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National Federation of Blind v. Federal Trade Commission: The Fourth Circuit's Uncertain Scrutiny of the Telemarketing Sales Rules

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National Federation of the Blind v. Federal Trade Commission: The Fourth Circuit's Uncertain Scrutiny of the Telemarketing Sales Rule

"There are few more annoying occurrences than the disruption of one's sleep due to a late-night or early-morning phone call by a telephone solicitor."[1] While telemarketing calls may be highly annoying and intrusive to their unwilling recipients, for nonprofit organizations, telemarketing serves as an invaluable tool for raising the funds necessary to support their charitable operations.[2] Furthermore, because "solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes,"[3] telemarketing is also a means by which charities can advocate for their causes and spread information about their charitable missions.[4] As a result, the United States Supreme Court has consistently held that charitable solicitation is protected speech under the First Amendment, including even the annoying and disruptive calls of telemarketers.[5]

In 2005, the Federal Trade Commission ("FTC") promulgated the Telemarketing Sales Rule ("TSR"),[6] imposing various limitations on professional telemarketers who solicit charitable contributions.[7]

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1. Nat'l Fed'n of the Blind v. FTC, 420 F.3d 331, 351 (4th Cir. 2005) (Duncan, J., dissenting), *cert. denied*, 126 S. Ct. 2058 (2006); *see also* Kevin Pang, *Consumer Reaction to No-Call List: Deafening; On the First Day, at Least 735,000 People Put Their Phone Numbers in an FTC Database To Block Telemarketing Calls*, CHI. TRIB., June 28, 2003, at C1 (quoting statement of President George W. Bush that "[u]nwanted telemarketing calls are intrusive, they are annoying, and they're all too common").

2. *See Nat'l Fed'n of the Blind*, 420 F.3d at 355 (Duncan, J., dissenting) ("The ability to raise funds is the lifeblood of a charity." (citing Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 789 (1988))); *see also* Ellen Harris et al., *Fundraising into the 1990s: State Regulation of Charitable Solicitation After* Riley, U.S.F. L. REV. 571, 572 (1990) ("Fundraising is often vital to enable charities to provide services and benefits to the public.").

3. Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980).

4. Harris et al., *supra* note 2, at 584 ("Many charities utilize fundraising for the purpose of advocating ideas and disseminating information, as well as for soliciting funds.").

5. *See Riley*, 487 U.S. at 787–88; Sec'y of State of Md. v. Joseph H. Munson, Inc., 467 U.S. 947, 959 (1984); *Schaumburg*, 444 U.S. at 632–33.

6. FTC Telemarketing Sales Rule, 16 C.F.R. § 310 (2006).

7. Specific restrictions imposed by the TSR include: (1) a prohibition on calls between 9:00 p.m. and 8:00 a.m.; (2) a requirement that telemarketers submit their name and telephone number to caller ID services; (3) an obligation that telemarketers refrain from calling a person who has previously asked not to be called (the "do-not-call list"

With respect to nonprofit organizations, the TSR regulations apply only to calls made by *professional* telemarketers soliciting donations on behalf of nonprofit organizations.[8] The regulations do not apply to a nonprofit organization's volunteer or "in-house" callers.[9] In *National Federation of the Blind v. FTC*,[10] two nonprofit organizations that rely on professional telemarketers to solicit donations challenged the TSR on the grounds that it violated the First Amendment of the United States Constitution.[11] The United States Court of Appeals for the Fourth Circuit rejected this challenge, holding that the TSR regulations are consistent with the First Amendment[12] and that the application of those regulations solely to professional telemarketers does not render the TSR unconstitutionally underinclusive.[13]

This Recent Development will attack the Fourth Circuit's First Amendment analysis on two distinct grounds. First, this Recent Development will argue that the court erred by not initially determining the appropriate level of scrutiny to be applied to the TSR, thus resulting in a fundamentally flawed analysis of the regulations. The court's failure to make the crucial determination whether to apply strict or intermediate scrutiny not only resulted in an uncertain analysis of the TSR, but also set an erroneous precedent for the Fourth Circuit. Second, this Recent Development will argue that the court misconstrued the "neutral justification" requirement when evaluating whether the regulations were unconstitutionally underinclusive by failing to determine how limiting the application of the TSR solely to professional telemarketers furthered the government's purported interests. As a result, the court erroneously upheld the TSR when it should have instead struck down the regulations as unconstitutionally underinclusive.

This Recent Development will first discuss the statutory and rulemaking history of the TSR. Then this Recent Development will examine the level of scrutiny the First Amendment requires for charitable solicitation regulations, ultimately concluding that the

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provision); (4) a requirement that callers promptly disclose the name of the organization for which they are seeking donations; and (5) a prohibition on "abandoned calls." *See id.* § 310.4(a)–(e). An "abandoned call" occurs when the person receiving the call is not connected with a telemarketer within two seconds of answering. *Id.* § 310.4(b)(1)(iv).

8. *See* Nat'l Fed'n of the Blind v. FTC, 420 F.3d 331, 334 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 2058 (2006); *infra* note 30 and accompanying text.

9. *See Nat'l Fed'n of the Blind*, 420 F.3d at 334; *infra* note 30.

10. 420 F.3d 331 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 2058 (2006).

11. *Id.* at 336.

12. *Id.* at 351.

13. *See id.* at 345–49.

Fourth Circuit erred by failing to consider whether strict or intermediate scrutiny should have applied to the TSR. Finally, this Recent Development will address the court's erroneous holding that the TSR is not unconstitutionally underinclusive, therefore concluding that the limited application of the TSR to professional telemarketers was not adequately supported by a "neutral justification."[14]

The FTC's decision to limit the TSR regulations to professional telemarketers was a result of several pieces of legislation defining the FTC's jurisdiction and regulatory authority.[15] In 1994, Congress passed the Telemarketing and Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"),[16] which granted the FTC authority to prohibit deceptive and abusive telemarketing practices.[17] Under the Telemarketing Act, "telemarketing" was narrowly defined to include only calls related to the sale and purchase of goods.[18] Thus, telephone calls soliciting charitable contributions were beyond the scope of the FTC's control.[19] Furthermore, the Telemarketing Act restricted the FTC to regulating within its prescribed jurisdictional limits by referencing the FTC's organic statute, the Federal Trade Commission Act ("FTC Act").[20] Under the FTC Act, the FTC has the authority to exercise jurisdiction over "persons, partnerships, or corporations,"[21] with "corporation" defined as a company or association "organized to carry on business for its own profit or that of its members."[22] Nonprofit organizations do not fall within this definition of "corporation" and are thus not within the FTC's

14. In addition to the First Amendment challenge to the TSR, the Fourth Circuit addressed and ultimately rejected arguments that the TSR exceeded the scope of the FTC's statutory authority, *see id.* at 336–38, and that the TSR violated the Equal Protection Clause, *see id.* at 350 n.8. A complete analysis of these issues is beyond the scope of this Recent Development, which focuses on the Fourth Circuit's First Amendment analysis.

15. *See id.* at 334–36.

16. Pub. L. No. 103-297, 108 Stat. 1545 (1994) (codified as amended at 15 U.S.C. §§ 6101–08 (2000 & Supp. II 2002)).

17. 15 U.S.C. § 6102(a)(1) (2000).

18. *Id.* § 6106(4) ("The term 'telemarketing' means a plan, program, or campaign which is conducted to induce purchases of goods or services by use of one or more telephones and which involves more than one interstate telephone call.").

19. *See Nat'l Fed'n of the Blind*, 420 F.3d at 334.

20. *See* Telemarketing and Consumer Fraud and Abuse Prevention Act, Pub. L. No. 103-297, § 6(a), 108 Stat 1545, 1549 (1994) (codified as amended at 15 U.S.C. § 6105(a) (2000)) ("[N]o activity which is outside the jurisdiction of [the FTC Act] shall be affected by this Act.").

21. 15 U.S.C. § 45(a)(2).

22. *Id.* § 44.

jurisdiction.[23] The Telemarketing Act clearly left this jurisdictional limitation unchanged, and the FTC therefore had no authority to regulate directly the telemarketing practices of nonprofit organizations.[24]

In 2001, Congress altered the scope of the FTC's telemarketing authority by passing the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("PATRIOT Act").[25] Section 1011 of the PATRIOT Act, titled "Crimes Against Charitable Americans," amended the 1994 Telemarketing Act by broadening the definition of "telemarketing" to include calls made to induce charitable contributions and donations.[26] Although the definition of telemarketing was expanded, the PATRIOT Act did not expand the FTC's jurisdiction to include nonprofit entities.[27] As a result, the FTC had the authority to regulate telemarketing aimed at soliciting charitable contributions, but did not have the power to directly regulate nonprofit organizations.[28] Pursuant to its authority under the newly amended Telemarketing Act, the FTC promulgated the TSR in 2005.[29] In an effort to reconcile the new definition of telemarketing

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23. *See Nat'l Fed'n of the Blind*, 420 F.3d at 334.

24. *Id.*

25. Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of the U.S.C.).

26. *Id.* § 1011(b)(3), 115 Stat. at 396 (codified as amended at 15 U.S.C. § 6106(4) (Supp. II 2002)). The newly amended Telemarketing Act defines "telemarketing" as "a plan, program, or campaign which is conducted to induce purchases of goods or services, *or a charitable contribution, donation, or gift of money* or any other thing of value, by use of one or more telephones and which involves more than one interstate telephone call." 15 U.S.C. § 6106(4) (Supp. II 2002) (emphasis added). This particular provision was included in the PATRIOT Act as a result of Congress's concern that fraudulent organizations would take advantage of charitable donors in the aftermath of the September 11 terrorist attacks. *See* August Meacham, Comment, *To Call or Not To Call? An Analysis of Current Charitable Telemarketing Regulations*, 12 COMMLAW CONSPECTUS 61, 66 (2004); *see also* JAMES J. FISHMAN & STEPHEN SCHWARZ, NONPROFIT ORGANIZATIONS: CASES AND MATERIALS 317 (3d ed. 2006) ("Congress expected the enormous charitable response in the aftermath of 9/11 to be accompanied by a corresponding increase in fraudulent fundraising.").

27. *Nat'l Fed'n of the Blind*, 420 F.3d at 335; *see also* Telemarketing Sales Rule, 67 Fed. Reg. 4492, 4496 (proposed Jan. 30, 2002) (to be codified at 16 C.F.R. pt. 310) ("[N]either the text of section 1011 nor its legislative history suggest that it amends Section 6105(a) of the Telemarketing Act—the provision which incorporates the jurisdictional limitations of the FTC Act into the Telemarketing Act . . . .").

28. *See Nat'l Fed'n of the Blind*, 420 F.3d at 335. The Fourth Circuit quite succinctly summarized the effect of the PATRIOT Act: "The PATRIOT Act . . . expanded what '*acts and practices*' could be regulated by the FTC under the Telemarketing Act, but it did not change what *type of entity* was subject to the FTC's control." *Id.*

29. FTC Telemarketing Sales Rule, 16 C.F.R. § 310 (2005).

supplied by the PATRIOT Act with its jurisdictional limitations, the FTC concluded that the TSR regulations would only apply to professional telemarketers calling on behalf of nonprofit organizations; volunteer or "in-house" callers acting on behalf of a charity were not subject to the TSR.[30]

In *National Federation of the Blind*, the Fourth Circuit confronted a challenge to the FTC's interpretation of the TSR. The court applied a two-part test that was set forth in *Village of Schaumburg v. Citizens for a Better Environment*,[31] where the United States Supreme Court held that charitable solicitation should be treated as fully protected speech under the First Amendment.[32] The *Schaumburg* Court reasoned that "solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and . . . without solicitation the flow of such information and advocacy would likely cease."[33] Holding, however, that charitable solicitation may be subject to "reasonable regulation,"[34] the Court used two factors to judge the constitutionality of a charitable solicitation regulation: first, whether the regulation "serves a sufficiently strong, subordinating interest that the [government] is entitled to protect,"[35] and second, whether the regulation is "narrowly drawn . . . to serve those interests without unnecessarily interfering with First Amendment freedoms."[36]

Interestingly, the Fourth Circuit began its analysis of the regulations in *National Federation of the Blind* by stating, "It is unclear whether this standard amounts to 'strict scrutiny' (as the

30. Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4585 (Jan. 29, 2003) (to be codified at 16 C.F.R. pt. 310) ("Reading the amendments to the Telemarketing Act effectuated by § 1011 of the USA PATRIOT Act together with the unchanged sections of the Telemarketing Act compels the conclusion that for-profit entities that solicit charitable donations now must comply with the TSR, although the Rule's applicability to charitable organizations themselves is unaffected.").

31. 444 U.S. 620 (1980); *Nat'l Fed'n of the Blind*, 420 F.3d at 335–36.

32. *See Schaumburg*, 444 U.S. at 632. In *Schaumburg*, a nonprofit environmental protection organization challenged a local ordinance which prohibited door-to-door solicitation by charitable organizations unless the organization could prove that at least seventy-five percent of the proceeds were used for charitable purposes. *Id.* at 624–25.

33. *Id.* at 632. The Court based its decision on a long line of precedent, *see id.* at 628–32, and held that these "prior authorities . . . clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment," *id.* at 632.

34. *Id.*

35. *Id.* at 636.

36. *Id.* at 637.

charities allege) or to the less stringent 'intermediate scrutiny' (as the FTC urges).... Regardless of the label, the substance of the test is clear."[37] This statement is erroneous because by choosing not to address whether the *Schaumburg* test requires strict or intermediate scrutiny at the outset of its analysis, the court failed to define how stringently the test should be applied. Furthermore, the statement reflects the court's failure to recognize the critical distinction between content-based and content-neutral speech regulations and the differing standards of review applied to each. Some of the TSR regulations were content-based and others were content-neutral, each category requiring the use of a different level of scrutiny. As such, by failing to establish the correct standard of review, the court conducted a flawed analysis of the regulations.

The Fourth Circuit erred by failing to analyze each of the individual TSR requirements to determine whether they were content-neutral or content-based, a distinction that has been described "as a crucial one in First Amendment law."[38] In general, the Supreme Court has held that content-based speech regulations are subject to strict scrutiny review, and in order for such regulations to be upheld, the government must show that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[39] Alternatively, a content-neutral law regulating the time, place, or manner of protected speech must be "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[40] Therefore, for content-neutral speech regulations, a form of intermediate scrutiny is applied.[41]

37. Nat'l Fed'n of the Blind v. FTC, 420 F.3d 331, 338 n.2 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 2058 (2006).

38. *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 193 (1999); *see also* DANIEL A. FARBER, THE FIRST AMENDMENT 21 (1998) ("The content distinction is the modern Supreme Court's closest approach to articulating a unified First Amendment doctrine.").

39. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

40. *Id.*

41. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994) ("[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny...." (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984))). Professor Erwin Chemerinsky summarized the content distinction by citing *Turner* and stating that "the general rule is that content-based restrictions on speech must meet strict scrutiny, while content-neutral regulation only need meet intermediate scrutiny." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (2d ed. 2002). Professor Chemerinsky described the Court's approach as a "two-tier system of review." *Id.* at 903.

In approaching these alternative standards, there are two factors that differentiate strict and intermediate scrutiny. The first factor is the importance of the government's interest in regulating the specific conduct. Under strict scrutiny, the government's interest must be considered "compelling," whereas intermediate scrutiny only requires that the government's interest be "significant."[42] The other critical distinction between strict and intermediate scrutiny is the degree to which the government's regulation must be tailored to its purported interest. Under strict scrutiny review of content-based speech regulations, the "narrowly drawn" element requires that the government choose the "least restrictive means" necessary to accomplish its purported interest.[43] On the other hand, when applying intermediate scrutiny, "the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.' "[44] In other words, under intermediate scrutiny, the "narrowly tailored" element *does not* require the government to choose the least restrictive means to accomplish its interests.[45] Therefore, it is apparent that the classification of a speech regulation as content-based or content-neutral will affect the severity of the court's review.[46] As a result, before subjecting a speech regulation to First Amendment analysis, a court must first decide whether the regulation is content-neutral or content-based, which will then determine whether strict or intermediate scrutiny should be applied.[47]

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42. *See supra* notes 39–41 and accompanying text; *see also* CHEMERINSKY, *supra* note 41, at 519–20 (summarizing distinctions between strict and intermediate scrutiny).

43. *See* Boos v. Barry, 485 U.S. 312, 321 (1988) (holding that content-based speech regulations "must be subjected to the most exacting scrutiny"). The Court held that the regulation in question was not narrowly tailored because "a less restrictive alternative [was] readily available." *Id.* at 329.

44. Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

45. *Id.* at 798 ("Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests *but that it need not be the least restrictive or least intrusive means of doing so.*" (emphasis added)); *see also* Hill v. Colorado, 530 U.S. 703, 726 (2000) ("[W]hen a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal.").

46. *See* FARBER, *supra* note 38, at 21 ("Government regulations linked to the content of speech receive severe judicial scrutiny. In contrast, when government is regulating speech, but the regulation is unrelated to content, the level of scrutiny is lower.").

47. *See* Frisby v. Schultz, 487 U.S. 474, 481 (1988) ("[T]he appropriate level of scrutiny is initially tied to whether the statute distinguishes between prohibited and permitted speech on the basis of content."); *see also* CHEMERINSKY, *supra* note 41, at 901

In the context of charitable solicitation regulations, the *Schaumburg* Court did not explicitly state whether the applicable standard of review was strict or intermediate scrutiny.[48] Although some commentators have suggested that the Court applied strict scrutiny,[49] a review of cases implementing the *Schaumburg* test suggests that, like other forms of protected speech, the level of scrutiny will vary depending on whether the charitable solicitation regulation is content-based or content-neutral. For example, in *American Target Advertising, Inc. v. Giani*,[50] the United States Court of Appeals for the Tenth Circuit reviewed a provision of the Utah Charitable Solicitations Act, which required "all professional fundraising consultants to register with the state and obtain a permit."[51] In its analysis, the court first reviewed the regulation to determine that it was content-neutral[52] and then proceeded to apply the two-part *Schaumburg* test using an intermediate scrutiny standard.[53] The United States Supreme Court took a similar approach in *Riley v. National Federation of the Blind of North Carolina*.[54] *Riley* involved a challenge to the North Carolina Charitable Solicitations Act.[55] After first deciding that a particular

("[A]ny law can be reviewed to determine whether it is content-based or content-neutral, a distinction that the Court has said is crucial in determining whether strict scrutiny or intermediate scrutiny should be used." (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994))).

48. *See* Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 622 (1980). The terms "strict scrutiny" and "intermediate scrutiny" are nowhere to be found in the Court's opinion.

49. *See, e.g.*, John T. Haggery, Note, *Begging and the Public Forum Doctrine in the First Amendment*, 34 B.C. L. REV. 1121, 1132–33 (1993) ("[U]nder strict scrutiny, the Court determined that the regulation did not sufficiently further the Village's asserted interests . . . ."); Steven R. Probst, Note, *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, 395 n.280 (2003) ("The Court . . . applying strict scrutiny, invalidated the ordinance as not sufficiently narrowly tailored.").

50. 199 F.3d 1241 (10th Cir. 2000).

51. *See id.* at 1246. In order to obtain a permit, professional fundraisers were required to: (1) submit a written application, (2) pay a $250 annual fee, and (3) post a $25,000 bond or letter of credit. *Id.*

52. *Id.* at 1247.

53. *See id.* ("The Act does not authorize a content-based review of the charitable mailings . . . . Therefore, the Act is content neutral, and we accordingly subject it to intermediate scrutiny.").

54. 487 U.S. 781 (1988).

55. *Id.* at 784. Specifically, the challenged provisions of the Act (1) defined the reasonable fee a fundraiser was able to charge, (2) required fundraisers to disclose to donors the percentage of revenues retained by the fundraiser in previous solicitations, and (3) required fundraisers to obtain a license. *Id.*

provision of the Act was content-based,[56] the Court then applied "exacting First Amendment scrutiny."[57] The Court also engaged in a "least restrictive means" analysis, finding that "more benign and narrowly tailored options" were available,[58] therefore holding the law unconstitutional.[59]

As *American Target* and *Riley* suggest, the *Schaumburg* test for analyzing First Amendment challenges to charitable solicitation regulations will differ depending on whether the regulation is content-based or content-neutral, thus changing the "substance" of the test being applied.[60] The Fourth Circuit, therefore, erroneously stated in *National Federation of the Blind* that "[r]egardless of the label, the substance of the test is clear."[61] Not only is the statement clearly wrong, the court's failure to determine the correct level of scrutiny renders its analysis fundamentally flawed, even if it happened to reach the correct result. Instead, the court should have first determined whether each of the TSR regulations was content-based or content-neutral so that it could then decide whether to apply strict or intermediate scrutiny.[62]

Without first drawing the content-based/content-neutral distinction, the Fourth Circuit proceeded to address five specific TSR regulations.[63] Applying the *Schaumburg* test, the court first determined that the TSR was designed to prevent fraud and protect consumer privacy, and that both were sufficiently strong interests that the government is entitled to protect.[64] The court then found that each of the regulations imposed by the TSR was narrowly tailored to

56. *Id.* at 795 ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech." (citing Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974))).

57. *Id.* at 798.

58. *Id.* at 800.

59. *Id.* at 803.

60. *See supra* notes 48–59 and accompanying text.

61. Nat'l Fed'n of the Blind v. FTC, 420 F.3d 331, 338 n.2 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 2058 (2006).

62. *See* Brief for Veterans First in Support of Petition for a Writ of Certiorari by National Federation of the Blind as Amici Curiae Supporting Petitioner at 4, Nat'l Fed'n of the Blind v. FTC, 126 S. Ct. 2058 (2006) (No. 05-927) ("The Fourth Circuit's majority dismissively cast aside both the importance and the substance of the strict scrutiny standard of review. Indeed, the Fourth Circuit cavalierly shirked its responsibility to define the standard it was applying . . . .").

63. *See Nat'l Fed'n of the Blind*, 420 F.3d at 341–43; *see also supra* note 7 (describing specific requirements imposed by the TSR).

64. *See Nat'l Fed'n of the Blind*, 420 F.3d at 339–40.

serve the government's interests.[65] Although the court did not expressly articulate the standard of review, it appears that the court applied the less stringent intermediate scrutiny analysis. This conclusion is based on the fact that the court did not engage in a "least restrictive means" analysis, which would have been necessary if strict scrutiny were applied.[66]

If the Fourth Circuit had conducted a proper analysis, the first step would have been to determine the appropriate level of scrutiny for each of the five regulations it examined. Under this analysis, the court would have found that intermediate scrutiny was appropriate with respect to four of the TSR regulations. The abandoned call prohibition, Caller ID requirement, and time-of-day restriction are content-neutral regulations that merely affect the time or manner of speech.[67] Additionally, intermediate scrutiny was appropriate with respect to the TSR's "do-not-call list" provision. Although the "do-not-call list" requirement arguably regulates more than just the time, place, or manner of the speech, it may still be considered a content-neutral regulation because it is unrelated to the content of the speech.[68] As noted by the United States Court of Appeals for the Tenth Circuit, "there is no meaningful distinction between evaluation of a content neutral regulation of expressive conduct and a content neutral time, place, or manner restriction."[69] Therefore, intermediate scrutiny was appropriate for this restriction as well.

Unlike the above provisions, intermediate scrutiny was not appropriate for analyzing the TSR disclosure requirement; instead, strict scrutiny should have been applied because the fact that the regulation compels speech renders the regulation content-based. The TSR requires that a telemarketer making an outbound telephone call to induce a charitable donation "truthfully, promptly, and in a clear and conspicuous manner" identify both "[t]he identity of the

65. *See id.* at 341–43.

66. *See id.* at 339–45; *see also supra* notes 43–45 and accompanying text (describing application of the "least restrictive means" analysis under strict scrutiny review).

67. *See* Rita Marie Cain, *Nonprofit Solicitation Under the Telemarketing Sales Rule*, 57 FED. COMM. L.J. 81, 97 (2004) (suggesting that the time of day limitations and abandoned call requirements can be characterized as time, place, and manner restrictions); *see also id.* at 102 (arguing that the caller ID requirement may be considered narrowly tailored to the government's interest in protecting privacy).

68. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("A regulation that serves purposes unrelated to the content of expression is deemed neutral . . . .").

69. Am. Target Adver., Inc. v. Giani, 199 F.3d 1241, 1247 n.1 (10th Cir. 2000) (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 298 (1984)). In other words, as long as a regulation is content-neutral, intermediate scrutiny is the appropriate standard of review. *See id.*

charitable organization on behalf of which the request is being made" and "[t]hat the purpose of the call is to solicit a charitable contribution."[70] Dealing with a similar requirement in *Riley*, the Supreme Court invalidated a provision of the North Carolina Charitable Solicitations Act, which provided,

> [d]uring any solicitation and before requesting or appealing either directly or indirectly for any charitable contribution a professional solicitor shall disclose to the person solicited . . . [t]he average of the percentage of gross receipts actually paid to the persons established for a charitable purpose by the professional fund-raising counsel or professional solicitor conducting the solicitation for all charitable sales promotions conducted in this State by that professional fund-raising counsel or professional solicitor for the past 12 months, or for all completed charitable sales promotions where the professional fund-raising counsel or professional solicitor has been soliciting funds for less than 12 months.[71]

The Court held that this was a content-based regulation because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech"[72] and, as such, strict scrutiny should apply.[73] Based on the Court's reasoning in *Riley*, the TSR disclosure requirement should also be considered a content-based regulation because it, too, would alter the content of the telemarketer's speech. If simply mandating speech that would not otherwise be made is sufficient to establish a content-based regulation, it follows that even a regulation as seemingly modest as the TSR disclosure requirement should be subject to strict scrutiny.

The Fourth Circuit, however, did not apply strict scrutiny to analyze the TSR disclosure requirement. Instead, the court relied on language contained within a footnote in the *Riley* decision, which stated that " 'nothing in this opinion should be taken to suggest that the State may not require a fundraiser to disclose unambiguously his or her professional status. On the contrary, such a narrowly tailored

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70. FTC Telemarketing Sales Rule, 16 C.F.R. § 310.4(e) (2006).

71. Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 786 n.3 (1988) (quoting N.C. GEN. STAT. § 131C-16.1 (1986)). The North Carolina law also required the professional fundraiser to disclose his name, as well as the name and address of the professional fundraising counsel. *Id.* These provisions were not challenged in *Riley*. *See id.* at 786.

72. *Id.* at 795.

73. *See id.* at 798 ("North Carolina's content-based regulation is subject to exacting First Amendment scrutiny.").

requirement would withstand First Amendment scrutiny.' "[74] The Fourth Circuit went on to state that "[i]f the First Amendment permits an obligation for a telefunder to disclose his professional status, then surely it also permits the present modest disclosure requirement."[75] The problem with this reasoning, however, is that the Supreme Court's statement in *Riley* was merely dicta because it addressed a situation not before the Court.[76] Furthermore, the requirement that a telemarketer disclose his or her professional status, which was approved in the *Riley* dicta, can be distinguished from the TSR requirement that a telemarketer disclose the name of his charity and the purpose of the call. Requiring a telemarketer to expose his professional status is arguably less intrusive than the TSR disclosure requirement.

Mandating a telemarketer to disclose promptly the name of his charity and the purpose of the call may interfere with the organization's ability to craft a strategy to best advocate for donations. For example, suppose a nonprofit organization hires professional telemarketers for a solicitation campaign, but instructs the telemarketers to first describe the organization's mission or cause in an effort to "feel out" the prospective donor before asking for contributions. The charity may determine that such a nonaggressive approach will be better suited to its mission and more likely to result in charitable donations. However, the TSR disclosure requirement precludes the organization from taking such an approach because the telemarketer is required to disclose the purpose of the call at the outset of the conversation, a requirement which could easily result in many listeners hanging up immediately. The TSR disclosure requirement thus acts as a fairly substantial intrusion by the government on the right of a charity to conduct its solicitations the best way it deems fit.

Nevertheless, by relying on the *Riley* dicta, the Fourth Circuit assumed, without thorough examination, that requiring a telemarketer to state the name of the charity and purpose of the call

74. Nat'l Fed'n of the Blind v. FTC, 420 F.3d 331, 343 (4th Cir. 2005) (quoting *Riley*, 487 U.S. at 799 n.11), *cert. denied*, 126 S. Ct. 2058 (2006).

75. *Id.*

76. *See Riley*, 487 U.S. at 803 (Scalia, J., concurring) (stating that the majority "depart[ed] from the case at hand to make a pronouncement upon a situation not before [the Court]"). In *Riley*, Justice Scalia objected to the majority's statement in footnote 11, which referred to an unchallenged provision of the North Carolina Charitable Solicitations Act, which required "professional fundraisers to disclose their professional status to potential donors." *Id.* at 799 (majority opinion).

would be constitutionally permissible.[77] Although one could argue that it is a practical necessity for telemarketers eventually to make such disclosures if they wish to generate any money,[78] that fact does not necessarily lead to the conclusion that the TSR disclosure requirement is narrowly tailored. Rather, in order for the regulation to be narrowly tailored in this context, it must be the least restrictive means available to further the government's interest in preventing fraud and protecting consumer privacy.[79] Unfortunately, and much to the detriment of nonprofit organizations that rely on professional telemarketers, the Fourth Circuit failed to engage in such analysis. The Fourth Circuit's conclusory assumption that the TSR disclosure requirement passed constitutional muster was not an adequate substitute for actual strict scrutiny review, and, as a result, the constitutionality of the regulation remains uncertain. Therefore, in the future, the Fourth Circuit should be more precise in its analysis and, when strict scrutiny review is required, should engage in a thorough review of the government's alternative channels of regulation to determine whether the regulation in question is narrowly tailored and the least restrictive means available to carry out the government's interests.

In addition to upholding each of the TSR regulations under the two-part *Schaumburg* test, the Fourth Circuit also addressed the issue of whether the regulations were impermissibly underinclusive.[80] A speech regulation is considered underinclusive "when it discriminates against some speakers but not others without a legitimate 'neutral justification' for doing so."[81] In this case, the challenged TSR requirements apply only to professional telemarketers but not to volunteers calling on behalf of nonprofit organizations. The result is an underinclusive regulation that "adversely affect[s] those charities that choose to out-source their fundraising work."[82] However, simply because a regulation is underinclusive does not necessarily render it unconstitutional.[83] Rather, the underinclusiveness of a regulation

77. *See Nat'l Fed'n of the Blind*, 420 F.3d at 343.

78. *See* Cain, *supra* note 67, at 93 (arguing that the TSR disclosure requirement is a "basic necessity in legitimate nonprofit solicitation" and should be constitutionally permissible).

79. *See supra* note 43 and accompanying text.

80. *See Nat'l Fed'n of the Blind*, 420 F.3d at 345–49.

81. *Id.* at 345 (citing City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429–30 (1993)).

82. *Id.*

83. *See id.* ("[A] speech restriction with a limited reach is not doomed to fail First Amendment scrutiny.").

may have the effect of diminishing the credibility of the government's justification for regulating,[84] thus weakening the government's argument that the regulation is "narrowly tailored."[85] The United States Supreme Court addressed the underinclusiveness concept in *City of Cincinnati v. Discovery Network, Inc.*,[86] holding that an underinclusive speech regulation will be upheld only if supported by a "neutral justification."[87] Furthermore, the government has the burden to establish a "reasonable fit" between its legitimate interests and the selective means chosen to further those interests.[88]

In analyzing whether the TSR regulations were unconstitutionally underinclusive, the Fourth Circuit held that the FTC's jurisdictional boundary, which prevented it from directly regulating nonprofit organizations, was a sufficient "neutral justification" for the TSR's discriminatory classification.[89] The court reasoned that the distinction between professional and volunteer telemarketers was one that the FTC was "bound to make by simple application of its jurisdictional limitations"[90] because it was "the only way to reconcile the new instructions from Congress set forth in the PATRIOT Act with the old, unchanged instructions from Congress set forth in the Telemarketing Act."[91] Judge Allyson Duncan dissented from the court's opinion by arguing that the FTC's jurisdictional limitation could not serve as a sufficient neutral justification for the TSR's discriminatory treatment of similarly situated actors.[92] Judge Duncan emphasized the fact that the FTC presented no evidence to suggest that professional telemarketers

84. City of Ladue v. Gilleo, 512 U.S. 43, 52 (1994) ("Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place.").

85. *See Nat'l Fed'n of the Blind*, 420 F.3d at 345 ("A law is underinclusive in this sense, and thus not narrowly tailored, when it discriminates against some speakers but not others without a legitimate 'neutral justification' for doing so.").

86. 507 U.S. 410 (1993).

87. *See id.* at 429–30.

88. *Id.* at 416.

89. *See Nat'l Fed'n of the Blind*, 420 F.3d at 348 ("[S]uch underinclusiveness results from the simple fact that the PATRIOT Act designated 'charitable solicitations' as being within the type of behavior the FTC could regulate, but it left speech by charities outside the agency's jurisdiction. The agency's jurisdictional boundary, therefore, serves as the 'neutral justification' . . . .").

90. *Id.* at 347.

91. *Id.*; *see also supra* notes 25–30 and accompanying text (discussing the FTC's decision to limit TSR regulations solely to professional telemarketers based on a jurisdictional limitation).

92. *See Nat'l Fed'n of the Blind*, 420 F.3d at 354–55 (Duncan, J., dissenting).

would be more likely to engage in fraudulent behavior than a volunteer solicitor.[93] Additionally, Judge Duncan pointed out that there was no evidence to show that professional telemarketers would be more likely to violate consumer privacy or engage in abusive telemarketing practices than nonprofessional solicitors.[94] As such, the dissent concluded that the classification created by the TSR failed to further the government's interests in preventing fraud and protecting consumer privacy, and was therefore unconstitutionally underinclusive.[95]

Although the FTC's jurisdictional limitation may be considered neutral because it is unrelated to the content of the speech,[96] the critical flaw in the court's reasoning is that this "neutral justification" is in no way related to the government's legitimate interests in regulating. In other words, as Judge Duncan correctly noted, the government failed to show a "reasonable fit" between its legitimate interests and the discriminatory means chosen to further those interests, a showing which is required by *Discovery Network*.[97] As a result, the court should have held that the TSR's limited application was impermissibly underinclusive and therefore unconstitutional; a proper application of *Discovery Network* would warrant such a result. To illustrate, in *Discovery Network*, the city of Cincinnati enforced an ordinance that prohibited the distribution of commercial handbills on public news racks, while exempting general newspapers from the restriction.[98] The law was challenged by Discovery Network, Inc. and Harmon Publishing Co., two parties that distributed commercial handbills on public news racks.[99] The Supreme Court, in striking down the ordinance, held that the distinction between commercial handbills and newspapers "bears no relationship *whatsoever* to the particular interests that the city has asserted. It is, therefore, an impermissible means of responding to the city's admittedly legitimate

93. *Id.* at 352.

94. *Id.* at 353.

95. *See id.* ("The FTC has made no showing that the professional/non-professional distinction it employs in the TSR furthers the goals of fraud prevention and consumer privacy. It is this showing that *Discovery Network*'s 'neutral justification' and 'reasonable fit' requirements compel. Because these requirements are not satisfied, the TSR cannot survive."(citations omitted)).

96. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("A regulation that serves purposes unrelated to the content of expression is deemed neutral . . . .").

97. *See Nat'l Fed'n of the Blind*, 420 F.3d at 353 (Duncan, J., dissenting).

98. City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 413 n.3 (1993).

99. *Id.* at 412–14.

interests."[100] Similarly, in *National Federation of the Blind*, there was no evidence showing that the distinction between nonprofit organizations that rely on professional telemarketers and those that rely on volunteers was in any way related to the government's asserted interests in preventing fraud and protecting consumer privacy.[101] As a result, the Fourth Circuit should have struck down the TSR as unconstitutionally underinclusive.

The troubling result of the Fourth Circuit's decision is that it allows the FTC to discriminate against nonprofit organizations that rely on professional telemarketers based simply on the FTC's arbitrary jurisdictional boundary. Essentially, the FTC was able to circumvent *Discovery Network*'s "neutral justification" and "reasonable fit" requirements by relying on its jurisdictional limitation.[102] The Fourth Circuit should have instead required the FTC to prove that the limited application of the TSR furthers the government's interests. In contrast to the Fourth Circuit's erroneous analysis, a recent case decided by the United States Court of Appeals for the Eighth Circuit illustrates a more appropriate approach. In *Fraternal Order of Police v. Stenehjem*,[103] the Eighth Circuit upheld a North Dakota law that prohibited telemarketers from soliciting residents who had registered with the state's do-not-call list.[104] The law exempts nonprofit organizations from the prohibition, but only if the organization uses volunteer or in-house callers.[105] Thus, the North Dakota law creates a distinction between nonprofit organizations that use professional telemarketers and those that rely on volunteer callers,[106] similar to the distinction created by the TSR. The Eighth Circuit upheld the law based on a finding by the North Dakota legislature that "professional charitable solicitors intrude more

100. *Id.* at 424. The interests purportedly served by enforcement of the ordinance were the city's safety and aesthetics. *Id.* at 418. The Court noted that the ordinance would only eliminate sixty-two news racks, with 1500 to 2000 news racks remaining in place. *Id.* at 417–18.

101. *See supra* notes 93–95 and accompanying text.

102. *See Nat'l Fed'n of the Blind*, 420 F.3d at 355–56 (Duncan, J., dissenting) ("The majority holds . . . that Congress can justify unconstitutional restrictions on speech based upon the identity of the speaker simply by delineating jurisdiction over those speakers between various executive agencies. This argument is untenable. It provides a jurisdictional loophole through which government can achieve indirectly that which it cannot do directly.").

103. 431 F.3d 591 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 2058 (2006).

104. *Id.* at 596.

105. *Id.*

106. *See id.*

regularly on residents' privacy than volunteers or employees."[107] In other words, the distinction furthered the government's legitimate interest in protecting consumer privacy. Unlike the Eighth Circuit, however, the majority in *National Federation of the Blind* did not find any evidence that the limited application of the TSR furthered the government's interests, but instead erroneously relied on an arbitrary jurisdictional boundary to serve as a neutral justification.[108] The court's reliance on the FTC's jurisdictional limitation was inappropriate, resulting in an erroneous holding that the TSR was not impermissibly underinclusive.

While the Fourth Circuit held that the regulations imposed by the Telemarketing Sales Rule were constitutionally permissible, several errors in the court's analysis lead to the conclusion that the Fourth Circuit reached an erroneous decision. Specifically, the court failed to determine whether it was applying strict or intermediate scrutiny, which resulted in a flawed and uncertain analysis of the regulations, particularly with respect to the TSR disclosure requirement. Because the disclosure requirement is a content-based speech regulation, the court should have applied strict scrutiny; by choosing not to do so, the court failed to subject the regulation to a sufficient analysis as required by the First Amendment. Whether the regulation could have survived strict scrutiny is unclear, and as a result the constitutionality of the disclosure requirement remains uncertain. Furthermore, this error begs the question as to whether the Fourth Circuit would engage in a sufficient strict scrutiny review if such an analysis were required in future charitable solicitation cases. Additionally, the court did not consider how a limited application of the TSR solely to professional telemarketers could further the government's interests in protecting consumer privacy and preventing fraud, and therefore erroneously held that the TSR was not unconstitutionally underinclusive.

The unfortunate result of the Fourth Circuit's decision is that those nonprofit organizations that rely on professional telemarketers will be disadvantaged by the TSR regulations, limiting the ability of such organizations to advocate for their cause and support their operations.[109] Because charitable donations are central to the vitality

107. *Id.* at 598.

108. *See supra* notes 93–95 and accompanying text.

109. *See* Nat'l Fed'n of the Blind v. FTC, 420 F.3d 331, 355 (4th Cir. 2005) (Duncan, J., dissenting) ("As charities compete for the finite charitable donation dollar, those charities that either choose to or are forced to use telefunders are placed at a competitive

of many nonprofits, the limited application of the TSR may result in the demise of small or less popular charities that do not have the resources to engage volunteer or in-house callers.[110] Without recognizing the substantial limitations imposed by the TSR, the Fourth Circuit's cursory review of the regulations denied these organizations the full effect of their constitutional rights.

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disadvantage by the regulations that affect them and not their charitable counterparts."), *cert. denied*, 126 S. Ct. 2058 (2006).

110. *See id.* ("[F]or small or unpopular charities, the ability to engage in mass volunteer fundraising may be impossible, and thus the use of professional fundraisers may hold the key to the entity's existence.").