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Brief of Amici Curiae — United States Senate Committee on Commerce, Science, and Transportation

03-1429

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FEDERAL TRADE COMMISSION, et al.,

Defendants and Appellants,

v.

MAINSTREAM MARKETING SERVICES, INC., et al.,

Plaintiffs and Appellees.

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

BRIEF OF AMICUS CURIAE OF UNDERSIGNED MEMBERS OF THE UNITED STATES SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

IN SUPPORT OF REVERSAL

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IDENTITY AND INTEREST OF THE AMICUS CURIAE

This *Amicus Curiae* Brief is respectfully filed by the undersigned members of the United States Senate Committee on Commerce, Science, and Transportation ("Committee").[1] Acting in our capacity on behalf of the United States government, we may file this Brief pursuant to Fed. R. App. P. 29(a).

The Committee exercises oversight responsibility for both the Federal Trade Commission ("FTC") and the Federal Communications Commission ("FCC"). With the respect owed to a co-equal branch of government, we file this Brief to share with the Court our strongly-held views regarding the constitutional law issues in contest in this appeal and the vital public policy interests served by the national Do-Not-Call Registry.

SUMMARY OF ARGUMENT

This appeal requires this Court to reconcile two powerful American values: the right to privacy and freedom of speech. Telemarketers who make phone solicitations are engaged in commercial speech protected under the First Amendment. However, when a telemarketer telephones a consumer's home that phone call may also be an unwelcome invasion of privacy. And, by long tradition within our society, the right to privacy is at its apex within the home.

While telemarketing is commercial speech, this is not at core an ordinary commercial speech case. Contrary to first impression, this appeal does *not* in fact turn on whether the Do-Not-Call Registry is a permissible regulation of commercial speech under a straight-forward application of the governing commercial speech standard set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). If the ordinary standards of *Central Hudson* were all that mattered here, the case would be simple given that there is no question that the Do-Not-Call Registry is a reasonably-crafted reform that directly and materially advances a powerful societal interest in the protection of peace and privacy within the home. Viewed as a case pitting privacy against regulation of commercial speech, the outcome under existing legal doctrine is clear: privacy wins.

This outcome is dictated by the Supreme Court's decision in *Rowan v. United States Post Office Department*, 397 U.S. 728 (1970), an early case in which

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[1] The undersigned members would like to gratefully acknowledge the assistance of Rodney A. Smolla, Dean and Professor of Law, University of Richmond School of Law, in the research and preparation of this brief.

the Court upheld a statute that allowed an addressee to refuse mail from any sender of "erotically arousing or sexually provocative" advertising material by notifying the local postmaster, who then instructed the sender to remove the addressee's name and address from its mailing list under penalty of law. *Rowan* was a decision steeped in reverence for the protection of the privacy within the home, and *Rowan*, standing alone, contains similarities to this case that ought to be enough to carry the day for Do-Not-Call.

The complication in this controversy, and the crux of this appeal, is not the routine application of *Central Hudson*, but rather a quite different First Amendment question. Distilled to its essence, that question is whether the differential treatment of commercial and non-commercial telemarketing in the current application of the Do-Not-Call Registry is "content-discrimination" of the sort that renders an otherwise constitutional regime an unconstitutional one. This is the only potentially viable attack advanced by the commercial telemarketers, and it is the only argument that might arguably provide a valid basis for the decision of the District Court.

The content-discrimination argument in play in this case emanates almost entirely from one Supreme Court decision, *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). In *Discovery Network* the city of Cincinnati, Ohio, enacted an ordinance restricting newsracks on streets and sidewalks to reduce traffic congestion and aesthetic blight. But the ordinance was applicable only to roughly 3 percent of the racks in the city, those containing commercial magazines and handbills, while exempting racks holding traditional newspapers. The Supreme Court struck down this content-discrimination, as it should have, for there was absolutely no relationship between the aesthetic or traffic harms caused by racks and the content of the material inside them.

It is our respectful view that the District Court below erred in accepting the claim that the *Discovery Network* content-neutrality principle trumped the *Rowan* privacy principle, and the normal operation of the *Central Hudson* test. The District Court's analysis is flawed in three basic ways.

First, there was content discrimination in *Rowan* itself; the law in *Rowan* was limited to sexually explicit advertising material that would normally have been protected by the First Amendment. Yet the Supreme Court in *Rowan* held that the free speech protection afforded the material stopped at the mailbox. The District Court missed this essential privacy point. Whereas *Discovery Network* involved regulation of speech in the open marketplace, the traditional public forum of streets and sidewalks, *Rowan* applied a different value hierarchy in the exclusion of speech from the home.

Second, in *Discovery Network* it was the *government* acting as the direct discriminator. The government banned the commercial newsracks, interfering with communication between otherwise willing publishers and readers. In contrast, with respect to Do-Not-Call, the government is not acting to substitute the judgment of the community for the judgment of the individual consumer. Instead, the law empowers the private citizen to bar certain speech from penetrating the confines of the home, but sovereignty over the decision rests with the consumer, not any government official. This renders Do-Not-Call similar to *Rowan*, and different from *Discovery Network*.

Third, viewed both quantitatively and qualitatively, the connection between the governmental interests vindicated by Do-Not-Call and the regulatory mechanism employed by the current FTC and FCC regulations is direct, material, and reasonably tailored. We argue that, as in *Rowan*, the government has a substantial interest in protecting consumers from receiving unwanted correspondence. We support the FTC's position that the cumulative effect of unwanted telemarketing calls is intrusive and an abuse of the telephone as a medium of communication. *See Bland v. Fessler*, 88 F.3d 729, 732 (9th Cir. 1996) (noting that "sheer quantity" of calls generated by automatic dialing and announcing devices increases the invasion of privacy).

Employing the sort of analysis invited by *Central Hudson*, Do-Not-Call is easily defensible as a government response to invasion of privacy. This stands in stark contrast to the regulation in *Discovery Network*, in which there was a complete "disconnect" between the objectives of the government regulation -- reduction of physical and visual clutter-- and the ban on commercial kiosks.

ARGUMENT

I. DO-NOT-CALL VINDICATES A POWERFUL INTEREST IN THE PROTECTION OF THE PRIVACY WITHIN THE HOME

A. The Powerful Privacy Interests Advanced by Do-Not-Call

The Do-Not-Call Registry poses a conflict between two sacred American values, both of constitutional dimensions: the right of privacy and freedom of speech. Privacy may be the most important emerging right of this new century. As technologies make it increasingly difficult for Americans to maintain their privacy, evolution in administrative, statutory, and constitutional law is necessary to keep pace, preserving privacy as an essential element of human dignity. Just as we make adjustments for inflation in cost-of-living indexes, we may need to think of "escalation clauses" in our legal protection for privacy. As the power to impinge on privacy increases, legal principles must escalate to meet the challenge, preserving the power of the average person to fight back against unwelcome intrusions. *See, e.g., Katz v. United States*, 389 U.S. 347, 351 (1967) (holding that the Fourth Amendment's guarantee against unreasonable searches extended to cover electronic eavesdropping, even though the framers of the Constitution could not have contemplated such an electronic search, because the Fourth Amendment was intended to protect "people, not places.")

The privacy of the home is at the core of American conceptions of privacy. This respect for the home was originally conceptualized as a bulwark against the force of the state and is embodied in the Fourth Amendment and its guarantee of the right of the people to be secure in their "persons, houses, papers, and effects" against unreasonable searches and seizures. U.S. Const. amend. IV; *see also Silverman v. United States*, 365 U.S. 505, 511 (1961) ("The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.") (*citing Boyd v. United States*, 116 U.S. 616, 626-30 (1886)); *Entick v. Carrington*, 19 Howell's State Trials 1029, 1065 (C.P. 1765)). This tradition of privacy in one's home has evolved into a broader concept in which the home is seen as an essential to one's autonomy and privacy, a place of respite from the world. In the words of Judge Jerome Frank: "A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty--worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle." *United States v. On Lee*, 193 F.2d 306,

315-16 (2d Cir. 1951) (Frank, J., dissenting); *see also Martin v. Struthers*, 319 U.S. 141 (1943) (The Supreme Court struck down a local ordinance that contained a blanket prohibition of all door-to-door solicitations as an unconstitutional infringement of the rights of free speech and press, but the Court was clear in its defense of the right of the householder to request not to be bothered. In the words of Justice Murphy: "[F]ew, if any, believe more strongly in the maxim, 'a man's home is his castle', than I." *Id.* at 150).

B. An Overview of the Statutory and Administrative History of Do-Not-Call

Do-Not-Call is not some newfangled concept rushed into regulation on an impulsive political tide. It is rather a concept that has evolved over time, as Congress and two federal agencies have labored to balance the compelling societal interest in the protection of the privacy of the home with the free speech interests of telemarketers. Congress in 1991 passed the Telephone Consumer Protection Act, 47 U.S. § 227 ("TCPA"). The law was enacted "to protect residential telephone subscribers' privacy rights to avoid telephone solicitations to which they object." *Id*. § 227(c)(1). The FCC was directed to promulgate regulations that restricted the use of automatic telephone dialing systems. *Id*. § 227(b)(1).

In 1992, the FCC adopted rules pursuant to the TCPA, but stopped short of creating a national "Do-Not-Call" list. The FCC instead required telemarketers to adopt company-specific Do-Not-Call lists. Under this system a consumer who did not wish to receive telephone solicitations from a particular company could request that the telemarketer remove that consumer's telephone number from the telemarketer's list. Three years after the enactment of the TCPA, Congress in 1994 enacted a second important piece of legislation, the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-6108 ("TCFAPA"). The law instructed the FTC to promulgate rules prohibiting deceptive and other abusive telemarketing acts or practices and to include in such rules a definition of deceptive telemarketing acts or practices. *Id*. § 6102(a) (1) & (2). The TCFAPA, enforced by the FTC, did not apply to activities that were outside of the jurisdiction of the FTC, such as certain financial institutions, common carriers, air carriers and

nonprofit organizations, or insurance companies. In 1995, the FTC adopted rules implementing this legislation, which did not contain any national Do-Not-Call Registry.

By 2002, both the FTC and FCC appeared to realize that the company-specific approach had failed to provide adequate privacy protections to consumers and each agency issued a Notice of Proposed Rulemaking requesting comment on whether a national Do-Not-Call registry should be established. The FTC also proposed rules to address the problem of "abandoned calls" resulting from the use of predictive dialing by telemarketers

In January 2003, the FTC promulgated final rules establishing a nationwide Do-Not-Call Registry and specified requirements for the use of "predictive dialers." The FTC found that the previous company-specific Do-Not-Call rules, which permitted a consumer to request that his name be removed from a company's call list, were insufficient to protect consumers from unwanted calls. The FTC found that telemarketers interfered with consumers' attempts to be placed on company-specific lists by hanging up on them or ignoring their request. The FTC noted that the prior practice placed too much burden on consumers who had to repeat their Do-Not-Call request with every telemarketer who called, that the company-specific list continually exposed consumers to unwanted initial calls, which had significantly increased in numbers since adoption of the original FTC rules, and that consumers had no method to verify that their name had been removed from the company's list.

The FTC exempted charitable organizations from the do-not-call requirements. The FTC made this exception partly in deference to the heightened First Amendment protection afforded to charitable speech. The FTC also found that abusive telemarketing practices of the sort the registry sought to combat were more likely to be undertaken by commercial telemarketers than those soliciting charitable and political contributions. The FCC followed suit, ultimately adopting rules that paralleled those of the FTC.

Congress strongly endorsed this movement in 2003, enacting the Do-Not-Call Implementation Act, Pub.L. No. 108- 10, 7 Stat. 577. ("Implementation Act"). The Implementation Act provided, among other things, that the FTC could promulgate regulations establishing fees sufficient to implement and enforce the provisions of its national Do-Not-Call Registry.[2]

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[2] The first significant judicial setback to this momentum was a decision on September 23, 2003 by the United States District Court for the Western District of Oklahoma, *U.S. Security v. Federal Trade Commission*, -- F.Supp.2d –, 2003 WL 22003719 (W.D. Okla. 2003). In *U.S. Security* the District Court held that the FTC

II. THIS APPEAL SHOULD BE GOVERNED BY THE STRAIGHT-FORWARD APPLICATION OF *CENTRAL HUDSON* AND THE PRIVACY PRINCIPLES RECOGNIZED BY THE SUPREME COURT IN *ROWAN*, NOT THE CONTENT-DISCRIMINATION PRINCIPLES EMANATING FROM *DISCOVERY NETWORK*

A. The Case is Not Close Under *Central Hudson*

Commercial telemarketing is a form of "commercial speech." Contemporary commercial speech doctrine is governed by the four-part test first articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980):

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

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lacked the statutory authority to create its national registry. Whereas Congress had clearly given the FCC the green light to adopt a national registry in acting the TCPA, the District Court reasoned, no similar explicit authority existed under the TCFAP granting parallel authority to the FTC. In reaching this judgment, the District Court was unmoved by the fact that the Implementation Act appeared to tacitly endorse the FTC's national registry, holding that Congress' appropriation and fee-authorizing legislation was not a "ratification" of the FTC's actions sufficient to constitute statutory authorization for the registry. Congress reacted with extraordinary swiftness to cure the alleged defect relied upon by the District Court in *U.S. Security*. Within days of the decision, Congress passed and President Bush signed into law a statute explicitly and unequivocally granting the FTC authority to enforce the Do-Not-Call registry.

Id. at 563-64.

Neither the commercial telemarketers nor the District Court below contested the weight of the government interests vindicated by Do-Not-Call. The protection of the privacy of the home is plainly a "substantial" governmental interest, and Do-Not-Call, by eliminating between 40 and 60 percent of telemarketing calls, is manifestly a program that will "directly and materially advance" that interest. Moreover, the final prong of *Central Hudson*, the requirement that there be a "reasonable fit" between ends and means, is simply a demand of proportionality, not a requirement of a "perfect" or even "best" fit. *See Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989; *United States v. Edge Broadcasting Co*, 509 U.S. 418, 427-28 (1993). Fundamental to these concepts is the notion that government may attack difficult problems through incremental steps. The First Amendment's commercial speech jurisprudence does *not* normally require "all or nothing." Rather, "[w]ithin the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgments." *Edge Broadcasting*, 509 U.S. at 434. The First Amendment simply does not require "that the Government make progress on every front before it can make progress on any front." *Id*.

Here, as the history of Do-Not-Call demonstrates, the Congress, the FCC,

and the FTC have evolved in their collective legislative and administrative judgments. The initial attempts to protect privacy through the company-specific Do-Not-Call did not accomplish the desired privacy objective. When the new option of a national Do-Not-Call Registry was introduced, Americans responded in droves, with millions of Americans listing over 51 million phone numbers on the Registry. While First Amendment cases are not decided by plebiscite, the tidal dimension of this public response *does* speak with great probity to the strength of the governmental interests serviced by Do-Not-Call, and to the degree of pent-up public frustration and dissatisfaction with prior attempts to limit the invasions of privacy caused by telemarketing.

In short, if the *Central Hudson* test was the only standard in controversy, Do-Not-Call would be an easy victor.

B. **The Principles of *Rowan* Support Do-Not-Call**

In *Rowan v. United States Post Office Department*, 397 U.S. 728 (1970), the Supreme Court acknowledged and applied the right of privacy within the home, sustaining the right of the consumer to reject unwanted mail. In *Rowan*, the Court upheld a statute that allowed an addressee to refuse mail from any sender of "erotically arousing or sexually provocative" material by notifying the local

postmaster, who then instructed the sender to remove the addressee's name and address from its mailing list under penalty of law. Noting that the purpose of the statute was to eliminate governmental involvement in any determination concerning the content of the materials, allowing the addressee discretion to reject advertising for sexually explicit material, the Court sustained the law. *Rowan* is a case steeped in reverence for privacy, and enough, on its own terms, to support Do-Not-Call.

C. The District Court Failed to Reconcile Properly *Rowan* with *Discovery Network*

1. The District Court's Reliance on *Discovery Network* was Misplaced

One might think that the combined learning of *Central Hudson* and *Rowan* would be enough to defeat the challenge to Do-Not-Call. But while the District Court below acknowledged *Rowan*, it failed to appreciate the full implications of the *Rowan* decision. Instead, the turn of the District Court's analysis appeared disproportionately influenced by a different Supreme Court case, *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). In *Discovery Network*, the city of Cincinnati, Ohio, enacted an ordinance prohibiting the distribution of commercial handbills on public property. The ordinance effectively granted distributors of traditional "newspapers," such as the *Cincinnati Post*, *USA Today*, or *The Wall Street Journal*, access to public sidewalks through newsracks, while denying

equivalent newsrack access to the distributors of commercial magazines and handbills, such as publications for apartment or house rentals or sales. The ordinance was designed to reduce the visual and spatial clutter of newsracks. The constitutional difficulty, however, was that no principled distinction could be drawn between the clutter caused by a *USA Today* newsrack and one caused by a real estate magazine. Clutter was clutter, and a newsrack was a newsrack, and the content of the speech inside the rack bore no relation to the city's environmental or aesthetic interests. The "disconnect" in *Discovery Network* was all the more egregious because commercial newsracks, which bore the entire brunt of the regulation, constituted only 3 percent of all racks.

2. The District Court Failed to Apply Sufficiently the Current Case to *Rowan*

We assert that the District Court placed undue emphasis on *Discovery Network*, and undervalued *Rowan*. The District Court portrayed *Rowan* as somehow different in kind from the Do-Not-Call Registry, depicting *Rowan* as a content-neutral program in which the government did not engage in content discrimination. We argue that this reading of *Rowan* is flawed given that there *was* content-based regulation in *Rowan*. Indeed, if anything, the content discrimination was more pointed in *Rowan* than here. It is also noted that *Rowan* involved a

restriction on advertising limited to one narrow band of speech--the federal statute at issue applied to advertisements that offered for sale matter, which the addressee in his sole discretion believed to be "erotically arousing or sexually provocative." *Rowan*, 390 U.S. at 730, *quoting* 39 U.S.C. § 4009(a) (1964 ed., Supp. IV).

Thus, while the Do-Not-Call registry applies to all commercial telemarketing, the postal law in *Rowan* singled out a subset of advertising, dealing with erotic material. The District Court's analysis below failed to come to grips with this key element of *Rowan*. Yet the existence of this content-discrimination in *Rowan* is enormously important, for when one focuses on it, the driving principles of the decision in *Rowan* are far more brightly illuminated. Those principles were privacy and consumer choice. The confluence of those two values powered the engine in *Rowan*. *Rowan* makes sense only in light of the combination of *Rowan*'s reference for the privacy within the home and the fact that the consumer, not the government, made the ultimate blocking decision. Indeed, any other explanation of *Rowan* would be incoherent, then and now.

Rowan did not involve "obscene" speech, which of course would have been entitled to no constitutional protection whatsoever and could have been banned outright from the mail. *See Miller v. California*, 413 U.S. 15 (1973). Rather, this was sexually explicit but not obscene speech, expression that was *within* the

protection of the First Amendment. Both at the time *Rowan* was decided and today, it would have been plainly unconstitutional for the government to ban by its own fiat the transport of such sexually explicit (but not obscene) material through the mails or the channels of interstate commerce. *See Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997). Thus the *only* factors that plausibly explain *Rowan* were the fact that the statute was enacted to reinforce the sovereignty of individuals to shut off the entry of the advertising into the home, and the fact that it was the consumer, not the government, who determined that a certain type of commercial speech would be disallowed to enter the consumer's home.

3. The District Court Failed to Reconcile Properly *Rowan* and *Discovery Network*

If the District Court below gave insufficient weight to *Rowan*, it gave too much weight to *Discovery Network*. The principle of *Discovery Network* is logical and important as far as it goes. But it only goes so far.

First and foremost, the District Court below failed to appreciate the key distinction between *Discovery Network* and Do-Not-Call for purposes of First Amendment values. In *Discovery Network*, the government did the censoring by banning commercial handbill newsracks. The government directly intervened in

the marketplace of ideas, frustrating an otherwise willing publisher from reaching an otherwise willing reader. And this intervention by the government took place in the open spaces of city streets and sidewalks, a quintessential public forum traditionally open to the free flow of public discourse, commercial and non-commercial alike. Under the Do-Not-Call regime, however, *no consumer* willing to receive a message is prevented from receiving one, and no messages are blocked by anyone in the open arenas of public discourse and commercial marketing. The *only* decision maker who can block a message is the consumer, and the consumer may block the message only at the threshold of the home. These distinctions vacuum the oxygen from the First Amendment claim in this case. The central First Amendment antipathy toward content-discrimination by government, an antipathy that has always been driven primarily by a fear that government will censor messages that it finds offensive or disagreeable, simply is not implicated.

Once again, a comparison to *Rowan* is pivotal. For the District Court's analysis to be persuasive, it must treat *Rowan* as essentially overruled by *Discovery Network*. If under *Discovery Network* distinctions between commercial and non-commercial speech are not permissible, let alone distinctions *within* the universe of commercial speech such as those in *Rowan*, then the statute in *Rowan* would necessarily be unconstitutional were that case to come before the Supreme Court in

a post-*Discovery Network* world. Not only is there nothing in *Discovery Network* to indicate that anything so radical was intended, but as previously explained, even without *Discovery Network* the discrimination that existed in *Rowan* would have been plainly unconstitutional if it had been a government official (such as the Postmaster General) who had been empowered to block the mail to consumers. *Rowan*, however, established the hierarchy of constitutional trumps. Privacy and consumer choice trump freedom of speech when it is the consumer and not the government controlling what speech enters the home and what speech does not.

4. There is No Paternalism in Do-Not-Call

Tellingly, this is *not* a case involving paternalism. There is no mistaking the arc of modern commercial speech jurisprudence: in decision after decision the Supreme Court has advanced protection for advertising, repeatedly striking down regulations grounded in paternalistic motivations. *See, e.g., Thompson v. Western States Medical Center*, 122 S.Ct. 1497, 1505 (2002) (striking down restrictions on pharmaceutical advertising); *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 554-555 (2001) (striking down some and sustaining some restrictions on tobacco advertising); *Greater New Orleans Inc., v. United States,* 527 U.S. 173 (1999) (striking down casino gambling advertising limitations); *44 Liquormart, Inc., v. Rhode Island*, 517 U.S. 484 (1996) (striking down liquor advertisement

restrictions); *Rubin v. Coors Brewing Company*, 514 U.S. 476 (1995) (striking down beer advertising regulations); *Ibanez v. Florida Dep't of Business and Professional Regulation*, 512 U.S. 136, 147 (1994) (striking down restrictions on accountancy advertising); *Edenfield v. Fane,* 507 U.S. 761 (1993) (striking down commercial speech limitations on accountants); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (striking down restrictions on newsracks for commercial flyers and publications); *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91(1990) (regulation banning lawyer advertisement of certification by the National Board of Trial Advocacy as misleading unconstitutional); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (regulation banning solicitation for legal business mailed on a personalized or targeted basis to prevent potential clients from feeling undue duress to hire the attorney unconstitutional); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985) (striking down some and upholding some restrictions on lawyer advertising); *Bolger v. Youngs Drug Product Corp*., 463 U.S. 60 (1983) (statute banning unsolicited mailings advertising contraceptives to aid parental authority over teaching their children about birth control unconstitutional); *In re R.M.J.*, 455 U.S. 191 (1982) (regulations limiting the precise names of practice areas lawyers can use in ads and identifying the

jurisdictions lawyer is licensed in as misleadingly unconstitutional); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980) (striking down restrictions on advertising statements by public utilities); *In re Primus*, 436 U.S. 412 (1978) (striking down restrictions on solicitation of legal business on behalf of ACLU); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (regulation banning lawyer advertisement of prices for routine legal services as misleadingly unconstitutional).

In all of these cases, however, it was the government acting as censor, the government substituting its judgment for that of the consumer. This is the kind of over-regulation of the free marketplace that acts as a drag on the economy, and the kind of over-regulation of the marketplace of ideas that acts as a drag on the free flow of commercial information protected by the First Amendment.

Do-Not-Call does not fit this picture. Do-Not-Call does not place the government in the censor seat. Do-Not-Call is not about paternalism, but privacy, and that difference changes the constitutional calculus. *See Watchtower Bible & Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 164-65 (2002) (observing that the protection of "residents' privacy" was among the "important interests that the Village may seek to safeguard through some form of regulation of solicitation activity"). Do-Not-Call is not a paternalistic usurping of consumer

choice, it is an *empowerment* of consumer choice, in aid of the tranquility of the home. *See Frisby v. Schultz*, 487 U.S. 474, 484 (1988) ("The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."). Just as the traditional law of trespass empowers the home dweller to bar an unwanted physical visitor, Do-Not-Call empowers the home dweller to bar an unwanted electronic visitor. As the Supreme Court noted in *Rowan*, the law has long recognized "the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property." *Rowan*, 397 U.S. at 737. "The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality." *Id.*

With Do-Not-Call, government is not paternalistically skewing the marketplace of ideas. With Do-Not-Call, consumers are sovereign. With Do-Not-Call, the Government is reinforcing the ancient shelter the law has provided for privacy within the home, vindicating the ancient wisdom that the home is one's castle.

C. The "Fit" Between Ends and Means is Reasonable in Do-Not-Call

There are other features distinguishing *Discovery Network* from Do-Not-Call. Viewed both quantitatively and qualitatively, the justification for the

distinctions drawn in *Discovery Network* were far weaker than the justifications for the distinctions drawn in Do-Not-Call. In the traditional parlance of *Central Hudson* and commercial speech doctrine, the "fit" between ends and means, almost non-existent in *Discovery Network*, is plainly "reasonable" for Do-Not-Call.

In *Discovery Network*, there was absolutely no relationship between the content of the material inside the commercial handbills newsrack and the capacity of the newsrack to pose a traffic impediment or contribute to aesthetic clutter. The *physical characteristics* of the newsrack were the source of 100 percent of the perceived harm. The content of the message inside the newsracks had *zero* connection to that harm. Moreover, commercial handbill newsracks were the least significant offenders, constituting the smallest percentage of racks, yet bearing the entire brunt of the regulation. These newsracks constituted only three percent of the offending physical objects, but bore 100 percent of the regulatory burden.

In the case of telemarketing phone calls, however, the matter is much more complex. The identity of a caller and the content of the phone call *do* matter to people. Not all phone calls are created equal. Some are more vexatious, irritating, and invasive than others. Congress, the FTC, and the FCC are entitled to attack these problems with a dose of realism. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995). The District Court seemed to think that it was simply the

ring of the phone and the hassle of getting up from the dinner table to contend with a call that was at stake. Respectfully, however, Congress and the enforcing agencies could quite justifiably conclude that for most Americans, volume was also a factor. Volume alone can alter the nature and order of the privacy invasion. *See Bland v. Fessler*, 88 F.3d at 732. Moreover, the District Court gave insufficient attention to the critical fact that political and charitable callers do not have a "free pass" under the existing regime. However, consumers may also bar these types of telemarketers under the system of caller-specific blocking. As this Court itself noted in its decision granting a stay of the District Court's order:

> Before the FTC amended its Telemarketing Sales Rule, certain charitable organizations asked the agency not to include non-commercial callers in any do-not-call list (neither a national do-not-call list nor a company-specific do-not-call list). Although the FTC decided not to include charitable callers in a national do-not-call list, it was unwilling to exclude them from its company-specific do-not-call list if particular homeowners wanted to designate them specifically. In this context, the FTC stated that charitable callers, in addition to commercial callers, had an effect on homeowners' privacy, and thus should not be completely immune from a consumer-initiated restriction. The FTC stated that "the encroachment upon consumers' privacy rights by unwanted solicitation calls is not exclusive to commercial telemarketers" and it therefore concluded that some regulation was appropriate even in the non-commercial context. 68 Fed. Reg. 4637. However, the FTC never

> found that commercial and non-commercial callers affected homeowners' privacy interests to the *same* degree. Rather, it emphasized "fundamental differences" between commercial and charitable solicitation that make commercial callers more likely to "engage in all the things that telemarketers are hated for." *Id*. Because of this distinction, the FTC found it appropriate to subject commercial telemarketers to the national do-not-call registry, but to regulate charitable callers only under the less burdensome company-specific do-not-call rules.

Federal Trade Commission v. Mainstream Marketing Services, Inc., -- F.3d -- (10th Cir. 2003) (Order of October 7, 2003 staying preliminary injunction of the District Court).

Thus, in the case of Do-Not-Call, commercial telemarketers comprise the majority of telephone solicitations, and unlike *Discovery Network,* do not in actuality bear the entire brunt of the regulation. Political and charitable callers may be excluded, but such callers are excluded on a more caller-specific basis. In the calculus of *Central Hudson*, in short, the "fit" between the regulatory mechanism and the governmental interest is much stronger for Do-Not-Call, and the extreme "disconnect" in quantitative terms that existed in *Discovery Network* does not exist.

In our view, it is the disruption caused by a bevy of multiple calls during quality family time that matters to most consumers. And in a world in which commercial telemarketers are by percentage the worst offenders, Congress and the

two federal agencies could sensibly conclude that empowering consumers to block all commercial telemarketers with one swoop, and to selectively block other specific telemarketers as needed, would be the optimal adjustment of the competing interests. *See Missouri v. Am. Blast Fax, Inc.*, 323 F.3d 649, 655-56 (8th Cir. 2003) (ruling, in the context of faxes, that a bar on unsolicited commercial faxes in the TCPA was a reasonable fit with the substantial governmental interest of reducing costs and intrusion, because commercial faxes could be properly classified as more intrusive than non-commercial faxes).

The "targeting blocking" aspects of Do-Not-Call dovetail well with the fact that it is the consumer, not the government, making the ultimate choice. This consumer empowerment is a favored device, not a disfavored one, in terms of First Amendment values. *See United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 815 (2000) (observing that a system of consumer-initiated blocking is "less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests"). Once again, the analysis loops back to *Rowan*. As this Court noted in its order granting a stay of the District Court's decision, *Rowan* heavily emphasized the element of individual choice, and the "opt-in" feature of the mail blocking system, a feature analytically identical to the opt-in feature of Do-Not-Call. *Federal Trade*

Commission v. Mainstream Marketing Services, Inc., -- F.3d -- (10th Cir. 2003) (Order of October 7, 2003 staying preliminary injunction of the District Court) (*citing Rowan*, 397 U.S. at 730). The Supreme Court thus strongly endorsed the fact that the home dweller was the "exclusive and final judge of what will cross his threshold." *Rowan*, 397 U.S. at 736. *See also Anderson v. Treadwell*, 294 F.3d 453, 462-63 (2d Cir. 2002) (applying commercial speech standards, the court held that in assessing what is or is not a "reasonable fit," a resident-activated solicitation restriction was narrowly tailored and of the kind "endorsed by the Supreme Court in *Rowan*"); *Pearson v. Edgar*, 153 F.3d 397, 404 (7th Cir. 1998) (striking down a regulation under the "reasonable fit" prong as paternalistic, because, unlike *Rowan*, "[h]ere, the state, not the homeowner, has made the distinction between real estate solicitations and other solicitations without a logical privacy-based reason").

CONCLUSION

Privacy and freedom of speech are often in tension in American society. When these values are both implicated in a legal regulation, the constitutional principles protecting the free flow of information must at times be tempered to vindicate privacy interests that are also of ancient vintage and vital importance. *See Bartnicki v. Vopper*, 532 U.S. 514, 536 (2001) (Breyer, J., concurring.) We

assert that in its analysis the District Court placed too much emphasis on the concepts of content-neutrality, and failed to afford sufficient emphasis on the protection of privacy. We respectfully urge this Court to reverse the judgment of the District Court, restoring Do-Not-Call, and its critical role in the protection of privacy in modern American life.

Respectfully submitted,

Certificate of Compliance
Pursuant to Fed. R. App. P. Rule 32(a)(7)

I certify that the foregoing Brief complies with the length requirements of the Federal Rules of Appellate Procedure and the United States Court of Appeals for the Tenth Circuit, being less than 7,000 words in length. The word-count as measured by the word-processing program upon which this Brief was prepared is approximately 6,400 words.

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Counsel,
For the undersigned members of the Committee on Commerce, Science, and Transportation