

Telemarketing Restrictions and the First Amendment

IAN HEATH GERSHENGORN

The U.S. Supreme Court's commercial speech doctrine is in a state of transition. The Justices are openly wrestling with the unique challenges posed by regulation of commercial speech, and the Court's current framework for analyzing the constitutionality of commercial speech restrictions, the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,¹ has been criticized as insufficiently protective of speech by a number of Justices on different occasions.² This Term, however, as in several recent Terms, the Court has refused to establish a new doctrinal framework, choosing instead to invalidate the commercial speech restrictions at issue by applying a rigorous version of the *Central Hudson* analysis.³

There seems little doubt that the Court will at some point soon resolve this doctrinal disarray. In the meantime, commercial speech is in limbo, not yet fully protected, but nevertheless sufficiently valuable so that restrictions, and especially content-based restrictions, are viewed with skepticism.

One set of commercial speech restrictions that seems certain to draw the increasing attention of the courts in the next few years involves regulation of telemarketers. Recent legislation at the state and federal level has imposed an array of restrictions on telemarketers, vastly curtailing a wide range of commercial speech.

The stakes are enormous. Telemarketing is a multibillion-dollar industry that is the lifeblood for many American businesses. Last year alone, telemarketers generated more than \$274 billion in sales to consumers involving everything from credit cards to life insurance.⁴ Countless

charitable and political organizations make extensive use of telemarketing to raise money for their various causes; indeed, by one estimate, "60 percent to 70 percent of nonprofit and charitable organizations use professional fundraisers to deliver their messages to consumers and solicit donations."⁵ In 2001, the consumer telemarketing industry employed more than four million workers.⁶

The industry, however, has come under increasing attack as state and federal regulators seek to curb perceived abuses. In the early 1990s, Congress enacted statutes such as the Telephone Consumer Protection Act (TCPA)⁷ and the Telemarketing Consumer Fraud and Abuse Prevention Act (TCFAPA)⁸ that set forth the basic federal prohibitions, and it charged the Federal Communications Commission and the Federal Trade Commission, respectively, with enforcing their provisions. State legislatures have increasingly joined the fray.⁹

One critical question is whether these regulatory efforts are consistent with the First Amendment and, in particular, whether they impose unconstitutional restrictions on protected commercial speech. The principal vulnerability of these regulations is that many, if not most, of them use content-based distinctions to determine the line between permitted and forbidden telemarketing calls. Exemptions exist in one regulation or another for calls on behalf of charitable organizations, religious organizations, political organizations, banks, insurance companies, real estate agents, newspapers, motor vehicle dealers, insurance agents, and financial advisers. If the Court were to accord commercial speech full membership in the pantheon of protected speech, many of the current restrictions would almost certainly fall. But even in the absence of full protection for commercial speech, the current regulation of telemarketing raises troubling constitutional issues, especially in light of Court decisions over the past decade that vigorously apply the *Central Hudson* analysis.

Two recent developments have brought this issue to the fore. First, the FTC has proposed a nationwide do-not-call list for many telemarketing calls,

prompting numerous comments suggesting that the FTC's proposed rules would violate the First Amendment. Second, a federal judge has held portions of the TCPA relating to unsolicited fax advertisements to be unconstitutional under the First Amendment. These two developments suggest that the time has come for an examination of the constitutionality of the current set of telemarketing regulations. That examination in turn reveals that, even under the Court's current doctrinal framework, many current and proposed restrictions on commercial speech cannot stand.

Current Regulatory Framework

Telemarketing calls are subject to a complex web of regulations that restrict who can be called, when calls can be made, and what types of calls are permitted. The principal sources of regulation, focusing on residential calls, are two federal acts and a variety of state regulations, as described below.

Telephone Consumer Protection Act

Before 1991, there was no substantial federal regulation of telemarketing calls.¹⁰ By the early 1990s, however, Congress found that the decreasing costs of telecommunications technology and long distance phone calls had led to a marked increase in interstate telemarketing calls and a corresponding rise in consumer complaints.¹¹ Although by 1991 more than forty states had enacted legislation limiting telemarketing in some way, Congress determined that federal legislation was necessary because those state laws did not reach the increasing number of interstate calls.¹²

To fill this perceived regulatory gap, Congress passed the TCPA. According to the Act's congressional findings, the TCPA sought to balance "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade . . . in a way that protects the privacy of individuals and permits legitimate telemarketing practices."¹³

TCPA's Restrictions

The TCPA restricts three general categories of telemarketing activity: (1) so-

Ian Heath Gershengorn (igershengorn@jenner.com) is a partner in the Washington, D.C., office of Jenner & Block, LLC. The author filed comments on behalf of the U.S. Chamber of Commerce in connection with the proposed telemarketing regulations promulgated by the Federal Trade Commission. The views expressed in this article are those of the author and do not necessarily represent the views of Jenner & Block, LLC, or its clients.

licitations over automated dialing equipment, (2) telephone solicitations, and (3) unsolicited faxes.

Automated Dialing Equipment. The TCPA generally makes it illegal to use autodialers or prerecorded or artificial voices to call emergency lines and hospitals, as well as services where the recipient of the call is charged for the call.¹⁴ It also generally prohibits prerecorded calls to residential lines,¹⁵ and requires automated callers to release the called party's line no more

Congress also tasked the FCC with developing limitations on all “telephone solicitations,” live or recorded, to residential subscribers.

than five seconds after the called party hangs up.¹⁶ Following passage of the TCPA, the FCC launched a comprehensive rulemaking to implement its provisions. With respect to prerecorded calls, the FCC created exemptions for (1) non-commercial calls, (2) commercial calls that do not include unsolicited advertisements, (3) calls made by tax-exempt nonprofit organizations, and (4) calls based on an “established business relationship.”¹⁷

Telephone Solicitations. Congress also tasked the FCC with developing limitations on all “telephone solicitations,” live or recorded, to residential subscribers.¹⁸ The TCPA defines telephone solicitations as calls “for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services,” excluding calls to a party who has given express permission, calls to a party with whom the caller has an established business relationship, and calls from a tax-exempt nonprofit organization.¹⁹ Responding to the congressional directive, the FCC considered a number of options, including a national do-not-call database. After notice and comment, the Commission rejected the national database option as too burdensome. Instead, the FCC required telemarketers to maintain company-specific do-not-call lists, so that if an individual asks a given company not to call, that company may not call for ten years, though all other companies may continue to call that individual until requested not to.²⁰ In addi-

tion, the FCC imposed time of day restrictions that limited telephone solicitations to between the hours of 8 A.M. and 9 P.M. local time.²¹

Unsolicited Faxes. Congress took matters more into its own hands with respect to faxes. The TCPA makes it unlawful to “use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.”²² An “unsolicited advertisement” is defined as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.”²³ Neither the statute nor the FCC’s implementing regulations prohibit the sending of an unsolicited fax that is not an “advertisement.”

Enforcement of the TCPA and Implementing Regulations

The TCPA provides that its provisions and the FCC’s implementing regulations²⁴ may be enforced in a civil action by consumers or, if the telemarketer has engaged in a “pattern or practice” of prohibited call, by a state.²⁵ Available remedies include injunctive relief and actual monetary damages or \$500 per violation, whichever is greater.

In addition, the FCC can hear complaints brought by consumers against a telemarketer for violations of the TCPA, and it may impose the penalties provided in that statute.²⁶ Further, the FCC can bring its own administrative proceeding against TCPA violators. For “willful or repeated” violations of the TCPA, the FCC may demand forfeitures that result in much higher penalties than consumer actions.²⁷ The FCC has brought several such forfeiture actions for violations of the TCPA’s ban on unsolicited fax advertisements and has demanded forfeitures as high as \$1.1 million.²⁸

Telemarketing Consumer Fraud and Abuse Prevention Act

Congress’s other principal foray into regulation of telemarketers was the TCFAPA, which was passed in 1994 to help the Federal Trade Commission to reduce telemarketing fraud.²⁹ The Act required the FTC to “prescribe rules pro-

hibiting deceptive telemarketing acts or practices.”³⁰ Among the issues the FTC was to consider were (1) “a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer’s right to privacy,” (2) restrictions on when unsolicited calls to consumers may be made, and (3) various disclosure requirements.³¹

Consistent with the congressional design, the FTC’s rules were principally concerned with fraud.³² Thus, the regulations required telemarketers to disclose, among other things, (1) the identity of the seller, (2) that the purpose of the call was to make a sale, and (3) the nature of the goods or services being offered.³³ Other provisions prohibited misrepresentations about the cost, quantity, and other material aspects of the goods or services being offered.³⁴

The FTC regulations, however, were not entirely fraud-related. Importantly for present purposes, the FTC, like the FCC when it implemented the TCPA, included company-specific do-not-call regulations that prohibit a seller (or a telemarketer acting on the seller’s behalf) from calling a person who has previously asked not to be called by or on behalf of that seller.³⁵

Congress limited the scope of the FTC regulations so that “no activity that is outside the jurisdiction of [the Federal Trade Commission] Act” is covered by the TCFAPA. Consequently, “banks, credit unions, savings and loans, companies engaged in common carrier activity, non-profit associations, and companies engaged in the business of insurance” are outside the scope of the FTC’s telemarketing regulations.³⁶

As with the TCPA, the TCFAPA allowed for enforcement by states, when a “pattern or practice” is involved,³⁷ and by private parties.³⁸ A state may seek “damages, restitution, or other compensation.” Similar relief may be obtained in a suit by a private party, although the amount in controversy must exceed \$50,000.³⁹ In addition, the FTC may enforce the telemarketing regulations, bringing to bear all of the powers (and duties and restrictions) delineated in the Federal Trade Commission Act.⁴⁰

State Regulation

Most states have enacted antitelemarketing statutes in some form to regulate

intrastate calls, interstate calls, or both,⁴¹ and many roughly follow the TCPA scheme. Most states, for example, have enacted restrictions on automated calls. The state laws often prohibit such calls if not preceded by an introduction by a live operator. The scope of these statutes varies, however. Some state legislation governing automated calls regulates commercial calls only.⁴² Other state statutes ban all automated calls without the consent of the called party.⁴³ In addition, although the federal statute covers only calls to residences, some state provisions do not limit their applicability just to residences and govern calls to businesses as well.⁴⁴

Many states have also chosen, as did Congress in the TCPA, to regulate live telemarketing calls. In the past decade, there has been a steady proliferation of states and even some municipalities enacting laws creating statewide or municipality do-not-call lists. If a consumer requests to be placed on the statewide list, often for a small fee, then telemarketers covered by the statute, both inside the state and elsewhere, may not call those consumers. The more recent do-not-call laws have been well publicized, and some lists have apparently garnered a significant number of names and phone numbers.⁴⁵

The scope of these state provisions varies. In Georgia, for example, charitable organizations are wholly excepted from the do-not-call list legislation.⁴⁶ The Arkansas Consumer Telephone Privacy Act contains a do-not-call list provision that specifically covers both commercial and charitable calls,⁴⁷ but excludes a broad array of calls in both commercial and noncommercial categories, including: (1) charitable solicitations made by someone who is not paid to make the call, (2) calls by a licensed real estate agent, (3) calls by a licensed motor vehicle dealer, (4) calls by a licensed insurance agent, (5) calls by a licensed securities salesperson or financial adviser, (6) calls by a newspaper for purposes of soliciting subscriptions, (7) calls made on behalf of any federally or state-chartered bank as long as the call is not about credit cards, and (8) calls by licensed funeral establishments.⁴⁸ The Indiana telemarketing statute explicitly covers both commercial and charitable calls, but exempts calls by licensed insurance agents, licensed real estate agents, and certain calls soliciting news-

paper sales.⁴⁹ The Tennessee statute exempts calls on behalf of not-for-profit organizations and political groups.⁵⁰

FTC's Proposed National Do-Not-Call Registry

One occasion for increased scrutiny of the constitutionality of telemarketing restrictions is a recent proposal by the FTC to drastically expand the scope of its telemarketing restrictions.⁵¹ Most important, the FTC rules propose the creation of a national do-not-call registry to be maintained by the FTC. The FTC's rules would thus "provide a 'one-stop' method of allowing consumers to reach many telemarketers quickly" because, for customers that placed themselves on the FTC's proposed registry, it would "eliminate *all* telemarketing calls from *all* sellers and telemarketers" covered by the FTC's rules.⁵²

Like the previous FTC rules, the amended rules would be limited in coverage to the areas within the FTC's jurisdiction. Thus, banks, credit unions, certain insurance businesses, and others are exempt from the rule. The FTC's proposal changes the scope of the rules in important ways. First, in the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001,⁵³ Congress expanded the scope of the definition of telemarketing that appears in the TCFAPA to include any campaign conducted to induce "a charitable contribution, donation, or gift of money or any other thing of value."⁵⁴ The FTC thus extended the reach of its do-not-call provisions to cover telemarketers soliciting charitable contributions.⁵⁵ Second, the FTC made clear that its telemarketing rules do not apply to requests for contributions to "political clubs, committees, or parties" or "constituted religious organizations." The former, according to the FTC, were excluded because they are outside the statutory definition of "charitable contribution"; the latter were excluded "as a matter of policy" because of the "risk or perceived infringement on a paramount societal value—free and unfettered religious discourse."⁵⁶ Despite these exceptions, the FTC's proposed national do-not-call registry would likely threaten the continued existence of businesses and charities that depend on telemarketing.

Constitutionality of the Proposed Registry

The FTC's proposed rules are under attack not only for practical problems, but also for constitutional difficulties. The principal vulnerability of the FTC's regulation lies in the numerous content-based distinctions that it contains. Although the do-not-call requirements apply to most solicitations by business and charitable organizations, at least when conducted by for-profit telemarketers, they do not apply to calls by for-profit telemarketers calling on behalf of political or religious organizations.⁵⁷ Nor do the regulations apply to banks⁵⁸ or to a number of other specified industries.⁵⁹ If the Court were to hold that commercial speech is fully protected, the restrictions would almost certainly fall. But even in the absence of such new doctrinal ground, the distinctions leave the Commission's rules vulnerable under both the strict scrutiny analysis that applies to certain content-based distinctions on proscribable speech and the somewhat more lenient analysis of *Central Hudson*.

R.A.V. and the Argument for Strict Scrutiny

As the Supreme Court has repeatedly observed, "content-based regulations are presumptively invalid."⁶⁰ Indeed, "[a]s a general matter, 'the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'"⁶¹ Permitting the government broad leeway to make content-based distinctions on speech "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace."⁶² Rather than a system of government control, the First Amendment "'is intended to remove governmental restraints from the area of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.'"⁶³

In the commercial speech context, as noted above, the U.S. Supreme Court has not yet deemed commercial speech worthy of full First Amendment protection, and thus content-based distinctions in commercial speech regulations do not automatically bring strict scrutiny. Nevertheless, under the Court's First

Amendment jurisprudence, strict scrutiny should apply to the FTC regulations. Ironically, the key case, *R.A.V. v. City of St. Paul*,⁶⁴ is not a commercial speech case at all.

In *R.A.V.*, the Supreme Court addressed content-based restrictions within categories of “proscribable speech,” in that case, fighting words. The Court noted that “when the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists.”⁶⁵ When the content-based distinctions are unrelated to the reason the speech is generally proscribable, however, the Court’s oft-noted concerns of the dangers of content-based discrimination remain at the fore.

For example, a state may choose to prohibit only obscenity that is “the most patently offensive in its prurience,” but may *not* prohibit only that obscenity that includes “offensive political messages.”⁶⁶ Similarly, the government may criminalize threats of violence against the president because the “reasons why threats of violence [that] are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the president,” but the government may not criminalize only those threats that “mention his policy on aid to inner cities.”⁶⁷

More important for the present discussion, the Court made clear in *R.A.V.* that this analysis applies fully to content-based restrictions among categories of commercial speech. Thus, the Court emphasized that “a State may choose to regulate price advertising in one industry but not in others because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection) is in its view greater there.”⁶⁸ A state may not, however, prohibit “only that commercial advertising that depicts men in a demeaning fashion.”⁶⁹ *R.A.V.* thus makes clear that “the power to proscribe [speech] on the basis of *one* content element (*e.g.*, obscenity) does not entail the power to proscribe it on the basis of *other* content elements.”⁷⁰ Justice Thomas made this same point in his concurrence in *Lorillard Tobacco Co. v. Reilly*, arguing that “even when speech falls into a category of re-

duced constitutional protection, the government may not engage in content discrimination for reasons unrelated to those characteristics of the speech that place it within the category.”⁷¹

Indeed, the case for strict scrutiny of at least some commercial speech restrictions is even stronger than it was under *R.A.V.* itself. After all, *R.A.V.* involved speech that is generally unprotected. In contrast, the Court has, at least since *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,⁷² consistently acknowledged that commercial speech has inherent value and should receive significant, albeit less than full, First Amendment protection. If, as *R.A.V.* held, restrictions on fighting words receive strict scrutiny when the restrictions draw distinctions that are unrelated to the reasons why fighting words are generally unprotected, then strict scrutiny should apply a fortiori to commercial speech restrictions when the restrictions are similarly unrelated to the reasons why commercial speech has generally received less protection.

Under the *R.A.V.* analysis, the FTC’s regulations are unconstitutional. The doctrinal distinction between commercial and noncommercial speech has been justified principally on the ground that commercial speech is both “more easily verifiable by its disseminator” and less likely to be “chilled by proper regulation.”⁷³ The regulation of commercial speech, therefore, “is limited to the peculiarly *commercial* harms that commercial speech can threaten—*i.e.*, the risk of deceptive or misleading advertising”⁷⁴ and the need to “preserv[e] a fair bargaining process.”⁷⁵

The content-based distinctions in the FTC’s proposed do-not-call regime, however, are not related to these core concerns. The Commission’s only justification for a nationwide do-not-call registry is the need to protect consumer privacy.⁷⁶ But that interest is “unrelated to the preservation of a fair bargaining process,” and under *R.A.V.* cannot justify content-based distinctions among categories of commercial speech. Strict scrutiny would thus apply and the regulations would fall.⁷⁷

Central Hudson

The familiar *Central Hudson* analysis provides another framework for discussion. For the regulation of nonmisleading truthful speech about lawful activities to

be upheld under *Central Hudson*, the asserted government interest in restricting the speech must be substantial; the government must show that its speech restriction directly and materially advances the asserted government interest; and the government must narrowly tailor its restriction to the asserted interest.⁷⁸

The core of the *Central Hudson* analysis, reflected in the latter two prongs above, is that the Constitution demands a “reasonable fit” between a speech-restrictive regulation and the government’s asserted goal,⁷⁹ such that the challenged regulation advances the government’s interest “in a direct and material way.”⁸⁰ A fundamental mismatch between the government regulation and its purported goal calls into question the sincerity of the government’s proffered justification and raises the specter that the government simply prefers some speakers over others.

Although the Court’s initial decisions under *Central Hudson* suggested some deference toward government regulation of commercial speech, the Court’s more recent decisions have applied *Central Hudson* more rigorously. In *Discovery Network*, for example, the Court struck down a city ordinance that banned commercial news racks but permitted noncommercial ones.⁸¹ The Court agreed that the city’s asserted concerns about the safety and aesthetics of its streets and sidewalks were important; it determined, however, that those concerns applied equally to commercial and noncommercial news racks.⁸² The Court stated that “[i]n the absence of some basis for distinguishing between ‘newspapers’ and ‘commercial handbills’ that is relevant to an interest asserted by the city, we are unwilling to recognize Cincinnati’s bare assertion that the ‘low value’ of commercial speech as a sufficient justification for its selective and categorical ban on newsracks dispensing ‘commercial handbills.’”⁸³ The Court thus held that if “the distinction between commercial and noncommercial speech . . . bears no relationship whatsoever to the particular interests that the [government] has asserted,” such a distinction—even though it results in too little rather than too much speech being restricted—is impermissible.⁸⁴

Consistent with the understanding set forth in *Discovery Network* that the First Amendment precludes speech regulations that are underinclusive, the Court has consistently invalidated un-

derinclusive regulations of commercial speech, particularly when the underinclusiveness diminishes the credibility of the government's asserted rationale for the regulations.

In *Coors*, for example, the Court struck down a statutory scheme that prohibited beer labels from displaying alcohol content. The Court observed that while the statute "bans the disclosure of alcohol content on beer labels, it allows the exact opposite in the case of wines and spirits."⁸⁵ The Court concluded that "there is little chance that [the statute] can directly and materially advance its aim, while other provisions of the same Act directly undermine and counteract its effects."⁸⁶

Similarly, in *GNOBA*, the Court struck down a federal statute that prohibited broadcast advertising of private casino gambling. Noting that the statutory scheme permitted advertising of casinos run by states and Indian tribes, as well as advertising of numerous other gambling events, the Court held that the statutory regime was "so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it."⁸⁷

Central Hudson and the FTC's Proposed Do-Not-Call List

Under the *Central Hudson* analysis, as elaborated in recent Supreme Court decisions, the nationwide do-not-call list the FTC has proposed for a select group of commercial speakers is suspect as applied to truthful, nonmisleading information about a lawful commercial transaction.⁸⁸ Even assuming that the Commission's asserted interest in residential privacy is considered substantial,⁸⁹ the FTC cannot establish that the regulations directly and materially advance the government's privacy interest and that they are narrowly tailored to further the government's asserted goals.⁹⁰

The problem for the FTC are the "exemptions and exceptions" in its regulatory scheme. The exclusion of solicitations by nonprofits, the exceptions for solicitations on behalf of religious organizations and on behalf of "political clubs, committees, or parties," and the numerous industry-specific exclusions counsel strongly against a finding that the regulations advance the FTC's asserted privacy interests in a direct and material way.

Moreover, it is hard to believe the

FTC could justify the regime's numerous exceptions on the ground that the prohibited calls are somehow more invasive of personal privacy. Whatever intrusion on privacy that telemarketing calls cause is the same whether the unwanted solicitation comes from a charity, a landscaping company, or a bank.⁹¹

Indeed, some lower courts have already relied on this line of reasoning to strike down antisolicitation provisions. In *Pearson v. Edgar*,⁹² for example, the Seventh Circuit invoked *Discovery Network* to invalidate an Illinois statute that made it unlawful for a real estate agent to solicit a sale or listing of property from any owner who had indicated a desire not to sell the property.⁹³ The Court observed that because "the distinction between real estate solicitation and other types of solicitation is not plausible absent evidence that real estate solicitation poses a particular threat to residential privacy," the speech restriction did not "reasonably fit" the reason for the restriction.⁹⁴ Similarly, in the absence of evidence that the real estate solicitations at issue were particularly invasive, "a mechanism whereby homeowners can reject real estate solicitations but not other kinds of solicitation cannot be said to advance the interest in residential privacy 'in a direct and material way.'"⁹⁵

Similarly, in *Lysaght v. New Jersey*,⁹⁶ a federal district court enjoined enforcement of a New Jersey ban, absent the called party's consent, on automated commercial calls. Applying intermediate scrutiny and relying heavily on *Discovery Network*, the court held that the government's interest in preserving the privacy of the home, while valid, was not furthered by banning only commercial calls because both commercial and noncommercial calls "equally disrupt residential privacy."⁹⁷ Nor was it furthered by prohibiting only prerecorded calls because such calls threaten the privacy of the home no more than live calls.⁹⁸

One lower court case in particular provides further evidence that some telemarketing restrictions may be vulnerable to a commercial speech challenge. *Missouri v. American Blast Fax, Inc.*⁹⁹ presented a fairly routine application of the TCPA's proscription on un-

solicited fax advertisements. The case arose out of an action brought by the State of Missouri against American Blast Fax, Inc., a corporation in the business of providing fax advertising services. American Blast Fax had the misfortune to send unsolicited fax advertisements to the Missouri Attorney General's offices, a total of 229 such faxes to five different machines over

American Blast Fax had the misfortune to send unsolicited fax advertisements to the Missouri Attorney General's offices.

the course of ten months. The Attorney General sued American Blast Fax under the TCPA, and the company defended itself by alleging that the TCPA violated the First Amendment.¹⁰⁰

In March 2002, U.S. District Court Judge Stephen Nathaniel Limbaugh accepted American Blast Fax's argument and held that the TCPA's blanket prohibition on unsolicited fax advertisements violated the First Amendment.¹⁰¹

Applying the *Central Hudson* analysis, the court turned first to the government's asserted substantial interests, which Judge Limbaugh identified as first, that "unsolicited junk faxing shifts advertising costs from the advertiser to the recipient," and second, that "unsolicited fax advertising occupies a recipient's facsimile machine so that the recipient cannot utilize it for his or her desired business purposes."¹⁰² Judge Limbaugh expressed considerable skepticism about the strength of the government's asserted interests, noting the paucity of material in the legislative history indicating a real problem in either of these areas.

But even assuming the substantiality of the government's interests, Judge Limbaugh held that the TCPA failed to survive scrutiny under *Central Hudson*. In particular, drawing on cases such as *GNOBA* and *Coors*, Judge Limbaugh found that the statute failed to directly advance the government's asserted interests because it prohibited only unsolicited advertisements, and not other types of unsolicited faxes. As Judge Limbaugh observed, "recipients can still bear the costs of printing others'

messages, even if they strongly oppose the messages' content. The costs of printing political messages, jokes, and some advertisements which are not included in the TCPA's definition, still fall on the recipient."¹⁰³

Judge Limbaugh also found that the selective prohibitions in the TCPA cast doubt on whether the statute satisfied *Central Hudson's* "reasonable fit" requirement: "Again, there is no rationality behind the government's distinction between unsolicited advertisements and other unsolicited faxes. The recipient must still bear the cost, and the fax can still interfere with the recipient's use of his or her facsimile machine for business purposes."¹⁰⁴

By focusing on the exceptions in the statute and the lack of a reasonable fit between the government interests asserted and the particular exceptions, *American Blast Fax* thus sets forth a plan of attack for the FTC's proposed regulations and other antitelemarketing regimes that draw content-based distinctions.

Conclusion

The FTC is currently reviewing comments on its proposed telemarketing restrictions, and *American Blast Fax* is currently moving its way up the appellate chain. Either case could provide a vehicle for the Supreme Court to decide once and for all whether commercial speech receives full First Amendment protection. But whether or not the Court takes up that challenge, the cases provide further opportunity for the appellate courts (and even the Supreme Court) to remind regulators that content-based distinctions in commercial speech that are unrelated either to the reasons for proscribing the speech in the first place or to the interests purportedly being advanced violate the First Amendment. 

Endnotes

1. 447 U.S. 557, 566 (1980).
2. See, e.g., *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 197 (1999) (GNOBA) (Thomas, J., concurring); 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501, 510-14 (1996) (opinion of Stevens, J., joined by Kennedy and Ginsburg, JJ.); *id.* at 517 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 518 (Thomas, J., concurring in part and concurring in the judgment).
3. *Thompson v. W. States Med. Ctr.*, 122 S. Ct. 1497 (2002); see also *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554-55 (2001); *GNOBA*, 527 U.S. at 184.

4. See Comments of the Direct Marketing Association, Inc. and the U.S. Chamber of Commerce, at 5 (Apr. 15, 2002) (available from author).

5. Comments of the Not-for-Profit and Charitable Coalition in Response to the Federal Trade Commission's Proposed Amendments to the Telemarketing Sales Rule, at 6 (Apr. 15, 2002); see also Comments of American Diabetes Ass'n ("We call literally millions of people every year in an effort to raise funds."); Comments of California Professional Firefighters (Mar. 14, 2002) (if FTC adopts new limits on the use of professional telemarketers, "our ability to solicit contributions supporting California's professional firefighting and EMS personnel would be severely crippled") (available from author).

6. See DMA FTC Comments, *supra* note 4, at 5.

7. 47 U.S.C. § 227.

8. 15 U.S.C. §§ 6101 *et seq.*

9. See, e.g., ARK. CODE ANN. § 4-99-402 *et seq.*; GA. CODE ANN. § 46-5-27; IND. CODE § 24-4.7-1-1; N.Y. GEN. BUS. § 399-z(1)(i); TENN. CODE ANN. § 65-4-401(6)(A); see also www.ftc.gov/bcp/online/pubs/alerts/dncalr.htm (providing links to state do-not-call registries).

10. The FCC had considered regulating telemarketing as early as 1980, but concluded that the volume of interstate calls, which were the only calls the Commission could regulate under the Communications Act, was insufficient to justify Commission action. See *In re Unsolicited Tel. Calls*, 77 F.C.C.2d 1023, 1033 (1980).

11. S. REP. NO. 102-178, at 2-3, *reprinted in* 1991 U.S.C.C.A.N. 1968, 1969-70; H.R. REP. NO. 102-317, at 9-10 (Nov. 15, 1991).

12. See S. REP. *supra* note 11, at 3 ("These [state] measures have had limited effect, however, because States do not have jurisdiction over interstate calls."); TCPA § 2(7) ("telemarketers can evade [state] prohibitions through interstate operations").

13. TCPA § 2(9); see also S. REP., *supra* note 11, at 1 (noting the need to "protect the privacy interests of residential telephone subscribers").

14. 47 U.S.C. § 227(b); 47 C.F.R.

§ 64.1200(a).

15. 47 U.S.C. § 227(b)(1)(B); 47 C.F.R.

§ 64.1200(a)(2).

16. 47 U.S.C. § 227(d)(3); 47 C.F.R.

§ 64.1200(d).

17. 47 C.F.R. § 64.1200(c); *id.*

§ 64.1200(f)(4).

18. 47 U.S.C. § 227(c).

19. *Id.* § 227(a)(3).

20. See *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 F.C.C.R. 8752, ¶¶ 20-24 (1992); see also 47 C.F.R.

§ 64.1200(e)(2); see 47 C.F.R.

§ 64.1200(e)(2)(vi).

21. *Id.* § 64.1200(e)(1).

22. *Id.* § 227(b)(1)(C).

23. *Id.* § 227(a)(4).

24. See 47 U.S.C. § 227(c)(5). The TCPA provides an affirmative defense in any action brought pursuant to § 227(c)(5) if the defendant has "established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the [FCC's] regulations."

25. 47 U.S.C. § 227(b)(3).

26. See 47 U.S.C. § 208(a); *In re Consumer.net v. AT&T Corp.*, 15 F.C.C.R. 281, ¶¶ 1, 42 (handling § 208 formal complaint proceeding and explaining that complainant was limited to TCPA penalties).

27. 47 U.S.C. § 503(b).

28. See, e.g., *In re 21st Century Fax(es) Ltd.*, 2000 WL 1799579 (FCC Dec. 7, 2000) (demanding forfeiture of \$1.1 million for 152 violations); *In re US Notary, Inc.*, 15 F.C.C.R. 16,999 (2000) (demanding forfeiture of \$90,000); *In re Carolina Liquidators, Inc.*, 15 F.C.C.R. 16,837 (2000) (demanding forfeiture of \$230,000 for thirty-four violations); *In re Get-Aways, Inc.*, 15 F.C.C.R. 1805 (1999) (demanding forfeiture of \$85,500 for nineteen violations).

29. Congress also enacted the Senior Citizens Against Marketing Scams Act of 1994, 18 U.S.C. §§ 2325 *et seq.*, which provides for longer prison sentences for certain telemarketing-related crimes.

30. 15 U.S.C. § 6102(a).

31. See *id.* § 6102(a)(3).

32. See generally *Telemarketing Sales Rule*; Proposed Rule, 67 Fed. Reg. 4492, 4493 (Jan. 30, 2002).

33. 16 C.F.R. § 310.4(d).

34. *Id.* § 310.3(a)(2).

35. See *id.* § 310.4(b)(1)(ii). The FTC also promulgated rules (like the FCC rules) that prohibit calls before 8:00 A.M. and after 9:00 P.M. *Id.* §§ 310.4(c) and 310.4(b)(1)(ii).

36. FTC Proposal, 67 Fed. Reg., *supra* note 32, at 4493 n.16.

37. See 15 U.S.C. § 6103.

38. See *id.* § 6104.

39. See *id.* §§ 6103(a); 6104(a).

40. See 15 U.S.C. §§ 41 *et seq.*; *id.* § 6105(b).

41. To the extent that state statutes purport to impose restrictive regulations on interstate calls, the statutes may well be preempted by the TCPA and the FCC's implementing regulations.

42. See, e.g., N.Y. GEN. BUS. LAW § 399p(1)(d) (covering automated calls "for the purpose of soliciting a sale of any consumer goods or services"); GA. CODE ANN. § 46-5-23(a)(2) (covering automated calls "for the purpose of advertising or offering for sale, lease, rental, or as a gift any goods, services, or property").

43. In Minnesota, for example, the legislature initially enacted legislation banning commercial automated calls without consent but later expanded it to cover all automated

calls. See MINN. STAT. ANN. § 325E.27 (no automated calls unless preceded by live operator obtaining consent of called party); see also CAL. PUB. UTIL. CODE § 2874 (banning all automated calls unless live operator introduces and obtains consent for call).

44. See, e.g., N.Y. GEN. BUS. LAW § 399p; NEB. REV. STAT. § 86-1208 (4).

45. See, e.g., FTC Proposal, 67 Fed. Reg., *supra* note 32, at 4517 (noting reports that “consumers are responding in such overwhelming numbers to the State ‘do-not-call’ statutes that some States’ telephone systems have crashed”).

46. See GA. CODE ANN. § 46-5-27(b)(3).

47. ARK. CODE ANN. § 4-99-403(2).

48. See *id.* § 4-99-406.

49. IND. CODE § 24-4.7-2-9.

50. TENN. CODE ANN. § 65-4-401(6)(B)(ii).

51. See Proposed FTC Rule, 67 Fed. Reg. *supra* note 32, at 4492. Comments on the FTC’s proposed amendments were due April 15, 2002, and the FTC held a public hearing on the amendments on June 5-7, 2002.

52. See *id.* at 4518-19.

53. Pub. L. No. 107-56 (2001).

54. USA PATRIOT Act, § 1011(b)(3).

55. Proposed FTC Rule, 67 Fed. Reg., *supra* note 32, at 4516.

56. *Id.* at 4499.

57. See *id.* at 4499 (excluding “any contributions to ‘political clubs, committees, or parties’” and “contributions to constituted religious organizations”).

58. *Id.* at 4497 n.56.

59. *Id.* at 4519.

60. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

61. Consol. Edison Co. of N.Y. v. Pub. Serv. Comm’n, 447 U.S. 530, 536 (1980) (quoting Police Dep’t v. Mosley, 408 U.S. 92, 95 (1972)).

62. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991).

63. Leathers v. Medlock, 499 U.S. 439, 447 (1991) (quoting Cohen v. California, 403 U.S. 15, 24 (1971)).

64. R.A.V., 505 U.S. at 388.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 388-89 (internal citations omitted).

69. *Id.* at 389.

70. *Id.* at 386 (emphasis in original).

71. 533 U.S. 525, 576 (2001) (Thomas, J., concurring); see also Rubin v. Coors Brewing Co., 514 U.S. 476, 494 (1995) (Stevens, J., concurring) (“[A]ny description of commercial speech that is intended to identify the category of speech entitled to less First Amendment protection should relate to the reasons for permitting broader regulation: namely, commercial speech’s

potential to mislead.”).

72. 425 U.S. 748 (1976).

73. *Id.* at 772 n.24; see also Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 576 (2001) (Thomas, J., concurring).

74. *Lorillard*, 533 U.S. at 576 (Thomas, J., concurring) (emphasis in original).

75. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996) (Stevens, J., concurring, joined by Kennedy and Ginsburg, JJ.); see also R.A.V. v. City of St. Paul, 505 U.S. 377, 388-89 (noting that “risk of fraud” is “one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection”); *Coors*, 514 U.S. at 493 (Stevens, J., concurring) (identifying the “rationales for treating commercial speech differently under the First Amendment” as “the importance of avoiding deception and protecting the consumer from inaccurate or incomplete information in a realm in which the accuracy of speech is generally ascertainable by the speaker”).

76. See FTC Proposed Rule, 67 Fed. Reg., *supra* note 32, at 4516-17 (“This proposal directly advances the Telemarketing Act’s goal to protect consumers’ privacy.”); *id.* at 4518-19 (“[T]he proposed modification of the Rule promotes the Act’s privacy protections.”).

77. See, e.g., United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 812 (2000); R.A.V., 505 U.S. at 395; *Lorillard*, 533 U.S. at 577 (Thomas, J., concurring). The FTC regulations would be unlikely to survive such scrutiny. Under strict scrutiny, the government’s speech restrictions must be narrowly tailored to a compelling government interest. See, e.g., *Playboy Entertainment Group*, 529 U.S. at 812; *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 657 (1990). Even assuming that the Commission’s asserted privacy interest is compelling, the “dispositive question” here, as it was in *R.A.V.*, would be “whether content discrimination is reasonably necessary to achieve [the government’s] compelling interests.” *R.A.V.*, 505 U.S. at 395-96. The FTC has thus far made no effort at all to show that the content-based restrictions are indeed necessary to protect the FTC’s asserted interests in residential privacy.

78. See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993).

79. See *id.* at 417 n.13.

80. *Edenfeld v. Fane*, 507 U.S. 761, 767 (1993).

81. *Discovery Network, Inc.*, 507 U.S. at 430-31.

82. *Id.* at 427-28.

83. *Id.* at 428.

84. *Id.* at 424.

85. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995).

86. *Id.* at 489.

87. *Greater New Orleans Broadcasting Ass’n v. United States*, 527 U.S. 173, 190 (1999) (GNOBA); see also *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 512 n.20 (1996) (noting examples of underinclusiveness).

88. To the extent the calls are fraudulent, they can be regulated without First Amendment objection under federal and state fraud provisions.

89. The interest in protecting residential privacy, while important in the abstract, cannot be asserted at a high level of generality to satisfy *Central Hudson*. See *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1234-36 (10th Cir. 1999) (“[T]he government cannot satisfy the second prong of the *Central Hudson* test by merely asserting a broad interest in privacy. It must specify the particular notion of privacy and interest served.”).

90. See *Discovery Network*, 507 U.S. at 416, 417 n.13; *Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

91. Cf. *GNOBA*, 527 U.S. at 191 (“[T]he Solicitor General does not maintain that government-operated casino gaming is any different . . . or that one class of advertisers is more likely to advertise in a meaningfully distinct manner than the others.”).

92. 153 F.2d 397 (7th Cir. 1998).

93. *Id.* at 402-05.

94. *Id.* at 404.

95. *Id.* (quoting *Edenfeld v. Fane*, 507 U.S. 761, 767 (1993)).

96. 837 F. Supp. 646 (D.N.J. 1993).

97. *Id.* at 651.

98. *Id.* at 653.

99. 196 F. Supp. 2d 920 (E.D. Mo. 2002).

100. The U.S. Department of Justice intervened to defend the constitutionality of the statute.

101. At least two other district courts have rejected similar First Amendment challenges to the fax provisions of the TCPA. See *Texas v. American Blastfax, Inc.*, 121 F. Supp. 2d 1085 (W.D. Tex. 2000); *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162 (S.D. Ind. 1997).

102. *American Blast Fax*, 196 F. Supp. 2d at 928.

103. *Id.* at 931.

104. Judge Limbaugh also noted the existence of variety of “other options which can advance the government’s asserted interest in a manner less intrusive to First Amendment rights” than the total ban imposed by the TCPA. Among the alternatives he identified was the use of “a national ‘no-fax’ database similar to those being utilized for telephone solicitations.” In light of those available alternatives, Judge Limbaugh concluded that “the regulation is more extensive than necessary.” *Id.* at 932.