

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Rules and Regulations Implementing) CG Docket No. 02-278
the Telephone Consumer Protection)
Act of 1991)

**REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION
OF THE STATE AND REGIONAL NEWSPAPER ASSOCIATIONS**

The undersigned 53 state and regional newspaper associations (“Newspaper Associations”), representing almost every daily and weekly newspaper in the United States, 1/ by counsel and pursuant to 47 C.F.R. § 1.429, hereby reply to oppositions to their request that the FCC reconsider its adoption of new rules that restrict telephone calls or messages encouraging the purchase of goods or services. *Rules and Regulations Implementing the Telephone Consumer Protection Act*, 18 FCC Rcd 14014 (2003) (“*TCPA Rule Review Order*”) (revising rules implementing Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”). Specifically, the Newspaper Associations urged reconsideration because the Commission justified the rules only on grounds that such calls constitute commercial speech. *Id.* at 14052-59, ¶¶ 63-73. Consequently, it failed to conduct the constitutional analysis necessary to support application of its new national “do-not-call” registry and other rules to newspapers, magazines and other periodicals,

1/ The Newspaper Associations, which are listed *infra* at pp. 10-11, are the trade organizations for virtually all daily and weekly newspapers across the country and serve numerous functions, including representing the industry before state legislatures. A number of them offer media law advice, function as clearing houses of information, and/or serve the public by helping to protect basic freedoms of press, speech and the free flow of information. All the associations hold regular workshops, seminars and conferences on industry issues, and serve numerous functions in the interest of newspaper publishers throughout their states or market segments.

the publication and circulation of which enjoy full First Amendment protection. ^{2/} This reply responds to the National Association of State Utility Consumer Advocates' ("NASUCA") erroneous claims that the TCPA limits FCC discretion to refine its telemarketing regulations to comport with constitutional requirements, and that the *Central Hudson* test applicable to commercial speech controls the regulation of the fully protected activity of distributing and circulating newspapers and other periodicals. ^{3/}

As to the Commission's power to grant relief in response to the Newspaper Associations' petition, there is no question that taking the necessary action is not "beyond the Commission's statutory authority." NASUCA Opp. at 4. As a threshold matter, it bears noting that, contrary to NASUCA's characterization, the Newspaper Associations did not specifically "urge the Commission to exempt newspapers, magazines and similar publications" from the new TCPA rules. *Id.* Rather, they asserted that "[i]f the Commission decides to retain its new telemarketing rules" and apply them to publications, "it cannot simply fall back on the limited

^{2/} The Newspaper Associations emphasized that the Commission's premise that it could impose discriminatory regulation based on the relative constitutional "value" of different speech was flawed. Newspaper Pet. at 5-6. But even under this erroneous premise, the Commission cannot justify extending the "do-not-call" rules to newspapers.

^{3/} Opposition of the National Association of Consumer Advocates to Petitions for Reconsideration ("NASUCA Opp.") at 4-8 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980)). Dennis C. Brown's Opposition to Petitions for Reconsideration offers a one-paragraph discussion of the Newspaper Associations' petition, the central thrust of which is his absurd notion that because the "do-not-call" and other rules do not prevent newspapers from reading people news over the phone, so long as they do not sell any papers that way, the rules are permissible. *Id.* at 7-8. As Brown fails to address the constitutional and other issues raised by the petition, no reply is necessary beyond pointing out the non-responsiveness of his filing, though it should be noted his claim that "increas[ing] the cost of a newspaper's finding subscribers" somehow "do[es] not impose any burden on the circulation of news," *id.* at 7, is not only tautological and preposterous on its face, but inconsistent with well-recognized legal principles. See, e.g., *Mainstream Mktg. Servs. Inc. v. FTC*, 2003 WL 22213517, *9 (D. Colo. Sept. 25, 2003) (even telemarketing rules that "do not restrict speech by explicitly and directly limiting it ... sufficiently involves ... government ... regulation of ... speech to implicate the First Amendment"); *Distribution Sys. of America, Inc. v. Village of Old Westbury*, 862 F.Supp. 950 (E.D.N.Y. 1994) (invalidating village's "do-not-distribute" registry for periodicals left at residences in that, *inter alia*, regulations permitted more-costly option of mailing while restricting doorstep distribution).

constitutional analysis offered in the *TCPA Rule Review Order*,” but rather “must demonstrate that its regulations are constitutional under the more exacting rules applicable to fully protected speech” and “adjust [them] to accommodate the ‘constitutionally protected activity of newspaper distribution,’” by finding “telemarketing of newspapers and similar publications ... not subject to the new ... rules” as currently formulated and justified. Newspaper Pet. at 11 (quoting *Jacobsen v. Howard*, 109 F.3d 1268, 1271 (8th Cir. 1997)). In short, the thrust of the petition was not that the FCC should simply grant a special exemption for publications, but rather that it must conduct a constitutional analysis under First Amendment standards applicable to the distribution and circulation of publications, a task the Commission has yet to undertake.

Wherever that analysis may lead – whether it be modification of the rules as they pertain to telemarketing fully protected publications or other relief – it is clear the FCC is empowered to adopt a constitutional solution. Though NASUCA argues “the Commission lacks authority to create exemptions that are not in the statute,” because the TCPA “specifically enumerate[s] the types of calls that are exempt,” NASUCA Opp. at 7 (citing 47 U.S.C. §§ 227(a)(3), (b)(2)(B)), this cramped reading of both the statute and the FCC’s duty, for which NASUCA cites no precedent, is in error. Whatever exceptions the TCPA specifies, and whatever directives or restrictions it places on the Commission, the statute is always subordinate to the facts Congress cannot direct the FCC to adopt unconstitutional rules, *see, e.g., Action for Children’s Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), and that the FCC must interpret any statutes it implements in a manner that comports with the Constitution. *Building Owners & Mgrs. Ass’n Int’l v. FCC*, 254 F.3d 89, 101 (D.C. Cir. 2001) (Randolph, J., concurring) (citing “familiar canon that if one permissible interpretation of statute would render it unconstitutional and another permissible interpretation would make it constitutional, the latter should prevail”).

Thus, as a general proposition the Commission must take whatever steps First Amendment precepts require.

But granting the Newspaper Associations' requested relief need not rest on just a "general proposition," as the statute at hand expressly requires that all telemarketing rules satisfy First Amendment strictures. In adopting the TCPA, Congress required the Commission to ensure "individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade [are] balanced." Pub. L. No. 102-243, § 2(9). *See also* 47 U.S.C. §§ 227(c)(1)(A)-(E) (formalizing statutory and constitutional criteria that TCPA regulations be appropriately balanced). So, not only is the Commission authorized to conduct the necessary constitutional analysis to determine whether its rules may apply to telemarketing by newspapers, and to grant an exemption or whatever other relief is necessary to satisfy the First Amendment, it is *obligated* to do so. *E.g., compare, Time Warner Entmt. Co., L.P. v. FCC*, 211 F.3d 1313 (D.C. Cir. 2000) (rejecting facial constitutional challenge to Cable Television Consumer Protection and Competition Act ownership provisions), *with Time Warner Entmt. Co., L.P. v. FCC*, 240 F.2d 1126 (D.C. Cir. 2001) (invalidating as unconstitutional FCC horizontal and vertical cable ownership rules adopted to implement Cable Television Consumer Protection and Competition Act).

There is no doubt that such further analysis is necessary, as the Commission has thus far has considered only whether its "do-not-call" registry and other rules pass muster under *Central Hudson*, and not the more exacting scrutiny required for regulations that restrict the distribution or circulation of fully protected speech such as newspapers and other periodicals. Any argument that *Central Hudson* analysis is sufficient is legally insupportable. NASUCA at 4-5. To be sure, to the extent a court invalidates the new TCPA rules as applied to *any* telemarketer on grounds that they cannot withstand constitutional scrutiny under *Central Hudson* – as

one district court already has with respect to virtually identical FTC rules, *see Mainstream Mktg.*, *supra* note 2 (cited in NASUCA Opp. at 6 n.28) – the rules of course would be unconstitutional as applied to newspapers and other periodicals as well. But even if the rules survive *Central Hudson* scrutiny, they can still be unconstitutional as applied to newspaper circulation. *Cf.*, *Fraternal Order of Police, N.D. State Lodge v. Stenehjem*, Civil File No. A3-03-74 (D. N.D. Oct. 17, 2003) (invalidating “do-not-call” law as unconstitutional as applied to fully protected speech though law withstood *Central Hudson* test).

In response to the litany of cases cited in the Newspaper Associations’ petition to show that regulations affecting the publication of newspapers, magazines and other periodicals, including their promotion, distribution and circulation, are subject to full First Amendment protection, ^{4/} NASUCA offers only a misreading of a footnote in the Supreme Court’s *Discovery Network* decision. NASUCA Opp. at 5 (quoting 507 U.S. at 416 n.11). In arguing that the *Central Hudson* standard applies even to the telemarketing of newspapers and other publications, NASUCA notes language in *Discovery Network* to the effect that “[b]ecause ... Cincinnati’s ban on commercial newsracks cannot withstand scrutiny under *Central Hudson* ... we need not decide whether that policy should be subjected to more exacting review.” *Id.* The folly of NASUCA’s argument is apparent even from just the excerpted language it offers. The quoted footnote does not stand for the proposition that newspaper circulation and distribution is entitled

^{4/} Newspaper Associations Pet. at 5-11 (citing *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993); *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750 (1988); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983); *Murdock v. Pennsylvania*, 319 U.S. 105, 114 (1943); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936); *Jacobsen*, 109 F.3d at 1271; *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1196-97 (11th Cir. 1991); *Gannett Satellite Info. Network, Inc. v. Metropolitan Transp. Auth.*, 745 F.2d 767, 771 (2d Cir. 1984); *Gasparo v. City of New York*, 16 F.Supp.2d 198 (E.D.N.Y. 1998); *Rubin v. City of Berwyn*, 553 F. Supp. 476 (N.D. Ill. 1982); *Lacoff v. Buena Vista Publ’g, Inc.*, 705 N.Y.S.2d 183, 189 (N.Y. Sup. Ct. 2000); *People v. Fogelson*, 577 P.2d 677, 681 n.7 (Cal. 1978)).

only to the protection afforded commercial speech under *Central Hudson*, but rather that the clearly misguided ordinance in that case could not withstand even that lower level of First Amendment scrutiny.

It is also notable that the plaintiffs challenging the ordinance that applied to their publications “[did] not challenge their characterization as ‘commercial speech.’” *Discovery Network*, 507 U.S. at 416. In other words, they *conceded* the publications at issue, as distinct from the sale of them, consisted of commercial speech rather than news and other noncommercial information. *Compare Distribution Sys.*, 862 F.Supp. at 962, (First Amendment analysis for fully protected speech applied to weekly newspaper featuring “local and general news stories, but predominantly ... local advertisements” which was deemed not “commercial speech because it involve[d] more than just a mere proposal for a commercial transaction”). More importantly, even given the fact that the publications in *Discovery Network* consisted only of commercial speech rather than fully protected news, the footnote NASUCA cites specified that:

[T]he standard ... in *Central Hudson* ... at least ... might not apply to the type of regulation at issue in this case. For if commercial speech is entitled to “lesser protection” only when the regulation is aimed at either the content of the speech or the particular adverse effects stemming from that content, it would seem to follow that a regulation that is not so directed should be evaluated under the standards applicable to fully protected speech, not the more lenient standards by which we judge regulations on commercial speech.

Id. at 416 n.11. Here, the TCPA rules are not targeted at the content of the Newspaper Associations’ speech (whether it be characterized as the publications themselves or communication aimed at selling them), or secondary effects of that conduct as distinct from the effects of any other telemarketing, that is, the disruption of unwanted telephone calls. *TCPA Rule Review Order*, 18 FCC Rcd at 14017 (“we revise[d] the current [TCPA] rules and adopt new rules to provide consumers with several options for avoiding unwanted telephone solicitations”).

Accordingly, the level of protection normally afforded the sale of newspapers and other periodicals and publications, though it may involve commercial transactions, applies here. That much is evident from cases discussed in the Newspaper Associations’ petition and herein, which grant full First Amendment protection to all aspects of distribution or circulation. 5/

Finally, NASUCA’s attack on the Newspaper Associations’ discussion of exemptions granted by various states for telemarketing of newspapers and/or other publications, which the Commission heedlessly eradicated in the *TCPA Rule Review Order*, mischaracterizes both the scope and number of the exemptions, as well as the sound reasons they were enacted. NASUCA at 6-7. Though NASUCA disparages the exemptions as the result of “lobbying success” or “one of many do-not-call exemptions crafted by state legislatures,” *id.* at 7, its disdain cannot supplant the validity of or need for the exemptions.

First, NASUCA claims “only six of the 36 stats have such laws.” *Id.* at 6 (footnote omitted). That is wrong. The following states have (or, had before the *TCPA Rule Review Order*) exemptions for newspapers and/or other publications:

5/ See, e.g., *Sentinel Communications*, 936 F.2d at 1196-12-6 (standard “unbridled discretion” and forum analyses); *Jacobsen*, 109 F.3d at 1272-74 (forum analysis). See also *Distribution Sys.*, 862 F.Supp. 958-60 (invalidating “do-not-distribute” registry regime under strict scrutiny). Notably, none of these cases even hinted that the *Central Hudson* standard applied to the regulations in question, though they all targeted various aspects of the distribution and/or sale of newspapers or other publications. Any attempt to undermine the Newspaper Associations’ showing that “*City of Lakewood* ... did not ‘even suggest that the *Central Hudson* test or commercial speech doctrine [was the] appropriate framework’” for analyzing regulations on the sale of newspapers must fail. NASUCA Opp. at 5 n.22 (quoting Newspaper Associations Pet. at 9 (discussing 486 U.S. at 769-70)). NASUCA argues that the First Amendment analysis applied in *Lakewood* “does not apply to the rule at issue” here, because in *Lakewood* “the Court addressed a licensing process which gave the mayor ‘unfettered discretion to deny a permit’” necessary to place newsracks on city property. *Id.* (quoting 486 U.S. at 772). But as the cases above reveal, the point is not whether the problem is “unfettered discretion,” a discriminatory tax on speech, or a ban on selling newspapers from a particular location, but rather that each of these invalidated actions involved the sale of newspapers, and that none of them were analyzed under *Central Hudson*.

STATE	STAUTORY PROVISION	PROVIDES EXEMPTION FOR:
Alabama	Al. Code § 8-19A-4(6)	Persons primarily soliciting sales of newspapers, periodicals of general circulation, or magazines
Alaska	Alaska Stat. § 45.63.080(8)	Persons primarily soliciting sale of a subscription to, or advertising in, newspapers of general circulation
Arkansas	Ark. Code Ann. § 4-99-406(6)	Persons primarily soliciting sale of newspapers of general circulation, magazines or book club memberships
Florida	Fl. Stat. Ann. § 501.059(c)(4)	Newspaper publishers or their agents or employees in connection with their business
Idaho	Idaho Code § 48-1005(1)(e)	Persons making a telephone solicitation solely for purposes of selling subscriptions to or advertising in newspapers of general circulation
Indiana	Ind. Code § 24-4.7-1-1(6)	Telephone calls soliciting sale of newspapers of general circulation if made by a volunteer or employee of the newspaper
Mississippi	Miss. Code Ann. § 77-3-609(f)	Persons calling for newspapers of general circulation for the sole purpose of soliciting subscriptions to the newspaper or soliciting the purchase of advertising by consumers
Nevada	Nev. Rev. Stat. § 599B.010(11)(d)	Solicitation by newspaper or magazine publishers, or their agents pursuant to a written agreement
N. Dakota	N.D. Cent. Code § 51-18-08(4)	Sales of subscriptions to or advertising in newspapers of general circulation
Oklahoma	15 Okla. Stat. § 775A.2(1)(t)	Persons soliciting sales of newspapers, magazines, or other periodicals of general circulation if such sales constitute a major proportion of such person's business and business revenues
Oregon	Or. Rev. Stat. § 646.551(2)(f)	Persons primarily soliciting sales of subscriptions to or advertising in newspapers of general circulation
Washington	Wash. Rev. Code § 19.158.020(3)(j)	Persons primarily soliciting sales of newspapers of general circulation, magazines or periodicals

Add to these dozen states the 14 that NASUCA implicitly recognizes as having no “do-not-call” laws, NASUCA at 6 (claiming 36 states have “do-not-call” laws), and a majority of states (26 of them) allowed newspapers and other periodicals to freely telemarket their publications before the FCC trumped their laws (or lack thereof) in the *TCPA Rule Review Order*.

The fact that a handful of states may have numerous exemptions, *see* NASUCA Opp. at 7, does not change the fact that a full third of the states that adopted “do-not-call” laws determined that exemptions for newspapers and other publications were necessary and/or appropriate. Though NASUCA claims that in states with multiple exceptions, the newspaper “exemptions ... have little correlation with the relationship [a newspaper has] with its community,” *id.*, there can be no serious doubt that both the focus and distribution of most newspapers in this country are strongly community-based, and that the First Amendment protection accorded newspapers and other publications is significant. As the Supreme Court has noted:

[M]edia corporations differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public. We have consistently recognized the unique role that the press plays in informing and educating the public, offering criticism, and providing a forum for discussion and debate. The press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and a constitutional chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve

Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 667-68 (1990) (quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 781 (1978); *Mills v. Alabama*, 384 U.S. 214 (1966) (internal quotations omitted). Whatever reasons may underlie exemptions granted other industries, nothing in NASUCA’s opposition undermines the fact that the local nature of most

newspapers remains a key reason states granted them the latitude to continue telephone solicitations even where the practice otherwise was reined in somewhat by state law. 6/

CONCLUSION

For the foregoing reasons, the Newspaper Associations respectfully request that the Commission reconsider the *TCPA Rule Review Order* and determine that the telemarketing of newspapers and similar publications is not subject to the new federal telemarketing rules.

Respectfully submitted,

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American Court & Commercial Newspapers
Arizona Newspapers Association
Arkansas Press Association
Association of Alternative Newsweeklies
California Newspaper Publishers Association
Colorado Press Association

New England Newspaper Association
New England Press Association
New Jersey Press Association
New Mexico Press Association
New York Newspaper Publishers Association
New York Press Association
North Carolina Press Association
North Dakota Newspaper Association

6/ It is notable that the record before the FTC, which the FCC necessarily relied upon in adopting new rules that “maximize consistency” with the parallel FTC regulations, *see, e.g., TCPA Rule Review Order*, 18 FCC Rcd at 14033, reflected that 50 percent of consumers supported regulations that would allow local or community-based organizations or businesses, which ostensibly would include their local newspapers, to call during specific hours. *Telemarketing Sales Rule*, 68 Fed. Reg. 4580, 4593 (2003) (citing Michael A. Turner, *Consumers, Citizens, Charity and Content: Attitudes Toward Teleservices* (Information Policy Institute, June 4, 2002)).

Connecticut Daily Newspapers Association
Florida Press Association
Georgia Press Association
Hoosier State Press Association
Idaho Newspaper Association
Illinois Press Association
Iowa Newspaper Association
Kansas Press Association
Kentucky Press Association
Louisiana Press Association
Massachusetts Newspaper Publishers Assn.
Maryland, Delaware and District of Columbia
Press Association
Michigan Press Association
Minnesota Newspaper Association
Mississippi Press Association
Missouri Press Association
Montana Newspaper Association
Nebraska Press Association
Nevada Press Association

Ohio Newspaper Association
Oklahoma Press Association
Oregon Newspaper Publishers Association
Pennsylvania Newspaper Association
Pacific Northwest Newspaper Association
South Carolina Press Association
South Dakota Newspaper Association
Southern Newspaper Publishers Association
Suburban Newspapers of America
Tennessee Press Association
Texas Daily Newspaper Association
Texas Press Association
Utah Press Association
Vermont Press Association
Virginia Press Association
Washington Newspaper Publishers Association
West Virginia Press Association
Wisconsin Newspaper Association
Wyoming Press Association

CERTIFICATE OF SERVICE

I, Ronald G. London, hereby certify that copies of the foregoing Reply to Oppositions to Petition for Reconsideration of the State and Regional Newspaper Associations were served by United States First-Class Mail upon:

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