

this regard, Not-for-Profit Coalition stated that “[c]ompounding the harm is the fact that the registry would apply equally to donors with a long history of supporting bona fide non-profit and charitable organizations as well as new prospective donors. Depriving charities and non-profits of the ability to contact prior supporters will be financially devastating.”⁶⁶¹

Not-for-Profit Coalition also argued that the effect of the “do-not-call” registry requirement would be to drive non-profit organizations away from efficient use of professional telefundraisers, and toward inefficient in-house operations.⁶⁶² According to commenters, the efficiency benefits of using professional telefundraisers may be substantial. For example, Hudson Bay stated:

HBC’s phone canvass is mostly for smaller non-profit organizations (and the state chapters of large ones). Instead of renting space, buying computers and phone equipment, hiring supervisors and so on, HBC’s clients find it cheaper to contact their members and donors by sharing these resources. Even after paying HBC’s fee, which ranges from 4 to 7%, it is much cheaper for these non-profits to centralize these services. The savings achieved by phone company volume discounts alone pays more than half of HBC’s fee.⁶⁶³

Several representatives of non-profit organizations argued that under relevant First Amendment precedent, charitable fundraising is fully protected speech, and that attempts by the government to regulate it are subject to the highest level of scrutiny.⁶⁶⁴ These commenters also noted that under the relevant precedents, no distinction between the speech of the non-profit organization and that of the professional telefundraiser actually making the calls is recognized—both are equally protected. Several criticized the proposal’s exemptions for solicitations by “political clubs, committees, or parties” and “constituted religious organizations” as making distinctions based on the type of speech or speaker

that are impermissible under the First Amendment.⁶⁶⁵

The Commission believes that, with respect to telemarketing that solicits sales of goods or services, the “do-not-call” registry provisions are consistent with the relevant First Amendment cases. In *Central Hudson Gas & Elec. v. Pub. Serv. Comm. of N.Y.*, the Supreme Court established the applicable analytical framework for determining the constitutionality of a regulation of commercial speech that is not misleading and does not otherwise involve illegal activity.⁶⁶⁶ Under that framework, the regulation (1) must serve a substantial governmental interest; (2) must directly advance this interest; and (3) may extend only as far as the interest it serves⁶⁶⁷—that is, there must be “a ‘fit’ between the legislative ends and the means chosen to accomplish those ends . . . a fit that is not necessarily perfect, but reasonable . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.”⁶⁶⁸

With regard to the first of these criteria, protecting the privacy of consumers from unwanted commercial telemarketing calls is a substantial governmental interest.⁶⁶⁹ “Individuals are not required to welcome unwanted speech into their own homes and the government may protect this freedom.”⁶⁷⁰ The “do-not-call” registry is designed to advance the privacy rights of consumers by providing them with an effective, enforceable means to make known to sellers their wishes not to receive solicitation calls. Simply put, sellers or telemarketers soliciting sales may not call persons who have placed themselves on the registry. The registry is also designed to cure the inadequacies as a privacy protection measure that became apparent in the company-specific “do-not-call” provisions included in the original Rule.⁶⁷¹ Thus, the second of *Central*

Hudson’s criteria is satisfied. Finally, the national “do-not-call” registry is a mechanism closely and exclusively fitted to the purpose of protecting consumers from unwanted telemarketing calls.

In *Rowan v. Post Office Dept.*, the Supreme Court upheld a federal statute empowering a homeowner to bar mailings from specific senders by notifying the Postmaster General that she wished to receive no further mailings from that sender.⁶⁷² The Court stated:

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. That we are often “captive” outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere. The asserted right of a mailer, we repeat, stops at the outer boundary of every person’s domain. . . . To hold less would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home. Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail. 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, and none of the recognized exceptions includes any right to communicate offensively with another.⁶⁷³

Under *Rowan*, the First Amendment allows a statutory scheme whereby a person may block a sender’s mailings by notifying the Postmaster General, who then will prevent that sender’s mailings from being delivered to that person. The Commission believes that the First Amendment similarly raises no impediment to Rule provisions that will enable a person by signing up on a national “do-not-call” registry to block commercial communications via telephone, which are far more intrusive than the communications, at issue in *Rowan*, via printed words and images.⁶⁷⁴

⁶⁷² 397 U.S. 728 (1969).

⁶⁷³ *Id.*, at 737-38 (internal citations omitted).

⁶⁷⁴ While the statute under consideration in *Rowan* was focused on mailed advertisements of a sexual nature, the Court specifically rejected arguments that it should be read narrowly to cover only “salacious” or “pandering” advertisements—or even all advertisements. Instead, the court upheld the statute interpreted as covering all mailings from the sender, regardless of whether they were advertisements, and regardless of

those who have a prior relationship with the Foundation If the Foundation cannot contact prior donors and volunteers on the basis of a preexisting relationship, then the effectiveness of our fundraising program will be jeopardized.” See also, e.g., APTS-NPRM at 2; ADA-NPRM at 1; AAST-NPRM at 3; FireCo-NPRM at 1; NTC-NPRM at 3; Southern Poverty-NPRM at 2; NCLF-NPRM at 1.

⁶⁶¹ Not-for-Profit Coalition-NPRM at 10.

⁶⁶² *Id.* at 18, 19.

⁶⁶³ Hudson Bay-Goodman-NPRM at 2. See also, e.g., APTS-NPRM at 3; Not-For-Profit Coalition-NPRM at 19.

⁶⁶⁴ See, e.g., Hudson Bay-Goodman-NPRM at 4, 5; DMA-NonProfit-NPRM at 7; Not-For-Profit Coalition-NPRM at 15.

⁶⁶⁵ See, e.g., DMA-NonProfit-NPRM at 5, 6; Not-for-Profit Coalition at 41.

⁶⁶⁶ 447 U.S. 557 (1980).

⁶⁶⁷ *Id.* at 566.

⁶⁶⁸ *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

⁶⁶⁹ In some instances, the “do-not-call” registry provisions will also serve another substantial governmental interest—prevention of fraud and abuse, as in cases where elderly consumers are signed up on the registry to protect them from exploitative or fraudulent telemarketers. Cf. *Metromedia v. San Diego*, 453 U.S. 490, 509 (1981) (holding, *inter alia*, that San Diego’s “twin goals that the ordinance seeks to further—traffic safety and the appearance of the city—are substantial government goals.”)

⁶⁷⁰ *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

⁶⁷¹ The shortcomings of the company-specific approach are set forth above in the discussion of § 310.4(b)(1)(iii).