

CHAPTER 464: NEVADA'S NO-CALL REGISTRY: MAJOR OFFENSIVE OR MINOR SKIRMISH IN THE WAR AGAINST TELEPHONE TERRORISM?¹

Statutes Affected: NEV. REV. STAT. 597.814; 598.0918; 598.0999; 598.375; 598A.260; Assemb. B. 343 §§ 5,7-12, 15, 72d Sess. (Nev. 2003).

Adds new sections to NEV. REV. STAT. Chapter 228.

Statutes of Nevada: Assemb. B. 232, 72d Sess. (Nev. 2003) (Conklin); 2003 Nev. Stat. 464.

I. Introduction

“Telemarketers. The public hates them. It hates them even more than it hates France, low-flow toilets or ‘customer service.’”² America’s loathing for telephone solicitations, which “cuts across gender, class, and culture,”³ can be traced back to before 1991 when Senator Ernest Hollings branded automated telephone solicitations as “the scourge of modern civilization.”⁴ He demanded a halt to this form of “telephone terrorism.”⁵

At that time, an estimated 30,000 companies were using telephones to make unsolicited sales pitches to 18 million Americans each day,⁶ generating \$435 billion in annual sales – a fourfold increase since 1984.⁷ Consumers were frustrated because there appeared to be no way to prevent unsolicited calls from invading the privacy of the

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² Dave Barry, *Constitutional Right to Annoy? Hello?*, RENO GAZETTE-J., Aug. 31, 2003, at 9B.

³ Steven R. Probst, *Telemarketing, Commercial Speech, and Central Hudson: Potential First Amendment Problems for Indiana Code Section 24-4.7 and Other Do-Not-Call Legislation*, 37 VAL. U. L. REV. 347, 347 n.7 (2002) (quoting Fred Kaplan, *Demands for Privacy Curb Telemarketers*, BOSTON GLOBE, Dec. 26, 2000, at A1, available at 2000 WL 3356952).

⁴ 137 CONG. REC. 30,821 (1991) (remarks by Sen. Hollings).

⁵ *Id.* at 30,818.

⁶ S. REP. NO. 102-178, at 1 (1991) *reprinted in* 1991 U.S.C.C.A.N 1968, 1969.

⁷ *Id.* at 2.

home.⁸ One survey showed 75 percent of persons contacted favored some form of regulation and one-half favored a prohibition against *all* unsolicited calls.⁹

In response, Congress passed the Automated Telephone Consumer Protection Act of 1991 (“TCPA”).¹⁰ One purpose of the Act was to allow the Federal Communications Commission (“FCC”)¹¹ to “develop the necessary ground rules for cost-effective protection of consumers from unwanted telephone solicitations.”¹² Despite legislation in forty states restricting unsolicited telemarketing in various manners,¹³ some in Congress believed federal legislation was necessary “to fill the regulatory gap due to differences in federal and state telemarketing regulations.”¹⁴ Among other things, the TCPA permitted the FCC to establish a national electronic database where persons who did not wish to receive unsolicited telephone calls could register their names.¹⁵

The first Bush administration, however, objected to the legislation when it was before Congress and signed the TCPA only because it gave the FCC “ample authority to preserve legitimate business practices.”¹⁶ The FCC Chairman testified before Congress

⁸ *Id.* at 1.

⁹ *Id.* at 3.

¹⁰ Automated Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2395 (1991) (codified at 47 U.S.C.A. § 227 (West 2003)).

¹¹ The FCC is an independent federal agency established by the Communications Act of 1934 and charged with regulating interstate and international communications by radio, television, wire, satellite and cable. About the FCC, *A Consumer Guide to Our Organization, Functions and Procedures*, available at <http://www.fcc.gov/aboutus.html>.

¹² 137 CONG. REC. 35,040 (remarks by Sen. Larry Pressler).

¹³ S. REP. NO. 102-177, at 3 (1991) (concluding state legislation had limited effect because states do not have jurisdiction over interstate calls).

¹⁴ Hilary B. Miller & Robert R. Biggerstaff, *Application of the Telephone Consumer Protection Act to Intrastate Telemarketing Calls and Faxes*, 52 FED. COMM. L.J. 667, 676 n.48 (2002) (citing Congressman Edward Markey’s comments when introducing The Telephone Advertising Consumer Rights Act of 1991, H.R. 1304, 102d Cong. (1991)).

¹⁵ 137 CONG. REC. 35,040 (remarks by Sen. Pressler). See also 47 U.S.C.A. § 227(c)(3).

¹⁶ President’s Signing Statement, 27 WEEKLY COMP. PRES. DOC. 1877 (Dec. 23, 1991) reprinted in 1991 U.S.C.C.A.N 1968, 1979.

that the TCPA was unnecessary.¹⁷ Upon completion of its rulemaking hearings, the FCC found that the disadvantages of a national do-not-call database outweighed any possible advantages of such a system and instead, opted to require the development of company-specific do-not-call lists.¹⁸

By 2002, the telemarketing industry grew to an estimated \$668 billion-a-year industry, employing approximately six million people.¹⁹ Telemarketing had become one of business' major direct marketing tools,²⁰ with over 104 million calls being made each day.²¹ To curb the growing volume of unwanted telephone solicitations, states began to enact do-not-call statutes.²² These statutes "attempt to erect virtual no solicitation signs on telephone numbers much like signs erected to combat the problem of door-to-door solicitation"²³ These statutes create a statewide database of citizens in each state who have expressly objected to receiving telemarketing calls.²⁴ The do-not-call lists are compiled and must usually be purchased on a regular basis by telemarketers who wish to do business in these states.²⁵ The statutes generally provide a sanction for any calls placed by telemarketers to numbers appearing on the do-not-call lists.²⁶

¹⁷ S. REP. NO. 102-177, at 3 (referring to statement of Alfred C. Sikes, Chairman, Fed. Communications Comm'n: Hearing on S.1410, S.1462 and S.857 before the Subcomm. on Communications of the S. Comm. on Commerce, Sci. & Transp., pp. 1-2 (July 24, 1991)).

¹⁸ *In re Rules and Regulations Implementing the Telephone Consumer Protection Act*, 7 F.C.C. 8752, 8760 (1992), 1992 WL 690928.

¹⁹ Patricia Pattison & Anthony F. McGann, *State Telemarketing Legislation: A Whole Lotta Law Goin' On!*, 3 WYO. L. REV. 167, 171 (2003) (referencing American Association of Retired Persons, *Feds Offer Relief from Unwanted Calls*, AARP Bulletin 4 (Mar. 2002)).

²⁰ *Id.*

²¹ Press Release, Federal Communications Comm'n, FCC Authorizes Nationwide Do-Not-Call Registry 2 (June 26, 2003) 2003 FCC LEXIS 3544 [hereinafter FCC June 26, 2003 Press Release].

²² Probst, *supra* note 3, at 389.

²³ *Id.*

²⁴ *Id.* at 389-90. *See also* 47 U.S.C.A. § 227(e)(1); Miller & Biggerstaff, *supra* note 14, at 675 (explaining that states can create such databases under the savings clause of the TCPA, which allows them to retain laws restricting intrastate calls that are more restrictive than the TCPA).

²⁵ Probst, *supra* note 3, at 390.

²⁶ *Id.*

As of January 30, 2003, thirty states established some form of do-not-call registry.²⁷ In 2003, Nevada joined these states with the enactment of Chapter 464, the purpose of which is to establish a do-not-call registry in the state Attorney General's Office to protect Nevada residents from "the abuses and inconveniences that are caused by unsolicited sales calls."²⁸

II. Legal Background

Nevada, like many other states, has long had a statute in place to prohibit the use of devices for automatic dialing and dissemination of prerecorded messages.²⁹ The unauthorized use of such devices was made a deceptive trade practice pursuant to Chapter 611 of the 1999 Session.³⁰ The reach of the statute, however, is limited to intrastate calls³¹ and excludes from its provisions persons with whom the solicitor has a preexisting business relationship³² as well as other enumerated exceptions.³³

A bill to establish a do-not-call registry was introduced during the Nevada Legislature's 71st Session in 2001.³⁴ The measure died, however, in the Senate

²⁷ *Minutes of Assemb. Comm. on Commerce & Labor for Mar. 10, 2003: Hearing on Assemb. B. 232 Before the Assemb. Comm. on Commerce & Labor, 2003 Leg., 72d Sess. Ex. H, Federal and State Telemarketing Laws as of Jan. 30, 2003 (included with statement of Bob Ostrovsky, Leg. Advocate for Cox Communications Co.) [hereinafter *Assemb. Comm. on Commerce & Labor Minutes for Mar. 10, 2003*].*

²⁸ *Id.* at Ex. D. 1, 4-5 (statement of Assemb. Marcus Conklin, chief sponsor).

²⁹ *See* NEV. REV. STAT. 597.814 (2001).

³⁰ 1999 Nev. Stat. 611.

³¹ S. REP. NO. 102-177, at 3 (1991).

³² NEV. REV. STAT. 597.814(3). There is no definition of preexisting business relationship in this section of the statute.

³³ NEV. REV. STAT. 597.816 (2001) exempts from the prohibition against using automatic dialing devices, school districts when contacting parents or guardians, nonprofit organizations, cable television providers when contacting customers about previously arranged service, public utilities regarding installation service, certain facilities storing dangerous materials when there is a potentially life-threatening emergency, or state or local governments when there is a public safety, police or fire, or impending emergency, and political candidates and political action committees.

³⁴ Assemb. B. 439, 71st Sess. (Nev. 2001).

Commerce and Labor Committee without being voted on due to, among other things, questions over how many exemptions should be included in the bill.³⁵

While Nevada's Legislature chose not to act, other states moved forward. Since 1999, twenty-four states either adopted or revised do-not-call statutes.³⁶ Furthermore, in 2003, the Federal Trade Commission ("FTC")³⁷ and the FCC concluded rulemaking, calling for a National Do-Not-Call Registry.³⁸ The National Registry is to be monitored by the FTC³⁹ with enforcement to be coordinated between the two agencies.⁴⁰ The FTC began taking registrations for the National Registry on June 27, 2003 and it was to take effect on October 1, 2003.⁴¹ As of September 2, 2003, 48.4 million consumers registered

³⁵ See *Minutes of S. Comm. on Commerce & Labor for May 8, 2001; Minutes of S. Comm. on Commerce & Labor for May 11, 2001: Hearings on Assemb. B. 439 Before S. Comm. on Commerce & Labor*, 2001 Leg., 71st Sess. (Nev. 2001).

³⁶ *Id.* This count excludes any legislative action taken in 2003, such as in Nevada.

³⁷ The Federal Trade Commission enforces federal consumer protection laws that prevent fraud, deception and unfair trade practices, federal antitrust laws and conducts economic and policy research to support its law enforcement efforts. Guide to the Fed. Trade Comm'n, *Facts for the Consumer*, available at <http://www.ftc.gov/bcp/conline/pubs/general/guidetoftc.htm>.

³⁸ Telemarketing Sales Rule, 68 Fed. Reg. 4580 (Jan. 29, 2003) (to be codified at 16 C.F.R. pt. 310). See also FCC June 26, 2003 Press Release, *supra* note 21, at 3. The FCC was directed to consult and coordinate with the FTC on the implementation of a National Registry by the Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (2003), signed into law on March 11, 2003.

³⁹ FCC June 26, 2003 Press Release, *supra* note 21, at 2.

⁴⁰ *Id.*

⁴¹ Press Release, Fed. Trade Comm'n Office of Pub. Affairs, The National Do Not Call Registry and the FTC's Telemarketing Sales Rule (June 26, 2003) (on file with author). *But see* discussion *infra* Part V. On September 23, 2003, the U.S. District Court for the Western District of Oklahoma found that the FTC did not have the authority to promulgate the National Registry and invalidated that portion of the FTC's Telemarketing Sales Rule. *U.S. Security v. Fed. Trade Comm'n*, No. CIV-03-122-W, 2003 WL 22203719, at *5, *9 (W.D. Okla. Sept. 23, 2003). Two days later, the U.S. District Court for the Western District of Colorado held that the National Registry was unconstitutional under the First Amendment and prohibited its implementation. *Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm'n*, No. 03 N 0184, 2003 WL 22213517, at *14 (D. Colo. Sept. 25, 2003). Moreover, the judge in the Colorado case issued an order saying the FCC was not to use the Registry either. Caroline E. Mayer, *FTC to Appeal Latest Do-Not-Call Ruling*, WASH. POST, Sept. 30, 2003 available at <http://www.washingtonpost.com/wp-dyn/articles/A2245-2003Sep30.html>. However, on October, 7, 2003, the United States Court of Appeals for the Tenth Circuit allowed the agency to start enforcing the list. Caroline E. Mayer, *FTC Set to Process Protests of Sales Calls*, WASH. POST, Oct. 9, 2003, at E01 available at <http://www.washingtonpost.com/wp-dyn/articles/A343-2003Oct.8.html>.

with National Registry, including nine million who were transferred from state do-not-call lists.⁴² Nearly 320,000 of the registrants were Nevada consumers.⁴³

States with do-not-call statutes must address several questions. The first is whether the FCC's rules for the National Registry will preempt a state's do-not-call statute. Unlike much of the law that limits the FCC's jurisdiction to interstate and international calls,⁴⁴ the TCPA applies to all intrastate calls and faxes.⁴⁵ The TCPA, however, does not preempt *all* state do-not-call legislation.⁴⁶ Rather, through the savings clause,⁴⁷ state law "that imposes more restrictive intrastate requirements or regulations on, or which prohibits . . . the making of telephone solicitations" is not preempted.⁴⁸ As explained by the FCC:

The federal rules constitute a floor and therefore supercede all less restrictive state do-not-call rules. States may adopt more restrictive do-not-call laws governing intrastate telemarketing. When Congress enacted the TCPA it gave the Commission jurisdiction over both interstate and intrastate telemarketing calls with the intent generally to promote a uniform regulatory scheme. Therefore, any state regulation of interstate telemarketing calls that differs from FCC rules almost certainly would be preempted . . .⁴⁹

The TCPA also prohibits a state from using any do-not-call list that does not include the part of the National Registry that relates to that state,⁵⁰ thus requiring that state and federal registries be linked together.

⁴² Press Release, Fed. Trade Comm'n Office of Pub. Affairs, Do Not Call Registry Jumps to 48.4 Million (Sept. 2, 2003), available at <http://www.ftc.gov/opa/2003/09/030902dnc2.htm>. See also Press Release, Fed. Trade Comm'n Office of Pub. Affairs, 41.7 Million Telephone Numbers Registered on Do Not Call List (Aug. 26, 2003) available at <http://www.ftc.gov/opa/2003/08/dnc1wk.htm> [hereinafter FTC Aug. 26, 2003 Press Release].

⁴³ *Id.*

⁴⁴ See 47 U.S.C.S. § 151 (Law. Co-op. 2003).

⁴⁵ See FCC June 26, 2003 Press Release, *supra* note 21, at 3.

⁴⁶ *Id.*

⁴⁷ Miller & Biggerstaff, *supra* note 14, at 674.

⁴⁸ 47 U.S.C.A. § 227(e)(1)(D).

⁴⁹ FCC June 26, 2003 Press Release, *supra* note 21, at 3.

⁵⁰ *Id.*

Whether a state's do-not-call statute is preempted may turn on the number of exemptions in the statute. Exemptions are most often accomplished by excluding the favored types of telemarketing calls from the statute's definition of telephone solicitation.⁵¹ For example, the TCPA excludes from the definition of telephone solicitation, calls or messages (1) to any person with that person's prior express permission; (2) to any person with whom the person has an established business relationship ("EBR"); or (3) by a tax-exempt non-profit organization.⁵² Exemptions can also be made by simply excluding certain telephone solicitations from the application of the statute at its outset.⁵³ For example, the TCPA allowed the FCC, during its rulemaking, to exempt certain calls not made for commercial purposes from its prohibition against the use of prerecorded messages.⁵⁴

The most significant exemption from the provisions of the National Registry is if there is an EBR⁵⁵ between the telemarketer and the person called. Under both the FTC and the FCC rules, an EBR is based on a buyer's purchase or transaction within eighteen months immediately preceding the date of the call or an inquiry or application regarding the products or services offered by the seller within three months immediately preceding the date of the call, so long as the relationship has not been terminated by either party.⁵⁶

As a result of this exemption, a telemarketer may continue to make telephone

⁵¹ Probst, *supra* note 3, at 394.

⁵² 47 U.S.C.A. § 227(a)(3).

⁵³ Probst, *supra* note 3, at 394.

⁵⁴ 47 U.S.C.A. § 227(b)(2)(B)(i), (ii). *See also* 16 C.F.R. § 310.6 (West 2003) (listing many of the exemptions from the TSR); 15 U.S.C.A. § 45(a)(2) (West 2003) (exempting certain entities from the FTC Act); Telemarketing Sales Rule, 67 Fed. Reg. 4492, 4496 (proposed Jan. 30, 2002) (explaining other exemptions from the FTC's authority).

⁵⁵ 16 C.F.R. § 310.2(n) (West 2003).

⁵⁶ *Id.* *See also* 47 C.F.R. § 64.1200(f)(3) (West 2003).

solicitations to a customer with whom a transaction took place within the established time periods unless the customer has previously asked the seller not to call.⁵⁷

Exemptions may have the effect of disappointing expectations of consumers who believe they will be free from telemarketing calls once they sign up for the do-not-call lists.⁵⁸ To guard against unmet expectations, the FTC's do-not-call website routinely reminded customers that they would continue to receive calls for 18 months from businesses with which they made a purchase or payment, for three months after a consumer requested information from a company and from charities, political organizations and organizations conducting surveys.⁵⁹

Exemptions can also play a role in determining whether a state's do-not-call statute runs afoul of the United States Constitution.⁶⁰ The general constitutional framework to balance consumers' privacy rights against sellers' First Amendment protections of free speech was outlined when the Senate considered the Telephone Advertising Consumer Rights Act.⁶¹ In its Report, the Senate Committee on Commerce, Science and Transportation indicated that limitations placed on the use of autodialers and other telemarketing machines were examples of reasonable time, place and manner restrictions on speech.⁶² The Committee explained that the United States Supreme Court

⁵⁷ *Assemb. Comm. on Commerce & Labor Minutes for Mar. 10, 2003*, *supra* note 27, at Ex. G, Established Business Relationship; FCC and FTC Internal Do-Not-Call List Requirements 1, 3 (memorandum from Gardner F. Gillespie dated Feb. 6, 2003).

⁵⁸ Probst, *supra* note 3, at 398.

⁵⁹ *See, e.g.*, FTC Aug. 26, 2003 Press Release, *supra* note 42.

⁶⁰ Probst, *supra* note 3, at 403.

⁶¹ S. REP. NO. 102-177, at 6 (1991). The Telephone Advertising Consumer Rights Act (S. 1410, 102d Cong. (1991)) contained many of the requirements eventually incorporated into the TCPA, including limitations on the use of autodialers and fax machines and Congressional directives to the FCC to adopt rules to protect consumers from unsolicited telephone calls. *Id.* at 9.

⁶² *Id.* at 6.

has long recognized such limitations so long as the restrictions are not based on the content of the message being conveyed.⁶³

The Committee further maintained that other restrictions on speech in the bill, such as the directive that the FCC adopt rules to protect consumers from unsolicited telephone calls, could also be justified in the interest of privacy.⁶⁴ Explaining that “the Constitution accords a lesser protection to commercial speech than other constitutionally guaranteed expression,”⁶⁵ as put forth by the Supreme Court in *Central Hudson Gas and Electric Co. v. Public Service Commission*, the Committee concluded that *Central Hudson’s* test for limiting commercial speech⁶⁶ could be met because (1) there was a substantial governmental interest in protecting consumers’ privacy rights from unsolicited telephone solicitations, and (2) federal legislation was necessary to address that interest.⁶⁷

III. Chapter 464

Chapter 464, among other things, authorizes the Attorney General of Nevada to establish either a statewide registry or use that portion of a similar federal list.⁶⁸ The registry will maintain the name and telephone number of each person in Nevada who does not wish to be contacted by solicitors making unsolicited telephone calls for the sale

⁶³ *Id.* (citing *Kovacs v. Cooper*, 336 U.S. 77 (1948)).

⁶⁴ *Id.* at 7 (citing *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (finding that “in the privacy of the home . . . the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.”)).

⁶⁵ *Id.* (referencing *Cent. Hudson Gas & Elec. Co. v. Pub. Svc. Comm’n*, 447 U.S. 557, 563-64 (1980) (setting forth a three-prong test for determining the constitutionality of limitations on commercial speech. If commercial speech concerns lawful activity and is not misleading, the government can regulate speech if (1) there is a substantial governmental interest served by the restriction; (2) the restriction directly advances that governmental interest; and (3) the restriction is no more extensive than necessary to serve that governmental interest)).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ 2003 Nev. Stat. 464 §§ 9, 10.

of goods or services.⁶⁹ The Attorney General may either (1) issue a finding that it is in the best interest of the state to use the applicable federal list as the state's registry, or (2) establish and maintain a statewide registry within Nevada.⁷⁰

If the Attorney General concludes that the Nevada portion of the national database is adequate, the Attorney General is to forward information to the applicable federal agency.⁷¹ The Attorney General may rescind his finding upon a reexamination of the single national database on the basis of biennial reviews.⁷² Within one month of rescinding his decision, the Attorney General must establish and maintain a registry within the state of Nevada.⁷³

If the Attorney General decides to establish and maintain a statewide registry, he is to (1) provide a toll-free number that may be used to request inclusion of a telephone number in the registry; (2) publish a list of the telephone numbers in the registry at least once every six months; (3) periodically purge names and telephone numbers from the registry; and (4) include that part of the federal registry pertaining to Nevadans within the state registry and update it at least every six months.⁷⁴ The Attorney General is also required to make information available to the public regarding the establishment and maintenance of the registry, including the schedule for purging names and numbers, as well as when the revised lists will be published.⁷⁵

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at § 9(2)(b).

⁷² *Id.* at § 9(3).

⁷³ *Id.* at § 9(3)(a).

⁷⁴ *Id.* at § 10.

⁷⁵ *Id.* at § 11.

The updated list of telephone numbers is to be offered for sale to telephone solicitors for not more than \$1000 annually.⁷⁶ Telephone solicitors are not to intentionally make unsolicited telephone calls to any telephone number on the current version of the list.⁷⁷ However, telephone solicitors are not prohibited from calling a number that is on the list if (1) there is an EBR between the telephone solicitor and the person called; (2) the telephone solicitor has established and maintained an internal do-not-call registry list that complies with federal and state laws; and (3) the telephone solicitor annually provides a written notice that the consumer may elect to be placed on the telephone solicitor's internal do-not-call list.⁷⁸ The statute defines Nevada's EBR as being based on a person's purchase, rental or lease of goods or services, or any other financial transaction directly between the person and the telephone solicitor that occurs with eighteen months before the unsolicited telephone call.⁷⁹

Charitable organizations⁸⁰ and religious and political organizations⁸¹ are exempt from the provisions of Chapter 464.⁸² Furthermore, the Chapter also exempts persons who have expressly requested or given permission for the telephone call to be made or had an EBR with the caller if the telephone call is made to verify the termination of a business relationship, or if the person called has a delinquent obligation for which payment or performance is due.⁸³

⁷⁶ *Id.* at § 13.

⁷⁷ *Id.* at § 14.

⁷⁸ *Id.* at §§ 15(1)-(3)(c).

⁷⁹ *Id.* at §15(4).

⁸⁰ Charitable organizations are organizations which are tax exempt pursuant to 26 U.S.C. § 501(c)(3).

⁸¹ Political organizations include committees for political action (as defined in NEV. REV. STAT. 294A.0055), political parties, and candidates for political office.

⁸² *Id.* at § 8.

⁸³ *Id.* at §§ 8(3)(a)-(c)(2).

Making an unsolicited telephone call in violation of the do-not-call statute constitutes a deceptive trade practice, which could result in a telephone solicitor being suspended from conducting business within the state or, if a corporation, the corporation could be dissolved.⁸⁴ The Chapter also makes it a deceptive trade practice to solicit business at a person's residence by telephone between the hours of 8 p.m. and 9 a.m. or make a call that cannot be identified by the telephone number or name of the business.⁸⁵

The registry program is to be funded by the fees charged to telephone solicitors and an increase in the cap on the allowable balance in the Attorney General's Special Fund, which was increased from \$250,000 to \$500,000.⁸⁶ The program will also be funded by monies obtained as awards, damages or civil penalties for the State of Nevada in unfair trade practice actions.⁸⁷

The registry takes effect on January 1, 2004, if the Attorney General finds it in the best interest of the State to use the part of the national database that relates to Nevada as the registry.⁸⁸ If the Attorney General does not make such a finding, Chapter 464 becomes effective on May 1, 2004, enabling the Attorney General to receive requests for telephone numbers to include in the registry; June 1, 2004 for the purpose of publishing the first list; and on July 1, 2004 for all other purposes.⁸⁹

IV. Similar Legislation Enacted in Other States

⁸⁴ *Id.* at §§ 17, 3(6)(a)-(b).

⁸⁵ *Id.* at § 2(4)-(5).

⁸⁶ *Id.* at § 3.5(3)-(4).

⁸⁷ NEV. REV. STAT. 598A.260 (2001).

⁸⁸ 2003 Nev. Stat. 464 § 29(4).

⁸⁹ *Id.* at § 29(6).

At least thirty other states have enacted telemarketing laws with do-not-call list requirements.⁹⁰ Florida implemented the first registry in 1998.⁹¹ Of those states, every state except Indiana has an existing business relationship exemption.⁹² The longest duration for an existing business relationship is thirty-six months prior to the solicitation.⁹³ Other specific business exemptions generally recognized in other states include cable TV operators, financial institutions, newspapers, periodicals, magazines, telephone and utility companies.⁹⁴ Three states, Illinois, Rhode Island and Tennessee, recognize compliance if an entity is in compliance with either FCC or FTC regulations.⁹⁵ Four states, Kansas, Maine, Vermont and Wyoming, merely require sellers to subscribe to the do-not-call list maintained by the Direct Marketing Association (“DMA”).⁹⁶

V. Analysis

Despite the political appeal of a statewide do-not-call statute, there were significant philosophical differences between the Senate and Assembly as to how best formulate an effective do-not-call statute during the 2003 Legislature.

The original Assembly version called for the establishment of a do-not-call registry with purposely few exemptions.⁹⁷ The bill exempted only calls from charitable

⁹⁰ *Assemb. Comm. on Commerce & Labor Minutes for Mar. 10, 2003*, *supra* note 27, at Ex. H, Federal and State Telemarketing Laws as of Jan. 30, 2003.

⁹¹ *Id.* at 10 (statement of Assemb. Conklin).

⁹² *Id.* at Ex. H, Federal and State Telemarketing Laws as of Jan. 30, 2003.

⁹³ *Id.* at 1, 3 (referencing ARK. CODE ANN. §§ 4-95-101-4-95-108; 4-99-101-4-99-112 [(Michie 2001)]; KAN. STAT. ANN. § 50-670 [(2002)]).

⁹⁴ *Id.*

⁹⁵ *Id.* at 2, 4-5 (referencing, among other things, 815 ILL. COMP. STAT. 413/1-413/25 [(2001)]; R.I. [GEN. LAWS] § 5-61 [(2002)]; TENN. CODE ANN. § [47-18-1501-1527; 47-18-1601-1604 (2002)]).

⁹⁶ *Id.* at 3, 5 (referencing KAN. STAT. ANN. § 50-670; ME. REV. STAT. ANN. tit. 10, §§ 1498-1499; tit. 32, § 14716 [(West 2002)]; VT. STAT. ANN. tit. 9, § 2464 [(2002)]; WYO. STAT. ANN. § 40-12-301[-305 (Michie 2001)]).

⁹⁷ *Assemb. B. 232 (As Introduced)*, 72d Sess. § 5 (Nev. 2003) (exempting charitable organizations, political parties or candidates for public office). *See also Assemb. Comm. on Commerce & Labor Minutes for Mar. 10, 2003*, *supra* note 27, at 9 (testimony of Assemb. Conklin that his intent was to draft a bill with “zero exceptions”).

organizations, religious organizations and political candidates from its requirements. Of most concern to those testifying on the original version of the bill was the absence of any exception for telephone calls made by businesses with an EBR with their customers. Without this exception, the business community generally opposed the measure.⁹⁸ The Las Vegas Chamber of Commerce summed up these concerns, saying that the measure “eliminated telephone communications between legitimate businesses in the state and customers of those businesses.”⁹⁹ As a result, the bill was amended in the Assembly to direct the establishment of two lists so that consumers could either exempt or include calls from telemarketers with which they had an EBR.¹⁰⁰ The first list would allow the customer to receive calls from solicitors with which a customer did business or from whom he wanted to receive calls, and would exclude “cold calls” only.¹⁰¹ The second list would be the “I really mean it, don’t call” list and there would be no exemptions if a consumer registered on that list.¹⁰²

As the Assembly proposed two lists, the Senate Commerce Committee was pursuing a bill to establish a *do*-call registry.¹⁰³ The *do*-call registry was to be a database of telephone numbers from *only* those people who *wished* to receive telemarketing calls – the complete opposite of the *do-not-call* list.¹⁰⁴ The reason for the bill, according to the chairman of the committee, was that “[a] person should be able to choose if they desire telemarketing calls in their homes. [A consumer] should not be required to buy a device

⁹⁸ *Id.* at 10-14.

⁹⁹ *Id.* at 14.

¹⁰⁰ *Minutes of Assemb. Comm. on Commerce & Labor for Mar. 14, 2003: Hearing on Assemb. B. 232 Before the Assemb. Comm. on Commerce & Labor, 2003 Leg., 72d Sess. Ex. C (Nev. 2003)* (remarks by Assemb. Conklin).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ S.B. 255 (As Introduced), 72d Sess. (Nev. 2003).

¹⁰⁴ *Id.* at §§ (7), (13).

to screen calls The burden should not be on the consumer, most of whom I believe do not wish to be called.”¹⁰⁵ The Senate Commerce and Labor Committee eventually amended Assembly Bill 232 as a whole, substituting instead the provisions of a do-call registry originally called for in Senate Bill 255.¹⁰⁶

While most people would instinctively agree with the notion of a do-call list, such an approach, as was suggested in testimony, could lead to a constitutional challenge on the basis that a do-call registry unreasonably infringes on commercial free speech.¹⁰⁷ The do-not-call list was suggested as a more reasonable approach to restricting commercial free speech.¹⁰⁸

The free flow of commercial information is “indispensable” to the public’s ability to make intelligent and well-informed “private economic decisions,” which are essential to our “predominantly free enterprise economy.”¹⁰⁹ However, as the Supreme Court held in *Central Hudson*, commercial free speech can be lawfully regulated so long as a substantial government interest justifies the restriction on the speech and “the regulatory technique used by the government to restrict the speech [is] carefully tailored to achieve the governmental interest.”¹¹⁰ *Central Hudson* remains the test for commercial speech regulation.¹¹¹

¹⁰⁵ *Minutes of S. Comm. on Commerce & Labor Meeting for Mar. 18, 2003: Hearing on S.B. 255 Before S. Comm. on Commerce & Labor*, 2003 Leg., 72d Sess. (Nev. 2003) (statement of Sen. Randolph Townsend, Chairman) [hereinafter *S. Comm. on Commerce & Labor Minutes for Mar. 18, 2003*].

¹⁰⁶ *Minutes of S. Comm. on Commerce & Labor Meeting for May 8, 2003: Hearing on Assemb. B. 232 Before S. Comm. on Commerce & Labor*, 2003 Leg., 72d Sess (Nev. 2003).

¹⁰⁷ *Minutes of S. Comm. on Commerce & Labor Meeting for Mar. 21, 2003: Hearing on S.B. 255 Before S. Comm. on Commerce & Labor*, 2003 Leg., 72d Sess. (Nev. 2003) (testimony of Chris MacKenzie, Lobbyist, American Express) [hereinafter *Minutes of S. Comm. on Commerce for Mar. 21, 2003*].

¹⁰⁸ *Id.*

¹⁰⁹ Probst, *supra* note 3, at 358 (quoting *Bigelow v. Va.*, 425 U.S. 748, 765 (1976)).

¹¹⁰ *Id.* at 361 (referencing *Cent. Hudson Gas & Elec. Co. v. Pub. Svc. Comm’n*, 447 U.S. 557, 564 (1980)).

¹¹¹ *Id.* at 362. *See also* *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002) (affirming that *Central Hudson* remains the test for the constitutionality of a restriction on commercial free speech).

In *Central Hudson*, a New York Public Service Commission prohibiting *any* promotional advertising by electric utility companies was challenged as an unconstitutional restriction on free speech.¹¹² The Court found the government’s interest in assuring fair rates to its customers to be substantial.¹¹³ It also found the prohibitions imposed on the utility advanced that interest.¹¹⁴ However, the Court invalidated the regulation because the government failed to demonstrate that the same purpose could not be served by less restrictive means of controlling the speech in question.¹¹⁵

In the case of do-not-call statutes (or do-call) statutes, the substantial governmental interest in protecting the privacy expectations of consumers must be balanced against the First Amendment rights of companies who use telemarketing and of those consumers who may be willing to receive that information.¹¹⁶ The Court has recognized a person’s constitutional right to privacy in the home,¹¹⁷ which is the reason cited for Nevada’s do-not-call list.¹¹⁸ The ultimate question is whether a *do*-call registry such as was proposed in Senate Bill 255, could satisfy the *Central Hudson* requirement that there be a reasonable fit between the legislature’s ends and the means used to accomplish those ends,¹¹⁹ particularly in view of the alternative of a do-not-call registry.

¹¹² *Id.* at 360 (citing *Cent. Hudson*, 447 U.S. at 558, 560).

¹¹³ *Id.* at 361 (citing *Cent. Hudson*, 447 U.S. at 569).

¹¹⁴ *Id.*

¹¹⁵ *Id.* (citing *Cent. Hudson*, 447 U.S. at 570-71).

¹¹⁶ *Id.* at 367.

¹¹⁷ *Id.* at n.118 (citing *Hill v. Colo.*, 530 U.S. 703, 717 (2000) (explaining that the “right to avoid unwelcome speech has special force in the privacy of the home.”); *FCC v. Pacifica Found.*, 438 U.S.726, 748 (1978) (stating that “in the privacy of the home . . . the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.”)).

¹¹⁸ *See Assemb. Comm. on Commerce & Labor Minutes for Mar. 10, 2003*, *supra* note 27, at Ex. D, 4-5; *S. Comm. on Commerce & Labor Minutes for Mar. 18, 2003*, *supra* note 105 (remarks of Chairman Townsend).

¹¹⁹ *Probst*, *supra* note 3, at 361 n.84 (explaining that the least restrictive means of enforcing a regulation established in *Central Hudson* (*Cent. Hudson*, 447 U.S. at 566) had been clarified to require a reasonable “fit between the legislature’s ends and the means used to accomplish those ends.”) (citing *Bd. of Trustees v. Fox*, 492 U.S. 469, 480 (1989)). This approach was confirmed in *Lorillard Tobacco Co. v. Reilly*, 533

The Supreme Court recently underscored the importance of a government narrowly tailoring its restrictions of commercial speech to in *Lorillard Tobacco Co. v. Reilly*.¹²⁰ In *Lorillard*, a group of tobacco product manufacturers and retailers challenged several Massachusetts regulations governing the advertisement and sale of cigarettes, cigars and smokeless tobacco as violating the First Amendment.¹²¹ One of the restrictions prohibited a tobacco products seller from advertising the sale of cigars or cigarettes within a 1,000-foot radius of any public playground or school.¹²²

The Court found that the regulations failed to satisfy the *Central Hudson* analysis because “the broad sweep of the regulations [which would have prevented advertising in a substantial portion of major metropolitan areas of Massachusetts] indicated the state did not ‘carefully calculate the costs and benefits associated with the burden on speech imposed by the regulations.’”¹²³ The Court also found that the range of restricted communications was unduly broad in that it would have gone so far as to prevent a retailer from being able to respond to inquiries about its tobacco products if the communication occurred outdoors.¹²⁴ Furthermore, the regulation did not distinguish based on the size of the advertisement and would have placed an onerous burden on retailers with small advertising budgets and with relatively few alternative ways of communicating with potential customers.¹²⁵

U.S. 525, 554-55 (2001) (reaffirming that the Court’s precedents require “a reasonable ‘fit between the legislature’s ends and the means chosen to accomplish those ends, . . . a means narrowly tailored to achieve the desired objective.’”)

¹²⁰ *Lorillard*, 533 U.S. at 525.

¹²¹ *Id.* at 533.

¹²² *Id.* at 536 (citing MASS. REGS. CODE tit. 940, §§ 21.04(5); 22.06(5)(a) (2000)).

¹²³ *Id.* at 562 (citations omitted).

¹²⁴ *Id.* at 563.

¹²⁵ *Id.* at 563, 565-66.

The Court concluded that the Massachusetts regulation on outdoor advertising was more extensive than necessary to advance the state's interest in preventing under-age use of tobacco.¹²⁶ The Court advised, “[a] careful calculation of the costs of a speech regulation does not mean that a State must demonstrate there is no incursion on legitimate speech interests, but a speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information on products.”¹²⁷

As a result of *Central Hudson* and *Lorillard*, proponents of a do-call registry must be prepared to demonstrate that any restriction on commercial speech is only as restrictive as it needs to be to accomplish its objective. This would have been a difficult showing for the do-call registry during the 2003 Session, given the fact no other state has yet implemented such a registry¹²⁸ and the do-not-call registry had yet to be tested in Nevada. Concerns about the constitutionality of the do-call center and the interaction between state and federal do-not-call registries eventually led the Senate and Assembly to adopt the more reasonable restriction on commercial speech¹²⁹ represented by the do-not-call registry.

Despite the Legislature's caution, however, recent events have shown that even “reasonable” do-not-call lists can be subject to constitutional challenge. In a dizzying blur of judicial and congressional activity during the week of September 22, 2003, a

¹²⁶ *Id.* at 565.

¹²⁷ *Id.* at 566.

¹²⁸ *S. Comm. on Commerce & Labor Minutes for Mar. 18, 2003*, *supra* note 105 (testimony of Attorney General Brian Sandoval that legislation for a do-call list was under consideration in Montana). *See also Minutes of Assemb. Comm. on Commerce & Labor Meeting for May 9, 2003: Hearing on S.B. 255*, 2003 Leg., 72d Sess. (Nev. 2003) (testimony from Ann Wilkinson, Nevada Assistant Attorney General, that the legislation was no longer under consideration in Montana).

¹²⁹ *Minutes of Assemb. Comm. on Commerce & Labor Meeting for May 9, 2003: Hearing on S.B. 255*, 2003 Leg., 72d Sess. (Nev. 2003) (discussion between Assemb. Majority Leader Barbara Buckley and Gary M.G. Deacon, Leg. Advocate, Battle Born Institute). *See also supra* notes 107, 108.

federal court ruled that the FTC did not have the statutory authority to promulgate the National Registry under the Telemarketing and Consumer Fraud and Abuse Prevention Act (“TCFAP”).¹³⁰ Congress answered in breakneck speed two days later by passing what one Congressman referred to as the “‘This Time We Really Mean It Act’”¹³¹ The act, which was approved without dissent in the Senate and by a wide margin in the House, authorized the FTC to implement the National Registry under the TCFAP and ratified the National Registry already called for in the FTC’s regulations.¹³²

On the same day that Congress acted, however, U.S. District Judge Edward Nottingham struck down the National Registry as a violation of the First Amendment in *Mainstream Marketing Services, Inc. v. Federal Trade Commission*.¹³³ He agreed with the plaintiffs’ argument that the FTC’s exemption of charitable telemarketing calls from the National Registry while subjecting commercial calls to regulation was tantamount to “the reasoning of the pigs in George Orwell’s ‘Animal Farm’ [that] ‘[s]ome animals are more equal than others.’”¹³⁴ The court acknowledged that although charitable speech is more protected than commercial speech,¹³⁵ the FTC’s exemption of charitable solicitations imposed a “content-based” limitation on what consumers could ban from their homes, one that was not based solely on the desires of individual consumers.¹³⁶

Thus, the FTC’s rule “influences consumer choice, thereby entangling the government in

¹³⁰ U.S. Security v. Fed. Trade Comm’n, No. CIV-03-122-W, 2003 WL 22203719, at *5, *2 (W.D. Okla. Sept. 23, 2003) (noting the TCFAP is codified at 15 U.S.C. §§ 6101-6108).

¹³¹ Bob Sullivan, *Do Not Call list gets blocked . . . again*, MSNBC NEWS, Sept. 25, 2003, available at <http://www.msnbc.com/news/971734.asp> (last visited on Sept. 26, 2003) (quoting Rep. Billy Tauzin, chairman of the House Energy & Commerce Comm.).

¹³² Pub. L. No. 108-82, 117 Stat. 1006 (2003) (to be codified at 15 U.S.C.A. § 6102).

¹³³ *Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm’n*, No. 03 N 0184, 2003 WL 22213517, at *14 (D. Colo. Sept. 25, 2003).

¹³⁴ *Id.* at *5 (internal citations omitted).

¹³⁵ *Id.* at *8.

¹³⁶ *Id.* at *10, *9.

deciding what speech consumers should hear. This entanglement creates a regulatory burden on commercial speech.”¹³⁷

Finding that burdened speech implicated the First Amendment, the court applied the *Central Hudson* test to the National Registry.¹³⁸ The court concluded that the FTC’s interests in protecting privacy in the home and consumers from deceptive and abusive telemarketing practices were substantial interests that could justify a restriction of speech under *Central Hudson*.¹³⁹

In evaluating whether the National Registry materially advanced the identified interests, the court relied on *Cincinnati v. Discovery Network*.¹⁴⁰ In *Discovery Network*, the City of Cincinnati, to further its city beautification efforts, prohibited news racks containing commercial handbills. The city, however, did not prohibit racks for newspapers.¹⁴¹ The Court specifically rejected the argument that *any* reduction furthered the city’s cause and found that the restriction did not materially advance the city’s interest in beautification because only three percent of the racks contained commercial handbills.¹⁴² The Court held the regulation failed the First Amendment challenge because it distinguished between commercial and noncommercial speech, noting there was no indication that commercial news racks contributed to the beautification problem more significantly than other news racks.¹⁴³

Applying this same reasoning, the *Mainstream* court found that although the FTC’s projections that the Registry would reduce telephone calls to residences by forty to

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm’n*, No. 03 N 0184, 2003 WL 22213517, at *11 (D. Colo. Sept. 25, 2003).

¹⁴⁰ 507 U.S. 410 (1993).

¹⁴¹ *Mainstream Mktg.*, 2003 WL 22213517, at *12 (citing *Discovery Network*, 507 U.S. at 417).

¹⁴² *Id.*

¹⁴³ *Id.* at *13 (citing *Discovery Network*, 507 U.S. at 418-19).

sixty percent met the “materially advances” part of the test, the Registry did not meet the “content-discrimination” limitation.¹⁴⁴ The Registry’s exclusion of charitable calls failed according to the court, because “[t]here is no doubt that unwanted calls seeking charitable contributions are as invasive to the privacy of someone sitting down to dinner at home as unwanted calls from commercial telemarketers.”¹⁴⁵ Thus the FTC’s Registry failed to materially advance its interest in protecting consumer privacy or curbing abusive telemarketing practices.¹⁴⁶ The FTC appealed the ruling, which put the implementation of the National Registry on hold.¹⁴⁷ The Tenth Circuit removed the restriction and allowed the FTC to enforce the National Registry pending resolution of the appeal.¹⁴⁸

If this ruling stands, it will put state statutes, such as Nevada’s, that exclude charitable organizations from application of the do-not-call law, in constitutional jeopardy.¹⁴⁹ Charitable contributions are protected more highly than commercial speech because such solicitations do more than inform private economic decisions by disseminating “views and the advocacy of political and social causes.”¹⁵⁰ Thus, as observed in one editorial, finding that an exemption for charitable contributions triggers a constitutional problem creates a “Catch-22”¹⁵¹ because “[t]he Constitution would require

¹⁴⁴ *Id.* at *12-13.

¹⁴⁵ *Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm’n*, No. 03 N 0184, 2003 WL 22213517, at *13 (D. Colo. Sept. 25, 2003). The court also rejected the FTC’s arguments that justified the disparate treatment on that basis that commercial solicitors engage in fraud or abusive practices more frequently than charitable organizations or that commercial calls could be treated differently based upon the secondary effects of the constant ringing of unwanted telemarketing calls. *Id.* at **13-14.

¹⁴⁶ *Id.* at *14.

¹⁴⁷ Mayer, *supra* note 41.

¹⁴⁸ *Id.*

¹⁴⁹ *See, e.g.*, 2003 Nev. Stat. 464 § 8.

¹⁵⁰ *Mainstream Mktg.*, 2003 WL 22213517, at *9 (citing *Village of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632 (1980)).

¹⁵¹ Editorial, *The No-Call Catch-22*, WASH. POST, Sept. 30, 2003, at A18.

both that political and charitable speech be treated differently and forbid them from being treated differently.”¹⁵²

Interestingly, the FTC acknowledged the need for heightened First Amendment protections of charitable organizations and the telemarketers who solicit for them when it considered and rejected a number of alternative proposals to restrict charitable solicitations when it amended its Telemarketing Sales Rule.¹⁵³ It ended up creating the exemption for charitable calls “because it believed the First Amendment required it to do so.”¹⁵⁴

The *Mainstream* ruling came at a time when the distinction that has existed between commercial speech and political speech (including speech of charitable organizations) has become increasingly blurred due to “socially aware corporate communication.”¹⁵⁵ As a result, “[c]ommercial-speech doctrine is really in flux. . . . if the right case comes along there might be some change.”¹⁵⁶ Any changes to that doctrine may also require that do-not-call statutes be revisited to effectuate constitutionally compliant programs and thus frustrate the promised remedies to telephone-weary consumers.

At the very least, *Mainstream* may affect the implementation timetable for Nevada’s do-not-call program. Because the FTC’s program is in legal limbo, Nevada’s

¹⁵² *Id.*

¹⁵³ Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4636 (Jan. 29, 2003). For example, the FTC considered and rejected alternative proposals to (1) allow consumers signing up for the National Registry to selectively receive calls from entities from whom they would welcome such calls and (2) bifurcate the National Registry into separate categories, one for commercial calls and one for charitable solicitations, thereby allowing consumers to sign up for one but not the other list. *Id.* at 4636-37. Both options were rejected as impractical, inefficient and costly and were generally opposed by the non-profit entities offering comments. *Id.* at 4637.

¹⁵⁴ Charles Lane, *Do-Not-Call Case Spotlights Vagueness of Commercial Speech Law*, WASH. POST, Sept. 27, 2003, at E01.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* (quoting Stuart Banner, a professor of constitutional law at UCLA).

Attorney General may well decide to forgo using that portion of the National Registry with Nevada consumers on it as Nevada's do-not-call list.¹⁵⁷ Thus Nevada's option to fast-track a do-not-call program into place by January 1, 2004, may not materialize and Nevadans may have to wait until July 1, 2004 for the state registry to be implemented.

At the worst, Nevada may have to revisit the provisions of Chapter 464 to address the disparate treatment of charitable and commercial solicitations currently in the law.¹⁵⁸ Judge Nottingham suggested his ruling might have been a "different matter" under two possible alternatives.¹⁵⁹ The first was if the do-not-call registry were applied without regard to the content of the speech. The second was if complete autonomy were left in the hands of the consumer, as in *Rowan v. United States Post Office*.¹⁶⁰ There is some agreement that the whole problem could have been avoided had the FTC permitted customers to choose for themselves between banning only commercial calls, or both commercial and noncommercial calls, so that the content-based discrimination was a function of individual choice, not government action.¹⁶¹ Thus the concept of two lists (first considered by the Assembly to allow the consumer to choose between receiving calls from solicitors with which there was an EBR or not)¹⁶² has re-emerged as a possible method to resolve the constitutional conflict identified in *Mainstream*.

¹⁵⁷ 2003 Nev. Stat. 464 § 9(2)(a).

¹⁵⁸ *See id.*

¹⁵⁹ *Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm'n*, No. 03 N 0184, 2003 WL 22213517, at *14 (D. Colo. Sept. 25, 2003).

¹⁶⁰ *Id.* at *14, *9 (citing *Rowan v. U.S. Post Office*, 397 U.S. 728, 738 (1970) (upholding a statute that allowed the addressee to refuse mail from any sender by notifying the local postmaster, who, in turn notified the sender to remove the addressee's name and address from its mailing list under penalty of law because the statute eliminated government involvement in any determination regarding the content of the materials and gave the addressee complete and unfettered discretion in electing what speech he desired to receive)).

¹⁶¹ Lane, *supra* note 154.

¹⁶² Assemb. B. 232 (First Reprint), 72d Sess. (Nev. 2003).

V. Conclusion

Chapter 464 was recognized during the Legislature as a reasonable approach to restricting commercial free speech.¹⁶³ However, the *Mainstream* decision has raised new questions about how a do-not-call registry must be structured to withstand constitutional challenge, replacing in priority for the moment at least the question of whether Chapter 464 and the National Registry will be effective weapons in the war on telephone terrorism.

The *Mainstream* decision not only disrupted the government's plans to curb telemarketing solicitations but may have opened the door to the "legal hall of mirrors" known as the commercial-speech doctrine . . ."¹⁶⁴ The viability of Chapter 464 and Nevada consumers' hopes for continued relief from the constant jangling of telephones at dinnertime are now inextricably linked to the success of the FTC's appeal to the Tenth Circuit.

¹⁶³ See *Minutes of S. Comm. on Commerce for Mar. 21, 2003*, *supra* note 107.

¹⁶⁴ Lane, *supra* note 154.