
THE SEVENTH CIRCUIT HANGS UP ON CHARITABLE RIGHTS

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INTRODUCTION

Telemarketing, to many people, is nothing more than a nuisance and an unwanted intrusion upon home life. Yet for many non-profit charities, it represents the most effective way to inform people of their causes, and to raise money. Recently, in *National Coalition of Prayer v. Carter*, the U.S. Court of Appeals for the Seventh Circuit curtailed the speech that these charities can express.¹ Rather than use the standard of scrutiny outlined by the Supreme Court to deal with regulations on charitable speech, the Seventh Circuit used a balancing test that has not been used since the case which created it was decided thirty-five years ago.² The test, which dealt with a commercial restriction, simply weighed the governmental interest of protecting personal privacy against the free speech rights of the charities.³ In using this test, the Seventh Circuit circumvented what the concurrence calls the “firmly-established narrow tailoring requirement.”⁴ While the

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¹ See *Nat'l Coal. of Prayer, Inc., v. Carter*, 455 F.3d 783 (7th Cir. 2006).

² *Id.*; see *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970).

³ *Rowan*, 397 U.S. at 736-37.

⁴ *Carter*, 455 F.3d at 792 (William, J., concurring).

decision upholding the constitutionality of the statute was not necessarily incorrect, the Seventh Circuit's rationale for so holding was incorrect. The right to free speech is a bedrock principle in our society, and the restraint of it deserves a proper test. This Comment contends that the Seventh Circuit, going against precedent, used the wrong level of scrutiny in its recent decision *Carter*.⁵

Section I of this Comment will describe the facts and rationale behind the majority's opinion in *Carter*, Section II will relate the relevant precedent and case law, Section III will argue the court went against this precedent in its application of the balancing test, Section IV will argue that, even if the court had not misinterpreted precedent, the application of *Rowan* was incorrect given the distinguishing facts between the two cases, finally Section V will argue that by applying *Rowan*, the Seventh Circuit restrained charitable speech without proper analysis.

I. THE FACTS AND REASONING BEHIND THE MAJORITY'S OPINION IN *NATIONAL COALITION OF PRAYER V. CARTER*

On any given day, more than 300,000 operators employed by various telemarketing firms are working to contact over 18 million people.⁶ Telemarketing is undoubtedly a powerful and enormously successful tool, but the majority of the public considers it an irritant.⁷ This public backlash has manifested itself in federal and state laws

⁵ For the test the majority used *see Rowan*, 397 U.S. at 736-37.

⁶ Augusta Meacham, *To Call or Not to Call? An Analysis of Current Charitable Telemarketing Regulations*, 12 COMMLAW CONSPECTUS 61, 61 (2004) (citing Edwin L. Klett & Rochelle L. Brightwell, *Exercise in Free Speech or Just a Pain in the Neck?*, 24 PA. LAW. 38, 38 (2002)).

⁷ Studies show that only .1% of the population likes to receive unsolicited calls and 69% of people find telemarketing offensive. *See* Hilary B. Miller & Robert R. Biggerstaff, *Application of the Telephone Consumer Protection Act to Intrastate Telemarketing Calls and Faxes*, 52 FED. COMM. L.J. 667, 686 (2000) (citations omitted).

directed at stopping what is seen as an intrusion upon the privacy of the home.⁸ The Indiana statute was enacted for this precise reason.⁹

In 2001, Indiana enacted the Indiana Telephone Privacy Act (“the Act”), which established a statewide do-not-call list.¹⁰ The Act

⁸ See, e.g., 15 U.S.C. § 6101-08; N.D. Cent. Code § 51-28 (2006).

⁹ The statute in relevant part states:

A telephone solicitor may not make or cause to be made a telephone sales call to a telephone number if that telephone number appears in the most current quarterly listing published by the division.

Ind. Code § 24-4.7-4-1 (2006). However, the Act does not apply to any of the following:

(1) A telephone call made in response to an express request of the person called.

(2) A telephone call made primarily in connection with an existing debt or contract for which payment or performance has not been completed at the time of the call.

(3) A telephone call made on behalf of a charitable organization that is exempt from federal income taxation under Section 501 of the Internal Revenue Code, but only if all of the following apply:

(A) The telephone call is made by a volunteer or an employee of the charitable organization.

(B) The telephone solicitor who makes the telephone call immediately discloses all of the following information upon making contact with the consumer:

(i) The solicitor's true first and last name.

(ii) The name, address, and telephone number of the charitable organization.

(4) A telephone call made by an individual licensed under Ind. Code 25-34.1 if:

(A) the sale of goods or services is not completed; and

(B) the payment or authorization of payment is not required; until after a face to face sales presentation by the seller.

(5) A telephone call made by an individual licensed under IC 27-1-15.6 or IC 27-1-15.8 when the individual is soliciting an application for insurance or negotiating a policy of insurance on behalf of an insurer (as defined in Ind. Code 27-1-2-3).

(6) A telephone call soliciting the sale of a newspaper of general circulation, but only if the telephone call is made by a volunteer or an employee of the newspaper.

Ind. Code § 24-4.7-1-1 (emphasis added).

allowed residents of Indiana to place their telephone numbers on this list and shield themselves from telephone solicitors.¹¹ Under the Act, commercial telemarketers were completely prohibited from calling any resident who placed their number on the do-not-call list.¹² The Act, however, exempted certain calls, most particularly those placed by charitable organizations exempt from federal income taxation under Section 501 of the Internal Revenue Code.¹³ Organizations falling under this category are exempt provided that the “telephone call is made by a volunteer or an employee of the charitable organization [and] the telephone solicitor who makes the telephone call immediately discloses. . . [his or her] true first and last name [and t]he name, address, and telephone number of the charitable organization.”¹⁴

In January 2002, Indiana commissioned a professional survey to study the Act’s effectiveness.¹⁵ The survey found that calls by telemarketers to numbers registered on the do-not-call list fell from an average of 12.1 per week to 1.9 per week.¹⁶ Additionally, “[n]early 98% of the residents who had registered their telephone numbers reported receiving ‘less’ or ‘much less’ telemarketing interruption since the Act become law.”¹⁷

¹⁰ Nat’l Coal. of Prayer v. Carter, 455 F.3d 783, 785 (7th Cir. 2006).

¹¹ *Id.* “Telephone Solicitor” is defined in the act as: “[A]n individual, a firm, an organization, a partnership, an association, or a corporation. Ind. Code Ann § 24.7-2-10.

¹² Ind. Code § 24-4.7-4-1.

¹³ *Carter*, 455 F.3d at 784. Ind. Code § 24-4.7-4-1(3). “The Indiana Attorney General recognizes an ‘implicit exclusion’ for calls soliciting political contributions. *Carter*, 455 F.3d at 784. Beyond this, the ITPA specifically allows for exceptions to the do-not-call list in two other circumstances: (1) it allows newspapers to solicit sales through telemarketing, as long as the call is made by a volunteer or employee; and (2) the act permits licensed real estate agents or insurance agents to call numbers on the do-not-call list under specified circumstances. Ind. Code § 24-4.7-1-1(6) and 24.7-1-1(4) and (5), *Carter*, 455 F.3d at 784.

¹⁴ *Carter*, 455 F.3d at 784 (quoting Ind. Code § 24-4.7-1-1(3)).

¹⁵ *Id.* at 785.

¹⁶ *Id.*

¹⁷ Nat’l Coal. of Prayer v. Carter, 455 F.3d 783, 785 (7th Cir. 2006).

The effectiveness of the Act has led to an increasing number of Indiana residents registering their numbers.¹⁸ In May of 2003 approximately half of Indiana's residential lines had been registered on the list, and by late 2005 that number had increased by another 500,000.¹⁹

Plaintiffs, all tax-exempt charities, brought suit alleging that the prohibition against using professional telemarketing firms to solicit donations violated their First Amendment rights.²⁰ In cross motions for summary judgment, the district court for the Southern District of Indiana, Indianapolis Division found in favor of the state, and the Plaintiffs appealed to the Seventh Circuit.²¹

On appeal the Plaintiffs argued, among other things, that the regulation was content-based and should be subjected to strict scrutiny under *United States v. Playboy Entertainment Group, Inc.*²² In

¹⁸ *See id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Nat'l Coal. of Prayer v. Carter*, 455 F.3d 783, 787 (7th Cir. 2006); The Plaintiffs' first argument, which is not being discussed in this paper, was that they had standing to challenge the entire act, not only the exemptions which applied to them. This assertion was based on two arguments, (1) that the provisions aimed at commercial speakers showed the "real purpose" of the Act, and (2) commercial speakers may not be treated more favorably than charitable speakers. *Id.* The plaintiffs' contended in the first argument that the exemptions directly injured them because they showed the true motive of the Act, which was to "suppress 'reviled speakers *vis-à-vis* more favored speakers.'" *Id.* (citing *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993)). In *Discovery* the city passed a law regulating newsracks for the supposed purpose of clearing the sidewalks of the numerous newsracks. *Id.* An exemption for non-commercial handbills however, allowed 1,438 of the 1,500 newsracks to remain. *Id.* This exemption was so broad as to render the legislation ineffective, and bore no relationship to the city's asserted interests, the Court therefore struck the statute down. *Id.* The plaintiffs argued that *Discovery* held that "exceptions within an ordinance can show an impermissible 'true reason' behind legislation, and any disfavored plaintiff can request the Act be invalidated on that basis." *Id.* The Court dismissed this argument stating "[t]h case stands for the proposition that commercial speech cannot lightly be singled out as 'less valuable' than other speech, and that restrictions on commercial speech, like

Playboy the U.S. Supreme Court dealt with a federal act aimed at preventing “signal bleed” – when the partial or full portions of audio or video can be seen from scrambled porn channels.²³ The act in question required cable operators to limit the transmission of the signal to hours when children were not likely to be watching.²⁴ Since the restrictions the act placed on the transmission of the channels were based on the type of content those channels transmitted, the Court found the restrictions to be “content based” and subject to strict scrutiny.²⁵

The concurrence argued that it was not a content based regulation, as the Plaintiff urged, because it was a “regulation that serves purposes unrelated to the content of expression . . . even if it has an incidental effect on certain speakers or messages but not others.”²⁶ Similarly, the majority found this argument unconvincing, but did not address why they found the statute not to be content-based, instead they adopted the level of scrutiny the state suggested, which required no such analysis.²⁷

restrictions on ‘core’ First Amendment speech, must directly further a legitimate state interest.” *Nat’l Coal. of Prayer v. Carter*, 455 F.3d 783, 787 (7th Cir. 2006).

The second standing argument was based on the holding in *Broadrick v. Oklahoma*, where the Supreme Court held that a commercial speaker has the standing to assert non-commercial speakers’ rights. 413 U.S. 601, 611 (1973). The plaintiffs argued this case was the converse, where a non-commercial speaker is asserting the rights of a commercial speaker. *Carter*, 455 F.3d at 786. The court, however, rejected this argument and held that commercial speakers have standing to assert the rights of non-commercial speakers because the court presumes that speech accorded greater protection, namely non-commercial speech, will create a stronger case against regulation. *Id.* Since restrictions on commercial speech must meet a lower standard of review, the plaintiffs are not being treated less favorably if they are allowed to challenge the restrictions which must meet a higher standard, those affecting non-commercial speech. *Id.*

²³ *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 806 (2000).

²⁴ *Id.* at 806.

²⁵ *Id.* at 813

²⁶ *Id.* at 798-99 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (William, J., concurring)).

²⁷ *Nat’l Coal. of Prayer v. Carter*, 455 F.3d 783, 787-77 (7th Cir.2006).

The State urged the Seventh Circuit to apply a less traditional level of scrutiny outlined in the thirty-five year-old Supreme Court decision *Rowan v. United States Postal Service*.²⁸ The State's argument, which the court eventually adopted, stated that since Indiana's statute, aimed at protecting residential privacy, allowed residents to "opt-in" by placing themselves on a statewide do-not-call list the only determination the court needed to make was whether the State's interest in protecting residential privacy outweighed "the speaker's right to communicate his or her message into private homes."²⁹

The concurrence, however, was unconvinced by both the Plaintiff and the majority, and argued for a different level of scrutiny outlined in the Supreme Court case *Village of Schaumburg v. Citizens for a Better Environment*³⁰, and the subsequent Supreme Court cases interpreting it.³¹ The Supreme Court in *Schaumburg* held that regulations affecting charitable speech must be narrowly tailored to advance a sufficiently strong governmental interest, without unnecessarily interfering with First Amendment Freedoms.³² *Rowan*, the concurrence argued, must be read not as establishing a stand-alone test which requires a mere balancing of the parties' interests, but rather as only an example of the substantial privacy rights of residents in their homes, and as support that an opt-in statute protecting that right can be narrowly tailored.³³ Further, the concurrence maintained that by employing the *Rowan* balancing test, the majority circumvents the principle of narrow tailoring analysis, and departs from firmly

²⁸ 397 U.S. 728; *Carter*, 455 F.3d at 787.

²⁹ *Carter*, 455 F.3d at 787.

³⁰ 444 U.S. 620 (1980).

³¹ The other cases interpreting *Schaumburg* were *Sec'y of Maryland v. Joseph H. Munson, Co.*, 467 U.S. 947 (1984) and *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988).

³² *Carter*, 455 F.3d at 793 (citing *Schaumburg*, 444 U.S. at 636-37).

³³ *Carter*, 455 F.3d at 794.

established “bedrock constitutional principles pertaining to charitable speech.”³⁴

II. RELEVANT CASE LAW CONCERNING THE FIRST AMENDMENT

A. *Content-Based and Content-Neutral Regulations on Free Speech*

In *Carter*, the plaintiffs argued that the Act is a “content-based regulation because its applicability requires analysis of the content of the message in order to determine to which callers it applies.”³⁵ While the majority rejects this argument with little comment, the concurrence devotes some analysis to it, and indeed finds the question of whether the Indiana Act is a content neutral regulation is a close one.³⁶ It is therefore relevant to briefly discuss the issue of content neutrality.

The Supreme Court has outlined different levels of scrutiny for restrictions on free speech based on the type of speech that is being restrained, or the manner in which the speech is being regulated. One of the distinctions the Supreme Court has drawn is whether the regulation is content-neutral or content-based. In a content-based regulation, the government seeks to restrict speech based on the content of the message³⁷, and is presumptively invalid and subject to strict scrutiny.³⁸

³⁴ *Id.* at 792.

³⁵ Brief of Petitioner-Appellant at 21, *Nat’l Coal. of Prayer v. Carter*, No. 05-3995 (7th Cir. July, 28, 2006).

³⁶ *Carter*, 455 F.3d at 798-99.

³⁷ *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). Examples of content based regulations include, *Boos v. Barry*, 485 U.S. 312, 318-19 (1988) (finding that a statute prohibiting the display of signs critical to foreign governments within 500 feet of that government’s embassy was content-based because “[w]hether individuals may picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign government or not”); *Simon Schuster, Inc., v. N.Y. Crime Victims Bd.*, 502 U.S. 105, 115-16 (1991) (illustrating the presumptive invalidity of content based regulations, the Court found a law that required income earned by a convicted criminal from published works describing his/her crime to be donated to a victim compensation fund was content based

A content neutral speech restriction is one that regulates without reference to the content of the speech.³⁹ Rather, they regulate through time, place, and manner restrictions of the speech at issue. These regulations are not content-based even if they have an incidental effect on the speakers.⁴⁰ The test for content-neutral regulations is intermediate judicial scrutiny, and was outlined by the Court in *United States v. O'Brien*.⁴¹ A content-neutral regulation is justified if it (1) is within the constitutional powers of the government, (2) furthers an important or substantial governmental interest, (3) the government interest is unrelated to the suppression of free speech, and (4) is an incidental restriction on free speech that is no greater than essential.⁴²

B. The Level of Scrutiny Afforded Regulations on Commercial Speech

If, however, the regulation is content-based, it may still be constitutional, and not be strict scrutiny, if it falls into one of the lower

because it imposed a financial burden on speakers because of the content of their speech).

³⁸ Strict scrutiny requires that the government have a compelling government interest, and the statute in question be narrowly tailored to further that interest. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). "If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989). If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative. *Reno v. ACLU*, 521 U.S. 844, 874 (1997) ("[The CDA's Internet indecency provisions] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve"); *Sable Commc'ns, supra*, at 126, ("The Government may ... regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest"). To do otherwise would be to restrict speech without an adequate justification, a course the First Amendment does not permit." *Playboy*, 529 U.S. at 813.

³⁹ *Barry*, 485 U.S. at 320.

⁴⁰ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

⁴¹ 391 U.S. 367 (1968).

⁴² *O'Brien*, 391 U.S. at 377.

valued forms of speech.⁴³ Commercial speech is one such form of speech. At one time, commercial speech had no first amendment protection.⁴⁴ In *Valentine*, the Court held that government cannot “unduly burden” the freedom of speech, yet observed that “[w]e are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.”⁴⁵

This early hesitance to apply first amendment protections to commercial speech is shown in *Rowan*. Indiana’s statute is not the first state or federal statute intended to protect the privacy of the home from unwanted intrusion.⁴⁶ While telemarketing has been the recent target of legislation, other methods of commercial speech were targeted earlier. *Rowan*, the case which the majority in *Carter* relies on for its balancing test, was one of the first cases dealing with this issue. In 1967 Title III of the Postal Revenue and Federal Salary Act allowed householders to insulate themselves from advertisements that were deemed “erotically arousing or sexually provocative.”⁴⁷ Once the householder had sent notice to the Postmaster General requesting the sender of such mailings to stop all future advertisements, the sender was required to delete the address from all mailing lists owned or controlled by the sender.⁴⁸

⁴³ Kerri L. Keller, *The Supreme Court Sends First Amendment Guarantees Up In Smoke By Applying the Commercial Speech Doctrine to Content-Based Regulations*, 36 AKRON L. REV. 133, 140 (2002). Forms of low value speech include fighting words, incitements-to-riot, and obscenity. Kerri L. Keller, *The Supreme Court Sends First Amendment Guarantees Up In Smoke By Applying the Commercial Speech Doctrine to Content-Based Regulations*, 36 AKRON L. REV. 133, 140 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *Whitney v. California*, 274 U.S. 357, 379 (1927) (Brandeis, J. concurring); and *Miller*, 423 U.S. at 26). Forms of high value speech include political, literary, artistic, and scientific speech. *Id.* (citing *Miller v. California*, 413 U.S. 15, 26 (1973).

⁴⁴ *Valentine v. Chrestensen*, 316 U.S. 52, 54-55 (1942).

⁴⁵ *Id.*

⁴⁶ See the federal telemarketing statute 15 U.S.C. § 6101-08; *Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620 (1980)

⁴⁷ *Rowan v. United States Post Office*, 397 U.S. 728, 729-30 (1970).

⁴⁸ *Id.*

As mentioned above, the Court upheld the constitutionality of the statute based on a test which weighed the mailer's right to send against the homeowner's right to prevent unwanted communication from entering the household.⁴⁹ "Weighing the highly important right to communicate. . . against the very basic right to be free from sights, sounds, and tangible matter we do not want, it seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee."⁵⁰

The two major factors in the Court's decision to weigh in favor of the homeowner were the plenary power of the homeowner under the Act, and the affirmative action required by the homeowner. In an opinion that extensively analyzed in depth the legislative history and prior versions of the Act, the Court found that the opt-in nature of the Act effectively permitted "a citizen to erect a wall that no advertiser may penetrate without his acquiescence."⁵¹ This "wall" the homeowner was allowed to erect could essentially block an unlimited amount of commercial mailings from being delivered to the citizen's home.⁵² Because the Act required the homeowner to simply state that, in her subjective viewpoint, the mailings were erotic in nature, the homeowner could conceivably "prohibit the mailing of a dry goods catalog because he objects to the contents."⁵³ This sweeping power, along with the required affirmative action of opting-in by the homeowner, placed the Postmaster General in an acceptable "ministerial" role. The Act did not require the Postmaster General to decide which of the sender's mailings were erotic, but simply carried out the wishes of the homeowner, making it only an enforcing or ministerial role.

The statute at issue in *Rowan* was content based, because it only allowed the homeowner to bar commercial advertisements from entering his mailbox, making the applicability of the statute based

⁴⁹ *Id.* at 737.

⁵⁰ *Id.* at 736-37

⁵¹ *Id.* at 738

⁵² *Id.*

⁵³ *Id.*

upon content of the speakers' message; yet consistent with their case law to date, the Court did not analyze it under strict scrutiny.⁵⁴

Following *Rowan*, a series of cases changed the level of scrutiny applied to restrictions on commercial speech. In *Bigelow v. Virginia*, the Court first recognized that commercial speech is entitled to some first amendment protection.⁵⁵ This protection was defined and extended in subsequent cases⁵⁶, but it was not until the Court decided *Central Hudson Gas & Electric Corp. v. Public Service Commission*⁵⁷ that the current governing test for first amendment challenges to commercial speech was established.⁵⁸

In *Central Hudson*, the Court articulated a four prong test to analyze the constitutionality of a restriction on commercial speech; (1) the commercial speech must concern a lawful activity, and not be misleading, (2) there must be a substantial government interest; (3) the proposed regulation must directly advance the substantial government interest; and (4) the proposed regulation must be no more extensive than necessary to advance the government interest.⁵⁹

Following *Central Hudson*, the court decided *Board of Trustees of State University of New York v. Fox*, and *Cincinnati v.*

⁵⁴ The Court in *Rowan* did not face a content-based argument, and therefore did not address whether the statute was content-based or not, but subsequent cases have found that the statute was content-based. See *S. Suburban Housing Ctr. v. Greater S. Suburban* 935 F.2d 868, 894 (1991).

⁵⁵ See 463 U.S. 60, 64-65 (1983). The *Bigelow* Court balanced the public interest in receiving information against the state's interest in preventing the commercial speech. Kerri L. Keller, *The Supreme Court Sends First Amendment Guarantees Up In Smoke By Applying the Commercial Speech Doctrine to Content-Based Regulations*, 36 AKRON L. REV. 133, 140 (2002) (citing *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975)).

⁵⁶ See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

⁵⁷ 447 U.S. 557, (1980)

⁵⁸ Joshua A. Marcus, *Commercial Speech on the Internet: Spam and the First Amendment*, 16 CARDOZO ARTS & ENT. L.J. 245, 253 (1998).

⁵⁹ *Cent. Hudson Gas and Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

Discovery Network.⁶⁰ In *Fox*, the Court held that a restriction is narrowly tailored within the context of the *Central Hudson* test if there is a reasonable “fit” between the regulation and legislature’s intent.⁶¹ This decision seemed to weaken the narrow tailoring requirement of *Central Hudson*, since it only required a reasonable fit. However, *Discovery Network* emphasized the value of commercial speech under the reasonable fit requirement.⁶² In *Discovery* the city passed a law regulating commercial newsracks with the supposed purpose of clearing the sidewalks of the numerous newsracks.⁶³ Non-commercial newsracks, however, constituted 1,438 of the 1,500 newsracks on the streets.⁶⁴ There was no reasonable fit, since this exemption was so broad as to render the legislation ineffective, and bore no relationship to the city’s asserted interests.⁶⁵

Under current case law, the *Central Hudson* approach is the governing test for all restrictions on commercial speech.⁶⁶ The fourth prong of the *Central Hudson* test is satisfied when there is a reasonable fit, as defined by *Fox* and *Discovery*, between the restriction and the purposed governmental interest behind it.

⁶⁰ 492 U.S. 469 (1989); 507 U.S. 410 (1993).

⁶¹ “What our decisions require is a ‘fit’ between the legislature’s ends, and the means chosen to accomplish those ends,’ a fit that is not necessarily perfect, but reasonable[.]” *Fox*, 492 U.S. at 480 (citing *Posadas v. Tourism Co. of P.R.*, 478 U.S. 328, 341 (1986)).

⁶² “‘In the area of noncommercial speech, content-based restrictions. . . are sustained only in the most extraordinary circumstances. . . By contrast, regulation of commercial speech based upon content is less problematic.’ While that statement remains true today as the continued viability of the *Cent. Hudson* test shows, we cannot say that the difference in value between commercial speech and noncommercial speech is as great as it was before *Discovery Network*.” *Pearson v. Edgar*, 153 F.3d 397, 404-05 (7th Cir. 1998) (quoting *Curtis v. Thompson*, 840 F.3d 1291, 1297-98 (7th Cir. 1988)).

⁶³ *Cincinnati v. Discovery Network*, 507 U.S. 410, 418 (1993).

⁶⁴ *Id.* at 418.

⁶⁵ *Id.* at 424-28.

⁶⁶ *Thompson v. Cent. States Med. Ctr.*, 535 U.S. 357, 367 (2002).

C. The Level of Scrutiny Afforded Restrictions on Charitable Speech

After the Court had extended first amendment protection to commercial speech, the Court faced a series of challenges to laws regulating charitable speech. In a succession of cases upholding the challenges to these restrictions, the Supreme Court defined the method of review for a restriction on charitable speech.⁶⁷ While the Court did not directly face a challenge to the constitutionality of an opt-in regulation on charitable speech directed at protecting privacy within the home, this “trilogy” of cases tackling on other restrictions on charitable speech can be read as establishing the level of scrutiny that must be applied to such restrictions.⁶⁸ It is this trilogy of cases, the concurrence argues, which provides the controlling test for content-neutral restrictions on charitable speech.⁶⁹

1. *Schaumburg v. Citizens for a Better Environment*

The first case to give protection under the first amendment for charitable speech was *Schaumburg v. Citizens for a Better Environment*.⁷⁰ In *Schaumburg* an ordinance requiring any charity soliciting door-to-door or on-street for contributions was required to use at least 75% of their receipts for “charitable purposes”.⁷¹ In an

⁶⁷ See *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620 (1980); *Sec’y of Maryland v. Munson*, 467 U.S. 947 (1984); and *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988).

⁶⁸ Judge Williams refers to these cases as a trilogy in his concurrence in *Carter*, but the name has been used in many other scholarly writings and opinions. See Rita Marie Cain, *Nonprofit Solicitation Under the Telemarketing Sales Rule*, 57 Fed. Comm. L.J. 81, 89 (2004); John T. Haggerty, *Begging and the Public Forum Doctrine in the First Amendment*, 34 B.C. L. REV. 1121, 1132 (1993); Edward J. Schoen, Joseph S. Falchek, *The Do-Not-Call Registry Trumps Commercial Speech*, MICH. ST. L. REV. 483, 524 (2005).

⁶⁹ *Nat’l Coal. of Prayer v. Carter*, 455 F.3d 783, 792-93 (2006) (William, J., concurring).

⁷⁰ 444 U.S. 620 (1980).

⁷¹ *Id.* at 622.

extensive review of relevant precedent the Supreme Court held that charitable solicitations, while open to limitations, are a protected form of speech subject to a higher form of First Amendment protection than that afforded commercial speech.⁷² Charitable solicitations are acknowledged to be commercial in some manner, but protected because they are “characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues[.]”⁷³

The State named two governmental interests behind the statute, the protection of the public from fraud, and from invasion of privacy.⁷⁴ The Court conceded that that these interests were “substantial, “but they are only peripherally promoted by the 75-percent requirement[.]”⁷⁵ In analyzing the regulation’s effectiveness in promoting the prevention of fraud, the Court concentrated on the fact that the regulation held that any organization using more than 25 percent of its proceeds on fundraising, salaries and overhead was not charitable, but commercial, and therefore acted fraudulently in promoting itself as a charity.⁷⁶ This was unconstitutionally overbroad because it neglected to account for organizations that are “primarily engaged in research, advocacy, or public education” and use donated funds to support those causes.⁷⁷ The restriction lumped charities such

⁷² *Id.*; August Meacham, *THE CATHOLIC UNIVERSITY OF AMERICA COMMLAW CONSPECTUS*, 12 *CommLaw Conspectus* 61, 68 (2004). The cases the Supreme Court cited as precedent were *Schneider v. State*, 308 U.S. 147 (1939); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Valentine v. Chrestensen*, 316 U.S.52 (1942); *Jamison v. Texas*, 318 U.S.413 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Martin v. Struthers*, 319 U.S. 141 (1943); *Thomas v. Collins*, 323 U.S. 516 (1945); *Beard v. Alexandria*, 341 U.S. 622 (1951); *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976).

⁷³ *Schaumburg*, 444 U.S. at 632

⁷⁴ *Id.* at 636.

⁷⁵ *Id.* at 636-39

⁷⁶ *Id.* at 636

⁷⁷ *Id.* at 636-37. The government identified the protection of the public from fraud, criminal conduct, and invasions of privacy as the interest to be advanced by the seventy-five percent limitation. Conceding these interests were substantial. The Court decided they were only “peripherally promoted by the [seventy-five percent]

as these together with solicitors which were in fact using the “charitable label as a cloak for profitmaking[.]”⁷⁸ The Court emphasized the importance of narrowly drawing the regulation to serve the legitimate interest: “Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone.”⁷⁹ Additionally, the Court suggested ways in which the Village could have protected against fraud in a manner less intrusive to free speech; enforcing penal laws against fraud or encouraging charitable financial transparency would have protected citizens against fraud and avoided any infringements on charitable free speech.⁸⁰

The interest in protecting residential privacy was also found to be related only indirectly to the regulation, and not narrowly tailored.⁸¹ Those soliciting on behalf of those charities who met the 75-percent requirement would not be less intrusive than those representing charities who did not meet the requirement.⁸² The solicitation would disturb householders, regardless of which type of charity they represented.⁸³ The regulation’s only relation to the protection of privacy is that it would reduce the total number of solicitors the householder would see, but any prohibition on solicitation would have the same effect.⁸⁴

requirement,” and could be “sufficiently served by measures less destructive of First Amendment interests.” In analyzing these interests, the distinction between “funds for the needy” organizations and “advocacy” organizations was instrumental. Concerning the village interest in preventing fraud, the Court observed that the assumption that only those charitable organizations able to meet the seventy-five percent requirement were non-deceitful unnecessarily crimped the ability of advocacy organizations to raise and use donated funds to support research, advocacy and public education activities. Edward J. Schoen, Joseph S. Falchek, *The Do-Not-Call Registry Trumps Commercial Speech*, MICH. ST. L. REV. 483, 509-08 (2005).

⁷⁸ *Schaumburg*, 444 U.S. at 637.

⁷⁹ *Id.* (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

⁸⁰ *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 638 (1980).

⁸¹ *Id.* at 638

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 638.

Schaumburg provides significant protection for charitable speech. On one level it protects charitable solicitation from regulations governing the final use of charitable funds.⁸⁵ More significantly, however, the case creates the level of scrutiny which a content neutral regulation on charitable speech must reach in order to be held constitutional, and protects against broad prophylactic measures. In order for a limitation to stand up to a constitutional challenge, it must serve a sufficiently strong governmental interest, and be narrowly drawn. . . to serve. . . [that] interest without unnecessarily interfering with First Amendment freedoms.”⁸⁶ Finally, as both the concurrence and majority concede, this case holds that charitable speech is a protected form of speech subject to a higher form of First Amendment protection than that afforded commercial speech.⁸⁷

2. *Secretary of Maryland v. Joseph H. Munson, Co.*

Following *Schaumburg*, the Court invalidated a Maryland statute which prohibited charities from paying solicitors more than 25% of the

⁸⁵ *Schaumburg* provides significant protection to charitable organizations and professional fundraisers. Charitable solicitations are deemed protected speech under the First Amendment, and charitable organizations are accorded equal status under the First Amendment whether their purpose is to raise "funds for the needy" or to engage in advocacy of ideas and information dissemination. Further, percentage-based limitations on the ultimate application of charitable donations are considered prophylactic, unconstitutional restrictions on free speech, in the absence of a demonstration that such limitations are narrowly tailored to achieve a compelling government interest. Likewise, criminal prosecutions for fraud or trespass, or communications by potential donors that they do not want to be solicited by charitable organizations, are deemed less intrusive, more tailored means of protecting donors against fraud and invasions of their privacy. Edward J. Schoen, Joseph S. Falchek, *The Do-Not-Call Registry Trumps Commercial Speech*, MICH. ST. L. REV. 483, 510 (2005).

⁸⁶ *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 636-37 (1980). This standard, as the Eighth Circuit notes, is similar to intermediate scrutiny review of a content-neutral regulation. *Fraternal Order of Police v. Stenehjem*, 431 F.3d 591, 597 (8th Cir. 2005).

⁸⁷ *Nat'l Coal. of Prayer v. Carter*, 455 F.3d 773, 791 and at 792 (2006) (William, J., concurring).

amount raised.⁸⁸ Under the statute, charitable organizations were prohibited from soliciting of any kind if they paid as expenses more than 25 percent of the amount raised.⁸⁹ This statute was similar to the one at issue in *Schaumburg* except for the creation of an administrative waiver. The statute permitted the Secretary of State to waive the restriction for a specific charity, if that charity could show that the 25 percent limitation would effectively prevent it from raising contributions.⁹⁰ The primary issue, the Court noted, was whether an administrative waiver based on a charity's demonstration of financial need shows a sufficient narrow tailoring of the statute so as to avoid the outcome of *Schaumburg*.⁹¹ It was not.

Under the statute, the Secretary of State had no discretion to waive the 25 percent threshold except for instances involving financial need.⁹² The waiver was restricted to instances of financial necessity due to the high cost of raising contributions.⁹³ The waiver provision did not provide relief to the charities which were of particular concern to the Court in *Schaumburg*, namely to charitable organizations whose costs exceeded the twenty-five percent threshold out of choice.⁹⁴

⁸⁸ *Sec'y of Maryland v. Joseph H. Munson, Co.*, 467 U.S. 947 (1984).

⁸⁹ *Id.* at 951. The statute in relevant part stated:

(a) A charitable organization other than a charitable salvage organization may not pay or agree to pay as expenses in connection with any fund-raising activity a total amount in excess of 25 percent of the total gross income raised or received by reason of the fund-raising activity. The Secretary of State shall, by rule or regulation in accordance with the 'standard of accounting and fiscal reporting for voluntary health and welfare organizations' provide for the reporting of actual cost, and of the allocation of expenses, of a charitable organization into those which are in connection with a fund-raising activity and those which are not. The Secretary of State shall issue rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund-raising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions.

⁹⁰ *Id.* at 951.

⁹¹ *Id.* at 962.

⁹² *Id.*

⁹³ *Sec'y of Maryland v. Joseph H. Munson, Co.*, 467 U.S. 947, 963 (1984).

⁹⁴ *Id.* at 963.

Charities whose high costs were due to "information dissemination, discussion and advocacy of public issues," were barred from carrying on charitable solicitation activities protected by the First Amendment.⁹⁵

Furthermore, the Court ruled that the statute, like the statute in *Schaumburg*, was too broad and did not accomplish its objective of protecting the public against fraud and invasion of privacy.⁹⁶ By punishing charitable organizations with high fundraising costs, the statute relies on the "mistaken premise that high solicitation costs are an accurate measure of fraud."⁹⁷ The statute may prevent some charities from the fraudulent misdirection of funds away from its purported goals, but this result is "little more than fortuitous."⁹⁸ Equally as possible, is that the statute would restrict First Amendment speech that results in high costs, due to the nature of the charity's mission (such as public education, and advocacy), or restrict speech which results in high costs simply because of the unpopularity of the charity's goals.⁹⁹ Finally, the Court found that the statute completely failed in its promotion of the government's goals; the restriction's percentage limitation does nothing to prevent an organization which wishes to engage in fraudulent behavior from misdirecting funds solicited funds.¹⁰⁰

Munson reiterated the Supreme Court's holding in *Schaumburg*, that charitable solicitation is a protected form of speech and that a restriction on charitable solicitation must serve a sufficiently strong governmental purpose, and must be narrowly tailored to accomplish that purpose without unnecessarily interfering with protected speech.¹⁰¹

⁹⁵ *Id.*

⁹⁶ *Id.* at 966.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Sec'y of Maryland v. Joseph H. Munson, Co.*, 467 U.S. 947, 967 (1984).

¹⁰⁰ *Id.*

¹⁰¹ Edward J. Schoen, Joseph S. Falchek, *The Do-Not-Call Statute Trumps Commercial Speech*, MICH. ST. L. REV. 483, 513 (2005); see Richard Steinberg,

3. *Riley v. National Federation of the Blind of North Carolina, Inc.*

In the final case in the trilogy, the Court dealt with a statute aimed not only at the charities directly, but also at the professional fundraisers they employed.¹⁰² First, the statute prohibited professional fundraisers from retaining an "unreasonable" or "excessive" fee, and defined a "reasonable fee".¹⁰³ Reasonable was defined within the statute as a percentage of gross revenues raised.¹⁰⁴ Fees for professional solicitors which exceeded 35% of the amount raised were presumed unreasonable, and fees below 20% were presumed reasonable.¹⁰⁵ Fees falling between 35% and 20% could be deemed unreasonable, if the state could show that advocacy or dissemination of information was not involved in the professional solicitor's efforts.¹⁰⁶ Second, the statute required professional fundraisers to disclose to potential donors the identity of the charitable organization for whom it worked, and the average percentage of gross receipts actually turned over to charities by the fundraiser for all charitable solicitations conducted in the State within the previous 12 months.¹⁰⁷ Finally, the statute required professional fundraisers to obtain a license before making charitable solicitations.¹⁰⁸ All three restrictions were held to violate the protections of the first amendment.

The Court struck down the first restriction, the reasonable fee provision, because it was, like the restrictions in *Schaumburg* and *Munson*, not narrowly tailored to fulfill the statute's goals of fraud prevention and maximizing the funds which the charity would

Economic Perspectives on Regulation of Charitable Solicitation, 39 CASE W. RES. 775, 777 n.9 (1989).

¹⁰² *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988)

¹⁰³ *Id.* at 784-85.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 786

¹⁰⁸ *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 786 (1988).

receive.¹⁰⁹ Relying heavily on their decisions in *Schaumburg* and *Munson* the Court once again held “that the solicitation of charitable contributions is protected speech[.]”¹¹⁰

As in *Schaumburg* and *Munson*, we are unpersuaded by the State's argument here that its three-tiered, percentage-based definition of "unreasonable" passes constitutional muster. Our prior cases teach that the solicitation of charitable contributions is protected speech, and that using percentages to decide the legality of the fundraiser's fee is not narrowly tailored to the State's interest in preventing fraud.¹¹¹

The statute's three-tiered approach would not logically prevent fraud because there was no connection between the percentage of funds retained by the fundraiser and fundraising fraud.¹¹² A charity might “choose a particular type of fundraising drive, or a particular solicitor, expecting to receive a large sum as measured by total dollars rather than the percentage of dollars remitted.”¹¹³ Or, a charity may wish to sacrifice short-term monetary gains in order to “achieve long-term, collateral, or noncash benefits” such as advocacy or a dissemination of information[.]”¹¹⁴ Beyond this, the statute would cause an unacceptable chill on certain kinds of charitable speech, particularly the dissemination of information and advocacy.¹¹⁵ Requiring professional fundraisers to potentially litigate any time they wished to engage in advocacy or the dissemination of information, and to bear the costs of that litigation, might simply result in either driving professional fundraisers out of North Carolina or discouraging them

¹⁰⁹ *Id.* at 789.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 793.

¹¹³ *Id.* at 791-92.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 794.

from engaging in those types of charitable campaigns.¹¹⁶ Additionally, as with *Schaumburg* and *Munson*, the Court found that the goal of fraud prevention could be accomplished without restricting free speech through the state's already existing antifraud laws.¹¹⁷

The Court struck also struck down the mandatory disclosure of information restriction. Forcing the commercial telemarketers to disclose the percentage of contributions given to the charities for which they work requires the telemarketers to engage in speech which they would not usually engage in, and is therefore a content-based regulation.¹¹⁸ The state's proffered interest behind the regulation was to inform "donors how the money they contribute is spent in order to dispel the alleged misperception that the money they give to professional fundraisers goes in greater-than-actual proportion to benefit charity."¹¹⁹ In the eyes of the Court, however, this was not a sufficiently compelling interest.¹²⁰ The state presumed that charities derive no benefit from money collected but not given to the charity.¹²¹ But this assumption is incorrect because "where the solicitation is

¹¹⁶ "[F]undraisers will be faced with the knowledge that every campaign incurring fees in excess of 35%, and many campaigns with fees between 20% and 35%, will subject them to potential litigation over the "reasonableness" of the fee. And, of course, in every such case the fundraiser must bear the costs of litigation and the risk of a mistaken adverse finding by the factfinder, even if the fundraiser and the charity believe that the fee was in fact fair. This scheme must necessarily chill speech in direct contravention of the First Amendment's dictates. See *Munson, supra*, at 969, 104 S.Ct., at 2853; *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279, 84 S.Ct. 710, 725, 11 L.Ed.2d 686 (1964). This chill and uncertainty might well drive professional fundraisers out of North Carolina, or at least encourage them to cease engaging in certain types of fundraising (such as solicitations combined with the advocacy and dissemination of information) or representing certain charities (primarily small or unpopular ones), all of which will ultimately 'reduc[e] the quantity of expression.'" *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 794 (quoting *Buckley v. Valeo*, 424 U.S. 1, 19, 39, (1976)).

¹¹⁷ *Riley*, 487 U.S. at 795.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 798.

¹²⁰ *Id.*

¹²¹ *Id.*

combined with the advocacy and dissemination of information, the charity reaps a substantial benefit from the act of solicitation itself.”¹²² Moreover, the Court found that less restrictive means which were more narrowly tailored could accomplish the statute’s goals.¹²³ For example, the state could publish the detailed financial data which fundraisers were required to file, or the state could simply enforce its antifraud laws to prohibit telemarketers from making false statements or obtaining money through deceit.¹²⁴

Since this restriction was content-based, the Court analyzed it using strict scrutiny, rather than the test outlined in *Schaumburg*.¹²⁵ However, the Court held that a regulation affecting charitable speech must be analyzed as such, even if it purports to regulate only commercial actors.¹²⁶ Therefore, as in the case here, where a statute is directed only at the commercial telemarketers employed by charities, it necessarily affects charitable solicitation, so it must be subject to the test for fully protected charitable solicitation.¹²⁷

Finally, the court invalidated the third restriction, the licensing requirement. While the state has the power license speech, that power is not unlimited.¹²⁸ The licensing requirement was imposed only on commercial solicitors, who, while their applications were pending, could not engage in charitable solicitation.¹²⁹ States may impose reasonable time, place, or manner restrictions on solicitation through

¹²² *Id.*

¹²³ *Id.* at 800.

¹²⁴ *Id.*

¹²⁵ *Id.* at 798.

¹²⁶ *Id.* at 796 (quoting *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620 632 (1980), quoted in *Sec’y of Maryland v. Joseph H. Munson, Co.*, 467 U.S. 947, 959-960 (1984).

¹²⁷ “Thus, where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression.” *Riley*, 487 U.S. at 796.

¹²⁸ *Id.* at 802.

¹²⁹ *Id.* at 801.

licensing requirements, however, the state must also explicitly state a time limit in which the license application will be decided.¹³⁰ Because the statute in *Riley* had no provision stating a time in which the licensor must either issue the license, or allow the applicant to go to court, the Court found the requirement to be unconstitutional.¹³¹

As concurrence correctly argues, this trilogy of Supreme Court cases clearly states that charitable solicitation, regardless of its commercial undertones, is a protected form of speech, subject to a higher form of scrutiny than purely commercial speech.¹³² Furthermore, these cases outline the level of protection afforded charitable solicitation.¹³³ Specifically, the Court stated:

But even assuming, without deciding, that such speech in the abstract is indeed merely “commercial,” we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech. Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon. This is the teaching of *Schaumburg* and *Munson*, in which we refused to separate the component parts of charitable solicitations from the fully protected whole. Regulation of a solicitation ‘must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech . . . , and for the reality that without solicitation the flow of such information and advocacy would likely cease.’¹³⁴

¹³⁰ *Id.* at 802.

¹³¹ *Id.*

¹³² Nat’l Coal. of Prayer v. Carter, 455 F.3d 783, 792 (2006).

¹³³ Vill. of Schaumburg v. Citizens for a Better Env’t, 444 U.S. 836-37.

¹³⁴ *Riley*, 487 U.S. at 796.

According to these cases, nonprofit solicitation must receive the highest First Amendment protection, requiring any regulation to be narrowly tailored to fulfill a substantial governmental interest.¹³⁵

B. Seventh Circuit Case Law

The Seventh Circuit, while not directly facing an opt-in statute restricting charitable speech, is not without precedent either in how and when it has applied *Rowan*, or in whether the Circuit has required narrow tailoring analysis for other types of restrictions on charitable speech.

First, following *Schaumburg* the Seventh Circuit “uniformly applied the narrow-tailoring requirement to regulations affecting charitable speech.”¹³⁶ In *Gresham v. Peterson*, the Seventh Circuit analyzed a regulation restricting street begging to public places, and prohibiting completely “aggressive” panhandling.¹³⁷ The court found

¹³⁵ *Carter*, F.3d 455 at 792; Rita Marie Cain, *Nonprofit Solicitation Under the Telemarketing Sales Rule*, 57 FED. COMM. L.J. 81, 89 (December, 2004).

¹³⁶ The concurrence, in footnote 1, lists a number of cases with parentheticals in support of this statement, it reads: “*See, e.g., Wis. Action Coal. v. City of Kenosha*, 767 F.2d 1248, 1251-59 (7th Cir. 1985) (noting that the Supreme Court “has also repeatedly stated that a regulation must be narrowly drawn” and applying a narrow-tailoring analysis); *City of Watseka v. Ill. Pub. Action Council*, 796 F.2d 1547, 1552-57 (7th Cir. 1986) (noting that the Supreme Court routinely requires that a time, place, and manner regulation be “narrowly tailored” and applying a four-part test that required consideration of whether the regulation was “narrowly tailored to serve the government objective”); *Nat’l People’s Action v. Vill. of Wilmette*, 914 F.2d 1008, 1012-13 (7th Cir. 1990) (noting that the Supreme Court has reaffirmed “emphatically” that a regulation geared toward protected speech must be narrowly tailored and applying such an analysis); *Gresham v. Peterson*, 225 F.3d 899, 905-06 (7th Cir. 2000) (noting that regulations must be “narrowly tailored to serve a significant government interest” and applying such a test). *Carter*, 455 F.3d at 793.

¹³⁷ The statute at issue in *Gresham* stated:

It shall be unlawful to engage in an act of panhandling in an aggressive manner, including any of the following actions:

- (1) Touching the solicited person without the solicited person's consent.
- (2) Panhandling a person while such person is standing in line and

that charities and street beggars are indistinguishable in terms of first amendment protection of their speech,¹³⁸ and, relying on *Schaumburg*, found the statute to be narrowly tailored to serve a significant government interest.¹³⁹ Additionally, the *Gresham* court recognized that the Supreme Court has held that charitable solicitation receives a higher level of scrutiny than commercial speech, stating:

The Court placed charitable solicitations by organizations in a category of speech close to the heart of the First Amendment, and distinguished it from "purely commercial speech" which is "primarily concerned with providing information about the characteristics and costs of goods and services." *Id.* Commercial speech, on the other hand, has been placed lower in the First Amendment food chain, somewhere between political speech and pornography. It deserves protection, but authorities are more free to regulate commercial speech than core-value speech.¹⁴⁰

"In *Watseka*, using intermediate scrutiny for a content-neutral regulation, the court found the city's ban on door-to-door solicitation during certain parts of the day was not "narrowly tailored to achieve

-
- waiting to be admitted to a commercial establishment;
 - (3) Blocking the path of a person being solicited, or the entrance to any building or vehicle;
 - (4) Following behind, ahead or alongside a person who walks away from the panhandler after being solicited;
 - (5) Using profane or abusive language, either during the solicitation or following a refusal to make a donation, or making any statement, gesture, or other communication which would cause a reasonable person to be fearful or feel compelled; or,
 - (6) Panhandling in a group of two (2) or more persons.

Gresham, 225 F.3d at 901-02.

¹³⁸ *Id.* at 904.

¹³⁹ *Id.* at 905-06.

¹⁴⁰ *Id.* at 904.

Watseka's legitimate objectives."¹⁴¹ Similarly, in *City of Kenosha*, the court, relying on *Schaumburg*, held a time restriction on door-to-door, charitable solicitation to be constitutional because the "restriction [was] narrowly tailored to serve the [protectable and subordinating] interest[.]"¹⁴² Finally, in *Village of Wilmette*, in addressing the constitutionality of a city ordinance requiring door-to-door solicitors to submit fingerprints in order to receive a license to solicit, the court found that Supreme Court has "emphatically" reaffirmed the need for regulations on protected speech to be narrowly tailored.¹⁴³

Not only has the Seventh Circuit consistently applied the narrow tailoring requirement to regulations on charitable speech, but also, the court has never used *Rowan* as a stand-alone balancing test either in the commercial or charitable speech context. "Rather, consistent with Supreme Court jurisprudence, [the Seventh Circuit has] limited [its] application of *Rowan* to the framework of whether the regulation was narrowly tailored (or, relatedly, whether the government had a sufficiently strong interest in protecting residential privacy.)"¹⁴⁴

In *Curtis v. Thompson*, the court upheld an Illinois statute which prohibited real estate agents from soliciting a homeowner to sell or list their property after the homeowner had provided notice that they

¹⁴¹ *City of Watseka v. Ill. Pub. Action Council*, 796 F.2d 1547, 1558 (7th Cir. 1986)

¹⁴² *Wisconsin Action Coalition v. City of Kenosha*, 767 F.2d 1248, 1251-59 (7th Cir. 1985).

¹⁴³ *Nat'l People's Action v. Vill. of Wilmette*, 914 F.2d 1008, 1012 (7th Cir. 1990).

¹⁴⁴ *Nat'l Coal. of Prayer v. Carter*, 455 F.3d 783, 794 (7th Cir. 2006) (William, J., concurring). Again, the concurrence provides ample authority in support of this statement, stating in footnote 5: "See, e.g., *Collin v. Smith*, 578 F.2d 1197, 1202 n.8 (7th Cir. 1978) (citing to *Rowan* for the proposition that the ordinances at issue were not "appropriately narrow ordinances"); *Curtis v. Thompson*, 840 F.2d 1291, 1301-02 (7th Cir. 1988) (applying *Rowan* to a narrow-tailoring analysis pertaining to a commercial speech ordinance); *S. Suburban Housing Ctr. v. Greater S. Suburban Bd. of Realtors*, 935 F.2d 868, 892-94 (7th Cir. 1991) (same); *Pearson v. Edgar*, 153 F.3d 397, 403-05 (7th Cir. 1998) (same)." *Carter*, 455 F.3d at 794 (William J., concurring).

have no desire to sell.¹⁴⁵ The statute, like the statute at issue in *Rowan* required an affirmative act by the homeowner, in the form of providing notice, in order to receive the protection under the statute.¹⁴⁶ The purpose behind the statute was two-fold, first it was intended to prevent blockbusting¹⁴⁷, and second it was to protect residential privacy.¹⁴⁸ Proceeding under the *Central Hudson* framework, the court found the statute did not violate the free speech rights of the plaintiffs.¹⁴⁹ The *Curtis* court relied heavily on *Rowan* in its narrow tailoring analysis, and found it to be a “case almost directly on point”.¹⁵⁰

In *South-Suburban Housing Center v. Greater South Suburban Board of Realtors* the court again dealt with a restriction on the solicitation of real estate listings.¹⁵¹ The municipal ordinance at issue, which was similar to the one in *Curtis*, prohibited any person from soliciting an owner of a dwelling to sell, rent, or list the dwelling any time after the owner had notified the city clerk of their desire not to be solicited.¹⁵² The clerk was to maintain a list of owners wishing not to be solicited and furnish a copy of the list to real estate firms belonging to the local multiple-listing service.¹⁵³ Like in *Curtis*, the court

¹⁴⁵ *Curtis v. Thompson*, 840 F.2d 1291, 1293 (1988).

¹⁴⁶ *Id.* at 1294.

¹⁴⁷ Blockbusting is when a real estate agent attempts to persuade white owners to see their home by stating that property prices will lower because people of color are moving or have moved into the neighborhood.

¹⁴⁸ *Curtis*, 840 F.2d at 1293.

¹⁴⁹ *Id.* at 1299-1305.

¹⁵⁰ *Id.* at 1301. The *Rowan* analysis in *Curtis* did not receive a majority vote, but as the court in *Pearson v. Edgar*, discussed *infra*, states:

Our *Rowan* analysis in *Curtis* did not garner a majority of votes. However, we reaffirmed the *Rowan* analysis in *S. Suburban* by a unanimous vote, so we will treat the *Rowan* analysis as if it were established by a majority in *Curtis*.

Pearson v. Edgar, 153 F.3d 397, 404 (7th Cir. 1997).

¹⁵¹ *S. Suburban Housing Ctr. v. Greater S. Suburban Bd. of Realtors*, 935 F.3d 868, 874 (7th Cir. 1991).

¹⁵² *Id.* at 874-75.

¹⁵³ *Id.*

analyzed the restriction under *Central Hudson*, and, in its narrow tailoring analysis, relied heavily on *Rowan* as an example of a narrowly tailored statute, and as evidence of the Court's high regard for the protection of residential privacy.¹⁵⁴ Particularly, the court stated that "we are convinced that the ordinances at issue here and the statute in *Rowan* are materially indistinguishable for First Amendment purposes."¹⁵⁵ The court states:

Both in *Rowan* and instant case it is the householder who is required to take the initiative in determining that he does not wish to receive the material. The *Rowan* Court's broad explanation of a householder's right to exclude unwanted mail fails to eliminate the similarity between the content-specific statute in *Rowan* and the content-specific ordinances at issue here. The . . . distinction between *Rowan* allowing "a resident to insulate himself from a particular mailer" and the authority granted in the ordinances to "exclude an entire class of mailers based upon occupation and content," is immaterial.¹⁵⁶

Despite this similarity, however, the court does not apply the *Rowan* balancing test, but once again cites to *Rowan* only in to support its analysis under *Central Hudson*.¹⁵⁷

In *Pearson v. Edgar* the statute at issue in *Curtis* was revisited, this time with the newly decided Supreme Court case *Discovery* as a guiding factor in analyzing the last two prongs of the *Central Hudson* test.¹⁵⁸ Even though the act required an affirmative act by the

¹⁵⁴ *Id.* at 890-94.

¹⁵⁵ *Id.* at 893

¹⁵⁶ *Id.* at 894.

¹⁵⁷ *Id.* at 890-94

¹⁵⁸ *Discovery* was the Supreme Court case which gave more protection to commercial speakers under the *Cent. Hudson* test. The Seventh Circuit recounted the history of *Pearson v. Edgar* at the beginning of the opinion, that synopsis states:

homeowner as a predicate to receiving protection under the statute, the court again refused to apply the *Rowan* balancing test.¹⁵⁹ Using *Rowan* only as an example of a narrowly tailored statute, the Court found this restriction on commercial speech violated the First Amendment because it was not narrowly tailored to fit the legitimate governmental interests.¹⁶⁰ Perhaps most significantly, the *Pearson* court held that its

The plaintiffs moved for a preliminary injunction to halt application of the statute during litigation. The district court found that the complaint failed to state a claim under the First Amendment and that the plaintiffs had no likelihood of success on the merits; the district court therefore denied the motion for a preliminary injunction. Only plaintiff Curtis pursued an interlocutory appeal. We affirmed the district court's denial of the preliminary injunction and remanded the case for further proceedings in an opinion that became the key to this long running saga. See *Curtis v. Thompson*, 840 F.2d 1291 (7th Cir. 1988).

The district court read our opinion in *Curtis* to preclude any chance of success for any of the plaintiffs and to establish the law of the case, and the district court dismissed the case in its entirety. See *Pearson v. Thompson*, 1989 U.S. Dist. LEXIS 8970, No. 86 C 2181, 1989 WL 88367 (N.D. Ill. July 26, 1989). All the plaintiffs then appealed, and we affirmed on law of the case grounds. See *Pearson v. Thompson*, 1992 U.S. App. LEXIS 1814, No. 89-3248, 1992 WL 25349 (7th Cir. Feb. 13, 1992), vacated, *Pearson v. Edgar*, 507 U.S. 1015, 123 L. Ed. 2d 441, 113 S. Ct. 1809 (1993).

The plaintiffs petitioned for a writ of certiorari. The Supreme Court granted the writ, vacated our second opinion, and remanded the case to us “for further consideration in light of *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 123 L. Ed. 2d 99, 113 S. Ct. 1505 (1993).” *Pearson v. Edgar*, 507 U.S. 1015, 123 L. Ed. 2d 441, 113 S. Ct. 1809 (1993). We, in turn, remanded the case to the district court “for consideration of the impact of *Cincinnati v. Discovery Network* The district court should conduct an evidentiary hearing to allow the parties to create the appropriate record for determining the constitutionality of Ill. Rev. Stat. ch. 38 70-51(d) under the new standards set out by *Discovery Network*.” *Pearson v. Edgar*, 1993 U.S. App. LEXIS 21600, 1993 WL 315601 (7th Cir. Aug. 12, 1993). 153 F.3d 397, 400.

Pearson v. Edgar, 153 F.3d 397, 400 (7th Cir. 1998).

¹⁵⁹ *Nat'l Coal. of Prayer v. Carter*, 455 F.3d 783, 795 (7th Cir. 2006).

¹⁶⁰ *Pearson*, 153 F.3d at 404.

reliance on *Rowan* in its narrow tailoring analysis under *Central Hudson* in its previous cases, *Curtis* and *South Suburban Housing Center*, was weakened by *Discovery*'s emphasis on reasonable fit.¹⁶¹ *Pearson* then holds that, within the context of narrow tailoring analysis, *Rowan* is not as relevant as it was before *Discovery*.

*C. The Fourth, Eighth and Tenth Circuits' Holdings
on Charitable Speech Restrictions*

The Seventh Circuit stands alone in its current interpretation of *Rowan*. Other circuits which have faced similar challenges to commercial and charitable telemarketing restrictions have all read *Schaumburg*, *Riley*, and *Munson* to require a narrow tailoring analysis.

In *National Federation of the Blind v. F.T.C.*, the Fourth Circuit faced a challenge by nonprofit groups to the Federal Trade Commission's regulation prohibiting calls to numbers on an opt-in do-not-call list.¹⁶² Like the Indiana statute in *Carter*, the regulation completely prohibited calls by charities using professional telemarketers, but not those charities using volunteers or in-house employees.¹⁶³ The regulation, the Telemarketing Sales Rule, created a charity specific do-not-call list, which prohibited calls by charities using professional telemarketers from calling homes which had previously asked not to be called by that specific charity.¹⁶⁴ However, those charities using volunteers or in-house employees were exempt from the act and its restrictions.¹⁶⁵ The Fourth Circuit upheld the restriction, based on a governing test stemming from *Schaumburg*, *Munson*, and *Riley*.¹⁶⁶ Under this test, in order for a regulation to withstand a constitutional attack, it must "(1) 'serve a sufficiently strong, subordinating interest that the [government] is entitled to

¹⁶¹ *Id.*

¹⁶² 420 F.3d 331, 334 (4th Cir. 2005).

¹⁶³ *Id.* at 335.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 336.

¹⁶⁶ *Id.* at 338.

protect’ and (2) [be] narrowly drawn. . . to serve the interest without unnecessarily interfering with the First Amendment freedoms.”¹⁶⁷

The Fourth Circuit relied upon *Rowan*, but only to show that the protection of household privacy is a sufficiently strong governmental interest, and that the FTC’s regulation was narrowly tailored because it was opt-in.¹⁶⁸ According to the court:

The parallels between the law at issue in *Rowan* and the do-not-call list in this case are unmistakable. If consumers are constitutionally permitted to opt out of receiving mail which can be discarded or ignored, then surely they are permitted to opt out of receiving phone calls that are more likely to disturb their peace. In this way, a do-not-call list is more narrowly tailored to protecting privacy than was the law in *Rowan*.¹⁶⁹

Similarly, in *Mainstream Marketing Services, Inc. v. F.T.C.* the Tenth Circuit faced a challenge to the same Federal Trade Commission’s regulations, but this case dealt with the restrictions imposed on commercial telemarketers.¹⁷⁰ Like the restrictions on commercial telemarketers in the Indiana Act at issue in *Carter*, the federal Act prohibited commercial telemarketers from calling numbers that had been placed on the national do-not-call registry.¹⁷¹ Since it was a challenge on commercial restrictions, the court applied *Central Hudson*.¹⁷² Again, the Tenth Circuit relied on *Rowan*, and extensively analyzed the decision, but only “within the context of considering

¹⁶⁷ *Carter*, 455 F.3d at 797 (Williams, J., concurring) (quoting *Nat’l Fed’n of the Blind v. F.T.C.*, 420 F.3d 331, 338 (4th Cir. 2005) (citing *Sec’y of Maryland v. Joseph H. Munson, Co.*, 467 U.S. 947, 960-61 (1984) (quoting *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 636-37 (1980))).

¹⁶⁸ *Carter*, 455 F.3d at 798; *Nat’l Fed’n of the Blind*, 420 F.3d at 342.

¹⁶⁹ *Carter*, 455 F.3d at 798 (Williams, J., concurring) (emphasis excluded) (citing *Nat’l Fed’n of the Blind*, 420 F.3d at 342).

¹⁷⁰ (“*Mainstream Marketing IP*”), 358 F.3d 1228, 1234 (10th Cir. 2004).

¹⁷¹ *Id.*

¹⁷² *Id.* at 1236.

whether the federal do-not-call list was narrowly tailored.”¹⁷³ The court found *Rowan*’s opt-in feature as strong evidence that the federal statute was narrowly tailored, specifically the court stated:

Like the do-not-mail regulation approved in *Rowan*, the national do-not-call registry does not itself prohibit any speech. Instead, it merely “permits a citizen to erect a wall. . . that no advertiser may penetrate without his acquiescence.” *See Rowan* 397 U.S. at 738, 90 S.Ct. 1484. almost by definition, the do-not-call regulations block calls that would constitute unwanted intrusions into the privacy of consumers who have signed up for the list. Moreover, it allows consumers who feel susceptible to telephone fraud or abuse to ensure that most commercial callers will not have an opportunity to victimize them. Under the circumstances we address in this case, we conclude that the do-not-call registry’s opt-in feature renders it a *narrowly tailored* commercial speech regulation.¹⁷⁴

Perhaps most significantly, in a “precursor case to *Mainstream Marketing II*, the Tenth Circuit cited to [The Seventh Circuit] decision in *Pearson*, noting that ‘[o]ther courts have relied on *Rowan*’s analysis in finding that similar mechanisms of private choice in solicitation restrictions weigh in favor of finding a ‘reasonable fit[,]’ and held that ‘*Rowan* demonstrates that the element of private choice in an opt-in feature is relevant for purposes of analyzing ‘reasonable fit’”¹⁷⁵.

Finally, in *Fraternal Order of Police v. Stenehjem*, the Eighth Circuit confronted a North Dakota statute remarkably like the Indiana

¹⁷³ *Carter*, 455 F.3d at 795 (Williams, J., concurring) (citing *see Mainstream Marketing II*, 358 F.3d at 1243-44).

¹⁷⁴ *Mainstream Marketing II*, 358 F.3d at 1244-45.

¹⁷⁵ *Carter*, 455 F.3d at 795-96 (William, J., concurring) (citing *F.T.C. v. Mainstream Marketing, Inc.* (“*Mainstream Marketing I*”), 345 F.3d 850, 856 (10th Cir. 2003) (citing *Anderson v. Treadwell*, 294 F.3d 453, 462-63 (2d Cir. 2002); *Pearson v. Edgar*, 153 F.3d 397, 400, 404 (7th Cir. 1998))).

statute at issue in *Carter*. Using the test outlined in *Schaumburg*, the court upheld a restriction on charitable phone solicitation.¹⁷⁶ The North Dakota statute prohibited charitable solicitation by professional telemarketers, but granted an exemption for calls made by volunteers or in-house employees.¹⁷⁷ Again, after finding the statute content

¹⁷⁶ *Fraternal Order of Police v. Stenehjem*, 431 F.3d 591 (8th Cir. 2005).

¹⁷⁷ *Id.*; *Carter*, 455 F.3d at 797. The North Dakota Statute in relevant part states:

In this chapter, unless the context or subject matter otherwise requires, the terms shall have the meanings as follows:

1. "Automatic dialing-announcing device" means a device that selects and dials telephone numbers and that, working alone or in conjunction with other equipment, disseminates a prerecorded or synthesized voice message to the telephone number called.
2. "Caller" means a person, corporation, firm, partnership, association, or legal or commercial entity that attempts to contact, or that contacts, a subscriber in this state by using a telephone or a telephone line.
3. "Caller identification service" means a telephone service that permits telephone subscribers to see the telephone number of incoming telephone calls.
4. "Established business relationship" means a relationship between a seller and consumer based on a free trial newspaper subscription or on the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the twenty-four months immediately preceding the date of a telemarketing call.
5. "Message" means any telephone call, regardless of its content.
6. "Subscriber" means a person who has subscribed to residential telephone services from a telephone company or the other persons living or residing with the subscribing person, or a person who has subscribed to wireless or mobile telephone services.
7. "Telephone solicitation" means any voice communication over a telephone line for the purpose of encouraging charitable contributions, or the purchase or rental of, or investment in, property, goods, services, or merchandise, including as defined in subsection 3 of section 51-15-03, whether the communication is made by a live operator, through the use of an automatic dialing-announcing device, or by other means. Telephone solicitation does not include communications:
 - a. To any subscriber with that subscriber's prior express written

neutral based on *Ward*, the Eighth Circuit found that “the appropriate [test] for regulation of professional charitable solicitation is derived from [*Schaumburg*].”¹⁷⁸ Citing previous Eighth Circuit precedent, the court explained that *Schaumburg* required an inquiry into: “(a) whether the State had a sufficient or ‘legitimate’ interest; (b) whether the interest identified was ‘significantly furthered’ by a narrowly

request, consent, invitation, or permission.

b. By or on behalf of any person with whom the subscriber has an established personal or business relationship.

c. By or on behalf of a charitable organization that is exempt from federal income taxation under section 501 of the Internal Revenue Code, but only if the following applies:

(1) The telephone call is made by a volunteer or employee of the charitable organization; and

(2) The person who makes the telephone call immediately discloses the following information upon making contact with the consumer:

(a) The person's true first and last name; and

(b) The name, address, and telephone number of the charitable organization.

d. By or on behalf of any person whose exclusive purpose is to poll or solicit the expression of ideas, opinions, or votes, unless the communication is made through an automatic dialing-announcing device in a manner prohibited by section 51-28-02.

e. By the individual soliciting without the intent to complete, and who does not in fact complete, the sales presentation during the call, but who will complete the sales presentation at a later face-to-face meeting between the individual solicitor or person who makes the initial call and the prospective purchaser.

f. By or on behalf of a political party, candidate, or other group with a political purpose, as defined in section 16.1-08.1-01.

N.D. CENT. CODE § 51-28-01 (year). The North Dakota Act also makes the following prohibitions:

A caller may not make or cause to be made any telephone solicitation to the telephone line of any subscriber in this state who, for at least thirty-one days before the date the call is made, has been on the do-not-call list established and maintained or used by the attorney general under section 51-28-09 or the national do-not-call registry established and maintained by the federal trade commission under title 16, Code of Federal Regulations, part 310.

N.D. CENT. CODE § 51-28-06 (emphasis added).

¹⁷⁸ *Stenehjem*, 431 F.3d at 597

tailored regulation; and (c) whether the regulation substantially limited charitable solicitations.¹⁷⁹ Following in the steps of the Fourth and Tenth Circuits, the Eighth Circuit cited *Rowan* extensively, but again, only in an effort to establish the legitimate interest of the State in protecting residential privacy, and that the opt-in nature of the statute made the statute narrowly tailored.¹⁸⁰

III. THE MAJORITY MISINTERPRETS CASE LAW BY RELYING ON *ROWAN*

It was against this backdrop of Supreme Court precedent and subsequent Circuit Court interpretations that the Seventh Circuit decided *Carter*. Rather than apply the scrutiny for charitable restrictions outlined in *Schaumburg*, the Court relies on the balancing test of *Rowan*. This was the incorrect decision because, to begin with, *Rowan* dealt with a commercial restriction, and precedent clearly shows that commercial and charitable speech are subject to different levels of scrutiny. Additionally, the court, in coming to their decision, misread, or in some cases ignored, Supreme Court and Seventh Circuit authority, as well as the persuasive holdings of its sister courts.

A. *Rowan Deals With A Regulation on Commercial Speech, Not Charitable Speech*

As a primary issue, *Rowan* did not deal with charitable solicitation. *Rowan* prohibited the sending of *commercial* mailings. This, as the concurrence correctly states, is a significant difference given the fact that both the Supreme Court and the Seventh Circuit have held that restrictions on charitable speech receive greater protection than restrictions on commercial speech.¹⁸¹ Speech aimed at soliciting funds can be divided into two categories. Commercial solicitation, whose expression is related solely to the economic interest

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Nat'l Coal. of Prayer v. Carter, 455 F.3d 783, 793 (7th Cir. 2006); Gresham v. Peterson, 225 F.3d 899, 904 (7th Cir. 2000).

of the speaker¹⁸², and charitable solicitation, which has, as one of its goals economic benefit, but which is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues. These two categories have separate levels of scrutiny, neither of which is the *Rowan* balancing test.

As explained *supra*, the test which should be used for restrictions on charitable solicitation is the one outlined in *Schaumburg*, and *Central Hudson*, decided ten years after *Rowan*, formulated the test which governs commercial restrictions.¹⁸³ As the concurrence correctly points out, the *Central Hudson* test is similar to the *Schaumburg* test, yet charitable solicitations receive heightened scrutiny and, “unlike commercial regulations, are presumptively invalid if they are not content neutral.”¹⁸⁴ “[W]hatever *Rowan* has to say regarding the test applicable to First Amendment challenges involving commercial speech must be filtered through subsequent Supreme Court authority. . . [the *Rowan*] test is no longer the controlling law even in the commercial speech arena, much less in the more highly protected charitable speech context.”¹⁸⁵ Thus, even in the context of regulations on commercial speech, *Rowan* is not the controlling test.

Not only did the Seventh Circuit misapply an invalid commercial test to a restriction on charitable speech, but also, by ignoring the difference between commercial speech and charitable speech, the majority has effectively stripped the plaintiffs of their right to have their case analyzed under the heightened level of scrutiny afforded charitable speech.

¹⁸² *Cent. Hudson Gas and Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980).

¹⁸³ 447 U.S. 557.

¹⁸⁴ *Carter*, 455 F.3d at 794 n.3 (citing *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 636-37 (1980); *Gresham*, 225 F.3d at 904; *Stenehjem*, 431 F.3d 59).

¹⁸⁵ *Carter*, 455 f.3d 783, 794 (see *Cent. Hudson*, 447 U.S. at 565) (William, J., concurring).

B. The Majority Ignores Supreme Court Precedent

Rowan has not become obsolete, in fact, as the majority correctly states, it has never been explicitly overruled by the Supreme Court.¹⁸⁶ It has been cited frequently by both the Supreme Court and Seventh Circuit, but, as the majority concedes, only in support of the state's great interest in protecting residential privacy, or in narrow tailoring analysis.¹⁸⁷ In order to apply *Rowan* in the manner it did, the court had misinterpret Supreme Court precedent.

As explained above, *Schaumburg* undoubtedly held that charitable solicitation is under the protection of the first amendment. "Charitable solicitations. . . are within the protections of the First Amendment."¹⁸⁸ Further, the Court in *Schaumburg* was well aware of the *Rowan* case, and cited to it, but not in support of a balancing test.¹⁸⁹ Instead, the Court cited to *Rowan* during its narrow tailoring analysis, as an example of less intrusive methods of protecting residential privacy than through the state's method at issue in *Schaumburg*.¹⁹⁰ The *Schaumburg* test was solidified as the governing test for regulations affecting charitable solicitation by the following cases *Munson* and *Riley*. In both these cases the Court faced challenges to regulations on charitable solicitation, and while the state interests behind the regulations were legitimate, they failed because

¹⁸⁶ *Carter*, 455 F.3d at 789.

¹⁸⁷ *Id.*

¹⁸⁸ *Schaumburg*, 444 U.S. at 633 (1980); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 789 (1988) (applying the test outlined in *Schaumburg* and stating "Our prior cases teach that the solicitation of charitable contributions is protected speech").

¹⁸⁹ *Schaumburg*, 444 U.S. at 639.

¹⁹⁰ Specifically, the Court stated: "Other provisions of the ordinance, which are not challenged here, such as the provision permitting homeowners to bar solicitors from their property by posting signs reading 'No Solicitors or Peddlers Invited.' § 22-24, suggest the availability of less intrusive and more effective measures to protect privacy." *Schaumburg*, 444 U.S. at 633 (citing *Rowan v. Post Office Dep't.*, 397 U.S. 728 (1970)).

they were not narrowly tailored.¹⁹¹ Under *Rowan*, narrow tailoring analysis is not required, but in its narrow tailoring analyses in subsequent cases the Court has cited to *Rowan* frequently.¹⁹² In fact, the Supreme Court has never used *Rowan* in support of a stand-alone balancing test, but has limited *Rowan*'s application to either "establish[ing] the significance of residential privacy interests and/or to address the narrow tailoring or least restrictive means requirements."¹⁹³

The majority dismisses the concurrence's argument that Supreme Court precedent, specifically *Schaumburg*, establishes the test for restrictions on charitable solicitation by stating that in *Schaumburg*:

[T]he Court evaluated an ordinance that would forbid certain charities from soliciting door-to-door *or in public streets*. The Court specifically noted that the statute was

¹⁹¹ See *Sec'y of Maryland v. Joseph H. Munson, Co.*, 467 U.S. 947, 966-67 (1984) and *Riley*, 487 U.S. at 788-803.

¹⁹² In footnote 4, the concurrence cites examples of the Supreme Court using *Rowan* only in narrow tailoring analysis or in support of the state's legitimate purpose in protecting residential privacy:

See, e.g., Vill. of Schaumburg, 444 U.S. at 639 (noting the interest in residential privacy and citing *Rowan* within a narrow-tailoring analysis); *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 542 n.11, 100 S. Ct. 2326, 65 L. Ed. 2d 319 (1980) (same); *Carey v. Brown*, 447 U.S. 455, 471, 100 S. Ct. 2286, 65 L. Ed. 2d 263 (1980) (citing *Rowan* to establish the substantial interest in residential privacy); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 72, 77-78, 103 S. Ct. 2875, 77 L. Ed. 2d 469(1983) (same); *Frisby v. Schultz*, 487 U.S. 474, 482-85, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988) (same); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 814-15, 120 S. Ct. 1878, 146 L. Ed. 2d 865(2000) (citing *Rowan* within a least-restrictive-means analysis); *Hill v. Colorado*, 530 U.S. 703, 717-18, 720, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000) (citing *Rowan* within the context of a narrow-tailoring analysis).

Carter, 455 F.3d at 794 n.4.

¹⁹³ *Id.* at 794.

“not directed to the unique privacy interests of persons residing in their homes because it applies not only to door-to-door solicitation, but also to solicitation on public streets and public ways.”¹⁹⁴

This argument, however, fails because the quote the majority used in support of its dismissal of *Schaumburg* discussed whether the restrictions were narrowly tailored. In *Schaumburg* the Court stated that the 75% requirement was not narrowly tailored because it was related to the protection of privacy “in only the most indirect of ways.”¹⁹⁵ The restrictions imposed by the statute were only peripherally aimed at protecting privacy, since “householders are equally disturbed by solicitation on behalf of organizations satisfying the 75% requirement as they are by solicitation on behalf of other organizations”, and because it is directed at both door-to-door solicitation and solicitation on public streets.¹⁹⁶ *Schaumburg* distinguished *Rowan* only to illustrate a statute which *is* narrowly tailored to protect residential privacy, not in an effort to establish the validity of the *Rowan* balancing test.

C. *The Majority in Carter Ignores Seventh Circuit Precedent*

The majority in *Carter* similarly ignores Seventh Circuit precedent. Following *Schaumburg* the Seventh Circuit “uniformly applied the narrow-tailoring requirement to regulations affecting charitable speech.”¹⁹⁷ However, in the opinion the court does not even address *Gresham*, *Watseka*, *City of Kenosha*, or *Village of Wilmette*, all Seventh Circuit cases dealing with various restrictions on charitable speech, and all requiring narrow tailoring analysis.¹⁹⁸ Presumably, the court rejects these cases for the same reason it rejected the Supreme

¹⁹⁴ *Id.* at 789 (quoting *Schaumburg*, 444 U.S. at 638-39).

¹⁹⁵ *Schaumburg*, 444 U.S. at 638.

¹⁹⁶ *Id.*

¹⁹⁷ *Carter*, 455 F.3d at 793.

¹⁹⁸ The facts and holdings of these cases are recounted *supra*.

Court's decision in *Schaumburg*, namely that the court has not been presented with an "opt-in statute that applies only to private residences in a manner that effectively protects residential privacy."¹⁹⁹ Since the majority does not address these cases, it is difficult to guess exactly why they dismissed previous Seventh Circuit cases, however, the argument for dismissing *Schaumburg* fails for the same reason outlined *supra*.

Beyond Seventh Circuit precedent concerning charitable restrictions, the majority also dismisses the Seventh Circuit case law concerning opt-in commercial restrictions, a situation where it has consistently applied the narrow tailoring requirement.²⁰⁰ In fact, when dealing with a commercial restriction, the court has never used *Rowan* as a stand-alone balancing test. "Rather, consistent with Supreme Court jurisprudence, [the Seventh Circuit has] limited [its] application of *Rowan* to the framework of whether the regulation was narrowly tailored (or, relatedly, whether the government had a sufficiently strong interest in protecting residential privacy.)"²⁰¹

For challenges to commercial speech restrictions, the Seventh Circuit has continually held that *Rowan* is indeed relevant, but only within the framework of the subsequent test laid out by the Supreme Court in *Central Hudson*. In *Curtis*, *Rowan* was "almost directly on point"²⁰², and in *South Suburban Housing Center*, the statute at issue and the statute in *Rowan* were "materially indistinguishable for First

¹⁹⁹ *Carter*, 455 F.3d at 789.

²⁰⁰ See the Seventh Circuit history *supra*.

²⁰¹ *Carter*, 455 F.3d at 794. Again, the concurrence provides ample authority in support of this statement, stating in footnote 5:

See, e.g., Collin v. Smith, 578 F.2d 1197, 1202 n.8 (7th Cir. 1978) (citing to *Rowan* for the proposition that the ordinances at issue were not "appropriately narrow ordinances"); *Curtis v. Thompson*, 840 F.2d 1291, 1301-02 (7th Cir. 1988) (applying *Rowan* to a narrow-tailoring analysis pertaining to a commercial speech ordinance); *S. Suburban Housing Ctr. v. Greater S. Suburban Bd. of Realtors*, 935 F.2d 868, 892-94 (7th Cir. 1991) (same); *Pearson v. Edgar*, 153 F.3d 397, 403-05 (7th Cir. 1998) (same).

Carter, 455 F.3d at 794 n. 5.

²⁰² *Curtis v. Thompson*, 935 F.2d 1291, 1300-01 (7th Cir. 1988).

Amendment purposes”²⁰³, but in both cases the court not only refused to use the *Rowan* balancing test, but cited to *Rowan* frequently only as support for its analysis under the *Central Hudson* test. Additionally, in *Pearson*, the Seventh Circuit declared its reliance on *Rowan* in its narrow tailoring analysis and discussion of legitimate state interests “weakened” by the subsequent Supreme Court case *Discovery*.²⁰⁴

In a footnote, the majority dismisses the argument that *Pearson* rejected the *Rowan* framework.²⁰⁵ The majority noted that *Pearson* distinguished the statute at issue from the statute in *Rowan*.²⁰⁶ *Rowan*, was not completely analogous to *Pearson*, the majority argues, because in *Pearson* the homeowner could not “ban any bothersome solicitation but only real estate solicitation”, whereas in *Rowan*, the homeowner “could prevent any material from entering his home[.]”²⁰⁷

²⁰³ *S. Suburban Housing Ctr. v. Greater S. Suburban* 935 F.2d 868, 893 (1991).

²⁰⁴ *Pearson v. Edgar*, 153 F.3d 397, 404.

²⁰⁵ The footnote stated:

In that case [*Pearson*], the statute in question forbade real estate agents from "solicit[ing] an owner of residential property to sell or list such residential property at any time after such person or corporation has notice that such owner does not desire to sell such residential property." *Pearson*, 153 F.3d 397 at 399. Notably, this statute does not limit its ban to times when the homeowner is inside the home that he or she owns. Perhaps that is why the district court in that case found that the state had produced "no evidence . . . that real estate solicitation harms or threatens to harm residential privacy." *Id.* at 404. We noted in that case that the *Rowan* test was not applicable to such an underbroad statute, even though the statute was of an opt in nature. *Id.* at 404 ("Here the state, not the homeowner, has made the distinction between real estate solicitations and other solicitations *without a logical privacy-based reason.*" (emphasis added)). Therefore, we cannot agree with our concurring colleague that *Pearson* rejected the *Rowan* framework with respect to an opt-in statute that is not underbroad and is confined to communications aimed solely at a residence.

Carter, 455 F.3d at 790.

²⁰⁶ *Id.*

²⁰⁷ *Pearson*, 153 F.3d at 404.

“[T]he *Rowan* test was not applicable to such an underbroad statute, even though the statute was of an opt in nature.”²⁰⁸

The majority, however, fails to realize that this exact argument could be used to distinguish *Carter* from *Rowan*. The homeowner in *Carter* can not ban any bothersome telemarketing call; newspapers, real estate and insurance agents, calls soliciting political contributions, and charities using in-house employees or volunteers are all exempt from the do-not-call list.²⁰⁹

D. Other Circuits Have Analyzed Restrictions Similar to the One at Issue in Carter and Have Not Used the Test Outlined in Rowan

Besides incorrectly distinguishing Supreme Court precedent, the Seventh Circuit quickly dismisses the rulings of the Fourth, Eighth and Tenth Circuits.²¹⁰ The majority in *Carter*, in an effort to explain why their sister circuits opted for more traditional methods of review states: “[n]either the Eighth Circuit nor the Tenth Circuit directly addressed a *Rowan* argument similar to the one the State presses here. Instead they reversed by employing more standard First Amendment analysis.”²¹¹ This statement is true, but misleading.²¹² In *Stenehjem*, an amicus brief filed by the Indiana Attorney General urged the Eighth Circuit to adopt a *Rowan* balancing test, yet unsurprisingly the court declined and analyzed the restrictions under the test on charitable restrictions outlined in *Schaumburg*, and cited to *Rowan* only as support that an opt-in feature helps to show the statute is narrowly tailored.²¹³

²⁰⁸ *Carter*, 455 F.3d 783, 790.

²⁰⁹ *Id.* at 784. The concurrence makes this exact argument in response to the majority’s determination that the Act places the Indiana Attorney General in a “ministerial” role. *Id.* at 796. The discussion of this argument is dealt with below.

²¹⁰ *Id.* at 788.

²¹¹ *Id.*

²¹² *Id.* at 797 (Williams J. concurring).

²¹³ *Nat’l Coal. of Prayer v. Carter*, 455 F.3d 783, 798 (7th Cir. 2006) (Williams, J., concurring) (citing Brief for State of Indiana et al. as *Amici Curiae* Supporting Appellant, at 2, 13).

Similarly, in *Mainstream Marketing II*, several states supporting the federal regulations on commercial telemarketers filed amicus briefs arguing that *Rowan* created a balancing test.²¹⁴ Not surprisingly the Tenth Circuit chose not to adopt *Rowan*'s balancing test, but instead employed the test outlined in *Central Hudson* for restrictions on commercial speech.²¹⁵

Additionally all three Circuits addressed *Rowan* and relied on it in support of their respective narrow tailoring analyses, at the very least the Eighth, Tenth and Fourth Circuits were aware of the balancing test in *Rowan*, and consciously choose not to accept it.²¹⁶ "Thus, at a minimum, these circuits did not interpret *Rowan* as requiring nothing more than a balancing of interests. More likely, they appropriately disregarded the states' request for a truncated balancing-of-interest test and instead applied *Rowan* solely within the constraints created by subsequent Supreme Court Authority."²¹⁷

E. The Majority's Use of "Underbroad" is Misplaced and Confusing

After misinterpreting case law and applying *Rowan*, a case which requires no narrow tailoring analysis, the majority proceeded to analyze the statute under the "reasonable fit" doctrine, outlined in a manner which resembles narrow tailoring analysis.²¹⁸

Once we have decided to apply the *Rowan* analysis, it would seem the case is resolved, since the Supreme

²¹⁴ *Carter*, 455 F.3d at 798 (citing *Mainstream Marketing Services, Inc.* ("*Mainstream Marketing I*"), 358 F.3d 1228 (10th Cir. 2004) and Brief for State of California et al. as *Amici Curiae* Supporting Appellants in Case No. 03-1429 and Supporting appellees in Case No. 03-9571 at 1-3, *Mainstream Marketing Services, Inc.*, 358 F.3d 1228 (Nos. 03-1429, 03-6258, 03-9571, 03-9594).

²¹⁵ *Carter*, 455 F.3d at 798 (citing *Mainstream Marketing II*, 358 F.3d at 1242-44).

²¹⁶ *Id.* at 798 (William, J., concurring).

²¹⁷ *Id.*

²¹⁸ *Id.* at 790-91.

Court has already made clear that citizens in their own homes have a stronger interest in being free from unwanted communication than a speaker has in speaking in a manner that invades residential privacy. However, the Plaintiffs strenuously argue that the Act is underbroad and therefore prohibited under *Discovery Network*. We agree that if the Act was so underbroad as to fail to materially advance the State's interest in residential privacy, Plaintiffs might prevail even under *Rowan*.²¹⁹

The majority's reliance on *Discovery* is confusing, given that *Discovery* was a case analyzing a restriction on commercial speech, and was decided using the *Central Hudson* framework.²²⁰ Additionally, *Discovery*, and its predecessor *Fox*, analyze the term "reasonable fit" within the context of the last two prongs of the *Central Hudson* test which both deal with narrow tailoring analysis.²²¹ This makes the majority's refusal to use proper narrow tailoring analysis even more confusing. Furthermore, *Carter* dealt with a restriction on charitable speech, and *Discovery* has not been cited, either by the Supreme Court or the Seventh Circuit, in the narrow tailoring analysis of a restriction on charitable speech.

Adding to the confusion is the majority's reliance, within its "underbroad" analysis, on *Hill v. Colorado*,²²² a case which upheld a statute that "prohibited knowingly approaching within eight feet of another person, without that person's consent, 'for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such person. . . ' within

²¹⁹ *Id.*

²²⁰ *Cincinnati v. Discovery Network*, 507 U.S. 410, 416 (1993)

²²¹ *Id.*

²²² The majority states: "the Act's legitimacy is bolstered by the Supreme Court holding in *Hill v. Colorado*." *Carter*, 455 F.3d 783, 790.

designated areas surrounding health care clinics.”²²³ The Supreme Court held the statute to be constitutional because it was a content neutral, valid time, place, and manner restriction, and was *narrowly tailored* to serve a significant and legitimate governmental interests.²²⁴ The majority in *Carter*, while neglecting to engage in a proper narrow tailoring analysis, cites to two commercial restriction cases (*Discovery* and *Hill*) in support of its underbroad analysis, both of which engage in extensive narrow tailoring analysis.

IV. THE SEVENTH CIRCUIT INCORRECTLY SEES INDIANA’S STATUTE AS GIVING ONLY MINISTERIAL POWER TO THE INDIANA ATTORNEY GENERAL

Even if the court in *Carter* had not misinterpreted Supreme Court and Seventh Circuit precedent, the use of *Rowan*’s balancing test would still be incorrect. In *Rowan*, the Court’s decision to weigh in favor of the homeowner, relied heavily on the plenary power of the homeowner under the act, and the affirmative action required by the homeowner. The opinion extensively analyzed the legislative history and prior versions of the act. A prior version of the act could have been read to prohibit only future mailings from the sender, or “future mailings of similar materials.”²²⁵ “The section as originally reported by the House Committee prohibited ‘further mailings of such pandering advertisements’ s 4009(a), ‘further mailings of such matter,’ s 4009(b), and ‘any further mailings of pandering advertisements,’ s 4009(c).”²²⁶ This prior version would have taken discretion away from the householder by interposing the “Postmaster General between the sender and the addressee and, at least, creat[ed] the appearance if not

²²³ The purpose of the statute was intended to shelter women visiting abortion clinics from unwanted encounters with abortion protestors. *Nat’l Coal. of Prayer v. Carter*, 455 F.3d 783, 790 (citing *Hill v. Colorado*, 530 U.S. 703, 706 (2000)).

²²⁴ *Hill v. Colorado*, 530 U.S. 703, 725 (2000).

²²⁵ *Rowan v. United States Post Office Dep’t*, 397 U.S. 728, 732 (1970).

²²⁶ *Id.* (quoting H.R. Rep. No. 90-722, at 125 (1967)).

the substance of governmental censorship.”²²⁷ The final version of the act, however, resolved any constitutional issues by giving the householder “complete unfettered discretion in electing whether or not he desired to receive further material from a particular sender.”²²⁸ The Court found that the opt-in nature of the act effectively permitted “a citizen to erect a wall that no advertiser may penetrate without his acquiescence.”²²⁹ This “wall” could essentially block out an unlimited amount of commercial mailings the homeowner deemed undesirable. Because the act required simply the homeowner to state that in her subjective viewpoint, the mailings were erotic in nature, the homeowner could conceivably “prohibit the mailing of a dry goods catalog because he objects to the contents.”²³⁰ This sweeping power, along with the required affirmative action of opting-in by the homeowner placed the Postmaster General in a “ministerial” role. The act did not require the Postmaster General to decide which of the sender’s mailings were erotic, but simply carried out the wishes of the homeowner, making it only an enforcing or ministerial role.

In an effort to analogize the Indiana statute to *Rowan*, the majority concentrates on the “ministerial” evaluation, and reviews extensively the Supreme Court’s legislative history examination in *Rowan*.²³¹ The calls which were exempt were well defined and involved little discretion to decide if a call was placed by a professional telemarketer on behalf of a charity, or by a volunteer or in-house employee of the charity.²³² The majority concluded that the role of the Indiana Attorney General was more analogous to the ministerial role of the Postmaster General.²³³

²²⁷ *Rowan*, 397 U.S. at 735.

²²⁸ *Id.* at 734.

²²⁹ *Id.* at 738

²³⁰ *Id.*

²³¹ *Nat’l Coal. of Prayer v. Carter*, 455 F.3d 783, 788-89 (7th Cir. 2006).

²³² *Id.* at 789.

²³³ The Seventh Circuit concluded that:

[T]he Act places the Attorney General of Indiana in a ‘ministerial’ role more analogous to that of the Postmaster General in the final legislation in *Rowan* than that act’s objectionable predecessor. The

The majority's concentration on the ministerial role is misplaced.²³⁴ The majority's reasoning that the Attorney General, like the Postmaster General, is given sole discretion to decide only if the call was placed by a charity's volunteer or in-house employee, or if it was placed by a professional telemarketing employee on behalf of the charity, is erroneous because it considers only the state's involvement in enforcing the statute.²³⁵ While the Act in *Rowan* was limited in language to material that the homeowner found erotic or sexually arousing, there was no objective test which could prevent the homeowner from prohibiting any commercial mailing as long as they deemed sexually arousing.²³⁶ By allowing the homeowner complete control over what material could be prohibited from entering the household Act at issue in *Rowan* truly allowed the homeowner complete control.²³⁷ In contrast, the Indiana statute at issue in *Carter* left exemptions for phone calls which the homeowner could not elect to block.²³⁸ The majority ignored the fact that the actual passage of the law with "numerous exemptions is an act of immersing itself in the regulation of the different forms of telemarketing speech."²³⁹ By creating exceptions to the law, Indiana created telemarketing calls

telephone calls that the Attorney General must allow to be placed to numbers on the do-not-call list are very well defined. For example, it involves little discretion to decide if the call was placed on behalf of a tax-exempt charity, or if the person who placed the call was a volunteer or employee of that charity. We therefore disagree with the view that *Rowan* is inapplicable merely because the Act imposes well-defined restrictions on precisely what protections from unwanted communication a residential phone customer may receive by opting in to the do-not-call list.

Id.

²³⁴ *Id.* at 796.

²³⁵ *Id.*

²³⁶ *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 732 (1970).

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Carter*, 455 F.3d at 796

which the homeowners could not block.²⁴⁰ Therefore, the total power to restrict all intrusions into the home which was enjoyed by the homeowners in *Rowan* does not exist here.

CONCLUSION

Simply because the concurrence and majority come to the same decision does not make the *Carter* court's oversights irrelevant. Under the majority's test, there was no need to analyze the regulation for content neutrality. If a restriction on charitable speech regulates on the basis of content, then it is not a content neutral restriction and must be analyzed under strict scrutiny.²⁴¹ The plaintiff argues that the act is "content-based regulation because its applicability requires analysis of the content of the message in order to determine to which callers it applies."²⁴²

"If one must necessarily look at the content of the speech to determine whether the law applies, then the law is content-based." *Ark. Writers' Project Inc. v. Ragland*, 481 U.S. 221, 230 (1987). For example, a call by one of the charities to educate a consumer is not banned but if the call ends with a request for a donation

²⁴⁰ Unlike in *Rowan*, the state here has carved out particular categories of calls the homeowner *cannot* block. These state-created carve-outs include not only charitable calls made by volunteers and employees, but also certain calls by newspaper organizations, real estate agents, and insurance agents. Thus, the homeowner here does not have the plenary power to restrict all intrusions as the homeowner could in *Rowan*. Instead, Indiana has actively immersed itself in regulating the forms of telemarketing speech that homeowners are allowed to block: a homeowner has unfettered discretion to block calls from professional telemarketers, but lacks such discretion when it comes to, for example, calls initiated by employees or volunteers of charities. *Id.* at 796 (Williams, J. concurring).

²⁴¹ *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 789 (1988); *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980); *see Sec'y of State of Maryland v. Munson*, 467 U.S. 947 (1984).

²⁴² Brief of Petitioner-Appellant, at 21, *Nat'l Coal. of Prayer v. Carter*, No.05-3995 (7th Cir. July 28, 2006).

it is banned. If that same call was placed by a volunteer or a paid charitable employee it is exempt. An outside fundraiser, paid the same wage, would be banned from this speech.

The Act applies its restrictions based on the content of the banned calls and the identity of the caller. A statute that defines the speech it regulates by content, or particular speakers, is evaluated as a content-based restriction on speech. *Playboy*, 529 U.S. at 811-12.²⁴³

The concurrence rejects this content-based argument, stating: “Although the question of whether the Indiana Act is a content neutral regulation is a close one, it is nonetheless a ‘regulation that serves purposes unrelated to the content of expression . . . even if it has incidental effect on certain speakers or messages but not others.’”²⁴⁴ Analyzing the restriction for its content-neutrality is a hurdle which the restriction must pass in order to be found constitutional. While the argument fails, and the concurrence eventually arrives at the same conclusion as the majority the restriction was at least analyzed for content-neutrality.

The majority ignores the weight of Supreme Court precedent, Seventh Circuit precedent, and the persuasive arguments of its sister circuits,²⁴⁵ but is it relevant that the majority used the wrong test. The concurrence, the Fourth, and the Eighth Circuits, all using a higher level of scrutiny reached the same conclusion as the majority. The result may have been the same, but what is relevant is that when a government seeks to burden a right as fundamental as free speech, it is the court’s duty to analyze that regulation in the manner dictated by precedent. In this case, while the majority and concurrence reached the same conclusion, the majority’s test allowed for a less strict review.

²⁴³ *Id.* at 21-22.

²⁴⁴ *Nat’l Coal. of Prayer*, 455 F.3d at 798-99 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791).

²⁴⁵ See *Nat’l Fed’n for the Blind v. F.T.C.*, 420 F.3d 331 (4th Cir. 2005); *Fraternal Order of Police v. Stenehjem*, 431 F.3d 591 (8th Cir. 2005).