

requirement that the regulation be narrowly-tailored to ensure that it is no more extensive than necessary to serve the governmental interest.” *Id.* ¶ 50. However, as explained below, the Commission must conduct an independent inquiry to assess the constitutionality of any new proposed regulation under case law that is far more speech-protective than existed in 1992 when TCPA rules were first adopted. In addition, the content-based focus of the proposed rules requires the use of heightened scrutiny in this analysis

A. The Commission Has a Specific Obligation to Assess the Constitutionality of Any New Restrictions Under the TCPA

1. The FCC Has an Independent Duty to Conduct a First Amendment Review

The Commission cannot presume that a national “do-not-call” database would be constitutional simply because Congress gave it the discretion to consider that option. While the *Notice* states that “[t]he TCPA specifically authorizes the Commission to ‘require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations,’” NPRM ¶ 3, this does not answer the constitutional questions presented. As noted above, Congress charged the FCC with adopting rules to implement the TCPA in a way that protects the interests of telephone subscribers “without intruding unnecessarily and inappropriately on the First Amendment rights of the speaker.” S Rpt. 102-177 at 6. It backed away from initial proposals to impose a national “do-not-call” list, and instead empowered the FCC to look at all the alternatives and then to adopt rules that preserve the statutorily (and constitutionally) required balance.

Consequently, any change in the rules must be subjected to searching constitutional review.

As the Commission is well aware, even a judicial finding as to the constitutionality of the underlying congressional enactment does not relieve the FCC of its duty to conduct an independent review of any proposed rules and to justify its findings on the record. For example, in *Time Warner Entm't Co. v. FCC*, 211 F.3d 1313 (D.C. Cir. 2000), the United States Court of Appeals for the District of Columbia Circuit upheld various provisions of the 1992 Cable Act that imposed channel occupancy and subscriber limits on cable television operators. The court held that the First Amendment did not preclude the adoption by Congress of content-neutral requirements designed to advance the recognized communication policy goals of programming diversity. *Id.* However, the FCC decision implementing the law did not fare so well. The court struck down the FCC rules on First Amendment grounds, noting that “[c]onstitutional authority to establish some limit is not authority to impose any limit imaginable.” *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1129-30 (D.C. Cir. 2001). The court reviewed closely the record compiled by the agency, and found that the First Amendment required more than the FCC’s conclusion that it had appropriately balanced competing statutory goals. *Id.* at 1137. Rather, the court of appeals stressed that “the FCC must show a record that validates the *regulations*, not just the abstract statutory authority.” *Id.* at 1130 (emphasis in original).

The same reasoning applies here. Any decision by the Commission to retain, or to expand, restrictions under the TCPA must be supported by the record

compiled in this proceeding. In *Time Warner*, the court of appeals invalidated the Commission's rules under intermediate First Amendment scrutiny, which required the FCC to justify the limits it had chosen as "not burdening substantially more speech than necessary." In addition, the court required the Commission to show that "the recited harms are real, not merely conjectural." *Id.* (citation omitted). The test applied in *Time Warner* is almost identical to the type of intermediate scrutiny typically applied to review restrictions on commercial speech. However, as discussed below, there are reasons to apply heightened First Amendment scrutiny to the Commission's proposed rules under the TCPA.

2. Changes in the Law Since 1992 Require Close Scrutiny of Any TCPA Proposals

An important factor that must be considered in this proceeding is the extent to which courts have expanded protections for commercial speech since 1992. Indeed, at the time the FCC first adopted rules under the TCPA, the level of First Amendment protection for commercial speech was somewhat uncertain because of the Supreme Court's decision in *Posadas de Puerto Rico Assocs. V. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986). In that 5-4 opinion, the Supreme Court upheld a ban on casino advertisements aimed at Puerto Rican residents even though advertisements for other games of chance, including horseracing, cockfighting, and the state lottery, were freely permitted. The Court assumed without empirical support that the law would further the government's asserted interests by reducing demand for casino gambling among Puerto Rican residents, and it rejected arguments that advertisements for other forms of gambling rendered the law underinclusive. *Id.* at 342-43. Undoubtedly, the

TCPAs limitations, which apply to some forms of solicitations but not others, would be more defensible under the standard set by *Posadas*.

But *Posadas* is no longer good law. In *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), the Court unanimously rejected the notion that the government has greater latitude to regulate certain forms of commercial speech, *id.* at 482 n.2 (“[n]either *Edge Broadcasting* nor *Posadas* compels us to craft an exception to the Central Hudson standard”), and it struck down a regulation of beer labeling (which applied to some forms of alcohol but not others) as underinclusive. *Id.* at 489-491. The following year, in another unanimous decision, the Court further strengthened the protections extended to commercial speech. **44** *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). In his plurality opinion, Justice Stevens wrote that strict First Amendment scrutiny should apply to restrictions on commercial speech unless the regulations targeted false, misleading or coercive advertising, or required the disclosure of information to help avoid such advertising. *Id.* at 502-503. Specifically, he wrote that the Court in *Posadas* “erroneously performed the First Amendment analysis.” 72/

In the course of generally strengthening its overall test for protecting commercial speech, the Supreme Court since 1992 has invalidated (1) an ordinance that regulated commercial, but not noncommercial, newsracks, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993); (2) a state ban on in-person solicitation by CPAs, *Edenfield v. Fane*, 507 U.S. 761 (1993); (3) a state ban on using the

72/ *Id.* at 509. See also *id.* at 510 (“Because the 5-to-4 decision in *Posadas* marked such a sharp break from our prior precedent, and because it concerned a constitutional question about which this Court is the final arbiter, we decline to give force to its highly deferential approach.”).

designations “CPA and “CFP on law firm stationary, *Ibanez v. Florida Dept. of Business and Professional Regulation*, 512 U.S. 136 (1994); (4) a restriction on printing a designation of alcohol content on beer labels, *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); (5) a state ban on advertising alcohol prices, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); (6) a federal ban on broadcast advertising of casino gambling, *Greater New Orleans Broadcasting Ass’n, Inc. v. United States*, 527 U.S. 173 (1999); (7) state regulation of tobacco advertising, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); and (8) FDA restrictions on advertising the practice of drug compounding. *Thompson v. Western States Med. Ctr.*, 122 S. Ct. 1497, 1503-04 (2002). In addition, in the noncommercial context, the Supreme Court in 2002 invalidated a restriction on door-to-door solicitation. *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 122 S. Ct. 2080, 2088 (2002).

Although not all commercial speech claims have been successful at the Supreme Court, the few exceptions did not blunt the trend toward increasing protection.⁷³¹ Accordingly, any proposed changes to the FCC’s rules must be evaluated by the prevailing First Amendment standards of 2002, not those of 1992.

⁷³¹ In *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), the Court upheld a 30-day moratorium on direct-mail solicitation by attorneys of accident victims. The 5-4 decision was predicated on the majority’s finding that the restriction was “narrow both in scope and duration.” *Id.* at 635. In *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), the Court upheld a federal prohibition against broadcast advertising of lottery information in states where lotteries are illegal. Relying on *Posadas*, the Court held the law directly advanced the interests of non-lottery states. *Id.* at 426, 428-429.

3. Content-Based Restrictions Under the TCPA Require Heightened Scrutiny

The “do-not-call” provisions of the TCPA may well justify a higher level of First Amendment scrutiny than normally applies in commercial speech cases because they are explicitly content-based.^{74/} Section 227 generally exempts from its reach calls from nonprofit organizations and commercial calls from entities with established business relationships. Yet the FCC previously has acknowledged the constitutional problems associated with discriminatory application of telemarketing restrictions. As the Commission found in 1980, when it declined to adopt telemarketing rules on its own authority:

Exempting calls made for political and charitable solicitation or survey research purposes from regulations applicable to commercial sales calls would also appear to raise serious constitutional questions in the absence of significant practical differences between unsolicited commercial and non-commercial calls. All solicitation calling – whether for charitable, political or business purposes – involves similar privacy implications. We have no information that subscribers would find an advertising message more offensive than a request for a charitable contribution or a political message or solicitation.

Unsolicited Telephone Calls, 77 F.C.C.2d at 1035. This finding has never been repudiated and such distinctions plainly affect the level of constitutional scrutiny. See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) (holding the distinction between commercial and noncommercial speech is content-based “by any commonsense understanding of the term”). See also *Lysaght v. New Jersey*, 837 F.

^{74/} Our analysis on this point is predicated on the possible adoption of a national “do-not-call” database. ATA has never objected to the use of company-specific lists under the current rules. *Cf. Rowan v. Post Office*, 397 U.S. 728 (1970).

Supp. 646, 648-649 (D. N.J. 1993) (stating that telemarketing restrictions that distinguish between commercial and non-commercial speech are content-based).

Such content- and speaker-based distinctions normally are subject to the strictest level of First Amendment review. *Arkansas Writers' Project*, 481 U.S. at 234 (stating there is a "heavy burden on the State to justify its action") (quoting *Minneapolis Star & Tribune v. Minnesota Comm'r. of Revenue*, 460 U.S. 575, 592-93 (1983)). The Supreme Court repeatedly has held that "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984). See *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("[W]e have frequently condemned . . . discrimination among different users of the same medium for expression.").

Although the commercial speech doctrine generally permits some content-based distinctions between speakers, this exception does not apply in this instance for three reasons: (1) the Commission's stated reason for regulating commercial but not non-commercial calls has nothing to do with commerce, but with a perceived ability to impose greater restrictions on a certain class of speakers simply because of their status; (2) imposing "do-not-call" requirements on commercial calls does not promote privacy more than identical restrictions on non-commercial calls; and (3) the proposed restrictions suggest a governmental preference for certain messages over others.

a. TCPA Restrictions Are Unrelated to Commerce

The Supreme Court has made clear that the intermediate scrutiny associated with the commercial speech doctrine applies only where the government's power to regulate a commercial transaction is "linked inextricably" to the speech about the transaction. *Friedman v. Rogers*, 440 U.S. 1, 10 n.99 (1979). As Professor Laurence Tribe has explained, the commercial speech doctrine "represents an accommodation between the right to speak and hear expression *about* goods and services and the right of government to regulate the sales *of* such goods and services." Laurence Tribe, *AMERICAN CONSTITUTIONAL LAW* § 12-15 p. 903 (2d ed. 1988) (emphasis in original). Thus, regulations that protect consumers from deceptive, abusive or misleading sales messages, or that require the disclosure of certain information vital to a transaction, are appropriately reviewed under the *Central Hudson* standard that governs commercial speech.

However, "[t]he mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them." *44 Liquormart, Inc.*, 517 U.S. at 501; *Discovery Network, Inc.*, 507 U.S. at 416 n.11 (regulations of commercial speech that are not predicated on the particular attributes of commercial transactions may be subject to "the standards applicable to regulations on fully protected speech"). *See also Rubin*, 514 U.S. at 491-492 (Stevens, J., concurring) (commercial speech doctrine does not apply where a regulation "neither prevents misleading speech nor protects consumers from the dangers of incomplete information"). The Supreme Court illustrated this point

in a case about “fighting words,” a category of speech entirely without First Amendment protection. It explained that content discrimination is valid only “when the basis for [it] consists entirely of the very reason the entire class of speech at issue is proscribable.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992). But the government may not single out commercial speech and impose greater speech restrictions that have nothing to do with its commercial nature. For example, “a state may not prohibit only that commercial advertising that depicts men in a demeaning fashion.” *Id.* at 389.

Here, the TCPA imposed greater “do-not-call” restrictions on commercial as opposed to non-commercial telemarketers not because of any aspect related to the commercial transaction – problems of fraud and abuse are covered by the Telemarketing Act and other sections of the TCPA. Rather, Congress and the Commission targeted commercial calls for greater restrictions primarily because they believed they had greater constitutional latitude to regulate such speech simply because it is “commercial.” See H. Rep. 102-317 at 16 (Committee made a “public policy determination” to exclude calls made by charitable or political organizations). In this circumstance, where the government imposes greater restrictions on commercial speakers simply because it believes it can do so, strict First Amendment scrutiny should apply. Cf. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (distribution of handbills not transformed into an unprotected commercial activity by solicitation of funds).

b. TCPA Restrictions Have No Connection to Privacy

The Commission has never found that commercial telemarketing calls are any more bothersome than non-commercial calls. Rather, the NPRM makes the rather

tepid observation that non-commercial calls by exempt organizations “do not tread heavily upon the consumer interests implicated by section 227,” NPRM ¶ 30, and it repeatedly notes that the Commission will not seek comment on this issue. See *id.* at ¶¶ 30, 31, 33. Even in the 1992 rulemaking, the Commission made no independent findings on the extent of telemarketing calls by exempt organizations. Nor did it seek to determine which type of calls consumers find to be the most annoying. Instead, it relied on the legislative history, and stated that “no evidence has been presented in this proceeding to show that non-commercial calls represent as serious a concern for telephone subscribers as unsolicited commercial calls.” *TCPA Report & Order*, 7 FCC Rcd at 8774, citing H. Rep. 102-317 at 16-17.^{75/}

In this proceeding, the Commission abdicates a key constitutional obligation to the extent it refuses to explore whether or not exempt calls create the same problems as calls that would be subject to a national database requirement. **As** explained below, under the test for commercial speech, the Commission cannot simply assume that its regulations will directly and materially advance the government’s asserted interest unless it performs this analysis. See *infra* Section III.B.2. But the Commission’s failure to address this critical issue is even more serious under First

^{75/} The Commission has never disavowed the conclusion it reached in 1980 that “[a]ll solicitation calling – whether for charitable, political or business purposes – involves similar privacy implications” and that there is no reason to believe “subscribers would find an advertising message more offensive than a request for a charitable contribution or a political message or solicitation.” *Unsolicited Telephone Calls*, 77 F.C.C.2d at 1035. The present record, moreover, supports the FCC’s earlier reasoning. See *infra* note 82 (comments in this proceeding by individuals indicating non-commercial calls are just as intrusive as commercial calls).

Amendment strict scrutiny. ⁷⁶¹ For example, in *Discovery Network, Inc.*, 507 U.S. 410, the Supreme Court struck down a local regulation of newsboxes premised solely on the distinction between commercial and noncommercial speech. It emphatically declined to credit the city’s “bare assertion that the ‘low value’ of commercial speech is a sufficient justification for its selective and categorical ban on newsracks dispensing ‘commercial handbills,’” *id.* at 428, and noted that “the distinction bears no relationship whatsoever to the particular interests the city has asserted.” *Id.* at 424 (emphasis in original). Similarly, in *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983), the Supreme Court specifically declined to accept the government’s proposed distinction between commercial and noncommercial speech in seeking to protect the public from what it considered to be “offensive” speech relating to contraceptives. *Id.* at 71-72. And in *Carey v. Brown*, 447 U.S. 455, 465 (1980), the Court held that the government’s asserted interest in protecting residential privacy could not sustain a statute permitting labor picketing while prohibiting non-labor picketing. It found that “nothing in the content-based labor-nonlabor distinction has any bearing whatsoever on privacy.”

The same is true here. Nothing in the TCPAs commercial/non-commercial distinction has any bearing on the law’s ability to prevent unwanted calls.

As noted above, the blanket restriction on commercial solicitations is both over- and

⁷⁶¹ See, e.g., Nadel, *supra* note 4 at 112 (“if the government were able to decide which [telemarketing] calls were desirable, significant constitutional problems would arise”); Susan Burnett Luten, Give Me a Home Where *No* Salesmen Phone: Telephone Solicitation and the First Amendment, 7 *HASTINGS CONST. L. Q.* 129, 157 (1979) (“any legislation which undertakes on its face to classify commercial and noncommercial calls and prohibit only commercial calls would very likely not survive a challenge on First Amendment content-neutrality grounds”).

underinclusive. It blocks commercial calls that might be welcomed while failing to prevent vexing noncommercial calls. In this regard, suggestions in the legislative history (upon which the Commission relied) that “most unwanted telephone solicitations are commercial in nature,” H. Rep. 102-317 at 16-17, are wholly inadequate, and not just because those findings are by now a decade old (and contradicted by the record in this proceeding, see *infra* note 82). Rather, the conclusions in the House Report were based on an analysis of complaints filed with state regulators that actually revealed a high level of dissatisfaction with political, religious and charitable solicitations despite the fact that state laws exempt such calls from regulation. 77

Notwithstanding its assumptions at the time, Congress acknowledged that charitable or political calls might in some instances “represent as serious a problem as commercial solicitations,” H. Rep. 102-317 at 16-17, and it directed the Commission to examine this issue in order to determine whether there might be a need for additional authority to regulate exempt solicitations. 47 U.S.C. § 227(c)(1)(D). The Commission

77 The House Subcommittee on Telecommunications and Finance asked the National Association of Consumer Agency Administrators to report on the number of complaints received for commercial calls compared to complaints for charitable or political calls. The Subcommittee concluded, based on this survey, that “most unwanted telephone solicitations are commercial in nature.” H. Rep. 102-317 at 16. However, the results are hardly surprising since every state telemarketing law provides exemptions for calls from political or charitable organizations, so there would be no basis for filing a complaint in most instances. See Exhibit 13 (chart listing state exemptions). The survey did not specify the number of complaints considered, or the reason for the complaints (*e.g.*, fraud, abuse, privacy intrusion, etc.). Even with these serious limitations, the data compiled by the House Committee indicated that a full 20 percent of complaints in California and Vermont were filed against charitable organizations. An even larger proportion of complaints (perhaps nearly half – the report fails to provide specific figures) related to non-commercial calls in New York, Tennessee, Nevada and Washington. *Id.*

did so, and despite comments urging otherwise, declined “to seek additional authority to curb calls by tax-exempt nonprofit organizations.” *TCPA Report & Order*, 7 FCC Rcd at 8773-74. This conclusion was based almost entirely on the inadequate findings in the House Report. *Id.* at 8774 n.75.

Notwithstanding the Commission’s assumptions, there are indications already on the record of this proceeding – just as there were in 1992 – that political and charitable calls are no different from commercial calls in their effect on domestic tranquility. Indeed, the volume of such calls has greatly increased since the TCPA rules were adopted. Although political telemarketing has been used since the 1970s, the major parties began to make heavy use of advanced telephone dialing technology in recent years. In 1998, the White House recorded more than 200 different messages tailored to different races and voters. In the 2000 election alone, Democrats placed 50 million telemarketing calls in the presidential contest (15 million recorded calls, 25 million placed by paid phone banks and 10 million by volunteers) and Republicans made 62 million calls, 50 million of which using recorded messages. The calls primarily targeted residents of 20 key states. See *Calling All Voters: Campaigns Step Up Telemarketing*, ABC News.com (Nov. 4, 2000) (<http://abcnews.go.com/sections/politics/DailyNews/campaigntelemarketing0001103.html>). ^{78/} These figures do not even

^{78/} According to a 2001 ATA survey, 58 percent of Americans received at least one unsolicited call from a political campaign during the 2000 elections, and nearly 20 percent reported receiving between six and ten such calls. *ATA Consumer Research—Feb./Mar. 2001* (http://www.ataconnect.org/htdocs/consinfo/consumer_study_march-feb01.htm#political) (last visited December 6, 2002).

scratch the surface for other federal candidates, state and local candidates, and calls to discuss political issues.

Telemarketing calls by charitable and other noncommercial groups have undergone a similar transformation since 1992.^{79/} For example, SER Solutions, Inc., the leading manufacturer of outbound predictive dialers in the United States, has noted in comments filed in this proceeding that it supplies equipment to all types of telemarketing entities, including nonprofit organizations that solicit charitable donations. See Comments of *SER Solutions, Inc.*, CG Docket No. 02-278 (filed Nov. 14, 2002). Yet when Congress was considering legislation that resulted in passage of the TCPA, it assumed that non-commercial organizations were locally-based and did not use autodialers, the technology under consideration at the time. See H. Rep. 101-633, 101st Cong., 2d Sess. (July 27, 1990) at 7. These assumptions are no longer valid. Evidence from the states suggests that a substantial number of telemarketing complaints arise from calls made by exempt entities.^{80/} Additionally, preliminary

^{79/} Testimony by the FTC staff during the agency's "Do-Not-Call" Forum suggests the biggest problem sometimes comes from nonprofit organizations. Federal Trade Commission, Telemarketing Sales Rule, "Do-Not-Call" Forum, Matter No. P994414, Tr. at 75, 16062 (Jan. 11, 2000), at <http://www.ftc.gov/bcp/rulemaking/tsr/dnc-forum/000111xcript.pdf> (last visited June 20, 2002); see also Christi Parsons, Court Reviewing *Charity Solicitators*, CHICAGO TRIB., Aug. 31, 2001 ("Telemarketing firms frequently contract to do telephone fundraising for charitable organizations that otherwise wouldn't be able to raise thousands and sometimes millions of dollars."); Jeff Gelles, *FTC Proposes Restrictions on Calls from Telemarketers*, PHILA. INQUIRER, Jan. 23, 2002, at A01 (noting the increasingly common practice of fund-raising for charities and non-profits).

^{80/} For example, according to the Office of the Idaho Attorney General, half of the complaints received in that office under the Idaho "do-not-call" law since May 2, 2001 have been from exempt entities. Similarly, the Office of the Missouri Attorney General indicates that 20 percent of the complaints received under the Missouri do not call law

analysis shows that approximately 40 percent of telemarketing complaints submitted to the FTC relate to calls by charitable organizations. 81/ Consequently, there is no basis for the Commission in this proceeding to conclude that exempt calls do not raise the same privacy issues as nonexempt calls.

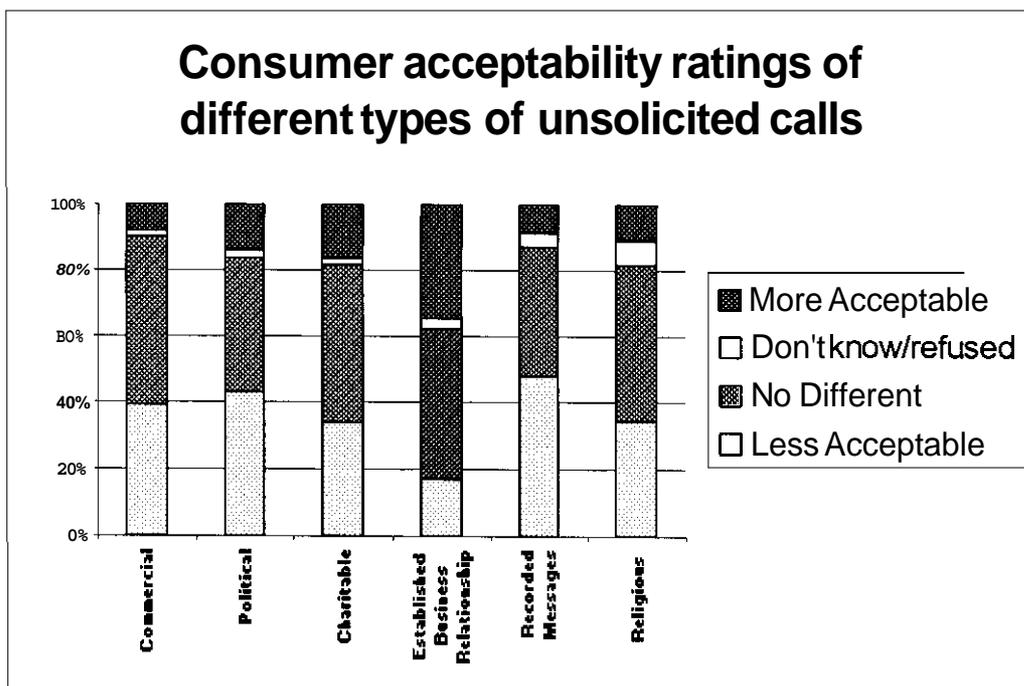
Nor is there any reason to assume that the exemptions correspond to consumer preferences. Already in this proceeding a significant percentage of the comments on file with the Commission argue that political and charitable calls intrude on residential privacy in precisely the same way as commercial calls. 82/ Survey research commissioned by ATA further confirms this commonsense notion. A random

are against exempt callers and another 20 percent are against unknown callers. See supra note 53. See *also* Barbara Yuill, *Battle Lines Emerge as Views Aired On Proposed FTC Telemarketing Rule Change*, ELECTRONIC COMMERCE & LAW, June 12, 2002 at 578 (reporting that 4,000 complaints in Missouri applied to exempt callers and another 4,000 lacked adequate information).

811 This analysis results from a FOIA request ATA submitted to the FTC in recognition that that agency, like the FCC, receives and is in the process of reacting to consumer complaints regarding telemarketing. ATA requested all complaints dating back to January 1, 1998, submitted to the FTC under the TCFAPA, 15 U.S.C. §§ 6101-6108, or the FTC's regulations implementing the TCFAPA, 16 C.F.R. §§ 310.1 et seq. ATA also requested all complaints during the same period regarding unsolicited telephone calls from non-commercial entities, including religious, political or charitable organizations. The FTC has been providing these documents on a rolling basis. Thus far, ATA has received 129 complaints involving non-commercial entities for 2002, and 206 TCFAPA complaints from that year (with more expected). ATA intends, to the extent the FTC's production schedule allows, to update and expand upon this analysis in its reply comments in this proceeding.

82/ Comments from individuals received in this proceeding are particularly strident on this point. For example, they note that "it's not uncommon for the caller to try and survey me or ask for some donation" which is "just as annoying as sales solicitation calls", they express that "my distaste for telemarketing does not exclude politicians and charities. I don't want to be telemarketed by **ANYone**," and they argue "[t]here should be NO EXEMPTIONS . . . even for tax exempt calls" because "[t]ax exempt organizations calling me looking for a donation are complete turnoff!"

sample of 1,000 U.S. residents was polled in November, 2002, and asked whether particular types of unsolicited telephone calls are "more acceptable, less acceptable, or no different from other unsolicited calls." A full 84 percent of the respondents said that "calls from political candidates or promoting a political issue" are either less acceptable than (42.9 percent) or no different from (41.1 percent) other unsolicited calls. The results were almost identical for other categories of calls that currently are exempt under the TCPA. Eighty-one percent of respondents considered calls seeking charitable contributions either less acceptable or no different from other unsolicited calls, and the result for calls from religious organizations was 82 percent. ^{83/}



The Commission's refusal to seek comment on the exemptions in the NPRM is a serious flaw. As an initial matter, Congress directed the Commission to examine this issue in Section 227(c)(1)(D), and that command is equally applicable in

^{83/} The ATA survey results and methodology are attached as Exhibit 12.

the current rulemaking proceeding as it was when the FCC initially adopted rules. More importantly, the First Amendment requires that the Commission conduct this analysis. As Senator Hollings explained, the TCPA was crafted to “allow the FCC to design rules to implement this bill that are consistent with the free speech guarantees of the Constitution if it finds that a distinction between commercial and noncommercial calls is justified and can be supported by the record.” 137 Cong. Rec. S.18784 (Nov. 27, 1991) (Statement of Senator Hollings) (emphasis added). Because it failed even to ask questions on this issue, any decision by the FCC to impose more restrictions on commercial callers would be extremely vulnerable.

Just to be clear, it is not ATA's position that the FCC should ask Congress for additional authority to restrict political, charitable or other unsolicited non-commercial calls, or that such a sweeping restriction on speech would be constitutional, The First Amendment “includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience.” *Hill v. Colorado*, 530 U.S. 703, 716 (2000). As the Supreme Court stressed, “the First Amendment protects the right of every citizen to ‘reach the minds of willing listeners and *to do so* there must be an opportunity to win their attention.” *Id.* at 728, quoting *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949). (citation omitted) (emphasis added). However, a policy that discriminates between commercial and non-commercial calls where there is no difference in their impact on the government's asserted interest cannot be tolerated.

c. TCPA Exemptions Manifest a Content-Based Preference

Another reason the Commission's national "do-not-call" proposal qualifies for heightened scrutiny is the official endorsement of the content of calls in the exempt categories. As Commissioner Martin noted:

I am also pleased to note that the proceeding we launch today does not seek to alter in any way the exemption from the telemarketing restrictions for entities involved in political or religious speech. Protecting free and unfettered political and religious speech is critical to our democracy. In my view, the risk of any actual or perceived infringement on political or religious discourse outweighs whatever speculative benefits may be obtained from imposing additional regulatory restrictions on such activity.

NPRM (Separate Statement of Commissioner Kevin J. Martin). As this statement illustrates, the focus of this proceeding indicates a marked preference for speech in the exempt categories.

The concept that "government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). Accordingly, the Supreme Court has invalidated an ordinance that banned picketing adjacent to a school, but permitted labor picketing, noting that "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Mosley*, 432 U.S. at 95. See also *Carey*, 447 U.S. at 465 (declaring that a state's interest in residential privacy cannot sustain statute permitting labor picketing while prohibiting non-labor picketing)

This constitutional bar against such content-based discrimination applies even where the government is not motivated by a desire to censor a particular speaker or type of speech. *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Rev.*, 460 U.S. 575, 579-80 (1983) (“Illicit legislative intent is not the sine qua non of a violation of the First Amendment.”); *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987) (same). As the Supreme Court has pointed out, “exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: they may diminish the credibility of the government’s rationale for restricting speech in the first place.” *Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994), citing *Discovery Network, Inc.*, 507 U.S. at 424-426. In this proceeding, the TCPAs exemptions seriously undermine any argument for a national “do-not-call” requirement for commercial solicitations.

The content discrimination problem is not diminished by the fact that signing up for the national “do-not-call” list would be voluntary on the part of subscribers. The identity of the callers blocked by the list is selected by the government, not the homeowner, and its preemptive all-or-nothing approach restricts a great deal of protected speech. As the Commission recognized when it rejected a national database in 1992, the company-specific approach permits individuals “to selectively halt calls from telemarketers from which they do not wish to hear” and does not present them with an “all or nothing” choice. TCPA Report & Order, 7 FCC Rcd at 8765.

In constitutional terms, controlling authority does not support such across-the-board preemptive restrictions. In *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980) (citation omitted), the Supreme Court stressed that “[b]road prophylactic rules in the area of free expression are suspect.” There, the Court held that a local government cannot single out disfavored groups based on how much they spend on overhead, label them as “fraudulent” and bar them from canvassing on the streets and house to house. *Id.* In particular, it held that the government could not justify a discriminatory restriction on the theory that it “reduc[es] the total number of solicitors” where the regulation was “not directed to the unique privacy interests of persons residing in their homes.” *Id.* at 638-39. See also *Martin v. City of Struthers*, 319 U.S. 141, 144-145 (1943) (government cannot “substitut[e] the judgment of the community for the judgment of the individual householder” in blocking unsolicited communications).

Here, the government presumes that all commercial calls are unwelcome (unless made by a firm with an established business relationship) and all non-commercial calls are welcome, and it would enforce this presumption via a national “do-not-call” list. Although the Supreme Court has upheld laws that allow individual homeowners to block unsolicited advertisements from particular senders, *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970), it has invalidated similar attempts to impose a blanket ban on unsolicited mailings where the government made the choice. *Bolger*, 463 U.S. at 69 n.18. The regulations in *Rowan* were upheld only because the individual homeowner was accorded unlimited discretion to choose which unsolicited

advertisements to block, and government officials were accorded no power “to make any discretionary evaluation of the material.” Rowan, 397 U.S. at 737. Cf. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209(1975) (government cannot “selectively . . . shield the public from some kinds of speech on the ground that they are more offensive than others”).

Even before Bolger was decided, the Commission analyzed Rowan and reached the same conclusion. It noted that when the Supreme Court upheld the postal statute at issue in Rowan, “the Court made clear its reliance upon the fact that it was the householder and not the postmaster who determined what mail was provocative and should not be sent.” *Unsolicited Telephone Calls*, 77 F.C.C.2d at 1035. The FCC observed that “Congress provided this sweeping power not only to protect privacy but to avoid possible constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a governmental office.” *Id.*

But the same cannot be said of the TCPAs exemptions if the government’s content-based preferences are made part of a national database. Under such a rule, one bad experience with a single telemarketer that prompts a subscriber to sign up for the list would impose a block on all commercial calls, while all exempt callers – no matter how offensive they may be – would be unaffected. In this circumstance, strict First Amendment scrutiny applies, and established case law suggests such a discriminatory approach would be presumptively invalid.

B. A National “Do-Not-Call” List Would Violate the *Central Hudson* Standard for Commercial Speech

A national “do-not-call” database would violate the First Amendment under the standard that applies to commercial speech as well as under strict scrutiny. As explained in this section, it will be difficult for the FCC to demonstrate a substantial interest in adopting more restrictive rules than currently exist. Moreover, the commission cannot assume that a national database would materially serve that interest, or that it would be no more restrictive than necessary.

1. No Substantial Interest Supports the Adoption of a National “Do-Not-Call” Database

Because of the importance of free speech protections, it is the government’s burden to build a record “adequate to clearly articulate and justify” a limitation on commercial speech. *Utah Licensed Beverage Ass’n v. Leavitt*, 256 F.3d 1061, 1069 (10th Cir. 2001) (quoting *U.S. West*, 182 F.3d at 1234). In this regard, the government must both articulate the interest it seeks to serve and demonstrate that the interest is substantial. *Edenfield v. Fane*, 507 U.S. at 768 (stating that courts may not “supplant the precise interests put forward by the State with other suppositions”). In numerous cases, the Supreme Court has made clear that it will not uphold restrictions on commercial speech backed only by “unsupported assertions,” *Ibanez v. Florida Dept. of Bus. & Prof. Reg.*, 512 U.S. 136, 143 (1994), or even by “anecdotal evidence and educated guesses.” *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995). See

44 *Liquormart, Inc.*, 517 U.S. at 505 (commercial speech restrictions are invalid where there are no "findings of fact, or indeed any evidentiary support whatsoever"). 84/

ATA does not dispute that there is a generalized interest in residential privacy, but the FCC has a constitutional obligation to do more than simply name the interest it seeks to promote. Rather, it must articulate how a recognized interest would be served by its proposed rule and back its explanation with evidence. The United States Court of Appeals for the Tenth Circuit explored this question in *U.S. West*, and found that "the government cannot satisfy the second prong of the *Central Hudson* test by merely asserting a broad interest in privacy." 182 F.3d at 1234-35. It noted that the concept of privacy is "multi-faceted," that protecting privacy as an abstract principle may impose "real costs on society," and that courts must "pay particular attention to attempts by the government to assert privacy as a substantial state interest." *Id.* Accordingly, the court held that "privacy may only constitute a substantial state interest if the government specifically articulates and properly justifies it." *Id.* at 1235 (stating a preference for "empirical explanation and justification for the government's asserted interest").

In this respect, it is important to note that the TCPA equates the concept of "privacy" with "annoyance," making it difficult to weigh against constitutional values. For example, the notion of privacy envisioned by the Commission in this proceeding is

84/ Even when the government makes detailed factual findings that "are recited in the text of the Act itself," a reviewing court must exercise "independent judgment" in a First Amendment case to ensure that the government has "demonstrate[d] that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 632, 646, 665-66 (1994).

not the same as the privacy interest embodied in the Fourth Amendment, which protects individuals from unreasonable searches and seizures by the government. U.S. Const. Amend. IV. Nor does it involve the public exposure of private facts, which formed the basis for the theory of a right to privacy in Louis Brandeis' and Samuel Warren's groundbreaking law review article 112 years ago. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The authors argued that the exploitation of private facts should provide the basis for tort recovery, and courts in the twentieth century began to accept and apply their theory. ^{85/} This theory of privacy also underlies modern statutory protections against public disclosures of private information. ^{86/} Expanding the analysis, Dean William L. Prosser postulated four branches of privacy invasions, including publication of private facts, placing a person in a false light, appropriation of name and likeness, and "intrusion" or invasion of solitude. ^{87/}

Of the legally-recognized variants of privacy rights, only intrusion appears at all relevant to the concept of privacy contemplated in the TCPA. But this type of privacy action "normally involves some physical, not merely psychological, incursion into one's privacy." J. Thomas McCarthy, *THE RIGHTS OF PUBLICITY AND PRIVACY*

^{85/} The RESTATEMENT (SECOND) OF TORTS § 867 (1939) recognized a right of privacy, which most states followed, which provided that "[a] person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other."

^{86/} See 15 U.S.C. §§ 6801 et seq. (Gramm-Leach-Bliley Act privacy provisions); 45 C.F.R. Parts 160 & 164 (implementing privacy provisions of Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, §§ 261-264, 110 Stat. 1936).

^{87/} Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960)

§ 5.10[a][1] (West Group 1999). In this regard, “courts have treated intrusions by telephone as less offensive or objectionable to a reasonable person unless the harm suffered was serious enough to warrant a claim for mental distress.” Luten, *supra* note 76 at 140 n.67. Consequently, courts generally award damages in tort only where calls are of a quantity and quality sufficient to be considered harassment. *Eg., Housh v. Peth*, 133 N.E.2d 340 (1956) (tort recovery allowed when creditor made numerous and frequent threatening calls to plaintiff and her employer). Quite clearly, the concept of privacy contemplated in this proceeding – simple annoyance – is a problem of a far lesser magnitude.

While there is no doubt that the Commission has the discretion to define a single commercial call from a “blacklisted” source as an invasion of privacy, this does not settle the question for purposes of constitutional review. For example, in *Consolidated Edison Co. of New York v. Public Service Comm’n of New York*, 447 U.S. 530, 541 (1980), the Supreme Court struck down a state restriction on including inserts in utility bills that addressed controversial issues of public policy. The state court of appeals had upheld the ban on the theory that the bill inserts “intruded upon individual privacy,” but the Supreme Court disagreed. It found that even though the inserts “may offend the sensibilities of some consumers, the ability of government ‘to shut off discourse solely to protect others from hearing it [is] dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.’” *Id.*, quoting *Cohen v. California*, 403 U.S. 15, 21 (1971).

The same calculus applies to commercial solicitations. The Court has made clear that an interest in shielding homeowners from unsolicited advertisements they are likely to find offensive or overbearing “carries little weight.” *Bolger*, 463 U.S. at 71. See also *Shapiro v. Kentucky Bar Ass’n*, 486 U.S. 466, 473-74 (1988) (stating that privacy interest will not support direct mail solicitation on attorney advertising). Here, where the Act seeks to block some solicitation calls but not others, it is particularly difficult for the government to establish a substantial interest since its policies are “decidedly equivocal.” *Greater New Orleans Broadcasting Ass’n*, 527 U.S. at 187. In light of these well-established principles, a generalized assertion of an interest in protecting privacy is far from adequate.

In this proceeding, the NPRM assumes, but does not seek comment on, the nature of the “substantial” interest at stake. At the same time, it seeks comment on a national “do-not-call” list, which would restrict a significant amount of commercial speech. Given the constitutional values to be balanced, the FCC must articulate the precise nature of the privacy interest that is implicated by the “annoyance” of a ringing telephone. Moreover, it must specifically address whether the government has a substantial interest in *expanding* restrictions beyond those that already exist. The interest in this case **is** even more complicated, because the TCPA directs the FCC to protect *both* privacy and the right of commercial speech.

2. A National “Do-Not-Call” Database Would Not Directly and Materially Advance the Government’s Stated Interest

If the Commission decides to adopt a national “do-not-call” database it has the burden to demonstrate that the regulation advances that interest in a direct and material way. *Utah Licensed Beverage Ass’n*, 256 F.3d at 1070. This burden cannot be met by “mere speculation and conjecture.” *Edenfield*, 507 U.S. at 770-71. The Supreme Court has described the third *Central Hudson* element as “critical,” since otherwise a state could easily “restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.” *Rubin*, 514 U.S. at 487 (quoting *Edenfield*, 507 U.S. at 771). Accordingly, reviewing courts will not sustain a restriction on commercial speech that provides “only ineffective or remote support for the government’s purpose.” *Greater New Orleans Broadcasting Ass’n*, 527 U.S. at 188. See *Utah Licensed Beverage Ass’n*, 256 F.3d at 1071.

Uneven or inconsistent restrictions on commercial speech are especially suspect. In *Rubin*, for example, the Supreme Court struck down a federal restriction on disclosing alcohol content on beer labels, except where required by state law, and where no similar restrictions limited identical disclosures in beer advertising. The Court further noted that federal law permitted disclosure of alcohol content on distilled spirits labels and required such disclosure on labels for wines with more than 14 percent alcohol. *Rubin*, 514 U.S. at 488. Accordingly, it found that the “exemptions and inconsistencies bring into question the purpose of the labeling ban,” and it held that the restriction could not directly and materially achieve its purpose where “other provisions

of the same Act directly undermine and counteract its effects.” *Id.* at 489. See *Greater New Orleans Broadcasting Ass’n*, 527 U.S. at 189 (holding that ban on advertising of casino gambling cannot achieve its purpose where government policy simultaneously promotes tribal casino gambling and permits advertising of state-run lotteries). Similarly, in *Utah Licensed Beverage Ass’n*, 256 F.3d at 1071-74, the Tenth Circuit invalidated state restrictions on wine and liquor advertising that were rife with exceptions and did not cover beer advertising. The court found that the statutory scheme “makes no rational sense if Utah’s true aim is to suppress the social ills which its own evidence attributes to all types of alcohol,” and it held that the law failed to satisfy the third *Central Hudson* factor. *Id.* at 1073.

The same logic applies to the TCPA, given its exemptions for noncommercial solicitation calls and for certain types of commercial calls. A ringing phone has the same effect on residential privacy, regardless of the caller’s identity or the subject of the call. As the Commission recognized in 1980, when it declined to adopt telemarketing rules on its own authority, “all solicitation calling – whether for charitable, political or business purposes – involves similar privacy implications.” *Unsolicited Telephone Calls*, 77 F.C.C.2d at 1035. Similarly, when it implemented TCPA rules in 1992, the Commission rejected a national database that would not permit individuals to “choose among those telemarketers from whom they do and do not wish to hear.” *TCPA Report & Order*, 7 FCC Rcd at 8761.

Content and speaker-based distinctions have led some courts to enjoin and/or invalidate telemarketing restrictions. For example, in *Lysaght v. New Jersey*,

837 F. Supp. 646 (D. N.J. 1993), the district court enjoined a New Jersey law that prohibited the delivery of prerecorded commercial messages by telephone without the prior consent of the called party. The law exempted noncommercial messages from its scope, a fact that the court found to preclude a reasonable fit between means and ends. The court found that the distinction between commercial and noncommercial messages “bears no relationship to the interest of protecting residents from unwanted intrusions at home.” *Id.* at 651 (“Simply put, both commercial and noncommercial prerecorded messages equally disrupt residential privacy.”). Accord *Moser v. Frohnmayer*, 845 P.2d 1284 (Or. 1993) (invalidating, under Oregon Constitution, prohibition of automatic dialing devices for commercial, but not noncommercial, telephone messages).

More recently, the United States District Court for the Eastern District of Missouri, citing the First Amendment, dismissed claims that a fax advertising service had violated the TCPA and the Missouri Merchandising Practices Act. *Missouri v. American Blast Fax, Inc.*, 196 F. Supp.2d 920 (E.D. Mo. 2002). The court held that the provisions that banned the transmission of unsolicited faxes were invalid under *Central Hudson*, in part because the law exempted all faxes except those containing advertising. In particular, the court noted that there is “no evidence as to the number of unsolicited faxes the average business receives, and there is no breakdown as to how many of those are advertisements which fall within the TCPA’s definition.” *Id.* at 932. Because the government provided “no evidence as to what type of unsolicited faxes are

causing the harm which the government is trying to alleviate,” the court could not “assess whether the regulation directly advances the government’s interest.” *Id.*

If the FCC plans to adopt a national “do-not-call” database, it must demonstrate on the record which types of calls cause a problem with residential privacy, either in terms of their numbers or in their subjective effects. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 563-64 (2001) (requiring that government restrictions on advertising must be crafted to address the type of ads that are associated with the problem to be addressed). However, experience to date under the TCPA and state laws does not support the assumption that commercial communications are the biggest concern. ^{88/} Given the lack of any difference between the exempt versus non-exempt categories in relation to the asserted interest, a national “do-not-call” database that excludes non-commercial calls should be invalidated under *Central Hudson*. ^{89/}

3. A National “Do-Not-Call” Database Would Be More Restrictive Than Necessary to Serve the Government’s Stated Interest

The final prong of *Central Hudson* requires the Commission to demonstrate that the TCPA restrictions are “not more extensive than is necessary to

⁸⁸¹ See *supra* note 82. In *American Blast Fax*, the court pointed to evidence that most of the faxes that resulted in junk fax complaints in that case were “not advertising the commercial availability of property, goods or services.” 196 F. Supp.2d at 932. See also *id.* at 925 (“The Court reviewed the faxes attached to the complaints and found that the majority of them were polls and were not advertising anything.”).

^{89/} See *Rubin*, 514 U.S. at 488-89. See *Utah Licensed Beverage Ass’n*, 256 F.3d at 1074 (banning advertisements for some types of alcohol but not others “makes no rational sense if Utah’s true aim is to suppress the social ills which its own evidence attributes to all types of alcohol”).

serve [the asserted] interest[s].” 447 U.S. at 566. In this regard, the Supreme Court recently made clear that “if the Government can achieve its interests in a manner that does not restrict commercial speech, or that restricts less speech, the Government must do so.” *Western States Med. Ctr.*, 122 S. Ct. at 1499; *Rubin*, 514 U.S. at 490. There must be “a reasonable fit between the means and ends of the regulatory scheme,” *Lorillard Tobacco Co.*, 533 U.S. at 525, thus requiring the government to “‘carefully calculat[e] the costs and benefits associated with the burden on speech imposed’ by the regulation[.]” *Id.* at 561 (quoting *Discovery Network, Inc.*, 507 U.S. at 417). Here, it is clear that a national “do-not-call” database would have a significant impact on commercial speech, yet less restrictive measures exist that give subscribers control over unwanted calls.

It is important to note that the initial 1991 federal law on telemarketing was predicated on the understanding that no effective technical solutions existed to address issues involving residential privacy. Pub. L. No. 102-243, § 2(11), 105 Stat. 2394 (1991). Now, ten years after TCPA rules were first implemented, individual homeowners can use technical alternatives to exert a great deal of choice about the nature and volume of calls they receive from all outside sources. See *supra* Section II.E. Technical call blocking options range from services provided by telephone companies, such as Caller ID (including free upgrade services such as Anonymous and Selective Call Rejection), to a wide variety of consumer electronic devices (such as the “TeleZapper” and the “Phone Butler”) that screen, and reject, unwanted calls. 90/

90/ A list of the available services and technologies, including descriptions of how they work and how much they cost, is set forth in Exhibits 14-15.

These options enable homeowners to make individualized selections about which calls they would prefer to receive and those they would rather block without having to agree to the content-based categories set forth in the TCPA. In addition to individual self-help alternatives, many telemarketers belong to professional associations that provide self-regulatory approaches.

These technical options and services are entirely content-neutral and empower homeowners to determine which calls to block. ^{91/} Accordingly, they better fulfill the asserted interest of protecting residential privacy but without the constitutional infirmity of the government's content-based selection. *Cf. United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000) ("Technology expands the capacity [of individuals] to choose [the expression they prefer]; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us."). In any event, "[i]t is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective." *Id.* at 824

The Commission must fully assess these alternatives on the record of this proceeding. While the Central Hudson test does not require the government to use the least restrictive means, "the existence of 'numerous and obvious less-burdensome alternatives to the restriction on commercial speech . . . is certainly a relevant consideration in determining whether the "fit" between means and ends is reasonable.'" *Florida Bar v. Went For It, Inc.*, 515 U.S. at 632 (quoting *Bd. of Trustees v. Fox*, 492

^{91/} Notably, self-regulatory efforts such as the DMA's TPS are "content neutral" because they provide no exceptions to its prohibition against calling listed consumers.

U.S. 469, 480 (1989)). “If the First Amendment means anything, it means that regulating speech must be a last – not first – resort.” *Western States Med. Ctr.*, 122 S. Ct. at 1507.

In addition to market-based alternatives, existing rules provide a less restrictive alternative to a national database, and are more directly targeted toward preventing abusive practices. The Supreme Court has stressed that the tailoring requirement of *Central Hudson*'s fourth prong requires “targeting those practices” that cause the problems sought to be avoided “while permitting others.” *Lorillard Tobacco Co.*, 533 U.S. at 563. See also *Utah Licensed Beverage Ass’n*, 256 F.3d at 1073-74. Where, as here, the existing rules provide a way to address the government’s interest that is less restrictive of speech, the First Amendment requires retention of those rules. *Playboy Entm’t Group*, 529 U.S. at 823-24; *Western States Med. Ctr.*, 122 S. Ct. at 1506.

IV. POLICY CONCLUSIONS AND RECOMMENDATIONS

A. The Commission Should Retain the Rule Requiring Company-Specific “Do-Not-Call” Lists

1. Company Specific Do-Not-Call Lists are Effective and Strike the Appropriate Balance Required by the TCPA

The FCC preserved the necessary balance between privacy interests and the basic rights of telemarketers when it rejected a national “do-not-call” database in 1992 and adopted a company-specific list requirement. It should reaffirm that decision in this proceeding. Company-specific “do-not-call” lists preserve the industry’s ability to persuade its audience while simultaneously respecting the consumer’s right to cut off