

newspapers, finding that “the distinction bears no relationship *whatsoever* to the particular [aesthetic] interests that the city has asserted.” Here, Congress’ decision to exclude tax-exempt nonprofit organizations from the definition of telemarketing in the TCPA was both rational and related to its interest in protecting residential privacy. The House Report finds that “the record suggests that most unwanted telephone solicitations are commercial in nature. * * * [T]he Committee also reached the conclusion, based on the evidence, that “calls [from tax-exempt nonprofit organizations] are less intrusive to consumers because they are more expected. Consequently, the two main sources of consumer problems “high volume of solicitations and unexpected solicitations—are not present in solicitations by nonprofit organizations.” H.R. Rep. No. 102–317, at 16 (1991).

47. Commenters in our record also express the concern that subjecting tax-exempt nonprofit organizations to the national do-not-call requirements may sweep too broadly because it would prompt some consumers to accept blocking of non-commercial, charitable calls to which they might not otherwise object as an undesired effect of registering on the national database to stop unwanted commercial solicitation calls. Both the Eighth and the Ninth Circuits in *American Blast Fax* and *Destination Ventures* found that the provisions of the TCPA, which bans unsolicited commercial faxes but not non-commercial faxes, directly advance a substantial government interest, and we believe that the same distinction may be applied to the national do-not-call registry.

48. We find under the third prong of the *Central Hudson* test that our proposed regulations are not more extensive than necessary to protect residential privacy. The Supreme Court has made clear that with respect to this prong, “the differences between commercial speech and noncommercial speech are manifest.” *Florida Bar*, 515 U.S. 618, 632. The Court held that:

[T]he least restrictive means test has no role in the commercial speech context. What our decisions require, instead, is a fit between the legislature’s ends and the means chosen to accomplish those ends, a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served * * * [T]he 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 the ends and means is reasonable.

In *Florida Bar*, the Supreme Court found that a prohibition against lawyers using direct mail to solicit personal injury or wrongful death clients within 30 days of an accident was not more extensive than necessary to “protect * * * the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers.” *Id.* at 624. Similarly, the Ninth Circuit has found that the TCPA’s ban on prerecorded telemarketing calls constitutes a “reasonable fit” with the government’s legitimate interest in protecting residential privacy. *Moser*, 46 F.3d at 975.

49. Here, we find that our regulations meet the requirements of *Central Hudson*’s third prong. Pursuant to our regulations, we adopt a single, national do-not-call database that we will enforce jointly with the FTC. Our rules mandate that common carriers providing telephone exchange service shall inform their subscribers of their right to register on the database either through a toll-free telephone call or over the Internet. Furthermore, telemarketers and sellers must gain access to telephone numbers in the national database and will be able to do so by means of a fully automated, secure Web site dedicated to providing information to these entities. In addition, sellers will be assessed an annual fee based upon the number of area codes they want to assess, with the maximum annual fee capped at \$7,250. Our rules also provide that the national database will be updated continuously, and telemarketers must update their lists quarterly. We find that our regulations are a reasonable fit between the ends and means and are not as restrictive as the bans upheld in the cases cited. In *Florida Bar*, the Supreme Court upheld an *absolute* ban against lawyers using direct mail to solicit personal injury or wrongful death clients within 30 days of an accident. Similarly, the Ninth Circuit has upheld the TCPA’s *absolute* ban on prerecorded telemarketing calls, and both the Eighth and Ninth Circuit have upheld the TCPA’s *absolute* ban on unsolicited faxes. Here, our regulations do not absolutely ban telemarketing calls. Rather, they provide a mechanism by which individual consumers may choose not to receive telemarketing calls. We also note that there are many other ways available to market products to consumers, such as newspapers, television, radio advertising and direct mail. See *Florida Bar*, 515 U.S. at 633–34. In addition, there simply are not “numerous and obvious less-burdensome alternatives” to the

national do-not-call registry. The record clearly demonstrates widespread consumer dissatisfaction both with the effectiveness of the current company-specific rules that are currently in place and the effectiveness and expense of certain technological alternatives to reduce telephone solicitations. We also note that many of the “burdens” of the national do-not-call registry—issues concerning its costs, accuracy, and privacy—have been addressed by advances in computer technology and software over the last ten years. Thus, we find that our regulations implementing the national do-not-call registry are consistent with the First Amendment and the framework established in *Central Hudson*.

50. Furthermore, we reject the arguments that the *Central Hudson* framework is not appropriate and that strict scrutiny is required because the regulations implementing the national do-not-call list are content-based, due to the TCPA’s exemptions for non-profit organizations and established business relationships. For support, commenters cite to *Discovery Network*, 507 U.S. 410, in which the Court struck down Cincinnati’s ordinance which banned newsracks containing commercial publications but did not ban newsracks containing newspapers. The Court found that the regulation could neither be justified as a restriction on commercial speech under *Central Hudson*, nor could it be upheld as a valid time, place, or manner restriction on protected speech. *City of Cincinnati v. Discovery Network Inc. et al.*, 507 U.S. 410 at 430 (1993). The Court explained that “the government may impose reasonable restrictions on the time, place or manner of engaging in protected speech provided that they are adequately justified ‘without reference to the content of the regulated speech.’” *Id.* at 428 (citation omitted). In this case, the Court held that the City’s ban which covered commercial publications but not newspapers was content-based. *Id.* at 429. “It is the absence of a neutral justification for its selective ban on newsracks that prevents the city from defending its newsrack policy as content neutral.” *Id.* at 429–30.

51. Here, however, there was a neutral justification for Congress’ decision to exclude non-profit organizations. Congress found that “the two sources of consumer problems—high volume of solicitations and unexpected solicitations—are not present in solicitations by nonprofit organizations.” H.R. Rep. No. 102–317, at 16 (1991). Congress also made a similar finding with respect to solicitations based on established