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Brief of Amicus Curiae — U.S. States

No. 03-1429
Consolidated with No. 03-9571 and No. 03-6258

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MAINSTREAM MARKETING SERVICES, INC., *et al*. Plaintiffs-Appellees, v. FEDERAL TRADE COMMISSION, *et al.*, Defendants-Appellants.	No. 03-1429 On Appeal from the United States District Court for the District of Colorado The Honorable Edward W. Nottingham District Judge D.C. No. 03-N-184

BRIEF OF AMICI CURIAE OF CALIFORNIA, COLORADO, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, PUERTO RICO, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA AND WYOMING

IN SUPPORT OF THE FEDERAL TRADE COMMISSION IN CASE NO. 03-1429 AND REVERSAL OF THE JUDGMENT BELOW AND IN SUPPORT OF THE FEDERAL COMMUNICATIONS COMMISSION IN CASE NO. 03-9571 AND IN SUPPORT OF AFFIRMING ITS ORDER BELOW

(Captions for consolidated cases appear on the following page)

U.S. SECURITY, et al. Plaintiffs-Appellees, v. FEDERAL TRADE COMMISSION, et al. Defendants-Appellants.	No. 03-6258 On Appeal from the United District Court For the Western District of Oklahoma The Honorable Lee R. West District Judge D.C. No. W 03-122

MAINSTREAM MARKETING, et al. Petitioners, v. FEDERAL COMMUNICATIONS COMMISSION, Respondent.	No. 03-9571 On Petition for Review from the Federal Communications Commission CG No. 02-278

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INTRODUCTION

America is frustrated with telemarketing. To help individuals reclaim a measure of peace and privacy in their homes, the States and, later, the federal agencies had to step in. On behalf of the fifty-one million individuals who have registered on the national do-not-call ("DNC") list, Amici Curiae California, Colorado, Alabama, Alaska, Arizona, Arkansas, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming (collectively "States") submit this brief in support of the Federal Trade Commission ("FTC") and the Federal Communications Commission ("FCC") (collectively "the federal agencies") pursuant to F.R.A.P. 29(a).

When America demanded protection from these all too common and bothersome calls, the States' regulatory response was restrained and thoughtfully crafted. The States' DNC laws do not impose a blanket, government-imposed restriction on commercial solicitations. Rather, these laws depend on individual choice to activate their protection. In addition, States have found that DNC laws

can be tailored to ensure that only those calls that are the most prevalent and unwelcome are eligible to be blocked. The States' experiences demonstrate that applying the law to unsolicited commercial calls will directly and materially advance residential privacy and do so in the most effective, yet least restrictive manner. The States' experiences show that exempting some noncommercial calls can be consistent with maintaining residential privacy.

When the federal agencies enacted their DNC rules there was a body of State experiences supporting distinctions between commercial and noncommercial speech. With their individual DNC laws, the States have served as a proving ground for the development of innovative ways to protect residential privacy. These laws have been tested at the State level, and their provisions have proven to be principled and effective. Thus, the States submit this Amici Curiae Brief to share their experiences and to support the federal agencies' carefully tailored DNC rules.

INTEREST OF AMICI

Consumer protection is a field traditionally regulated by the States as part of their historic police powers. *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989). Because under the federal agencies' DNC rules state Attorneys General have been authorized by Congress to enforce the FTC and FCC telemarketing regulations, 15 U.S.C. § 6103; 47 U.S.C. § 227(f), the States' interest is clear.

The creation of the federal DNC list has also affected enforcement of State laws. States that have maintained their own DNC lists can now supplement the enforcement of their state DNC laws with telephone numbers that are registered on the federal list. *See* Appendix A, Summary of State DNC Laws, § I. Other States provide state law protections to those who register on the federal list. *See id.* § II. Thus, the implementation of the FTC and FCC DNC regulations is an important component in the States' efforts to protect the public from intrusive telemarketing.

BACKGROUND

When the federal agencies enacted their DNC rules twenty-seven States already had enacted DNC laws. *See* Telemarketing Sales Rules ("FTC Final Rule"), 68 Fed. Reg. 4580, 4630 n.592 and accompanying text (January 29, 2003) (codified at 16 C.F.R. § 310) (collecting state laws). These state laws recognized the importance of residential privacy and concluded that telemarketing was an invasion of that privacy interest. *See* Appendix A, § III. Thus, by the time the federal agencies enacted their DNC rules, there was widespread recognition that residential privacy was an important interest and that unwanted telemarketing intruded upon this right.

Most of the State laws exempt noncommercial calls. *See* Appendix A, § IV. When the federal agencies enacted the national DNC registry, they likewise exempted noncommercial calls. 16 C.F.R. § 310.4(b)(1)(iii)(B) and § 310.6(a)

(FTC DNC rules); 47 C.F.R. § 64.1200(f)(9) (FCC DNC rules). The States' experiences have shown that these reasonable exemptions, based on individuals' expectations and preferences, do not undermine the effectiveness of the DNC laws.

ARGUMENT

I. There Is No Right To Direct Commercial Calls To An Objecting Listener In The Privacy Of The Listener's Home.

The Colorado District Court held that because the FTC's DNC rules targeted commercial speech, they must be analyzed under the commercial speech test set forth in *Central Hudson Gas & Electric v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980). *Mainstream Mktg. v. FTC*, No-03-N-184, slip op. at 17 – 18 (D. Colo. September 25, 2003). In reaching this conclusion, however, the Colorado District Court did not consider the substantial right of unwilling listeners to exclude unwanted speech from their homes. This substantial right must be measured against the total absence of any right of a commercial telemarketer to deliver an unwanted message into the home. *See Rowan v. U.S. Post Office Dept*., 397 U.S. 728 (1970). *See also Frisby v. Schultz*, 487 U.S. 474 (1988); *Hill v. Colorado*, 530 U.S. 703 (2000). Because there is no First Amendment right to force unwanted commercial calls into the home, an analysis under *Central Hudson* is unnecessary.

In *Hill*, the Supreme Court recognized that the right of an unwilling listener to avoid unwanted speech is one of our most established and inviolate rights: "It is

an aspect of the broader 'right to be let alone' that one of our wisest Justices characterized as 'the most comprehensive of rights and the right most valued by civilized men.'" *Hill*, 530 U.S. at 716 – 717 (quoting *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928) (Brandeis J., dissenting)). At issue in *Hill* was a Colorado statute that prohibited sidewalk counselors from breaching an 8-foot buffer around individuals entering health clinics. This law pitted the right of an unwilling listener "to be let alone" against the right of another to communicate. *Id.* at 718. After carefully balancing these interests, the Court upheld the right of the unwilling listener. In reaching this conclusion the Court relied heavily on *Rowan* and *Frisby*, in which the Court held that the "right to avoid unwelcome speech has special force in the privacy of the home and its immediate surroundings." *Id.* at 717.

In *Rowan*, the Court entertained a challenge to a federal statute that allowed residents to block future mailings to their home if they notified the Postmaster that they received advertisements for "matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative." *Rowan,* 397 U.S. at 729 – 730. The Court explained that "Congress has erected a wall—or more accurately permits a citizen to erect a wall—that no advertiser may penetrate without his acquiescence." *Id.* at 738.

The *Rowan* Court gave great weight to the recipients' right to decide what speech to allow into their homes. Allowing the resident to make this choice struck

an eminently reasonable balance, the Court stressed, because it did not operate to substitute the government's judgment for that of the resident. *See id.* at 734 and 737 – 738. The Court observed that "the right of every person 'to be let alone' must be placed on the scales with the right of others to communicate . . ." *Id.* at 736. After weighing these rights the Court concluded that "a mailer's right to communicate must stop at the mailbox of an unreceptive addressee." *Id.* at 736 – 737.

The possibility that valuable communication might be restricted prompted no equivocation by the Court in *Rowan*:

> We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient.

Id. at 738 (citation omitted).

In *Frisby*, the Court again emphasized that "[t]here simply is no right to force speech into the home of an unwilling listener." *Frisby*, 487 U.S. at 485. *See also FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) ("[I]n the privacy of the home . . . the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.").

Thus, *Rowan* and *Frisby* recognize a strong right of an unwilling listener to exclude unwanted speech from his or her home. *Hill* took this right a step further and upheld speech restrictions where core speech was directed to an unwilling listener in a public setting.

Taken together the *Rowan-Frisby-Hill* holdings create a balancing test whenever the right of an unwilling listener to exclude unwanted speech is pitted against the rights of a speaker. In this balancing test, the right of the unwilling listener is given special weight when the message is directed into the unwilling

listener's home. *Rowan*, 397 U.S. at 736 – 737; *Frisby*, 487 U.S. at 485. This right is stronger yet when the resident—not the government—makes the decision that the communication may not enter the home, as is the case here. *Rowan*, 397 U.S. at 734 and 737 – 738. *Compare Bolger v. Young's Drug Prods. Corp.*, 463 U.S. 60, 71 – 72 (1983) (invalidating a federal law that banned the mailing of unsolicited contraceptive advertising and provided no mechanism for the resident to exercise choice as to whether to accept or reject the unsolicited advertisement).

As in *Rowan*, the federal DNC rules allow individuals—not the government—to decide whether commercial solicitations may cross their homes' thresholds. Moreover, the DNC rules apply to individuals in the privacy of their homes.[1] Here, the unwilling listener is more accurately described as an objecting listener. Mainstream seeks to override the established rights of an objecting listener by interjecting a commercial solicitation into the privacy and serenity of

[1] In addition to protecting privacy in the home, the regulations also permit registration of wireless telephone numbers on the DNC registry, but that is not a significant new restriction on telemarketers. It was already illegal to place such calls using the automatic dialing systems commonly used by telemarketers. 47 U.S.C. § 227(b)(1)(A)(iii). The decision to allow registration of wireless telephone numbers was made in recognition of the fact that many wireless subscribers pay for incoming calls. FTC Final Rule, 68 Fed. Reg. at 4632 – 4633 n.634 and accompanying text; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 ("FCC Final Rule"), 68 Fed. Reg. 44,144, 44,165 at ¶ 116 (July 25, 2003) (codified at 47 C.F.R. § 64.1200).

his or her home. As in *Rowan,* the right of the objecting listener to stop this solicitation must prevail.

The Colorado District Court discounted the individual choice provided for under the federal DNC rules because it felt that the noncommercial speech exemptions unduly influenced the individual's choice. *Mainstream Mktg.*, No. 03-N-184, slip op. at 18. This conclusion is contrary to the evidence and the Supreme Court's recent decision in *Watchtower Bible & Tract Society v. Village of Stratton*, 536 U.S. 150 (2002).

In *Watchtower*, the Supreme Court indicated that it is permissible to draw a distinction between commercial and noncommercial speech when regulating solicitations directed into the privacy of the home. Though the Court held that the challenged ordinance swept too broadly because it regulated religious speech, the Court noted, albeit in dicta, that had the ordinance applied only to commercial solicitations, it may have been narrowly tailored to advance residential privacy. *Id.*

Also, because noncommercial calls are not as prevalent or bothersome to individuals as unsolicited commercial calls, there is a valid basis for distinguishing between commercial and noncommercial speech. *See* § II(B)(2)(a), *infra*, at 19 – 20. When a valid basis exists to distinguish between commercial and noncommercial speech, (such as when seeking to protect residential privacy) the regulatory system must be upheld. *Id.*

The federal DNC rules give meaning to the strong right of objecting listeners to exclude unwanted commercial solicitations from their homes. When balanced against the right of the commercial solicitor to call into the home, the right of the objecting listener must prevail. Thus, under *Rowan-Frisby-Hill*, the federal DNC rules need not be analyzed under *Central Hudson*.

II. The Federal DNC Rules Are Valid Under *Central Hudson*.

Even if the Court determines that *Central Hudson* provides the appropriate analytical framework for deciding the constitutionality of the federal DNC rules, the rules pass constitutional muster, and the decision below must be reversed.

Under *Central Hudson,* the government may regulate truthful, non-deceptive commercial speech if "(1) [the government] has a substantial state interest in regulating the speech, (2) the regulation directly and materially advances that interest, and (3) the regulation is no more extensive than necessary to serve the interest." *Revo v. Disciplinary Bd. of the Sup. Ct. for the State of N.M.*, 106 F.3d 929, 932 (10th Cir.), *cert. denied*, 521 U.S. 1121 (1997) (citing *Central Hudson*).

A. There Is A Substantial Interest In Protecting Residential Privacy From Unwanted Commercial Sales Calls.

In its October 7, 2003, order granting the FTC's motion for a stay pending appeal, this Court has already undertaken a thorough analysis of why the federal DNC rules pass the *Central Hudson* test. The States agree with that analysis, and it

would serve no purpose to repeat it here. Instead, the States raise a few discrete points to supplement those already considered by the Court.

As discussed above, it is well established that the government has a substantial interest in protecting residential privacy. *Frisby*, 487 U.S. at 485; *Pacifica Found.*, 438 U.S. at 748; *Carey v. Brown*, 447 U.S. 455, 471 (1980).

The governmental interest here, an interest in allowing people to make their own choices about whether they wish to accept unsolicited commercial telemarketing calls, is focused and specific to the individuals who seek to invoke their well-established right as objecting listeners to exclude unwanted solicitations from the home. The DNC regulations protect only those people affirmatively seeking protection; the regulations burden only that speech which is directed at *unwilling* listeners. There can be no question that this governmental interest is substantial.

The already ample record concerning the government's substantial interest in this regard is bolstered by the experiences of the States in adopting their own DNC laws. Many of the States' DNC laws refer to this interest. *See* Appendix A, § III. The FTC was made aware of this public interest early in its rulemaking process, at a forum organized to discuss the possibility of a national DNC list. An FTC representative asked why more and more States were enacting DNC laws. A representative from the Kentucky Attorney General's Office explained that:

> I cannot tell you how intense, how strong an issue this is to the people. We get calls by the hundreds, the legislators report to us it is far and above the biggest issue which they get any calls on, that people are saying that they absolutely want some means of controlling the calls that come into their home.

Transcript of January 11, 2000 Proceeding at 137 (statement of Kentucky Assistant Attorney General Wanda Delaplane) (part of the FTC's Internet-based rulemaking record at http://www.ftc.gov/bcp/rulemaking/tsr/tsrrulemaking/). Also, as a representative from the National Association of Attorneys General explained, States that enacted DNC laws found the public response to be immediate and overwhelming; more than one state agency had its own telephone system overwhelmed by calls from individuals eager to sign up. *Id.* at 89. This public outcry for protection from unwanted telemarketing calls was the basis for Congressional and State legislative action.

Finally, although Mainstream has consistently relied on *US West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999) to argue that there is not a substantial interest in protecting residential privacy, *US West* does not apply here.

In *US West*, this Court agreed that privacy "may rise to the level of a substantial state interest." *Id.* at 1234. At issue in that case was an FCC regulation that sought to protect consumer calling records from being divulged by the telephone company. Here, the federal DNC rules are trying to protect the choice of

an objecting listener to exclude unwanted solicitations from intruding upon the serenity of the home—a clearly established right.

The *US West* Court distinguished the privacy interest before it from those cases that have recognized a state's interest in protecting against unwanted intrusions caused by solicitations. *Id.* at 1235. The *US West* Court specifically noted that it was not dealing with the privacy interest that protects against a telemarketing intrusion. *Id.* at 1236 n.8. Rather, it indicated that the privacy interest in consumer calling records was a new interest. *See id.* at 1235. The Court specifically distinguished this emerging privacy interest from the privacy interest that protects against the unwanted intrusion into an individual's home caused by solicitations. *Id.* Because *US West* was dealing with a different interest it is inapplicable.

The right to residential privacy, free from unwanted solicitations, is at least a substantial interest, if not a compelling interest under well established First Amendment precedent. Accordingly, the rules meet the first part of the *Central Hudson* test.

B. The Rules Materially And Directly Advance The Government's Interests.

Mainstream argues, essentially, that the rules fail to materially advance the government's stated interest, because they would not block all (or nearly all) forms

of telephone solicitation. This argument is not only contrary to the evidence, but assumes a legal standard that is far more stringent than *Central Hudson* and its progeny.

1. The Overall Regulatory System Is Likely To Substantially Reduce Unwanted Telemarketing Calls.

Mainstream argues that the federal DNC rules cannot be constitutional unless all telephone solicitation calls are blocked. *Central Hudson* does not require this all-or-nothing approach. So long as the DNC rules achieve a reasonable fit between "the legislature's ends and the means chosen to accomplish those ends," the Court will "leave it to the governmental decisionmakers to judge what manner of regulation may best be employed." *Bd. Of Trustees of St. Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

As this Court recognized in its October 7 order, these two sets of regulations, and their likely effect, should not be considered in isolation. This case demonstrates the wisdom of the Supreme Court's observation "that the Government [need not] make progress on every front before it can make progress on any front." *United States v. Edge Broadcasting Company*, 509 U.S. 418, 434 (1993). Here, the District Court's focus on the FTC front ignored the fact that this battle has been waged on many fronts. The problem of intrusive, unwanted telemarketing calls is ubiquitous, and the States and the federal government have

addressed it in a variety of ways. Each step along the way has improved individuals' ability to protect themselves from unwanted telemarketing calls. As would be expected (indeed, encouraged) in our federal system, the States have tried different approaches, serving as laboratories for the development of governmental solutions to a problem that is of widespread concern. While none of these varied approaches has fully and permanently solved the problem—no law ever does—they have each materially advanced the government's interest in addressing it. Under the District Court's reasoning, none of these laws would have been allowed to take effect, because each would have been struck down as less than a complete solution.

The likely effect of the FTC and FCC regulations must be examined in a context that includes the efforts of both agencies as well as those of the States. With regard to the federal agencies, each has the authority to enforce its own rules; each agency will bring its own particular strengths to those efforts, so federal enforcement will benefit from the FTC's experience in consumer protection and the FCC's expertise in the use of communications technologies. In addition, the States have statutory authority to prosecute violations of both agencies' regulations. 15 U.S.C. § 6103 (FTC); 47 U.S.C. § 227(f) (FCC). State prosecutors are well positioned to recognize and respond to patterns of violations that affect particular regions of the country and their own States' citizens. State and federal

authorities will also be able to join resources when that is appropriate, and to coordinate their work in order to maximize the overall effectiveness of the regulations.

In particular, the effectiveness of the FTC's regulations cannot be evaluated without considering the effect of the FCC's regulations, because the FCC regulations reach businesses (such as common carriers and banks) and intrastate calls that are not within the FTC's jurisdiction. Viewed in that light, the District Court's assumption that the FTC's regulations would block 40% to 60% of all unwanted telephone solicitations suggests that the combined regulations would reach a substantial majority of all telephone solicitation calls, and an even higher percentage of the commercial telemarketing calls found by Congress to be most intrusive. *See* H.R. Rep. No. 102-317, 102d Cong., 1st Sess. at *16 (1991).

Furthermore, the experiences of the States with DNC lists suggest that Mainstream underestimates the extent to which telemarketing calls will be reduced. For example, Indiana has enacted a DNC law that exempts certain categories of charitable and commercial solicitation calls. Despite these exclusions, independent research showed that individuals who signed up on the Indiana DNC list saw the number of solicitation calls (including exempt calls) decline by more than 80%. *See Martin & Assoc. v. Carter*, Cause No. 82C01-

0201-PL-38, slip op. at 30 – 31 (Vanderburgh Cir. Ct., July 5, 2002) (copy attached as Appendix B).[2]

Thus, by covering a substantial number of the calls that are placed to the home, the rules materially and directly protect residential privacy. This same logic persuaded the Eight Circuit to uphold the TCPA's ban on fax advertising, which applied only to commercial entities but exempted noncommercial faxes. *Missouri v. American Blast Fax*, 323 F.3d 649, 658 (8th Cir. 2003). The federal DNC rules take a similar approach. They give the individual an option to

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[2] The Indiana trial court's finding and the legislative history of the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227, discussed, *infra*, at 19 – 20, may be received by the Court in support of the DNC rules, even if the FTC did not rely on them in its statement of basis and purpose for its DNC rules. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582 (1991) (Souter, J., concurring) (A valid justification for a speech restriction "may not be ignored merely because it is unclear to what extent the purpose motivated the . . . legislature."). *See also Essence, Inc. v. Federal Heights*, 285 F.3d 1272, 1284 – 1285 (10th Cir. 2002) (relying on post-enactment evidence to justify a speech restriction); *Anderson v. Treadwell*, 294 F.3d 453, 461 n.5 (2nd Cir. 2002), *cert. denied*, 123 U.S. 1482 (2003). In fact, the Court can rely on a wide variety of sources to justify a speech restriction. *See Los Angeles v. Alameda Books*, 535 U.S. 425, 439 (2002) (plurality opinion) (relying on a single study and common sense); *id.* at 451 – 452 (Kennedy, J., concurring) (same); *Renton v. Playtime Theaters*, 475 U.S. 41, 51 – 52 (1986) (relying on studies and anecdotes from other locales); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (permissible to rely solely on history, consensus and simple common sense); *Missouri v. American Blast Fax, Inc.*, 323 F.3d 649, 654 (8th Cir. 2003) (relying on the legislative history of a predecessor bill).

eliminate those telemarketing calls that account for a substantial number of the calls that disrupt the serenity and privacy of the home.

2. The Validity Of The Regulations Is Not Defeated By The Decision To Recognize Differences Between Commercial And Charitable Solicitations.

a. The Distinction Is Based On Differences Pertaining To The Goal Of Reducing Unwanted Telemarketing Calls.

This Court has recognized and analyzed the reasons why the FTC properly concluded that commercial and charitable solicitations need not be subject to identical regulations. The record shows that individuals consider commercial calls to be more intrusive than charitable solicitations. In a regulatory system intended to allow individuals to make their own choices about which calls to receive, it would be counterproductive to ignore that distinction; it is a distinction that is directly related to the purpose of the regulations.

There is empirical evidence showing that people find charitable solicitations to be less intrusive than sales calls. During Congressional hearings on the TCPA, the House Committee on Energy and Commerce studied the nature of the telemarketing intrusion. *See* H.R. Rep. No. 102-317, at *13 – *17. It found that individuals generally have two objections to telemarketing. *Id.* at *14. The first pertains to the volume of unwanted calls and the second relates to whether the call

is expected. *Id.* Based on the evidence that it received, the House Committee found that individuals are more accepting of noncommercial calls because they are more expected. *Id.* at *16. This evidence that individuals expect these calls supports the decision by the FTC and FCC to exempt noncommercial calls. *American Blast Fax* again supports the distinction drawn between commercial and noncommercial solicitations on this basis. *American Blast Fax*, 323 F.3d at 656 (citing the TCPA's legislative history, H.R. Rep. 102-317, at *16).

These considerations show why the DNC regulations are unlike the ordinance invalidated in *Cincinnati v. Discovery Networks*, 507 U.S. 410 (1993). That ordinance distinguished between commercial and noncommercial speech solely because of the view that commercial speech had less value under the Constitution, rather than for any reason related to the aesthetic interests behind the ordinance. Individuals' receptiveness to these exempt calls serves to distinguish this case from the regulation at issue in *Discovery Networks*. Here, there is ample evidence that excluding noncommercial speech is consistent with the goal of protecting residential privacy.

Also, the Cincinnati ordinance directly prohibited the dissemination of speech (the commercial or noncommercial nature of which was in question) via newsracks that were owned by the speakers (the two companies) and located on public property (the city sidewalks). In contrast, the government enforces the

registry provisions at issue here only if a telephone subscriber first chooses to invoke them; the registry provisions apply to speech that is clearly commercial in nature, in that the prohibition on calls to people who have signed on to the registry applies only to solicitations that seek to persuade consumers to buy or invest in something; and the instrumentality for dissemination of the telemarketer's commercial speech – the consumer's telephone – does *not* belong to the speaker and generally is located on private property.

b. The Distinction Between Commercial And Charitable Calls Reflects The Government's Effort To Balance Competing Interests

Any measure of the effectiveness of the regulations must be based on more than just the percentage of telemarketing calls that will be blocked. If the agencies' sole interest had been to block all telemarketing calls, they could have achieved that goal with a straightforward, all-encompassing ban on telemarketing. It is evident from the regulatory record and rationale that both agencies sought to achieve a *balance* of competing legitimate interests.

In *United States v. Edge Broadcasting*, 509 U.S. 418 (1993) the Supreme Court made it clear that the effectiveness of an effort at balancing cannot be measured against absolutist goals. In *Edge*, the Court considered the constitutionality of a federal statute that generally prohibited the broadcast of

lottery advertisements. An exception allowed broadcasting of information concerning state-sponsored lotteries, but only by broadcasters located within States that sponsored lotteries.

The statute was challenged by a broadcaster who operated in North Carolina (a non-lottery State), but primarily broadcasted to listeners across the State line in Virginia (a lottery State). Measured against a goal of preventing lottery promotions from reaching listeners in non-lottery States, the statute was clearly overinclusive, because it also blocked some lottery promotions from listeners in neighboring lottery States. It was also underinclusive, because listeners in non-lottery States would hear promotions broadcast from lottery States. Finding the statute constitutional, the Court recognized that the purpose of the legislation was not to eliminate all lottery promotions, but to balance the competing interests of lottery states and non-lottery States. *Id.* at 433 – 434.

Here, it is evident that the FTC and FCC sought to do something other than eliminate all telemarketing calls. Rather, their obvious goal was to achieve a balance, reducing telephone solicitation calls to those who prefer not to receive them, preserving a means by which individuals could choose something other than all-or-nothing exclusion of such calls, allowing commercial solicitors to generate income by calling those who do not object, and allowing charitable solicitors to seek donations and advocate issues while respecting individuals' wishes. The

rulemaking records and the federal legislative record show that there was an ample basis for the agencies to conclude that their chosen approach would have a substantial impact on unwanted telemarketing calls without undue effect on the other interests at stake.

By giving individuals the right to block the most prevalent and unwanted calls, the federal DNC rules directly and materially advance residential privacy. Thus, the federal DNC rules satisfy the second part of the *Central Hudson* test.

C. The Federal DNC Rules Are Not More Extensive Than Necessary to Achieve the Governmental Interest.

The federal agencies do not have to prove that the rules are the least restrictive alternative, or that there are no conceivable alternatives to the DNC rules. *Fox,* 492 U.S. at 478. The law instead requires that the "regulation not burden more speech than is necessary to further the government's legitimate interest." *Id*. (internal quotation omitted).

Since *Fox*, Courts have held that individual-initiated restrictions on commercial speech satisfy the tailoring requirement of the *Central Hudson* test. *See U.S. v. Playboy Entm't Group*, 529 U.S. 803, 815 (2000) (permitting individual homeowners to block unwanted cable channels is a less restrictive alternative than banning sexually explicit channels); *Anderson v. Treadwell*, 294 F.3d 453, 462 (2nd Cir. 2002), *cert. denied* 123 S. Ct. 1482 (2003) (giving individuals the choice

whether to block speech from coming into their homes is no more extensive than necessary because "it is precisely co-extensive with those who are experiencing the particular harm that it is designed to alleviate"); *South/Southwest Assoc. of Realtors v. Village of Evergreen Park,* 109 F. Supp. 2d 926, 929 (N.D. Ill. 2000) (municipal ordinance prohibiting commercial solicitation to a homeowner who has given a non-solicitation notice to the city is narrowly tailored because "it leaves control in the hands of its residents and bars communication only to the extent that the resident requests.").

The DNC regulations are tailored to exclude only those calls that individuals want excluded. Individuals who want to block calls from all or most telemarketers can do so through the national registry. Individuals who register may continue to receive calls from businesses with whom they have an established business relationship, but individuals can block those calls as well by asking those businesses to cease calling. To the extent individuals are willing to accept calls from some but not all telemarketers, they may choose to register their telephone numbers, then provide authorization to those companies whose calls they are willing to accept. Alternatively, individuals can bypass the registry, and choose to rely on company-specific lists. Because of this flexibility, there is no reason why a telemarketer will be blocked from calling a willing listener.

In the Colorado District Court, *Mainstream* alleged that the federal DNC rules go too far because the federal agencies did not consider call blocking options available through call blocking services, electronic gimmicks and industry self-regulation as less restrictive alternatives. These alternatives are either costly or ineffective. In addition, the FTC and FCC had an ample basis, given their prior experience, for concluding that regulations based only on a company-specific list were "seriously inadequate" in protecting residential privacy. *See* FTC Final Rules, 68 Fed. Reg. at 4631; FCC Final Rule, 68 Fed. Reg. at 44147.

Moreover, the regulations include a "safe harbor," so that telemarketers who are doing what is necessary to comply with the law will not be held strictly liable for an inadvertent call to a telephone number on the registry. 16 C.F.R. § 310.4(b)(3); 47 C.F.R. § 64.1200(c)(2).

Also, Mainstream's suggested alternatives are not viable to protect residential privacy. A less restrictive alternative must be at least as effective as the rules in advancing this important interest. *See Reno v. ACLU,* 521 U.S. 844, 874 (1997). Here the federal DNC rules are tailored to just those individuals who seek its protection. They cost individuals nothing and are effective in preventing the bulk of the unwanted calls from ringing into the home in the first instance. The alternatives are costly and many times do not prevent the ringing of the phone in the first instance.

Finally, all of Mainstream's suggested alternatives assume that the States and federal agencies should not play a role in regulating practices that disturb residential privacy. Protecting the well-being and tranquility of the home, however, are matters squarely within the States' and federal agencies' police powers. The DNC rules and state laws are a valid exercise of this power, notwithstanding the existence of self-help devices, all of which are not as effective as the DNC rules and State laws.

III. The Federal DNC Rules Are Not Subject To Strict Scrutiny.

In the Colorado District Court, Mainstream claimed that the federal DNC rules amount to a content-based restriction because they target commercial solicitations while exempting noncommercial solicitations. The mere fact that a statute regulates commercial speech does not mean that the statute is a content-based restriction. This theory would subject all commercial speech regulations to heightened scrutiny, which has been consistently rejected. *See Thompson v. Western States Med. Center*, 535 U.S. 357, 367 – 368 (2002); *Anderson*, 294 F.3d at 460 (rejecting the argument that a commercial speech restriction creates a content specific regulation). This Court has previously held that even if a regulation can be viewed as content-based, if it concerns commercial speech it is still subject to analysis under the *Central Hudson* standard. *Lanphere & Urbaniak*

v. Colorado, 21 F.3d 1508, 1513 (10th Cir.), *cert. denied* 513 U.S. 1044 (1994). Therefore, strict scrutiny does not apply here.

CONCLUSION

The States have had considerable experience in crafting and enforcing their DNC laws. This experience supports the fact that the right of an objecting listener to exclude unwanted solicitations from intruding upon his or her residential privacy is an established and inviolate right. Thus, a commercial telemarketer must stop its message at the threshold of the home of an unwilling listener.

The States' experiences also support the federal agencies' conclusion that their regulations will protect residential privacy, and are no more restrictive than necessary. The federal DNC rules are consistent with residential privacy and the First Amendment. The States therefore support reversal of the Colorado District Court's decision in *Mainstream Mktg.* and upholding the FCC's rules.

Certificate of Compliance with F.R.A.P. 32(a)(7)

The undersigned counsel hereby certifies that this brief complies with the type-volume limitation set forth in F.R.A.P. 32(a)(7)(B)(i) and F.R.A.P. 29(d). There are 5,786 words in this brief, excluding the caption, table of contents, table of authorities, this certification appendices and signature block. The undersigned counsel used the word count function in Microsoft word to count the words.

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APPENDIX A

SUMMARY OF STATE DO-NOT-CALL LAWS

I. States with DNC registries under their state laws and which can incorporate the federal DNC registry:

Colorado:	Colo. Rev. Stat. § 6-1-905(3)(c)
Louisiana:	La. Rev. Stat. § 45:844.13(A) and (D)
Massachusetts:	Mass. Gen. Laws ch. 159C
Mississippi:	Miss. Code Ann. § 77-3-717
Missouri:	Mo. Rev. Stat. § 407.1101.1(3)
Tennessee:	Tenn. Code Ann. § 65-4-405(c)

II. States that rely on the federal DNC registry:

Alabama:	Ala. Code § 8-19A-3
Arizona:	Ariz. Rev. Stat. Ann. § 44-1282(A)
Arkansas:	Ark. Code. Ann. § 4-99-405(3)
California:	Cal. Bus. & Prof. Code § 17592(a)(2), as amended 2003 Cal. Stat. Ch. 779
Connecticut:	Conn. Gen. Stat. § 42-288a
Georgia:	Ga. Code Ann. § 46-5-27(d)(4)
Illinois:	815 ILCS 402/20(a)
Michigan:	Mich. Comp. Laws § 445.111a
New Mexico	N.M. Stat. Ann. § 57-12-22(C)
New York:	N.Y. Gen. Bus. Law § 399-z(2)(b)
North Carolina:	N.C. Gen. Stat. §§ 75-101(3) and 75-102(a)
Pennsylvania:	73 P.S. § 2242
South Dakota:	S.D. Codified Laws Ann. § 49-31-103
Vermont:	Vt. Stat. Ann. Title 9, § 2464a

III. State DNC laws that recognize telemarketing as an invasion of residential privacy:

Alaska:	Alaska Stat. 45.50.475
Arkansas:	Ark. Code Ann. § 4-99-402(a)
Colorado:	Colo. Rev. Stat. § 6-1-902(1)(b)
California:	Cal. Bus. & Prof. Code § 17590, as amended 2003 Cal. Stat. Ch. 779
Georgia:	Ga. Code Ann. § 46-5-27(a)(4) – (7)
Mississippi:	Miss. Code Ann. § 77-3-703
North Carolina:	N.C. Gen. Stat. § 75-100(2) and (3)
Oregon:	Or. Rev. Stat. § 646.563, § 646.569
Tennessee:	1999 Tenn. Pub. Acts, 478, Preamble, ¶ 5
Vermont:	Vt. Stat. Ann. Title 9, § 2464a

IV. States with exemptions for noncommercial calls:

Alabama:	Ala. Code § 8-19A-(2)
Arkansas:	Ark. Code Ann. § 4-99-406(5)
California:	Cal. Bus. & Prof. Code § 17592(e)(7), as amended 2003 Cal. Stat. Ch. 779
Colorado:	Colo. Rev. Stat § 6-1-903(10)(b)
Connecticut:	Conn. Gen. Stat. § 42-288(a)(6)(B)
Georgia:	Ga. Code Ann. § 46-5-27(b)(3)(C)
Illinois:	815 ILCS 402/5(e)(4)
Indiana:	Ind. Code Ann § 24.4.7-1-1 (exempting some calls made by or on behalf of charitable organizations, licensed real estate agents, licensed insurance agents and newspapers)
Louisiana:	La. Rev. Stat. Ann. § 45:844.12(4)(d)
Massachusetts:	Mass. Gen. Laws ch. 159C, Sec. 1
Michigan:	Mich. Comp. Laws § 445.111e(a)
Minnesota:	Minn. Stat. § 325E.311 § 6(3)
Mississippi:	Miss. Code Ann. §§ 77-3-709(b) and (c)
Missouri:	Mo. Rev. Stat. § 407.1095(3)(c)
New Mexico:	N.M. Stat. Ann. §§ 57-12-22(C)(1) and (D)(4)
New York:	N.Y. Gen. Bus. Law § 399-z(1)(g)
North Carolina:	N.C. Stat. § 75-103(a)(3)
Oklahoma:	Okla. Stat. Ann. Title 15, § 775B.2(1)

Oregon:	Or. Rev. Stat. § 646.561(a) and (b); § 646.567(5)(b) and (c)
Pennsylvania:	73 P.S. § 2242
Tennessee:	Tenn. Code Ann. § 65-4-401(6)(B)(ii)
Texas:	Tex. Bus. & Com. Code § 44.003(b)(2)
Virginia:	Va. Code § 59.1-510