No. 01-1080

In the Supreme Court of the United States

TRANS UNION CORPORATION,
Petitioner,
v.
FEDERAL TRADE COMMISSION,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMICUS CURIAE THE COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does this court's decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), create a category of speech that is removed from the full protection of the First Amendment, on the grounds that this speech is not related to a matter of "public concern?"

2. Does the requirement that the government show at least a substantial interest in imposing a content-based restriction on speech (the use of a list of names and addresses used to communicate information about products and services to consumers or to solicit charitable donations) oblige the court to conduct some meaningful review of the government's alleged interest and tailoring?

3. Does the value of the use of a list of names and addresses used in targeted marketing to consumers and businesses mean that the restriction in this case should be subjected to strict scrutiny, although it may be closely akin to commercial speech?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page**

MISCELLANEOUS **Page**

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus Curiae the Competitive Enterprise Institute is a nonpartisan policy analysis organization, dedicated to the principles of limited constitutional government and free enterprise. The Competitive Enterprise Institute has the written consent of both parties to file this brief with the court.

Competitive Enterprise Institute scholars have produced key articles concerning the balance between the First Amendment's protection of freedom of information and the regulation of consumer data.[2] The Competitive Enterprise Institute has a substantial interest in supporting the position of the petitioner to uphold the first amendment rights of lawful businesses to exchange truthful information about real people. The Competitive Enterprise Institute believes that the lower court's approval of the weak rationale proffered in support of the restrictions on speech crafted by the Federal Trade Commission in this case amounts to a substantial departure from this Court's opinions requiring meaningful first amendment protection for truthful speech.

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* state that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity other than *Amicus Curiae* made a monetary contribution to the preparation or submission of this brief**.**

[2] Solveig Singleton, *Privacy Versus the First Amendment: A Skeptical Approach*, XI Fordham Intellectual Property, Media & Entertainment Law Journal 97 (Autumn 2000); Competitive Enterprise Institute, *The Future of Financial Privacy: Private Choices Versus Political Rules* (2000); Solveig Singleton, *Privacy as Censorship: A Skeptical View of Proposals to Regulate Privacy in the Private Sector*, Cato Institute Policy Analysis No. 295, January 22, 1998.

SUMMARY OF ARGUMENT

The D.C. Circuit below in *Trans Union II* and *III* considered a first amendment challenge to the FTC's decision to require Trans Union to individually contact customers to get them to "opt in" before their names and addresses (regulated as "credit reports" but not the in fact the full report) could be used for targeted marketing. The Circuit Court determined that, because this Court had held in *Dun & Bradstreet* that credit reports were "private speech" of lesser first amendment value, that the FTC's regulation would be subject to intermediate rather than full scrutiny. However, the "private speech" inquiry of *Dun & Bradstreet* is a throwback to days when only newsworthy speech was fully protected, and ought not to be expanded outside of its original context, a defamation case. Its application to Trans Union's speech, which is truthful, is entirely inappropriate and, indeed, bizarre.

Perhaps because the D.C. Circuit chose to rely on the confusing "private speech" doctrine, the D.C. Circuit failed to apply the "substantial interest" test it chose to employ with any sort of rigor. It might just as well have been applying a rational basis test. It failed to identify any concrete government interest in the regulations in question other than a general interest in privacy. Given that the *question in the case* was whether the government's claimed interest in privacy is legitimate, given the protection the first amendment generally gives to truthful speech, the lower court's reasoning was essentially circular. And it entirely failed to consider different types of regulation that would have served the government's legitimate interests as well or better, particularly opt-out.

Because the D.C. Circuit's analysis below was, frankly, defective, the question remains of whether the commercial speech doctrine would have served as a better framework for analysis. The speech in question — the communication of lists of names and addresses that fit certain criteria between businesses — is not itself advertising. It may be ultimately used in for-profit advertising, or in political speech, or for other purposes. So the applicability of the commercial speech doctrine is an open question. But in any case, the information Trans Union seeks to communicate here is valuable, not only to businesses but to consumers. And the regulation in question, because of the enormous expense and inconvenience of opt-in requirements, amounts to a virtual ban on the speech. This speech is thus an ideal candidate for heightened scrutiny, although it may be closely akin to commercial speech.

ARGUMENT

I. The "public concern" test should be confined to defamation cases.

The first issue presented by this case is how the "public concern" doctrine of *Dun & Bradstreet* will be applied outside the context of a defamation action. The Circuit Court below applied the "public concern" doctrine of *Dun & Bradstreet* to determine that Trans Union's communication of lists of names and addresses to use in marketing would be subject to only intermediate scrutiny 472 U.S. 749 (1985); *Trans Union III*, 267 F.3d 1138, 1141 (D.C. Cir. 2001). This holding bizarrely and unwisely expands the "private speech" language of *Dun & Bradstreet* outside of the defamation context to truthful speech restricted by a *de facto* prior restraint.

Dun & Bradstreet involved a defamation action brought against the purveyors of a false credit report to five businesses. The *Dun & Bradstreet* Court ruled that the plaintiff need not prove "actual malice," the defamation standard appropriate to a media defendant, in the action against the credit bureau. The Court reasoned that the credit report, sent to only five businesses, was not a matter of "public concern," familiar enough language in inquiries into the constitutionality of defamation torts. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254 (1964); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). The *Dun & Bradstreet* Court added, "speech on matters of purely private concern is of less First Amendment concern" 472 U.S. 749,759-760.

Commentators have noted that the "public concern" inquiry, both in defamation cases and in its other doctrinal niche, inquiries into the free speech rights of government employees, is barely coherent and should not be expanded.[3] The "public concern" test began to be used at a time when newsworthy speech was considered the only speech worthy of first amendment protection, even before entertainment such as movies was brought into the free speech fold.[4] It hearkens back to the late nineteenth century, when most judges thought only speech in the "public interest" was protected by the first amendment.[5] The public/private speech dichotomy is inconsistent with many first amendment precedents long recognizing free speech rights beyond the newspaper headlines. It is unlikely that the framers, some of whom thought that its enumerated powers constrained Congress so narrowly that the Bill of Rights was not necessary,[6] intended to empower Congress to regulate private speech (which would presumably include ordinary conversations, letters, private journals, and so on).[7]

Nevertheless the D.C. Circuit applied the "public concern" doctrine to the communication of Trans Union's marketing lists to other businesses as justification for

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[3] *See,e.g.,* Volokh, 52 Stan. L. Rev. at 1097-98; Gilles, 41 Case W. Res. L. Rev. at 739.
[4] *See* Zimmerman, 9 DePaul-lca J. Art & Ent. L. & Pol'y at 58, nn. 59-63.
[5] *See generally* David M. Rabban, *Free Speech in its Forgotten Years* (1997).
[6] *See, e.g.*, James Wilson, Speech in the State House Yard, Oct. 6, 1787 *in* 2 *The Documentary History of the Ratification of the Constitution* 167-72 (Merrill Jensen ed., State Historical Soc. of Wis. 1976); The Federalist No. 84, at 513-15 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *Wallace v. Jaffree*, 472 U.S. 38, 94 (1985)(Rehnquist, J., dissenting).
[7] Singleton, XI Fordham Intell. Prop. Media & Ent. L.J. at 137-39.

giving the speech less first amendment protection. The content of the list in Trans Union's case is concededly accurate, not false and defamatory; the D.C. Circuit's decision wrongly expands *Dun & Bradstreet* to truthful speech, outside of the defamation context. Furthermore, the restraint in this question is not the mere threat of a "chill" on speech created by the post hoc risk of a tort suit; as we discuss further below, the opt-in regime is so restrictive is operates as a *de facto* prior restraint.

The Supreme Court should take this opportunity to clarify that the "public concern" language of *Dun & Bradstreet* was not intended to create a new category of truthful speech to be withdrawn from full protection of the first amendment. It may also take this opportunity to clarify the application of the commercial speech doctrine to the communication of information about consumers between businesses, a question that the lower courts may now begin to encounter with more frequency. *See, e.g., U.S. West v. F.C.C.*, 182 F.3d 1224 (10th Cir. 1999).

II. In subjecting regulation to a "substantial interest" test under the First Amendment, the courts must subject the government's claims to meaningful analysis.

Even assuming that the D.C. Circuit was correct in applying a substantial interest test to the regulation in question, the court did not do so properly. In considering Trans Union's challenge to the FTC's restriction on the communication of its lists, the Circuit court converts the "substantial interest" test into a sort of truncated rational basis test. This failure to treat the conflict between the restriction on speech in this case and the first amendment seriously is inconsistent with the close scrutiny this Court has traditionally given to restrictions of truthful speech.

A. The Government's Alleged Interest May Not Be Substantial

The D.C. Circuit first gave short shrift to Trans Union's first amendment case in assessing the nature of the government's interest in this case. In asserting that the government had a substantial interest in the restrictions, Judge Tatel's initial opinion offered only the following:

> The "Congressional findings and statement of purpose" at the beginning of the FCRA state: "There is a need to insure that consumer reporting agencies exercise their grave responsibilities with ... respect for the consumer's right to privacy." Contrary to the company's assertions, we have no doubt that this interest — protecting the privacy of consumer credit information — is substantial" *Trans Union II*, 245 F.3d 809, 818 (2001).

The D.C. Circuit's opinion upon rehearing merely referred briefly to the government's "interest in protection of personal financial data" *Trans Union III*, 267 F.3d. at 1142.

For the government to have a substantial interest in protecting consumer's privacy by the opt-in scheme in question, however, there must be some threat to consumer's

privacy rights to protect against. But the legitimate scope of our privacy rights as consumers does not ordinarily extend to our names and addresses, or to most other facts about ourselves. On many occasions the courts have stepped in to protect the right to disseminate such information when it is found in the public records. *See, e.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Indeed, if privacy rights did extend so far, credit reports could not legally exist at all. Nor could journalism. The legal system *does* recognize privacy rights against the private sector in the form of narrowly construed common-law actions and some statutes. But when it comes to conflicts with the first amendment, those privacy rights, like defamation, have often been narrowly confined to protect free speech.[8] This dovetails with intellectual property law, as well, which recognizes that copyrights do not extend to facts or opinions. *See Feist Publications Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991).

Congress's legitimate interests cannot extend to turn the normal rule that people may exchange facts about one another on its head, without some specific showing of how people will actually be harmed by this. Will they be embarrassed by the possibility that someone might imply from their inclusion on a given market list that they have a mortgage or a checking account? Is this the sort of harm that Congress can legitimately regulate? Does the harm to be prevented outweigh the benefit of the speech in question? These are questions that the first amendment requires the government to answer. That answer has not been forthcoming in this case.

B. The Regulation is Not Appropriately Tailored

The "substantial interest" test also requires some kind of meaningful examination of the fit between the government's alleged interest and the speech that has been restricted. In considering the question of the "fit" between the regulation and the government's alleged interest, the D.C. Circuit blithely concluded that "the government cannot promote its interest (protection of personal financial data) except by regulating speech because the speech itself (dissemination of financial data) causes the very harm the government seeks to prevent. Thus, the FCRA unquestionably advances the identified state interest." *Trans Union III*, 267 F.3d. at 1142.

To begin with, this neglects that fact that the speech that will be suppressed by the FTC's regulation is *not* merely the lists of names and addresses that Trans Union would have transmitted to other businesses. In many cases, it will include the speech that those businesses would have then transmitted to consumers using the lists. Of course, other lists might be available. But, also in addressing whether an opt-in regulation violated free speech rights, the Tenth Circuit has noted that the availability of alternatives to targeted marketing using the restricted lists do not traditionally justify the suppression of speech *U.S. West*, 182 F.3d at 1232.

The D.C. Circuit's opinion seems to be based on the notion that the "privacy interests" that Congress may have been protecting are legitimate no matter how broadly they may sweep. *But in a first amendment challenge to the regulation in question, it is*

[8]Singleton, XI Fordham Intell. Prop. Media & Ent. L.J. at 114.

the very legitimacy of those interests that is in question. Of course a regulation will appear to be "narrowly tailored" if the government interest it furthers is defined as suppressing the information in question entirely. But that type of reasoning neglects a serious inquiry into the nature and legitimacy of the government's alleged interest, and a failure to understand the regulatory alternatives.

One regulatory alternative, barely mentioned by the D.C. Circuit, is an "opt-out" regime, under which consumers that do not wish to have their information shared may "opt-out" of doing so. In considering Trans Union's appeal, the D.C. Circuit dismissed "opt-out" as only marginally different from opt-in, which is simply wrong. Opt-out is much less restrictive; an empirical trial by U.S. West showed that the compliance costs of opt-in and the annoyance it offers customers mean that it operates as a virtual prior restraint in most contexts. U.S. West, one of the few businesses in the U.S. to operate under an opt-in system, found it cost $30 per customer contacted to obtain a consent, and required an average of 4.8 calls to each household before the company reached an adult who could grant consent.[9] For this reason, opt-in can be much more intrusive than opt out. The D.C. Circuit was also wrong in believing that Congress had considered and rejected opt-out, as petitioner Trans Union notes in its brief. Brief of Petitioner Trans Union, at 29, n.15. But there are other alternatives as well, including mandating the use of a fulfillment house that keeps consumer's information confidential,[10] a simple requirement that consumers be given notice, and so on.

In short, the Circuit Court should have followed Supreme Court opinions of recent years recognizing the value of economic and commercial speech, many of which are cited in petitioner's brief. The D.C. Circuit should have taken its obligation to inquire into the constitutionality of this restriction seriously. Because it did not, the Supreme Court ought to take this opportunity to offer guidance to the lower courts on this issue.

III. Does the value of the use of a list of names and addresses used in targeted marketing to consumers and businesses mean that the FTC's speech restriction should be subjected to strict scrutiny, although it is akin to commercial speech?

Over the years, this Court has taken significant steps towards recognizing that commercial speech does indeed have meaning and value in people's lives, value that makes it worthy of significant first amendment protection. *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Ibanez v. Florida Dept. of Bus. and Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136 (1994); *Rubin v. Coors Brewing Co.,* 514 U.S. 476 (1995). The Court has recently ruled that a

[9] Coalition for Sensible Public Records Access, *The Limits of Opt-In*, at http://www.cspra.org/ (accessed February 18, 2002).

[10] A fulfillment house stands between a purveyor of lists and the business that wishes to use the list; the purveyor generates the list according to the criteria desired by the business (a list of first-time home buyers, for example). The fulfillment house takes the list and uses it to label mailing envelopes, which it fills with the business's marketing information. It then mails the envelopes. The business does not see the list; it learns the names and addresses of consumers after the mailing only if those consumers respond to its marketing message. Fulfillment houses are widely used in marketing already.

total ban on commercial speech is subject to heightened scrutiny *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 495 (1996).

The D.C. Circuit's opinions in *Trans Union II* and *III* below hint at the possibility that Trans Union's communications could have been treated as "commercial speech" rather than "private speech." This is a possibility. Although the communications of marketing lists between businesses is not itself advertising, the lists are often ultimately used in contacting consumers for marketing purposes. Note, though, that the lists may also be used for other purposes, such as disseminating political speech or requests for charitable donations. The Court thus would not be entitled to automatically assume that the speech in this case is "commercial speech."[11] It would be of value to the lower courts for this Court to explore this issue further.

Even if this Court were to find that some of the uses of the information are so closely related to commercial speech as to fall within that category, the Court should also ask whether this type of restriction on this type of speech should be treated with heightened scrutiny. As we discuss in Section II B. above, the opt-in restriction is for practical purposes a ban on the use of the speech in question, like the regulation in *44 Liquormart*. And the speech in this case is unquestionably of value. Its vanishing from the realm of shared information will make a difference—perhaps a difficult-to-measure difference, but a difference none-the-less, in how people live their lives.

The speech that Trans Union wishes to communicate is of substantial value to consumers as well as to businesses. These names and addresses can be used to send offers of new goods and services, discounts and special offers, to millions of people. Economists once believed that marketing and advertising were essentially wasteful activities that manipulated consumers into buying goods that they did not really need. But research has since shown that marketing enhances competition; when advertisers are active, consumers enjoy lower prices and better quality products.[12] While each advertiser's individual "pitch" may be biased, consumers benefit and learn from the plethora of messages as a whole, in the same way that judges learn about a case from hearing each attorney's side of the issue.

This case would be an excellent occasion for the Supreme Court to explore further the idea that some restrictions on truthful commercial speech are entitled to heightened first amendment scrutiny.

Conclusion

Simply put, this is a case that involves a restriction on the communication of truthful information between legitimate businesses, a restriction imposed for no particularly good reason. CEI submits that certiorari should be granted in this case, and that the Supreme Court should take this opportunity to confine the mischievous "private

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[11] Singleton, XI Fordham Intell. Prop. Media & Ent. L.J. at 134-40.

[12] *See generally* John E. Calfee, *Fear of Persuasion: Advertising and Regulation* (1997)(describing empirical studies of the benefits of advertising for consumers).

speech" doctrine to its proper bounds, as well as clarifying the constitutional status of the communications of truthful information about consumers between businesses.

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Respectfully submitted,

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