No. 05-927

In the Supreme Court of the United States

NATIONAL FEDERATION OF THE BLIND, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Telemarketing Sales Rule, 16 C.F.R. Pt. 310, which imposes restrictions and disclosure requirements on telemarketing calls, violates the First Amendment because it covers for-profit telefunders that solicit charitable contributions.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-42a) is reported at 420 F.3d 331. The opinion of the district court (Pet. App. 44a-70a) is reported at 303 F. Supp. 2d 707.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 2005. A petition for rehearing was denied on October 25, 2005 (Pet. App. 1a). The petition for a writ of certiorari was filed on January 23, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1994, Congress enacted the Telemarketing and Consumer Fraud and Abuse Prevention Act (Telemarketing Act or Act), Pub. L. No. 103-297, 108 Stat. 1545 (15 U.S.C. 6101 *et seq.*). The Act is designed to combat "[i]nterstate telemarketing fraud" and "other forms of telemarketing deception and abuse." 15 U.S.C. 6101. The Act requires the Federal Trade Commission (FTC or Commission) to "prescribe rules prohibiting deceptive * * * and other abusive telemarketing acts or practices." 15 U.S.C. 6102(a)(1). Those rules must include "a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy," as well as restrictions on the hours of the day during which such calls are permitted, and certain disclosure requirements. 15 U.S.C. 6102(a)(3) (2000 & Supp. II 2002). As originally enacted, the Telemarketing Act limited the definition of "telemarketing" to calls seeking "to induce purchases of goods or services." 15 U.S.C. 6106(4).

The Commission's jurisdiction under the Telemarketing Act is coextensive with its jurisdiction under the Federal Trade Commission Act (FTC Act), 15 U.S.C. 41 *et seq.* See 15 U.S.C. 6105(a). Its jurisdiction under the FTC Act excludes many non-profit entities. See 15 U.S.C. 44, 45(a)(2). The Commission also lacks jurisdiction over certain for-profit entities that are subject to other regulatory regimes, including banks, savings and loan institutions, federal credit unions, common carriers, and entities engaged in "the business of insurance." 15 U.S.C. 45(a)(2), 1012(b). If the Commission has jurisdiction over a particular entity, the Commission retains that jurisdiction even if the entity is acting on behalf of another entity over which the Commission does not have

jurisdiction. See, *e.g.*, *Official Airline Guides, Inc.* v. *FTC*, 630 F.2d 920, 923 (2d Cir. 1980), cert. denied, 450 U.S. 917 (1981).

In 1995, the FTC promulgated its original Telemarketing Sales Rule (TSR or Rule) to implement the Telemarketing Act. 60 Fed. Reg. 43,842 (16 C.F.R. Pt. 310 (2003)). The Rule prohibited various deceptive telemarketing practices (16 C.F.R. 310.3 (2003)), as well as certain abusive practices (16 C.F.R. 310.4 (2003)), such as calling a consumer who has stated that he does not wish to be called by a particular seller (the company-specific "do-not-call" provision), and imposed time restrictions and disclosure requirements. In keeping with the statutory definition of "telemarketing" in effect at the time, 15 U.S.C. 6106(4), the Rule applied only to telephone calls conducted to induce the purchase of goods or services (see 16 C.F.R. 310.2(u) (2003)).

In October 2001, Congress enacted the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 396. Section 1011 of the USA PATRIOT Act amended the Telemarketing Act by expanding the definition of "telemarketing," 15 U.S.C. 6106(4) (2000 & Supp. II 2002), to cover any "plan, program, or campaign which is conducted to induce * * * a charitable contribution, donation, or gift of money or any other thing of value." Section 1011 did not, however, expand the Commission's jurisdiction over entities not otherwise subject to the FTC Act and the Telemarketing Act.

In January 2002, the Commission issued a notice of proposed rulemaking to consider amending the TSR to reflect, among other things, the enactment of the USA PATRIOT Act. 67 Fed. Reg. 4492. In January 2003, after considering thousands of comments and conducting a public forum, the Commission issued an amended TSR. 68 Fed. Reg. 4580. Based on the 2001 statutory

amendments and the rulemaking record, the Commission extended the coverage of the TSR to telefunders, for-profit entities that solicit charitable contributions on behalf of non-profit organizations. *Id.* at 4584-4586. The Commission rejected the contention "that no privacy protection measures are necessary with respect to charitable solicitation telemarketing," because the Commission concluded that charitable solicitations can interfere with residential peace. *Id.* at 4637 & n.685. The Commission stated that, although "the USA PATRIOT Act amendments did not expand the Commission's jurisdiction under the TSR to make direct regulation of non-profit organizations possible," *id.* at 4586, the Act authorized the Commission to prevent telefunders from engaging in deceptive or abusive practices. *Id.* at 4585.

The Commission applied most, but not all, of the Rule's restrictions to telefunders. In particular, the Commission exempted telefunders from the national "do-not-call" registry established by the amended Rule for commercial telemarketing. 16 C.F.R. 310.6(a). The Commission explained that the exemption was warranted because compliance by telefunders with the more modest entity-specific "do-not-call" provision should provide sufficient consumer protection and because the exemption would minimize the impact of the Rule on the First Amendment rights of telefunders and the charities that hire them. 68 Fed. Reg. at 4636-4637.

In order to protect consumers from abusive solicitation practices, however, the Commission subjected telefunders to many of the generally applicable provisions of the TSR. Those provisions include:

(1) the entity-specific "do-not-call" provision, 16 C.F.R. 310.4(b)(1)(iii)(A), which prohibits a telemarketer from calling any consumer who has indicated that he wants no further calls from or on

behalf of the particular seller or non-profit organization;

(2) the prohibition on abandoned (and recorded) calls, 16 C.F.R. 310.4(b)(1)(iv), which requires the telemarketer to connect each call to a representative within two seconds of the recipient's completed greeting;

(3) the prohibition on placing calls before 8 a.m. or after 9 p.m., 16 C.F.R. 310.4(c);

(4) the requirement that telemarketers transmit caller identification information, 16 C.F.R. 310.4(a)(7); and

(5) a requirement that telefunders promptly indicate that the purpose of the call is to solicit charitable contributions and identify the charity on behalf of whom they are soliciting, 16 C.F.R. 310.4(e).

b. The Commission's authority under the Telemarketing Act overlaps with authority provided to the Federal Communications Commission (FCC) under the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. 227. Among other things, the TCPA directs the FCC to issue rules addressing "the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object," 47 U.S.C. 227(c)(1), and also prohibits most prerecorded calls to residential phone lines with a few exceptions, 47 U.S.C. 227(b)(1)(B). The definition of "telephone solicitation" under the TCPA specifically exempts calls "by a tax exempt nonprofit organization." 47 U.S.C. 227(a)(3).

In July 2003, the FCC issued revised TCPA rules that are nearly identical to the Commission's TSR, including the "do-not-call" requirements, the abandoned call provisions, the time restrictions, and the disclosure and

caller identification provisions. See *In re Rules and Regulations Implementing the TCPA (In re TCPA)*, 18 F.C.C.R. 14,014 (2003). The FCC's amended rule subjects all commercial entities to its requirements, including for-profit entities exempt from the FTC's jurisdiction. *In re TCPA*, 18 F.C.C.R. 18,558, 18,560 (2003). The FCC retained regulatory provisions, however, that exempt from coverage solicitations by both non-profit organizations themselves and their for-profit telefunders. 68 Fed. Reg. at 44,161.

2. Petitioners National Federation of the Blind and Special Olympics Maryland, Inc., are both tax-exempt non-profit organizations that hire telefunders to solicit charitable contributions for them. Pet. App. 49a. In April 2003, petitioners filed suit for declaratory and injunctive relief against the FTC in the United States District Court for the District of Maryland. As relevant here, petitioners contended that the five provisions of the amended TSR described above, pp. 4-5, *supra*, violate the First Amendment to the Constitution. Pet. App. 8a, 49a.

The district court granted the Commission's motion for summary judgment. Pet. App. 43a-70a. The court held, *inter alia*, that the modest restrictions imposed by the TSR comport fully with the First Amendment. *Id.* at 55a-68a.

The court of appeals affirmed the district court's judgment. Pet. App. 2a-42a. The court held that the TSR does not violate the First Amendment because it is a "reasonable regulation" that is "narrowly drawn" to serve "sufficiently strong subordinating interest[s] that the [government] is entitled to protect"—namely preventing fraud and protecting home privacy. Pet. App. 3a (quoting *Secretary of State* v. *Joseph H. Munson Co.*, 467 U.S. 947, 960-961 (1984)). Analyzing each of the

challenged TSR provisions in turn (Pet. App. 15a-23a), the court concluded that they are the "most reasonable and minor restrictions on telemarketing practices." *Id.* at 20a. For example, the court held that the charity-specific do-not-call provision is narrowly tailored because "it restricts only calls that are targeted at unwilling recipients," and it requires recipients to object to calls on a charity-by-charity basis. *Id.* at 17a-18a (quoting *Mainstream Mktg. Servs., Inc.* v. *FTC*, 358 F.3d 1228, 1242 (10th Cir.), cert. denied, 543 U.S. 812 (2004)). The court distinguished the present case from this Court's decisions in *Munson*, *supra*, *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980), and *Riley* v. *National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1986), which held unconstitutional "blunt and broad" state laws that limited fundraising fees. Pet. App. 20a. The court of appeals explained that the laws invalidated in those cases were insufficiently tailored to prevent fraud, whereas the challenged TSR provisions "are carefully crafted" to prevent fraud and to protect privacy. *Id.* at 21a.

The court of appeals also rejected petitioners' argument that the TSR is unconstitutionally under-inclusive because it covers calls by telefunders but not direct solicitations by charities themselves. Pet. App. 23a-30a. The court concluded that the purported under-inclusiveness in the TSR "is justified by a neutral and legitimate reason"—the Commission's jurisdictional limitations. *Id.* at 24a; see *id.* at 26a-29a. The court reasoned that those jurisdictional boundaries do not raise any "red flag[s] indicating First Amendment problems," such as an attempt to favor one side of a public debate, the pursuit of an illegitimate government interest, or the failure genuinely to serve the interest that the challenged regulation is designed to advance. *Id.* at 28a.

The court noted that the "TSR provisions do not exhibit any disapproval of the content of the calls placed by telefunders. The TSR applies evenhandedly to solicitations for charities of all persuasions and beliefs. The restrictions apply to all telemarketing calls made by entities within the FTC's jurisdiction, regardless of the subject matter of the call or the viewpoint expressed by the caller." *Id.* at 32a. The court therefore concluded that the Rule is consistent with the First Amendment. *Id.* at 33a.

Judge Duncan dissented. Pet. App 34a-42a. Relying on *Riley*, *supra*, and *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410 (1993), she reasoned that the TSR is unconstitutionally under-inclusive because it covers telefunders but not in-house charity callers. Pet. App. 34a-37a. Unpersuaded that there is a legitimate justification for that distinction, she concluded that the Rule violates the First Amendment. *Id.* at 37a-42a.

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or of another court of appeals. This Court's review is therefore not warranted.

1. Although professional fundraising on behalf of charities enjoys some First Amendment protection, this Court has consistently held that speech "[s]oliciting financial support is undoubtedly subject to reasonable regulation." *Village of Schaumburg* v. *Citizens for a Better Env't,* 444 U.S. 620, 632 (1980); see *Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795-796 (1988); *Secretary of State* v. *Joseph H. Munson Co.,* 467 U.S. 947, 959-960 (1984). The government may impose content-neutral regulations on charitable fundraising if the regulations serve "sufficiently strong, subordi-

nating interest[s] that the [government] is entitled to protect" and are "narrowly drawn * * * to serve [the] interes[ts] without unnecessarily interfering with First Amendment freedoms." *Munson*, 467 U.S. at 960-961 (quoting *Schaumburg,* 444 U.S. at 636-637). The TSR provisions challenged by petitioners easily pass that test.[1]

Petitioners incorrectly assert (Pet. 16-18) that the TSR's restrictions are "substantial burdens" on speech. On the contrary, as the court of appeals explained, the Rule's provisions are narrowly tailored to further important governmental interests. Pet. App. 15a-23a. Most of the challenged provisions impose modest limitations on telemarketing calls in order to protect residential privacy, which this Court has recognized as an interest "of the highest order in a free and civilized society." *Frisby* v. *Schultz*, 487 U.S. 474, 484 (1988) (quoting *Carey* v.

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[1] Petitioners incorrectly contend (Pet. 10) that the TSR is not content-neutral. In general, a regulation is content-neutral unless "the government has adopted [the] regulation because of disagreement with the message it conveys." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). The TSR was clearly not adopted for such a purpose. As the court of appeals explained, "the TSR provisions do not exhibit any disapproval of the content of the calls placed by telefunders. The TSR applies evenhandedly to solicitations for charities of all persuasions and beliefs. The restrictions apply to all telemarketing calls made by entities within the FTC's jurisdiction, regardless of the subject matter of the call or the viewpoint expressed by the caller." Pet. App. 32a. Petitioners appear to argue that the TSR is not content-neutral based on the supposition that its restrictions are more likely to affect small or unpopular charities. Pet. 10-11. Petitioners provide no support for that supposition, but it is irrelevant in any event. As explained above, the TSR "serves purposes unrelated to the content of expression"—the protection of privacy and the prevention of fraud—and it is therefore "deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791.

Brown, 447 U.S. 455, 471 (1980)). For example, the prohibition on calls early in the morning or late at night enables families to enjoy a few uninterrupted hours at home but still permits a generous thirteen hours each day for solicitations. 16 C.F.R. 310.4(c). Similarly, the restriction on abandoned calls, 16 C.F.R. 310.4(b)(1)(iv), protects households from an intrusion that the Commission found, based on extensive public comment, to be particularly severe. Abandoned calls not only waste consumers' time but also frighten some consumers, who become concerned that they are being monitored by stalkers or burglars. 68 Fed. Reg. at 4641-4643.

Other provisions of the TSR simply give individual households the choice to restrict unwelcome solicitations. The entity-specific do-not-call provision enables consumers to indicate that they do not wish to receive additional calls on behalf of a particular charity. 16 C.F.R. 310.4(b)(1)(iii)(A). Similarly, the provision requiring telemarketers to transmit their caller identification information gives households the opportunity to screen solicitation calls and either accept or ignore the calls as they see fit. 16 C.F.R. 310.4(a)(7); see 68 Fed. Reg. at 4627. The Court has repeatedly approved regulations of this type, which allow individuals to opt in to limitations on speech, because they are a far more narrowly tailored means of protecting privacy than absolute prohibitions on speech. See *Rowan* v. *United States Post Office Dep't*, 397 U.S. 728, 737-738 (1970) (upholding law permitting residents to bar mailings that they consider to be provocative); *Watchtower Bible & Tract Soc'y of N.Y., Inc.* v. *Village of Stratton*, 536 U.S. 150, 168-169 (2002) (recognizing validity of law permitting enforcement of "no solicitation" signs posted by residents); *United States* v. *Playboy Entm't Group, Inc.*,

529 U.S. 803, 815 (2000) (targeted blocking by consumer less restrictive than government ban on speech).

The fifth provision challenged by petitioners requires telefunders to identify the charity on whose behalf they are calling and the purpose of the call. 16 C.F.R. 310.4(e). As the court of appeals explained, that provision is narrowly tailored to further the government's substantial interest in preventing fraud. Pet. App. 19a. The required disclosures permit consumers to make informed decisions about their charitable donations, including whether to invoke the entity-specific do-not-call provision. See *Illinois* v. *Telemktg. Assocs., Inc.*, 538 U.S. 600, 623 (2003). This Court has upheld substantially broader disclosure requirements in order to prevent charitable solicitation fraud. See *Riley*, 487 U.S. at 799 n.11, 800 (professional fundraisers may be required to disclose their "professional status," and a State may publish their "detailed financial disclosure forms"); *Munson*, 467 U.S. at 961-962 n.9 (upholding law requiring charity to disclose its finances).[2]

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[2] Petitioners incorrectly contend (Pet. 16, 17, 19) that the TSR can pass muster under the First Amendment only if it is "the least restrictive means" to further the government's interests. This Court has never imposed that level of scrutiny on laws regulating professional fundraising for charities. Instead, the Court has required only that the regulations be "narrowly drawn" to serve a "sufficiently strong, subordinating interest." *Munson*, 467 U.S. at 960-961 (quoting *Schaumburg*, 444 U.S. at 636-637). Cf. *Ward*, 491 U.S. at 797-799 & n.6 (rejecting assertion that narrow tailoring requirement mandates least-restrictive-means analysis of content-neutral time, place, and manner restrictions). In any event, the challenged TSR provisions satisfy the strict scrutiny advocated by petitioners. Protecting the privacy of the home and preventing fraud are compelling state interests, and the TSR's provisions directly advance those interests by imposing only the most minimal limitations on speech. Any less restrictive alternatives (such as

2. Petitioners mistakenly argue (Pet. 6-16, 18-19) that the TSR violates the First Amendment because it is under-inclusive. Petitioners' primary complaint is that the TSR covers telefunders but not solicitation calls made directly by charities themselves. As the court of appeals explained, however, that limitation on the scope of the TSR is "justified by a neutral and legitimate reason"—the FTC's limited jurisdiction. Pet. App. 24a; see *id.* at 26a-29a. And the limits on the FTC's jurisdiction present no First Amendment concerns. See *id.* at 32a.

"There is no mystery * * * about why the FTC has distinguished telefunders from in-house charity callers." Pet. App. 26a. The Commission has no jurisdiction over charitable organizations, and it therefore lacks authority to subject them to the TSR. See 68 Fed. Reg. at 4586-4587. At the same time, in the USA PATRIOT Act, Congress unambiguously directed the FTC to use the authority that it does possess to prevent abusive charitable solicitations. See 15 U.S.C. 6106(4) (2000 & Supp. II 2002). The FTC therefore included for-profit telefunders within the coverage of the TSR, just as the FTC included other for-profit entities that are subject to its jurisdiction. 68 Fed. Reg. at 4585. The FTC's decision to regulate all entities over which it has jurisdiction, but only those entities, does not reflect discrimination against any category of speech or group of speakers. On the contrary, the FTC's jurisdictional constraints provide a "neutral justification" for the scope of the TSR. Pet. App. 28a (quoting *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 429-430 (1993)).

Petitioners contend (Pet. 12, 15-16) that the First Amendment does not permit Congress to subject

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permitting late night calls or calls from persons who refuse to identify themselves) would leave consumers vulnerable to abuse or fraud.

telefunders to the telemarketing protections of the TSR unless it also expands the FTC's jurisdiction to cover in-house charity callers. But it is perfectly reasonable for Congress to distinguish between solicitations by professional fundraisers and solicitations by charities themselves. That distinction reflects the common-sense judgment that for-profit solicitors are more likely to engage in abusive or coercive telemarketing behavior because their compensation depends on the level of contributions they solicit. Several courts have recognized the validity of that judgment in upholding solicitation laws that exempt in-house charity callers. See *Fraternal Order of Police, N.D. State Lodge* v. *Stenehjem*, 431 F.3d 591, 598 (8th Cir. 2005) (deferring to legislative judgment "that professional charitable solicitors intrude more regularly on residents' privacy than [the charity's] volunteers or employees"), petition for cert. pending, No. 05-1149 (filed Mar. 6, 2006); *National Coalition of Prayer, Inc.* v. *Carter*, No. 02-0536-C B/S, 2005 WL 2253601, at *12-*13 (S.D. Ind. Sept. 2, 2005) (same), appeal docketed, No. 05-3995 (7th Cir. Oct. 14, 2005); *Special Programs, Inc.* v. *Courter*, 923 F. Supp. 851, 860 (E.D. Va. 1996) (same); *Lucas* v. *Curran*, 856 F. Supp. 260, 273 (D. Md. 1994) (same).

This Court has also recognized that the government may impose narrowly tailored restrictions on telefunders without imposing those restrictions on charities. As noted above, in *Riley*, the Court expressly approved laws that required fundraisers to disclose their "professional status" and provided for publication of the amount of money that the fundraisers turned over to the charities for which they solicited, because those laws are narrowly tailored to prevent telefunder fraud. *Riley*, 487 U.S. at 795, 799 n.11, 800.

There is thus no merit to petitioners' contention (Pet. 8-9, 12, 18-19) that this Court—in *Riley*, *Schaumburg*, and *Munson*—categorically rejected any connection between the paid status of a telefunder and fraud. Rather, in those cases, the Court struck down laws that presumed that solicitations were fraudulent based solely on the percentage of funds retained by the solicitor, because those laws only "peripherally promoted" the government's interest in preventing fraud. *Schaumburg,* 444 U.S. at 636; see *Riley*, 487 U.S. at 788-789; *Munson*, 467 U.S. at 966-967. At the same time, the Court recognized that the "interest in protecting charities (and the public) from fraud is, of course, a sufficiently substantial interest to justify a narrowly tailored regulation" imposed on professional fundraisers. *Riley*, 487 U.S. at 792.

Petitioners also err in contending that *Riley* holds that laws directed at telefunders but not charities themselves "'necessarily' discriminate against small or unpopular charities." Pet. 10-11; see Pet. 6. One of the laws held unconstitutional in *Riley* required professional fundraisers, during the solicitation and before the appeal for funds, to disclose the amount of money that they turned over in the previous year to the charities for which they solicited. The Court reasoned that this disclosure requirement would so prejudice "legitimate" fundraising efforts that it would "discriminate[]" against charities that hire professional fundraisers. 487 U.S. at 799. But the Court did not rule that *all* limitations directed only at professional fundraisers are discriminatory and unconstitutional. On the contrary, as noted above, the Court expressly approved several limitations of that kind because they were narrowly tailored to address legitimate governmental interests. See *id.* at 795, 799 n.11, 800. The TSR's modest strictures, including

the requirement that telefunders disclose the identity of the charity for which they are soliciting and the purpose of the call, are the sort of narrowly tailored regulations approved in *Riley*. See *id.* at 799 n.11.

Petitioners are also mistaken in asserting (Pet. 7, 9, 12, 19) that the decision below conflicts with *Discovery Network*. That case involved a city's ban on newsracks dispensing commercial handbills, but not newsracks dispensing newspapers, for the purported purpose of promoting esthetics and pubic safety. The Court struck down the ban, which covered approximately 4% of the city's newsracks, because it made only a "minute" or "paltry" contribution to the city's goals. 507 U.S. at 417-418. The Court also noted that the city proffered "no justification" for its distinction between commercial newsracks and newspaper racks other than a "naked assertion that commercial speech has 'low value.'" *Id.* at 429. In sharp contrast to the "paltry" manner in which the law at issue in *Discovery Network* furthered the government's asserted interests, the TSR's application to telefunders directly and significantly furthers the protection of privacy and the prevention of fraud by, for example, restricting early-morning and late-night calls, eliminating menacing hang-up calls, and requiring basic disclosures about the purpose of solicitations. Moreover, as discussed above, distinguishing between telefunders and in-house charity callers is entirely reasonable. See p. 13, *supra*.

3. Petitioners also object (Pet. 7, 14, 18-19) to other exemptions in the TSR that they contend render it impermissibly under-inclusive. There are, however, legitimate reasons for all of those exemptions. In each case, the entity or speech exempted from the TSR is either subject to another federal law protecting consum-

ers or does not pose the same risk of overreaching or harassment as calls by telefunders.

First, all commercial telemarketers that are not covered by the TSR are fully covered by the FCC's TCPA rules, which are virtually identical in all relevant respects to the TSR. See *In re TCPA*, 18 F.C.C.R. at 14,034; *id.* at 14,138-14,139. Similarly, intrastate calls are covered by the FCC's parallel TCPA rules. See 47 U.S.C. 152(b); *In re TCPA*, 18 F.C.C.R. at 14,028; *id.* at 14,138-14,139.

Second, the TSR does not cover political fundraising because political solicitations are neither commercial nor charitable telemarketing and therefore do not fall within the terms of the Telemarketing Act. See 15 U.S.C. 6106(4) (2000 & Supp. II 2002); 68 Fed. Reg. at 4589 & n.106. Laws regulating political speech pose unique First Amendment concerns. See *Burson* v. *Freeman*, 504 U.S. 191, 196 (1992); *Meyer* v. *Grant*, 486 U.S. 414, 425 (1988). Congress has therefore decided to regulate political fundraising under a separate regime, the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, administered by a separate agency, the Federal Election Commission, which has expertise in the area. That decision does not render the TSR constitutionally suspect.

Finally, Congress's decision not to regulate calls that do not solicit funds, such as education or advocacy calls, is also reasonable. Those calls do not pose the same concerns as fundraising calls. See *Hill* v. *Colorado*, 530 U.S. 703, 723-724 (2000) (upholding a statute against a charge of under-inclusiveness because the speech it permitted was not "similarly likely to raise the legitimate concerns to which [the statute] respond[ed]"); *United States* v. *Kokinda*, 497 U.S. 720 (1990) (upholding a reg-

ulation that restricted solicitations, but not other forms of expression).

4. Petitioners do not—and could not—contend that this Court's review is necessary to resolve any split of authority among the courts of appeals. The courts of appeals have consistently upheld the TSR, as well as analogous state charitable solicitation laws. Many of those state laws contain exemptions for in-house charity callers, political solicitations, and other types of speech or speakers similar to the exemptions in the TSR.

For example, the Eighth Circuit recently upheld a state do-not-call law that applies to charitable solicitations but exempts in-house charity callers, advocacy calls, political fundraising calls, and calls to persons with a prior business relationship. *Stenehjem*, 431 F.3d at 596-599; see also *National Fed'n of the Blind of Ark., Inc.* v. *Pryor*, 258 F.3d 851, 855 n.3, 857 (8th Cir. 2001) (upholding law that regulates charitable and commercial solicitations but not political solicitations or advocacy calls). Other courts of appeals have likewise upheld state laws restricting charitable solicitations or imposing disclosure requirements that contain similar exemptions from coverage. See *American Target Adver., Inc.* v. *Giani*, 199 F.3d 1241, 1248-1249 (10th Cir.) (upholding disclosure and other requirements imposed only on professional charitable fundraisers), cert. denied, 531 U.S. 811 (2000); *Dayton Area Visually Impaired Persons, Inc.* v. *Fisher*, 70 F.3d 1474, 1481-1482, 1485 (6th Cir. 1995) (upholding law requiring various disclosures by charitable fundraisers and containing various exemptions), cert. denied, 517 U.S. 1135 (1996); *Auburn Police Union* v. *Carpenter*, 8 F.3d 886, 901 (1st Cir. 1993) (upholding law prohibiting solicitations benefitting police officers and containing an exemption for campaign speech), cert. denied, 511 U.S. 1069 (1994).

Finally, the Tenth Circuit recently rejected a First Amendment challenge to the national TSR do-not-call registry, which, as noted above, applies to commercial but not charitable telemarketing. *Mainstream Mktg. Servs., Inc.* v. *FTC*, 358 F.3d 1228 (10th Cir.), cert. denied, 543 U.S. 812 (2004).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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