

**DO NOT KNOCK?
LOVELL TO WATCHTOWER AND BACK AGAIN**

GEOFFREY D. KORFF*

I. INTRODUCTION

Since the United States Supreme Court decided *Lovell v. City of Griffin*¹ in 1938, there has been an ongoing struggle between the courts and municipalities that have passed laws limiting the ability of charitable, political, and religious groups to speak to residents and solicit funding for their respective organizations.² In 2002, it appeared the Court provided a definitive blow against those municipalities attempting to limit the ability of religious and political groups to go door-to-door and spread their messages. In *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*,³ the Court stated unequivocally that “[i]t is offensive . . . to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors”⁴ Even with such strong language, the core of *Watchtower* has eroded over the course of the past several years, and new questions have been raised as to its effect.

It is well established in American constitutional jurisprudence that commercial speech is afforded less protection than is non-commercial or “pure speech” under the First Amendment;⁵ yet there is no bright-line

Copyright © 2010, Geoffrey D. Korff

* J.D. Syracuse University College of Law; B.A. The Ohio State University. This article would not have been possible without the knowledge and efforts of Attorney Edward Icove of the Icove Legal Group, Ltd., and Ohio Citizen Action. All mistakes are my own.

¹ 303 U.S. 444 (1938).

² See, e.g., *Murdock v. Pennsylvania*, 319 U.S. 105, 116–17 (1943) (invalidating a municipal ordinance requiring a license to canvass); *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940) (invalidating a state law prohibiting solicitation for religious, charitable, and philanthropic causes without governmental approval); *Schneider v. State*, 308 U.S. 147, 163–65 (1939) (invalidating a municipal ordinance requiring a license to canvass).

³ 536 U.S. 150 (2002).

⁴ *Id.* at 165–66.

⁵ E.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562–63 (1980).

between the two concepts, and determining what level of protection is warranted has proven difficult.⁶

The Court has not set forth an easily understood or easily applicable definition of commercial speech. This is perhaps because segregating commercial and non-commercial speech into distinct categories has not proven to be a simple undertaking.⁷ This struggle over definitions has left both practitioners and academics to ask the obvious question: What is commercial speech?⁸ Groups that depend on their ability to couple fundraising with political advocacy place profound importance on this question.

Regardless of the mixed feelings that surround the issue, the commercial speech doctrine is firmly embedded within the First Amendment.⁹ The purpose of this article is to analyze the distinction between commercial and pure speech as it pertains to political expression that is “inextricably intertwined” with a commercial interest.¹⁰ The article then examines a new trend in lawmaking, whereby cities, taking a cue from the federal government, prevent political and religious groups from knocking on their residents’ doors.

Part II of this article addresses commercial speech generally and the judicial developments that led to its existence. Part III addresses a recent outgrowth of the commercial speech doctrine, that being the Telemarketing Sales Rule¹¹ and the “Do Not Call” registry.¹² Part IV identifies several

⁶ See, e.g., David F. McGowan, Comment, *A Critical Analysis of Commercial Speech*, 78 CAL. L. REV. 359, 360 (1990) (finding no definition of commercial speech and no coherent theory for protecting such speech in First Amendment jurisprudence); Caren Schmulen Sweetland, Note, *The Demise of a Workable Commercial Speech Doctrine: Dangers of Extending First Amendment Protection to Commercial Disclosure Requirements*, 76 TEX. L. REV. 471, 472 (1997) (stating commercial speech regulations lack uniformity).

⁷ See, e.g., McGowan, *supra* note 6.

⁸ See generally Erwin Chemerinsky & Catherine Fisk, *What Is Commercial Speech? The Issue Not Decided in Nike v. Kasky*, 54 CASE W. RES. L. REV. 1143 (2004) (providing a brief history of the complex judicial history of commercial speech and discussing the increasingly blurry line between commercial and non-commercial speech).

⁹ This article presents the necessary and unavoidable history of the commercial speech doctrine, but it is admittedly a duplicative effort. See Alan B. Morrison, *How We Got the Commercial Speech Doctrine: An Originalist’s Recollections*, 54 CASE W. RES. L. REV. 1189 (2004), for a thorough recounting of the development of the commercial speech doctrine.

¹⁰ See, e.g., *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988).

¹¹ Telemarketing Sales Rule, 16 C.F.R. § 310 (2009).

past attempts to restrict door-to-door advocacy and support for various causes, and how the Supreme Court has dealt with these issues. Part V addresses a recent development in Ohio, where a municipality attempted to adopt a “Do Not Knock” ordinance,¹³ mirrored after the national “Do Not Call” registry. Part VI highlights a recent case out of the Fourth Circuit, noting the allowable limitations on charitable solicitation. Finally, Part VII concludes the article, and offers some predictions and expectations for the future of this issue.

II. COMMERCIAL SPEECH GENERALLY

The commercial speech doctrine has developed into a bit of a jumble. Courts have struggled to construct a straightforward definition of commercial speech and to develop rationale as to why commercial speech should be afforded less protection.¹⁴ *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*¹⁵ is the most frequently cited case when courts address commercial speech issues because of the test it provides, but it is not the fountainhead of the doctrine. The separation of commercial speech from other speech with regard to First Amendment protection originally occurred in *Valentine v. Chrestensen*.¹⁶

The Court’s announcement of the commercial speech doctrine in *Chrestensen* was almost cavalier. In passing, the Court set forth the general rule that government may not impede a person’s use of public places for the dissemination of ideas,¹⁷ but then opined that “the

¹² § 310.4(b)(1)(iii)(B).

¹³ PARMA, OHIO, CODIFIED ORDINANCES § 757.06(g) (2009), available at [http://www.amlegal.com/nxt/gateway.dll/Ohio/parma_oh/codifiedordinancesofthecityofparmaohio?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:parma_oh](http://www.amlegal.com/nxt/gateway.dll/Ohio/parma_oh/codifiedordinancesofthecityofparmaohio?f=templates$fn=default.htm$3.0$vid=amlegal:parma_oh).

¹⁴ See Note, *Dissent, Corporate Cartels, & the Commercial Speech Doctrine*, 120 HARV. L. REV. 1892, 1898 (2007).

¹⁵ 447 U.S. 557 (1980).

¹⁶ 316 U.S. 52 (1942). Where *Chrestensen* is correctly referred to as the fountainhead, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), has been referred to as the “springboard.” Morrison, *supra* note 9, at 1190.

¹⁷ The Court stated:

[S]treets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that

(continued)

Constitution imposes no such restraint on government as respects purely commercial advertising.”¹⁸ Little more was said on the matter; however, the Court later submitted that *Chrestensen* “obviously does not support any sweeping proposition that advertising is unprotected per se.”¹⁹

More than thirty years after *Chrestensen*, the Court extended First Amendment protection to commercial speech through *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*²⁰ and expounded upon the type of regulation that may be placed on speech that does “no more than propose a commercial transaction.”²¹ The Court held that time, place, and manner restrictions are justified so long as they serve a significant governmental interest and that there be ample alternative means available for communicating the regulated information.²² The Court also left states free to proscribe or otherwise regulate commercial speech that is untruthful, deceptive, or misleading.²³

The Court stated that “commonsense differences” between commercial and non-commercial speech suggested that “a different degree of protection is necessary to ensure that the flow of truthful and legitimate commercial information is unimpaired.”²⁴ Yet, the Court has made no such pronouncement meant to protect the truthfulness of pure speech. This

the Constitution imposes no such restraint on government as respects purely commercial advertising.

Chrestensen, 316 U.S. at 54. Much commentary has been made about the fact that Justice William O. Douglas characterized the creation of the commercial speech doctrine as “casual, almost off-hand.” *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

¹⁸ See *Chrestensen*, 316 U.S. at 54.

¹⁹ *Bigelow v. Virginia*, 421 U.S. 809, 819–20 (1975).

²⁰ 425 U.S. 748 (1976). Note that there were several cases between *Chrestensen* and *Va. State Bd. of Pharmacy* that addressed the commercial speech doctrine, but none that expanded upon the reach or limits of the doctrine. See, e.g., *Bigelow*, 421 U.S. 809; *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Smith v. California*, 361 U.S. 147 (1959).

²¹ *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973) (discussing the Court’s view of the speech at issue in *Chrestensen*).

²² *Va. State Bd. of Pharmacy*, 425 U.S. at 771.

²³ *Id.* at 771–72. However, partial-truths were still considered within the commercial speech doctrine’s scope so as to warrant some protection. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562 (1980) (citing *Bates v. State Bar of Ariz.*, 433 U.S. 350, 374 (1977)) (“[S]ome accurate information is better than no information at all.”).

²⁴ *Va. State Bd. of Pharmacy*, 425 U.S. at 762 n.24.

is an odd conceptual dichotomy, where commercial speech must be true to gain the protection of the First Amendment, but political speech need not be—one implication being that political truth is, in this sense, subordinate to commercial truth.²⁵

The Court based its newfound acceptance of protections for commercial speech not on the right of the advertiser or speaker to express their ideas, but on the right of the consumer to receive information that relates to their commercial decision-making.²⁶ The Court found this rationale to be of particular import, as it is of significant consequence to the poorest members of society, for whom commercial decisions are often their most profound, and for whom it is more difficult to learn “where their scarce dollars are best spent.”²⁷

The Court was far from finished with the issue, and there were a substantial number of gray areas that resulted from the decision in *Virginia State Board of Pharmacy*.²⁸ Only four years after the Court decided that case, it announced a test to determine the validity of laws regulating commercial speech in *Central Hudson Gas & Electric Corp.*²⁹ In *Central Hudson*, the Court was confronted with a case in which a governmental commission had ordered all electric utilities in New York to discontinue their use of advertising that encouraged the use of electricity.³⁰ The commission reasoned that advertisements advocating electrical use would promote excessive energy consumption, which as a result would lead to higher prices for the consumer.³¹

²⁵ It may, in fact, only seem odd at first glance. The practical consequences of requiring all political speech to be “true” would be vast, insofar as knowing political “truth” presents far greater epistemological difficulties than does knowing commercial truth. Additionally, the counter-argument can be made that, because so-called pure speech is so valuable, the truth of its content need not be readily ascertainable to still merit constitutional protection, refuting the statement that commercial speech is elevated in this context.

²⁶ See *Va. State Bd. of Pharmacy*, 425 U.S. at 763.

²⁷ *Id.*

²⁸ See *id.* at 773 (holding that a state may not “completely suppress the dissemination of concededly truthful information about entirely lawful activity”). This case left open the extent to which commercial speech could be restricted. However, as previously stated, the Court held that speech encouraging unlawful activity or misleading speech can be proscribed. *Id.* at 771–72.

²⁹ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563–64 (1980).

³⁰ See *id.* at 558.

³¹ *Id.* at 568–69.

The *Central Hudson* test first asked (1) whether the regulation was targeting truthful, commercial speech for a legal product or service.³² If it was, the Court then required the government to prove that (2) it had a substantial interest in regulating the speech; (3) the regulation would directly advance that interest; and (4) the restriction on speech must not be more excessive than necessary—it must be narrowly-tailored.³³ This test is a form of intermediate scrutiny,³⁴ as contrasted with content-based limitations on non-commercial speech, which face strict scrutiny.³⁵

Regulations may not be sustained if they provide “only ineffective or remote” aid in achieving the government’s purpose.³⁶ Additionally, the Court held that “if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.”³⁷ The Court found that the commission’s restriction banning energy advertising was overbroad and thus failed part four of the test.³⁸ It was ruled overbroad because the commission could not show that its interest in conservation could not be protected adequately by a more limited regulation of commercial expression.³⁹ The Court later held that the “narrowly-tailored” standard does not require the government’s response to protect its substantial interest to be the least restrictive measure available.⁴⁰ All that the *Central Hudson* test requires is a proportional response.⁴¹

³² See *id.* at 563.

³³ *Id.* at 564.

³⁴ E.g., Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 794 (2007) (explaining that commercial speech has lower constitutional value, so it receives intermediate scrutiny through the *Central Hudson* test); Susan Dente Ross, *Reconstructing First Amendment Doctrine: The 1990 [R]Evolution of the Central Hudson and O’Brien Tests*, 23 HASTINGS COMM. & ENT. L.J. 723, 740 (2001).

³⁵ E.g., *Cornelius v. NAACP Legal Def. & Ed. Fund, Inc.*, 473 U.S. 788, 800 (1985); see also *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (explaining that content-neutral limitations may still be placed on fully protected speech so long as they only regulate the time, place, and manner in which the speech is made).

³⁶ *Cent. Hudson*, 447 U.S. at 564.

³⁷ *Id.*

³⁸ See *id.* at 572.

³⁹ *Id.* at 570.

⁴⁰ See *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

⁴¹ *Id.*

The *Central Hudson* test might have proven workable had the Supreme Court produced a specific definition for commercial speech. However, the only definition that has been consistently used is the one settled on by the Court three years after *Central Hudson* in *Bolger v. Youngs Drug Products Corp.*⁴² In *Bolger*, the Court did not create a definition so much as settle on the one currently in use. It referred back to *Virginia State Board of Pharmacy* and *Pittsburgh Press Co.*, holding that the “core notion of commercial speech” is “speech which does ‘no more than propose a commercial transaction,’” and then proceeded to use this as the perfunctory definition.⁴³

The development of the contours of the commercial speech doctrine more or less stopped after *Bolger*, and the Court has since applied the *Central Hudson* test to arrive at a variety of incongruous outcomes. This is largely because of a general inability to determine when speech does more than simply propose a commercial transaction.⁴⁴ One prominent development regarding how commercial speech can be properly regulated arose in 2003 and has since spawned a legion of scholarly analysis and debate. This development was the creation of the Federal Trade Commission’s “Do Not Call” registry⁴⁵ and its subsequent judicial affirmation by the Tenth Circuit in *Mainstream Marketing Services, Inc. v. Federal Trade Commission*.⁴⁶

III. THE “DO NOT CALL” REGISTRY

The history and particulars of the national “Do Not Call” registry need not be addressed here, as they have already been thoroughly dealt with elsewhere.⁴⁷ However, a brief overview of the registry and its effects is necessary to understand the remainder of this article.

⁴² 463 U.S. 60 (1983).

⁴³ *Id.* at 66 (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburg Press Co. v. Pittsburg Comm’n on Human Relations*, 413 U.S. 376, 385 (1973))).

⁴⁴ See Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 631 (1990).

⁴⁵ 16 C.F.R. § 310.4(b)(1)(iii)(B) (2009).

⁴⁶ 358 F.3d 1228, 1246 (10th Cir. 2004).

⁴⁷ See Edward J. Schoen & Joseph S. Falchek, *The Do-Not-Call Registry Trumps Commercial Speech*, 2005 MICH. ST. L. REV. 483 (2005), for an extensive discussion of the registry and its commercial speech implications.

A. The Telemarketing Sales Rule

On January 29, 2003, the Federal Trade Commission (FTC) promulgated the Telemarketing Sales Rule that established the nationwide “Do Not Call” registry.⁴⁸ The current law prohibits telemarketers from calling numbers listed on the registry, and telemarketers are required to remove any numbers recently placed on the list by reviewing a new copy of the registry at least every thirty-one days.⁴⁹ Thus, a national opt-in program was established for all persons desiring not to receive phone calls from telemarketers.⁵⁰ The law also requires telemarketers to pay annual fees for access to the registry, based on the number of area codes the company accesses.⁵¹

The Telemarketing Sales Rule does not affect promotions of commercial transactions outside of telemarketing, such as newspaper, radio, television, and mailed advertisements.⁵² It is also important to note that the national “Do Not Call” registry does not prohibit commercial speech; it simply provides a way for consumers to choose from a number of options. The options available to consumers include: (1) placing their numbers on the “Do Not Call” registry; (2) using company-specific no-call provisions; (3) placing their numbers on the “Do Not Call” registry and giving individual companies permission to call; or (4) receiving commercial telemarketing solicitation by doing nothing.⁵³

However, the option to block telemarketing calls applies only to commercial solicitations; there is no option to block charitable solicitors or tax-exempt non-profit groups.⁵⁴ The FTC proffered little evidence to justify the distinction, other than to reference, on several occasions, that charitable phone solicitation is generally less of a nuisance than commercial calls.⁵⁵

⁴⁸ See 16 C.F.R. § 310.4(b)(1)(iii)(B) (2003).

⁴⁹ See 16 C.F.R. § 310.4(b)(3)(iv) (2009).

⁵⁰ See § 310.4(b)(1)(iii).

⁵¹ See § 310.8(c).

⁵² Schoen & Falchek, *supra* note 47, at 530.

⁵³ *Id.*

⁵⁴ See 16 C.F.R. § 310.6(a) (2009).

⁵⁵ See Telemarketing Sales Rule, 68 Fed. Reg. 44,144, 44,153 (July 25, 2003) (“[S]ubjecting tax exempt nonprofit organizations to the national do-not-call requirements may sweep too broadly because it would prompt some consumers to accept blocking of non-commercial, charitable calls to which they might not otherwise object.”).

Almost immediately after the Telemarketing Sales Rule was enacted, a number of telemarketing companies sued, challenging the law on First Amendment grounds.⁵⁶ Two federal district courts ruled against the FTC on separate grounds, after which the subsequent appeals were consolidated.⁵⁷

B. Mainstream Marketing Services, Inc. v. Federal Trade Commission

On appeal, the Tenth Circuit held that the FTC possessed the statutory authority to promulgate the Telemarketing Sales Rule⁵⁸ and also that the law did not violate the First Amendment.⁵⁹

In opposition to the Telemarketing Sales Rule, the telemarketing companies relied heavily on *City of Cincinnati v. Discovery Network, Inc.*,⁶⁰ in which the Supreme Court, hoping to address the problem of “visual clutter,” applied *Central Hudson* to a previously un-enforced commercial handbill restriction that banned commercial newsracks throughout the city.⁶¹ The Court struck down the law, largely because it was underinclusive: it only applied to sixty-two of the city’s 1500–2000 newsracks, and according to the Court, bore “no relationship *whatsoever* to the particular interests that the city has asserted.”⁶²

The Tenth Circuit held that the national “Do Not Call” registry would be valid “if it [was] designed to provide effective support for the government’s purposes and if the government did not suppress an excessive amount of speech when substantially narrower restrictions would

⁵⁶ See, e.g., *Broad. Team, Inc. v. FTC*, 429 F. Supp. 2d 1292, 1296 (M.D. Fla. 2006); *Nat’l Fed’n of the Blind v. FTC*, 303 F. Supp. 2d 707, 710 (D. Md. 2004); *U.S. Sec. v. FTC*, 282 F. Supp. 2d 1285, 1290 (W.D. Okla. 2003); *Mainstream Mktg. Servs., Inc. v. FTC*, 283 F. Supp. 2d 1151, 1154 (D. Colo. 2003).

⁵⁷ See *Mainstream Mktg. Servs.*, 283 F. Supp. 2d at 1162–63 (holding the “Do Not Call” registry violated the First Amendment); *U.S. Sec.*, 282 F. Supp. 2d at 1291 (holding the FTC lacked authority to establish a “Do Not Call” registry). These cases were consolidated on appeal in *Mainstream Marketing Services, Inc. v. FTC*, 358 F.3d at 1229.

⁵⁸ *Mainstream Mktg. Servs., Inc.*, 358 F.3d at 1250.

⁵⁹ *Id.* at 1246.

⁶⁰ 507 U.S. 410 (1993).

⁶¹ See *id.* at 415. This case has been interpreted as ratcheting-up the level of scrutiny applied to commercial speech since *Central Hudson*. See Emily Erickson, *Disfavored Advertising: Telemarketing, Junk Faxes & the Commercial Speech Doctrine*, 11 COMM. L. & POL’Y 589, 598–600 (2006).

⁶² See *Discovery Network, Inc.*, 507 U.S. at 417, 424–25.

have worked just as well.”⁶³ This is a restatement of the *Central Hudson* test.⁶⁴ The court added that those criteria were “plainly established” in this case.⁶⁵ It stated that the national “Do Not Call” registry was designed to “reduce intrusions into personal privacy and the risk of telemarketing fraud and abuse that accompany unwanted telephone solicitation,” and held that the registry directly advanced those goals.⁶⁶ The court concluded that the law was not underinclusive and that *Discovery Network* did not apply.⁶⁷ In doing so, the court found the Telemarketing Sales Rule was narrowly tailored because of its opt-in nature, which ensured that it does not prevent speech from reaching a willing listener.⁶⁸

It is noteworthy that the Tenth Circuit emphasized that the state has a particular interest in protecting the unique nature of the home and maintaining its “well-being, tranquility, and privacy.”⁶⁹ Consequently, the government may protect an individual’s right to prevent unwanted speech from entering their home.⁷⁰ This right has similarly been recognized on repeated occasions by the Supreme Court, which has held that persons have the right to be free from having unsolicited speech forced upon them.⁷¹ This right is not absolute, but the protection against unwanted speech is at its strongest when a person is in their home.⁷²

After the Tenth Circuit ruled in favor of the government, the telemarketers appealed to the Supreme Court, which denied certiorari.⁷³ Thus, the ruling of the Tenth Circuit became the proverbial last word on the constitutionality of the “Do Not Call” registry, but it applied only to telemarketers.⁷⁴ There were still groups whose activities were not

⁶³ *Mainstream Mktg. Servs., Inc.*, 358 F.3d at 1238.

⁶⁴ See *supra* notes 29–36 and accompanying text.

⁶⁵ *Mainstream Mktg. Servs., Inc.*, 358 F.3d at 1238.

⁶⁶ *Id.* at 1240.

⁶⁷ *Id.* at 1241–42.

⁶⁸ *Id.* at 1238.

⁶⁹ *Id.* at 1237 (quoting *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (internal citation omitted)).

⁷⁰ *Mainstream Mktg. Servs., Inc.*, 358 F.3d at 1237–38 (quoting *Frisby*, 487 U.S. at 484–85).

⁷¹ See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978); *Rowan v. U.S. Post Office Dep’t.*, 397 U.S. 728, 738 (1970); *Kovacs v. Cooper*, 336 U.S. 77, 86–87 (1949).

⁷² See *Frisby*, 487 U.S. at 484–85.

⁷³ See *Mainstream Mktg. Servs., Inc.*, 358 F.3d at 1232–33, *cert. denied*, 543 U.S. 812 (2004).

⁷⁴ See *Erickson*, *supra* note 61, at 589–90.

commercial in nature, which were permitted to contact people by phone and go door-to-door, canvassing neighborhoods and soliciting donations. The groups not affected by the Telemarketing Sales Rule fall largely into three categories—charitable, religious, and political.⁷⁵

The following section addresses how local governments have tried to prevent these non-commercial groups from engaging in door-to-door canvassing and solicitation.

IV. DO NOT KNOCK? RESTRICTIONS ON DOOR-TO-DOOR ADVOCACY

Just as people have a right to free speech and free expression in public places, the right of free speech extends to non-commercial solicitors who call upon homeowners.

A. Door-to-Door Advocacy and the Courts

This freedom was first expressly upheld in 1938 in *Lovell v. City of Griffin*.⁷⁶ *Lovell* challenged the constitutionality of a city ordinance that required anyone desiring to distribute literature within the city to obtain a permit from the city manager.⁷⁷ Ms. Lovell attempted to distribute religious pamphlets without a permit, and as a result, was convicted of violating the ordinance.⁷⁸ The Supreme Court held this ordinance was invalid on its face because it struck “at the very foundation of the freedom of the press by subjecting it to license and censorship.”⁷⁹ Foreshadowing *Central Hudson*’s narrow-tailoring requirement, the Court found that the ordinance was not limited in its application, not restricted to the purposes of maintaining public order or preventing disorderly conduct, nor was it limited strictly to the promotion of an important governmental interest.⁸⁰

Schneider v. State (Town of Irvington),⁸¹ decided the following year, had similar facts to *Lovell*.⁸² In *Schneider*, the Court consolidated appeals

⁷⁵ See 16 C.F.R. § 310.6(a) (2009) (exempting solicitations for charitable contributions from the rule); *Mainstream Mktg. Servs., Inc.*, 358 F.3d at 1233 n.2 (“We express no opinion as to whether the do-not-call registry would be constitutional if it applied to political and charitable callers.”).

⁷⁶ 303 U.S. 444, 452–53 (1938).

⁷⁷ See *id.* at 447–48.

⁷⁸ See *id.* at 448.

⁷⁹ *Id.* at 451.

⁸⁰ See *id.*

⁸¹ 308 U.S. 147 (1939).

⁸² See *Schneider*, 308 U.S. at 148 (hearing challenges to municipal ordinances that imposed either a prohibition or a permit requirement on distribution of handbills).

from challenges to municipal ordinances in Los Angeles, California, Milwaukee, Wisconsin, Worcester, Massachusetts, and Irvington, New Jersey.⁸³ The ordinances at issue required persons who intended to “canvass, solicit, distribute circulars, or other matter, or call from house to house” to obtain a permit from the chief of police.⁸⁴ The Court found that the Los Angeles, Milwaukee, and Worcester ordinances did not purport to license distribution of informational materials, but “all of them absolutely prohibited it in the streets and, one of them, in other public places as well.”⁸⁵

The Court conceded that people might fraudulently misrepresent themselves seeking solicitation for charitable purposes in the attempt to further some criminal endeavor.⁸⁶ However, it held that a municipality cannot, in the hopes of preventing such activity, require all persons who wish to disseminate ideas to first go to the police department and obtain its approval.⁸⁷ The Court stated succinctly that although a municipality may enact regulations in the interest of the “public safety, health, welfare or convenience,” the regulations may not interfere with “the individual liberties secured by the Constitution to those who wish to speak, write, print or circulate information or opinion.”⁸⁸ The Court held that a person wishing to participate in the activities “cannot be punished for acting without a permit.”⁸⁹

The Supreme Court continued along the *Schneider* and *Lovell* vein of cases in *Martin v. City of Struthers*.⁹⁰ In *Martin*, a woman was convicted of violating an ordinance that prohibited any person from going door-to-door to distribute “handbills, circulars or other advertisements.”⁹¹ The woman, Thelma Martin, was delivering leaflets, advertising and inviting persons to a local congregation of Jehovah’s Witnesses’ meeting.⁹² Martin appealed her conviction, arguing that the ordinance in question was beyond the power of the State of Ohio to enforce because it violated the

⁸³ *See id.* at 153–58.

⁸⁴ *Id.* at 157.

⁸⁵ *Id.* at 162.

⁸⁶ *See id.* at 164.

⁸⁷ *Id.*

⁸⁸ *Id.* at 160.

⁸⁹ *Id.* at 165.

⁹⁰ 319 U.S. 141 (1943).

⁹¹ *Id.* at 142.

⁹² *See id.*

constitutionally guaranteed rights of freedom of the press and freedom of religion.⁹³

The Supreme Court reversed her conviction and held the ordinance was unconstitutional.⁹⁴ The Court stated, “Freedom to distribute information to every citizen wherever he desires to receive it is so vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved.”⁹⁵ The Court also noted the fact that this method of disseminating information has a long history and has proven effective over many years as a means of spreading one’s personal opinions.⁹⁶

While door-to-door distributors of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion. The widespread use of this method of communication by many groups espousing various causes attests its major importance.⁹⁷

The Court opined that the right of the individual resident to simply refuse to speak with persons, such as Thelma Martin, was sufficient protection for the privacy of the citizen.⁹⁸ All of the preceding cases contain strong language purportedly sanctifying the right of a person to go door-to-door to spread a particular political or religious message. Still, these cases represented more of the opening salvo rather than the final accord of what would turn into years of litigation over door-to-door activism. *Martin* settled the issue as to whether a person could go to door-to-door seeking only to disseminate information,⁹⁹ but it did not answer the question of whether a member of a group can rightfully claim First Amendment protection while traveling door-to-door and also attempting to recruit members and solicit donations.

⁹³ *Id.*

⁹⁴ *See id.* at 149.

⁹⁵ *Id.* at 146–47.

⁹⁶ *See id.* at 145.

⁹⁷ *Id.*

⁹⁸ *See id.* at 147.

⁹⁹ *See id.* at 146–47.

B. The Charitable Solicitation Trilogy

The Fourth Circuit in *National Federation of the Blind v. FTC*¹⁰⁰ referred to the following three cases as the Supreme Court's "trilogy," illustrating that charitable solicitation has not been dealt with as purely commercial speech.¹⁰¹ In fact, the Court has repeatedly held that charitable solicitation is empowered with full constitutional protection under the First Amendment.¹⁰²

In 1974, the Village of Schaumburg, Illinois adopted an ordinance that regulated solicitation by charitable organizations.¹⁰³ The ordinance required charitable solicitors to acquire a permit, to accede to a curfew on an organization's canvassing, and to accede to a requirement that any charitable group apply at least 75% of its contributions directly towards its charitable objectives, rather than toward the administrative costs of running the organization.¹⁰⁴

An environmental advocacy group, Citizens for a Better Environment (CBE), requested permission to solicit donations within the Village of Schaumburg through its canvassers, but was denied a permit because the group could not demonstrate that 75% of its receipts would be used for charitable purposes.¹⁰⁵ CBE then sued the Village of Schaumburg, alleging that the 75% requirement violated the First and Fourteenth Amendments.¹⁰⁶ CBE alleged in one of its affidavits that its door-to-door canvass was its "single most important source of funds."¹⁰⁷ The district court awarded summary judgment to CBE, concluding that the 75% requirement was a

¹⁰⁰ 420 F.3d 331 (4th Cir. 2005).

¹⁰¹ *Id.* at 338 (citing *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988); *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980)). See Marcus Wilbers, *Residential Privacy and Free Speech: Competing Interests in Charitable Solicitation Regulation*, 71 MO. L. REV. 1177, 1183–88 (2006), for further discussion of the three "trilogy" cases.

¹⁰² See, e.g., *Illinois ex rel. Madigan v. Telemktg. Assocs., Inc.*, 538 U.S. 600, 611 (2003); *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 563–64 (1987).

¹⁰³ See *Vill. of Schaumburg*, 444 U.S. at 622 (1980).

¹⁰⁴ See *id.* at 624.

¹⁰⁵ *Id.* at 624–25. Canvassing is generally described in this context to be the act of sending persons into a community to go door-to-door and either spread a particular political message, solicit donations, or both.

¹⁰⁶ *Id.* at 625.

¹⁰⁷ *Id.* at 626.

form a censorship on its face, and thus prohibited by the First and Fourteenth Amendments.¹⁰⁸ The Court of Appeals for the Seventh Circuit affirmed.¹⁰⁹

In its appeal to the Supreme Court, the Village of Schaumburg urged the Court to find the ordinance valid because it prohibited only solicitation and left any charitable organization free to go door-to-door disseminating information and speaking with residents, so long as it did not solicit money.¹¹⁰

The Supreme Court first referred back to its decision in *Schneider*, declaring that a “city could not . . . subject door-to-door advocacy and the communication of views to the discretionary permit requirement.”¹¹¹ The Court also cited *Virginia State Board of Pharmacy* as acknowledging the understanding “that soliciting funds involves interests protected by the First Amendment’s guarantee of freedom of speech.”¹¹² The Court then went on to cite several other cases, all supporting the central theme that the solicitation of funds and the propagation of particular views often involve the same fundamental interests.¹¹³

The Court held that prior authority clearly established the rule that the charitable solicitation of funds involves interests that are within the scope of First Amendment protection.¹¹⁴ The Court then turned to the actual question of the case: whether the Village of Schaumburg had regulated its solicitation in a way that not did impinge upon free speech.¹¹⁵

The Court acknowledged that there could be instances where the 75% rule could be enforceable,¹¹⁶ but held that such a rule could not constitutionally be applied against “organizations whose primary purpose

¹⁰⁸ *Id.* at 626–27.

¹⁰⁹ *Id.* at 627; *see also* *Citizens for a Better Env’t v. Vill. of Schaumburg*, 590 F.2d 220, 226 (7th Cir. 1978).

¹¹⁰ *Id.* at 628.

¹¹¹ *Id.* at 628–29 (citing *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 163 (1939)). The ordinance in *Schneider* was grounded solely in the desire of the city to prevent fraud veiled as charitable solicitation. *See Schneider*, 308 U.S. at 163–64.

¹¹² *Schaumburg*, 444 U.S. at 629 (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976)).

¹¹³ *See id.* at 630–32. The cases the Court cited to support this theory include: *Thomas v. Collins*, 323 U.S. 516 (1945), *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and *Jamison v. Texas*, 318 U.S. 413 (1943).

¹¹⁴ *Schaumburg*, 444 U.S. at 632.

¹¹⁵ *Id.* at 633.

¹¹⁶ *See id.* at 635.

is not to provide money or services for the poor, the needy or other worthy objects of charity, but to gather and disseminate information about and advocate positions on matters of public concern.”¹¹⁷ The Court intimated that these types of organizations cannot be held to such a standard because their purpose inherently requires more organizational skill among those in its employ, and thus greater expense, than do groups that operate largely as “conduits for contribution.”¹¹⁸

In its conclusion, the Court held that the 75% requirement was not sufficiently related to the governmental interests asserted to justify its intrusion into the First Amendment.¹¹⁹ However, the Court did not hold that charitable solicitation is beyond regulation, but rather that such regulation must be reasonable.¹²⁰ To assess the reasonableness of future regulation, the Court once again crafted a test, this time creating two factors to be considered in determining a regulation’s constitutionality. First, the Court asked whether the regulation “serve[d] a sufficiently strong, subordinating interest that the government is entitled to protect,” and second, whether the regulation was “narrowly drawn . . . to serve those interests without unnecessarily interfering with First Amendment freedoms.”¹²¹

Four years later, the Court was again confronted with a statute placing limits on expenses of charitable fundraisers. In *Secretary of State v. Joseph H. Munson, Co.*,¹²² a professional fundraising business filed suit against the Secretary of State of Maryland seeking injunctive relief to stop the State from enforcing a law that prohibited a group seeking contributions from paying or agreeing to pay as expenses more than 25% of the amount raised to any professional fundraiser.¹²³ Upon reaching the merits, the Court immediately referred to *Schaumburg* and re-stated the central question of *Munson* as whether the ordinance at issue in *Schaumburg* (the 75% requirement) and the statute at issue in *Munson* were sufficiently distinct to warrant finding the Maryland statute constitutional.¹²⁴

¹¹⁷ *Id.*

¹¹⁸ *Id.* (quoting *Citizens for a Better Env’t v. Vill. of Schaumburg*, 590 F.2d 220, 226 (7th Cir. 1978)).

¹¹⁹ *See id.* at 639.

¹²⁰ *See id.* at 632.

¹²¹ *Id.* at 636–37.

¹²² 467 U.S. 947 (1984).

¹²³ *Id.* at 950–51.

¹²⁴ *See id.* at 959.

The Court held that the two laws were not sufficiently distinct.¹²⁵ The statute did allow exemptions in certain situations, giving the secretary of state the discretion to waive the requirements of the bill with regard to advocacy groups; however, the Court did not find the discretionary power vested in the secretary of state sufficient to safeguard fundamental First Amendment rights.¹²⁶ Specifically, and again in reference to *Schaumburg*, the Court found that the Maryland statute was overbroad because there was “little connection between the percentage limitation and the protection of public safety or residential privacy.”¹²⁷

Four years after *Munson*, the Supreme Court decided *Riley v. National Federation of the Blind of North Carolina, Inc.*,¹²⁸ a case that dealt with the broadly-conceived North Carolina Charitable Solicitations Act (Act), which regulated charitable solicitation by professional fundraisers.¹²⁹ The Act created a three-tiered schedule for determining whether charitable fundraising expenses were “unreasonable,” addressing percentage expenses ranging from 20% to 35% or more, and set up specific analyses for each range within the law.¹³⁰ The law also required professional fundraisers to obtain a license, and in doing so to disclose their name, their employer’s name, and the average percentage of solicited funds that the charitable organization actually received during the previous year.¹³¹

North Carolina’s primary argument in support of the Act was that, because of the three-tiered structure, it was narrowly-tailored to accomplish its intended objectives without placing any undue restrictions on the freedom of speech.¹³² The Court held that the three-tiered structure was irrelevant to the consideration of whether the law works to achieve the proffered goals of these kinds of regulations, namely the prevention of fraud.¹³³ The Court held that there was no “nexus” between the percentage of funds paid out in expenses and the likelihood of fraud.¹³⁴ In regards to the licensing requirement, the Court held that the professional fundraisers

¹²⁵ *See id.* at 968–70.

¹²⁶ *Id.*

¹²⁷ *Id.* at 962 n.10.

¹²⁸ 487 U.S. 781 (1988).

¹²⁹ *See* Charitable Solicitation Licensure Act, N.C. GEN. STAT. §§ 131C-1–131C-17.1 (1981) (repealed 1995); *see also Riley*, 487 U.S. at 784.

¹³⁰ *See id.* at 784–85.

¹³¹ *Id.* at 786.

¹³² *See id.* at 792.

¹³³ *See id.* at 793–94.

¹³⁴ *Id.* at 793.

were still entitled to First Amendment protection and also that the licensing provision was unconstitutional because there was no timeliness aspect of the licensing process that provided for a period when a license had to be granted.¹³⁵

These three cases illustrate that the Supreme Court views charitable solicitation as being almost equal to pure speech.¹³⁶ Although the Court stated that it would permit reasonable regulation of charitable solicitation, it was unable to find such reasonableness in any of the three cases.¹³⁷

Most recently, the Court struck down a municipal ordinance subjecting a religious group to licensing requirements in *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*.¹³⁸ The petitioners were Jehovah's Witnesses who publish and distribute religious materials.¹³⁹ They alleged that the ordinance facially violated their First Amendment rights to the free exercise of religion, free speech, and freedom of the press.¹⁴⁰ The Village asserted that the ordinance served the goals of protecting its residents from fraud and crime, and also helped to ensure their privacy.¹⁴¹ Although acknowledging that these objectives were certainly valid governmental interests, the Court held that the ordinance, because it required groups like the Watchtower Society to obtain permits, impeded individuals' rights to support a cause and express their opinions anonymously.¹⁴²

The Court specifically addressed three examples that illustrated the deleterious effects of a permit requirement. First, the Court acknowledged that there are a number of people who support causes anonymously as a means of avoiding "economic or official retaliation," "social ostracism," or

¹³⁵ See *id.* at 801–02.

¹³⁶ See *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980); *Sec'y of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988).

¹³⁷ See *Schaumburg*, 444 U.S. at 632; *Munson*, 467 U.S. at 968–70; *Riley*, 487 U.S. at 793–94.

¹³⁸ 536 U.S. 150, 169 (2002).

¹³⁹ *Id.* at 153.

¹⁴⁰ *Id.* at 154.

¹⁴¹ *Id.* at 164–65.

¹⁴² *Id.* at 165, 166 (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341–42 (1995)). *Watchtower* was reaffirmed in 2006 by the Third Circuit in *Service Employees International Union, Local 3 v. Municipality of Mount Lebanon*, 446 F.3d 419, 428–29 (3d Cir. 2006).

simply to preserve their privacy.¹⁴³ The permit requirement necessitates that a person forego that constitutionally protected anonymity to support their chosen cause.¹⁴⁴ Because the Village ordinance in question was fairly wide-ranging, the protection offered to residents was insufficient to justify the loss of constitutionally protected anonymous speech.¹⁴⁵

Secondly, the Court found that the simple process of applying for a permit may work disproportionately against members of certain religious groups, who may feel it goes against their beliefs to seek the state's permission to proselytize, or against patriotic Americans, who would prefer silence over speech licensed by a "petty official."¹⁴⁶

Finally, the Court noted that the ordinance is likely to bar an appreciable amount of spontaneous speech.¹⁴⁷ "A person who made a decision on a holiday or a weekend to take an active part in a political campaign could not begin to pass out handbills until after he or she obtained the required permit."¹⁴⁸

Regarding the Village's most relevant primary justification, preventing fraud,¹⁴⁹ the Court found that a criminal, intent on defrauding a resident of the Village, would unlikely be deterred from knocking on someone's door because they lack a permit to do so.¹⁵⁰ Regardless, the Court ruled in favor of Watchtower and struck down the ordinance as being facially invalid.¹⁵¹

After these decisions sanctifying the right of an organization to canvass an area to solicit funds,¹⁵² it would make sense for city councils across the country to stop adopting ordinances aiming to prevent this activity. This has not been the case, and local governments continue to

¹⁴³ *Watchtower*, 536 U.S. at 166.

¹⁴⁴ *See, e.g.*, *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 198 (1999).

¹⁴⁵ *See Watchtower*, 536 U.S. at 167.

¹⁴⁶ *Id.* Regarding the objection that patriotic Americans might have to a permit requirement, Justice Scalia in his concurrence stated, "If our free-speech jurisprudence is to be determined by the predicted behavior of such crackpots, we are in a sorry state indeed." *Id.* at 171 (Scalia, J., concurring).

¹⁴⁷ *Id.* at 167 (majority opinion).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 158.

¹⁵⁰ *Id.* at 169.

¹⁵¹ *Id.*

¹⁵² *See id.* at 169; *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 791-92 (1988); *Sec'y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 968-70 (1984); *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980).

adopt similar ordinances.¹⁵³ One particular municipality in Ohio has taken a cue from the Telemarketing Sales Rule and chosen to adopt an ordinance that grants area residents the ability to opt-in to a “do not knock” list, and thus prohibit organizations of all kinds from knocking on their doors or soliciting donations.¹⁵⁴

V. A CONTEMPORARY UPRISING: LESSONS AND EXAMPLES FROM OHIO

It is unclear why Ohio has been the nexus of the dispute over door-to-door canvassing and solicitation, but much of this legal battle finds its origin there. *Martin v. City of Struthers* comes from the City of Struthers, Ohio, just outside of Youngstown.¹⁵⁵ *City of Lakewood v. Plain Dealer Publishing Company*¹⁵⁶ involved licensing in contravention of the First Amendment in a city outside of Cleveland.¹⁵⁷ *Watchtower* hailed from the Village of Stratton, Ohio.¹⁵⁸ Now, an Ohio political advocacy group has taken up the dispute against newly minted “No Solicitation Laws” in Ohio courts.¹⁵⁹ The group is Ohio Citizen Action (OCA), a consumer and environmental advocacy organization active throughout Ohio.¹⁶⁰ OCA’s stated goal has been to “use the power of community organizing to cause major industries to prevent pollution” through “door-to-door democracy.”¹⁶¹ It is similar in its goals and organization as CBE was in *Schaumburg*.¹⁶²

¹⁵³ E.g., Judy Keen, *City Ordinances Aim to Curb Door-to-Door Sales*, USA TODAY, Nov. 24, 2009, at 3A (noting at least five such ordinances passed in 2009 in municipalities across the country).

¹⁵⁴ See *id.* (discussing the “Do Not Knock” law of Canal Winchester, Ohio).

¹⁵⁵ E.g., ROBERT BRUNO, STEELWORKER ALLEY: HOW CLASS WORKS IN YOUNGSTOWN 15 (1999).

¹⁵⁶ 486 U.S. 750 (1988).

¹⁵⁷ *Id.* at 752–53.

¹⁵⁸ *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 153 (2002).

¹⁵⁹ See Keen, *supra* note 153.

¹⁶⁰ See OHIO CITIZEN ACTION, ABOUT OHIO CITIZEN ACTION, <http://www.ohiocitizen.org/about/about.htm> (last visited Feb. 27, 2010).

¹⁶¹ *Id.*

¹⁶² Compare *id.*, with *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 625 (1980) (“CBE employs ‘canvassers’ who are engaged in door-to-door activity . . . endeavoring to distribute literature on environmental topics and answer questions of an environmental nature when posed [and] solicit contributions to financially support the organization and its programs . . .”).

In lawsuits prior to the enactment of the Telemarketing Sales Rule, OCA was successful in defeating three laws prohibiting solicitation that was coupled with political speech, similar to those laws previously mentioned. *Ohio Citizen Action v. City of Avon Lake*,¹⁶³ *Ohio Citizen Action v. City of Seven Hills*,¹⁶⁴ and *Ohio Citizen Action v. City of Mentor-on-the-Lake*¹⁶⁵ saw the Northern District of Ohio consider and strike down those cities' "No Solicitation" laws. All three cities' "No Solicitation" laws had the general purpose of subjecting OCA and other groups to a licensing process and limiting their ability to canvass the cities.¹⁶⁶ In *Mentor-on-the-Lake*, the court found the city's ordinance was "facially invalid" under the First Amendment Free Speech Clause to the extent that the ordinance prohibited "persons from going door to door to communicate their social, political, or religious ideas and positions without first having obtained a license"¹⁶⁷

The city of Parma, Ohio has taken a slightly different route. Since the enactment of the Telemarketing Sales Rule in 2003,¹⁶⁸ Parma has adopted its own "No Solicitation" law that includes an opt-in alternative to the blanket laws, whereby a resident may prohibit all persons from canvassing or soliciting their home without a license.¹⁶⁹ The opt-in version of the law works similarly to the national "Do Not Call" registry, whereby local residents can place their address on the list to warn solicitors that they do not want to be visited.¹⁷⁰ The law, enacted in 2006,¹⁷¹ does not create any exemptions for charitable or other non-commercial groups.¹⁷² The text of that law reads, in pertinent part:

¹⁶³ 986 F. Supp. 454 (N.D. Ohio 1997).

¹⁶⁴ 35 F. Supp. 2d 575 (N.D. Ohio 1999).

¹⁶⁵ 272 F. Supp. 2d 671 (N.D. Ohio 2003).

¹⁶⁶ See *City of Mentor-on-the-Lake*, 272 F. Supp. 2d at 674–75; *City of Seven Hills*, 35 F. Supp. 2d at 575–76; *City of Avon Lake*, 986 F. Supp. at 459–60.

¹⁶⁷ *City of Mentor-on-the-Lake*, 272 F. Supp. 2d at 679.

¹⁶⁸ See 16 C.F.R. § 310 (2003).

¹⁶⁹ See PARMA, OHIO, CODIFIED ORDINANCES §§ 757.01–757.06 (2009), available at [http://www.amlegal.com/nxt/gateway.dll/Ohio/parma_oh/codifiedordinancesofthecityofparmaohio?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:parma_oh](http://www.amlegal.com/nxt/gateway.dll/Ohio/parma_oh/codifiedordinancesofthecityofparmaohio?f=templates$fn=default.htm$3.0$vid=amlegal:parma_oh).

¹⁷⁰ Compare *id.*, with 16 C.F.R. § 310.4(b)(1)(iii)(B) (2009).

¹⁷¹ See PARMA, OHIO, CODIFIED ORDINANCES §§ 757.01–757.06 (2009), available at [http://www.amlegal.com/nxt/gateway.dll/Ohio/parma_oh/codifiedordinancesofthecityofparmaohio?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:parma_oh](http://www.amlegal.com/nxt/gateway.dll/Ohio/parma_oh/codifiedordinancesofthecityofparmaohio?f=templates$fn=default.htm$3.0$vid=amlegal:parma_oh).

¹⁷² See § 757.01 (applying the definitions of "peddler" and "solicitor" for purposes of the law to "any person" without listing exemptions).

Solicitor means any person who obtains or seeks to obtain funds for any cause whatsoever by traveling door to door either by foot, automobile, truck or any other type of conveyance upon the private residences, including any house, apartment or other dwelling, within the City.¹⁷³

The question now turns to constitutionality. Are these opt-in “Do Not Knock” laws sufficiently narrow to pass *Central Hudson* and thus comply with the First Amendment?

VI. ANALYSIS OF OPT-IN, DO NOT KNOCK ORDINANCES

Parma has not yet met a judicial challenge to its “Do Not Knock” ordinance, so there is no judicial record to cite or opinion to guide this analysis. Recall that the test for constitutionality under *Central Hudson* first requires a determination as to whether the speech in question is commercial,¹⁷⁴ and that commercial speech is defined as “speech which does ‘no more than propose a commercial transaction.’”¹⁷⁵ This definition does not apply where the economic interest involved is incidental to the primary goal of the group.¹⁷⁶ Where the goals of those groups challenging solicitation restrictions are primarily charitable, religious, or political, it becomes difficult to argue that they do no more through canvassing than propose a commercial transaction.

In *Riley*, the Supreme Court held that the level of First Amendment scrutiny applied to commercial speech that is “inextricably intertwined” with otherwise fully protected speech should depend upon “the nature of the speech taken as a whole.”¹⁷⁷ The Court in *Central Hudson*, however, noted that advertising, which “‘links a product to a current public debate’ is not thereby entitled to the constitutional protection afforded

¹⁷³ § 757.01(b).

¹⁷⁴ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562–64 (1980).

¹⁷⁵ *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973))).

¹⁷⁶ See *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988).

¹⁷⁷ See *id.*

noncommercial speech.”¹⁷⁸ It is the charge of the courts to divine the true motivations of any group engaged in collecting funds.¹⁷⁹

The speech at issue, namely political and religious expression, is the primary purpose for the door-to-door canvassing that these groups engage in; fundraising is only incidental to that purpose.¹⁸⁰ Courts have acknowledged this fact. In *Mentor-on-the-Lake*, the court held that “when a charitable or other non-profit organization incorporates a request for donations or other fund-raising activities with their otherwise fully protected speech, the courts may not parcel out the financial or ‘commercial’ aspect of the speech in order to justify the application of a lower level of scrutiny.”¹⁸¹ In consideration of the nature of the political speech of OCA and the religious speech of groups such as the Watchtower Bible and Tract Society, the scale tips decidedly towards finding that this speech does not fall under the “commercial speech” definition of *Bolger*.¹⁸² However, this does not end the analysis.

For restrictions to be valid, they must not be based on the content of the speech involved.¹⁸³ This presents a problem for opt-in “Do Not Knock” laws like Parma’s, where a person can allow one group to solicit and disallow another.¹⁸⁴ Although there is an argument that such limitations might not always be content-based, a court’s determination as to whether such a restriction is content based will almost undoubtedly turn on the specific set of facts before it.¹⁸⁵ However, any law which permits communication in a certain manner for some but not others creates a danger of content discrimination, and thus subjects the regulation to strict scrutiny.¹⁸⁶

¹⁷⁸ *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 475 (1989) (quoting *Cent. Hudson*, 447 U.S. at 563 n.5).

¹⁷⁹ *See Riley*, 487 U.S. at 796 (explaining courts must assess “the nature of the speech taken as a whole” to determine what level of scrutiny to apply).

¹⁸⁰ *See, e.g., Ohio Citizen Action v. City of Mentor-on-the-Lake*, 272 F. Supp. 2d 671, 680 (N.D. Ohio 2003).

¹⁸¹ *Id.*

¹⁸² *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983).

¹⁸³ *E.g., Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981) (citing *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 536 (1980)).

¹⁸⁴ *See* PARMA, OHIO, CODIFIED ORDINANCES §§ 757.01–757.06 (2009), available at [http://www.amlegal.com/nxt/gateway.dll/Ohio/parma_oh/codifiedordinancesofthecityofparmaohio?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:parma_oh](http://www.amlegal.com/nxt/gateway.dll/Ohio/parma_oh/codifiedordinancesofthecityofparmaohio?f=templates$fn=default.htm$3.0$vid=amlegal:parma_oh).

¹⁸⁵ *See City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 763–64 (1988).

¹⁸⁶ *Id.*

Even non-commercial speech may be reasonably restricted in the time, place, and manner in which it is made.¹⁸⁷ The government must also show that reasonable alternative channels of communication exist.¹⁸⁸

A. Time

Mentor-on-the-Lake provides an excellent analysis of the time, place, and manner regulation test. All time restrictions relating to door-to-door advocacy and solicitation impose some manner of curfew on group activities.¹⁸⁹ The statute at issue involved a 5:00 p.m. curfew premised on the promotion of public safety, which the court held to be both overbroad and underinclusive.¹⁹⁰ It was overbroad because safety concerns at 5:00 p.m. on a summer day are no greater than they are at 2:00 p.m. or 8:00 p.m., while the sun is still up.¹⁹¹ The ordinance was underinclusive because it exempted a long list of entities.¹⁹² The court agreed that promoting public safety was indeed a compelling governmental interest, but without some firmer empirical connection to time restrictions in *Mentor-on-the-Lake*, the curfew was unconstitutional.¹⁹³

¹⁸⁷ See, e.g., *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). These three restrictions have their own share of objections. “Place” restrictions have recently been the subject of both Supreme Court opinion, see *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992), and substantial scholarship, see Thomas P. Crocker, *Displacing Dissent: The Role of “Place” in First Amendment Jurisprudence*, 75 *FORDHAM L. REV.* 2587 (2007). Alongside the time, place, and manner test exists another test, known as the *O’Brien* test. See *United States v. O’Brien*, 391 U.S. 367, 376–77 (1968). The *O’Brien* test pertains to speech regulations where both expressive and non-expressive elements are present. It asks: 1) if the regulation is sufficiently within the constitutional power of the government; 2) if the regulation furthers an important or substantial governmental interest; 3) if the governmental interest is unrelated to the suppression of free expression; and 4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *Id.* The *O’Brien* test and the time, place, and manner test have been applied to the same regulations.

¹⁸⁸ E.g., *Ohio Citizen Action v. City of Mentor-on-the-Lake*, 272 F. Supp. 2d 671, 683 (N.D. Ohio 2003).

¹⁸⁹ See *id.*

¹⁹⁰ *Id.* at 684.

¹⁹¹ *Id.*

¹⁹² *Id.* (noting the ordinance included exemptions for, among others, newspaper delivery-persons, dairy-product salespersons, baked goods salespersons, and laundry and diaper services).

¹⁹³ *Id.* at 685.

This is not to say that curfews have been deemed per se unreasonable. Although the court in *Mentor-on-the-Lake* struck down a curfew on the canvassing activities of non-profit groups,¹⁹⁴ juvenile curfews meant to prevent juvenile crime have been held to be valid regulations under the time, place, and manner analysis.¹⁹⁵ In *Schleifer ex rel. Schleifer v. City of Charlottesville*,¹⁹⁶ the Fourth Circuit upheld a midnight curfew for minors, holding that the state's authority over children was broader than the state's authority over similar actions of adults, and as a result, intermediate scrutiny was justified and the ordinance was upheld.¹⁹⁷

However, *Schleifer* is not illustrative as to how a court might rule on the issue of a later curfew restricting the canvassing activities of a non-profit group. *Schleifer* deals with far different issues, and the ordinance in *Schleifer* had an exception for minors who were exercising First Amendment rights.¹⁹⁸ The crux of time restrictions appears to be neutrality.¹⁹⁹ Time restrictions that do not favor one speaker or type of speech over another are likely to pass the test of intermediate scrutiny so long as reasonable alternative means of communication are left open.²⁰⁰

B. Place

*International Society for Krishna Consciousness, Inc. v. Lee*²⁰¹ and *Lee v. International Society for Krishna Consciousness, Inc.*,²⁰² provide examples of place limitations on the solicitation of funds and the dissemination of religious messages. These cases dealt with the Krishnas' use of airport terminals for the solicitation of funds and the spreading of their religious message in a ritual known as sankirtan.²⁰³ The Court held that the prohibition of solicitation by the Krishnas in an airport terminal

¹⁹⁴ See *id.* at 684.

¹⁹⁵ See *Schleifer ex rel. Schleifer v. City of Charlottesville*, 159 F.3d 843, 846–47 (4th Cir. 1998).

¹⁹⁶ 159 F.3d 843 (4th Cir. 1998).

¹⁹⁷ See *id.* at 846–47.

¹⁹⁸ See *id.* at 846 (“Finally, the ordinance does not affect minors who are ‘exercising First Amendment rights protected by the United States Constitution, such as . . . freedom of speech’”).

¹⁹⁹ See *City of Mentor-on-the-Lake*, 272 F. Supp. 2d at 683.

²⁰⁰ See *id.* at 684.

²⁰¹ 505 U.S. 672 (1992).

²⁰² 505 U.S. 830 (1992) (per curiam).

²⁰³ See *Int'l Soc'y for Krishna Consciousness, Inc.*, 505 U.S. at 674–75; *Lee*, 505 U.S. at 830–31.

was constitutional because the government was acting as a proprietor and managing its internal operations, rather than acting as a lawmaker with the power to license or regulate.²⁰⁴ However, the Court upheld the Krishnas' right to leaflet and spread their message in the airport.²⁰⁵

These cases are particularly noteworthy because the Court redefined what a "public forum" is under the First Amendment and divided the "public forum" issue into three relatively indistinct categories. In *International Society for Krishna Consciousness*, the Court distinguished traditional public fora for free expression, such as parks and streets, from so-called "designated public fora" that the state has opened for expressive activity.²⁰⁶ The Court then drew a third, broad category of all other public property.²⁰⁷ The Court held that strict scrutiny will apply to the first and second categories so long as the restriction is content-based.²⁰⁸ However, if the forum belongs in the very broad and indistinct third category, the Court will only consider whether the regulation in question is reasonable and whether it is motivated by disagreement with the speaker's viewpoint.²⁰⁹

Both of these cases were limited in their scope, applying only to solicitation within an airport terminal, but the Court implied that it may be acceptable for the government to regulate solicitation coupled with the dissemination of a particular message if the solicitation is found to contribute to "pedestrian congestion."²¹⁰ Because the speech primarily

²⁰⁴ See *Int'l Soc'y for Krishna Consciousness, Inc.*, 505 U.S. at 678–79.

²⁰⁵ See *id.* at 690 (O'Connor, J., concurring); *Lee*, 505 U.S. at 830.

²⁰⁶ See *Int'l Soc'y for Krishna Consciousness, Inc.*, 505 U.S. at 678.

²⁰⁷ See *id.* at 678–79.

²⁰⁸ See *id.* at 678; see also *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983) (explaining the three categories of public fora).

²⁰⁹ See *Int'l Soc'y of Krishna Consciousness, Inc.*, 505 U.S. at 678–79 ("The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view."). See Crocker, *supra* note 187, at 2587, for an in-depth analysis of the First Amendment's "place restriction" jurisprudence. Crocker poses the uncomfortable question of whether it is conceivable that "public forum" could be defined as a non-existent place, resulting in the de facto abrogation of the First Amendment. *Id.*

²¹⁰ See *Int'l Soc'y of Krishna Consciousness, Inc.*, 505 U.S. at 683–85 (citing *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 925 F.2d 576, 582 (2d Cir. 1991)). The Court noted, "Although many airports have expanded their function beyond merely contributing to efficient air travel, few have included among their purposes the designation of a forum for solicitation and distribution activities." *Id.* at 683. The Court further

(continued)

addressed in this article takes place in the street, a “traditional public fora,”²¹¹ these holdings are unlikely to impede a group’s ability to canvass door-to-door, but they are an illustration of the Court’s subtle willingness to tolerate limits on speech, especially speech coupled with solicitation.²¹²

C. Manner

The manner in which restrictions are placed on canvassing brings the analysis full-circle, with concerns about permits and licensing with regard to charitable solicitation. Any licensing program that regulates the freedom of expression must have constitutionally valid requirements for receiving a permit, insofar as the licensing requirements do not create a content-based regulation.²¹³ Prior restraints on speech are presumed to be unconstitutional.²¹⁴ Additionally, licensing procedures cannot be subject to

recognized the disruptive effects of solicitation, especially for air travelers carrying luggage and rushing to catch their plane in time. *See id.* at 683–84.

²¹¹ *See, e.g.*, *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (holding that public streets and parks “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions”).

²¹² *See, e.g.*, *United States v. Kokinda*, 497 U.S. 720, 722–23 (1990) (holding that a federal regulation that prohibited individuals from soliciting on a sidewalk leading from a United States Postal Service branch to its parking lot did not violate the First Amendment); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303–04 (1974) (holding the city’s ban of political advertisements on city-owned transit vehicles, in an effort “to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience,” did not violate the First Amendment). Thus, although solicitation is a recognized form of speech, the freedom of expression protected by the First Amendment is not absolute and “does not guarantee the right to communicate one’s views at all times and places or in any manner that may be desired.” *Heffron v. Int’l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) (citations omitted).

²¹³ *See, e.g.*, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969) (“[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.”).

²¹⁴ *See, e.g.*, *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958) (“[A]n ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is . . . unconstitutional.”); *In re G. & A. Books, Inc. v. Stern*, 770 F.2d 288, 296 (2d Cir. 1985) (“Governmental action constitutes a prior restraint when it is directed to suppressing speech because of its content before the speech is communicated. This may take the form

(continued)

the “unbridled discretion” of the government officer granting the license or permit.²¹⁵ The basic test for determining whether the manner of a regulation is valid is simply whether the state can demonstrate that the restriction furthers an important or substantial government interest, which “does not burden substantially more speech than necessary to further those objectives.”²¹⁶

D. National Federation of the Blind v. FTC and the Current Climate

Perhaps the most telling case illustrating where the line is drawn between First Amendment freedoms and the government’s ability to regulate charitable solicitation is *National Federation of the Blind v. FTC*.²¹⁷

In 1994, Congress passed the Telemarketing Consumer Fraud and Abuse Prevention Act (Telemarketing Act).²¹⁸ The law gave the FTC the authority and direction to “prescribe rules prohibiting deceptive . . . and other abusive telemarketing acts or practices.”²¹⁹ However, phone calls made in an attempt to solicit charitable donations were outside the scope of the Telemarketing Act.²²⁰ In 1995, the FTC implemented the original Telemarketing Sales Rule²²¹ and issued an advisory statement clarifying that the Telemarketing Sales Rule did not regulate professional telemarketers calling on behalf of non-profit organizations.²²² In 2001, the PATRIOT Act amended the Telemarketing Act²²³ and included “fraudulent charitable solicitations” in its outline of the types of telemarketing

of orders prohibiting the publication or broadcast of specific information.”). Regulations on time, place, and manner, however, are not considered prior restraints. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 795 n.5 (1989) (upholding and distinguishing a municipal noise regulation from a prior restraint, stating that “the regulations that [the Court has] found invalid as prior restraints have had this in common: they gave public officials the power to deny use of a forum in advance of actual expression” (citation omitted)).

²¹⁵ *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 757 (1988).

²¹⁶ *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997).

²¹⁷ 420 F.3d 331 (4th Cir. 2005). In this case, the National Federation of the Blind and the Special Olympics of Maryland challenged the FTC’s restrictions that regulated charitable telemarketers. *Id.* at 333.

²¹⁸ *See* Telemarketing Consumer Fraud and Abuse Prevention Act, Pub. L. No. 103-297, 108 Stat. 1545 (codified as amended at 15 U.S.C. §§ 6101–6108 (2000)).

²¹⁹ *Nat’l Fed’n of the Blind*, 420 F.3d at 334 (quoting 15 U.S.C. § 6102(a)(1) (2000)).

²²⁰ *Id.*

²²¹ *Id.*; 16 C.F.R. § 310 (1995).

²²² *Nat’l Fed’n of the Blind*, 420 F.3d at 334–35.

²²³ Pub. L. No. 107-56, 115 Stat. 396 (2001).

practices that the FTC should regulate.²²⁴ Congress also changed the Act's definition of "telemarketing" to include charitable solicitations.²²⁵

The FTC asserted that its dual purpose in promulgating these regulations was to "prevent fraud *and* to protect the privacy of the home," pursuant to the 1994 Telemarketing Act.²²⁶ The court held that the regulation requiring callers to identify the purpose of their call advanced the government interest of preventing fraud and that the time restrictions upon late night and early morning calls advanced the government interest of protecting privacy in the home.²²⁷ In ruling for the FTC, the court declared that "[p]rotecting the sanctity of the family environment is important enough to actually serve as a basis for a constitutional right in many different contexts."²²⁸

However, the PATRIOT Act did not alter the FTC's jurisdiction, which still did not include non-profit organizations.²²⁹ "The PATRIOT Act, therefore, expanded what 'acts and practices' could be regulated by the FTC under the Telemarketing Act, but it did not change what type of entity was subject to the FTC's control."²³⁰ The Fourth Circuit concluded that the Telemarketing Sales Rule now applied to for-profit entities that solicit charitable donations, but left charitable groups outside of the law's jurisdiction.²³¹ Thus, these regulations only affected groups that used professional, for-profit fundraisers to solicit contributions over the telephone, while in-house callers from the charities themselves are outside of the jurisdiction of the FTC.²³² The regulations challenged included those that prohibited the fundraisers from making calls before 8 a.m. or after 9 p.m., restrictions that required the "telefunder" to transmit their name and phone number to caller ID services, and those that required them to immediately disclose the fact that they are seeking funds on behalf of a charity.²³³

²²⁴ 15 U.S.C. § 6102(a)(2) (Supp. 2004); *Nat'l Fed'n of the Blind*, 420 F.3d at 335.

²²⁵ 15 U.S.C. § 6106(4) (Supp. 2004); *Nat'l Fed'n of the Blind*, 420 F.3d at 335.

²²⁶ See *Nat'l Fed'n of the Blind*, 420 F.3d at 337 (emphasis in original).

²²⁷ See *id.* at 339.

²²⁸ *Id.* at 340, 351.

²²⁹ See *id.* at 335.

²³⁰ *Id.* (emphasis omitted).

²³¹ *Id.* at 336.

²³² *Id.* Although logically coherent, the court's decision regarding how the new rules regulating charitable solicitation and the FTC's jurisdiction applied seemed to avoid addressing the question of what Congress intended when it amended the Telemarketing Act.

²³³ *Id.*

The court found that the telemarketing regulations were narrowly tailored because the time restrictions at issue still permitted calls to be made for a thirteen-hour period during the day.²³⁴ Under this law, charities are restricted from calling a household if they request that a specific organization not call them.²³⁵ The court found this to be narrowly tailored because, like the national “Do Not Call” registry, it only prevented calls from reaching unwilling listeners.²³⁶

This may sound a bit like content-based regulation, but there is a distinction. Content-based regulations or restrictions are presumed to be unconstitutional *per se*, barring a compelling government interest.²³⁷ However, these opt-in ordinances are not content-based insofar as the government is prohibiting certain kinds of speech.²³⁸ Rather, the government is merely providing the vehicle by which individual citizens may make known their unwillingness to listen to unwanted speech.²³⁹

After *National Federation of the Blind*, it seems that at least some courts would be willing to find a restriction on charitable solicitation reasonable if the goals which it seeks to accomplish include the prevention of fraud and the maintenance of privacy in the home; that is, so long as the regulation leaves open the group’s ability to solicit funds from willing listeners.²⁴⁰ Unwilling listeners who place themselves on opt-in, “Do Not Solicit” lists may be able to avoid solicitation, regardless of the medium used.

VII. CONCLUSION

Recall that the Supreme Court held that “individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.”²⁴¹ The private and sacred nature of the home has been recognized and upheld throughout the history of the United

²³⁴ *See id.* at 341, 350–51.

²³⁵ *Id.* at 341–42. Note that this is a different approach as opposed to the 2003 version of the Telemarketing Sales Rule, where a person need only place their phone number on the “Do Not Call” registry. *See* 16 C.F.R. § 310.4(b)(1)(iii)(B) (2009).

²³⁶ *Id.* at 342.

²³⁷ *See, e.g., Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

²³⁸ *See Nat’l Fed’n of the Blind*, 420 F.3d at 350.

²³⁹ *See id.* at 351.

²⁴⁰ *See, e.g., Nat’l Coal. of Prayer, Inc. v. Carter*, 455 F.3d 783, 789 (7th Cir. 2006); *Ass’n of Cmty. Orgs. for Reform Now v. Town of E. Greenwich*, 453 F. Supp. 2d 394, 403–04 (D. R.I. 2006).

²⁴¹ *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

States, for good reason.²⁴² How then is the opt-in “Do Not Knock” law to be viewed against this historical backdrop? Is it a form of limitation on pure speech “which might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens?”²⁴³ Or is it merely analogous to being a large-scale “No Solicitation” sign that people can place on their front lawns and that the Supreme Court has held to be sufficient to prevent unwanted solicitors.²⁴⁴ This question remains unanswered.

Virtually all groups that use canvassing and door-to-door solicitation to raise funds acknowledge it is their primary source of funding and recruitment of new members, and without it, they would be lost.²⁴⁵ It is interesting that many of the same people who may claim to not want to be solicited in their homes eventually end up donating to these organizations once they learn about the cause and understand the goals of the group. This means that persuasive speech is useful in promoting ideas, and to limit the ability of a group to couple its advocacy and fundraising efforts, would necessarily result in the censorship of those causes which depend upon this method of fundraising.

Given its current make-up, if the issue of an opt-in, “Do Not Knock” ordinance ever reached the Supreme Court, the charitable or non-profit group’s right to canvass a city and solicit donations is likely to be subordinate to the individual’s right to opt-in to the “Do Not Knock” list. The municipalities likely will analogize their opt-in lists with a large-scale, “Do Not Solicit” sign.²⁴⁶ The conceptual distinction between the two is precarious and would be difficult for a court to distinguish.

One is left to ask: How could the First Amendment be construed to permit the banning of political speech and fundraising? The preceding sentence may be a *non sequitur*, insofar as proponents of such solicitation ordinances would argue that they are not banning political speech and

²⁴² See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978); *Rowan v. U.S. Post Office Dep’t.*, 397 U.S. 728, 738 (1970); *Kovacs v. Cooper*, 336 U.S. 77, 86–87 (1949).

²⁴³ *Grosjean v. Am. Press Co.*, 297 U.S. 233, 249–50 (1936).

²⁴⁴ See *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 168–69 (2002); *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 639 (1980).

²⁴⁵ See, e.g., *Martin v. City of Struthers*, 319 U.S. 141, 144–46 (1943); *Ass’n of Cmty. Orgs. for Reform Now v. City of Dearborn*, 696 F. Supp. 268, 271 (E.D. Mich. 1988).

²⁴⁶ See *Watchtower*, 536 U.S. at 156; *Am. Cmty. Newspapers, LLC v. City of Plano*, 540 F. Supp. 2d 717, 719, 724 (E.D. Tex. 2008); *N.J. Env’tl. Fed’n v. Wayne Twp.*, 310 F. Supp. 2d 681, 696 (D. N.J. 2004).

fundraising, so much as they are broadcasting the unwillingness of the recipients to listen.²⁴⁷ People certainly have an interest in maintaining the privacy of their homes, and there is also a legitimate governmental interest in protecting municipal residents against fraud and criminal endeavors. However, those interests do not require the complete exclusion of groups who act on behalf of a charitable, political, or religious interest.

In Judge Duncan's *National Federation of the Blind* dissent, she noted that the "ability to raise funds is the lifeblood of a charity."²⁴⁸ However, I would end with a quotation by Justice Black, where he presciently declared: "[D]oor to door distribution of circulars is essential to the poorly financed causes of little people."²⁴⁹ If further restrictions on door-to-door advocacy gain a judicial foothold, those poorly financed causes may cease to be financed at all.

²⁴⁷ *E.g.*, *Frisby v. Schultz*, 487 U.S. 474, 484–85 (1988).

²⁴⁸ *Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331, 355 (4th Cir. 2005) (Duncan, J., dissenting).

²⁴⁹ *Martin*, 319 U.S. at 146 (1943).