No. 03-1429

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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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.

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On Appeal from the United States District Court, District of Colorado, District Court No. 03-N-0184 (MJW), The Honorable Edward W. Nottingham

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BRIEF FOR *AMICI 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

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Interest Of Amici[1]

Amici curiae are Representatives W.J. "Billy" Tauzin and John D. Dingell, the Chairman and Ranking Member of the House Committee on Energy and Commerce, the authorizing committee with jurisdiction over the Federal Trade Commission. *Amici* authored, and were integral in securing passage of, legislation supporting the Commission's "Do Not Call" rules at issue in this appeal.[2]

Amici have dual interests in this litigation. First, *amici* have an institutional interest in ensuring that the judiciary upholds federal consumer protection laws and regulations that are consistent with Congressional enactments and the First Amendment. Second, *amici* have a substantive interest in ensuring that the Court understands the underlying basis of the Commission's decision to regulate commercial calls and non-commercial calls differently.

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[1] ..... All parties have consented to the filing of this brief.

[2] The following members of the Committee on Energy and Commerce, each of whom is either Chairman or Ranking Member of a subcommittee, also support this brief: Representative Fred Upton, Chairman, Subcommittee on Telecommunications and the Internet; Representative Edward J. Markey, Ranking Member, Subcommittee on Telecommunications and the Internet; Representative Cliff Stearns, Chairman, Subcommittee on Commerce, Trade and Consumer Protection; Representative Janice D. Schakowsky, Ranking Member, Subcommittee on Commerce, Trade and Consumer Protection; Representative Rick Boucher, Ranking Member, Subcommittee on Energy and Air Quality; Representative Michael Bilirakis, Chairman, Subcommittee on Health; Representative Sherrod Brown, Ranking Member, Subcommittee on Health; Representative Jim Greenwood, Chairman, Subcommittee on Oversight and Investigations; Representative Peter Deutsch, Ranking Member, Subcommittee on Oversight and Investigations; Representative Paul E. Gillmor, Chairman, Subcommittee on Environment and Hazardous Materials; and Representative Hilda L. Solis, Ranking Member, Subcommittee on Environment and Hazardous Materials.

Introduction

In 1995, the Federal Trade Commission ("FTC") promulgated telemarketing rules that prohibit "a seller or telemarketer [of goods or services] from calling a consumer who has previously asked not to be called by or on behalf of that seller." 68 Fed. Reg. 4580, 4629 (Jan. 29, 2003). *See also* 16 C.F.R. § 310.4(b)(1)(iii)(A). Earlier this year, the FTC amended its rules to make it easier for consumers to avoid telemarketing calls. Under the revised rule, commonly known as the "Do Not Call" rule, individuals can choose to prohibit ***all*** commercial telemarketing calls to their homes or cellular phones, with a limited exception for calls made pursuant to an established business relationship. *See* 16 C.F.R. § 310.4(b)(1)(iii)(B); 68 Fed. Reg. at 4629, 4632. The revised FTC rules also, for the first time, impose limitations on telemarketing for charitable donations; under the new rules, individuals may prohibit calls to their homes by any charities that they specifically designate. *See* 16 C.F.R. § 310.4(b)(1)(iii)(A); 68 Fed. Reg. at 4629.

Put together, the two provisions now authorize individuals to prohibit ***both*** commercial and charitable telephone solicitations in their homes. The "Do Not Call" registry allows them to prohibit all commercial telemarketing; if they would like to make company-specific exceptions to that general ban, they may do so by giving commercial entities express permission to call them. *See* 16 C.F.R. § 310.4(b)(1)(iii)(B)(i); 68 Fed. Reg. at 4629.[3] There is no mechanism for prohibiting all charitable solicitations, but citizens may designate any specific charity from which they do not wish to receive home solicitation calls. The difference between the regulation of commercial telemarketing and charitable solicitation is in the default rules: citizens must take affirmative steps to ***receive*** commercial telemarketing calls (once they have signed up with the "Do Not Call" registry) and to ***avoid*** charitable solicitations.

As set forth below, the FTC's decision to regulate commercial telemarketing and non-commercial telemarketing differently was based on legislative and regulatory findings that: (1) commercial solicitations are far more intrusive than non-commercial solicitations; and (2) commercial telemarketers are more likely to engage in abusive practices than telemarketers soliciting for charities. Those findings are more than adequate to support a system that allows citizens to prohibit commercial telemarketing on a blanket basis and charitable solicitation on a charity-specific basis. Accordingly, the Do Not Call rule does not impermissibly discriminate against commercial speech and is entirely consistent with the First Amendment.

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[3] By the same token, if an individual makes a company-specific request not to be called and would otherwise fall within the established business relationship exception, a seller may not call the individual "regardless of whether the consumer does business with the seller." 68 Fed. Reg. at 4634. *See also* 16 C.F.R. § 310.4(b)(1)(iii)(B)(ii).

Argument

Under well-established Supreme Court precedent, the federal government has the power to regulate truthful commercial speech as long as: (1) its interest is substantial; (2) the regulation it proposes "directly advances" that interest; and (3) the regulation is not more extensive than necessary to serve that interest. *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980). In order to satisfy the second and third prongs of this test, the government need only demonstrate a "reasonable fit" between the identified problem and the government's solution – not a "perfect fit." *United States v. Edge Broad. Co.*, 509 U.S. 418, 429, 434 (1993) ("Nor do we require that the Government make progress on every front before it can make progress on any front."); *Bd. of Trustees v. Fox*, 492 U.S. 469, 480 (1989) (requiring "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served'; that employs not necessarily the least restrictive means but, . . . a means narrowly tailored to achieve the desired objective"); *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649, 656 n.4, 658-59 (8th Cir. 2003). And "reasonable fit" need not be shown by volumes of scientific research or studies. The standard is far more generous than that: "anecdotes . . . history, consensus, and 'simple common sense'" all will suffice to show both the extent of the problem and that the regulation in question will alleviate it. *Florida Bar v. Went For It., Inc.*, 515 U.S. 618, 628 (1995); *Nixon*, 323 F.3d at 654.

Finally, in reviewing regulations such as the Do Not Call rule, courts afford substantial deference to any legislative conclusions that informed the regulatory decision at issue, because Congress is "'far better equipped than the judiciary to "amass and evaluate the vast amounts of data" bearing upon legislative questions.'" *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 195 (1997). *See also City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002) (plurality); *Fox*, 492 U.S. at 478; *Moser v. FCC*, 46 F.3d 970, 974 (9th Cir. 1995). In fact, the Supreme Court has recognized that courts should afford "an additional measure of deference" to Congressional findings in applying the second and third prongs of the *Central Hudson* test, "lest [courts] infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy." *Turner*, 520 U.S. at 196.

Over the last twelve years, Congress has held numerous hearings and enacted several pieces of legislation addressing telemarketing abuses. Through that process, Congress amassed a substantial legislative record on which the FTC relied in promulgating the regulations at issue here. As set forth below, that record amply demonstrates that commercial telemarketing differs from charitable

solicitation in at least two respects relevant here. First, citizens, as a general rule, consider commercial telemarketing far more intrusive than charitable solicitations. Second, commercial telemarketing is more prone to abuse than is charitable solicitation. Given those differences, the "fit" between the Do Not Call rule and the chief concerns raised by telemarketing is more than sufficient, and the rule falls comfortably within the boundaries of the First Amendment. *See Edenfield v. Fane*, 507 U.S. 761, 774-77 (1993) (invalidating ban on personal solicitation by accountants, despite similar ban for lawyers, because lawyers are more likely to engage in overreaching and other forms of misconduct than accountants, and "the constitutionality of a ban on personal solicitation will depend on the identity of the parties and the precise circumstances of the solicitation").[4]

I. The Legislative Record Underlying The Federal Trade Commission's Do Not Call Rule Demonstrates That Commercial Telemarketing Is Far More Intrusive Than Non-Commercial Telemarketing.

When Congress began investigating the state of telemarketing in the early 1990s, it found that commercial telemarketing was by far the most intrusive type of telemarketing. After holding a series of hearings that ultimately led to passage of the Telephone Consumer Protection Act of 1991 ("TCPA"), Congress concluded that "most unwanted telephone solicitations are commercial in nature" and "that unwanted commercial calls are a ***far bigger problem*** than unsolicited calls from political or charitable organizations." H.R. Rep. No. 102-317, at 16 (1991) (Submitted by former Chairman Dingell) (emphasis added).[5]

[4] The Supreme Court's holding in *Cincinnati v. Discovery Networks, Inc.*, 507 U.S. 410 (1993), relied upon by plaintiffs, is not to the contrary. In that case, there was no evidence – nor could there be – that people found commercial newsracks to be more aesthetically unpleasant than newsracks containing newspapers and other non-commercial periodicals. *See id.* at 425-26. Here, the record makes clear that solicitations by commercial telemarketers are not only more invasive than non-commercial calls, but also more likely to be coercive or fraudulent and to swindle vulnerable individuals (such as senior citizens). Moreover, unlike the regulation at issue in *Discovery Networks*, the rules at issue here regulate both commercial and non-commercial speech. They simply regulate them differently because they raise different levels of concern.

[5] While the TCPA was not the statute that authorized the FTC to explore the possibility of a "Do Not Call" registry, *see infra* at 9, it was the first statute in a series that reflected the evolution of Congress' thinking on the matter and its measured responses to

This conclusion was not mere speculation – it was backed by Congressional testimony as well as hard data. Among those who testified about the problem, there was a clear consensus that people consider commercial calls to be far more annoying and invasive than charitable calls. For example, in 1991, Robert Bulmash of Private Citizen, Inc., a consumer group dedicated to protecting privacy rights, testified that "[t]he rating of consumer non-acceptance on telemarketing, is, first and foremost, automatic dialing sales; then live sales; then charity; then legitimate survey research, and then finally, on the lowest level of annoyance is political calls." Hearing on S. 1462, S. 1410 & S. 857 Before the Subcomm. on Communications of the Comm. on Commerce, Science, & Transport., 102d Cong., at 26 (1991). Similarly, Michael Jacobson, Co-founder of the Center for the Study of Commercialism, another public interest group, testified that "[t]he very idea of having the sanctity of one's home invaded by these ***commercial*** intruders is offensive." *Id.* at 40 (emphasis added).

The Bulmash and Jacobson testimony confirmed what Members of Congress have been hearing from constituents for years – that calls from commercial telemarketers are more invasive than non-charitable solicitations. As

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the problems of commercial telemarketing. As a result, the FTC "considered, among other things, the approach taken by Congress and the FCC in the TCPA and its implementing regulations" when enacting its "Do Not Call" rules. 68 Fed. Reg. at 4591. Accordingly, as this Court already has recognized, the history of the TCPA also bears on the review of the FTC's "Do Not Call" rules. *See* Order, at 14 (10th Cir. Oct. 7, 2003).

Representative Markey stated during the debate that led to the TCPA, "[m]any consumers complain bitterly that when [the telephone] rings to deliver unsolicited advertising, it is invading their privacy." 136 Cong. Rec. H5820 (July 30, 1990). Representative Fish similarly noted during debate surrounding the 1991 legislation: "Over the years, I have heard an increasing number of complaints from constituents who have been harassed by unsolicited sales calls." 137 Cong. Rec. H10343 (Nov. 18, 1991). *See also id.* (statement by Rep. Rinaldo noting that "nonprofit organizations" do not engage in practices that "annoy[]" individuals).

The finding that commercial calls are far more annoying to consumers than charitable solicitations was also documented in the House and Senate reports on the TCPA. For example, the House Report cites studies conducted by two telephone companies, which found that "Sales/solicitation and Computer/advertising calls, respectively were the most often mentioned type of problem or annoyance call." *See* H.R. Rep. No. 102-317, at 8-9. The House Report also cites a study by the National Association of Consumer Agency Administrators, which found that just ten percent of complaints about telemarketing involved charitable calls. *See id*. at 16-17. The Senate Report similarly highlighted commercial telemarketing as the central source of annoyance to individuals. *See* S. Rep. No. 102-177, at 2 (1991) ("[T]hose who complain . . . cite the following problem[]: . . . telemarketers disturb consumers in the privacy of

their homes with unsolicited sales pitches for undesired goods or services[.]").[6]

Three years later, when Congress considered the Telemarketing and Consumer Fraud Abuse Prevention Act of 1994 ("TCFPA"), the statute ordering the FTC's involvement in the problem of deceptive and abusive telemarketing practices, a similar pattern emerged. Once again, it was clear that commercial calls are considered far more intrusive by consumers than charitable calls – in part because commercial callers tend to be more aggressive. Indeed, the telemarketers admitted to this problem themselves. Richard A. Barton, vice president of the Direct Marketing Association, a trade association whose membership includes telemarketers, testified about complaints from senior citizens regarding telemarketers who are "screaming at them over the phone and using curse words and calling them all sorts of names to try to get them to buy" products. Hearing on H.R. 868 Before the Subcomm. on Transport. & Hazardous Materials of the Comm. on Energy & Commerce, 103d Cong., at 37 (testimony of Richard Barton) (1993). *See also* H.R. Rep. No. 103-20, at 4-5 (1993) (Submitted by former Chairman Dingell) (recognizing that commercial calls are "coercive of a

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[6] As a result, when Congress passed the TCPA, requiring the FCC to initiate a "rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations," 47 U.S.C. § 227(c), it excluded tax-exempt nonprofit organizations from its coverage, *see id*. at § 227(a)(3)(C). Congress also exempted survey research calls from coverage under the 1991 Act because the evidence showed that those types of calls, like charitable solicitations, were considered less invasive by recipients. *See* H.R. Rep. No. 102-317, at 13.

consumer's right to privacy"). Notably, none of the witnesses or other evidence before Congress identified similar problems by charitable telemarketers.

Most recently, during various Congressional debates about the Do Not Call rule itself, the record yet again pointed to commercial telemarketing – not charitable telemarketing – as particularly intrusive to individuals and families. Representative Holt summed up the sentiments that numerous Members of Congress have heard from their constituents when he said, "The residents of my district have pleaded with me to do something so that they can have a peaceful family dinner, not interrupted by credit card solicitations or the latest condominium offerings on some tropical locale." 149 Cong. Rec. H408 (Feb. 12, 2003). Representative Schakowsky expressed a similar sentiment: "Who has not had that time [with our families] interrupted by ***commercial*** telemarketers? We all know from personal experience how intrusive these calls can be." *Id.* (emphasis added). *See also* Hearing Before the House Comm. on Energy & Commerce, 108th Cong. (2003) (noting that "many" deem "[u]nwanted telemarketing . . . to be an outright invasion of privacy" and that excepting charitable solicitations is a matter of "common sense") (statement of Rep. Dingell).

The most recent testimony before Congress on this issue also confirmed that consumers are far less resentful of charitable calls – and do not express the same animus toward non-commercial telemarketers. For example, in April 2003, the Chairman of the FTC testified before the House Appropriations Committee that

"we've found that consumers overwhelmingly do not resent the charitable calls the way they represent the calls from the non-charities." Hearing Before the Subcomm. on Commerce, Justice, State & Judiciary of the House Appropriations Comm., 108th Cong. (2003) (testimony of Timothy J. Muris, Chairman, FTC). Moreover, the record before Congress indicated that consumers – whom the Do Not Call rule seeks to protect – view the rule's treatment of charitable solicitations favorably, providing further evidence that citizens are less likely to find charitable solicitations intrusive or annoying. As Chairman Muris testified, "surveys of consumers in those states [with "do not call" rules] . . . indicate[] that consumers like their . . . rule including the charitable exemption." Hearing Before the House Comm. on Energy & Commerce, 108th Cong. (2003) (testimony of Timothy J. Muris, Chairman, FTC).

Citizens tend to receive charitable solicitations more warmly in part because charities are more concerned about keeping their donor base – and thus the recipients of their calls – happy. Unlike commercial telemarketers, who typically seek to make just one isolated sale, charitable solicitors have a far greater stake in maintaining positive relationships with those they call. As Chairman Muris testified, "My experience with the charities and a lot of people's experiences, they don't want to offend their donor base and that if you tell them to don't call you and send a letter, that they'll send you a letter." *Id*. The FTC explicitly relied on this

rationale in promulgating the challenged rules. *See* 68 Fed. Reg. at 4637 (noting that likelihood of pattern of abusive calls is less for nonprofits because the individual called "is more than a potential source of income[], he or she is also a voter, a constituent, a consumer, a source of information to others" and thus can be alienated "against the cause not just against the caller or their organization").

In short, Congress has established a weighty record, over more than a dozen years of debate, indicating that the "annoying ring on the phone" is far ***more*** annoying when the person on the other end is "calling to sell something," 149 Cong. Rec. H408 (Rep. Tauzin) (Feb. 12, 2003), rather than to solicit contributions to a charity – and that they want the government to do something about it. *See* Comment of Rep. Baldacci to FTC (Jan. 28, 2002) ("I have heard from many [of my constituents] about the unwelcome intrusion of sales calls and the ineffectiveness of current methods to eliminate the calls."). That record is by itself sufficient – indeed, far more than sufficient in light of the deference owed to legislative judgments under the *Central Hudson* standard – to justify the FTC's differential treatment of commercial telemarketing and charitable solicitation in the Do Not Call rule.

II. The Legislative Record Underlying The Federal Trade Commission's Do Not Call Rule Demonstrates That Commercial Telemarketing Is Far More Prone To Abuse Than Non-Commercial Telemarketing.

The legislative record indicates that commercial telemarketing is not only more invasive than charitable solicitation but also far more prone to abuse. This

concern, too, has been raised consistently throughout more than a decade of Congressional inquiry into the telemarketing problem.

Perhaps not surprisingly, the evidence of abuse that led to passage of the TCFAPA in 1994 focused almost exclusively on people who want to ***sell*** something. Witness after witness cited abusive ***sales*** practices – not abuse by charities. For example, John F. Barker, vice president of the National Consumers League, testified that "many of the calls we receive, especially from older people, report instances of smooth talking promoters who call repeatedly trying to coerce them into purchasing beauty products, cameras, piles of dirt and offshore currency futures rebates." Hearing Before the Subcomm. on Transport. & Hazardous Materials of the Comm. on Energy & Commerce, 103d Cong., at 31 (1993) (testimony of John F. Barker). During floor debate on the legislation, Members of Congress similarly highlighted the core telemarketing abuses that Congress sought to address – all of which, once again, involved commercial solicitations. As Senator Hollings stated, "consumers are frequently lured into purchasing goods and services with offers of investment opportunities, fabulous prizes, deluxe vacations, and even household products such as vitamins, all at little or no cost." 139 Cong. Rec. S8376 (June 30, 1993).

Other sales scams that came to the attention of Congress included "everything from the fraudulent sale of major investments . . . [to] water filters,

travel certificates, and cheap rubber dinghies." H.R. Rep. 103-20, at 2-5 (Feb. 24, 1993). *See also* S. Rep. 103-80, at 2 (June 29, 1993) (listing other fraudulent commercial schemes). And perhaps of greatest concern from a consumer protection standpoint, Congress also heard reports of fraud in the sale of various health care products by telephone. *See* 139 Cong. Rec. S8376-77 (Senator McCain) (June 30, 1993) (noting the particularly acute problem of fraudulent marketing of health-related products and services). Once again, none of these scams involves charities. What is more, debate over passage of the USA PATRIOT Act in 2001, which expanded the coverage of the TCFAPA to include solicitations made on behalf of charities, evidenced that fraud associated with the telemarketing of goods and services overwhelmingly exceeds the fraud associated with all charitable contributions. *Compare* 15 U.S.C. § 6101(3) *with* 147 Cong. Rec. S10065 (Senator McConnell) (Oct. 2, 2001).

In short, notwithstanding the TCFAPA's partial success in combating telemarketing fraud, there is no question that telemarketing fraud continues – and that the most serious problems are in the area of sales. As former FTC Chairman Robert Pitofsky testified in 1998, "[p]rize and sweepstakes promotions generate more consumer complaints in the Commission's complaint database than any other type of telemarketing." Hearing Before the Subcomm. on Commerce, Justice, State & the Judiciary of the Senate Appropriations Comm., 105th Cong. (1998) (statement of Robert Pitofsky, former Chairman, FTC). *See also* 149 Cong. Rec.

S11964 (Senator Pryor) (Sept. 25, 2003) ("[W]e all know that fraud can very much be a problem when it comes to telemarketing.") For this reason too, the FTC's decision to limit the general Do Not Call rule to the commercial context was a reasonable fit to address the telemarketing problems that have been identified by Congress and the Commission over the last twelve years.

Conclusion

As the Supreme Court's decisions have made clear, Congress may regulate commercial speech so long as there is a "reasonable" – not "perfect" – fit between the problem addressed by the regulation and the government's solution. *Fox*, 492 U.S. at 480; *see also Central Hudson*, 447 U.S. at 566; *Edge Broad.*, 509 U.S. at 433-34. The regulation need not be the "single best disposition" of a problem, *Fox*, 492 U.S. at 480, and it need not be supported by scientific certainty or data. It is enough that "simple common sense" supports the government's judgment that a particular regulation will help to alleviate a genuine problem. *Florida Bar*, 515 U.S. at 628.

The Do Not Call rule's different treatment of commercial telemarketing and charitable solicitation easily satisfies – indeed, far exceeds – that standard. The legislative record underlying the Do Not Call rule speaks for itself. Time and again, individuals have made clear to Congress that commercial calls – not charitable calls – are the most annoying and thus most invasive of their privacy interests. Moreover, Congress has collected substantial evidence that fraud and abuse problems are associated more closely with commercial than with non-commercial telemarketing. In short, there is over a decade's worth of legislative findings that the bulk of telemarketing problems originally arose, and still arise, from commercial calls. That is more than enough to show the requisite "reasonable fit" between the FTC's new rules and the problems they seek to address.

In evaluating the distinction drawn between commercial and charitable calls, this Court should be mindful that the government has not simply banned one type of call while permitting the other. Instead, with respect to ***both*** commercial and charitable calls, the law leaves to each citizen the decision of which calls to permit and which to forbid. The difference, as explained above, *see supra* at 2-3, is in the default rule: commercial calls are *not* to be made to those who sign up for the registry – unless the individual authorizes an entity-specific exception; charitable

calls *may* be made – but again, subject to a citizen's choice to make an entity-specific exception. *Amici* believe that the legislative record in this case would justify regulation that more definitely distinguishes between commercial and non-commercial calls. But it surely justifies this common-sense allocation of default rules, which leaves the ultimate choice in each case to the individual.

Dated: October 27, 2003

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 4,041 words. I relied on my word processor and its Microsoft Word software to obtain this count. I certify that the information on this form is true and accurate to the best of my knowledge and belief formed after a reasonable inquiry.

_____
Walter Dellinger

CERTIFICATE OF SERVICE

I hereby certify that two copies of the Brief For *Amici Curiae* Representatives W.J. "Billy" Tauzin And John D. Dingell were served by overnight delivery upon the persons listed below on this 27th day of October, 2003.

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