IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TOWN OF CASTLE ROCK, COLORADO Appellant, v. APTIVE ENVIRONMENTAL, LLC, Appellee.	Case No. 18-1166

AMICUS CURIAE BRIEF OF THE COLORADO MUNICIPAL LEAGUE SUPPORTING DEFENDANT-APPELLANT, TOWN OF CASTLE ROCK, COLORADO

Appeal from the United States District Court for the District of Colorado
The Honorable Marcia S. Krieger, District Court No. 17-cv-01545-MSK-MJW

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CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF FINANCIAL INTEREST

Pursuant to Fed. R. App. P. 26.1 and 10th Cir. R. 31.5, *Amicus Curiae* Colorado Municipal League ("CML") makes the following disclosures:

CML is a Colorado nonprofit corporation. CML does not have a parent corporation. No publicly-held corporation owns any part of CML.

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INTEREST OF *AMICUS CURIAE*

The Colorado Municipal League ("CML") was formed in 1923. It is a non-profit, voluntary association of 270 of the 272 municipalities that are located throughout the State of Colorado. Nearly 99 percent of people who reside in a city or town in Colorado live within a CML member jurisdiction.

Most of our members could reasonably be described as "small towns." As of the 2010 Census, 128 Colorado cities and towns had populations of fewer than 1,000; 69 had populations between 1,001 and 5,000; 49 had populations between 5,001 and 25,000; 15 had populations between 25,001 and 100,000; and only 10 had populations over 100,000. Our small town members typically have significant budgetary and resource constraints and limited professional staff.

Among its many roles in support of its member governments, CML provides for training and peer-to-peer information exchange on matters having to do with municipal challenges and the proper exercise of municipal police powers. Officials from our member municipalities are provided with opportunities to learn from each other's experiences, which allows them to address potential problems in their communities before they become serious. In this way, CML provides an important support infrastructure for its members—and particularly its hundreds of small town members.

Participation by CML in this case is intended to provide the Court with a statewide municipal perspective. The outcome of this case will have significant impacts on ability of CML's members to exercise their individual policy judgments with respect to matters of local concern, including but not limited to setting legal boundaries for commercial activities. It will either curtail proactive local legislation by making it too expensive, or overburden local governments with the costs of data gathering and analysis. It may also complicate municipal record retention policies.

CML submits that the District Court opinion will have a knock-on effect with respect to the myriad ways in which local governments regulate commercial activity. By conflating commercial speech and commercial activity, and then increasing the burden of the intermediate scrutiny test articulated in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), the opinion opens the door to First Amendment challenges of many different types of local regulations. It does so by requiring that they have a rigid, empirical basis that the municipality can prove-up many years after the regulations are adopted.

CML submits that the District Court's requirement for such analytical rigor and record-keeping opened the door to a steep and slippery slope. That is because a multitude of municipal regulations of commercial activity impact the timing, location, or manner of commercial speech (*e.g.*, zoning, sign controls, business licensing, and regulations regarding the use of public property and rights-of-way).

These measures often (and appropriately) seek to prevent harms before they occur (when there is little local data available)—or at least to close the door on such harms before they get loose and become unmanageable. If allowed to stand, the District Court ruling will frustrate reasonable proactive local ordinances that are in the public interest. As such, CML has authorized the filing of this *amicus curiae* brief in order to protect the legislative process by which local governments develop and adopt reasonable regulations of commercial activities.

RULE 29(c)(5) STATEMENT

This brief was authored by undersigned counsel, who does not represent any other party to this case. No party or party's counsel contributed money that was intended to fund preparation or submittal of this brief. No person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF THE ARGUMENT

The scope of the police power is extensive. It "extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community." *Kovacs v. Cooper*, 336 U.S. 77, 83 (1949). Regulation of commercial activities in order to protect peace and tranquility in residential neighborhoods is ubiquitous and long-standing. Local governments are

empowered, and expected, to anticipate and prevent problems, and, as a matter of law, are not required to wait for small problems to grow before taking action.

In the interests of safety, privacy, and tranquility, the Town of Castle Rock adopted an ordinance that restricts door-to-door sales between 7:00 p.m. and 9:00 a.m. The ordinance does not address the content of the commercial speech. It simply prohibits trespass after 7:00 p.m. by uninvited door-to-door commercial solicitors.

If this Court determines that the commercial speech is so intertwined with the trespass as to bring the trespass within the protective umbrella of the First Amendment, the curfew survives the test for constitutionality of commercial speech regulations that was articulated in *Central Hudson*.[1] Castle Rock's deliberative process for problem identification, balancing of interests, and adopting the curfew is entitled to some deference by the Court, as the Ordinance is "content-neutral" and does not impose a complete ban on door-to-door solicitation.

[1] CML does not concede that the curfew is a regulation of commercial speech that should be subject to First Amendment scrutiny, but offers the alternative argument to demonstrate how if it were, it would still pass constitutional muster.

ARGUMENT

> The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.

Oliver Wendell Holmes, Jr. THE COMMON LAW. (1881), at 1.

I. The Curfew Is a Regulation of Trespass That Does Not Implicate the First Amendment.

In Colorado, it is illegal to sell, barter, exchange, or offer to sell, barter, or exchange a motor vehicle on a Sunday from any place or premises or residence. *See* C.R.S. § 44-20-302. Colorado's cities and towns routinely regulate operating hours to mitigate the impacts of certain types of businesses on residential neighborhoods. *See, e.g.*, LONGMONT, COLORADO CODE OF ORDINANCES § 15.04.020(B)(6) (authorizing City to restrict hours of operation to "ensure no adverse impacts on adjacent properties); and ALAMOSA, COLORADO CODE OF ORDINANCES § 10.221 (restricting mobile food vending within 300 feet of an occupied residence to the hours of 8:00 a.m. and 9:00 p.m.). More than a decade ago, the Town of Castle Rock adopted an ordinance restricting uninvited door-to-door sales to the 10-hour window of 9:00 a.m. to 7:00 p.m., seven days per week (the "curfew"). A1295[2] (CASTLE ROCK MUNICIPAL CODE ("CRMC") § 5.04.080.A.).

[2] Citations in this format are to pages within the APPENDIX OF APPELLANT TOWN OF CASTLE ROCK.

These are examples of commonplace forms of business regulation. They all incidentally impact commercial speech. But none implicate the First Amendment.

The curfew at issue in the instant case provides, in pertinent part, "No solicitor shall: . . . (4) Enter upon any private property within the Town after 7:00 p.m. and before 9:00 a.m." The ordinance defines "solicitor" as: "a person who attempts to make personal contact with a resident at his or her residence without prior specific invitation or appointment from the resident, for the primary purpose of attempting to sell a good or service, whether or not the goods or services are actually delivered at the time of sales."[3] On its face, the ordinance regulates the conduct of an unprotected class of economic actors and does not reach their speech. The curfew is simply a regulation of trespass, intended to preserve the public safety, privacy, and tranquility of the Town's residential neighborhoods.

The District Court looked to the recitals of the ordinance and held that "the purpose of the curfew, as articulated in the ordinance, is to regulate commercial speech during particular hours." A857. Such an intent is not at all clear from the preamble, but it is also not legally pertinent. Preambles cannot be used to control the ordinance when the ordinance is clear and unambiguous, and "a court has no license

[3] Even though by definition a solicitor is uninvited, the ordinance makes clear that invited guests are not subject to punishment. An invitation from the property owner to enter upon the property after 7:00 p.m. or before 9:00 a.m. is specifically included as an affirmative defense to the ordinance. *See* § 5.04.080, CRMC, subsection C.

to make it do what it was not designed to do." *District of Columbia v. Heller*, 554 U.S. 570, 578 n.3 (2008). Moreover, it is a long stretch to conclude, as the District Court must have, that the Town Council believed that a regulation of a commercial actor's commercial speech would be a more effective way to prevent the problems associated with trespass than would a direct regulation of that commercial actor's physical trespass after 7:00 p.m.

The fact that the trespass regulation applies only to solicitors does not change the analysis. While speech itself is protected by the First Amendment, it is permissible to examine speech in order to evaluate the underlying conduct. *See Hill v. Colorado*, 530 U.S. 703, 721 (2000) (observing, "It is common in the law to examine the content of a communication to determine the speaker's purpose," and further, "We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct."). Indeed, if it were otherwise, government would not be able to function, because nearly every activity ultimately relates to speech. *See Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1152 (2017) (Breyer, J. Concurring in the Judgment, noting "virtually all government regulation affects speech. Human relations take place through speech. And human relations include community activities of all kinds—commercial and otherwise.").

What would change the analysis is if the trespass regulation had the purpose or effect of shutting down or significantly burdening a particular category of speech or a particular speaker. In that case, the First Amendment would be implicated, and heightened scrutiny would be in order. *See NAACP v. Button*, 371 U.S. 415, 439 (1963). The record shows that CML has provided guidance to its members on this point, citing cases in which total (or near total) bans have been struck down. A1331. The instant case is not about a total ban. The curfew allows door-to-door solicitors to work in Castle Rock up to 70 hours per week. A1300-01.

In spite of this wide opening for door-to-door solicitation, the District Court expanded the definition of "total ban" and found that the burden on Aptive was sufficient to trigger First Amendment scrutiny. It is plain that the District Court accepted Aptive's invitation to conflate correlation with causation and found that "Between August 5 and August 12, 2017, there were 49 to 55 sales in Castle Rock; but the rate of sale was twice as many in the Denver metropolitan area as in the Town of Castle Rock. Aptive attributes that to the fact that it could not engage in door-to-door solicitation after 7 o'clock p.m." A852. Yet such reasoning is unsound.

Indeed, there are many more cogent reasons why the rate of sale may be higher in the Denver metropolitan area. These include the age of the housing stock, community acceptance of door-to-door solicitors, the market penetration of other companies, and the available habitat for pests near homes, to name just a few.

Moreover, in the balance of interests between Town residents and door-to-door solicitors, the Town residents have a superlative right to privacy in their own homes, *see, e.g., Mainstream Mktg. Servs. v. FTC*, 358 F.3d 1228, 1237 (10th Cir. 2004), while the solicitors have no constitutional right to maximize their profits. *See, e.g.*, *Hold Cargo Sys. V. Delaware River Port Auth.*, 20 F. Supp. 2d. 803, 836 (E.D. Penn. 1998).

As such, the District Court erred in finding a constitutional issue. A solicitor is identifiable by his or her speech. *See Hill*, 530 U.S. at 721. But that is where the speech inquiry ends. Consequently, the curfew should not be subject to First Amendment inquiry.

II. If This Court Finds That the First Amendment is Implicated, the Curfew Passes the Applicable Constitutional Test.

If this Court finds that the burden on speech is sufficient to justify the invocation of First Amendment law, then *Central Hudson* provides the test for regulations that involve commercial speech. Where the regulated speech is lawful and not misleading, the test has three prongs: (1) the governmental interest must be substantial; (2) the regulation must directly advance the governmental interest; and (3) the regulation cannot be more extensive than necessary to serve the interest. The first prong of the test is not at issue. The District Court properly held that the interests at stake are substantial.

The second and third prongs of the *Central Hudson* test are related, and often applied together as a test of the fit between means and ends. This "means-ends" component of the *Central Hudson* test for the constitutionality of commercial speech regulations is not a test of statistical significance—it is a test of reason. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555-56 (2001).

On the "ends" side (considered first), the speech restriction must demonstrate that the harms are "real," and the regulation will alleviate them to a "material degree." *Id.* at 555. On the "means" side (considered second), there must be a "reasonable 'fit between the . . . ends and the means chosen to accomplish those ends . . . .'" *Id.* at 556 (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995)).

Examining the "ends," the District Court quoted *Lorillard* for the proposition that courts "do not . . . require that empirical data come accompanied by a surfeit of background information." A862. The District Court acknowledged that the government may "justify speech restrictions by references to studies and anecdotes pertaining to different locales altogether, or even, in a case applying [strict] scrutiny, to justify restrictions based solely on history, consensus, and simple common sense." A862 (quoting *Id.* at 555). Finally, the District Court cited this honorable Court for the proposition that "a regulation must do more than provide ineffective or remote support for a governmental purpose." A863 (citing *Mainstream Marketing*, 358 F.3d at 1237). *Lorillard* and *Mainstream Marketing* recognize the practical realities of the

inputs of the legislative process, by allowing for qualitative deliberations in lieu of data-driven analysis.

Yet the District Court did not apply those standards. It interpreted a demonstration of "real" harm to mean that the harm must already exist in the community. A868-69 (comparing Castle Rock's local situation to Shreveport, Louisiana's situation). It looked only to the experience of Castle Rock, and did not allow Castle Rock to rely on its anecdotal evidence, experience, consensus, and common sense, combined with the experience of other municipalities. Instead, it struck down the curfew based on the lack of a local empirical record. A873.

The District Court compared the evidence presented in *Vivint Louisiana, LLC v. The City of Shreveport*, 213 F. Supp. 3d 821 (W.D. La. 2016) , to that available to Castle Rock. A869-70. However, the District Court should have interpreted *Vivint* as an example of "experience of other municipalities" that shows that door-to-door solicitation is, in fact, a "real" problem that justifies the curfew. In *Vivint*, the Court upheld a total ban on commercial door-to-door solicitation under the *Central Hudson* test, based on an empirical demonstration of the local relationship between solicitation and crime rates. In that case, Shreveport went the extra mile with regard to analysis, but there was also more at stake due to the complete ban that was at issue.

U.S. Census data shows that Castle Rock grew from 20,224 people in 2000 to 48,231 in 2010. By contrast, Shreveport's population in 2010 was 199,311. Castle Rock could reasonably anticipate the problems of door-to-door solicitation would worsen with growth, as a critical mass of residences make the Town worth the effort for door-to-door salespeople (and people claiming to be door-to-door salespeople).

Put simply, *Vivint* does not set the standard for analysis that is required to support a limited business restriction like the curfew. Instead it supports the conclusion that the evidence, experience, consensus, and common sense available to the Town's elected officials brought them to the reasonable conclusion that the door-to-door solicitation problem was "real," and a problem that could become significant in Castle Rock over time. In fact, that is what the record shows. A1082, A1084. That is all that *Central Hudson* requires.

The opinion below reveals that at the time the ordinance was adopted, a councilmember had a bad experience with a door-to-door solicitor, and there was a complaint about a solicitor being in a neighborhood at 9:45 p.m. A847-48. Although the councilmember's experience was during daytime hours, it is not unreasonable for the Council to ultimately conclude, based on experience, consensus, and common sense, that a 7:00 p.m. curfew would address a real problem before it became manifest. Put another way, there was legally sufficient information to conclude that a "bad experience" with a solicitor would be compounded if the experience occurred

at night. It cannot be that the law would require a city or town to experience widespread privacy invasions, burglaries, vandalism, or even violent crime before the city or town takes reasonable action regarding a problem that the courts have acknowledged is "real." *See Vivint*, 213 F. Supp. 3d 821, 824-27 (W.D. La. 2016); *Ass'n of Cmty. Orgs. for Reform Now v. Town of E. Greenwich*, 239 Fed. Appx. 612, 614 (1st Cir. 2007).

It is not relevant that residents of another municipality "did not object to solicitors and, indeed, some warmly received solicitation in the evening hours." A865 (discussing *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250 (3rd Cir. 1986)). It is for the city or town's elected officials, not the District Court, to represent residents, and to determine their policy preferences. When elected officials reasonably believe that the problems created by door-to-door solicitation are "real," they are ideally situated to create solutions that are consistent with their residents' shared values. Indeed, if they are wrong, they can change course with amendments, or repeal the ordinance. Alternatively, their constituents can vote them out of office.

The District Court stated that it did not decide the third prong of *Central Hudson*. However, the District Court placed the burden on the Town to demonstrate how the curfew that affects only solicitors (and not noncommercial canvassers) materially advances privacy interests. Local government may regulate the area of commercial speech to advance its objectives, even if imperfectly. *See, e.g.*, *Contest*

Promotions, LLC v. City & Cty. Of San Francisco, 704 Fed. Appx. 665, 667-68 (9th Cir. 2017); *Resort Dev. International, Inc. v. Panama City Beach*, 636 F. Supp. 1078, 1083 n.4 (N.D. Fla. 1986). In the instant case, *Central Hudson's* third prong is satisfied.

The District Court found fault in the fact that Town data show that after adoption of the ordinance, door-to-door solicitation has not been a significant issue for the Town. It noted that there has been no documented evidence that commercial solicitation after 7:00 p.m. continues to impose a "real harm" on the community. While the District Court considered this a constitutionally fatal defect, this Court should consider it to be persuasive evidence that the curfew materially advances the governmental interest by alleviating the "real harm" from after-hours door-to-door solicitation.

CONCLUSION

CML submits that anecdotes, history, community consensus, and common sense are the heart of local government. Elected officials bring their individual experience, social connections, political persuasions, and individual perspectives to local government. They communicate (often through organizations like CML) to understand the landscape of issues that their municipalities may face. They talk to their constituents about problems and potential solutions. They see what others are doing. In short, they legislate.

One hundred ninety-seven of CML's member municipalities have populations of less than 5,000 people. They have limited resources, limited staff, and for many issues, rely almost exclusively on the experiences of others to anticipate and head-off emerging problems. The District Court's requirement that business regulations be based on local data and not broader experience, common sense, and local judgment is untenable. It is also not what *Central Hudson* requires.

In closing, the District Court erred when it subjected the curfew to constitutional scrutiny. Alternatively, the District Court misconstrued the second and third prongs of the *Central Hudson* test. As such, this honorable Court should vacate the decision below and dismiss the case, or remand the case to the District Court for additional findings consistent with the holding that the curfew does not regulate speech, or that the curfew satisfies the *Central Hudson* test.

Respectfully submitted,

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Date: September 17, 2018

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I hereby certify that on September 17, 2018, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

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