Network*, predictive dialers, because of their far greater number, are a far "greater culprit" for intruding into the home than ADADs.²⁹⁸ Charles Hinkle, the Mosers' attorney, observed that the TCPA is analogous to Congress deciding motor vehicles pollute the air, and then solving the problem by going after two-wheeled mopeds.²⁹⁹ To reiterate, prohibiting such a small part of all telemarketing calls does not reasonably fit with Congress's goal of protecting residences from the intrusive ring of unwanted telephone solicitations.

Some supporters of the TCPA argue that underinclusion of all types of calls does not, without more, mandate that the statute be overturned.³⁰⁰ In *Posadas de Puerto Rico Associates v. Tourism Co. of*

²⁹³ Arthur Winston, *DM and Commercial Speech*, DM NEWS, Feb. 22, 1993, at 18. In fact, the Senate committee report on S. 1462 noted that most telemarketers who had contacted the committee did not use ADADs. S. REP. NO. 178, 102d Cong., 1st Sess. 7-8 (1991), reprinted in 1992 U.S.C.C.A.N. 1968, 1975; Appellees' Brief at 14, *Moser* (No. 93-35686).

²⁹⁴ Winston, *supra* note 293, at 18; see also *Larry King Live* (CNN television broadcast, Dec. 29, 1992) (statement of Ray Kolker), available in LEXIS, Nexis Library, OMNI file. While an ADAD is capable of making 1,000 calls per day, a predictive dialer can make as many as 7,400 calls per hour. See Appellees' Brief at 7, *Moser* (No. 93-35686).

²⁹⁵ See *Moser*, 826 F. Supp. at 366-67. Because prerecorded messages make up less than three percent of all telemarketing calls received by Americans, the number of prerecorded commercial calls is accordingly an even smaller percentage of the total of all telemarketing calls. *Lysaght v. New Jersey*, 837 F. Supp. 646, 651 (D.N.J. 1993).

²⁹⁶ See Appellees' Brief at 8, *Moser* (No. 93-35686).

²⁹⁷ See *Discovery Network*, 113 S. Ct. at 1510; Appellees' Brief at 16, *Moser* (No. 93-35686).

²⁹⁸ See *Discovery Network*, 113 S. Ct. at 1515; Appellees' Brief at 16, *Moser* (No. 93-35686).

²⁹⁹ See Tim Mayer, *Telecomputer Firm's Founder Battling Ban on His Machines*, SAN DIEGO UNION-TRIB., Feb. 28, 1993, at 11.

³⁰⁰ See Consuelo Lauda Kertz & Lisa Boardman Burnette, *Telemarketing Tug-of-War: Balancing Telephone Information Technology and the First Amendment with Consumer Protection and Privacy*, 43 SYRACUSE L. REV. 1029, 1064 n.244 (1992).

Puerto Rico, for example, the United States Supreme Court upheld a ban on the advertising of casino gambling, while the advertising of other types of gambling was unregulated.³⁰¹ The *Posadas* Court reasoned, however, that because the government of Puerto Rico had the power to regulate gambling, it could therefore regulate the advertising of gambling as it saw fit.³⁰² There is no evidence that the underlying conduct here, the sale of commercial products, could be banned directly by the government, as could casino gambling. In addition, Congress only has a right to regulate false or misleading advertising, not all commercial advertising. The *State v. Casino Marketing Group* court, citing *Metromedia, Inc. v. City of San Diego*, concluded that a regulation of commercial speech does not fail to advance a state interest just because it does not solve the whole problem.³⁰³ Unlike the *Metromedia* Court's conclusion that offsite billboards created a more serious problem than onsite billboards, however, no evidence shows that ADADs cause more of a problem regarding invasion of privacy than do live calls. Essentially, the TCPA's distinction between ADADs and live operators does indeed reduce the invasion of privacy ever so slightly, but the division seems to be an arbitrary, unreasonable method of truly protecting consumers in their residences from all unwanted calls.

C. Disparate Impact on Small Businesses

The TCPA has a disparate impact on smaller businesses who rely on the use of ADADs as an inexpensive, time efficient way to generate business.³⁰⁴ Using ADADs is cheaper than employing live operators, and ADADs can reach more homes than can live operators.³⁰⁵ Though ADAD calls make up only three percent of all telemarketing calls, for many non-public, smaller companies ADADs provide the only realistic method of obtaining business.³⁰⁶ Small businesses cannot afford live

³⁰¹ *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 348 (1986).

³⁰² *Id.* at 345-46. The Court held that the greater governmental power to completely ban casino gambling necessarily included the lesser power to ban advertising of casino gambling. *Id.*

³⁰³ *State v. Casino Mktg. Group*, 491 N.W.2d 882, 890 (Minn. 1992) (citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510-12 (1981)).

³⁰⁴ See Arcadi, *supra* note 251, at 426-28.

³⁰⁵ See *Nightline*, *supra* note 151.

³⁰⁶ See Arcadi, *supra* note 251, at 427. According to Ray Kolker, president of Kolker-Systems, a manufacturer of ADADs, nearly 99% of those who purchase ADADs are small businesses. *Id.* at 426. Predictive dialers, which make up a huge majority of automated telemarketing calls and are unregulated by the TCPA, are primarily used by large businesses. See Appellees' Brief at 15, *Moser v. FCC*, No. 93-35686 (9th Cir. filed Jan. 20, 1994).

operators and predictive dialers as readily as large enterprises.³⁰⁷ For example, the plaintiffs in *Lysaght* generated about ninety-five percent of their income through leads obtained by business resulting from the use of ADADs.³⁰⁸ This "poor person's form of advertising" generates more business than other methods of advertising, despite many hang-ups or annoyed consumers.³⁰⁹ Telemarketing gets a higher response than direct mailings and is cheaper than using the postal system.³¹⁰ For example, the Mosers' machine quickly paid for itself and even increased business for the chimney sweep service.³¹¹ The Mosers and other small businesses would suffer great economic losses if they were forced to abandon the cost-effective ADADs.³¹²

Moreover, the Act could potentially have a discouraging effect on the research and development of new telemarketing and advertising technologies.³¹³ Representative Barney Frank, of Massachusetts, complained on ABC News' television show *Nightline* that ADADs accomplish telemarketing more efficiently, more cheaply and more rapidly than other methods of telemarketing, thereby increasing intrusions.³¹⁴ In a time when the government is trying to encourage small enterprises to maximize their business, efficiency is not such a bad thing. If investment and capital will result in devices that will be unlawful, advances that may be beneficial will be outweighed by risks of monetary losses.³¹⁵

³⁰⁷ See Appellees' Brief at 15 n.7, *Moser* (No. 93-35686).

³⁰⁸ See Alberta, *supra* note 214, at 3.

³⁰⁹ See Andrews, *supra* note 88, at D1. A 1990 survey by Walker Research, Inc., found that only 6% of telemarketing calls resulted in a sale, donation or appointment, while 61% were refused at the beginning of the call. See Lauerma, *supra* note 85, at 20. Congress did express some concern, though not enough, for small businesses by creating an exemption from the ADAD prohibition for businesses with prior relationships with the consumer, and by mandating that if the FCC created a database, it could not place an unreasonable financial burden on small businesses. See 137 CONG. REC. S18,317 (daily ed. Nov. 26, 1991) (statement of Sen. Pressler); 47 U.S.C. § 227(c)(4)(B)(iii) (Supp. 1992).

³¹⁰ See Lauerma, *supra* note 85, at 20. According to Lauerma, a phone call costs a nickel, compared with 40 cents for the average piece of direct-mail advertising. *Id.*

³¹¹ See Arcadi, *supra* note 251, at 427. Out of about 1500 calls a day, the Mosers get through to about 500, leading to about eight to ten leads, which translates into seven or eight jobs per day. *Larry King Live*, *supra* note 294 (statement of Kathryn Moser). As a result of the machine, the Mosers' chimney sweep company earned a net of about \$49.75 per job, instead of incurring a net loss of about \$100 with other advertising methods before they bought the ADAD. *Id.* (statement of Kathryn Moser).

³¹² See Arcadi, *supra* note 251, at 427. The Mosers estimated that if they were to lose their ADAD, they would lose 50 to 60% of their business. See *Nightline*, *supra* note 151 (statement of Ron Moser).

³¹³ See Arcadi, *supra* note 251, at 429.

³¹⁴ *Nightline*, *supra* note 151 (statement of Rep. Barney Frank).

³¹⁵ See Arcadi, *supra* note 251, at 429.

D. Alternatives and New Technologies

Representative Frank stated on *Nightline* that his constituents most often complained that ADADs left messages on answering machines, did not disconnect quickly when the called party hangs up and, like a "robot," increased the quantity of intrusions.³¹⁶ Most of these problems have been resolved by noncontroversial provisions in the TCPA or by new technologies.³¹⁷ Privacy, however, is still disturbed every time the phone rings. Instead of a complete ban on ADAD commercial calls, alternatives exist which would serve the desire for preserving residential privacy while still protecting the First Amendment rights of solicitors.

Technical and procedural standards are already in place for the few exempted uses of ADADs. ADADs must, at the beginning of the message, state clearly the name of the entity initiating the call, along with the telephone number or address of the calling party.³¹⁸ In addition, the FCC has restricted the time of day during which telephone solicitation to residences is permissible.³¹⁹ These requirements could simply be applied to all ADAD messages.³²⁰ As a result, consumers could complain directly to the soliciting companies to let them know their frustration or to ask not to be called again. In fact, H.R. 1304 did not ban ADADs, but simply imposed such time, place and manner restrictions.³²¹

In addition, the national database of people who wish not to be contacted for live telemarketing calls could be used for unsolicited prerecorded calls. Businesses, however, rejected this idea as a response to unsolicited live telephone calls as too cumbersome and expensive.³²²

³¹⁶ *Nightline*, *supra* note 151. Representative Frank complained that if a person goes on vacation, he or she may return to find many ADAD messages on his or her answering machine—to which I say, has he never heard of fast forward? *See id.*

³¹⁷ *See Lysaght v. New Jersey*, 837 F. Supp. 646, 647 (D.N.J. 1993); *Larry King Live*, *supra* note 294 (statement of Ray Kolker) ("in the old days, the old equipment did not hang up, but today it does"); *Nightline*, *supra* note 151 (statement of Ray Kolker) ("with today's modern technology, with digital voice recorders and that sort of thing, [ADADs] hang up instantaneously upon the called party hang-up"); *see also* Appellees' Brief at 5, *Moser v. FCC*, No. 93-35686 (9th Cir. filed Jan. 20, 1994).

³¹⁸ *See* 47 U.S.C. § 227(d)(3) (Supp. 1992); 47 C.F.R. § 64.1200(d) (1993).

³¹⁹ *See* 47 C.F.R. § 64.1200(e)(1).

³²⁰ *See* Arcadi, *supra* note 251, at 425.

³²¹ *See* H.R. 1304, 102d Cong., 1st Sess. § 3(d)(2) (1991), as reported in H.R. REP. NO. 317, 102d Cong., 1st Sess. 5 (1991).

³²² Arthur Winston, *The TCPA: A Half-Year (Almost) Review*, DM News, May 17, 1993, at 13. Businesses estimated that a national list would cost \$20 million to \$80 million annually to operate. *Id.* In addition, a fifth of all phone numbers change each year. *Id.* Currently, neither the TCPA nor any FCC regulations provide guidance for businesses to avoid liability for unintentional violations, such as calling a number that has been changed without notification. *See* Adler, *supra* note 267, at 16.

Alternatively, the FCC could require individual companies to maintain their own ADAD do-not-call lists, subject to periodic inspection, similar to the system that the FCC has implemented for live telemarketing calls.³²³ This method has received support as being more effective, easily implemented and relatively less costly than other proposed methods to curb unwanted telephone solicitations.³²⁴ Although individual company-maintained do-not-call databases would still require a consumer to tell each individual company that he or she did not want to receive calls, the databases, if monitored by the FCC, would be a step toward reducing invasions of privacy without suppressing First Amendment rights. Such company-specific do-not-call lists would not only ease the minds of consumers, but would spare businesses the time and expense of needless calls to consumers who would clearly be nonresponsive to solicitations.³²⁵

Better publicity regarding the availability of do-not-call databases would likely increase their use as an effective tool against the invasion of privacy inherent in all telemarketing. Recently, an aware consumer brought the first known lawsuit seeking recovery under provisions of

A statewide database has been shown to work in Florida. See S. REP. NO. 177, 102d Cong., 1st Sess. 19 (1991); Lauerma, *supra* note 85, at 20. Under Florida's system, consumers who do not wish to receive telephone solicitations register with the State Department of Agriculture and Consumer Services for a fee of \$10. S. REP. NO. 177, 102d Cong., 1st Sess. 19 (1991); Lauerma, *supra* note 85, at 20. Telecommunication companies must buy the list of these consumers and refrain from calling those people on it. S. REP. NO. 177, 102d Cong., 1st Sess. 19 (1991); Lauerma, *supra* note 85, at 20.

Representative Markey has urged the FCC to reconsider having a national database, instead of the ineffective, individual company-maintained databases currently mandated by the FCC. See Paul A. Alberta, *House Hits DMers on Phone Usage*, DM NEWS, July 25, 1994, at 1. Representative Markey stated in a recent report that the telemarketing industry has not complied with the TCPA and the FCC's company-specific do-not-call database provision. Edward J. Markey, *Telemarketing Law*, CONGRESSIONAL PRESS RELEASES, Aug. 9, 1994, available in LEXIS, Nexis Library, CURNWS File; Alberta, *supra*, at 1.

³²³ 47 C.F.R. § 64.1200(e)(2). See, e.g., Adler, *supra* note 267, at 16; Winston, *supra* note 322, at 13; Barbara Woller, *Steps to Take to Protect Your Privacy*, GANNETT NEWS SERVICE, July 20, 1993, available in LEXIS, News Library GNS File.

To show good-faith compliance with the law, a telemarketer must: maintain a written policy implementing its do-not-call procedures; inform and train telemarketing representatives; inform subscribers of their right to be placed on the no-calls list; place a telephone subscriber on the do-not-call list within a reasonable time after said request is made; and maintain that request for a period after the request is made. Winston, *supra* note 322, at 13.

³²⁴ Winston, *supra* note 322 at 13.

³²⁵ See Kertz & Burnette, *supra* note 300, at 1064. The Direct Marketing Association currently provides a service whereby a consumer can have his or her name removed from national advertising mailing lists or can receive fewer phone calls from national advertisers. See Woller, *supra* note 323. According to Richard Barton, senior vice-president for government affairs for the Direct Marketing Association, this service can probably remove a consumer from about 80 to 90% of all national telemarketing lists, but does not cover local companies. See Lauerma, *supra* note 85, at 20.

the TCPA.³²⁶ Michael Jacobsen, a consumer advocate with the Center for the Study of Commercialism, filed suit against Citibank Corp., claiming that the institution called him at home three times, two of which occurred after he told them specifically not to call him again.³²⁷ Mr. Jacobsen settled out of court for \$750, but set a precedent that consumers do have the power to protect their rights with these databases.³²⁸ Consumers, however, must clearly state that they want their name or phone number in the database and keep track of the telemarketers to which they have made such a request; slamming down the phone is insufficient.³²⁹ Jacobsen suggested the concept of a "do-call" database as an alternative to do-not-call databases.³³⁰ A do-call system would prohibit ADAD messages unless a consumer added his or her name to a "please-call-me" list, which companies could rent.³³¹ As a reasonable manner restraint, a do-call database might be justified if it applied to both commercial and noncommercial ADAD messages.

New technologies are being developed that do not play the pre-recorded message without the consent of the individual called.³³² In one example, a called party would have to press "0" before hearing the message.³³³ If the party did not wish to hear it, he or she could simply hang up, causing minimal intrusion. Another possible solution from a consumer perspective lies in the use of "smart" answering machines that recognize preprogrammed numbers.³³⁴ "Caller Identification," a variation on this screening of messages, displays the phone number of the party placing the call, giving the called party the option of not answering telephone numbers that begin with 800 or 900 or are otherwise unfamiliar.³³⁵ If the FCC required all autodialers to be on one exchange, technology allowing a consumer to block incoming calls from that exchange would likely follow.³³⁶

Still another solution, according to Ray Kolker, an ADAD manufacturer, would be to have consumers pay a small monthly fee to have

³²⁶ See John Eckhouse, *How to Make Telemarketers Stop Calling*, S.F. CHRON., Oct. 18, 1993, at B1.

³²⁷ See *id.*

³²⁸ See *Telemarketing Critic Michael Jacobsen Sues Citibank*, NAT'L PUB. RADIO, Dec. 27, 1993, Transcript No. 1246-47.

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

³³² See, e.g., Arcadi, *supra* note 251, at 430-31; Lauerman, *supra* note 85, at 20; Nadel, *supra* note 17, at 123-24.

³³³ See Arcadi, *supra* note 251, at 430-31; King, *supra* note 248, at 15.

³³⁴ See Lauerman, *supra* note 85, at 20.

³³⁵ See *Larry King Live*, *supra* note 294 (statement of Ray Kolker); Lauerman, *supra* note 85, at 20.

³³⁶ See 137 CONG. REC. S8,992 (daily ed. June 27, 1991) (statement of Sen. Pressler); *Putting Limits on Autodialers*, CHI. TRIB., Nov. 22, 1991, at 24.

a message play when automatic dialers call.³³⁷ This message to the business could say something like, "The number you have reached does not accept telemarketing calls."³³⁸ Kolker claimed this would automatically block all telemarketing calls, whether live or automatic.³³⁹ Another idea is a device available upon consumer request, that emits a short, recognizable do-not-call tone to any party who calls, before the telephone rings in the called party's home.³⁴⁰ Telemarketers would recognize that the particular individual did not wish to receive solicitations, while social callers could simply ignore the tone.³⁴¹ ADADs could be programmed to disconnect when the tone is played over the phone line. Finally, phone companies could use a system in which consumers who wished not to receive telemarketing, or specifically ADAD calls, would be listed in the phone book with an asterisk next to their names.³⁴² The expenses of implementing and maintaining this system, however, would probably be passed along to subscribers by telephone companies.³⁴³

V. CONCLUSION

The Telephone Consumer Protection Act of 1991 is, in part, unconstitutional. The Act distinguishes among types of speech based solely on content. It singles out a small category of all telemarketing telephone calls that represents no greater a threat to residential privacy than any other type of call. No reasonable fit exists between the banning of only commercial ADAD calls and the residential privacy interests Congress sought to protect by enacting the TCPA. Finally, the Act unfairly impacts on small businesses that employ a cost-effective, efficient form of technology. Congress should consider reworking several provisions of the TCPA, especially in light of the *Moser* decision. It may want to use do-not-call or do-call databases for ADADs, mandate procedural requirements or utilize emerging technologies that allow frustrated consumers to maintain their privacy without infringing on solicitors' right to free speech. In the meantime, consumers who do get calls or faxes forbidden by the Act should file suit and collect \$500!

HOWARD E. BERKENBLIT

³³⁷ See Arcadi, *supra* note 251, at 431; Nightline, *supra* note 151 (statement of Ray Kolker).

³³⁸ Arcadi, *supra* note 251, at 431; Nightline, *supra* note 151 (statement of Ray Kolker).

³³⁹ Nightline, *supra* note 151 (statement of Ray Kolker).

³⁴⁰ See Nadel, *supra* note 17, at 123-24.

³⁴¹ *Id.* at 123.

³⁴² See Luten, *supra* note 18, at 157-58.

³⁴³ See *id.* at 158.