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WHO'S CALLING? THIRD-PARTY TELEPHONE-FUNDRAISER DISCLOSURE REFORM

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INTRODUCTION

Americans are generous—individuals contributed 229.2 billion dollars to charity in 2008.¹ However, this laudable philanthropic spirit serves as “a fertile ground for those more interested in personal gain than in serving society.”² Consequently, regulators must curb abuse by ensuring the opportunity to make informed choices about charitable giving. This duty is amplified with regard to third-party fundraisers raising money over the telephone. Third-party fundraisers (“TPFs”) are for-profit organizations that contract with charities to raise money,

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1. MOLLY F. SHERLOCK & JANE G. GRAVELLE, CONG. RESEARCH SERV., R40919, AN OVERVIEW OF THE NON-PROFIT AND CHARITABLE SECTOR 23 (2009).

2. BRUCE R. HOPKINS, THE LAW OF FUNDRAISING 37 (4th ed. 2009).

frequently over the telephone. Imagine a noisy room with rows and rows of phone cubicles, equipped with speed dialers, computers, and a trained staff armed with high-pressure scripts.³ Although these methods can be effective at raising money for charities, the massive reach of these phone banks, coupled with a lack of information for the consumer, can lead to profitability at the expense of honesty. Current third-party telephone fundraising disclosure laws are insufficient to allow potential donors the opportunity to make an informed choice. Consequently, courts should revisit established constitutional bans on certain types of protections, and states should require more disclosure at the point of solicitation.

This Note begins by setting out the threat posed by TPFs to consumers and outlining the empirical data which suggests a problem. Second, it explores the current constitutional restrictions on TPF regulation, arguing that this line of cases ought to be revisited. Third, it explores other analogous varieties of speech where disclosure is compelled for the protection of the consumer. Fourth, it explores solutions pursued by the states, and recommends ways of strengthening protections within the current constitutional framework. Lastly, this Note addresses potential policy criticism of restricting the activities of TPFs.

I. THE THREAT OF TPFs: EVERYONE UNDERSTANDS THE GAME EXCEPT THE CONSUMER

By definition, charities and non-profits rely on donations. The flourishing of these entities suggests that people are willing to donate.⁴ Therefore, assuming that potential donors had perfect information about non-profits' needs and goals, no fundraising would arguably be necessary—individuals would make unsolicited donations to the charity of their choice. Yet, realistically, many people only give money when asked.⁵ To survive, charities and non-profits must identify and pursue individuals who support their cause and ask them for money.

Strategies to accomplish that goal are practically boundless: from mailings, to membership, to bingo nights at the senior-center. For example, some non-profits and charities employ sophisticated ad campaigns to promulgate their message.⁶ Others focus on word of mouth

3. The author of this article was briefly employed with a third-party fundraiser during early 2009. Much of the background information in this article comes from that experience.

4. See SHERLOCK & GRAVELLE, *supra* note 1, at 23.

5. Part of donating to charity may come from the psychological feeling of responding to a request. For a neuro-economic discussion of why people donate to charity at all, see generally Ulrich Mayr et al., *Neuroeconomics of Charitable Giving and Philanthropy*, in, *NEUROECONOMICS: DECISION MAKING AND THE BRAIN* 301 (Paul W. Glimcher ed., 2008) (arguing that people give to charity primarily for the feeling that they get when they do it).

6. See, e.g., James Diers, *Advertising for a Better World*, UTNE READER (Nov.-Dec. 2006), <http://www.utne.com/2006-11-01/AdvertisingforaBetterWorld.aspx> (outlining how

(so called “viral”) micro-donations.⁷ Regardless of the means employed, two things remain consistent: (1) charities usually have to ask for the money from the donors before they donate; and (2) the success or failure of any particular non-profit is predicated on efficiently making that request.

One of the most efficient ways to contact donors *en masse* is by telephone. Almost anyone can be reached by telephone; approximately 98.3% of households surveyed in 2010 had at least one phone.⁸ Therefore, fundraisers may target wide swaths of the population. Additionally, telephone fundraising provides an economical “middle way” of reaching out to potential donors—direct mail is far less effective and impersonal; in-person canvassing is costly and intrusive.⁹ The phone puts the solicitor in direct contact with the solicited by simply pushing ten buttons. At the same time, the solicitor does not sacrifice the ability to persuade the solicited with a cheerful tone and thought-out retorts.

The imbalance of information at the point of contact makes telephone fundraising even more attractive. When a fundraiser calls, a potential donor finds herself at a disadvantage—she suddenly is talking to an individual armed with a highly specific script and all the information. The fundraiser holds all the cards: “incomplete information on the part of the donor translates into information asymmetry where nonprofit organizations gain a strategic advantage over donors by withholding negative information and publicizing positive ratings and other information such as ‘feel good’ stories about their organization.”¹⁰ This “information asymmetry” means that a potential donor must assess the request and make a decision quickly, without more research. In sum, efficiency, personal contact and information asymmetry make telephone fundraising a uniquely useful way to reach donors.

Non-profits may seek outside professionals to help them wield the tool of telephone fundraising campaigns. Some non-profits may lack the

non-profit ad agencies use “provocative, attention-grabbing imagery and direct language”).

7. Micro-donation campaigns rely on viral promulgation of an opportunity to donate a small amount of money, such as contributing five dollars to the Red Cross via text message. See, e.g., Joe Frandoni, *Micro-donations: Proving Size Doesn't Always Matter*, TECHNOLOGY IN THE ARTS (June 4, 2010), <http://www.technologyinthearts.org/?p=1368> (reviewing a series of successful micro-donation ad campaigns).

8. STEPHEN J. BLUMBERG & JULIAN V. LUKE, NAT'L CTR. FOR HEALTH STATISTICS, WIRELESS SUBSTITUTION: EARLY RELEASE OF ESTIMATES FROM THE NATIONAL HEALTH INTERVIEW SURVEY, JANUARY-JUNE 2010 2 (2010), available at www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201012.pdf.

9. Fundraisers generally agree on a “hierarchy” of contact—in person contact is best, but most expensive; direct mail is least effective, but cheaper. JAMES M. GREENFIELD, FUNDRAISING FUNDAMENTALS: A GUIDE TO ANNUAL GIVING FOR PROFESSIONALS AND VOLUNTEERS 28 (2d ed. 2002).

10. Margaret F. Sloan, *The Effects of Nonprofit Accountability Ratings on Donor Behavior*, 38 NONPROFIT AND VOLUNTARY SECTOR Q. 220, 224 (April 2009).

resources to conduct their own telefundraising campaign. To that end, professional fundraisers have infrastructure—phone banks, head sets, predictive dialers, and trained staff.¹¹ Furthermore, professional fundraisers may be employed if “you want to outsource a particular fundraising activity to an outside agency so you do not have to implement the activity itself.”¹² Simply put, if conducting mass outreach is distasteful to the members of the organization, professionals can be hired to perform the “dirty work.”

Moreover, using a professional fundraiser may seem a low-risk endeavor for the charity. Like fishing, if they throw a line out in the water with no success, they can always try again. To that end, TPFs are almost always compensated based on something other than the percentage of funds raised.¹³ Frequently, this takes the form of a “pay-per-contact” contract. In other words, if the TPF gets someone on the phone, they get paid even if that person does not donate to the charity. Percentage based contracts are usually discouraged, and possibly unethical.¹⁴

However, the varying metrics of payment opens up the possibility that the fundraising drive might not net *any* donations to the non-profit. For example, imagine a TPF raising money on a “per-contact basis.” If the TPF contacted 2,000 individuals charging \$4 a contact, and subsequently raised \$8,000 dollars, then none of the money actually raised would reach the charity. Even more alarming are situations where the TPF talks to the same 2,000 individuals and only raised 4,000 dollars—then the non-profit actually *owes* the fundraiser money. In these scenarios, although the donors of the 4,000 dollars thought their money was helping their non-profit of choice, 100% of the money raised represents the profit of the TPF.

Why would a charity choose to engage in such a potentially costly endeavor? This is a low-risk proposition for the charity: if they make money, then they are ahead of the game; if they do not, then they can try another method of raising money. However, there is little disagreement that use of a commercial fundraiser has meant higher costs for a charity.¹⁵

11. See, e.g., About Telefund, TELEFUND, <http://www.telefund.com/about.html> (last visited April 30, 2012).

12. INSTITUTE OF FUNDRAISING, THE GOOD FUNDRAISING GUIDE 20 (2006).

13. See ASSOCIATION OF FUNDRAISING PROFESSIONALS, CODE OF ETHICAL PRINCIPLES AND STANDARDS (2008), available at <http://tinyurl.com/2w2sa6p>. Oddly, the AFP suggests that percentage based arrangements would be unethical. However, as explained below, this would always almost lead to less cost to the charity.

14. See *id.*

15. CAL. OFFICE OF THE ATT’Y GEN., CAL. DEP’T OF JUSTICE, SUMMARY OF RESULTS OF CHARITABLE SOLICITATIONS BY COMMERCIAL FUNDRAISERS 1 (2008), available at <http://ag.ca.gov/charities/publications/2008cfr/cfr2008.pdf>.

Empirically, TPFs do retain a surprisingly high percentage of donations. For example, the Office of the Attorney General for California estimates that somewhere between 33% and 43% of the money raised by TPFs actually reaches charities.¹⁶ The New York Attorney General's Office annual report similarly indicates that only around 40% of money ends up with the charity—80% of charities kept less than half of the funds raised; 50% of charities kept less than a third; and 7% of charities actually owed the TPF more than the funds raised.¹⁷ In other words, on average, of the donor's \$50 donation, only about \$20 is going to the non-profit or charity that they are choosing. To paint the picture more starkly, the consumer who believes he is contributing X amount of dollars is actually contributing $2/5X$, with $3/5X$ going to the TPF's profit margin.

Even so, many donors have no idea that they are talking to a commercial fundraiser. Frequently the TPF's phone pitch is "structured to lead the call recipients to believe that they are speaking to a volunteer member of the group."¹⁸ That strategy comports with common sense: TPFs have an incentive to appear to be part of the organization as opposed to independent, for-profit companies. Indeed, it strains credibility to suggest that a donor would voluntarily donate to a professional fundraiser if they realized that only 40% of their donation would be applied to charitable purposes.

However, donors lack the information to make an informed choice: "donors had no reason to suspect that this was the case and, if they did suspect it, had no practical way to determine in any specific case whether their donation would benefit charity or some commercial operation."¹⁹ Since the person on the other end of the phone could literally be anyone (or anywhere), the donor simply lacks the information to make an informed choice. There can be no doubt: "the victims are not the groups that hire the solicitors; the victims are the donors."²⁰

In sum, the imbalance of information between the consumer and the TPF leads to better profit margins, but less transparency. Consumers donate to charities without the knowledge that \$30 of every \$50 donated comprises profit. Thus, the lack of transparency leads to a disconnect between the desires of a fully informed consumer, the legitimate goals of the non-profit, and the TPF's bottom line.

16. *Id.* at 4.

17. N.Y. DEP'T. OF LAW CHARITIES BUREAU, PENNIES FOR CHARITY: TELEMARKETING FOR PROFESSIONAL FUNDRAISERS 2 (2009), available at http://www.charitiesnys.com/pdfs/2009_Pennies.pdf.

18. HOPKINS, *supra* note 1, at 38.

19. *Id.* at 37.

20. *Id.* at 38.

II. CONSTITUTIONAL BARRIERS: RATIOS AND DISCLOSURES

Assuming that this imbalance of information is undesirable, what is to be done? A major barrier to effective regulation is current Supreme Court jurisprudence limiting the restrictions that can be placed on professional fundraisers. In a trilogy of cases, the Supreme Court has decided that regulating percentages given to charities and forced disclosure of that percentage violates the First Amendment.

Since at least the 1940's, the Supreme Court has recognized the duty of the government to protect citizens from unscrupulous fundraisers. As Justice Jackson put it:

The modern state owes and attempts to perform a duty to protect the public from those who seek for one purpose or another to obtain its money. When one does so through the practice of calling, the state may have an interest in shielding the public against the untrustworthy, the incompetent, or the irresponsible, or against unauthorized representation of agency.²¹

Acknowledging this duty of a "modern state," how is the goal of protecting the public best accomplished in accordance with the First Amendment?

A. *Pre-Riley: A Reasonable Compromise*

Village of Schaumburg v. Citizens for a Better Environment, decided in 1980, attempted to answer that question.²² In *Schaumburg*, a municipality enacted an ordinance prohibiting door-to-door solicitation of funds when less than 75% of the money would be used for charities.²³ A licensed non-profit organization brought suit seeking declaratory judgment that these restrictions violated the First and Fourteenth Amendments.²⁴

In the decision, the Court first decided that paid solicitors constitute a variety of speech: "solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views Canvassers in such contexts are necessarily more than solicitors for money."²⁵ In other words, because canvassers gather money for groups with an expressive goal, their activities qualify as expression. This difference separates the paid solicitor on behalf of a charity from a paid solicitor of commercial

21. *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

22. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980).

23. *Id.* at 623.

24. *Id.* at 624.

25. *Id.* at 632.

products. According to the Court, paid solicitors for a non-profit, as opposed to a paid solicitor for commercial products, have a dual goal: not only are they looking for funds, but also spreading the message of the charity.²⁶ The categorization of TPF activities as expression is a vital underpinning of the case.

Finding that the paid solicitors for charities were engaging in speech, the Court applied strict scrutiny to the constitutionality of the “75% rule.”²⁷ The 75% rule prohibited the paid solicitor from keeping more than 75% of the funds raised. The village argued that this threshold helped root out fraud—why would a charity need to keep more than $\frac{3}{4}$ of the profits? The Court disagreed, noting that the amount of money raised should not be a proxy for fraud. This is especially true for “organizations that are primarily engaged in research, advocacy, or public education.”²⁸ In other words, it would be improper to assume that the purpose served by hiring a paid solicitor is merely monetary.

Consequently, the Court found that “the 75-percent requirement in the village ordinance plainly is insufficiently related to the governmental interests asserted in its support to justify its interference with protected speech.”²⁹ Striking the 75-percent requirement sent a resounding message that regulators could no longer limit the percentage of contributions retained by a TPF.

After *Schaumburg*, regulators attempted to circumvent these court-defined prohibitions. One of these attempts sparked *Secretary of State of Maryland v. Joseph H. Munson Co.*³⁰ *Munson* examined a Maryland law that required a similar 75%-25% ratio that was present in *Schaumburg*, but with an exception: the limit could be waived for good cause.³¹ If a charity could demonstrate why they needed to hire a TPF that kept more than $\frac{3}{4}$ the collections, they could do so. This solution attempted to answer the *Schaumburg* concern about “expressive” reasons for hiring a high priced solicitor. Therefore, the question presented to the *Munson* Court was if the *Schaumburg* rule strictly prohibited percentage caps, or allowed a waiver provision.³²

After dispensing with a standing issue, the Court decided that the waiver provision did not save the statute. Repeating language from *Schaumburg*, the Court noted that it is still based on the “mistaken premise that high solicitation costs are an accurate measure of fraud.”³³

26. *Id.*

27. *Id.* at 639.

28. *Id.* at 636-37.

29. *Id.* at 639.

30. *Sec’y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984).

31. *Id.* at 949.

32. *Id.* at 962.

33. *Id.* at 966.

Again, the primary concern with the statute was that it “does not help the charity whose solicitation costs are high because it chooses, as was stipulated here . . . to disseminate information as a part of its fundraising.”³⁴ Thus, the Court foreclosed the possibility of waiving the limit to save the restriction.³⁵

The Court, however, did suggest that states “could punish fraud directly and could require disclosure of the finances of a charitable organization so that a member of the public could make an informed decision about whether to contribute.”³⁶ The notion of an “informed decision” strikes at the very heart of the information asymmetry problem outlined above. After *Schaumburg* and *Munson*, regulators were clearly not allowed to cap the percentage of contributions taken by TPFs, but the Court had not slammed the door on other ways of dispersing information.

The *Schaumburg* and *Munson* decisions represent an intelligent compromise between the necessity of fundraising and the limits on restrictions of speech. A firm percentage cap on fundraisers would chill some legitimate speech. As the Court noted, there are simply some organizations which do not have raising money as their primary goal.³⁷ For example, some non-profit organizations are primarily interested in reaching out to their supporters with information, and therefore make a fundraising request only incidentally. Similarly, unpopular non-profits may need to engage in preliminary unprofitable outreach.

Furthermore, requiring charitable solicitation to be successful monetarily places the government in the position of deciding what valid speech is and what it is not. That decision would necessarily be arbitrary: if organization A gave 60% to charity, and organization B gave 59% to charity, which group is more worthy of donations? The obvious answer is that it depends on the context. The donor has the best vantage point to determine the validity of the non-profit—voting with his check book. However, in order to do so, donors must be equipped with sufficient information to make an intelligent choice. In short, fairness requires disclosing a minimum threshold of information to the consumer.

B. *Riley: Taking Away Valuable Information*

A valuable source of that information took a fatal blow in *Riley v. National Federation of the Blind of North Carolina*.³⁸ *Riley* examined a regulation which required TPFs to disclose the percentage of funds raised

34. *Id.* at 963.

35. *Id.* at 969.

36. *Id.* at 962 n. 9.

37. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 636-37 (1980).

38. 487 U.S. 781 (1988).

that were turned over to charity in the previous 12 months.³⁹ In other words, when a TPF talked to a potential donor, they were required to tell them “last year, X% of the money we raised was given to charity.” A donor could decide if they wanted to donate to the TPF based on all the information. This method eliminated the concern expressed in *Schaumburg* and *Munson* about unpopular charities: they could get their information out to the public without having to comply with an arbitrary cap.

The *Riley* Court began by reciting some of the concerns about paternalism that were expressed in *Schaumburg* and *Munson*: “As we have just demonstrated . . . the State’s generalized interest in unilaterally imposing its notions of fairness on the fundraising contract is both constitutionally invalid and insufficiently related to a percentage-based test.”⁴⁰ Next, the Court turned to the requirement that the TPF disclose the percentage to the donor, finding that such a requirement would impermissibly alter the content of the speech.⁴¹ Basically, the message would apparently be altered by adding in a disclosure. As a result, the Court found that this mandatory disclosure would unnecessarily chill speech: “Moreover, the compelled disclosure will almost certainly hamper the legitimate efforts of professional fundraisers to raise money for the charities they represent.”⁴²

Why would compelling disclosure “certainly hamper the legitimate efforts of professional fundraisers?”⁴³ The Court did not directly answer that question, but the reasoning seems to go something like this: if TPFs are required to reveal their fundraising percentages, then donors are less likely to donate to them. This will hamper their fundraising. However, this logic misses the point of the regulation: if TPFs are required to reveal their percentages, then consumers are able to make “informed decisions” when deciding if they want to donate. Indeed, the very disclosure which the Court assumed would “hamper fundraising” only did so by promoting transparency. The Court was nominally concerned that an important tool would be taken away from legitimate charities. However, the contours of the Court’s prohibition are unclear. For example, can regulators require that TPFs identify themselves? Can they require other sorts of compelled speech? While *Riley* fails to answer that question, the decision broadly prohibits compelled speech about fundraising ratios.

39. *Id.* at 786.

40. *Id.* at 792.

41. *Id.* at 795.

42. *Id.* at 799.

43. *Id.*

III. REEXAMINING THE RATIONALE FOR THE CONSTITUTIONAL LIMITS.

The confluence of *Schaumburg*, *Munson*, and *Riley* eviscerated many consumer protections against overzealous TPFs. By classifying third party solicitation as “being almost equal to pure speech,”⁴⁴ the Court gave TPFs extensive protections against regulations. This line of cases goes too far, stripping away the appropriate tools to ensure that abuse is not taking place by TPFs; consequently, certain aspects of those cases should be revisited. As discussed below, ample jurisprudential ammunition is at the disposal of the Court. The commercial speech doctrine, the Do-Not-Call list, and the content-neutrality tests suggest that the *Riley* line of cases should be brought into line with other constitutional doctrines.

Chief Justice Rehnquist, in his dissent in *Riley*, points out several problems with the majority’s reasoning:

This statute requires only that the professional solicitor disclose certain relevant and verifiable facts to the potential donor. Although the disclosure must occur at some point in the context of the solicitation (which can be either oral or written), it is directly analogous to mandatory disclosure requirements that exist in other contexts, such as securities transactions. In my view, the required disclosure of true facts in the course of what is at least in part a “commercial” transaction—the solicitation of money by a professional fundraiser—does not necessarily create such a burden on core protected speech as to require that strict scrutiny be applied.⁴⁵

As Rehnquist notes, the limits that would be enforced by the *Riley* majority are potentially internally inconsistent, and inconsistent with other statutory regimes. TPFs are engaging in an inherently commercial activity, far different than “pure speech.” As explored above, these activities are usually extremely profitable, with most of the funds raised going to the commercial enterprise.

A. *Riley and the Commercial Speech Doctrine*

The extension of such broad protection to an extremely profitable commercial enterprise conflicts with other Supreme Court jurisprudence. Normally, regulation of commercial speech is governed by the doctrine established in *Central Hudson Gas & Electric v. Public Service Commission of New York*.⁴⁶ In *Central Hudson*, the Court held that

44. Geoffrey D. Korff, *Do Not Knock? Lovell to Watchtower and Back Again*, 38 CAP. U. L. REV. 535, 552 (2010).

45. *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 811 (Rehnquist, J., dissenting).

46. 447 U.S. 557 (1980).

commercial speech may be regulated more strictly because “commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity.”⁴⁷ Paralleling the “information asymmetry” with telefundraising, the commercial consumer lacks information about the veracity of the speech. This puts the consumer at a clear disadvantage. Like any commercial setting, the telephone fundraiser has “extensive knowledge” about their activities that are much less available to the potential donor.

As the Court noted in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, “[t]he truth of commercial speech . . . may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else.”⁴⁸ Analogizing to telefundraising, the TPF is best situated to disclose that they are a paid solicitor, as opposed to forcing the consumer to deduce that information in a vacuum. Indeed, the objective verifiability of the information proffered allows greater restrictions on not only commercial speech, but also areas like defamation.⁴⁹

Additionally, the *Central Hudson* decision relied on the “commonsense” notion that those with an economic interest may have additional incentive to mislead.⁵⁰ For obvious reasons, entities standing to profit from the exaggeration of truth ought to be regulated. As the Court put it, “The First Amendment’s concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.”⁵¹ Along the same lines, the Court recognized that the government “may ban forms of communication more likely to deceive the public than to inform it.”⁵² TPFs have an incentive to misrepresent themselves to consumers: their financial interests rely on implying, if not outright convincing, donors that they are directly employed by the non-profit. Since TPFs, as commercial entities, have a perverse economic

47. *Id.* at 564 n. 6.

48. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 772 n. 24 (1976).

49. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985) (noting objective verifiability “to show how many of the same concerns that argue in favor of reduced constitutional protection” in commercial speech actions apply to defamation of private parties also).

50. *Central Hudson*, 447 U.S. at 563.

51. *Id.*

52. *Id.*; accord *Va. State Bd. of Pharmacy*, 425 U.S. at 771 (“[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake.”).

incentive to misrepresent the truth, the government should be able to curtail communication likely to deceive the public.

Normally, the Court employs intermediate scrutiny to commercial speech restrictions, asking: “whether the asserted governmental interest is substantial . . . , whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.”⁵³ Applying this standard allows the government to regulate some speech that is likely to mislead the public, while preserving the right of commercial entities to engage in other forms of speech that are unregulated. Intermediate scrutiny is the appropriate standard for TPFs, since they are engaged in an inherently commercial form of activity. Although some of their revenues may partially go to charities, they still retain a massive amount of the money raised. As explored above, that amount averages 30 dollars on every 50 dollars raised. Thus, the profit margins for these TPFs are enormous. Intermediate scrutiny allows the Court to balance freedom of speech against the interest of the consumer.

Regulations compelling commercial entities to make disclosures routinely survive intermediate scrutiny. For example, creditors are required to disclose credit information in a uniform manner under the Truth in Lending Act (“TILA”).⁵⁴ When passing TILA, Congress found that:

[b]y requiring all creditors to disclose credit information in a uniform manner, and by requiring all additional mandatory charges imposed by the creditor as an incident to credit be included in the computation of the applicable percentage rate, the American consumer will be given the information he needs to compare the cost of credit and to make the best informed decision on the use of credit.⁵⁵

In the credit context, lawmakers found it appropriate to give consumers full information. Making decisions about money requires full information. Donations to charity should be no exception.

Similar reasoning governed the implementation of the Nutrition Labeling and Education Act of 1990, found at 21 U.S.C.A. § 343: “Information about the nutritional ingredients in fruits, vegetables, and fish will be made available through signs or brochures. Consumers have long demanded this information, but under current law it is optional. Under the bill it will be mandatory.”⁵⁶ Consumers may choose not to

53. *Central Hudson*, 447 U.S. at 566.

54. 15 U.S.C.A. § 1601 *et seq.* (West 2010).

55. H.R. REP. NO. 90-1040, at 13 (1967), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1970; *see also Mourning v. Family Publ'ns Serv.*, 411 U.S. 356, 364 (1973).

56. 136 Cong. Rec. H12,953 (daily ed. Oct. 26, 1990) (statement of Rep. Henry A.

purchase certain nutritionally lacking, if delicious, items if they have full knowledge about their contents. In both the debt and nutritional contexts, Congress has found it appropriate to govern the contents of commercial speech in order to protect consumers. Such protection ought to extend to the domain of TPFs.

B. The Do-Not-Call List

A major parallel example of a regulation which survived constitutional scrutiny is the Do-Not-Call List (“DNCL”). The DNCL is a registry created to allow individuals to opt out of being contacted by telephone solicitors. A person simply puts their name in a database, and marketers are prohibited from contacting them. When establishing the DNCL, Congress found that:

Every consumer should have the right to choose whom they want to talk to. We allow consumers to opt out of junk mail. All they have to do is go down to the post office and tell the Postal Service they do not want junk mail coming to their house, and it does not come. They can choose not to answer a knock at the door. They can decide who enters their house and who communicates with them there. Consumers ought to have the power to say “no” to unwelcomed and unwanted telemarketing calls.⁵⁷

Consequently, a nation-wide system of registration was established, governed by 16 C.F.R. § 310.4(b)(1)(iii), to ensure that telephone solicitors are prevented from contacting the unwilling. Original versions of the DNCL registries did not treat TPFs any differently than normal solicitors—this was changed in the final version to harmonize with *Riley*.⁵⁸

Federal jurisprudence has universally upheld the constitutionality of the DNCL. In *Rowan v. United States Post Office Department*, the Supreme Court recognized “the ancient concept that ‘a man’s home is his castle’ into which ‘not even the king may enter’ has lost none of its vitality.”⁵⁹ Along the same lines, the Court noted in *Frisby v. Schultz*, that “[T]he State’s interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.”⁶⁰ Further, the *Frisby* Court noted that:

Waxman).

57. 149 CONG. REC. H8917 (daily ed. Sept. 25, 2003) (statement of Rep. W. J. Tauzin).

58. Telemarketing Sales Rule, 67 Fed. Reg. 4492 (proposed Jan. 30, 2002). Interestingly, the original versions of this rule instinctually viewed TPFs as possessing the same qualities and causes for concern as normal telephone solicitors.

59. *Rowan v. U.S. Post Office*, 397 U.S. 728, 737 (1970).

60. *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980)).

One important aspect of residential privacy is protection of the unwilling listener [A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.⁶¹

Specifically looking at the DNCL, the Tenth Circuit held that:

The telemarketers assert that the do-not-call registry is unconstitutionally underinclusive because it does not apply to charitable and political callers. First Amendment challenges based on underinclusiveness face an uphill battle in the commercial speech context. As a general rule, the First Amendment does not require that the government regulate all aspects of a problem before it can make progress on any front.⁶²

The same arguments apply with equal force in favor of stricter regulations on TPFs. Like those contacted by commercial fundraisers, donors contacted by a third-party for profit company are unwilling listeners. Indeed, they may be amenable to the underlying non-profits message; however, they do not have the information necessary to decide if they want to listen to a commercial fundraiser. Consequently, donors should not be “required to welcome unwanted speech” simply because they have less information about the nature of the call.

C. *Public Forums and Content-Neutrality*

Furthermore, stricter regulations should attach to TPFs because they use an inherently private channel of communication. Public forums enjoy more constitutional protection. Phones are not public forums, but rather lines of communication that run directly into someone’s house. The Eighth Circuit took that position in *Van Bergen v. Minnesota* when it held that “for First Amendment purposes, the telephone system is neither a public property nonpublic forum, nor a limited public forum, but a private channel of communication.”⁶³ Similarly, the Third Circuit has held that “the privacy of the home, and the obligation of government to protect that privacy, are entitled to particular solicitude from the courts.”⁶⁴ Precedent suggests that use of phone lines does not constitute

61. *Id.*

62. *Mainstream Marketing Servs., v. FTC.*, 358 F.3d 1228, 1238 (10th Cir. 2004); see also R. Michael Hoefges, *Telemarketing Regulation and the Commercial Speech Doctrine*, 32 J. LEGIS. 50 (2005).

63. *Van Bergen v. Minn.*, 59 F.3d 1541, 1553 (8th Cir. 1995).

64. *Pa. Alliance for Jobs and Energy v. Council of Borough of Munhall*, 743 F.2d 182, 186 (3d Cir. 1984).

the use of a public forum. As a result, individuals should have the ability to exclude speech from their private homes as they please. Telephones are inherently intrusive devices—when a solicitor 100 miles away presses seven digits, an alarm is made to go off in your house. Indeed, the TPF is reaching out to somewhat of a captive audience since the individual is in his house. As noted in *Frisby*, “The First Amendment permits the government to prohibit offensive speech as intrusive when the ‘captive’ audience cannot avoid the objectionable speech.”⁶⁵

Additionally, the regulation of fundraising disclosures is content-neutral—there is no discrimination as to what point of view the fundraisers can take. Rather, it is more akin to a time, place, and manner restriction. As the Supreme Court held in its seminal case, *Ward*:

The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government’s purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.⁶⁶

In the context of telephone fundraising, regulations on percentage disclosures would clearly have a disproportionate effect on TPFs that have higher costs. However, that does not mean that it would be unconstitutional according to the “content-neutral” logic present in *Ward*. Time, place, and manner restrictions on charitable calls have been found to be constitutional.⁶⁷ In most cases, a content-neutral regulation poses “a less substantial risk of excising certain ideas or viewpoints from the public dialogue.”⁶⁸

On the other hand, in *Texas v. Johnson* the Court found that burning the American flag could not be prohibited because the regulation took aim at “expressive conduct” that was part of a “political demonstration.”⁶⁹ Regulation aimed at a non-expressive aspect of speech may be proscribed; however, if the purpose of the regulation is to suppress “expressive conduct,” then the regulation is unconstitutional.⁷⁰

65. *Frisby*, 487 U.S. at 487 (1988).

66. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal citations omitted).

67. *Van Bergen*, 59 F.3d at 1553.

68. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994).

69. 491 U.S. 397, 406 (1989).

70. *See, e.g., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 881 (1982) (Blackmun, J., concurring) (“removing a learned treatise criticizing American foreign policy from an elementary school library because the students would not understand it is an action unrelated to the purpose of suppressing ideas.”); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513-14 (1969) (holding that schools could proscribe substantially

Even so, statutes that literally regulate speech are permissible “so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot.”⁷¹ Put another way, “the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”⁷² Statutes that target ideas are repugnant to the First Amendment. However, restrictions on speech of “such slight social value as a step to truth” that are “clearly outweighed by the social interest in order and morality” may be permissible.⁷³ Regulations placed on TPF speech is content-neutral since the actual substance of the message is not impacted. The restrictions merely help consumers make a more reasonable choice without impacting the message delivered to potential donors.

In sum, the current ambient constitutional surrounding of the *Riley* line of cases is in tension with the decision itself. Why are TPFs free from the intermediate scrutiny applied to all other commercial entities? Why are TPFs free from devices such as compelled disclosure and DNCLs? TPF speech involves neither a public forum, nor content-specific speech. Consequently, the Court has ample ammunition to change the constitutional framework to better allow information to reach consumers.⁷⁴

IV. CURRENT STATE SOLUTIONS: REGISTRATION AND BONDS

The Supreme Court’s condemnation of certain regulations of fundraisers has not prevented states from attempting to regulate TPF activity. These regulations take a variety of forms, but generally comport with the Supreme Court’s mandate that percentages do not have to be disclosed at the point of contact. As Hopkins put it, “The states have the difficult, but essential, tasks of protecting their citizens from charlatans who prey on their charitable natures.”⁷⁵ The question remains: in light of the current state of TPF jurisprudence, what can states do in order to protect their citizenry? The approach varies from state to state; however,

disruptive speech, so long as the regulation was not based on disagreement with the ideas expressed).

71. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 390 (1992).

72. *Johnson*, 491 U.S. at 414.

73. *Virginia v. Black*, 538 U.S. 343, 358-59 (2003) (quoting *R.A.V.*, 505 U.S. at 382-83).

74. The precise contours of this debate remain murky far beyond the contours of telephone fundraising; for example, the Supreme Court seems destined to revisit this debate regarding the compelled display of graphic anti-smoking pictures. *Compare* *R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin.*, Civ. 11-1482, 2012 WL 653828 (D.D.C. Feb. 29, 2012) (finding government regulations requiring cigarette companies to display graphic anti-smoking pictures unconstitutional by applying strict scrutiny) to *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 522 (6th Cir. 2012) (finding graphic anti-smoking pictures constitutional under the commercial speech doctrine).

75. *HOPKINS*, *supra* note 2, at 37.

the current model generally requires the TPF to register and post a bond to protect against abusive practices.

Nearly all of the states currently require TPF registration.⁷⁶ The purpose of this step is simple: to ensure that TPFs are actually participating with a non-profit entity at all, and not merely just committing fraud. An example of such a statute from Kentucky:

Prior to orally requesting a contribution or when requesting a contribution in writing, a professional solicitor shall clearly disclose: (a) His name as set out in the registration statement filed with the Attorney General pursuant to KRS 367.652 and the fact that he is being paid for his services. (b) The name of the charitable organization he represents and a description of how the contributions raised by the solicitation will be used for a charitable or civic purpose.⁷⁷

Some states require that TPFs submit a bond while registering. The goal of the bond is to deter illegitimate fundraisers from taking advantage of a fly-by-night strategy, where they “raise money” and then disappear. These malfeasance bonds range from 10,000 to 50,000 dollars.⁷⁸ As the California statute puts it: “The cash deposit or bond shall be in the amount of twenty-five thousand dollars (\$25,000) and shall be for the benefit of any person damaged as a result of malfeasance or misfeasance in the conduct of the activities specified in subdivision (a) of Section 12599.”⁷⁹

However, the bond system has clear limitations—it only covers a very small amount of potential damages, and unscrupulous TPFs could easily make more in profits than the initial bond. Furthermore, the bonding system only comes into play if there is some sort of fraud; it does not remedy the fact that the consumer does not know the lay of the charitable landscape. Under these schemes, TPFs could still keep all of the money raised and not have to pay out the bond.

Similarly, some states require TPFs to make certain filings with a regulatory agency. Some of these filings include the contracts that TPFs have with charities. For example, Colorado requires that:

76. *See, e.g.*, ALA. CODE § 13A-9-71 (2010); ALASKA STAT. § 45.68.010 (2010); CAL. GOV'T CODE § 12599 (West 2009); FLA. STAT. ANN. §§ 496.410, 412 (West 2010); GA. CODE ANN. §§ 43-17-3, -4, -8 (West 2010). *But see*, DEL. CODE. ANN. tit. 6, § 2591-97 (2010) (not requiring registration).

77. KY. REV. STAT. ANN. § 367.668 (West 2010).

78. *Compare* ALA. CODE § 13A-9-71 (2010) (10,000 dollar bond), *with* FLA. STAT. ANN. §§ 496.410, 412 (West 2010) (50,000 dollar bond).

79. CAL. GOV'T CODE § 12599.5.

Every contract between a paid solicitor and a charitable organization or sponsor for each solicitation campaign shall be in writing and shall be signed by an authorized official of the charitable organization or sponsor, one of whom shall be a member of the organization's governing body, and by the paid solicitor if the paid solicitor is an individual or by the authorized contracting officer for the paid solicitor if the paid solicitor is not an individual. The paid solicitor shall provide a copy of the contract to the charitable organization prior to the performance of any material services under the contract and shall make a copy of the contract available to the secretary of state upon request.⁸⁰

The rationale behind this measure apparently is that the TPF and the charity enter into a *fair* contract; however, there is no requirement of what the contract must include. Therefore, the filing requirement merely ensures that there is a contract between the parties, without arbitrating the equity of the arrangement.

Other states require that TPFs file a report after the fundraising drive that indicates what percentage of funds raised goes to charity.⁸¹ Indeed, these reporting requirements are the only way the public knows how much money is retained by the TPFs.

California *requires* that TPFs disclose this ratio to the donor at the point of solicitation: "It shall be unlawful for a commercial fundraiser for charitable purposes to not disclose the percentage of total fundraising expenses of the fundraiser upon receiving a written or oral request from a person solicited for a contribution for a charitable purpose."⁸² In other words, although they are not required to make an affirmative disclosure to the potential donor at the point of contact, they are required to provide that information when asked. This innovation strikes a unique balance between the prohibitions contained in *Riley*, and other state solutions.

In sum, the current state solutions are insufficient to effectively control the epidemic of TPF abuse. Due to the current Supreme Court restrictions on possible methods of regulation, these regulations merely curb possible fraud. However, they do not remedy the most pressing problem: the lack of consumer knowledge when making a decision to donate. In order to effectively control TPF activity, consumers must have more information at their disposal.

V. PROPOSALS UNDER THE CURRENT STRUCTURE: DISCLOSURES, CONTRACTS AND WATCHDOGS

Additional reforms comporting with the current constitutional

80. COLO. REV. STAT. ANN. § 6-16-104.6(2) (West 2006).

81. See CAL. GOV'T CODE § 12599(c)-(d).

82. *Id.* § 12599(j).

scheme could prevent some abuses. Adding charities to a Do-Not-Call list or requiring a percentage floor would be unconstitutional. It is possible that at some point in the future, the Court will move back towards the intermediate scrutiny approach outlined above; however, given the current composition and views of the court, that is unlikely.⁸³ In the meantime, states should consider (1) requiring TPFs to disclose to the consumer that they are talking to a TPF, (2) limiting or placing limits on the sort of contracts that TPFs and non-profits may enter into, and (3) establishing a federal watchdog agency to track and publish information about TPF activity.

Requiring TPFs to disclose to consumers that they are talking with a for-profit entity puts the consumer on notice to be wary, and is likely not foreclosed by the First Amendment. Under this proposal, TPFs would be required to tell the possible donor at the beginning of the call that they are speaking to a paid fundraiser. Indeed, a number of states already require this step.⁸⁴ However, the lack of universality makes the regulatory scheme burdensome and complicated. Donors do not know what to expect when they receive a call. If all TPFs were required to tell the donors that they are a professional fundraiser, it would at least put donors on notice to make further inquiries if needed. Therefore, all states should adopt this requirement—the TPF should have to announce that they are a TPF at some point during the call.

Requiring such disclosure would be especially effective if TPFs were additionally required to report the percentage of money going to charities to a regulatory agency and inform the consumer that they could find that information on a website. In that scenario, donors who are concerned about the ratio of money going to a third party could research the organization before they make a donation. Indeed, in the world of computers and smartphones, donors might very well be able to look up that percentage while on the phone with the fundraiser. Therefore, TPFs would have a greater incentive to keep the ratio low—if there is a credible threat that the donor will discover the “dirty laundry,” TPFs would have an incentive to keep that information less damning. This would perhaps give donors the best information to make a choice, short of requiring the percentage disclosure prohibited by *Riley*.

83. See, e.g., *Citizens United v. Fed. Election Comm’n*, 130 S.Ct. 876 (2010) (holding that certain campaign finance reform regulations on corporations were unconstitutional). Many commentators have suggested that this case is emblematic of how the Supreme Court will address future freedom of speech cases. See e.g., Case Comment, *Citizens United v. FEC: Corporate Political Speech*, 124 HARV. L. REV. 75, 75 (2010). For a possible continuation of that trend, see *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (holding “crush tapes” of animals being killed are protected by the First Amendment).

84. ARIZ. REV. STAT. ANN. §§ 44-6554, 6555 (2010); ARK. CODE ANN. §§4-28-407, 409 (2010); CONN. GEN. STAT. ANN. § 21a-190f (West 2010).

Another step that would make TPFs less abusive would be to impose limits on the types of contracts that they can enter into. As noted above, many of the abuses come from per-contact agreements. The current system rewards TPFs simply for making contact with the consumer. Theoretically, the per-contact system eliminates the potential for abuse by removing the incentive of the TPF to engage in high pressure tactics when making a pitch. However, in reality, the individual callers are frequently paid or rewarded based on the amount of money they raise. Therefore, the incentive to upsell still exists, with the possibility that no money will actually be returned to the charity. If TPFs were required to only charge a flat rate, or a fixed low percentage of the funds-raised, then there would be less possibility of absurd results. By mandating that TPF contracts meet a minimum threshold of profit for the underlying charity, states could better protect consumer interests.

Finally, Congress should consider creating a federal watchdog agency that exclusively examines TPF activity. Many of the TPFs do not call simply within one state. Indeed, these call centers reach the entire country. For that reason, state specific regulation has a difficult task when asked to prevent fundraising abuses. At the same time, the multi-state regulatory scheme has some advantages: new and innovative methods of controlling TPFs are needed in light of the current restrictive constitutional structure. Therefore, the ideal solution would be to create a federal watchdog agency that would keep track of TPF activity. This agency would have a jurisdictional hook for all TPFs that call between states. By gathering data on TPF activity and reaching out to possible donors, a well-structured watchdog could provide much needed transparency. One possible model would be akin to the Better Business Bureau, which relies on feedback from consumers.

Such a regulatory agency could also be a valuable tool for states seeking to enforce fraud regulations. While not constitutionally prohibited, TPFs that return a very small amount of money to charities would be subject to enhanced scrutiny. Providing information to state law enforcement agencies regarding TPFs nationwide could provide a clearer picture of which TPFs are operating unscrupulously.

A potential problem with this solution is that watchdogs are typically less effective than hoped in resolving abuses by the non-profit sector. Negative ratings by watchdog groups do not appear to have a negative impact on donor behavior.⁸⁵ Indeed, any such agency would have to find a way to get the required information to the consumer efficiently. For example, ad campaigns making consumers aware of the problem might help raise awareness.

To a certain extent, the hands of lawmakers at the federal and state

85. Sloan, *supra* note 10, at 230.

level are tied by the Supreme Court. However, simply waiting for the law to change with ongoing abuse is unacceptable. By requiring disclosure that they are being paid, restructuring contracts between TPFs and non-profits, and creating a federal watchdog agency, consumers would be better armed with the information and protections they deserve when considering donations.

VI. REJOINDER TO POLICY CRITICISM

As established above, there are positive steps that regulators could take to ensure less abusive TPF practices. However, the question remains about the normative value of taking such steps. Some commentators believe that additional regulations would be more onerous than valuable: “Abuses in the world of fundraising occur, to be sure, but nothing to warrant the volume of law crashing down on the nation’s charitable organizations, who, after all, are working for the benefit of society . . .”⁸⁶ While punishing charitable organizations defies society’s interest in charitable work, it is important to bear in mind that a TPF is a *commercial* entity. In other words, TPFs exist to make a profit. Although employed by non-profits, these companies are not setting out to work for the “benefit of society” any more than the company that supplies the non-profit’s copy machines. TPFs are instrumentalities. Abusive practices calls into question the validity of the entire charitable structure. Charities will benefit from increased trust in their instrumentalities.

Another critique argues that consumers may simply hang up the phone as soon as the caller identifies themselves as a third party fundraiser. Although a possibility, such a result would not be devastating to the interests of the charity. The charity still achieved contact with the potential donor. Perhaps if the donor was inclined to donate, such contact would inspire them to do so. Most importantly, however, if the donor does not want to make a donation through a TPF, and thereby to a TPF, then he should not be *required* to do so. The approbation that people feel about giving money to paid solicitors comes from valid economic instinct: there is something possibly abusive about paying someone to raise money for a non-profit. Donors are not obligated to donate, and should feel free to decline to contribute to a commercial entity’s profit margin. The Constitution ought not to provide a cloak of invisibility for TPFs.

Also, increased disclosure would force TPFs to become more efficient. By claiming reasonable overhead percentages, consumers would be less likely deterred by the disclosure. The precise logic applies to nutrition disclosures: if a food company knows the consumer could

86. HOPKINS, *supra* note 2, at xv.

learn of the health of their products, that company has an incentive to make healthier products. In effect, increased disclosure would force down the profit margin of the TPF. While possibly discouraging the less scrupulous or efficient fundraisers from participating, there would still be a need for legitimate organizations that specialize in fundraising. The practical effect of giving consumers more information would be to make the market more efficient due to the increased flow of information.

Is there really any difference between a TPF and staff employed by the charity? Yes: the TPF is trying to make a profit, and often times they succeed. If the charity were to use its own employees or volunteers, then the only cost would be the direct overhead, not a profit margin. There are some potential drawbacks to reform; however, those negative effects are more than made up for by the positive results of increased regulation.

CONCLUSION

The current state of telephone fundraising disclosure requirements needs to be overhauled. Major action needs to be taken to move away from the mentality that, "if the donor is lucky, a token amount will be used to actually help victims."⁸⁷ Charitable donations are a societal good, but must be channeled in such a way that the good that is intended to be created actually reaches the people in need. The current constitutional structure established in *Schaumburg* and *Munson and Reilly* deprive regulators of valuable tools that are normally available when regulating commercial entities. TPFs share characteristics with commercial entities and should not be subject to special treatment. While the current state solutions are better than nothing, there are additional steps that can be taken under the current constitutional rules: namely, requiring TPFs to identify that they are being paid, regulating the structure of contracts between non-profits and TPFs, and creating a federal watchdog agency. Regulations may limit the role of less efficient or scrupulous TPFs in fundraising; however, that result is desirable in order to effectively respect the will of donors. In short, Americans want to donate to non-profits. However, extracting profit from that transaction should be examined with heavy scrutiny and only done in such a way that ensures the consumer has a true choice in his decision.

87. *Id.* at 38.