Nos. 03-1429, 03-6258, 03-9571, 03-9594

ORAL ARGUMENT SCHEDULED FOR NOVEMBER 10, 2003

In the United States Court of Appeals for the Tenth Circuit

FEDERAL TRADE COMMISSION,

Defendant-Appellant,

v.

MAINSTREAM MARKETING SERVICES, INC., ET AL.,

Plaintiffs-Appellees.

On Appeal from the United States District Court for the District of Colorado,
No. 03-N-0184, The Hon. Edward W. Nottingham, Judge

FEDERAL TRADE COMMISSION,

Defendant-Appellant,

v.

U.S. SECURITY, ET AL.,

Plaintiffs-Appellees.

On Appeal from the United States District Court for the Western District of Oklahoma,
No. Civ. 03-122-W, The Hon. Lee R. West, Judge

MAINSTREAM MARKETING SERVICES, INC., ET AL.,
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

On Appeal from the Federal Communications Commission

BRIEF FOR
MAINSTREAM MARKETING SERVICES, INC., *et al.*, and U.S. SECURITY, *et al.*

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record certify as follows:

A. PARTIES

1. The parties in this Court are:

a. Defendant-Appellant:

Federal Trade Commission

b. Plaintiffs-Appellees/Petitioners:

Mainstream Marketing Services, Inc.

TMG Marketing, Inc.

American Teleservices Association

c. Petitioner:

Competitive Telecommunications Association

d. Plaintiffs-Appellees:

U.S. Security

Chartered Benefit Services, Inc.

Global Contact Services, Inc.

Infocision Management Corporation, Inc.

Direct Marketing Association, Inc.

e. Respondent:

Federal Communications Commission

2. Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Plaintiffs-Appellees/Petitioners Mainstream Marketing Services, Inc., TMG Marketing, Inc., and American Teleservices Association

state that none of them have a parent entity and that no publicly held entity owns more than 10 percent of their stock; Plaintiffs-Appellees U.S. Security, Global Contact Services, Inc., Infocision Management Corporation, and Direct Marketing Association, Inc., state that none of them have a parent entity and that no publicly held entity owns ten percent of their stock; Plaintiff-Appellee Chartered Benefit Services, Inc., states that Chartered Holdings, LLC, holds more than 10% of its stock.

B. RULING UNDER REVIEW

The rulings under review are *Mainstream Mktg. Servs., Inc. v. FTC*, 2003 WL 22213517 (D. Colo. Sept. 25, 2003); *U.S. Security v. FTC*, 2003 WL 22203719 (W.D. Okla. Sept. 23, 2003); and *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014 (2003).

C. RELATED CASES

Pursuant to Circuit Rule 28(a)(1)(C), the non-governmental parties listed above state that, other than *U.S. Security v. FTC*, No. 03-6276 (10th Cir. filed Oct. 17, 2003), and *National Fed'n of the Blind v. FTC*, No. JFM 03 CV 963 (D. Md. filed April 2, 2003), they are aware of no pending cases in this Court or any other court involving substantially the same parties and the same or similar issues.

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Statement of Related Cases:

As stated *supra* at page ii, there are two pending cases, *U.S. Security v. FTC*, No. 03-6276 (10th Cir. filed Oct. 17, 2003), and *National Fed'n of the Blind v. FTC*, No. JFM 03 CV 963 (D. Md. filed April 2, 2003), that involve similar parties or issues to those at bar.

GLOSSARY OF ACRONYMS AND SHORT FORMS

FTC	Appellant Federal Trade Commission
FCC	Respondent Federal Communications Commission
Mainstream	Plaintiff-Appellee/Petitioner Mainstream Marketing Services, Inc.
TMG	Plaintiff-Appellee/Petitioner TMG Marketing, Inc.
ATA	Plaintiff-Appellee/Petitioner American Teleservices Association
Mainstream Petitioners	Mainstream, TMG and ATA
U.S. Security	Plaintiff-Appellee U.S. Security
Chartered	Plaintiff-Appellee Chartered Benefit Services, Inc.
Global	Plaintiff-Appellee Global Contact Services, Inc.
Infocision	Plaintiff-Appellee Infocision Management Corp.
DMA	Plaintiff-Appellee Direct Marketing Association, Inc.
U.S. Security Appellees	U.S. Security, Chartered, Global, Infocision and DMA
CompTel	Petitioner Competitive Telecommunications Association
Petitioners	Mainstream Petitioners, U.S. Security Appellees and CompTel
Gov. Br. or Government's Brief	Consolidated Opening Brief of Appellant FTC, Respondent FCC, and Intervenor United States of America

J.A.	Appendix to Government's Brief
P.A.	Appendix to Petitioners' Brief
CompTel Br.	Brief of Petitioner Competitive Telecommunications Association
Stay Tr.	*Mainstream Mktg. Servs., Inc. v. FTC*, No. 03-N-0184, Reporter's Transcript, Status Conference, Sept. 29, 2003 (P.A. 0001-15)
Valentine & Kennelly Affidavits	Affidavits of Lynda Valentine and Cleve Kennelly, in *U.S. Security, et al. v. FTC*, Case No. 03-122-W (W.D. Okla.) (P.A.0734-59)

Senate Br.	Brief of *Amicus Curiae* of Undersigned Members of the United States Senate Committee on Commerce, Science, and Transportation in Support of Reversal
House Br.	Brief of *Amicus Curiae* Representatives W.J. "Billy" Tauzin and John D. Dingell and Certain Other Members of the House of Representatives of the United States in Support of Appellant and Intervenor
State Br.	Brief of *Amici Curiae* of California, *et al.*, in Support of the Federal Trade Commission and the Federal Communications Commission
AARP Br.	Brief of *Amicus Curiae* AARP in Support of Defendants/ Appellants Urging Reversal
Telemarketing Act	Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-6108 (11a-18a)
TCPA	Telephone Consumer Protection Act, 47 U.S.C. § 227 (1a-10a)
Implementation Act	Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (2003) (19a-20a)
2003 Appropriations Act	Consolidated Appropriations Resolution of 2003, Pub. L. No. 108-7 (2003)
TSR	Telemarketing Sales Rule, 16 C.F.R. §§ 310.1-310.9 (22a-37a)
DNCR	Do-Not-Call Registry
FTC Order	*Amended Telemarketing Sales Rule*, 68 Fed. Reg. 4580 (2003) (J.A. 214-314)
FTC Fee Order	*Amended Telemarketing Sales Rule Fees*, 68 Fed. Reg. 45134 (2003)

	(P.A. 0016-29)
FCC Order	*Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014 (2003) (J.A. 894-1058)
FCC NPRM	*Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 17 FCC Rcd. 17459 (2002)

First TCPA Order	*Rules and Regulations Implementing the Telephone Consumer Protection Act*, 7 FCC Rcd. 8752 (1992), *recon. granted in part*, *denied in part*, 10 FCC Rcd.12391 (1995)
FCC NOI Order	*Unsolicited Telephone Calls*, 77 F.C.C.2d 1023 (1980)
DNC-Tr.	Telemarketing Sales Rule "Do-Not-Call" Forum, Matter No. P994414 (Jan. 11, 2000) (P.A. 0562-617)
June 2002 Tr.	Telemarketing Sales Rule, "Rulemaking Workshop" Forum, Matter No. P994414 (June 5-7, 2002) (P.A. 0618-32)
RR-Tr.	Telemarketing Sales Rule, "Rule Review" Forum, Matter No. P994414 (July 27-28, 2003) (P.A. 0633-46)
H.R. Rep. 108-8	Do-Not-Call Implementation Act, H. Rep. No. 108-8, 108th Cong., 1st Sess. (Feb. 11, 2003)
S. Rpt. 102-177	Senate Report (Commerce, Science and Transportation Committee) No. 102-177, Oct. 8, 1991 (to accompany S. 1410), *reprinted in* 1991 USCCAN 1968
H. Rep. 102-317	House Report (Energy and Commerce Committee) No. 102-317, Nov. 15, 1991 (to accompany H.R. 1304)
H. REP. 103-20	H. REP. NO. 103-20 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1626
Know Your Call Act Hearing	*The Know Your Caller Act of 1999 and the Telemarketing Victim Protection Act of 1999: Hearing on H.R. 3100 and H.R. 3180 Before the House Comm. on Commerce Subcomm. on Telecomms., Trade and Consumer Prot.*, 106th Cong. 27 (2000) (P.A. 0647-715)
NARUC	National Association of Regulatory Utility Commissioners

NACAA	National Association of Consumer Agency Administrators
NCL	National Consumers League
ATA Comments	Comments of the American Teleservices Association, *Implementation of the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, filed Dec. 9, 2002 (P.A. 0030-242)

ATA Reply	Reply Comments of the American Teleservices Association, *Implementation of the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, filed January 31, 2003 (P.A. 0243-305)
ATA *Ex Partes*	Letters from Ronald G. London, Counsel, ATA, to Marlene H. Dortch, June 6 & 12, 2003, CG Docket No. 02-278 (P.A. 0306-22)
Pechnik	Comments of Thomas M. Pechnik, *Implementation of the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, filed Nov. 29, 2002 (P.A. 0323-35)
Hathaway	Comments of Edwin Bailey Hathaway, *Implementation of the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, filed Nov. 4, 2002 (P.A. 0336)
Reichenbach	Comments of Gregory Reichenbach, *Implementation of the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, filed Dec. 9, 2002 (P.A. 0337)
Gagnon	Comments of James D. Gagnon, *Implementation of the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, filed Dec. 2, 2002 (P.A. 0338)
DMA Comments	Comments of the Direct Marketing Association, Inc. and the U.S. Chamber of Commerce, Telemarketing Rulemaking, Comment FTC File No. R411001 (Proposed Amendments to the Telemarketing Sales Rule), April 15, 2002 (P.A. 0344-428)
Brass-RR	Comments of Eric Brass, February 28, 2000 Request for Comment (P.A. 0339)
Bennett-RR	Comments of Douglas H. Bennett, FTC, February 28, 2000 Request for Comment (P.A. 0340)
Hickman-RR	Comments of Bill and Donna Hickman, FTC, February 28, 2000 Request for Comment (P.A. 0341)

Menefee-RR	Comments of Marcie Menefee, FTC, February 28, 2000 Request for Comment (P.A. 0342)
Peters-RR	Comments of John Peters and Constance Frederick, FTC, February 28, 2000 Request for Comment (P.A. 0343)

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v.

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Respondent.

On Appeal from the Federal Communications Commission

BRIEF FOR
MAINSTREAM MARKETING SERVICES, INC., *et al.*, and U.S. SECURITY, *et al.*

ISSUES PRESENTED FOR REVIEW

1. Whether it violates commercial telemarketers' First Amendment rights to leave to residential telephone subscribers only the choice of placing their telephone numbers on a national registry, while vesting exclusively in the government the right to decide, based on content, which calls to numbers on the registry are blocked and which are not?

2. Whether it violates commercial telemarketers' First Amendment rights to discriminate between commercial and noncommercial telemarketing solicitations where the government has proffered no demonstrable correlation for this discriminatory treatment and its interest in preventing unwanted calls?

3. Whether the government met its burden of demonstrating it materially advances its interest in reducing unwanted telephone solicitations when it prohibits unwanted calls from only a subset of commercial telemarketers, while leaving completely unaddressed the large volume of equally unwanted calls from noncommercial telemarketers?

4. Whether the government has met its burden of demonstrating there were no other obvious, more narrowly tailored alternatives – other than a blanket "do-not-call" registry that substantially burdens commercial speech – when the government was presented with an array of less restrictive alternatives that materially reduce unwanted commercial telemarketing calls, including, among others, strengthened company-specific do-not-call rules, which the government never bothered to enforce or publicize?

5. Whether the government may impose a fee on selected telemarketers as a precondition for engaging in protected speech where the government will use the funds it collects for general agency administration?

STATUTES

All pertinent statutes and regulations are attached to the government's brief.

STATEMENT OF THE CASE

This case is a cautionary tale about what happens when federal agencies allow perceived political imperatives to override legal and constitutional concerns. Since 1992, the FCC, later joined by the FTC, has had company-specific "do-not-call" rules requiring telemarketers to honor individual requests to stop placing calls. The vast majority of telemarketers followed these rules and most consumers who used them found that they worked to limit the number of calls received. But most people did not know of their rights under the law, which neither agency ever enforced. Accordingly, the FTC and FCC concluded the old rules had failed – notwithstanding widespread public ignorance and absence of agency enforcement – and adopted the national "do-not-call" registry ("DNCR") which, once a consumer registers, imposes a blanket preemptive ban on certain commercial callers selected by the government. However, the agencies also decided, incongruously, that company-specific rules are effective, at least for certain callers, such as commercial call centers making calls for non-profit entities. The public, largely unaware of its rights under the prior regulation, enthusiastically supported the new rules that are only now being widely promoted (for the first time).

The DNCR violates basic First Amendment principles that the TCPA requires the government to consider. It imposes excessively restrictive regulations despite the fact that the agencies themselves found less onerous alternatives would work – most obviously educating the public and enforcing and strengthening their other rules. The FTC and FCC adopted the measure heedless of the widespread adverse consequences for honest telemarketers, whose concerns were brushed aside without analysis. They also riddled the DNCR with exceptions that limit its ability to serve its purported purpose under the dubious

premise that some speakers have First Amendment rights that others do not. Two district courts below correctly found that the agencies acted illegally.

STATUTORY AND REGULATORY BACKGROUND

A. The Telemarketing Act, TCPA, and Initial Rules

The DNCR rules under review are the product of two federal agencies acting pursuant to two different laws, only one of which was focused on unsolicited telephone calls. The Telemarketing Act, under which the FTC launched the initial actions leading to these rules, says nothing about "do-not-call" mandates, but rather targets crimes perpetrated via telemarketing. H. REP. 103-20 at 2, 1993 U.S.C.C.A.N. at 1627. It authorizes FTC "rules prohibiting deceptive telemarketing … and other abusive telemarketing acts or practices," 15 U.S.C. § 6102(a)(1), with a primary focus on illegal activities, not honest telemarketing. Congress was concerned with "unscrupulous activities from which no one benefits but the perpetrator" and sought "equitable balance between … stopping deceptive (including fraudulent) and abusive telemarketing activities and not unduly burdening legitimate businesses." [1]

As a result, the FTC's enforcement priorities through 2000 focused almost entirely on fraud, which the agency identified as a problem distinct from unsolicited calls. In a fifth-year review of its rules, the FTC reported to Congress "we have a lot of complaints about telemarketing, [but] almost all of them concern allegations of fraud. Only about 1 in 10 … concern unwanted calls." [2] Consequently, FTC enforcement efforts were directed exclusively toward fraud. Indeed, at a 2000 workshop, FTC Assistant Director of Marketing Practices Eileen Harrington stated, in response to comment that the agency never enforced the company-specific opt-out requirement, "you're absolutely right, that our enforcement priority has been fraud, and it will continue to be fraud until there isn't any more fraud. That was why this rule was issued primarily." DNC-Tr. at 104. (P.A. 0583) The FTC considered "do-not-call" issues to be completely separate, and of far lesser priority. [3] This changed after the agency placed adoption of the DNCR at the top of its policy agenda.

By sharp contrast, the FCC acted pursuant to the TCPA, which "recognizes the legitimacy of the telemarketing industry." *First TCPA Order* at 8753. The TCPA directed the FCC to ensure that any "do-not-call" regulations maintain an appropriate balance between commercial interests and privacy concerns while meeting constitutional standards. S. Rpt. 102-177 at 6. As originally proposed, the TCPA would have required the FCC to implement a national "do-not-call" registry. *Id.* at 4-6. However, the proposed mandate was replaced with a directive to consider alternatives and adopt balanced regulations meeting constitutional standards. *Id* at 4-5. *See also* H. Rep. 102-317 at 19.

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[1] H. REP. 103-20 at 4, 1993 U.S.C.C.A.N. at 1629. *See also* Cong. Rec. H 6160 (July 25, 1994) (statement of Rep. Swift) (bill "does not impose further restrictions on the legitimate telemarketing industry" but rather "target[s] strictly … telemarketing fraud, deception and other patterns of clearly abusive telemarketing activities); *id.* at 6161 (statement of Rep. Moorhead) (telemarketing fraud "also damages the legitimate honest telemarketers who rely upon telecommunications technology to make … goods and services more readily available to the American public").

[2] *Know Your Caller Act Hearing* at 27 (P.A. 0676) (statement of Eileen Harrington).

[3] DNC-TR. at 104-05 (P.A. 0583-84) (statement of Eileen Harrington) ("We don't hear nearly the level of concern from the public about ['do-not-call'] that we do … about misrepresentation and fraud" so "we … are concerned about real economic injury … when money is taken out of consumers' pockets").

Congress made a "public policy determination" to exclude political and other noncommercial calls from the initial rules, in part because "the record … does not contain sufficient evidence" regarding how welcome those calls are, and it merely "suggested" most unwanted calls are commercial. H. Rep. 102-317 at 16. *See also infra* at 39-40. However, Congress acknowledged "charitable or political calls might [in some cases] represent as serious a problem as commercial solicitations" and added "a special requirement" that the FCC "consider whether there was a need for additional authority [over] telephone solicitations" from these sources. H. Rep. 102-317 at 16-17 (specifying 47 U.S.C. § 227(c)(1)(D)). Congress also clarified that its "reference … to [consumers] who object to receiving certain classes or categories of telephone solicitations" in "the language authorizing … a single national database" was "intend[ed to] be interpreted as including … commercial, charitable and political" solicitations, and "to work hand-in-glove with the requirement … to consider whether additional authority is needed." *Id.* at 23 (citing 47 U.S.C. §§ 227(c)(3), (c)(1)(D)).

In its first TCPA rulemaking, weighing these statutory factors, the FCC declined to adopt a national "do-not-call" registry. It did so not just because a registry would be "costly and difficult to establish and maintain," as the government now suggests, [4] but for other reasons as well. A major factor was the inherent imprecision in a registry approach, which the FCC found would not help consumers seeking "to maintain their ability to choose among those … from whom they do and do not wish to hear." *First TCPA Order* at 8761. It also noted that consumers wishing to block every call would be disappointed, as those who registered "would still receive calls from exempted businesses or organizations." *Id.* at 8758-59. In contrast, the FCC found company-specific "do-not-call" rules would "represent[ ] a careful balancing of the privacy interests … against commercial speech rights of telemarketers and the continued viability of a valuable … service." *Id.* at 8766. *See also id.* at 8757.

The FCC reached similar conclusions in an earlier proceeding regarding constitutionally balancing "do-not-call" requirements. In 1980 the FCC found "all solicitation calling – whether for charitable, political or business purposes – involves similar privacy implications," and noted it had "no information that [consumers] would find an advertising message more offensive than a request for a charitable contribution or a political message or solicitation." *FCC NOI Order*, 77 F.C.C.2d at 1035. It noted in particular that "[e]xempting calls made for political and charitable solicitation or … research purposes from regulations" would "raise serious constitutional questions [absent] significant practical differences between unsolicited commercial and non-commercial calls." *Id.*

[4] Gov't Br. 7-8 (citing *First TCPA Order* at 8760-61).

B. DNCR Rules

The drive for a national "do-not-call" list began in October 2001 when new Chairman Timothy J. Muris pledged to create a registry as a top FTC priority. [5] The FTC announced a "privacy agenda" and placed creating the registry at the top of its "to do" list. http://www.ftc.gov/opa/2001/10/privacyagenda.htm. By year-end 2002, the FTC held a press conference at which the Chairman stated, among other things, that the FTC adopted rules fulfilling his DNCR promise. *See FTC Order*. Actions by Congress and the FCC followed shortly thereafter.

Because the FTC acted before it had either specific statutory authority or funding, *see U.S. Security v. FTC*, 2003 WL 22203719 *5 (W.D. Okla. 2003), it had to go to Congress, which responded with the Implementation Act, authorizing the FTC to set fees sufficient to implement and enforce the registry. Implementation Act § 2. It authorized the FTC to charge telemarketers a fee to obtain the registry access needed in order to place telemarketing calls (including to consumers not enrolled), without questioning the FTC's claim that it required approximately $18 million annually for the registry. The Act also established a deadline for FCC review of its rules that commenced a couple of months before the FTC acted, and it ordered the FCC to "consult" with the FTC to "maximize consistency" between them.

Congress stated it did not intend to "dictate the outcome of the pending FCC rulemaking," or to "foreclose consideration of … factors" required by the TCPA, and it emphasized the FCC remained bound by the TCPA balancing requirements. H. Rep. 108-8 at 9. Nevertheless, the FCC interpreted the Implementation Act as a requirement to duplicate the FTC's rules, and adopted essentially identical regulations. *See generally FCC Order*. It consequently all but ignored its duty under the TCPA and First Amendment to balance the impact of the new rules on legitimate telemarketing with privacy interests. With respect to the impact on telemarketers, the FCC offered only a conclusory dismissal that it was "not persuaded … a national do-not-call list will unduly interfere with the ability of telemarketers to contact customers," *id.* at 14039, echoing the one-sentence "analysis" offered earlier by the FTC that, though the rules might eliminate 40 to 60 percent of commercial telemarketing, it would somehow benefit the industry. *FTC Order* at 4631-32. The FCC also ignored the requirement in Section 227(c)(1)(D) to collect data on whether to extend regulation to political or charitable calls. [6]

The new FTC and FCC rules prohibit selected commercial entities, and for-profit telemarketers, from calling consumers on the national registry. Political solicitations are never regulated, charitable solicitations conducted by call centers (but not by in-house callers) are subject to company-specific requirements, and otherwise exempt businesses using call centers are fully subject to the rules, including the DNCR. *FTC Order* at 4584-85, 4587, 4589, 4636-37. The agencies exempted certain commercial callers from using the registry, including circumstances where a business has obtained prior express written consent from

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[5] Remarks of FTC Chairman Timothy J. Muris, Protecting Consumers' Privacy: 2002 and Beyond, The Privacy 2001 Conference, Cleveland, Ohio (Oct. 4, 2001), available at http://www.ftc.gov/speeches/muris/privisp1002.htm.

[6] *FCC NPRM* at 17478 (FCC "does not intend in this NPRM to seek comment on the exemption as it applies to political and religious speech."); *see also id.* at 17478-79 (same).

the called party, and where a business has an "established business relationship" with the called party. 16 C.F.R. § 310.4(b)(1)(iii)(B); 47 C.F.R. §§ 64.1200(c), (f)(9)(i)-(ii).

Shortly after the FCC acted, the FTC announced fee rules applicable to both agencies' regulations. 16 C.F.R. § 310.8; 47 C.F.R. § 64.1200(c)(2)(i)(E). The rules require payment of fees as a precondition to making telemarketing calls. 16 C.F.R. § 310.8(a)-(b). The FTC adopted this structure to collect from telemarketers the $18.1 million Congress authorized for the registry's first-year costs, an amount exceeding 10 percent of the FTC's annual budget. 2003 Appropriations Act at 95.

C. Rulemaking Record

The government defends its new rules based on enforcement history and the rulemaking record. It describes as a "major consideration" the "experience of consumers and enforcers of the company-specific rules" – particularly its own enforcement experience – culminating in a finding of "great public dissatisfaction with that provision." Gov. Br. at 12. The government's brief frequently refers to agency findings, but without citing any specific facts. *E.g.*, *id.* at 22 ("rulemaking records"), 28 (problems with company-specific rules), 37 (DNCR "grew out of the agencies' enforcement experience"), 42 (DNCR "is an outgrowth of the agencies' experience"), 49 ("the FTC had substantial evidence that the company-specific approach was insufficient"). The government also suggests "there were no similar reports of dissatisfaction with respect to noncommercial telemarketing," *id.* at 12, a characterization unsupported by the record. [7]

Contrary to these conclusory references, the record indicated that most people were unaware of the "do-not-call" rules, neither the FTC nor the FCC ever enforced them, those who made "do-not-call" requests found the rules worked, and most deficiencies the government cited were addressed through other new rules. In addition, other less restrictive "fixes" were overlooked. Overall, the record failed to support any claim that the volume of calls defeated less restrictive solutions, or that commercial callers are "fundamentally different" from noncommercial callers.

Widespread Ignorance. It is difficult to understand the government's finding of "great public dissatisfaction" with the company-specific rules since the record conclusively shows the vast majority of citizens were entirely ignorant of their existence. Amicus AARP testified about its survey "finding **less than 5 percent** of the people … across the country are even aware that a do-not-call provision is in effect." DNC-Tr. at 93. (P.A. 0577) *See also id.* at 28. (P.A. 0572) NARUC testified that the vast majority of consumers in one state-wide poll knew nothing about company-specific do-not-call options. *Id.* at 92. (P.A. 0576) *See also id.* at 141 (NARUC testimony that "there is a general lack of awareness"); *id.* at 183 (P.A. 0595) (citing "general consensus" of a lack of consumer awareness); *id.* at 107 (P.A. 0586) (NCL did not "know of any national surveys that have asked" about awareness "and …

[7] The government cites no source for this claim. However, its own record revealed 40 percent or more of "do-not-call" complaints relate to political and noncommercial callers. *E.g.*, June 2002 Tr. at 206. (P.A. 0626) *See also* ATA Comments at 72-73. (P.A. 0123-24) The FTC's own staff observed that "personally, I get a lot of calls from nonprofits, and even when I ask not to get any more calls, I keep getting them." DNC-Tr. at 160. (P.A. 0594) *Id.* at 75 (P.A. 0573) (FTC staff testimony that "nonprofits [are] the biggest problem").

that's something that really needs to be done before … formulat[ing] solutions"). The FCC record revealed the same problem. Indeed, one comment cited by the FCC to support the registry explained that a primary reason "company specific do-not-call lists have been a dismal failure" was "[t]he public's ignorance of its use." [8] Both agencies agreed greater public awareness would help. [9] In fact, the record showed consumer education to be an effective means of strengthening the company-specific option. *See* DNC-Tr. at 212. (P.A. 0604)

Lack of Enforcement The repeated references to the government's "enforcement experience" are curious, since no such experience exists. In the ten years that only company-specific "do-not-call" rules were in effect, the FCC issued only one published decision (and no forfeitures or even notices of apparent liability) that involved a violation, and in that lone case it found only two calls that contravened a do-not-call request. *See Consumer.Net v. AT&T Corp.*, 15 FCC Rcd. 281, 288-89, 295-99 (1999). Similarly, internal FTC documents reveal *zero cases* alleging violations of its company-specific "do-not-call" rules. [10] The FTC's lack of activity is explained by its exclusive focus on fraud instead of "do-not-call" issues. *See supra* at 3-4. This absence of enforcement is significant, since the record before the FTC indicates that its enforcement actions generally reduce the problem addressed. [11]

Lacking actual enforcement experience on "do-not-call," the agencies pointed to the number of complaints they received about telemarketing issues generally. For example, the FCC claimed it needed to review its TCPA rules in part because it received "over 11,000 complaints" in two years. *FCC NPRM* at 17466. However, both agencies acknowledge such complaint data is of doubtful relevance. The FCC regularly points out in its quarterly statistical reports about complaints, including TCPA complaints, that "many … do not involve violations" and "existence of a complaint does not necessarily indicate wrongdoing." *E.g.*, *Report on Informal Consumer Inquiries and Complaints, 2nd Quarter Calendar Year 2003* (CGB Sept. 12, 2003). The FTC acknowledges that "[w]e do not know … from our complaints anything other than the fact that we have received complaints." DNC-Tr. at 99-100. (P.A. 0578-79)

At the conclusion of its rulemaking, the FCC admitted "that the increasing number of inquiries and complaints about telemarketing practices should not form the basis upon which we revise or adopt new rules under the TCPA." *FCC Order* at 14140. *Compare* Gov. Br. 46, 48 (asserting complaint data is sufficient to demonstrate problem). The FCC had to make this admission after ATA obtained access to a portion of the complaints through a FOIA request, the review of which demonstrated the data failed to support the government's initial

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[8] Pechnik at 12. (P.A. 0334) Amicus AARP also informed the FCC that research the AARP had conducted "has shown a pretty significant lack of knowledge of … the do not call right[.]" RR-Tr. at 408. (P.A. 0642)

[9] The FTC staff noted "there's nothing … more valuable than effective education of consumers[.]" RR-Tr. at 406. (P.A. 0640) *See also* DNC-Tr. at 188 (P.A. 0600); News Release, *New Year's Resolutions for Telecom Consumers*, ¶ 5 (CGB Dec. 31, 2002).

[10] *See* (P.A. at 0716-18) ("TSR Sweeps" provided by FTC under Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), listing 87 cases alleging violations of the TSR, but none involving unwanted call provisions, 16 C.F.R. §§ 310.4(b)(1)(ii) or 310.4(b)(2)(i)-(iv)).

[11] DNC-Tr. at 10 (P.A. 0571) (FTC's "own complaint data" show "telemarketing fraud has dropped as a complaint category in terms of its standing in our top ten").

claims.[12] Of complaints ATA was able to obtain, nearly two-thirds had nothing to do with "do-not-call" issues. ATA Comments at 89-90 & Exh. 16. (P.A. 0140-41, 0234-38) The agencies' inability to draw any conclusions based on complaint data is reinforced by record evidence showing "do-not-call" complainants tend to focus on calls not subject to the rules, from both commercial and noncommercial sources. [13]

The Company-Specific Rules Work. The record showed the company-specific option effectively minimized unwanted calls when the rules were understood and used. Indeed, the FTC confirmed this conclusion by adopting the company-specific approach for telemarketing by for-profit call centers on behalf of nonprofit organizations. *FTC Order* at 4637. A survey of 1,000 consumers submitted to the FCC showed that, while only about one-third of respondents knew to ask to be on a telemarketer's "do-not-call" list, almost two-thirds who did so reported the requests stopped unwanted calls. [14] Similar evidence was presented to the FTC. [15] Moreover, the FTC staff members repeatedly acknowledged that noncompliance with the company-specific "do-not-call" requirement generally came from entities that were exempt from the rules. [16]

Identified Problems Were Addressed. The government asserts the company-specific approach is flawed because, among other things, dead-air calls and premature hang-ups preclude "do-not-call" requests, inability to identify callers undermines requests and

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[12] The FCC denied ATA's request to make the complaints available as part of the record. ATA then requested them through FOIA, but the agency stalled production and imposed exorbitant fees. ATA ultimately obtained 2420 (or 22%) of the complaints, *FCC Order* at 14139-40 & n.785, and challenged the FCC's stonewalling in court. (P.A. 0429-0561) (complaint in *American Teleservices Ass'n v. FCC*, No. 03-1848 (D.D.C. filed Sept. 4, 2003)).

[13] *See* DNC-Tr. at 215 (P.A. 0604a) ("one of the things we've identified … is that we don't really know what the magnitude of the problem is and what the source … is"). *See also* June 2002 Tr. at 206 (P.A. 0626) (State of Missouri testimony indicating about 40 percent of the complaints received were "false positives," including complaints directed toward exempt organizations and other irregularities); ATA comments at 70 n.80 (P.A. 0121) (citing evidence from Idaho Attorney General that "half of the complaints received in that office under the Idaho 'do-not-call' law since May 2, 2001 [were] from exempt entities"); DNC-Tr. at 133 (P.A. 0589) ("the rule could be very effective and you wouldn't necessarily know it if you're getting complaints [about] industry segments that are not within the rule").

[14] ATA comments at 73-74 & Exh. 12. (P.A. 0124-25, 0341) Another 9.5 percent of respondents were not certain whether calls continued after they made the request. *Id.*

[15] *See* RR-Tr. at 7 (P.A. 0639) (NCL acknowledgement that "the telemarketing rule works, it works pretty well"); Brass-RR at 1 (P.A. 0339) ("I have found that the [TSR] works very well for me. Several months ago I was receiving 6 or 7 unwelcome calls per week. Then I found out about the 'Do-Not-Call' lists[.] I began [using them and] I have not received a telemarketing call for quite some time."). Others found that "in most instances, when we ask … we receive no further phone calls" Hickman-RR at 1. (P.A. 0341) Another noted that most telemarketers calling his home "follow the rules." Bennett-RR at 1. (P.A. 0340)

[16] DNC-Tr. at 104 (P.A. 0583) ("looking at some of those complaints" and "from … experience," "repeat calls after asking to be put on the do-not-call list are coming from entities … not subject" to the company-specific rules.). *See also Know Your Caller Hearing* at 28 (P.A. 0677) (FTC staff testimony that "it is the parties who are exempt that keep calling").

hinders identification of violators, and consumers cannot verify they have been placed on a "do-not-call" list. *See*, *e.g.*, Gov't Br. 10, 12 n.5, 28. Each of these alleged shortcomings was addressed by the agencies through other less restrictive rules. For example, FTC and FCC predictive dialer rules require telemarketers to "abandon" no more than three percent of all calls, and even in that small percentage of cases to play a recording to identify the telemarketer and provide its telephone number. 16 C.F.R. § 310.4(b)(4); 47 C.F.R. § 64.1200(a)(6). In addition, all telemarketers must pass through caller ID information (telephone number and, where possible, company name). 16 C.F.R. § 310.4(a)(7); 47 C.F.R. § 64.1601(e). Now, irrespective of the registry rules, virtually all consumers will connect to a live sales agent with whom they can lodge a company-specific request. *See*, *e.g.*, *FTC Order* at 4625; *FCC Order* at 14121; 47 C.F.R. § 64.1200(a)(6). New rules also prohibit interfering with the ability to make "do-not-call" requests. 16 C.F.R. § 310.4(b)(1)(ii). The FCC also now requires telemarketers to honor company-specific "do-not-call" requests as quickly as technically possible, and in all cases within 30 days. *FCC Order* at 14069; 47 C.F.R. § 64.1200(d)(3).

The industry recommended additional steps that could have bolstered the company-specific rules but were rebuffed by the agencies. *E.g.*, *FCC Order* at 14068; DNC-Tr. at 200, 224. (P.A. 0601, 0605) These included requiring telemarketers to offer toll-free numbers or websites for registering and/or confirming company-specific "do-not-call" requests. *FCC Order* at 14068. *Cf.* DNC-Tr. at 28 (P.A. 0572) (AARP testimony requesting that "it [be] easier for people to get on a do-not-call list"). Commenters also suggested affording consumers other ways to confirm company-specific requests were processed. DNC-Tr. at 201. (P.A. 0602)

Call Volume. Record findings regarding the growing number of telemarketing calls were presented without any sense of proportion or context, and do not demonstrate that regulatory measures less restrictive than the DNCR will fail. *E.g.*, Gov't Br. 5. The government merely states that "as many as 104 million calls [are placed] a day – a five-fold increase in the last decade" without also considering other factors. *Id.* (citing, *inter alia*, *FCC Order* at 14054). But this number is a meaningless statistic to the extent it does not also disclose the proportional increase during this period with respect to telephone lines or calls actually received. [17] Information submitted by consumer advocates indicated consumers receive only a handful of telemarketing calls, perhaps even less than two per week on average. [18] At the same time, nothing in the record indicated how many or what percentage come from entities the government ultimately exempted from the registry, or the relative growth of the exempt and non-exempt categories of calls. *E.g.*, Gov. Br. 35 ("record does not contain evidence of the precise percentage of telemarketing calls that the registry would eliminate").

[17] With approximately 275 million telephone "lines" nationwide (based on residential and wireless numbers that may be placed on the registry), this figure suggests Americans receive, on average, 2.64 telemarketing calls per week. But the FCC indicated (in a footnote) that the total number is substantially lower because 41 percent of the 104 million are not completed (*e.g.*, busy signals, no answer, or answering machines). *FCC Order* at 14021 n.28.

[18] An officer of Private Citizen submitted a log of the telemarketing calls he received over a three year period from all sources, including commercial, political and charitable sources. The total amounted to 1.6 calls per week, which he described as an "epidemic" of calls. ATA Reply Comments at 6 & n.11 (P.A. 0258); Letter from Ronald London, Counsel for ATA, to Marlene H. Dortch, Secretary, FCC, March 5, 2003. (P.A. 0760)

"Fundamental Differences". The government's claim that differential treatment of commercial and noncommercial callers rests on findings of "fundamental differences" between different categories of telemarketers has grown in importance during the litigation as a linchpin of the government's justification of the DNCR scheme. But nothing in the record supports this claim. Quite to the contrary, the FTC concluded specifically that "consumers are disturbed by unwanted calls regardless of whether the caller is seeking to make a sale or to ask for a charitable contribution." *FTC Order* at 4637. The FCC similarly has said there is no evidence to show "subscribers would find an advertising message more offensive than a request for a charitable contribution or a political message or solicitation." *FCC NOI Order*, 77 F.C.C.2d at 1035. *See also TCPA Report and Order* at 8773.

The record confirms the Supreme Court's insight that a "consumer's interest in the free flow of commercial information … may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976). Whether a particular telemarketing call may be "unwanted" or "expected" does not turn on whether the call was commercial or noncommercial, but on whether its subject interests the recipient. In particular, the FTC cited a study by the Information Policy Institute which found 50 percent of consumers supported regulations that would allow local or community-based organizations or businesses to call during specific hours. [19] Yet the rules adopted do not reflect these more nuanced preferences, and instead established broad categories of favored and disfavored callers.

There was no finding that calls from commercial entities have a different impact on privacy than calls from political or noncommercial sources. Rather, testimony before the FTC and comments filed with both agencies showed that consumer reactions are largely the same regardless of the identity of the caller or the subject of the call. [20] The administrative records were rife with comments indicating that noncommercial calls are no more welcome than commercial calls, as is apparent even from just the relative handful the agencies themselves cited to support the national registry. This was the case before both the FTC, [21] and the FCC. [22] Survey research submitted in the FCC proceeding confirmed that a full 84

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[19] *FTC Order* at 4593 (citing Michael A. Turner, *Consumers, Citizens, Charity and Content: Attitudes Toward Teleservices* (Information Policy Institute, June 4, 2002)). The study also found 40 percent of respondents would support rules that allow national companies to call if there is an established business relationship.

[20] DNC-Tr. at 154, 185 (P.A. 0591, 0597) (testimony of Private Citizen); *id.* at 91 (P.A. 0575) (NARUC testimony).

[21] *FTC Order* at 4626, 4628-29, 4646 (citing, *e.g.*, Menefee-RR at 1 (P.A. 0342) ("I have … asked repeatedly for one (non-Profit [telemarketer]) to stop soliciting money from me on the phone. But at least once or twice a year they call again."); Peters-RR at 1 (P.A. 0343) ("telemarketing calls come from companies, including some from our favored charities, that we have repeatedly and consistently asked to drop our names from their calling lists")).

[22] *FCC Order* at 14030, 14033, 14055 (citing, *e.g.*, Hathaway at 1 (P.A. 0336) ("I do not want calls even from charities which I may support [or] calls from political parties even if they are the party I vote for."); Reichenbach at 1 (P.A. 0337) ("When you begin the national DNC list, please do not allow an exception for non-profits"); Gagnon at 1 (P.A. 0338) ("Automated calls promoting political candidates … should also be banned.")).

percent of respondents found "calls from political candidates or promoting a political issue" either less acceptable than (42.9 percent) or no different from (41.1 percent) other unsolicited calls, and that 81 percent considered calls for charitable contributions either less acceptable or no different from other calls. *See* ATA comments at 71-72 & Exh. 12. (P.A. 0122-23, 0222-28)

Nor did the record provide any basis for the government's current assertion that telemarketers who call on behalf of charities are "less likely to engage in abusive telemarketing practices that might alienate the customer." [23] Although the government claims noncommercial solicitors have "different incentives" than commercial telemarketers, and that charitable solicitors may be more receptive to company-specific rules (because "some … had already set up their own 'do-not-call' lists"), Gov. Br. 49, these factors hardly distinguish commercial from noncommercial telemarketers. Like noncommercial entities, the record showed commercial callers have the same incentive to avoid alienating prospective customers. *E.g.*, ATA Comments at 42, 88, 102, 111 & Exh. 3; DMA Comments, Exh. A at 8 (P.A. 0093, 0139, 0153, 0162, 0180-88, 0146) Moreover, establishment of voluntary "do-not-call" lists does not does not set noncommercial entities apart – DMA established the TPS, and many commercial telemarketers initiated individual "do-not-call" lists. [24] Indeed, when it first established company-specific rules, the FCC noted "[s]uch lists are already maintained on a voluntary basis by many telemarketers." *TCPA Report and Order* at 8773.

SUMMARY OF ARGUMENT

Because the government assumed incorrectly that some speakers "have rights that others don't" it misunderstood the delicate constitutional balancing that is required for regulations designed to protect people from exposure to unwanted speech. Petitioners have never disputed the government's ability to adopt appropriately tailored regulation. But the controlling principles – for both commercial and noncommercial speakers – are that any limitations be both narrow *and* neutral. This is the central theme of the Supreme Court's decision in *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), which held that the government cannot impose discriminatory regulations on commercial speech that bear no relationship to the governmental interest at issue. Here, the differential regulations imposed by the DNCR violate these principles, since a ringing phone at dinnertime has the same effect on privacy, regardless of the identity of the caller or the subject of the call.

The DNCR is not comparable to the company-specific "do-not-mail" regulation the Supreme Court upheld in *Rowan v. Post Office*, 397 U.S. 728 (1970). Quite to the contrary, *Rowan* supports the Petitioners in this case because it approved the use of a measure that in all important respects is *identical* to the less restrictive company-specific "do-not-call" approach. The Court held that the postal regulations were constitutional because that law gave the individual recipient complete discretion and denied the government any discretionary authority to determine what mail should be blocked, leaving the decision entirely in the hands of the homeowner. Even though the law was designed only to block "sexually provocative" mail, the Court in *Rowan* said that it was solely a matter for the

[23] This claim is based entirely on a single comment in the FTC proceeding and is not backed by any evidence whatsoever. *See FTC Order* at 4637.

[24] The TPS list, which The DMA has operated since 1985, at the time of the rulemaking included 4.5 million consumers whom DMA members are required to refrain from calling under threat of expulsion. DMA Comments at 7. (P.A. 0354)

individual to judge, and that the homeowner could use the provision to stop the mailing of a "dry goods catalog" if that was his preference. Here, by contrast, the DNCR is unconstitutional because government decides which calls to block and which calls to permit when a homeowner decides to list his number on the national registry. Additionally, its Internet sign-up feature lacks verification and thus allows third parties to register households on the DNCR without their knowledge or approval.

The DNCR also fails the *Central Hudson* test governing the regulation of commercial speech. The government failed to meet its burden to prove that the rule will materially advance its asserted goals. The registry has numerous exemptions and exclusions and the government made no effort beyond guesswork to determine what proportion of calls would be blocked for those who sign up. Nor did it seek to determine whether the calls that are stopped by the DNCR correspond to individual preferences. The record in this proceeding is far more nuanced, and suggests that the registry is significantly under- and over-inclusive. Data from the TCPA legislative history and from the current record not only fail to support the government's assumptions, but undermine them.

The DNCR also is unconstitutional because it is not narrowly tailored. Faced with evidence that the registry would devastate the teleservices industry, the FTC and FCC brushed these serious concerns aside and failed to weigh them. Bent on implementing the FTC's announced intention to impose a DNCR, they overlooked and failed to build a record justifying their rejection of effective, less restrictive alternatives in violation of *U S West v. FCC*, 182 F.3d 1224 (10th Cir. 2001). The most obvious of these was educating consumers about, and beginning to enforce, preexisting company-specific "do-not-call" rules, which the agencies concluded could be effective for certain callers. The record was clear that there was widespread public ignorance of the rules, and that neither the FTC nor FCC had ever enforced them. Additionally, the agencies did not consider the impact of the less restrictive rules they adopted in addressing perceived inadequacies of the company-specific approach, and they failed to adopt other such measures proposed by commenters. Finally, the government failed to consider market-based solutions that have emerged since the TCPA was adopted.

ARGUMENT

I. THE GOVERNMENT FAILED TO IMPLEMENT BALANCED RULES AS BOTH THE FIRST AMENDMENT AND THE TCPA REQUIRE

The government through the DNCR has engineered a selective ban based on its estimation of the relative value of various types of speech. However, First Amendment rights cannot be "balanced" by preserving some speakers' rights while extinguishing others, particularly where neither the FTC nor the FCC examined or tried to implement actual consumer preferences regarding which calls to block and which to permit, and did not examine their relative impact on privacy.

A. The Government's Limited Constitutional Analysis is Deeply Flawed Because of its Preoccupation With Commercial Versus Noncommercial Speech

From the beginning, clear thinking about the constitutional issues in this case has been obscured by Chairman Muris' unfortunate claim that "charities and religions have First Amendment rights that others don't have." [25] The same goes for politicians, the regulation of whose calls Chairman Muris simply remarked is "above my pay grade." The FTC and FCC assume they have greater latitude to restrict some forms of commercial telemarketing because telemarketers are unpopular and because commercial speech sometimes may be regulated more intensively than other expression. [26] It is from this faulty premise that many of the government's constitutional errors flow. [27]

Petitioners have never disputed residential privacy as an interest that can be supported by appropriately-tailored regulation. But the categorical claim that "the individual's right to be left alone [in the privacy of his home] plainly outweighs the First Amendment rights of an intruder," Gov. Br. 31 (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 748-749 (1978)), fails to account for the careful balancing that is required when First Amendment and privacy interests must be accommodated. This Court has examined the "difficulties encountered in this age of exploding information, when rights bestowed by the United States Constitution must be guarded as vigilantly as in the days of handbills on public

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[25] Remarks of Chairman Timothy J. Muris, FTC Press Conference, Dec. 18, 2002. *See* Ans. ¶ 62 (admitting Muris statement). *Compare* George Orwell, ANIMAL FARM 123 (1946) ("some animals are more equal than others").

[26] *See FTC Order* at 4635-36 (citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) and *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986)).

[27] Any suggestion that "the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment." *United States v. Eichman*, 496 U.S. 310, 318 (1990) ("national consensus" cannot justify restriction on speech). *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818, 826 (2000) (government cannot restrict speech "even with the mandate or approval of a majority"). *Compare* Gov. Br. 35 (asserting "the popularity of the government's program" justifies it).

sidewalks." *U S WEST, Inc. v. FCC*, 182 F.3d 1224, 1228 (10th Cir. 1999). It has cautioned in the commercial speech context that "[i]n the name of deference to agency action, important civil liberties, such as the First Amendment's protection of speech, could easily be overlooked." *Id.* Here, it appears the agencies are hoping the Court will overlook these vital issues as did the FCC in *U S West*.

It is important to recognize, as is written into the TCPA, that "pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors … demand[s] delicate balancing." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208 (1975). Thus, despite the seemingly absolute language cited by the government (*e.g.*, "no one has the right to press even 'good' ideas on an unwilling recipient," Gov. Br. 32-33 (quoting *Hill v. Colorado*, 530 U.S. 703, 718 (2000))), courts uniformly have permitted only very narrow restrictions on speech in this area, both in the noncommercial and commercial speech contexts. For example, in *Hill*, the Court approved only limited restrictions on "sidewalk counselling" outside abortion clinics that had no "adverse impact on the readers' ability to read signs displayed by demonstrators," and did not preclude communication at a "normal conversational distance." 530 U.S. at 714, 726-727. Similarly, in *Frisby v. Schultz*, 487 U.S. 474 (1988), the Supreme Court held a restriction on targeted residential picketing must be narrowly tailored to permit picketers to disseminate their messages generally through residential neighborhoods, including "go[ing] door-to-door to proselytize their views" or "contact[ing] residents by telephone, short of harassment." *Id.* at 483-484.

On the question of balance, the government's reliance on *Pacifica* relates directly to the factors prescribed in the TCPA, although not in the way the government intended. *See* Gov. Br. 31. Even in the case of "indecent" broadcasts that may intrude into the home, the Court held that any restrictions must be narrow. The "time channeling" approved in that case applies only during a time of day when children are likely to be in the audience, *Action for Children's Television v. FCC*, 58 F.3d 654, 665, 667 (D.C. Cir. 1995) (applying same intermediate scrutiny as in commercial speech cases), and cannot be applied at all to nonbroadcast media that permit homeowners to make individualized blocking decisions. [28] Notably, the TCPA was predicated on the understanding that no such individualized blocking solutions existed to address concerns over telemarketing, Pub. L. No. 102-243, § 2(11), 105 Stat. 2394 (1991), but since its passage a range of technical alternatives have evolved that give individuals a great deal of choice about the nature and volume of calls they receive from all outside sources. [29]

The required balancing is no different in cases involving commercial speech. Thus, in *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983), the Supreme Court struck down a restriction on the mailing of unsolicited contraceptive advertisements designed "to protect those recipients who might potentially be offended." *Id.* at 72 (distinguishing *Rowan* because

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[28] *E.g.*, *Playboy*, 529 U.S. at 815 (cable television permits individualized blocking); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 130-131 (1989) (telephone technology permits individualized blocking).

[29] ATA Comments at 56-58, 89-92 & Exhs. 14-15 (P.A. 0107-09, 0140-43, 0229-33) (listing technical options). Such developments are germane to whether the rules under review constitute a "reasonable fit." *See infra* Section II.B.3.b.

the mail blocked by the postal rule was in "sole discretion" of homeowner). Where restrictions on commercial speech are permitted to protect privacy, they must be narrow. In *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), the Court upheld a 30-day moratorium on direct-mail solicitation by attorneys to accident victims, a distinctly vulnerable class. The 5-4 decision was predicated on the majority's finding that the restriction was "narrow both in scope *and duration*" and on the ability to communicate using the same medium, *i.e.*, non-directed mail, during the moratorium. *Id.* at 635 (emphasis added). *See Revo v. Disciplinary Bd.*, 106 F.3d 929, 935 (10th Cir. 1997).

At bottom, the government's ability to shield "unwilling listeners" is the same regardless whether speech is commercial or core political speech. [30] In either case, regulations intended to protect privacy interests must be both narrow *and* neutral. [31] This point was again illustrated in *Action for Children's Television* where the D.C. Circuit struck down a preferential "safe harbor" that barred commercial broadcasters from broadcasting "indecent" programs during the same hours when noncommercial broadcasters were unrestricted. 58 F.3d at 668-669 (citing *Cincinnati v. Discovery Network, Inc.* 507 U.S. 410 (1993)). The decision was a straightforward application of the "bedrock principle" that the government cannot "impose[ ] different restrictions on each of two categories of [speakers] while failing to explain how this disparate treatment advance[s] its goal." *Id.* at 669.

This, of course, is the core holding of *Discovery Network*, which invalidated a local regulation premised solely on a distinction between commercial and noncommercial speech. The Court articulated two general principles that apply fully here: (1) a distinction between commercial and noncommercial speech that "bears no relationship whatsoever to the particular interests that the city has asserted" is invalid, and (2) a restriction that overemphasizes the difference between commercial and noncommercial speech "seriously underestimates the value of commercial speech." 507 U.S. at 424. Subsequent cases applying *Discovery Network* have made clear "it is unconstitutional to ban commercial speech but not non-commercial speech – at least absent a showing that the commercial speech has worse secondary effects." *Rappa v. New Castle County*, 18 F.3d 1043, 1074 n.54 (3d Cir. 1994). *See also Pearson v. Edgar*, 153 F.3d 397, 405 (7th Cir. 1998).

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[30] Dictum in *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002), is not to the contrary. *See* State Br. 15. That case struck down a requirement that individuals wishing to engage in door-to-door advocacy must obtain a solicitation permit and display their names while soliciting. *Watchtower*, 536 U.S. at 165-69. The Court did not address a "do-not-solicit" provision that "establishe[d] a procedure by which a resident may prohibit solicitation even by holders of permits." Unlike the DNCR, the ordinance did not dictate which solicitors to ban but instead allowed homeowners to choose from nineteen separate categories of solicitors – including both commercial and noncommercial speakers – they might block or permit. *Id.* at 157.

[31] *E.g.*, *Hill*, 530 U.S. at 723 (upholding restriction on "sidewalk counselling" because it "applies equally to used car salesmen, animal rights activists, fundraisers, environmentalists and missionaries"); *Ward v. Rock Against Racism*, 491 U.S. 781, 795 (1989) (regulation of sound amplification to protect nearby residents denies government ability "to vary the sound quality or volume based on the message being delivered"); *Discovery Network*, 507 U.S. at 428 ("prohibition against the use of sound trucks emitting loud and raucous' noise in residential neighborhoods is permissible if it applies *equally* to music, political speech *and advertising*.") (emphasis added).

The government erroneously tries to limit the relevance of *Discovery Network* to the analysis of *Central Hudson's* "material advancement" requirement which is discussed below. *See infra* Section II.B.2. But this ignores *Discovery Network*'s principal rationale – that a distinction between commercial and noncommercial speakers cannot be upheld if it bears "no relationship *whatsoever* to the particular interests that the city has asserted." *Id.* at 424 (emphasis in original). The Court explained that "the principal reason for drawing a distinction between commercial and noncommercial speech has little, if any, application to a regulation of their distribution," *id.* at 426 n.21, and questioned whether the commercial speech doctrine was appropriate in such cases. *Id.* at 416 n.11. Here, the record makes clear the DNCR suffers from the same infirmity as the Cincinnati ordinance in *Discovery Network* because of its unjustified distinctions among speakers. As noted above, there is no substance to the government's claim of "fundamental differences" between commercial and noncommercial. *Compare supra* at 15-18 *with* Gov. Br. 46-50. *See also infra* at 38-41.

B. The DNCR Violates the First Amendment Because it Imposes the Government's Speech Preferences, Not the Individual's

The district court correctly found that the DNCR "is a significant enough governmental intrusion and burden on commercial speech to amount to a government restriction implicating the First Amendment." *Mainstream Marketing*, 2003 WL 22213517 at *10. The response that a "decision to place a number on the registry is voluntary," and "akin to a 'NO SOLICITORS' sign whereby consumers may indicate that they do not want any further unsolicited commercial telemarketing calls," Gov. Br. 11, 21 (caps in original), is inapt because it overlooks the government's role in defining which callers are restricted. Consumers may choose whether to place numbers on the DNCR, but the *government* decides which callers – both commercial and noncommercial – are blocked by the law.

The rules' odd collection of coverages and exemptions is far from a simple "no solicitation" sign. Political solicitations are never covered by the law, while charitable or religious organizations may (or may not) be subject to a company-specific "do-not-call" requirement depending on who places the call, even if they call about the same cause and use identical scripts. The same is true for businesses – exempt and non-exempt companies are treated differently even when they are competing directly against each other in marketing the same or similar products. *See* CompTel Br. 3-6.

The DNCR cannot legitimately be compared to the postal regulations in *Rowan v. Post Office*, 397 U.S. 728 (1970), because *the government* has chosen which calls will be blocked when consumer names are placed on the DNCR. In fact, *Rowan* supports Petitioners, not the government, as the law upheld there operates almost exactly like the company-specific requirements elsewhere in the final rules. At issue in *Rowan* was a company-specific opt-out requirement "intended to allow the addressee complete and unfettered discretion in electing whether … he desired … further material from a particular sender." 397 U.S. at 734. Here, by imposing the DNCR requirement (on top of company-specific rules), the government chose a very different approach. *See Mainstream Marketing*, 2003 WL 22213517 at *10 ("mechanism purportedly created by the FTC to effectuate consumer choice instead influences consumer choice"). In *Rowan*, the Court relied heavily upon the fact that the postal statute was amended by the House in order "to remove 'the right of the Government

to involve itself in any determination of the content and nature of these objectionable materials,'" thus removing all discretion from the government. 397 U.S. at 733. Moreover, the Court concluded that "Congress provided this sweeping power [to allow homeowners to request prohibitory orders to block unsolicited erotic mail] not only to protect privacy but to avoid possible constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a governmental official." [32]

Thus, the purportedly "voluntary" nature of the registry does not avoid constitutional problems where the government controls the speakers to whom the restrictions apply. *Martin v. City of Struthers*, 319 U.S. 141 (1943), struck down a ban on door-to-door solicitation because it "substitute[d] the judgment of the community for the judgment of the individual householder." *Id.* at 144. While the Court indicated that homeowners instead could erect "no solicitation" signs, the ordinance would have fared no better if it permitted residents only to erect "no solicitation" signs that selectively barred speakers disfavored by the town council. Ultimately, constitutional protection is based on the principle that "the speaker and the audience, not the government, assess the value of the information presented." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993). For precisely this reason, *Pearson* rejected a similar attempt to expand *Rowan* to a discriminatory opt-out, pointing out that "[i]n *Rowan*, a homeowner could prevent *any* material from entering his home." 153 F.3d at 404 (citing 397 U.S. at 737).

The government confuses the constitutional question presented in *Rowan* and tries to frame it as a commercial speech case, which it clearly is not. [33] It observes the postal regulation applies only to "advertisements," but that says nothing about whether the communication involved would be considered commercial speech in a constitutional sense. *See*, *e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (editorial advertisement is political speech). As the government is well aware, advertisements by political candidates may well run afoul of the restrictions on "erotically arousing or sexually provocative" materials. [34] Indeed, the sole case the government cites for its claim that the postal regulation restricts only "commercial" matter proves just the opposite point. The court in *United States Postal Service v. Hustler Magazine, Inc.*, 630 F. Supp. 867, 871 (D.D.C. 1986), held only that the rules could not be used to block the sending of *Hustler* magazine to members of Congress *in their offices* because it would interfere with the right to petition the government. But the court

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[32] *Rowan*, 397 U.S. at 737. Moreover, the statute in *Rowan* hinged upon the Postmaster General receiving an opt-out notice "from the addressee," *id.* at 730, and thus truly involved opt-out decisions by the mail recipient. By contrast, the DNCR allows individuals to register anonymously over the Internet many phone numbers at one time. *FTC Order* at 4639. This has already resulted in individuals being placed on the DNCR by third parties without their knowledge or approval. Valentine & Kennelly Affidavits. (P.A. 0734-59)

[33] Gov. Br. 40-42. *Rowan* was decided in 1970, well before the Supreme Court extended First Amendment protection to commercial speech. *See Virginia Bd. of Pharm. v. Virginia. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). If the commercial nature of the mailings had been dispositive, the Court simply would have found no First Amendment issue since such material was unprotected at the time.

[34] The FCC has taken the position that candidate advertisements by Larry Flynt could be considered obscene and therefore exempt from "reasonable access" requirements under the Communications Act. *See* Letter from Chairman Mark Fowler to Congressman Thomas A. Luken, (Jan. 19, 1984) (described in Harvey Zuckman, et. al, 3 MODERN COMMUNICATIONS LAW 186 (West Group 1999). *See also* Reuters, *Porn Candidate Mary Carey Buys Ad Time on Leno*, Oct. 3, 2003 (P.A. 0719).

observed that the postal regulation could be used to block such politically-motivated mailings to the residences of congressmen, just as it could be used by other homeowners. [35] With respect to congressional offices, however, the court held that the requested prohibitory order barring the mailing of *Hustler* magazine was unconstitutional because it was "rooted in content discrimination." *Id.* at 871.

As with the rest of its constitutional argument, the government here tries to make far too much of the fact that its rules target commercial speech. But it cannot explain how the DNCR, which expressly dictates which calls are blocked and which ones get through, can be compared to a post office rule in which "the power of the householder … is unlimited; he may prohibit the mailing of a dry goods catalog because he objects to the contents." *Rowan*, 397 U.S. at 737. Senate Amici, in a brief prepared by Dean Rodney Smolla, contend "there *was* content-based regulation in *Rowan*," and that the district court here "appeared disproportionately influenced by … *Discovery Network*." Senate Br. 15, 17 (emphasis original). Perhaps the best answer to this argument was put forward by Dean Smolla himself, when he testified just one month ago to the Senate Commerce Committee that the DNCR appears to be "in tension with current First Amendment doctrines, especially decisions such as *Discovery Network*." He concluded the best way to ensure that "do-not-call" rules are constitutional "is to pattern the registry after the postal rules upheld in *Rowan*, permitting consumers to block all unsolicited calls, from whatever source." (P.A. 0732) Indeed.

II. THE DNCR IS UNCONSTITUTIONAL

The government fails to meet its burden of proof under *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980). [36] As a threshold matter, *Central Hudson* analysis asks whether a regulation involves truthful speech and legal activity. If so, the regulation may be upheld only if it (1) is needed to serve an important governmental interest; (2) directly and materially advances that interest; and (3) is narrowly tailored to restrict no more speech than necessary. *Id.* at 564-565. It is the government's burden to build a record "adequate to clearly articulate and justify" any limitation. *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1069 (10th Cir. 2001) ("*ULBA*") (quoting *U S West*, 182 F.3d at 1234). In numerous cases, the Supreme Court has made clear it will not uphold restrictions on commercial speech backed only by "unsupported assertions," *Ibanez v. Florida Dept. of Bus. & Prof. Reg.*, 512 U.S. 136, 143 (1994), or even "anecdotal evidence and educated guesses." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995). *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996).

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[35] *Hustler*, 630 F. Supp. at 871 ("In the home a Member can invoke the special privileges as a householder, including the privilege of stopping undesirable mail under § 3008.").

[36] Petitioners do not concede the DNCR's discriminatory restrictions warrant less than strict scrutiny, *Discovery Network*, 507 U.S. at 416 n.11, but they are invalid even under the standard typically applied in commercial speech cases.

A. This Case Involves Truthful Speech About Lawful Products and Services

This case is solely about regulating honest businesses. There is no claim that the telemarketing activities addressed by the DNCR involve misleading speech or unlawful activities. *See Discovery Network*, 507 U.S. at 416. Yet the government and supporting amici inexplicably cite legislative history of the Telemarketing Act, with its focus on "[i]nterstate telemarketing fraud," as justification for the DNCR. Gov. Br. 8 (quoting 15 U.S.C. § 6101); House Br. 9-10, 13-15; AARP Br. 1-16. However, the Telemarketing Act related almost entirely to issues of fraud, while the TCPA was premised on recognizing "the legitimacy of telemarketing industry." *See First TCPA Order* at 8753; *U.S. Security v. FTC*, 2003 WL 22203719 *5 (Congress was not contemplating "do-not-call" issues with the Telemarketing Act). The government's lack of precision in framing the issues has spawned confusion about the nature of the interests involved. For example, this Court referred to the legislative history of the Telemarketing Act and congressional findings regarding fraudulent activity. *FTC v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 858 (10th Cir. 2003). But fraud issues are the subject of entirely different rules having nothing to do with "do-not-call" or the overwhelming majority of the teleservices industry. *See supra* at 3-4, 11 & n.1 (congressional statements). The FTC in the past has drawn a sharp distinction between the two. *Id.* Accordingly, this Court must focus on the remaining elements of the *Central Hudson* test.

B. The DNCR Fails *Central Hudson*

1. The Government Failed to Demonstrate a Substantial Need for the DNCR

residential privacy as a general proposition has never been disputed. But

as this Court cautioned, "the government cannot satisfy" *Central Hudson* "by merely asserting a broad interest in privacy," *U S West*, 182 F.3d at 1234-35, so it cannot demonstrate its interest by merely naming an activity that may impinge upon privacy. It must demonstrate its interest in the particular regulations it proposes to adopt. It is worth noting, then, that this case does *not* involve attempts to intimidate individuals seeking medical treatment, Gov. Br. 25 (citing *Hill*, 530 U.S. at 716-717), wiretapping, *id.* (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)), or people held captive by targeted picketing. *Id.* at 32 (citing *Frisby*, 487 U.S. at 485). Rather, description of the government's interest as enabling consumers to block calls that are "intrusive" because they demand "immediate attention," Gov. Br. 32, underscores that it chose a content-based solution to address a content-neutral problem. [37]

ether calls are made either by covered entities or by exempt entities under

the DNCR. As the Eighth Circuit explained in *Van Bergen*, the identical concern arises from political calls to the same degree as commercial calls. The interest was substantial, according to the court, "because the recipient [of an automated call] has no opportunity to indicate the desire to receive such calls." 59 F.3d at 1555. On this basis it upheld rules that give "the recipient … the opportunity to tell the operator, at any point in the conversation, that he

[37] The two cases cited for this proposition involved content-neutral regulation of automatic dialing machines, not "do-not-call" regulations. *See Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir 1995); *Minnesota v. Casino Mktg. Group, Inc.*, 491 N.W. 2d 882 (Minn. 1992).

does not want to hear from the calling person or entity again." *Id.* In short, the substantial interest was sufficient to justify company-specific rules.

o show a substantial interest in rules that go beyond a company-specific

approach and it seeks authority to dictate which categories of speech are blocked by the DNCR. Similar issues arose in *Playboy*, where the three-judge district court had no difficulty finding a compelling interest in the general proposition – protecting children from unwanted sexually-oriented images in the home [38] – but nevertheless held the government failed to meet its burden of demonstrating the law at issue was "necessary to serve a compelling interest." [39] The court found the government could not show existing regulations were inadequate, and was particularly concerned about lack of public awareness of less restrictive regulatory options (voluntary household-by-household blocking), explaining that "[i]f the [less restrictive] blocking option is not being promoted, it cannot become a meaningful alternative." [40] In affirming, the Supreme Court agreed the less restrictive but unpublicized option had not been given a "fighting chance." *Playboy*, 529 U.S. at 819. Here, the government may have shown a general interest in residential privacy, or even in adopting company-specific rules, but it has failed to show a substantial need for the DNCR where

[38] *Playboy Entmt. Group, Inc. v. United States*, 945 F. Supp. 772, 786 (D. Del. 1996). On this basis the court denied Playboy injunctive relief based on an initial finding that it was unlikely to prevail, *id.* at 790, but later ruled for Playboy on the merits. *See infra* note 39.

[39] *Playboy Entmt. Group, Inc. v. United States*, 30 F. Supp.2d 702, 713 (D. Del. 1998), *aff'd*, 529 U.S. 803 (2000). It is immaterial that *Playboy* was a strict scrutiny case while this is a *Central Hudson* case. Whether the government must show a "compelling" interest or merely an "important or substantial" interest, it nevertheless must demonstrate the harm is real and additional restrictions are needed to alleviate it. *Edenfield*, 507 U.S. at 770-771.

[40] *Playboy*, 30 F.Supp.2d. at 712. State amici inaccurately compare the less restrictive rule in *Playboy* to the DNCR because it permitted blocking by individual homeowners. State Br. 28. But the two restrictions would be comparable only if the government had prescribed a list of channels not of the individual's choosing to be blocked upon homeowner request. Such a rule was not at issue in *Playboy* and would never have been upheld in that case.

there is widespread public ignorance about the company-specific rules and neither the FTC nor FCC has ever enforced them.

2. The Government Failed to Prove the DNCR Will Materially Advance its Interest

will advance its goals

to a material degree. *Edenfield*, 507 U.S. at 770-771. This cannot be accomplished through speculation and conjecture or "conclusory assertion[s]." *ULBA*, 256 F.3d at 1074. Numerous courts have held that "exemptions and inconsistencies bring into question [a law's] purpose," thereby precluding it from directly and materially achieving its objectives. *Rubin* 514 U.S. at 489. *See Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 189 (1999); *ULBA*, 256 F.3d at 1071-74. Here, the government claims to have met its burden by adopting a measure to lessen telemarketing calls by some unspecified amount. While acknowledging the registry "does not seek … to eliminate all [unsolicited] telephone calls," the government assumes each call it blocks serves its purpose of "*reducing* the number of unwanted telephone solicitations." Gov. Br. 35 (emphasis in original). But whether it chooses to characterize its purpose as limiting the aggregate number of calls or surgically excising undesired communications, the government falls woefully short of meeting its burden.

The government's admission that "the record does not contain evidence as to the precise percentage of telemarketing calls that the registry would eliminate" reveals a gift for understatement. *Id.* The *FTC Order* offers only the initial "guesstimate" that the registry will block 40 to 60 percent of commercial telemarketing calls, *FTC Order* at 4634, while FCC did not even do that. As it turns out, however, neither agency had even the slightest support for its claims. *See Mainstream Mktg.*, 2003 WL 22213517 *4 n.1. Pressed on this point below, the

FTC was unable to cite any data, analysis or other evidence to support its estimate of the percentage of calls expected to be blocked (which by then had grown to 80 percent):

> THE COURT: Where did you come up with this astonishing figure that you're going to … affect 80 percent of these calls?
>
> MR. DeMILLE-WAGMAN: Your Honor, we based that figure on the estimation … that was made by direct marketing – by the ATA of the percentage of jobs that would be lost.
>
> THE COURT: Really?

Stay Tr. at 7. (P.A. 0007) *See also* Gov. Br. 35 n.9 (acknowledging estimated reduction in calls rests on industry prediction of lost business). This admission is stunningly ironic, since both agencies dispute there will be *any* economic losses *at all*. *FCC Order* at 14029; *FTC Order* at 4631-32 (claiming rules will benefit telemarketers).

The FTC ultimately conceded "there is *no record in this case* other than that figure," based solely on potential job losses by the telemarketing industry, to support government claims regarding the registry's potential impact. Stay Tr. at 8 (P.A. 0008) (emphasis added). The agency acknowledged "we cannot give … an exact percentage that will be blocked," or even a reasonable approximation. *Id.* at 9. (P.A. 0009) The district court noted the estimate "has crescendoed through the course of this lawsuit and taken on a life of its own with no reference to the factual record." *Mainstream Mktg.*, 2003 WL 22232209*3 n.1. It concluded "[t]here is nothing whatsoever in the administrative record or the record before this court, beyond the FTC's *ipse dixit*, to support this amalgam." *Id.*

Lacking any factual support the government seeks refuge in a lax standard of review. It quotes *United States v. Edge Broad. Co.*, 509 U.S. 418, 434 (1993), for the proposition that it is not required to "make progress on every front before it can make progress on any front." Gov. Br. 36, 38. *But see Greater New Orleans Broadcasting*, 527 U.S. at 194-95 (distinguishing *Edge*); *News America Publ'g, Inc. v. FCC*, 844 F.2d 800, 815 (D.C. Cir 1988) ("courts reject the facile one-bite-at-a-time explanation for rules affecting important First Amendment values"). Extrapolating from *Edge Broadcasting*, the government assumes it satisfies *Central Hudson* if it can reasonably presume to reduce telemarketing calls by at least 11 percent. [41] But this is a blatant misreading of *Edge Broadcasting*. The Court quite clearly explained the lower courts had "asked the wrong question" in focusing on the percentage of the audience affected, and the proper inquiry was whether the federal law "support[ed] the anti-gambling policy of a State like North Carolina." *Id.* at 427-428. Analyzed this way, the law by definition served its purpose 100 percent of the time.

The Court confirmed this reading of *Edge* in a subsequent case in which it confronted the same question at issue here – whether exemptions from a law designed to reduce the incidence of certain messages reaching their audience affect the *Central Hudson* inquiry. In

[41] In *Edge*, the district court and court of appeals invalidated a federal ban on the broadcast of lottery advertisements in states where lotteries were illegal. They reasoned that the material advancement prong of *Central Hudson* was not met in barring a North Carolina station from carrying lottery ads where it accounted for only 11 percent of the listening time in its area of service, where Virginia stations could air lottery ads.

Greater New Orleans Broadcasting, 527 U.S. at 194-195 & n.8, the Court explained the regulation in *Edge* was upheld only because of the limited government interest of supporting the law in non-lottery states. But where its purpose is reducing the total number of "undesirable" commercial communications – as it is here – exemptions from coverage are fatal under *Central Hudson*. *Id.* at 193-94. *See Rubin*, 514 U.S. at 489; *ULBA*, 256 F.3d at 1071-74. Additionally, *Edge Broadcasting* has been superceded by cases that tightened *Central Hudson's* "substantial advancement" requirement,[42] and was not followed by this Court in *ULBA*, 356 F.3d at 1073-74.

Failing to prove the aggregate reduction, the government asserts that each commercial call it blocks is unwanted because, after all, the consumer decided to list his or her number on the DNCR. Gov. Br. 32, 35. But this assumption is entirely unsupported. The FTC itself described the overbroad reach of the DNCR, which blocks all calls in a given category – including calls the consumer "would not mind receiving" – as distinguished from a company-specific approach that perfectly reflects individual preferences. *FTC Order* at 4636. The record shows "consumers preferred a 'nuanced approach' to the 'do-not-call' issue, wanting to limit some calls to their household, but not all calls." *Id.* at 4593. The DNCR's content categories do not match these preferences, since individual choices are not defined by commercial versus noncommercial considerations. Consumers do not mind receiving calls from certain businesses, *id.* at 4593 (citing IPI Study), while the FTC found consumers can be "disturbed by unwanted calls regardless of whether the caller is seeking to make a sale or to ask for a charitable contribution." *Id.* at 4637. The FCC had no data whatsoever on the broad range of consumer preferences, since it cautioned commenters at the outset not to submit information on political, charitable or religious telemarketing. *See supra* note 6.

Because the agencies collected no current data on this issue the government relies exclusively on a 12-year-old reference in the TCPA legislative history for its conclusions that commercial calls cause the most problems and noncommercial calls are less intrusive because they are more "expected." [43] The government's repeated citation to this old data – at least six references in the current brief alone – highlights the poverty of the current record on this issue. There is no attempt to explain what makes a political or charitable call more "expected," since "the imperious ring of the telephone" is the same regardless of the purpose of the call. The absence of any distinction is clearly illustrated by the current record. *See supra* notes 7, 16, 21-22.

In any event, the government's citation of the TCPA's legislative history is highly misleading. It grossly distorts the data in the House Report to suggest that complaints regarding commercial solicitations "ranged from 80 to 99 percent" when that information was drawn from only a handful of the states that had statistical information "readily available." H. Rep. 102-317 at 16. The government fails to disclose that up to half of the

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[42] *Edge* relied on *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), which has been effectively overruled. *44 Liquormart*, 517 U.S. at 510. *See also Rubin*, 514 U.S. at 482 n.2, 489-91.

[43] Gov. Br. 6, 7, 26, 46, 47, 48. The same data is repeated in cases the government cites. *E.g.*, *Missouri v. American Blast Fax, Inc.*, 323 F.3d 649 (8th Cir. 2003); *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54 (9th Cir. 1995).

complaints in other states mentioned in the House Report (including New York, Tennessee, Nevada, and Washington) related to charitable or political calls. *Id.* This remarkable finding undoubtedly understates the problem, since state telemarketing laws almost all exempt political and charitable calls. The current record also shows that states currently receive a substantial number of complaints for calls from exempt categories. *See supra* note 13.

It is significant that the House Report data relates solely to *complaints*, since the government has acknowledged "complaints about telemarketing practices should not form the basis upon which we revise or adopt new rules under the TCPA." *FCC Order* at 14140. *See supra* at 11-12. The House report data – now being presented as dispositive – did not persuade Congress in 1991 to cut off further inquiry. Instead, it directed the FCC to monitor the issue, 47 U.S.C. § 227(c)(1)(D), acknowledging that charitable or political calls can "represent as serious a problem as commercial solicitations." H. Rep. 102-317 at 16-17. This is important because the TCPA delegated to the FCC the task of maintaining the proper constitutional balance. But the government here abdicated its responsibility by intentionally avoiding collection of updated information in this critical area. *See supra* note 6. Consequently, the record compiled below fails to show the DNCR materially furthers its interest.

The revisionist account of the legislative history in the House amicus brief fares no better in its attempt to pin the problem on commercial callers. Much of the brief is devoted to discussion of fraud or abuse issues and legislative history of the Telemarketing Act that is both irrelevant to this case and factually incorrect. [44] The quoted fragments of witness testimony and Member comments on "do-not-call" issues are highly misleading. While the brief cites 1991 testimony of Robert Bulmash of Private Citizen to suggest commercial calls are different from other categories, House Br. 7, it overlooks Mr. Bulmash's statement to the FTC in 2000 that "when I'm called from the shower, when I'm called from dinner for a solicitation … I don't care if it's a nonprofit, a survey or a solicitation call. I feel strongly that a national do-not-call database should include the options of getting off sales, survey and fundraising calls." DNC-Tr. 155. (P.A. 0592) And while it quotes congressman Dingell for the proposition that exempting charitable solicitations is "common sense," it omits his statement that rules should "maximize consumer choice [by] allowing individuals to receive the calls they want and to avoid those they do not," as well as the statements of other Members indicating that exempt political and charitable calls are the most problematic. [45] Notably, as Rep. Tauzin has pointed out with respect to exemptions, if consumers "still get

[44] House Br. 9-10, 13-15. *Compare supra* at 3-5, 31-32 (discussing different objectives of Telemarketing Act and TCPA). The claim that "none of the … evidence before Congress identified similar problems by charitable telemarketers" is false. *See* Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner, *Madigan v. Telemarketing Assocs., Inc.*, 123 S.Ct. 1829 (2003), 2002 WL 31907178, at *8 (detailing examples of abuse and "misrepresentations … typical of the charitable solicitation frauds that the federal government prosecutes both civilly and criminally").

[45] Do Not Call List Authorization Hearing, Jan. 8, 2003 at 7. *See also id.* at 32 (statement of Chairman Tauzin) ("I personally am offended by all the recorded calls from politicians … I know a lot of folks who are tired of hearing [these] messages"); *id.* at 8 (statement of Rep. Cox) ("there is no reason to grant preferred status to political calls, which are often the most annoying of all"); *id.* at 4 (statement of Rep. Barton) (registry should include political and charitable calls); *id.* at 10-11 (statement of Rep. Terry) (listing less restrictive technical options that would be preferable to "kill[ing] an industry"); *id.* at 30 (statement of Rep. Deal) (people will continue to get calls that bother them); *id.* at 34-35 (FTC response to Rep. Burr that it conducted no "studies or surveys" to determine which calls consumers find most annoying).

political solicitations [and] nonprofit solicitations … during the so-called dinner hour … my suspicion is that [they] would think that the legislation was a fraud." [46]

3. The DNCR is Not Narrowly Tailored

The government also fails to satisfy the requirement that its restriction be "no more restrictive than necessary." *See ULBA*, 256 F.3d at 1075. Under this requirement, it must "carefully calculat[e] the costs and benefits associated with the burden on speech imposed." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 528 (2001) (internal quotations omitted). In addition, if it could "achieve its interests in a manner that … restricts less speech, the Government *must* do so." *Thompson v. W. States Med. Ctr.,* 535 U.S. 357, 371 (2002) (emphasis added). Indeed, the DNCR virtually ensures restriction of *far* more speech than necessary because it allows *anyone* with an email address to use the Internet to place multiple telephone numbers – including those of other people – on the DNCR *without* their knowledge or approval. *FTC Order* at 4639; Valentine & Kennelly Affidavits. (P.A. 0734-59) As a direct result, the DNCR will block speech to persons who have *not* made an individualized decision consenting to such a restriction on commercial telephone solicitations to their homes, [47] in sharp contrast to the individual opt-out system at issue in *Rowan*.

While it is true "least restrictive means" analysis does not apply to commercial speech, this Court has noted that the government must carefully consider the existence of obvious, more narrowly tailored alternatives in evaluating the fit between means and ends. *U S West, Inc.*, 182 F.3d at 1239; *Revo*, 106 F.3d at 935. The government has the burden to show the

[46] *Know Your Caller Act Hearing* at 76. (P.A. 0697) The House amicus brief also mischaracterizes the study in the 1991 House Report as finding "just ten percent of complaints about telemarketing involved charitable calls," House Br. 9, when the figure it cites applies to only one state – Rhode Island – while the remaining data and reservations in the Report go unmentioned. *See supra* at 39.

[47] *See, e.g.* C. Mayer, *Sorry Wrong Number on Registry*, WASH. POST, at E1 (Oct. 18, 2003).

required fit through an adequate factual record. [48] Here, however, in their rush to fulfill the pre-ordained conclusion of their rulemakings, the FTC and FCC ignored both these fundamental requirements.

a. The Government Failed to Assess Regulatory Costs

Neither agency made any serious effort to weigh the impact of the proposed restriction on commercial free speech, the telemarketing industry, or the economy as whole. They had no idea, and did not bother to study, what volume of commercial telemarketing calls the restriction would suppress, much less how many calls would be blocked that customers are interested in receiving. Although the record showed the DCNR would devastate the telemarketing industry, resulting in lay-offs for as much as 50 percent of the industry, *FTC Order* at 4631; ATA Reply Comments at 26-30; ATA *Ex Partes* (all providing evidence of adverse impact) (P.A. 0077-81, 0306-22), the FTC and FCC each brushed off the evidence in a single sentence without any further inquiry. *FTC Order* at 4632; *FCC Order* at 14031, 14039. They did so even though the TCPA, not to mention the First Amendment, requires careful consideration of these efforts. *U S West*, 182 F.3d at 1238-39; *ULBA*, 256 F.3d at 1075 (regulation is invalid where there is no indication the government "made any careful calculation of the costs associated with its speech restrictions").

The claim that the DNCR does not restrict speech because it only allows consumers to "opt in" to a list, Gov. Br. 40, ignores the government's own findings. The FTC illustrated this point when it decided to subject charitable solicitations only to company-specific requirements and not the DNCR. It stated it was:

[48] This Circuit does not accept agency justifications not found in its record or that are vague or inconclusive. *U S West*, 182 F.3d at 1239 (rejecting reliance on "common sense" and insufficiently specific empirical study to satisfy burden to prove narrow tailoring). Nor has this Court accepted the type of *post hoc* rationalizations that litter the government's brief. *See ULBA*, 256 F.3d at 1075.

> concerned that subjecting charitable solicitation telemarketing – along with commercial telemarketing to solicit sales of goods and services – to national "do-not-call" registry requirements may sweep too broadly, because it could, for example, prompt some consumers to accept the blocking of charitable solicitation calls that they would not mind receiving, as an undesired but unavoidable side-effect resulting from signing up for the registry to stop sales solicitation calls.

FTC Order at 4636. *See id.* at 4634 (citing evidence that DNCR would reduce donor pool by 40 to 50 percent, and up to 80 percent in some states). This concern is well-founded, though the FTC wrongly assumed the same concerns were irrelevant with respect to all commercial calls. The FTC specifically found applying the national registry to nonprofits was *not narrowly tailored* because it would not accurately reflect specific consumer preferences. [49] Conversely, it found the company-specific approach constitutional because there is a "direct correlation between the governmental interest and the regulatory means employed to advance that interest: The consumer requests a specific caller not to call again, and the regulation requires the caller to make a record of and honor that request in the future." *Id.* at 4636.

The government misses the point in suggesting a ban on telemarketing or a requirement that consumers "opt in" to calls would be even more restrictive than the DNCR. Gov. Br. 40. Of course it would be. But the relevant question is not whether the government could have acted more restrictively, nor does the inquiry turn on the total amount of speech it will suppress – it is whether the restriction was "more restrictive than necessary." *ULBA*, 256 F.3d at 1075; *Playboy*, 30 F. Supp.2d at 718 ("The question is not the significance of the totality of the effects [but] the relative burden of one solution versus

[49] The FTC agreed with non-profit organizations opposing the DNCR, finding it would be "too costly … to obtain prospective donors' express permission to call, and too difficult for consumers to exercise their right to hear from them." Consequently, it concluded the DNCR was not narrowly tailored. *Id.* at 4636.

another."). *See also Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 758-759 (1996) (applying intermediate scrutiny to invalidate restrictions on unsolicited "indecent" speech where government failed to build record on possible alternatives). Here, the government never developed the necessary record because it had announced its preferred solution – the DNCR – from the outset.

b. The Government Failed to Consider Less Restrictive Alternatives

This Court has been clear that "existence of an obvious and substantially less restrictive means for advancing the desired government objective indicates a lack of narrow tailoring" and that the government must build a record showing such alternatives "would not sufficiently protect … privacy." *U S West*, 182 F.3d at 1238 n. 11, 1239. Here, the government's assertion that there are no "numerous and obvious less burdensome alternatives" to the DNCR, Gov. Br. 28, is totally undermined by its conclusion that the company-specific rules are substantially less restrictive and can be effective. *FTC Order* at 4636. Its repeated conclusory references to "experience" to show that company-specific rules are inadequate (but only in the commercial context) mean very little where the record demonstrates conclusively most people were ignorant of the rules and neither the FTC nor FCC ever enforced them. *See supra* at 9-12.

This lack of enforcement is fatal under *Central Hudson*. In *Revo*, for example, this Court held that, to justify a restriction on solicitations, the government must demonstrate "the existing regulations (or enhanced enforcement of those regulations)" would not materially address its objective. 106 F.3d at 936. Here, the utter failure to enforce the company-specific rules not only calls into question *post hoc* characterizations of the record, it shows efforts to enforce the company-specific rules were an obvious, entirely untested

alternative that would not restrict constitutionally protected speech. Under *Revo*, failure even to evaluate whether "enhanced enforcement" of company-specific requirements would materially address the desired objective renders the DNCR invalid. *Id.* at 936.

Here, the record shows most consumers were unaware of the company-specific option. *See supra* at 9-10. Thus, another obvious alternative was educating consumers about the availability of this option in much the same way the government now is energetically publicizing the DNCR. [50] Failure to explore this obvious alternative fails *Central Hudson* scrutiny. *U S West*, 182 F.3d at 1239 (agency must address whether customers, if notified of opportunity to prevent company from using their personal information, would use available protections). *See also Verizon Northwest v. Showalter*, 2003 WL 22160434 at *6-7 (W.D. Wa. Aug. 26, 2003) ("regulations that address the form, content and timing of opt-out notices, when coupled with a campaign to inform consumers of their rights, can ensure that consumers are able to properly express their privacy preferences."). *Cf. Playboy*, 30 F.Supp.2d at 712 (if less restrictive alternative is not promoted "it cannot become a meaningful alternative"). As the Supreme Court has noted, education campaigns may be both more effective at advancing state interests and more narrowly tailored than speech restrictions. *See 44 Liquormart*, 517 U.S. at 507.

To whatever extent the record shows problems with the company-specific rules, other new rules address any alleged shortcomings. For example, the FTC added a provision prohibiting companies from interfering with efforts to be placed on companies' do-not-call lists. 16 C.F.R. § 310.4(b)(1)(ii). In addition, rules governing abandoned calls and Caller ID

[50] *Cf.* DNC-Tr. at 92 (P.A. 0576) (Vermont study indicated state agency's education efforts had "substantial impact" on number of consumers asserting rights under existing laws to prevent unwanted telephone calls).

address other problems the government identified in justifying the DNCR. *E.g.*, 16 C.F.R. §§ 310.4(b)(4), 310.4(a)(7); 47 C.F.R. §§ 64.1200(a)(6), 64.1601(e). Before the FTC and FCC condemn other aspects of their own new rules as somehow inadequate to fix problems identified with company-specific rules, they must allow these less restrictive measures to be "tested over time." *Sable*, 492 U.S. at 128-129. In addition, the government failed to adopt other obvious and less restrictive alternatives – including postcard confirmation of company-specific requests, 800-number or Internet sign-ups, or requiring equipment necessary to receive requests from persons with disabilities – that would have made the company-specific requirement even more effective. *See e.g.*, *Denver Area*, 518 U.S. at 758-759.

Other than acknowledging Caller ID as a valuable tool to prevent unwanted calls and barring telemarketers from blocking Caller ID, *e.g.*, *FTC Order* at 4626-27, the government completely failed to consider technological alternatives for preventing unwanted calls, as required by the TCPA. 47 U.S.C. § 227(c)(1)(A). These options include call rejection and no solicitation services, and numerous consumer devices. *See supra* note 29 and accompanying text. Neither agency reviewed the effectiveness of the devices except that the FCC asserted that a few did not work well, and rejected them all on the ground that they imposed costs to consumers, without mentioning their cost. [51] But criticisms of these technologies, Gov. Br. 43-44, are entirely unsupported by the record, and precisely the sort of *post hoc* speculation *U S West* forbids. The existence of a growing number of market-based solutions is directly relevant to whether new regulations provide a "reasonable fit," particularly since the TCPA is premised on the outdated assumption that no such technologies exist. *See supra* note 29 and accompanying text. Additionally, the FTC and FCC chose not to publicize the entirely

[51] *FCC Order* at 14041. While some electronic devices involve modest costs, others, such as Caller ID, are increasingly bundled with basic telephone service.

content-neutral DMA Telephone Preference Service, which the record indicated provides 4.5 million consumers with effective protection against telemarketing calls. DMA Comments at 7-8.

The government contends its "layered approach" involving multiple regulatory requirements demonstrates narrow tailoring, Gov. Br. 42-43, but it instead creates the opposite presumption. The overlapping rules are not "nuanced." They are redundant. The combination of available less restrictive options shows that the government could have served its interests without discriminatory DNCR restrictions on commercial telemarketing. This approach was obvious and squarely before the agencies. In fact, this is precisely what the FTC and FCC chose to do with regard to charitable telemarketing – *i.e.*, rely on those other requirements in tandem with refined company-specific rules. The government's offer of a smorgasbord of regulations does not empower it to keep items on the menu that are more restrictive than necessary.

III. THE NATIONAL DNC REGISTRY FEES VIOLATE THE FIRST AMENDMENT

In order to create and implement the national DNCR, the FTC has imposed a revenue-based tax on First Amendment activity in violation of the Constitution. The rules require affected telemarketers to pay a fee for access to the registry as a precondition to constitutionally-protected speech. *See generally FTC Fee Order*. By structuring its regulatory scheme in this way, the government runs headlong into a well-established body of law in which the Supreme Court has shown its aversion to special taxes or fees on expressive activities. It is bedrock law that no one may be "compelled to purchase, through a license fee or a license tax, the privilege freely granted by the constitution." *Murdock v. Pennsylvania*, 319 U.S. 105, 114 (1943) (internal quote omitted).

Although the government may constitutionally impose a fee limited to the "expense incident to the administration" of a speech regulation, *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941), the Supreme Court has held that such fees must be narrowly tailored to match actual administrative costs. *Murdock*, 319 U.S. at 113-14. In this regard, the Court has shown particular antipathy to taxes and fees that discriminate between speakers. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (invalidating exemptions from sales taxes for religious, professional, trade and sports magazines).

Here, the government has *admitted* it will use a substantial portion (and perhaps most) of the funds generated by fees imposed on protected, truthful speech to pay for general agency outreach functions and technical systems used to address "fraud-related" complaints. [52] Congress authorized the FTC to collect $18.1 million to implement the DNCR, but the FTC is paying an outside contractor only $3.5 million to administer the registry. Although the FTC is hazy on details, it claims the excess $14.6 million is needed to cover "agency infrastructure and administration costs, including information technology structural supports," and in particular, "the Consumer Sentinel system (the agency's repository for all consumer fraud-related complaints) and its attendant infrastructure." *FTC Fee Order* at 45141. Significantly, the FTC reported to Congress recently that the vast majority of telemarketing complaints do not relate to "do-not-call" issues at all. Only **about one in ten of the complaints** filed with the agency about telemarketing concern unwanted telephone calls. *See*, *e.g.*, *Know Your Caller Act*, *supra* note 2. Accordingly, the DNCR fee schedule is an unconstitutional revenue measure.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court affirm the judgments of the district courts below and vacate the FCC's new TCPA registry rules.

Respectfully submitted,

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[52] *See FCC Order* at 14031 n.101, 14036 n.123 (emphasis added). The fee schedule also discriminates among speakers without regard to administrative costs. *FTC Fee Order* at 45139 (distinct corporate divisions, etc., within company are separate sellers required to pay own fees to access registry, while unified companies placing same number of calls to same number of consumers pay once). *Compare also* 16 C.F.R. § 310.8(e) (exempt entities (*e.g.*, charities, politicians, etc.) may voluntarily access registry free of charge), *with FTC Fee Order* at 45135-36 (telemarketers or other service providers may voluntarily access registry independent of clients on whose behalf they place calls, but must pay to do so even if the client has already bought the list).

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