Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

COMMENTS OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

TELEMARKETING RULEMAKING – COMMENT
FTC File No. R411001

(Proposed Amendments to the Telemarketing Sales Rule)

Bruce Josten
Chamber of Commerce of the
United States of America
1615 H Street, NW
Washington, DC 20062-2000
(202) 4635342

Ian Heath Gershengorn
Jodie L. Kelley
Lara M. Flint
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6083

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INTRODUCTION

The Chamber of Commerce of the United States of America ("Chamber") respectfully submits these comments addressing the proposal of the Federal Trade Commission (the "FTC" or "Commission") to create a nationwide do-not-call registry. *See* Telemarketing Sales Rule; Proposed Rule, 67 Fed. Reg. 4492 (proposed Jan. 30, 2002) ("*Do-Not-Call NPRM*" or "*NPRM*"). The Chamber is the world's largest federation of businesses and business organizations, representing an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every geographic region of the country. Many of the Chamber's members are businesses that provide or rely on telemarketing services that will be directly affected by the FTC's proposed nationwide do-not-call registry. In addition, the Camber's entire membership is concerned about preserving freedom of commercial speech.

For the reasons set forth in detail in the joint comments of the Chamber and Direct Marketing Association, Inc., the Chamber opposes the Commission's proposal to create a nationwide do-not-call registry. The Commission's proposal would impose massive limitations on a marketing technique that is critical to literally thousands of businesses large and small, and it threatens to stifle an industry that generates billions of dollars in sales and employs millions of workers. For those reasons among others, the Chamber believes that the proposals set forth in the *Do-Not-Call NPRM* represent bad policy.

In the Chamber's view, however, the proposed do-not-call restrictions are not just bad policy, they are fundamentally incompatible with the First Amendment, and therefore the Chamber files these supplemental comments. The Commission's *Do-Not-Call NPRM* proposes sweeping speech restrictions on a select group of companies, and it relies on the content of those companies' speech for

inclusion in the restricted group. Telemarketers making calls for commercial customers must comply with the Commission's do-not-call regulations; telemarketers making identical calls for religious organizations do not; telemarketers making calls for charitable organizations are covered; those making calls for political organizations are not. Such content-based restrictions are presumptively invalid under settled Supreme Court precedent.

Nor can the Commission's order be justified on the ground that it regulates solely commercial speech. The Supreme Court has applied strict scrutiny to content-based distinctions even within categories of "proscribable speech," when the content-based distinctions are unrelated to the characteristics of the speech that make it proscribable. Because the justifications offered by the Commission for its do-not-call registry are entirely unrelated to the purported justifications for permitting restrictions on commercial speech – namely, the need to prevent "peculiarly commercial harms" and to preserve a "fair bargaining process" – the Commission's proposed regulatory scheme is subject to strict scrutiny. The Commission does not even try to make the case that the content-based distinctions in the *NPRM* survive such searching review, and they plainly do not.

Indeed, even under the somewhat less restrictive framework prescribed in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980), the sole interest offered by the Commission – protecting consumer privacy – cannot justify the patchwork regulatory quilt the Commission has sewn. The proposed regulations exclude, in addition to the political and religious organizations described above, solicitations by non-profit organizations, banks, and common carriers, to name just a few. Nothing in the *NPRM* even purports to explain how the interest in protecting consumer privacy requires or even justifies the distinctions the Commission has drawn. Moreover,

from a privacy perspective, the numerous exceptions and exemptions in the Commission's proposed rules render those rules hopelessly underinclusive. Accordingly, the Commission's proposed do-not-call regime violates the First Amendment.

ARGUMENT

I. The Content-Based Speech Restrictions Contained in the Proposed Do-Not-Call Regime Are Subject to, and Cannot Survive, Strict Scrutiny Review.

As the Supreme Court has observed time and again, "Content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Indeed, "[a]s a general matter, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Consolidated Edison Co. of N.Y. v. Pub. Serv. Comm'n.*, 447 U.S. 530, 536 (1980) (quoting *Police Department v. Mosley*, 408 U.S. 92, 95 (1972)). Permitting the government broad leeway to make content-based distinctions on speech "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 116 (1991). Rather than a system of government control, the First Amendment "'is intended to remove governmental restraints from the area of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.'" *Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)).

These bedrock principles notwithstanding, the regulatory regime reflected in the *NPRM* is rife with content-based distinctions among types of commercial speech. Thus, although the do-not-call requirements apply to most solicitations by business and charitable organizations (at least when conducted by for-profit telemarketers), the restrictions do not apply to calls by for-profit telemarketers on behalf of political organizations, *see* 67 Fed. Reg. at 4499 (excluding "any contributions to 'political clubs, committees, or parties'"), or to similar solicitations on behalf of religious organizations, *see id.* (excluding "contributions to constituted religious organizations").

The Commission's order makes no effort to explain how this patchwork regime can overcome the nearly irrebuttable presumption against content-based distinctions, apparently believing that the commercial speech to be regulated under the *Do-Not-Call NPRM* is properly tested under the commercial speech analysis set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980). As demonstrated below, *see* Part II, the Commission's Order fails even under the *Central Hudson* analysis. But in this instance, the Commission's implicit reliance on *Central Hudson* is misplaced.

In *R.A.V.*, the Supreme Court addressed content-based restrictions within categories of "proscribable speech," such as those at issue in the Commission's order.[1] The Court noted that "when the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists." 505 U.S. at 388.

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[1]Although the Chamber believes that truthful, non-misleading commercial speech is entitled to full First Amendment protection, the Chamber is aware that a majority of the Supreme Court has not yet embraced that proposition. *See generally Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554-55 (2001)

When the content-based distinctions are *unrelated* to the reason the speech is generally proscribable, however, the Court's oft-noted concerns of the dangers of content-based discrimination remain at the fore.

Thus for example, a state may choose to prohibit only that obscenity which is "the most patently offensive in its prurience," but may *not* prohibit only that obscenity which includes "offensive political messages." *Id.* Similarly, the government may criminalize threats of violence against the President – since the "reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President" – the government may not criminalize only those threats that "mention his policy on aid to inner cities." *Id.*

Critically for present purposes, the Court made clear in *R.A.V.* that this analysis applies fully to content-based restrictions among categories of commercial speech. Thus, the Court emphasized that "a State may choose to regulate price advertising in one industry but not in others because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection) is in its view greater there." 505 U.S. at 388-89 (internal citations omitted). A State may not, however, prohibit "only that commercial advertising that depicts men in a demeaning fashion." *Id.* at 389. In short, as *R.A.V.* makes clear, "the power to proscribe [speech] on the basis of *one* content element (*e.g.*, obscenity) does not entail the power to proscribe it on the basis of *other* content elements." 505 U.S. at 386 (emphasis in original); *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 576 (2001) (Thomas, J., concurring) ("[E]ven when speech falls into a category of reduced constitutional protection, the government may not engage in content discrimination for reasons unrelated

to those characteristics of the speech that place it within the category."); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 494 (1995) (Stevens, J., concurring) ("[A]ny description of commercial speech that is intended to identify the category of speech entitled to less First Amendment protection should relate to the reasons for permitting broader regulation: namely, commercial speech's potential to mislead."); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 193-94 (1999) ("*GNOBA*") (Thomas, J., concurring) (noting that, even in the commercial speech context, "decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment").

The regulations at issue here plainly fail to satisfy the *R.A.V.* standard. The doctrinal distinction between commercial and non-commercial speech has been justified principally on the ground that commercial speech is both "more easily verifiable by its disseminator" and less likely to be "chilled by proper regulation." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976); *see also Lorillard*, 533 U.S. at 576 (Thomas, J., concurring). The regulation of commercial speech, therefore, "is limited to the peculiarly *commercial* harms that commercial speech can threaten – *i.e.*, the risk of deceptive or misleading advertising," *Lorillard*, 533 U.S. at 576 (Thomas, J., concurring) (emphasis in original), and the need to "preserv[e] a fair bargaining process," *44 Liquormart Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (Stevens, J., concurring, joined by Kennedy and Ginsburg, JJ.); *see also R.A.V.*, 505 U.S. at 388-89 (noting that "risk of fraud" is "one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection"); *Rubin v. Coors*, 514 U.S. at 493 (Stevens, J., concurring) (identifying the "rationales for treating commercial speech differently under the First Amendment" as "the importance of

avoiding deception and protecting the consumer from inaccurate or incomplete information in a realm in which the accuracy of speech is generally ascertainable by the speaker").

The content-based distinctions in the proposed do-not-call regime, however, are entirely unrelated to these core concerns. Indeed, the Commission offers no commercial justifications for creating a do-not-call registry or for the content-based distinctions in the proposed regime. The Commission's only justification for a nationwide do-not-call registry is the need to protect consumer privacy. *See Do-Not-Call NPRM*, 67 Fed. Reg. at 4516-17 ("This proposal directly advances the Telemarketing Acts' goal to protect consumers' privacy."); *id.* at 4518-19 ("[T]he proposed modification of the Rule promotes the Act's privacy protections."). But even assuming that the distinctions in the proposed regulatory regime could be justified on privacy grounds – and as discussed below they cannot – the Commission's articulated interest is plainly "unrelated to the preservation of a fair bargaining process," and cannot justify content-based distinctions among categories of commercial speech.

In such circumstances, "the content-discriminatory regulation – like all other content-based regulation of speech – must be subjected to strict scrutiny." *Lorillard*, 533 U.S. at 577 (Thomas, J., concurring); *see also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 812 (2000); *R.A.V.*, 505 U.S. at 395. Under strict scrutiny, the government's speech restrictions must be narrowly tailored to a compelling government interest. *See, e.g.*, *Playboy Entertainment Group*, 529 U.S. at 812; *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990). Even assuming that the Commission's asserted privacy interest is compelling, the "dispositive question" here, as it was in *R.A.V.*, is "whether content discrimination is reasonably necessary to achieve [the

government's] compelling interests." 505 U.S. at 395-96. And, as in *R.A.V.*, "it plainly is not," *id.* at 396: the Commission has made no effort at all to show that the content-based restrictions are at all necessary to obtain whatever benefits the Commission seeks. Indeed, the only apparent interest to be served by the content-based distinctions is to privilege those types of speech; "[t]hat is precisely what the First Amendment forbids." *Id.*

II. Under the Analysis Set Forth in *Central Hudson*, the Absence of Any "Reasonable Fit" Between the Proposed Regulations and the Commission's Purported Goals Renders the Regulations Unconstitutional.

Even if *Central Hudson* rather than *R.A.V.* sets forth the appropriate standard of review, the Commission's proposed nationwide do-not-call list is flatly inconsistent with the First Amendment. The core of the *Central Hudson* analysis is that the Constitution demands a "reasonable fit" between a speech-restrictive regulation and the government's asserted goal, *see City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993), such that the challenged regulation advances the government's interest "in a direct and material way." *Edenfeld v. Fane*, 507 U.S. 761, 767 (1993). A fundamental mismatch between the government regulation and its purported goal calls into question the sincerity of the government's proffered justification and raises the specter that the government simply prefers some speakers to others. Here, though purporting to protect the privacy of consumers and the sanctity of the home, the FTC's do-not-call proposal is so riddled with exceptions that any connection between the asserted ends and the chosen means seems almost coincidence. In such a case, the First Amendment precludes adoption of the regulations.

A. The *Central Hudson* Framework.

In *Central Hudson*, the Supreme Court established a four-part test for analyzing the constitutionality of a content-based commercial speech regulation: *First*, to warrant any First Amendment protection, the regulated speech must concern lawful activities and not be misleading. *See* 447 U.S. at 566; *Virginia State Bd. of Pharmacy*, 425 U.S. at 771. *Second*, for the regulation to be upheld, the asserted government interest in restricting the speech must be substantial. *Third*, the government must show that its speech restriction directly and materially advances the asserted government interest. *Fourth*, the government must narrowly tailor its restriction to the asserted interest, so that there is a reasonable fit between the two. *See Discovery Network*, 507 U.S. at 416. The third and fourth prongs form the heart of the *Central Hudson* analysis.

Although the Court's initial decisions under *Central Hudson* suggested some deference toward government regulation of commercial speech, the Court's more recent decisions have left little doubt that the Court views government regulation of commercial speech with a jaundiced eye. In *Discovery Network*, for example, the Court applied *Central Hudson* and struck down a city ordinance that banned commercial newsracks but permitted noncommercial newsracks. 507 U.S. at 430-31. The Court agreed that the city's asserted concerns about the safety and aesthetics of its streets and sidewalks were important; it determined, however, that those concerns applied equally to commercial and noncommercial newsracks. *Id.* at 427-28. The Court stated: "In the absence of some basis for distinguishing between 'newspapers' and 'commercial handbills' that is relevant to an interest asserted by the city, we are unwilling to recognize Cincinnati's bare assertion that the 'low value' of commercial speech as a sufficient justification for its selective and categorical ban on newsracks dispensing

'commercial handbills.'" *Id.* at 428. The Court thus held that if "the distinction between commercial and noncommercial speech . . . bears no relationship whatsoever to the particular interests that the [government] has asserted," such a distinction – even though it results in too little rather than too much speech being restricted – is impermissible. *Id.* at 424.

Consistent with the understanding set forth in *Discovery Network* that the First Amendment precludes speech regulations that are underinclusive, *cf. City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) ("While surprising at first glance, the notion that a regulation of speech may be impermissibly *underinclusive* is firmly grounded in First Amendment principles.") (emphasis in original), the Court has consistently invalidated underinclusive regulations of commercial speech in at least two situations: where the underinclusiveness indicates the government's preference for one side of a debate over another, and where the underinclusiveness diminishes the credibility of the government's asserted rationale for the regulations. *See id.* at 51-52.

In *Rubin v. Coors Brewing Co.*, for example, the Court struck down a statutory scheme that prohibited beer labels from displaying alcohol content. The Court observed that while the statute "bans the disclosure of alcohol content on beer labels, it allows the exact opposite in the case of wines and spirits." 514 U.S. at 488. The Court concluded that "there is little chance that [the statute] can directly and materially advance its aim, while other provisions of the same Act directly undermine and counteract its effects." *Id.* at 489.

Similarly, in *GNOBA*, the Court struck down a federal statute that prohibited broadcast advertising of private casino gambling. Noting that the statutory scheme permitted advertising of casinos run by States and Indian tribes, as well as advertising of numerous other gambling events, the

Court held that the statutory regime was "so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." 527 U.S. at 190; *see also 44 Liquormart*, 517 U.S. at 512 n.20 (noting examples of underinclusiveness).

B. Application of *Central Hudson* to the FTC's Proposed Do-Not-Call List.

Under the *Central Hudson* analysis, as elaborated in recent Supreme Court decisions, the nationwide do-not-call list proposed for a select group of commercial speakers is plainly unconstitutional. The first step of *Central Hudson* requires little discussion. The telemarketing calls that are subject to the do-not-call regime seek to offer truthful, non-misleading information about a lawful commercial transaction. (To the extent the calls are fraudulent, they can be regulated without First Amendment objection under federal and state fraud provisions.)

Even assuming that the Commission's asserted interest in residential privacy is considered substantial,[2] the Commission has not met its burden of satisfying parts three and four of the *Central Hudson* analysis – whether the regulation directly and materially advances the government's privacy interest, and whether it is narrowly tailored to further the government's asserted goals. *See Discovery Network*, 507 U.S. at 416, 417 n.13; *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

Under the statute as implemented by the Commission, there is a substantial mismatch between the regulatory regime and its asserted aims. Like the gambling advertising restrictions in *GNOBA*, the

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[2] *But see U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1234-36 (10th Cir. 1999) ("[T]he government cannot satisfy the second prong of the *Central Hudson* test by merely asserting a broad interest in privacy. It must specify the particular notion of privacy and interest served.").

Commission's do-not-call list is "so pierced by exemptions and exceptions" that it cannot stand. First, the rules apply only to solicitations by for-profit companies, leaving solicitations by non-profits entirely unregulated. *See NPRM,* 67 Fed. Reg. at 4497. Second, even within the category of for-profit solicitations, the regulations exclude vast numbers of telemarketing calls. Thus, the regulations do not apply to solicitations on behalf of religious organizations, or solicitations on behalf of "political clubs, committees, or parties." *See id.* at 4499. Nor do the regulations apply to banks, *id.* at 4497 n.56, or to a number of other specified industries, *id.* at 4519. The substantial number of calls that are exempt from the regulatory regime precludes any finding under the third prong of the *Central Hudson* analysis that the regulations advance the privacy interests in a direct and material way.

More important, nowhere in the order does the Commission even purport to justify the regime's numerous exceptions on the ground that the prohibited calls are more invasive of personal privacy. Nor could it, for the alleged intrusion in the home is the same whether the unwanted solicitation comes from a telemarketer seeking a contribution to a political party or a donation to a charity, and whether the solicitation comes from a landscaping company or a bank. *Cf. GNOBA*, 527 U.S. at 191 ("[T]he Solicitor General does not maintain that government-operated casino gaming is any different . . . or that one class of advertisers is more likely to advertise in a meaningfully distinct manner than the others."). In such circumstances, the Commission cannot plausibly claim that its regulations are narrowly tailored.

The Seventh Circuit's opinion in *Pearson v. Edgar*, 153 F.2d 397 (7th Cir. 1998), is directly on point. That case involved an Illinois statute that made it unlawful for a real estate agent to solicit a sale or listing of property from any owner who had indicated a desire not to sell the property. Relying heavily on *Discovery Network*, the Seventh Circuit held that the no-solicitation list at issue was

impermissibly underinclusive and thus violated the First Amendment. 153 F.3d at 402-05. The Court held, for example, that because "the distinction between real estate solicitation and other types of solicitation is not plausible absent evidence that real estate solicitation poses a particular threat to residential privacy," the speech restriction did not "reasonably fit" the reason for the restriction. *Id.* at 404. Similarly, in the absence of evidence that the real estate solicitations at issue were particularly invasive, "a mechanism whereby homeowners can reject real estate solicitations but not other kinds of solicitation cannot be said to advance the interest in residential privacy 'in a direct and material way.'" *Id.* at 404 (quoting *Edenfield*, 507 U.S. at 767). Finally, in light of the Supreme Court's commercial speech cases, the Seventh Circuit disclaimed the ability to "place the interest in residential privacy above the interest in logical distinctions in speech restrictions." *Id.* at 404.

Similarly on point is *Lysaght v. New Jersey*, 837 F. Supp. 646 (D.N.J. 1993), in which a federal district court enjoined enforcement of a New Jersey ban (absent the called party's consent) on automated commercial calls. Applying intermediate scrutiny and relying heavily on *Discovery Network*, the court held that the government's interest in preserving the privacy of the home, while valid, was not furthered by banning only commercial calls because both commercial and noncommercial calls "equally disrupt residential privacy," *id.* at 651; nor was it furthered by prohibiting only prerecorded calls, because such calls threaten the privacy of the home just as much as live calls, *id.* at 653; *see also Perry v. Los Angeles Police Dep't*, 121 F.3d 1365, 1369-70 (9th Cir. 1997) (striking down ordinance regulating only for-profit vendors along boardwalk because there was no evidence that they "are any more cumbersome upon fair competition or free traffic flow than those with nonprofit status"); *Anabell's Ice Cream Corp. v. Town of Glocester*, 925 F. Supp. 920, 928-29 (D.R.I. 1996)

(striking down on *Discovery Network* grounds ordinance prohibiting use of outdoor loudspeakers by merchants but not by nonmerchants).

As in *Pearson* and *Lysaught*, the absence of any evidence that the calls subject to the do-not-call list are any more invasive of privacy than those that are not is dispositive of the First Amendment analysis.

C. Neither of the Justifications Implicit in the Do-Not-Call *NPRM* Can Save the Proposed Regulatory Regime.

Although the *Do-Not-Call NPRM* contains no substantial constitutional analysis and thus no effective rebuttal of the *Central Hudson* analysis described above, two potential justifications for the do-not-call registry appear to be implicit. First, the Commission emphasizes that the do-not-call list is merely a limited restriction, rather than an outright ban on covered commercial speech. *See NPRM*, 67 Fed. Reg. at 4518-19. But it is a well-established principle of First Amendment jurisprudence that a person's constitutional rights are violated not only when the government enacts an outright ban on the exercise of First Amendment rights, but also when the government places restrictions on those First Amendment rights. *See, e.g.*, *Playboy Entertainment Group*, 529 U.S. at 812 ("It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans."); *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 809 (1996) (Kennedy, J., concurring in part and dissenting in part) ("[T]he possibility the Government could have imposed more draconian limitations on speech never has justified a lesser abridgment. Indeed, such an argument almost always is available; few of our First

Amendment cases involve outright bans on speech."); *United States v. National Treasury Employees Union*, 513 U.S. 454, 468 (1995) (invalidating statute barring receipt of honoraria by government employees, even though statute did not "prohibit any speech"); *Simon & Schuster*, 502 U.S. at 115 (invalidating statute that imposed financial burden on speech but did not ban any expression). *Pearson*, again, is directly on point: despite the fact that the ordinance at issue created only a voluntary no-solicitation list rather than an outright ban, the Seventh Circuit instead focused – properly, in our view – on the irrationality of the distinctions among types of solicitations and invalidated the ordinance.

Second, the Commission at times appears to rely on the low value of commercial speech relative to other speech. *See NPRM*, 67 Fed. Reg. at 4499 (exempting solicitations for religious organizations from the reach of the regulations because of "the actual or perceived infringement on a paramount social virtue"). Any such reliance is untenable. The Supreme Court has repeatedly observed that "[t]he free flow of commercial information is 'indispensable to the proper allocation of resources in a free enterprise system' because it informs the numerous private decisions that drive the system." *Rubin v. Coors*, 514 U.S. at 481 (quoting *Virginia State Bd. of Pharmacy*, 425 U.S. at 765). Indeed, "a 'particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate.'" *Rubin v. Coors*, 514 U.S. at 481-82 (quoting *Virginia State Bd. of Pharmacy*, 425 U.S. at 763). Repeatedly in commercial speech cases over the past decade, "the Court and individual members of the Court, have continued to stress the importance of free dissemination of information about commercial choices in a market economy." *44 Liquormart*, 517 U.S. at 520 (Thomas, J., concurring); *see also id.* at 522 (Thomas, J., concurring) ("I do not see a philosophical or historical basis for asserting that 'commercial'

speech is of 'lower value' than 'noncommerical' speech."); *Pearson*, 153 F.3d at 405 (rejecting, in light of the Supreme Court's emphasis on the value of commercial speech, any notion that "the interest in privacy [is] absolutely greater than the interest in commercial speech").

As the Court observed in *Edenfeld v. Fane*, "The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth, but the general rule is that the speaker and the audience, not the government, assess the value of the information presented." 507 U.S. at 766. Accordingly, to the extent that the Commission justifies its regulatory regime with reference to the "low value" of commercial speech, that regime is inconsistent with the First Amendment.

CONCLUSION

Because the patchwork do-not-call regime described in the *NPRM* is inconsistent with the First Amendment, the Commission should withdraw its proposal for a mandatory nationwide do-not-call registry.

Respectfully submitted,

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Bruce Josten
Chamber of Commerce of the
United States of America
1615 H Street, NW
Washington, DC 20062
(202) 463-5342

Ian Heath Gershengorn
Jodie L. Kelley
Lara M. Flint
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6083

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