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Residential Privacy and Free Speech: Competing Interests in Charitable Solicitation Regulation

*Fraternal Order of Police, North Dakota State Lodge v. Stenehjem*¹

I. INTRODUCTION

*“For Charity shall cover the multitude of sins.”*²

*“Charity creates a multitude of sins.”*³

Although these two quotations represent society’s mixed feelings toward charity, they also represent a distinction people often make between a charity’s aims and its means. Charitable organizations have the potential to spread hope, re-allocate societal resources, and advocate societal values. How they go about accomplishing these noble goals, however, is sometimes the subject of public frustration and annoyance. This creates a tension between admiring the charity’s philanthropy and becoming irritated with the means used to achieve it.

Undoubtedly, one of the most unwelcome guests in any household is a telemarketer. In fact, 98% of 1.78 million respondents to a recent online survey said telemarketing calls made them “angry.”⁴ Because of this, many states have enacted laws regulating charities’ use of telemarketing as a means to further their message.⁵

While public sentiment seems to support heavy regulation of telemarketers, regulating charitable solicitation presents interesting and unique problems. Charitable solicitation receives full First Amendment protection, so any state legislature attempting to regulate charitable solicitation must respect charities’ free speech rights.⁶ In examining these laws, courts must also care-

1. 431 F.3d 591 (8th Cir. 2005).

2. 1 *Peter* 4:8 (King James).

3. Oscar Wilde, *The Soul of Man Under Socialism*, in *THE ANNOTATED OSCAR WILDE* 398 (H. Montgomery Hyde ed., 1982).

4. See <http://www.dianamey.com> (last visited Sept. 25, 2006) (follow “Telemarketing Statistics” hyperlink). Diana Mey has gained notoriety for leading a campaign against telemarketers, and was named one of *People Magazine*’s most intriguing people of 1999.

5. See e.g., C.R.S. § 6-16-103 (2002); C.G.S.A. § 21a-190h (1994); GA. CODE ANN. § 43-17-3 to 43-17-7 (2002); LA. REV. STAT. ANN. § 51: 1905 (2003); N.H. REV. STAT. ANN. § 7:28-b (2004).

6. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980).

fully delineate the boundaries between a state's power to protect its residents' privacy and the charities' First Amendment right to advance its message.

As demonstrated in *Fraternal Order of Police, North Dakota State Lodge v. Stenehjem*, drawing this line between First Amendment rights and residential privacy is a difficult task, particularly in light of prior Supreme Court decisions muddying the water. Ultimately, when such weighty values collide, lower courts need particularized guidance to assist with their decisions. This Note argues that *Stenehjem* was wrongly decided, and that its misguided analysis reflects the uncertainty in this area of the law.

II. FACTS AND HOLDING

The North Dakota statute at issue in *Stenehjem* prohibited certain solicitations of residents registered with the state's "do not call" list.⁷ The statute permitted "in house" solicitations by charitable organizations, but prohibited calls made by professional soliciting organizations on behalf of charitable organizations.⁸ Additionally, to be permitted, the statute required that the caller make certain disclosures at the onset of the call, including the caller's name, as well as the name, address and phone number of the charitable organization.⁹

In *Stenehjem*, the plaintiffs were charitable organizations who "rel[ie]d on professional charitable solicitors for their fundraising."¹⁰ The plaintiffs

7. N.D. CENT. CODE § 51-28-01 (1999); *Fraternal Order of Police, N.D. State Lodge v. Stenehjem*, 431 F.3d 591, 596 (8th Cir. 2005).

8. *See id.* at 596. Specifically, the act excluded calls made by charitable organizations from the definition of "telephone solicitation" in limited circumstances. N.D. CENT. CODE § 51-28-01.7.c(1) to (2) (1999).

9. *Id.* The act also defined "telephone solicitation" as not including calls made to subscribers with the subscriber's written permission or consent, calls made for the purpose of conducting a telephone poll, calls made by political organizations, and calls by salespeople not intending to complete a transaction over the phone but at arranged "face-to-face" meetings. *Id.* at 7.a., 7.d-7.f.; *see also Stenehjem*, 431 F.3d at 596 n.2. The act itself only applied to telephone "solicitations," so charitable organizations could hire an outside agency to make calls on its behalf to simply advocate the organization's message. *See id.* at 596.

10. *Id.* Specifically, the plaintiffs were the Fraternal Order of Police, North Dakota State Lodge and the Veterans of Foreign Wars. *Id.* at 591. Furthermore, their petition was supported by *amicus curiae* briefs from several states, including: Indiana, Alaska, Arkansas, Idaho, Illinois, Iowa, Maine, Maryland, Missouri, Nevada, Ohio, South Dakota, Tennessee, Vermont, Wisconsin and Wyoming. Brief of Amicus Curiae for States of Indiana et al. in Support of Appellant Wayne Stenehjem, *Fraternal Order of Police v. Stenehjem*, No. 03-03848 (8th Cir. 2003), 2003 WL 23912560.

argued that the entire statute was unconstitutional because the distinctions it drew were content-based.¹¹

The United States District Court for the District of North Dakota stated that the statute regulated two types of speech: commercial and charitable.¹² In addressing the commercial speech regulations, the court applied a less rigorous standard of review¹³ and held that the statute's regulations were constitutional because there was a reasonable fit between the law and the harms the legislature sought to prevent.¹⁴ The court explained that charitable speech, on the other hand, "is fully protected by the First Amendment."¹⁵ The district court concluded that, since the government was attempting to preserve residential privacy and prevent fraud, the statute's distinction between charitable and commercial solicitors prohibited "more speech than the evil [it was] targeting," which rendered the statute content-based and therefore unconstitutional.¹⁶

The Eighth Circuit disagreed for two reasons.¹⁷ First, the court noted that the statute's distinction was not made "because of any disagreement with the message that would be conveyed, for the message would be identical regardless of who conveyed it."¹⁸ Second, the law was justified without reference to the content of the speech because the state has a compelling interest in "protecting residential privacy."¹⁹

III. LEGAL BACKGROUND

The seemingly simple language that "Congress shall make no law . . . abridging the freedom of speech" has spawned two centuries of court decisions that struggle to delineate the exact parameters of this First Amendment

11. See *Stenehjem*, 431 F.3d at 596. Generally, a facial challenge to a statute seeks "to vindicate not only [their] rights, but also those of others who may also be adversely impacted by the statute in question." 16 C.J.S. *Constitutional Law* § 113

12. Fraternal Order of Police, N.D. State Lodge v. *Stenehjem*, 287 F. Supp. 2d 1023, 1026-28 (D.N.D. 2003).

13. *Id.* at 1026. The court explained that "[t]he Constitution 'accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.'" *Id.* (quoting *Cent. Hudson Gas v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563 (1980)).

14. *Id.* at 1028. The court also noted that the plaintiffs did not have standing to challenge these provisions because they were not commercial speakers and because "the overbreadth doctrine does not apply to commercial speech." *Id.* at 1026, 1028.

15. *Id.* at 1028 (quoting *Nat'l Fed'n of the Blind of Ark., Inc. v. Pryor*, 258 F.3d 851, 854 (8th Cir. 2001)).

16. *Id.*

17. *Fraternal Order of Police, N.D. State Lodge v. Stenehjem*, 431 F.3d 591, 596 (8th Cir. 2005).

18. *Id.*

19. *Id.*

right.²⁰ Courts do not protect all types of expression equally; some types of speech receive less protection,²¹ while others receive no First Amendment protection at all.²² In addition, courts do not protect any type of speech absolutely.²³ Competing interests may require the government to restrict expression in certain situations.²⁴ However, in determining the appropriate balance between First Amendment rights and competing interests, courts often look to the type of speech involved and the legitimacy of the competing interest.²⁵

20. U.S. CONST. amend. I.

21. *See, e.g., Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562-63 (1980) (“The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”).

22. *See, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (upholding statute that prohibited using “[d]erisive or annoying word[s]” in public because regulating fighting words does not infringe on the speaker’s freedom of speech when the state’s interest is preserving public peace); *see also Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969) (invalidating criminal syndicalism act because it punished “mere advocacy” of violence – which is constitutionally protected speech – as opposed to incitement of violence, which is not constitutionally protected); *see also Miller v. California*, 413 U.S. 15, 23 (1973) (establishing obscenity test and noting that “obscene material is unprotected by the First Amendment.”).

23. *See, e.g., U.S. v. O’Brien*, 391 U.S. 367, 376 (1968) (rejecting the idea that “the freedom of expression which the First Amendment guarantees includes all modes of communication of ideas by conduct.”); *Rowan v. U.S. Post Office Dept.*, 397 U.S. 728, 738 (1970) (stating that “no one has a right to press even ‘good’ ideas on an unwilling recipient,” and that people need not be “captives” to objectionable speech); *see also Frisby v. Schultz*, 487 U.S. 474, 479-80 (1988) (noting that the “standards by which limitations on speech must be evaluated” differ according to the nature of the forum – either “the traditional public forum, the public forum created by government designation, and the nonpublic forum”).

24. *See supra* note 25 and accompanying text.

25. *See, e.g., Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 562-64 (“The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.”). *See also O’Brien*, 391 U.S. at 382 (1968) (holding that “because of the Government’s substantial interest in assuring the continuing availability of issued Selective Service certificates,” the prohibition on burning draft cards was constitutional even though it was symbolic expression). In addition, courts have used other factors to determine the appropriate balance between free expression and competing government interests, such as where the expression takes place, *see Frisby*, 487 U.S. at 479 (“To ascertain what limits, if any, may be placed on protected speech, we have often focused on the ‘place’ of that speech, considering the nature of the forum the speaker seeks to employ.”); and the entity expressing itself, *see, e.g., Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (“The Government can, without violating the Constitution, selectively fund a program to encourage cer-

Essentially, *Stenehjem* pitted charitable solicitation, a type of expression, against residential privacy, a compelling state interest.²⁶ The Supreme Court has addressed both of these issues in previous cases.

A. Residential Privacy

The Supreme Court has repeatedly recognized the validity of a person's right to "be left alone," or right to not have unwelcome messages thrust upon her.²⁷ While the parameters of this right vary depending on the situation, the Court has made clear that this right is strongest when the unwilling recipient is in her home.²⁸

In *Rowan v. United States Post Office Department*, the Supreme Court considered the constitutionality of a postal service law that required mail solicitors to stop all future mailings to a particular household upon the resident's request.²⁹ Although the Court recognized the fundamental importance of the free exchange of ideas, it also reasoned that "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate."³⁰ Balancing those interests, the Court recognized that the "plethora of mass mailings" had become increasingly frustrating for residents whose mail consisted mostly of "material [they] did not seek from persons [they did] not know."³¹ Because the "ancient concept that 'a man's home is his castle' . . . has lost none of its vitality," the Court held that "the mailer's right to communicate [was] circumscribed only by . . . the addressee giving notice that he wishes [to receive] no further mailings from that mailer."³² After tipping the scales in favor of residential privacy, the Court noted that the statute presented "no constitutional obstacles" because Congress was not regulating the mailer's speech.³³ Rather, the law merely permitted "a citizen to erect a wall — that no advertiser may penetrate without his acquiescence."³⁴

tain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.").

26. *Fraternal Order of Police, N.D. State Lodge v. Stenehjem*, 431 F.3d 591, 598 (8th Cir. 2005) (stating that the North Dakota "no call list" was "[s]eeking to balance the interest of callers against the privacy rights of subscribers").

27. *See supra* note 25 and accompanying text.

28. *See, e.g., Frisby v. Schultz*, 487 U.S. 474 (1988).

29. 397 U.S. 728, 729 (1970). The challenged law was Title III of the Postal Revenue and Federal Salary Act of 1967. *Id.*

30. *Id.* at 736.

31. *Id.*

32. *Id.* at 737.

33. *Id.* at 738.

34. *Id.*

The Supreme Court has also protected the interest of residential privacy under the Fourteenth Amendment. In *Carey v. Brown*, the Court addressed an Illinois statute that prohibited picketing around residences, but included an exception for labor-picketing.³⁵ Although the Court noted that “the Illinois statute regulates expressive conduct that falls within the First Amendment’s preserve,” it analyzed the statute under the Fourteenth Amendment’s equal protection clause.³⁶

The Court conceded that “[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value.”³⁷ Ultimately, however, the Court invalidated the statute because “even the most legitimate goal may not be advanced in a constitutionally impermissible manner.”³⁸ The primary problem with the statute at issue in *Carey* was that it “ma[de] no attempt to distinguish among various sorts of nonlabor picketing on the basis of the harms they would inflict on the privacy interest.”³⁹ The Court summarized that the “overinclusiveness and under inclusiveness” of the statute undermined Illinois’ claim that it was “maintaining domestic tranquility.”⁴⁰

The Supreme Court has used *Carey*’s discussion of residential privacy and guidelines for appropriate regulations to further that interest in several First Amendment cases.

In *Frisby v. Schultz*, the Supreme Court reviewed an ordinance that prohibited any person from picketing before or about the residence or dwelling of any individual.⁴¹ Since the ordinance prohibited picketing that took place solely in front of a particular residence, the Court noted that, to be valid, the ordinance must “serve a significant government interest and . . . leave[] open ample alternative channels of communication.”⁴²

Quoting *Carey*, the Court noted that the “‘State’s interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.’”⁴³ The Court explained that an “important aspect of residential privacy is protection of the unwilling listener,” and that the usual rule of requiring listeners “simply to avoid speech they do not want to hear” is inapplicable when the listener is at home.⁴⁴ After finding that the government had a significant interest in preventing residents from being “captives” in the “sanctuary of the[ir] home[s],” the Court held that the ordi-

35. 447 U.S. 455 (1980).

36. *Id.* at 459-60; U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

37. *Carey*, 447 U.S. at 471.

38. *Id.* at 464-65.

39. *Id.* at 465.

40. *Id.*

41. 487 U.S. 474 (1988).

42. *Id.* at 482-83.

43. *Id.* at 484 (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980)).

44. *Id.*

nance was narrowly tailored.⁴⁵ Ultimately, the Court found that the statute's complete ban was narrowly tailored because each activity within the statute's scope was an "appropriately targeted evil."⁴⁶

B. Charitable Solicitation

The Supreme Court has addressed First Amendment protection of charitable solicitation in a number of cases. The seminal case discussing charitable solicitation is *Village of Schaumburg v. Citizens for a Better Environment*, decided in 1980.⁴⁷

In *Schaumburg*, the Supreme Court considered a facial challenge to a Chicago suburb's soliciting ordinance.⁴⁸ Specifically, the ordinance required charitable organizations to obtain a permit before employing "door-to-door solicitation or the use of public streets and public ways" to solicit.⁴⁹ To obtain a permit, the applying organization had to show "[satisfactory] proof that at least seventy-five per cent of the proceeds of such solicitations w[ould] be used directly for the charitable purpose of the organization."⁵⁰

Schaumburg's ordinance was aimed at "protect[ing] its residents from fraud and the disruption of privacy," an admittedly "legitimate interest."⁵¹ Regulating charitable solicitation, however, "must be done with narrow specificity."⁵² The Supreme Court explained that "charitable appeals for funds . . . involve a variety of speech interests" and, therefore, are within the protection of the First Amendment.⁵³ "[C]haritable solicitation," the Court continued, "does more than inform private economic decisions . . . [and therefore] it has not been dealt with in our cases as a variety of purely commercial speech."⁵⁴

Schaumburg argued that its ordinance was narrowly tailored to protect charitable speech "because any charity is free to propagate its views from

45. *Id.* at 484-86.

46. *Id.* at 485-86. The statute challenged in *Frisby* only barred picketing that was "narrowly directed at the household, not the public." *Id.* at 486. Because that picketing "inherently and offensively intrudes on residential privacy," the Court rejected the plaintiff's argument that the ordinance violated their First Amendment rights. *Id.*

47. 444 U.S. 620 (1980).

48. *Id.* at 622-23.

49. *Id.* at 623.

50. *Id.* at 624 (first alteration in original).

51. *Id.* at 627.

52. *Id.*

53. *Id.* at 632.

54. *Id.* Interestingly, although the Court elevates charitable solicitation above commercial speech and states that charitable solicitations are within the protections of the First Amendment, it stops short of declaring strict scrutiny as the appropriate standard of review. *Id.* at 637. In declaring the appropriate standard, the Court declares the ordinance at issue "cannot survive scrutiny under the First Amendment." *Id.* at 636.

door to door in the Village without a permit as long as it refrains from soliciting money.”⁵⁵ The Court summarily rejected this argument because it “fail[ed] to perceive any substantial relationship between the 75-percent requirement and the protection of public safety or of residential privacy.”⁵⁶ Further, the Court argued that there was “no indication” that organizations not meeting the requirement would be “any more likely to employ solicitors who would be a threat to public safety” than those meeting the requirement.⁵⁷ In fact, the Court noted that the opposite may be true, as “organizations employing paid solicitors carefully screened in advance may be even less of a threat to public safety than solicitation by organizations using volunteers.”⁵⁸ While the Court conceded that the ordinance would reduce the total number of solicitors, it found that this goal could be also be accomplished by “any prohibition on solicitation,” and that “[t]he ordinance is not directed to the unique privacy interests of persons residing in their homes”⁵⁹ As such, the Court concluded that the ordinance was “unconstitutionally overbroad.”⁶⁰

Relying heavily on *Schaumburg*, the Court has more specifically addressed regulations of professionals who solicit funds on behalf of charities in subsequent cases. In *Secretary of State of Maryland v. Joseph H. Munson Co.*, a professional fundraiser challenged a Maryland statute restricting agreements between charities and professional solicitors.⁶¹ Specifically, the statute prohibited charities from paying more than 25% of the total solicited funds as compensation for professional solicitors.⁶² Although the statute allowed exemptions in limited circumstances, each contract between a professional solicitor and a charity had to be filed with the Secretary of State “within ten days after it [was] entered into and prior to any solicitations.”⁶³

The issue for the Supreme Court was “whether the distinctions between the *Schaumburg* ordinance and the Maryland statute [were] sufficient to render the statute constitutionally acceptable.”⁶⁴ After discussing the legitimate interest of the *Schaumburg* ordinance, the Court noted that the Maryland statute was flawed because there was no “connection between the percentage

55. *Id.* at 628.

56. *Id.* at 638.

57. *Id.*

58. *Id.* at 638 n.13.

59. *Id.* at 638.

60. *Id.* at 639.

61. 467 U.S. 947, 950 (1984).

62. *Id.* This limitation did “not apply to compensation or expenses paid by a charitable organization to a professional fund-raiser counsel for conducting feasibility studies for the purpose of determining whether or not the charitable organization should undertake a fund-raising activity.” *Id.*

63. *Id.* at 950-52 (noting that the Secretary of State can permit a charity to pay more than the statutory limitation “where the 25% limitation would effectively prevent the charitable organization from raising contributions”).

64. *Id.* at 959.

limitation and the protection of public safety or residential privacy.”⁶⁵ Maryland pointed out that the main difference between its statute and Schaumburg’s ordinance was the inclusion of an administrative waiver, which arguably prevented the Maryland statute from being too rigid.⁶⁶ The Court disagreed with Maryland and concluded that, “regardless of the waiver provision, *Schaumburg* requires that the percentage limitation in the Maryland statute be rejected.”⁶⁷

Four years after *Munson*, the Court decided *Riley v. National Federation of the Blind of North Carolina*, which addressed a North Carolina law regulating charitable solicitation by professionals in a more general manner.⁶⁸ The statute prohibited professional solicitors from collecting an “unreasonable” or “excessive” fee, as defined by a three-tiered schedule using percentages to mark each tier.⁶⁹ The statute also required professional solicitors to obtain an approved license and to disclose their name, the name of their employer, and the average percent of solicitations actually turned over to charities by their employer within the previous year before soliciting any funds.⁷⁰

North Carolina distinguished its percentage-based portion of the statute from those at issue in *Schaumburg* and *Munson* in two ways.⁷¹ First, in addition to the motives articulated in the prior two cases, its statute was designed to ensure “that the maximum amount of funds reach the charity.”⁷² Second, its statute was more flexible than those at issue in the prior cases, thus making it more narrowly tailored.⁷³ The Court rejected the first contention for two reasons. Primarily, it noted that North Carolina’s additional motivation was “little more than a variation of the argument rejected in *Schaumburg* and *Munson* that this provision is simply an economic regulation with no First Amendment implication.”⁷⁴ The Court concluded that, even if it were to assume that this motivation was valid, the fact that many charities would “reject the State’s overarching measure” illustrated that the statute was not narrowly

65. *Id.* at 962 n.10.

66. *Id.* at 962-68.

67. *Id.* at 968.

68. 487 U.S. 781 (1988) (The North Carolina law “defines the prima facie reasonable fee.”).

69. *Id.* at 784-85. A fee “up to 20% of the gross receipts collected is deemed reasonable.” *Id.* A fee “between 20% and 35% . . . [is deemed] unreasonable upon a showing that the solicitation at issue did not involve the dissemination of information, discussion, or advocacy relating to public issues as directed by the [charitable organization] which is to benefit from the solicitation.” *Id.* at 785 (second alteration in original). Finally, “a fee exceeding 35% is presumed unreasonable, but the fundraiser may rebut the presumption by showing that the amount of the fee was necessary.” *Id.*

70. *Id.* at 786.

71. *Id.* at 789-90.

72. *Id.* at 789.

73. *Id.* at 790.

74. *Id.*

tailored.⁷⁵ As for the second distinction, the Court noted this justification fails because of *Munson's* determination that "there is no nexus between the percentage of funds retained . . . and the likelihood that the solicitation is fraudulent."⁷⁶

Turning its attention to the mandatory disclosure provisions, the Court found them to be content-based regulation of speech because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech."⁷⁷ As such, the Court subjected the statute to "exactng First Amendment scrutiny."⁷⁸ The State responded by stressing the importance of its interest in donor information and transparency in the donation process to clear up misconceptions.⁷⁹ The Court concluded, however, that this was "not as weighty as the State asserts, and that the means chosen to accomplish it are unduly burdensome and not narrowly tailored."⁸⁰

The final step of *Riley's* analysis addressed the licensing requirement.⁸¹ Here, the Court emphasized that the professional solicitors were not less entitled to First Amendment protection "merely because compensation is received."⁸² The Court concluded that, even if the State's interest in "regulating those who solicit money" was sufficient, the statute was unconstitutional because it did not specify when a license would be provided.⁸³ Accordingly, the Court found that all three provisions were unconstitutional.⁸⁴

Recently, the Supreme Court clarified its position in these prior three cases when it rejected an attempt to use a percentage cap on fees paid to professional solicitors. In 2003, the Court decided *Illinois, ex. rel. Madigan v. Telemarketing Associates, Inc.*,⁸⁵ where a professional solicitor retained 85% of all donations collected on behalf of Vietnam veterans, but told residents that she only retained 10%.⁸⁶ The Court tempered its prior holdings by stating that they did "not rule out, as supportive of a fraud claim against fundraisers, any and all reliance on the percentage of charitable donations" retained.⁸⁷ While charitable solicitation is protected within the First Amendment, the Court noted, fraud is not.⁸⁸ Therefore, the Court distinguished *Madigan* from its prior trilogy of cases because *Madigan's* emphasis was on the misleading

75. *Id.* at 791-92.

76. *Id.* at 793.

77. *Id.* at 795.

78. *Id.* at 798.

79. *Id.*

80. *Id.*

81. *Id.* at 801.

82. *Id.*

83. *Id.* at 802.

84. *Id.* at 803.

85. 538 U.S. 600 (2003).

86. *Id.* at 607-08.

87. *Id.* at 606.

88. *Id.* at 611-12.

messages that solicitors conveyed, and not “percentage limitations on solicitors’ fees *per se*.”⁸⁹ For the Court, this distinction prevented the statute in *Madigan* from “chill[ing] protected speech.”⁹⁰

However, the *Schaumburg* trilogy does not represent the gamut of Supreme Court cases discussing solicitation. In *U.S. v. Kokinda*,⁹¹ the Court faced the regulation of a variety of solicitation and speech interests.⁹² Specifically, the U.S. Postal Service regulation prohibited “[s]oliciting alms and contributions” on postal service property.⁹³ In discussing the issue, the Court noted that two different levels of scrutiny apply to government actions.⁹⁴ A higher level of scrutiny applies when the government acts in its official law-making capacity; a lower level applies when the government is acting as a proprietor, managing its internal operations.⁹⁵ Since the regulation at issue dealt with the government’s postal service operations, the lower level of scrutiny applied. Because of this lower scrutiny, the Court upheld the regulation for two reasons.⁹⁶

First, the Court noted that the area where solicitation was prohibited was not a public thoroughfare, but a private means of access from the parking lot to the post office.⁹⁷ Second, the post office regulation was grounded in history and experience and solicitation along the means of access to the post office could potentially slow the mail.⁹⁸ Specifically, the Court pointed out that “solicitation is inherently disruptive of the Postal Service’s business” because “it has the potentiality for evoking highly personal and subjective reactions.”⁹⁹ Because of these emotions and potential for conflicts that could impede the

89. *Id.* at 619.

90. *Id.*

91. 497 U.S. 720 (1990). It is important to note that *Kokinda* did not produce a majority opinion, but a plurality, a concurrence, and a dissent. *Id.*

92. *Id.* at 723 (“[V]olunteers for the National Democratic Policy Committee . . . set up a table on the sidewalk near the entrance of the Bowie, Maryland, Post Office to solicit contributions, sell books and subscriptions to the organization’s newspaper, and distribute literature addressing a variety of political issues.”).

93. *Id.* at 722-23 (alteration in original).

94. *Id.* at 725.

95. *Id.* (“It is a long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny when ‘the governmental function operating . . . [is] not the power to regulate or license, as lawmaker, . . . but, rather, as proprietor, to manage [its] internal operation[s]’” (alterations and omissions in original)).

96. *See id.* at 725-26 (“The Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints, as does a private business, but its action is valid in these circumstances unless it is unreasonable, or, as was said in *Lehman*, ‘arbitrary, capricious, or invidious.’”).

97. *Id.* at 727.

98. *Id.* at 731-32.

99. *Id.* at 732-33.

means of access to the post office, the Court held that the regulation was reasonable.¹⁰⁰

C. Eighth Circuit Precedent

Admittedly, the previously discussed Supreme Court cases overlap and are not restricted to discussing either “residential privacy” or “charitable speech.” *Stenehjem* provided another example of these competing interests, although it was not the first time the Eighth Circuit addressed a conflict between residential privacy and charitable speech. For example, in *National Federation of the Blind of Arkansas, Inc. v. Pryor*,¹⁰¹ decided before *Madigan*, the Eighth Circuit addressed charitable solicitation over the phone and its intrusion on residential privacy.¹⁰²

In *Pryor*, an Arkansas statute required all charitable solicitors to “identify the caller and the organization on whose behalf the call [was] being made, state the purpose of the call, and briefly describe any product or service being offered.”¹⁰³ After this introduction, if the resident indicated she no longer wanted to hear about the charity, the caller was prohibited from offering additional information.¹⁰⁴ The Court cited the *Schaumburg* trilogy¹⁰⁵ for the proposition that, since charitable solicitation is fully favored speech, government regulations must serve a “sufficiently strong” interest and be “narrowly drawn” to prevent “unnecessar[y] interfer[ence] with First Amendment freedoms.”¹⁰⁶ The Court noted that this standard was similar to time, place, and manner restrictions.¹⁰⁷

In applying these principles, the Eighth Circuit relied on *Rowan* in asserting that Arkansas had a legitimate interest in “protect[ing] its citizens from unwanted telephone calls.”¹⁰⁸ As for the narrowly tailored means, the Court rejected the contention that other means, such as unlisted telephone numbers and caller-IDs defeated the statute.¹⁰⁹ Because the statute’s “only impact [was] to end solicitation calls to unwilling residents who otherwise would not hang up,” the Court concluded that the statute passed constitutional muster.¹¹⁰

100. *Id.* at 732-34.

101. 258 F.3d 851 (2001).

102. *Id.*

103. *Id.* at 854.

104. *Id.*

105. *See supra* notes 47-90 and accompanying text.

106. *Pryor*, 258 F.3d at 854-55.

107. *Id.* at 855.

108. *Id.*

109. *Id.* at 856.

110. *Id.*

With this extensive background of both Supreme Court precedent and Eighth Circuit interpretation of it, the Court addressed the facts of the *Stenehjem* case.

IV. INSTANT DECISION

A. *Majority Opinion*¹¹¹

Applying a *de novo* standard of review, the Eighth Circuit determined that “[t]he principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message the speech conveys.”¹¹² As such, incidental burdens on particular speakers or messages are acceptable as long as the regulation “serves purposes unrelated to the content of expression” and can be “justified without reference to the content of the regulated speech.”¹¹³

After applying these principles to the North Dakota statute at issue, the majority found the law content neutral for two reasons.¹¹⁴ First, the majority stated that the law’s distinction “between professional and in-house charitable solicitors [was not done] because of any disagreement with the message that would be conveyed, for the message would be identical regardless of who conveyed it.”¹¹⁵ Second, the majority reasoned, “the regulation can be justified without reference to the content of the regulated speech,” because the state’s interest “is in protecting residential privacy.”¹¹⁶

The majority acknowledged that “the Act appears to make a subject matter distinction,” but stated that the fact that a law distinguishes between speech activities in a manner likely to produce the consequences it seeks to prevent is not, itself, a reason to strike the law for “failure to maintain ‘content neutrality.’”¹¹⁷ The court reasoned that the act’s restrictions were “not limited to the ringing of the phone,” but to how invasive a phone call may be.¹¹⁸ Ultimately, because solicitation “may reasonably be viewed as more invasive than advocacy,” the act was content neutral.¹¹⁹

After asserting its conclusions, the majority applied the *Pryor* test, which is essentially an Eighth Circuit re-formulation of the Supreme Court’s

111. Judge Wollman wrote the majority opinion, in which Judge Holmes joined. *Stenehjem v. Fraternal Order of Police*, N.D. State Lodge, 431 F.3d 591, 595-96 (8th Cir. 2005). Judge Holmes is a District Judge for the Eastern District of Arkansas who was sitting by designation for this case. *Id.* at 595 n.1.

112. *Id.* at 596 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 596-97.

118. *Id.* at 597.

119. *Id.*

Schaumburg test.¹²⁰ This test, the court notes, has been interpreted as “intermediate scrutiny review” and is very similar to time, place and manner restrictions.¹²¹ The test involves three steps: “(a) whether the State had a sufficient or ‘legitimate’ interest; (b) whether the interest identified was ‘significantly furthered’ by a narrowly tailored regulation; and (c) whether the regulation substantially limited charitable solicitations.”¹²² The court then applied these three inquiries to the North Dakota statute at issue.

Citing prior Eighth Circuit and Supreme Court precedent, the majority stated it was clear that “residential privacy is a ‘significant’ government interest, particularly when telemarketing calls ‘are flourishing, and becoming a recurring nuisance by virtue of their quantity.’”¹²³ Therefore, the court held that the statute was motivated by a significant interest.¹²⁴

Addressing the second step of the analysis constituted the bulk of the majority’s opinion. The majority noted that the narrow tailoring requirement was satisfied as long as the Act promoted a “‘substantial interest that would be achieved less effectively absent the regulation and the means chosen [do] not burden substantially more speech than is necessary.’”¹²⁵ As long as the act did not foreclose all means of communication, the court continued, “it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal.”¹²⁶ North Dakota argued that its distinction between professional and in-house charitable solicitors was “based upon the sheer volume of calls,” because professional solicitors are able to reach many more residents than if the soliciting were done by the charity itself.¹²⁷

The majority also addressed the appellee’s argument that the Act was underinclusive “because a ringing phone disrupts residential privacy whether the caller is a volunteer or a professional.”¹²⁸ The majority conceded that exceptions to an otherwise legitimate speech regulation can “undermine the government’s reasons for the regulation.”¹²⁹ In this case, however, the court found that the exceptions fit with the underlying motives for the enactment. Specifically, the court noted that the Act did not give “one side of a debate” an advantage over another, but that it did address the overall problem it was

120. See *Stenehjem*, 431 F.3d at 597 citing Nat’l Fed’n of the Blind of Ark., Inc. v. Pryor, 258 F.3d 851 (8th Cir. 2001); *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620 (1980).

121. *Id.*

122. *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 855-56 (1989)).

123. *Id.* (quoting *Van Bergen v. Minnesota*, 59 F.3d 1541, 1555 (8th Cir. 1995)).

124. *Id.*

125. *Id.* (quoting *Krantz v. City of Fort Smith*, 160 F.3d 1214, 1219 (8th Cir. 1998)).

126. *Id.* at 597-98.

127. *Id.* at 598.

128. *Id.*

129. *Id.*

aimed at — reducing “the total number of unwelcome telephone calls to private residences.”¹³⁰

The court also called attention to the “opt-in” status of the no-call list.¹³¹ Although this status was “not dispositive,” the court noted that it “limit[ed] the degree of government interference with First Amendment interests.”¹³² In completing its second level of analysis, the court concluded that, because the government had not burdened the speech more than necessary, the act was narrowly tailored.¹³³

In its final level of analysis, the court asserted that the act did not substantially limit charitable solicitations.¹³⁴ Because the act left open other possibilities of solicitation such as making “in-house” calls, mailing campaigns, or in person soliciting, the act left open alternate channels and was, therefore, not a substantial limit to charitable solicitations.¹³⁵

After concluding that the act met all three of *Pryor*’s requirements, the court dismissed the appellee’s argument that the act was overbroad.¹³⁶ The appellees argued that the act was unconstitutionally overbroad because it made no attempt to distinguish between calls that infringed on residential privacy and “innocuous speech.”¹³⁷ The court disagreed, noting that the act only applied to residents who register with the no-call list, and therefore, “[t]he registrants have decided that the Act’s banned phone calls intrude on their residential privacy.”¹³⁸ Accordingly, the court reversed the district court and remanded “with direction to dismiss the complaint.”¹³⁹

*B. Dissenting Opinion*¹⁴⁰

The dissent’s position was straight-forward: residential privacy is a legitimate interest, but the Act was unconstitutional because it was not narrowly tailored.¹⁴¹ The dissent argued that the act substantially limited charitable solicitation and could therefore only be upheld if it served a “sufficiently strong” government interest and was “narrowly drawn” to serve that interest.¹⁴² Although the dissent “agree[d] that protection from the invasion of

130. *Id.*

131. *Id.* at 598-99.

132. *Id.* at 599.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 600.

139. *Id.*

140. Judge Heaney authored the dissenting opinion.

141. *Stenehjem*, 431 F.3d at 600-01 (Heaney, J., dissenting).

142. *Id.* at 600.

residential privacy by unwanted solicitations is such an interest,” it did not agree that the regulation was narrowly drawn for two reasons.¹⁴³

First, the dissent contended that the act was “overly restrictive” because its broad provisions prohibit professional soliciting “no matter the time of day nor the percentage of contributions earmarked for the charity.”¹⁴⁴ The restrictive nature of the Act, the dissent argued, prevented residents “who are adverse to commercial solicitation but open to charitable solicitation” from communicating with professional charitable solicitors.¹⁴⁵

Second, the dissent argued the act was “underinclusive.”¹⁴⁶ The dissent explained that a law is underinclusive when it “discriminates against some speakers but not others without a legitimate neutral justification for doing so.”¹⁴⁷ Noting that both professional and “in-house” solicitors intrude on residential privacy, the dissent noted that “[i]t remains unclear . . . why the government has restricted the charitable speech . . . when so many other groups may intrude upon that privacy.”¹⁴⁸ This undermined the government’s rationale for the act, in the dissent’s view, because the government offered no statistical evidence on how the act would “significantly reduce the number of telephone intrusions into private residences,” or that it would “even significantly improve[] residential privacy.”¹⁴⁹ The dissent concluded that, without this showing, the act failed the narrowly tailored requirement, therefore rendering it unconstitutional.

V. COMMENT

As previously discussed, there is no lack of Supreme Court decisions discussing charitable solicitation¹⁵⁰ or residential privacy.¹⁵¹ In fact, the Supreme Court and Eighth Circuit have addressed cases that pit these interests against each other.¹⁵² This precedent has failed to produce a consistent guiding framework, however, and has led to increasing uncertainty and erroneous decisions.

This comment argues that *Stenehjem* was wrongly decided for three reasons and that further clarification in this area of the law is needed to resolve the uncertainty highlighted by the Eighth Circuit’s decision. First, the regulation at issue in *Stenehjem* is arguably content-based, which should warrant

143. *Id.* at 600-01.

144. *Id.* at 601.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 601-02.

150. *See supra* Section III.B.

151. *See supra* Section III.A.

152. *See supra* notes 47-60 and accompanying text; *see also supra* notes 101-110 and accompanying text.

strict scrutiny review. Although the Eighth Circuit summarily dismissed this contention, an examination of the issue reveals that this question is closer than the court assumes. Second, even if the regulation is not content-based, the court reviewed the regulation under the wrong degree of scrutiny. This mishap was not intentional, however, because courts have struggled with determining the appropriate standard of review since *Schaumburg*. Third, the court compounded this problem by declaring to apply an intermediate standard of review, but instead giving legislative deference to North Dakota that amounts to rational basis review. Because of this deferential review, the court essentially affirmed the State's arbitrary regulatory distinctions between professional solicitors and charitable volunteers without any statistics or studies to support its determination.¹⁵³

After analyzing these flaws, this section argues that states are not helpless in shielding their citizens from unwanted telemarketing. Other tools discussed in *Rowan*¹⁵⁴ and the *Stenehjem* dissent strike a reasonable balance between protecting residential privacy while honoring charities' free speech rights.

A. Content-based

First, it is arguable that the North Dakota regulation is content-based. Specifically, while the act allows charities to use an "outside agency" to call residents and to advocate the charity's message, it prevents that agency from requesting donations.¹⁵⁵ This restriction undermines the state's justification for the regulation, because these "outside agencies" can make the same amount of calls, as long as they do not ask for money. This provision also highlights an interesting paradox. Under the statute, it is perfectly acceptable for an agency to call residents who are registered with a "do not call" list and say, "I am calling on behalf of the American Cancer Society, and I would like to encourage you to refrain from smoking." However, if the caller goes one step further and asks, "Would you like to help our cause with a donation?," the agency has just violated the North Dakota statute.

As previously discussed, *Schaumburg* describes charitable solicitation as encompassing a variety of speech interests.¹⁵⁶ Therefore, it appears that the statute regulates the very content of the charities' speech, because it prevents them from exercising one of their speech interests, without providing an adequate justification for distinguishing between solicitation and mere advocacy. In *Kokinda*,¹⁵⁷ for example, the postal service distinction was based on the

153. See *supra* notes 147-49.

154. See *supra* notes 32-34.

155. See *Fraternal Order of Police, N.D. State Lodge v. Stenehjem*, 431 F.3d 591, 595 (8th Cir. 2005).

156. See *supra* notes 52-56 and accompanying text.

157. See *supra* notes 91-100 and accompanying text.

emotions and potential for conflicts that would block customers' means of access.¹⁵⁸ On the other hand, in *Stenehjem*, North Dakota argued that the statute was justified, because it reduced the "sheer volume" of calls made on charities' behalf, which is much different than justifying the statute, because asking for money is more intrusive than simply advocating a message.

The Supreme Court has been receptive to an analogous argument. In *Riley*, the Supreme Court noted that the disclosure provisions compelled statements that otherwise might not be made.¹⁵⁹ Because this compulsion altered the charity's message, the Court found the regulation to be content-based.¹⁶⁰ Of course, there are differences between the *Riley* statute and the *Stenehjem* statute. *Riley* directly altered the charity's message, whereas *Stenehjem*'s alteration is indirect. As previously mentioned, it is unclear how the Supreme Court will resolve this content-based question, although a clear statement on these issues is necessary to give legislatures and courts more guidance in crafting and interpreting statutes.

B. Standard of Review

The problem of determining the appropriate standard of review for charitable solicitation regulations began in *Schaumburg*. There, the Court noted that charitable solicitation was not simply "a variety of purely commercial speech," because it involved several speech interests, such as promulgating the charity's views, disseminating information, and advocating for a charitable cause.¹⁶¹ Because of these factors, the Court characterized charitable solicitation as being protected by the First Amendment.¹⁶² Such a conclusion necessarily elevates charitable solicitation above various forms of disfavored speech,¹⁶³ entitling it to more protection from government regulation. Curiously, however, the Court did not declare a standard of review.¹⁶⁴ Instead, they hedged their language by declaring that the ordinance at issue could not "survive scrutiny under the First Amendment."¹⁶⁵

This hedge has only spawned more confusion in determining the appropriate standard of review. In *Riley*, the Court stated that, because the disclosure regulation at issue burdened protected speech, it would apply an "exact-

158. See *supra* notes 102-05 and accompanying text. Also, as previously mentioned, *Kokinda* does not represent controlling legal reasoning because there was no majority opinion. See *supra* note 96.

159. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 798 (1988).

160. *Id.*

161. *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980).

162. *Id.* at 633.

163. See *supra* text accompanying notes 21-22.

164. See *supra* note 54.

165. *Schaumburg*, 444 U.S. at 636.

ing First Amendment scrutiny.”¹⁶⁶ *Pryor*, an Eighth Circuit case, echoed the Supreme Court’s struggle by noting that charitable solicitation is “fully protected” by the First Amendment, and noting that the regulation at issue could only be upheld “if it withstands First Amendment scrutiny.”¹⁶⁷

Stenehjem claimed to make sense of this mess by looking back to *Schaumburg*, which claimed to have outlined the appropriate test.¹⁶⁸ The *Stenehjem* court then resolved any prior uncertainty by stating that although “the Supreme Court has not specified whether the *Schaumburg* test is an intermediate scrutiny review of a content-neutral regulation, we have interpreted it as such.”¹⁶⁹ Interestingly, the court cited to *Pryor*, where the court had simply mirrored the ambiguous language of *Schaumburg*.¹⁷⁰

The Eighth Circuit compounded this confusion by failing to apply intermediate scrutiny. In considering whether the North Dakota statute was narrowly tailored, the court determined that the goal of preserving residential privacy “would be achieved less effectively” if charities were allowed to use professional solicitors.¹⁷¹ North Dakota argued that its distinction was based upon the sheer volume of calls because a “charity using paid professional telemarketers” would typically be “able to dial substantially more residential telephone numbers than if the charity used its own volunteers and employees.”¹⁷² While this may be true, it is mere speculation. As the dissent pointed out, North Dakota “provided no statistics to support its assertion.”¹⁷³ Evidently, the majority was not concerned with this lack of statistical support, though, because it upheld the distinction and refused to “second-guess the North Dakota Legislature’s judgment.”¹⁷⁴ Ultimately, despite failing to mention its standard of review, the court applied a rational basis standard of review.

This level of cursory review would affirm virtually any reasonable distinction the government claimed to reduce the total number of solicitations. For instance, the 75% limitation on door-to-door solicitation in *Schaumburg* would surely reduce the total number of solicitors. Furthermore, organizations spending less than 75% of their soliciting proceeds on their organization’s message will have more money to pay employees to solicit around the neighborhood, thus knocking on more doors and intruding more onto residen-

166. *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 798 (1988) (applying this measure of scrutiny because the disclosure provisions amounted to compelled speech).

167. *Nat’l Fed’n of the Blind of Ark. v. Pryor*, 258 F.3d 851, 854 (8th Cir. 2001).

168. *Fraternal Order of Police, N.D. State Lodge v. Stenehjem*, 431 F.3d 591, 597 (8th Cir. 2005).

169. *Id.*

170. *Id.*; see *supra* notes 54, 106-107 and accompanying text.

171. *Stenehjem*, 431 F.3d at 598.

172. *Id.*

173. *Id.* at 601 (Heaney, J., dissenting).

174. *Id.* at 598 (majority opinion).

tial privacy. Under *Stenehjem*'s standard of review, this argument would prevail because of the court's reluctance to "second-guess" the government.

Instead, applying any level of heightened First Amendment scrutiny would require the court to examine the relationship between the regulation and the state's interest. In *Stenehjem*, the question should have been whether professional solicitors' calls were particularly intrusive to residential privacy to justify regulating them but not volunteer solicitors. In fact, *Schaumburg* even recognized the possibility that the opposite is true. In its opinion, the court noted that "solicitation by organizations employing paid solicitors carefully screened in advance may be even less of a threat to public safety than solicitation by organizations using volunteers."¹⁷⁵ Although the regulation will likely reduce the total number of phone calls to North Dakota residents, nearly any regulation of charitable solicitation would do that if courts accept the "sheer volume" justification.¹⁷⁶ For example, the total number of calls could also be reduced by only exempting charities that advocate health-related issues, such as the American Cancer Society or the Red Cross but restricting all other charities, such as the Salvation Army. Upholding this distinction would be ridiculous, however, because both types of charities intrude onto residential privacy to some degree and accepting the "sheer volume" argument gives the legislature too much latitude to make arbitrary distinctions.

C. Protecting Residential Privacy

Striking the appropriate balance between First Amendment freedom to solicit and residential privacy may be a daunting task, but states are not without the power to protect their citizens, and citizens are not without a remedy against unwanted callers. As previously discussed, the Supreme Court has upheld sender-specific prohibitions on unwanted mailings in *Rowan v. United States Post Office Department*.¹⁷⁷ A possible formulation of a *Rowan*-like "no call list" would allow residents to contact a state agency to report that they have been receiving unwanted charitable calls on behalf of a specific charity. For example, Missouri residents could contact the Public Service Commission,¹⁷⁸ who would then examine the residents' complaint to determine its merits and issue an order prohibiting the charity from contacting that number again.¹⁷⁹ States can use different criteria for determining what warrants an

175. *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 638 n.13 (1980).

176. *Stenehjem*, 431 F.3d at 598.

177. *See supra* notes 29-34 and accompanying text.

178. The Missouri Public Service Commission currently regulates telephone utilities, MO. CODE REGS. ANN. tit. 4, § 240-30.010 to -30.060 (2003); telecommunications service, *id.* § 240-32.010 to -32.200 (2004); and service and billing practices for telecommunications companies, *id.* § 240-33.010 to -33.160 (2005).

179. *See, e.g., Rowan v. U.S. Post Office Dept.*, 397 U.S. 728, 730 (1970)

administrative order, such as the frequency of the calls, and an appropriate enforcement mechanism, such as increasing fines for the violating charity.

Adopting a similar approach to handle unwanted charitable solicitation calls would circumvent the appellee's arguments against the statute in *Stenehjem*, while still preserving residential privacy. The *Rowan*-like regulation would not be underinclusive, because it would target *all* charitable calls that intrude on residential privacy, as determined by the residents themselves. The regulatory scheme would also not be overinclusive, because it would target *only* those charitable calls intruding on residential privacy and would not "burden more speech than is necessary to further the State's interest in residential privacy."¹⁸⁰ It is also important to note that under a *Rowan*-like scheme, the residents themselves declare what disrupts their residential privacy, as opposed to a legislature trying to determine and effectively regulate the most intrusive probes into residential privacy.

VI. CONCLUSION

Although striking an appropriate balance between protecting residential privacy and First Amendment rights is a difficult task, it seems that the Eighth Circuit reached the wrong conclusion. If its reasoning were accepted, particularly the "sheer volume" argument, the scales would be tipped too far in favor of residential privacy. This would impinge charities' First Amendment rights because of general public frustration with telemarketing. A better approach would adopt the Supreme Court's reasoning in *Rowan* and implement a caller-specific do not call list. Such an approach would strike a fairer balance between residential privacy and First Amendment rights, because it would regulate charities that actually intrude on residential privacy, while allowing non-intrusive charities to fully exercise their First Amendment rights. Without further clarification, however, state laws regulating charitable solicitation will continue to be reviewed by courts mired in confusion about how to appropriately balance residential privacy and First Amendment freedoms.

MARCUS WILBERS

(Subsection (b) mandates the Postmaster General, upon receipt of a notice from the addressee specifying that he has received advertisements found by him to be within the statutory category, to issue on the addressee's request an order directing the sender and his agents or assigns to refrain from further mailings to the named addressee. Additionally, subsection (c) requires the Postmaster General to order the affected sender to delete the name of the designated addressee from all mailing lists owned or controlled by the sender and prohibits the sale, rental, exchange, or other transactions involving mailing lists bearing the name of the designated addressee.).

180. *Stenehjem*, 431 F.3d at 598.

