IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MAINSTREAM MARKETING SERVICES, INC., TMG MARKETING, INC., and AMERICAN TELESERVICES ASS'N, Plaintiffs-Appellees, v. FEDERAL TRADE COMMISSION, Defendant-Appellant. UNITED STATES OF AMERICA, Intervenor.	))))))))	No. 03-1429 ON APPEAL FROM THE U.S. DISTRICT COURT, DISTRICT OF COLORADO The Honorable Edward W. Nottingham D.C. No. 03-N-0184 (MJW)
U.S. SECURITY, CHARTERED BENEFIT SERVICES, INC., GLOBAL CONTACT SERVICES, INC., INFOCISION MANAGEMENT CORP., and DIRECT MARKETING ASS'N, INC., Plaintiffs-Appellees, v. FEDERAL TRADE COMMISSION, Defendant-Appellant. UNITED STATES OF AMERICA, Intervenor.	))))))))	No. 03-6258 ON APPEAL FROM THE U.S. DISTRICT COURT, WESTERN DISTRICT OF OKLAHOMA The Honorable Lee R. West D.C. No. 03-122-W
MAINSTREAM MARKETING SERVICES, INC., TMG MARKETING, INC., and AMERICAN TELESERVICES ASS'N, Petitioners, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	)))))))	No. 03-9571 ON REVIEW OF ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION CG Docket No. 02-278
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA Respondents.	)))))))	No. 03-9594 ON REVIEW OF ORDER OF THE FEDERAL COMMUNICTIONS COMMISSION CG Docket No. 02-278

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INTRODUCTION AND SUMMARY

The do-not-call registry is the product of concerted, measured efforts by Congress and two agencies over more than a decade. When Congress passed the Telephone Consumer Protection Act ("TCPA"), it recognized that the nature and volume of unwanted telemarketing had created significant intrusions into residential privacy that individuals were powerless to combat. Congress authorized creation of a do-not-call registry at that time, but gave the Federal Communications Commission ("FCC") latitude to consider other options, such as requiring telemarketers to keep their own do-not-call lists.

After years of experience with company-specific lists, the flaws in this mechanism were apparent. The sheer number of callers posed formidable problems for consumers, forcing them to deal with countless calls. Only after it became clear that consumers were deeply dissatisfied with their limited ability to protect their homes from unwanted telemarketing did the Federal Trade Commission ("FTC") and the FCC create the do-not-call registry, which Congress promptly funded and later explicitly ratified. The registry gives consumers an additional tool to protect their homes from unwanted telemarketing, but otherwise restricts no speech. No consumer is required to use the new mechanism. To the contrary, a consumer must act to put her number in the registry, and can remove it if she is unhappy with the result. Thus, no solicitor faces any obstacle in reaching a willing listener.

Plaintiffs' brief is bereft of any suggestion that consumers who use the registry are getting anything other than what they want -- the chance to protect their privacy at home from unwanted telemarketing. Plaintiffs provide no reason to doubt that the registry advances the protection of residential privacy. Indeed, it is precisely because the registry is effective that plaintiffs oppose it. Nothing in the First Amendment requires the government to limit consumer options to less effective tools.

Although the registry advances a substantial government interest and restricts no more speech than necessary, plaintiffs argue that it is fatally underinclusive. Relying on Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993), plaintiffs argue that a regulation of commercial speech that directly advances a significant interest is invalid unless Congress imposes identical regulations on noncommercial speech that might be thought to contribute to the same problem. But Discovery Network did not work the revolution in First Amendment jurisprudence that plaintiffs imagine. Instead, Discovery Network holds that, where a ban on commercial speech does not appear to advance the government's interests, the government may not single out commercial speech unless it has a reason for doing so that relates to its interests. The decision does not suggest that Congress is barred from dealing with a major problem caused by commercial telemarketing unless it deals with charitable and political solicitation in the same way.

ARGUMENT

I. THE DO-NOT-CALL REGISTRY IS A CONSTITUTIONALLY PERMISSIBLE REGULATION OF COMMERCIAL SPEECH.

The government may regulate commercial speech if (1) its interest in doing so is "substantial," and the regulation (2) "directly advances" that interest, and (3) "is not more extensive than is necessary to serve that interest." Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980). "[T]he validity of restrictions on commercial speech should not be judged by standards more stringent than those applied to * * * time, place, or manner restrictions." United States v. Edge Broadcasting Co., 509 U.S. 418, 429 (1993).

A. The Government Has A Substantial Interest In Protecting Residential Privacy From Unwanted Commercial Telemarketing.

Plaintiffs understandably concede the importance of the government's interest in residential privacy, Br. 33, because "[i]ndividuals are not required to welcome unwanted speech into their own homes and the government may protect this freedom." Frisby v. Schultz, 487 U.S. 474, 485 (1988).

Plaintiffs nevertheless dispute that the government has demonstrated a "substantial need" for the registry, arguing that the rule should apply both to more speech (by addressing political solicitations) and to less speech (because company-specific rules would be sufficient). Br. 33-35. These arguments restate plaintiffs' position

with respect to other prongs of Central Hudson, but have no bearing on the incontrovertible point that the interest "'in protecting the well-being, tranquility, and privacy of the home'" is "'certainly of the highest order in a free and civilized society.'" Frisby, 487 U.S. at 484 (quoting Carey v. Brown, 447 U.S. 455, 471 (1980)).

Plaintiffs also confuse the interest in protecting consumers in their homes with regulations that would preclude unwanted speech generally. Thus, plaintiffs mistakenly liken the present case to Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), in which the Court struck down an ordinance that protected passersby from films played at drive-in theaters. Br. 22. While the Court rejected that restriction as impermissible censorship, it stressed that "[s]uch selective restrictions have been upheld * * * when the speaker intrudes on the privacy of the home." Id. at 209. Indeed, the Court in Erznoznik contrasted the restriction in that case with that upheld in Rowan v. United States Post Office Dep't, 397 U.S. 728, 738 (1970), explaining that "individual privacy is entitled to greater protection in the home than on the streets and noting that 'the right of every person "to be let alone" must be placed in the scales with the right of others to communicate.'" 422 U.S. at 209 n.4.

B. The Registry Directly And Materially Advances The Interest In Residential Privacy.

Commercial telemarketers complete over 16 *billion* calls a year. 68 Fed. Reg. at 4630 n. 591. Telemarketing calls, completed and abandoned, amount to as many as 104 million calls a day -- a "fivefold" increase in the last decade. 18 FCC Rcd. 14054 ¶ 66. The record leaves no doubt that large numbers of people consider these solicitations a serious invasion of their residential privacy. The do-not-call registry directly advances the privacy interests of consumers who wish to avoid those calls, by giving them an unmistakably effective way of doing so.

Plaintiffs dispute none of this. Instead, they urge that the registry does not materially advance the privacy interests of the persons who use it because it will not stop all solicitations. But the government is not precluded from providing consumers with an efficacious tool to protect their privacy because even more far-reaching tools might be possible. It is axiomatic that the government can make progress on "one front" of a potentially multi-faceted issue. Edge, 509 U.S. at 434. See also Virginia v. Black, 123 S. Ct. 1536, 1549 (2003) (government may address the most virulent instances of proscribable speech without addressing all instances); R.A.V. v. City of St. Paul, 505 U.S. 377, 390 (1992) (government may "address some offensive instances and leave other, equally offensive, instances alone"). Contrary to plaintiffs'

unsupported assertion, the Supreme Court has never called this principle into question, and the courts of appeals have repeatedly recognized its continued validity. See Missouri v. American Blast Fax, Inc., 323 F.3d 649, 656 n.4 (8th Cir. 2003), pet. for cert. pending, No. 03-507 (Oct. 1, 2003); Anderson v. Treadwell, 294 F.3d 453, 463 (2d Cir. 2002); Moser v. FCC, 46 F.3d 970, 974 (9th Cir. 1995).

Plaintiffs make no serious effort to explain how the registry can be analogized to the municipal ordinance at issue in Discovery Network , in which an outright ban on outlets for commercial speech had only a "paltry" impact on the city's proclaimed interest in advancing safety and aesthetics. Id. at 417-18. Even plaintiffs do not suggest that the benefit received by the consumers who have already registered 50 million numbers to avoid the 16 billion annual telemarketing calls could be characterized in this fashion. Moreover, as discussed below, it is also clear that the registry in fact addresses both the primary source of telephone solicitations and those calls which consumers regard as the greatest intrusion on their privacy. See Part I.D.

Plaintiffs mistakenly rely on decisions in which the link between the legislative goal and a restriction on speech was attenuated and uncertain, cases in which it was hoped that speech restrictions would discourage drinking, gambling or other conduct. See Greater New Orleans Broadcasting Ass'n v. United States, 527 U.S. 173 (1999); Rubin v. Coors Brewing Co., 514 U.S. 476, 488 (1995); Utah Licensed Beverage

Ass'n v. Leavitt, 256 F.3d 1061 (10th Cir. 2001). The uncertain connection between the legislative purpose and the restrictions on speech was exacerbated because the schemes were "so pierced by exemptions and inconsistencies" as to wholly undermine their efficacy. Greater New Orleans Broadcasting, 527 U.S. at 190; Leavitt, 256 F.3d at 1074 (state's "scheme of advertising regulation must be considered irrational"). Here, by contrast, there is no attenuation: the registry directly advances the interests of the consumers who use it in order to avoid intrusions on their privacy. See Trans Union Corp. v. FTC, 267 F.3d 1138, 1142 (D.C. Cir. 2001) (recognizing direct advancement of interest where "the speech itself * * * causes the very harm the government seeks to prevent").

C. The Registry Is Narrowly Tailored To Allow Consumers To Post Electronic "No Solicitation" Signs For Individual Residences.

As plaintiffs recognize, Br. 42, in regulating commercial speech, Congress need not employ the "least restrictive means." A law must be upheld if it "'promotes a substantial government interest that would be achieved less effectively absent the regulation,'" whether or not it is the "least intrusive" means of serving the government's interests. Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

The do-not-call registry is singularly nonintrusive. While other provisions of the TCPA bar some forms of unconsented solicitations outright -- and have consistently been upheld under the First Amendment[1] -- the registry bars no communications directly, but simply empowers consumers to avoid communications they do not want. Moreover, the registry, unlike the regulatory scheme at issue in U.S. West v. FCC, 182 F.3d 1224 (10th Cir. 1999), requires consumers affirmatively to "opt in," rather than assuming their participation unless they affirmatively "opt out." This structure precludes any suggestion that persons on the registry simply were insufficiently motivated to remove themselves from its protections.[2]

Plaintiffs misunderstand the full significance of the registry's structure. The government is not mandating any restrictions on telemarketing directed to willing listeners. It simply provides consumers with a means to prevent such calls if they so choose. The registry thus contrasts starkly with the paternalistic restrictions on

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[1] See Moser, supra (upholding 47 U.S.C. § 227(b)(1)(B), which prohibits calls to residential lines using artificial or prerecorded voices without consent); American Blast Fax, supra (upholding 47 U.S.C. § 227(b), which prohibits commercial fax solicitations without consent); Destination Ventures, Ltd. v. FCC, 46 F.3d 54, 56 (9th Cir. 1995) (same).

[2] Although plaintiffs suggest that allowing internet sign-up for the registry has resulted in unauthorized registrations, Br. 28 n.32, the two affidavits they cite specifically state that the affiants were authorized to register all the numbers they registered. See PA 736, 748. In any event, the FTC has adopted procedures to prevent abuse of internet registrations. See 68 Fed. Reg. 4639.

speech in the cases on which plaintiffs rely. In Martin v. City of Struthers, 397 U.S. 141 (1943), see Br. 29, the city banned all door-to-door leaftletting for any purpose. The problem with the scheme was that "the ordinance * * * substitutes the judgment of the community for the judgment of the individual householder. It [punishes literature distribution] even though the recipient of the literature distributed is in fact glad to receive it." Id. at 143-44.[3] The Court made clear, however, that citizens could post "no solicitation" signs on their property, and that the City could enforce a trespass statute against those who ignored them.

The registry accomplishes precisely what Martin held to be consistent with the First Amendment. It enables citizens to post an electronic "no solicitation" sign that would-be solicitors are required to honor just as they would be required to honor a sign posted by the consumer's door.

Plaintiffs argue that the First Amendment precludes the government from giving consumers the means to shield themselves from commercial telemarketing generally, and that it can only offer consumers a company-specific list. Br. 45-47. Plaintiffs' contention that company-specific rules are equally efficacious or even preferred by consumers is quite extraordinary. Any consumer who wishes to rely on

[3] The Court also stressed that the ordinance (unlike the registry) would have a debilitating effect on political discourse because "door to door campaigning is one of the most accepted techniques of seeking popular support" for causes. Id. at 146.

company-specific rules can continue to do so. But, as the overwhelming response to the establishment of the registry indicates, millions of consumers have found such - rules inadequate to protect their privacy. See 18 FCC Rcd. 14035, ¶ 29. ("Consumer frustration with telemarketing practices has reached a point in which many consumers no longer answer their telephones while others disconnect their phones during some hours of the day to maintain their privacy").[4] The First Amendment does not require the government to rely upon a means of regulation that will further its interests "less effectively" than the one it has chosen. Edge, 509 U.S. at 430.

A principal difficulty with company-specific rules is that the consumer must respond to thousands of calls from an ever-growing number of solicitors, requesting each to add her name to a company-specific list. See 18 FCC Rcd. 14067, ¶ 91. As one commenter observed, "[t]here are too many callers to possibly identify the callers and demand that they remove my name and number from the[ir] lists." Edwin Hathaway, Durham, NC (FCC Nov. 4, 2002), PA 336. The National Association of Attorneys General ("NAAG") similarly reported that the company-specific provision

[4] Contrary to plaintiffs' suggestion, Br. 11-12, 40, the FCC did not disavow the relevance of the "increasing number of inquiries and complaints about tele-marketing practices." 18 FCC Rcd. 14141, ¶ 216. The FCC simply explained that the TCPA Order rested, not on complaints filed with the agency outside the rulemaking proceeding, but on the "substantial record" that had been compiled in the rulemaking, including "over 6,000 comments" filed by "consumers, industry, and state governments * * * since September 2002." Id.

is too cumbersome because 30,000 businesses are engaged in telemarketing. JA 386; see also Garbin (FTC May 27, 2000) (first calls from telemarketers may result in thousands of calls per year). The FCC noted "the burdens of making do-not-call requests for every [telemarketing] call, particularly on the elderly and individuals with disabilities." 18 FCC Rcd. 14030 ¶ 19; 14054, ¶ 66. Indeed, comments indicated that some consumers received 20 or more calls daily.[5] Because of the large number of telemarketers and the large number of telemarketing calls that some consumers receive, company-specific rules would be inadequate even if it were always possible to make a do-not-call request and even if each request were promptly honored.

Furthermore, the record is replete with evidence that company-specific requests to telemarketers are frequently unavailing. Commenters to the FTC reported that their do-not-call requests are ignored, and they have no way of verifying that they

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[5] See, e.g., Josephine Presley, Asheville, NC (FCC Oct. 29, 2002) ("up to 26 telemarketing calls in one day"); Sandra West, Munday, TX (FCC Nov. 4, 2002) (sometimes "over 20 calls from telemarketers"); Joseph Durle, Fishers, IN (FCC Nov. 18, 2002) ("up to 20 calls per day"); Benjamin Johnson, Urbana, IL (FCC Oct. 29, 2002) (disconnected telephone after receiving "up to ten calls per day from telemarketers"); Karen Meyer, Lake Orion, MI (FCC Dec. 2, 2002) (elderly mother receives "u[p] to 10 solicitation phone calls per day"). Comments filed in the FCC's TCPA rulemaking proceeding are available on the internet by searching the FCC's Electronic Comment Filing System at: http://gullfoss.2.fcc/prod/ecfs/comsearch_v2/cgi. Comments filed in the FTC's rulemaking are similarly available at: http://www.ftc.gov/bcp/rulemaking/tsr/tsr-review.htm.

have been taken off a telemarketer's list. See 68 Fed. Reg. at 4629; 18 FCC Rcd. 14030, ¶ 19. For example, one consumer taped and logged all the telemarketing calls she received over a two-year period, including numerous calls made in violation of company-specific do-not-call requests. Diana Mey (FTC April 24, 2000).[6] She reported that telemarketers used a variety of means to discourage her from making do-not-call requests, including requiring that she make the request in writing, requiring that she give the name of every individual at her residence, hanging up before she could make the request, and refusing to take her request until she had listened to a statement outlining all the future solicitations she would miss if she received no further calls from the company (and then hanging up before she could make her do-not-call request). Id. NAAG, reporting the experience of state attorneys general, similarly reported that some telemarketers require consumers to make company-specific requests in writing, while others require consumers to call back on another telephone number. JA 387.

[6] Additional comments, also filed during the FTC's 2000 Telemarketing Sales Rule Review, confirm that consumers receive calls after making do-not-call requests (Anderson, Harper, Heagy, Nova, Nurik). Other commenters also complained that the provision does not work (Gardner, A.) and that telemarketers maintain a "no contact list" and refuse to honor the request of a consumer who asks to be put on a "do-not-call" list (Gilchrist).

The FCC record is to the same effect. For example, Thomas Pechnik of North Royalton, Ohio, submitted comments to the FCC stating that he had sought on numerous occasions to have himself taken off company calling lists but was unsuccessful, that he had sued several companies for TCPA violations, and that he concluded that "[t]he company-specific do-not-call approach has been a dismal failure." PA 323. Others recounted similar experiences. Sean Herriott, Canton, MI (FCC Nov. 22, 2002) ("[s]ome telemarketers have called repeatedly even after I have asked them to add me to their 'do not call' lists," and "[o]ne called literally every two weeks for a year; the same person would make the call each time, and deny that we had ever spoken before (despite my getting his name and keeping a record of the calls"); Steven Thornton, Seattle, WA (FCC Sept. 27, 2002) ("Despite being on no-call lists, my household receives dozens of illegal telemarketing calls, including auto-dialed and recorded answer calls"); Mavis Selway, Mesa, AZ (FCC Oct. 30, 2002) ("I have spent many hours on the phone calling all the appropriate agencies to get us 'off of their lists' all to no avail."). See also ACUTA, Inc., at 2 (FCC Mar. 29, 2002) ("Our experience is that it is often very difficult to track down and make contact with the companies making the calls, and to place our telephone numbers on do-not-call lists.").

The FCC record also confirms that telemarketers avoid "do-not-call" requests by hanging up rather than entertaining them. See J. Raymonde de Varona, Lansing, MI (FCC Dec. 6, 2002) ("Several telemarketers avoid my request to be placed in a 'Do Not Call' list by hanging up as soon as I start to make the request"); Mandy Burkart, Wellington, FL (FCC Dec. 2, 2002) ("I have asked the caller to provide his/her name and the company name, address and telephone number he is calling for. Their reply is a hang up. How can I report or protect myself from companies who do not give the information?"). Indeed, when the association representing university telecommunication administrators asked its members to obtain company names and call back numbers of telemarketers so that they could place their numbers on do-not-call lists, "[s]tudents reported that the telemarketers sometimes quickly hung up when they requested name and contact information from the callers," and this was "repeated on various campuses hundreds or thousands of time as calls were made to all campus residence phones." ACUTA, Inc., at 2.

Problems of proof that a particular telemarketer called a particular number after being requested not to call render enforcement of a company-specific regime difficult at best, as the consumer would not only have to keep records of all telemarketers asked not to call, but then also obtain and record information about the subsequent call. See Consumer.Net v. AT&T Corp., 15 FCC Rcd. 281, 291-95 ¶¶ 19-28 (1999)

(dismissing company-specific do-not-call claims for failure to satisfy burden on proving violation).[7]

Nor is there any merit to plaintiffs' contention that the government failed to "adopt other obvious and less restrictive alternatives * * * that would have made the company-specific requirement even more effective." Br. 47. Plaintiffs fail to note that many of these suggestions were opposed by commenters as too costly. See 18 FCC Rcd. 14066-67 ¶ 88. As for DMA's Telephone Preference Service, it only applies to DMA members, and even then is entirely voluntary. 68 Fed. Reg. 4631.

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[7] Nevertheless, the agencies, as well as states and individual consumers, have attempted to enforce the company-specific rules against telemarketers. Although the FCC's Consumer.Net decision dismissed several claims for lack of proof, it upheld others. See 15 FCC Rcd. 295-99, ¶¶ 29-39. The FCC has also issued a number of citations against telemarketers for violation of the do-not-call rules. See, e.g., Letter, July 18, 2002, Kurt A. Schroeder, FCC to Ad Resources, Inc.; Letter, Dec. 10, 2002, Schroeder to Newgen Results Corporation (available at: www.fcc.gov/eb/tsol.html). And just this week, the FCC issued a Notice of Apparent Liability that would impose a $780,000 forfeiture against AT&T for making 78 telemarketing calls to 29 residential telephone customers who had previously asked not to receive such calls. AT&T Corporation, FCC 03-267 (released Nov. 3, 2003). See also Charvat v. ATW, 712 N.E.2d 805 (Ohio App. 10 Dist. 1998); Adamo v. AT& T, 2001 WL 1382757 (Ohio App. 8 Dist. Nov. 8, 2001); Kaplan v. First City Mortgage, 701 N.Y.S.2d 859 (Rochester City Ct. Dec. 8, 1999) (all awarding damages in private suits for violation of company-specific do-not-call requests). Furthermore, contrary to plaintiffs' misstatement, Br. 11, the FTC has also brought cases charging violations of the company-specific do-not-call rule. See FTC v. Epic Resorts, LLC, No. 6:00-CV-1051-ORL-19C (M.D. Fla.); FTC v. 1st Financial Solutions, Inc., No. 01-C-8790 (N.D. Ill.).

Because the TPS is not "comprehensive," Congress rejected reliance on it in passing the TCPA. H.R. Rep. 102-317, at 19-20.[8]

D. The Registry Is Not Impermissibly Underinclusive.

At bottom, plaintiffs' argument is not so much that the registry extends too broadly but that it sweeps too narrowly. In plaintiffs' view, the registry is fatally underinclusive because it does not give consumers the option to screen charitable or political solicitations along with commercial telemarketing.

This argument fails at every turn. As the Ninth Circuit observed in Moser, in rejecting a challenge to provisions that barred pre-recorded but not live solicitations, "'underinclusiveness'" may trigger a First Amendment violation only when a regulation represents an "attempt to give one side of a debatable public question an advantage in expressing its views to the people." 46 F.3d at 974 (quoting City of Ladue v. Gilleo, 512 U.S. 43, 51 (1994)). That is not the case here.

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[8] Although plaintiffs contend that "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," Br. 24, the FCC found that "the availability of certain network technologies to reduce telephone solicitations is often ineffective and costly for consumers." 18 FCC Rcd. 14041 ¶ 39. "In particular," the FCC explained, it was "concerned that the cost of technologies such as Caller ID, call blocking, and other such tools * * * fall[s] entirely on the consumer," and that reliance on such solutions is therefore "inconsistent with Congress' intent in the TCPA." Id.

Plaintiffs suggest that the registry's "underinclusiveness" poses special problems because the distinction between commercial and noncommercial speech is based on content. But as Central Hudson explains, although the First Amendment prohibits content-based regulation in most contexts, the commercial speech doctrine allows such distinctions. 447 U.S. at 564 n.6. Commercial speech limitations are commonly based on the content of the speech being regulated. See Trans Union, 267 F.3d at 1141-42. See also Lanphere & Urbaniak v. Colorado, 21 F.3d 1508, 1513 (10th Cir. 1994) (recognizing commercial speech restrictions, though "content-based," are subject to Central Hudson scrutiny).

Moreover, other authorities establish that the government should be more hesitant to regulate charitable solicitation than commercial speech because "charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services." Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 (1980). Nothing precludes Congress from recognizing the characteristics of charitable solicitation that distinguish it from commercial speech.

Furthermore, plaintiffs' argument fails to come to grips with a pivotal feature of the registry: that it does not itself bar speech, but simply provides an option to the consumer. The only consequence of alleged "underinclusiveness" in this context is

that the consumer receives less protection from telephone intrusion than she might wish for. If the consumer determines that the protections the registry affords are inadequate, or that they are outweighed by the loss of valued communications, she presumably will not sign up. The Supreme Court has long recognized the propriety of regulations of this sort, which leave the decision whether to allow intrusion into the home "where it belongs -- with the homeowner himself." Martin, 397 U.S. at 143-44 (contrasting such regulation to prohibition on door-to-door solicitation); Rowan, supra (upholding consumer-initiated prohibitions on offensive mailings).

Plaintiffs note (correctly) that Rowan pre-dates development of the commercial speech doctrine and contend (incorrectly) that it entailed no governmental distinctions based on content. Br. 28-29. Rowan is directly pertinent.[9] The Court upheld the statute at issue although it involved a content-based distinction between erotic "advertisements" and other mail that consumers might find similarly offensive. The Court has made clear that this holding retains its validity because "selective restrictions" that would otherwise be invalid may be upheld when "the speaker intrudes on the privacy of the home." Erznoznik, 422 U.S. at 209 & n.4. These cases recognize

[9] The fact that the Court gave plenary consideration to the asserted speech interests there -- rather than rejecting them out of hand as commercial, see Valentine v. Chrestensen, 316 U.S. 52 (1942) -- simply reinforces the great weight it gave to the consumer-choice aspect of that regulation.

that, wholly apart from any commercial/non-commercial distinction, regulations that simply allow consumers to exercise control over communications into the home must be upheld even if they have limitations in scope that are content-based.

Plaintiffs attempt to avoid all of the foregoing principles, based on their misreading of Discovery Network. Plaintiffs disregard the Court's admonition that its holding was "narrow," and that it was only concluding that, based on the record before it, Cincinnati had "not established the 'fit' between its goals and its chosen means that is required * * *." Id. at 428. The Court did not convert distinctions between commercial and noncommercial speech into "content discrimination," and did not establish a new prohibition against "underinclusiveness." To the contrary, as the Court itself emphasized, its holding was based on the lack of any connection between the statute's goals and its provisions. The city had restricted the dissemination of commercial information for no legitimate purpose and had signally failed to consider other obvious alternatives that might actually have furthered its asserted interests. Id. at 428. That holding provides no basis for invalidating the registry, which bans no speech, gives consumers a highly effective means of preserving the privacy of their homes, and is based on a decade of experience that demonstrated the flaws of the regulatory mechanism that plaintiffs insist should be the sole protection offered to consumers.

Finally, plaintiffs have no cogent response to the evidence before Congress and the agencies regarding the role of commercial telemarketing in generating consumer dissatisfaction. Plaintiffs dismiss out of hand the legislative record cited in American Blast Fax and Destination Ventures. Br. 39 n.43. As the Eighth Circuit noted, however, the "legislative record" of the TCPA "indicates that commercial calls constitute the bulk of all telemarketing calls * * *." 323 F.3d at 658; accord Destination Ventures, 46 F.3d at 56 (upholding statutory ban on commercial faxes because the bulk of unwanted faxes are commercial). As the Eighth Circuit also explained, Congress, in enacting the TCPA, found that "non-commercial calls * * * are less intrusive to consumers because they are more expected." 323 F.3d at 655.

Contrary to plaintiffs' contentions, the data from state consumer protection agencies considered by Congress was absolutely clear and was not misunderstood by the courts reviewing TCPA challenges. Those states with complaint data broken down by category reported that between 80 and 99 percent of complaints involved commercial calls. Plaintiffs attempt to obscure the import of the legislative record by urging "that up to half the complaints in other states mentioned in the House Report * * * related to charitable or political calls." Br. 39. What the Report actually states, however, is that the four other states reporting data indicated that "that consumer

complaints about unsolicited telemarketing involved calls that were 'mostly commercial' in nature." H.R. Rep. 102-317, at 16.

Congress's understanding that commercial telemarketing constituted the bulk of telephone solicitations is borne out by experience under state regulatory schemes. For example, the registry established by the State of Missouri, which, like the national registry, applies only to commercial telemarketing, resulted in a reduction of calls by 70 to 80 percent. 68 Fed. Reg. at 4593 n.140, 4633 n.642. And the information provided by the telemarketers themselves reflected their own estimation that the do-not-call rule as initially proposed -- i.e., without coverage of entities subject only to FCC jurisdiction, such as banks and common carriers -- would reduce telemarketing by about half. See 68 Fed. Reg. at 4631. Ultimately, while it is impossible to quantify the precise impact of the registry, there is no reason to think that Missouri's experience is anomalous. See 18 FCC Rcd. 14054 ¶ 67 ("[t]he history of state-administered do-not-call lists demonstrates that such do-not-call programs have a positive impact on the ability of many consumers to protect their privacy by reducing the number of unwanted telephone solicitations that they receive each day.").

Plaintiffs observe that some states receive complaints about calls exempt under state law as well as covered commercial calls (although these often concern calls that

would not be permitted under less expansive federal exemptions).[10] They are doubtless correct that some consumers would prefer the option of barring solicitations altogether, and doubtless also correct that some consumers will prefer to rely on company-specific rules and will not enroll in the registry at all. Neither point raises any question as to the constitutionality of a tool that provides consumers the option of avoiding all commercial telemarketing.

II. THE FCC REASONABLY DECLINED TO ADOPT SPECIAL RULES THAT WOULD HAVE EXEMPTED COMPETITIVE TELECOMMUNICATIONS CARRIERS FROM THE DO-NOT-CALL REGISTRY.

Petitioner Competitive Telecommunications Association ("CompTel") -- a trade association representing competitive telecommunications carriers -- argues that the TCPA's exemption for calls to persons with whom a telemarketer has "an established business relationship [EBR]," 47 U.S.C. § 227(a)(3), unfairly burdens new competitive carriers relative to established incumbents, since the latter already have business relationships with virtually all subscribers in their regions. CompTel claims

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[10] See Plaintiffs' Br. 39, 12 n.13. Missouri's comments indicated that 20 percent of complaints it received involved entities exempt under that state's law -- including banks and telephone companies -- and another 20 percent of complaints were invalid for reasons that had nothing to do with the identity of the caller. TSR Forum, Transcript 6/5/2002 at 206. This information casts no doubt on the fact that commercial telemarketing constitutes the majority of telephone solicitations and the majority of calls that consumers find most objectionable.

that the FCC had an obligation to alter (in unspecified ways) its approach with respect to telemarketing by telecommunications carriers to take account of the pro-competition policies of the Telecommunications Act of 1996, 47 U.S.C. §§ 251, et seq. CompTel Br. 5-9.

CompTel's argument largely ignores the fact that the TCPA -- not the 1996 Act-- supplies the statutory authority under which the FCC adopted its do-not-call rules. The TCPA is a privacy statute, not a competition statute -- indeed, its fundamental instruction is that the FCC implement rules "concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object." 47 U.S.C. § 227(c)(1) (emphasis added). The established business relationship exemption is "grounded in the consumer's expectation of receiving the call." H.R. Rep. 102-317, at 15. The FCC explained that exempting "a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests." 7 FCC Rcd. 8770 ¶ 34; see generally 68 Fed. Reg. 4591-94.

CompTel makes passing reference to the requirement of § 227(c)(1)(A) that the FCC compare alternative methods and procedures both "for their effectiveness in protecting * * * privacy interests" "and in terms of their cost and other advantages and disadvantages" -- suggesting that this provision may be read to inject the FCC's

local competition policies into its TCPA analysis. CompTel Br. 7-8. CompTel does not indicate that this textual argument was ever presented to the FCC, however, and we are not aware of its having been made. This Court, accordingly, should not consider it. See 47 U.S.C. § 405(a) (filing of a petition for administrative reconsideration is a condition precedent to judicial review where party seeking review "relies on questions of fact or law upon which the Commission * * * has been afforded no opportunity to pass"); State Corporation Comm'n of Kansas v. FCC, 787 F.2d 1421, 1427 n.4 (10th Cir. 1986) (argument not raised before the FCC "is therefore not properly presented on review").

In any event, the TCPA's legislative history suggests that the direction to consider countervailing costs in the FCC's choice of a method of protecting consumer privacy was addressed primarily to the direct costs of implementing and administering a national do-not-call database -- not to the types of indirect competitive burdens that CompTel asserts here. See H.R. Rep. 102-317, at 20-23. The responsible Congressional committee stressed, moreover, that it "expects the Commission to choose the alternative that is most effective in protecting telephone subscriber privacy." Id. at 19. With respect to the role of the "established business relationship," in particular, Congress indicated that the relevant "balance" was between "barring all calls to those subscribers who objected to unsolicited calls, and a desire not to unduly interfere with

ongoing business relationships." Id. at 13 (emphasis added). CompTel's competitive arguments do not advance its case with respect to that balancing. Finally, even if § 227(c)(1)(A) were read more broadly, it would not require the FCC to subordinate the specific privacy goals of the TCPA to the general competitive objectives of the 1996 Act.[11]

CompTel's brief before this Court does not endorse -- or even describe -- any particular alternative to the rule it challenges. But the FCC, in fact, addressed and reasonably rejected alternative proposals. It considered two proposals by CompTel member MCI to redefine the statutory EBR exemption -- either to include all telecommunications carriers within the exemption (regardless of any actual customer relationship) or, alternatively, to exclude incumbent carriers from the exemption altogether. 18 FCC Rcd. 14085 ¶ 121. However, neither proposal provided a remotely plausible construction of "established business relationship," and the FCC reasonably rejected them. The latter proposal (narrowing the EBR exemption) would impermissibly have

[11] CompTel errs in asserting that the FCC arbitrarily declined to exercise discretion available to it on the mistaken view that the TCPA required it "to privilege consumer privacy above all else, whatever the harm to other congressional policies the FCC must implement." CompTel Br. 7 (citing 18 FCC Rcd. 14085 ¶ 122). The sentence fragment CompTel quotes to support that claim correctly recognizes the TCPA's "mandate" to adopt rules to protect consumer privacy, but it does not state, or fairly suggest, that the FCC believed itself powerless to consider competitive factors in tailoring those rules.

extended the ban on telemarketing to calls that fall outside the scope of "telephone solicitation[s]" proscribable under § 227(c). And the former proposal (broadening the exemption) not only stretched the statutory term beyond recognition, but also conflicted with the TCPA's purpose "'to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object.'" 18 FCC Rcd. 14085 ¶ 122 (quoting 47 U.S.C. § 227(c)(1)). In particular, Congress had included the EBR exemption in the TCPA because it saw calls from businesses with whom customers have established relationships as being more expected and thus less objectionable. H.R. Rep. 102-317, at 14. That reasoning has no application where no business relationship exists and the customer has "expressed a desire not to be called by registering with the national do-not-call list." 18 FCC Rcd. 14085 ¶ 122.

The FCC also considered another proposal that would have limited the EBR exemption to the particular services that the carrier provides its customer, so that an incumbent telephone company could not use its status as a customer's local service provider as a basis to make telephone solicitations regarding other (for example, long-distance or internet access) services. See 18 FCC Rcd. 14084-85 ¶ 120. However, competitive carriers also opposed that proposal, because they, too, wanted the flexibility to market additional products to their customers. Id. CompTel does not contest

before this Court the FCC's conclusion that such a restriction "would not be in the public interest." 18 FCC Rcd. 14085.

Having seriously considered the arguments of competitive carriers regarding the "potential effects of a national do-not-call list on competition in the telecommunications marketplace," the FCC rejected the specific alternative proposals before it. 18 FCC Rcd. 14085 ¶ 122. Although those proposals, in the FCC's judgment, failed effectively and efficiently to carry out the purposes of the TCPA, the FCC also found that the rules being adopted would leave new entrants with a number of effective marketing opportunities: carriers would "still be permitted to contact [by telephone] competitors' customers who have not placed their numbers on the national list" (18 FCC Rcd. 14085-86 ¶ 123); they would still "be able to call their prior and existing customers" under the EBR exemption (id.); and "[f]or the remaining consumers with whom common carriers have no established business relationship and who are registered on the do-not-call list, carriers may market to them using different advertising methods, such as direct mail." Id.

The Supreme Court has emphasized that "a court is not to substitute its judgment for that of the agency," Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983), a point that is "especially true when the agency is called upon to weigh the costs and benefits of alternative policies." Consumer Electronics Ass'n

v. FCC, No. 02-1312, slip op. 20 (D.C. Cir. Oct. 28, 2003). Although CompTel dislikes the line that the FCC reasonably drew after balancing the privacy and competitive concerns presented to it, it makes no effort to identify or defend a different line. Its petition for review should be denied.

III. THE FTC'S FEE RULE IS CONSTITUTIONAL.

The fees the FTC charges telemarketers for access to the registry are constitutional because they do not constitute a revenue-generating tax. See Plaintiffs' Br. 49. To the contrary, those fees are used only to defray expenses associated with the registry and related law enforcement efforts directed at telemarketing. Even with respect to activities protected by the First Amendment, the government may charge fees necessary "to meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed." Cox v. New Hampshire, 312 U.S. 569, 577 (1941). That is precisely what the FTC is doing here.

There is nothing "hazy" about how the FTC will spend the $18.1 million in fees Congress authorized it to collect. See Br. 50. The FTC contracted to pay $3.5 million in connection with creation of the registry. That amount, however, does not include the FTC's internal expenses related to the creation and maintenance of the registry, costs of processing consumer inquiries and complaints, administrative and infrastructure costs associated with the registry (including consumer and business

education), or the costs of investigating violations and enforcing compliance with the registry and other provisions of the TCFPA. 68 Fed. Reg. 45141.

There is no basis for plaintiffs' speculation that the FTC will use the fees "for general agency outreach functions and technical systems." See Br. 49. These systems are being upgraded to manage the significant impact of the registry on the agency's existing infrastructure. In particular, the systems must handle the massive influx of consumer complaints related to the registry that the FTC projected it would receive, and that it has, in fact, received.[12] Because all of the uses to which the FTC is putting the fees are "incident to the administration of the" TCFPA, the fees are constitutional. See American Target Advertising, Inc. v. Giani, 199 F.3d 1241, 1248-49 (10th Cir. 2000) (upholding against First Amendment challenge fees imposed on fundraising consultants that were used to enforce anti-fraud law); National Awareness Foundation v. Abrams, 50 F.3d 1159, 1164-67 (2d Cir. 1995) (upholding fees paid by professional fundraisers that defrayed both administrative expenses and costs of law enforcement).

[12] See 68 Fed. Reg. 45141; http://www.ftc.gov/opa/2003/11/dnc031103.htm, (as of November 3, 2003, the FTC had received more than 51,000 complaints from consumers regarding telemarketers who continue to call).

CONCLUSION

For the foregoing reasons, as well as those stated in our Consolidated Opening Brief, this Court should reverse the district court decisions in U.S. Security and Mainstream, and deny the petitions for review of the FCC's Order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 6999 words. I relied on my word processor and its WordPerfect 10 software to obtain this count. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2003, I served a copy of the Consolidated Reply Brief of Appellant Federal Trade Commission, Respondent Federal Communications Commission, and Respondent-Intervenor United States of America on appellees and petitioners by e-mail directed to their counsel listed below. On the same day, I served the same counsel with two copies of the reply brief by express overnight delivery.

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