IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MAINSTREAM MARKETING SERVICES, INC., et al.	)	
	)	
Petitioners,	)	
	)	No. 03-9571
v.	)	
	)	
FEDERAL COMMUNICATIONS COMMISSION,	)	
	)	
Respondent.	)	

RESPONSE OF THE FEDERAL COMMUNICATIONS COMMISSION TO PETITIONERS' MOTION FOR EXPEDITED STAY PENDING APPEAL

Statement Regarding Oral Argument

Respondent does not request oral argument on this motion.[1]

Introduction

On July 3, 2003, pursuant to the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. 227, the Federal Communications Commission ("FCC") issued an order establishing – along with the Federal Trade Commission ("FTC") – a national do-not-call registry for consumers who do not want to receive telemarketing calls at home.[2] Under the FCC's prior

[1] Although the United States is not named in the caption of the petition for review or any of petitioners' pleadings to date, it is a statutory respondent under 28 U.S.C. 2344. The caption should accordingly be amended to reflect the fact the Federal Communications Commission and the United States are respondents in this action.

rules, a consumer could only instruct a specific company not to call him at home on a case-by-case basis. The *Order* now provides consumers the opportunity to instruct all telemarketing companies not to call. There has been an extraordinary public response to the new rules. Since the Government's do-not-call registry became available on June 27, 2003, more than 48 million telephone numbers have been registered.[3]

Mainstream Marketing Services, Inc., TMG Marketing, Inc., and the American Teleservices Association ("petitioners") seek an expedited stay of the FCC's *Order* pending review. Petitioners' motion should be denied. As we explain below, the do-not-call rules are a reasonable regulation of commercial speech under the First Amendment. Although the rules may result in some dislocation of petitioners' businesses, issuance of a stay would frustrate the efforts of more than 48 million people to protect their privacy from the unwanted intrusion of telemarketing calls at home. Moreover, a stay of the FCC's rules would not provide petitioners with substantial relief, because the do-not-call registry also results from the rules promulgated by the FTC, which is not a party to this case.

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[2] *See Rules and Regulations Implementing the Telephone Consumer Protection Act*, 18 FCC Rcd 14014, 68 Fed. Reg. 44144 (2003) ("*Order*").

[3] *See*, *e.g.*, http://www.ftc.gov/opa/2003/09/030902dnc2.htm (visited on September 5, 2003).

Background

A. The FCC's Implementation of the Telephone Consumer Protection Act

In 1991, Congress enacted the TCPA to address the "pervasive" "use of the telephone . . . to market goods and services to the home and other businesses." TCPA, section 2(1), 47 U.S.C. 227 note. Noting that more than "300,000 solicitors" then called over "18,000,000 Americans" a day, Congress found that "[u]nrestricted telemarketing * * * can be an intrusive invasion of privacy," and that "many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers." TCPA, sections 2(3), 2(5), 2(6).

In light of this problem, Congress in the TCPA required the FCC to prescribe rules addressing "the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object." 47 U.S.C. 227(c)(1). The statute defines "telephone solicitation" to mean "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization." 47

U.S.C. 227(a)(3). The TCPA required the FCC, in promulgating regulations, "to compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific 'do not call' systems, and any other alternatives, . . .") for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages." 47 U.S.C 227(c)(1)(A). Moreover, the TCPA specifically authorized the FCC 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." *Id*. at 227 (c)(3).

In 1992, the FCC adopted rules implementing the TCPA, including a regulation requiring companies that solicit by telephone to maintain company-specific do-not-call lists of consumers who had requested not to be called. *Order* at para. 17; *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order 7 FCC Rcd 8752 (1992). At that time, the FCC did not adopt a national do-not-call registry due to concerns about the cost and difficulty of maintaining an accurate list. *Order* at para. 17.

B. The National Do-Not-Call Registry

In December 2002, the FTC issued an order adopting a national do-not-call registry to be maintained by the federal government. *Order* at para. 9; Telemarketing Sales Rule, 68 Fed. Reg. 4850 (2003) ("*Amended TSR Rule*"). The FTC registry does not cover entities over which it does not have jurisdiction, such as "common carriers, banks, credit unions, savings and loans, [and] companies engaged in the business of insurance and airlines," and does not apply to intrastate telemarketing calls. *Order* at para. 9. Nor does it apply to nonprofit organizations, although they must comply with the company-specific do-not-call rules when using for-profit telemarketers. *Id*.

In September 2002, the FCC issued a Notice of Proposed Rulemaking in which it sought comment on whether it should revise its TCPA rules. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 17 FCC Rcd 17459 (2002). The NPRM generated an extensive record. *See Order* at paras. 19-21 (describing "extensive comment from consumers, businesses, and state government"); 66 (noting "6,500 commenters in this proceeding").

In March 2003, Congress adopted the Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (2003) to be codified at 15 U.S.C.

6101 ("Do-Not-Call Act"). The Do-Not-Call Act authorizes the FTC to collect fees from telemarketers for the do-not-call registry, and required the FCC "to issue a final rule in its ongoing TCPA proceeding within 180 days of enactment, and to consult and coordinate with the FTC to 'maximize consistency' with the rule promulgated by the FTC." *Order* at para. 15.

On July 3, 2003, the FCC released the *Order*. The FCC explained that since the TCPA was enacted in 1991, many more telemarketing calls are made to consumers today and that the technology for making those calls has changed as well. The FCC noted that "today telemarketers may attempt as many as 104 million calls to consumers and businesses every day" through, among other means, "[a]utodialers" delivering "prerecorded messages to thousands of potential customers every day" and "[p]redictive dialers, which initiate phone calls while telemarketers are talking to other customers." *Order* at para. 8. The FCC found that "[c]onsumers often feel frightened, threatened, and harassed by telemarketing calls," "[t]hey are angered by hang-ups and 'dead-air' calls [and] by do-no-call requests that are not honored," and that "the vast majority of them support the establishment of a national do-not-call registry." *Order* at para. 2. The agency also noted that "36 states [had] passed 'do-not-call' statutes, *Order* at para. 12, but that

despite their efforts, "consumer frustration with unsolicited marketing calls continues." *Order* at para. 2.

The *Order* does not eliminate the company-specific approach the FCC adopted in 1992. Instead it supplements "current company-specific do not call rules for those consumers who wish to continue requesting that particular companies not call them" by establishing, along with the FTC, the national do-not-call registry. *Order* at para. 1. The registry applies only to marketing calls made by telemarketing companies, and includes only the telephone numbers of consumers who "opt in" to the registry – that is, the telephone numbers of consumers who take affirmative steps to place their number on the list.

A number of parties, including petitioners, sought a stay before the FCC, but on August 18, 2003, the FCC issued an Order on Reconsideration, which, among other things, denied that request. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Order on Reconsideration, FCC 03-208 (rel. Aug. 18, 2003), at para. 7. The FTC, FCC, and the States plan to begin enforcement of the registry on October 1, 2003. *Order* at p. 128.

Argument

The standard for obtaining a stay pending appeal is set out in Tenth Circuit Rule of Appellate Procedure 8.1, which provides that "[n]o application for a stay or an injunction pending appeal will be considered unless the applicant addresses . . . (B) the likelihood of success on appeal; (C) the threat of irreparable harm if the stay or injunction is not granted; (D) the absence of harm to opposing parties if the stay or injunction is granted; and (E) any risk of harm to the public interest." This Court has applied this four-part test in a number of cases. *See, e.g., McClendon v. City of Albuquerque,* 79 F.3d 1014, 1020 (10th Cir.), *stay vacated*, *McClendon v. City of Albuquerque,* 100 F.3d 863 (10th Cir. 1996); *United States v. Various Tracts of Land in Muskogee and Cherokee Counties*, 74 F.3d 197, 198 (10th Cir. 1996). The four factors "require individualized consideration and assessment in each case." *City of Albuquerque,* 79 F.3d at 1020.

A. Petitioners Cannot Show That They Are Likely To Succeed On the Merits.

Petitioners have no likelihood of success on the merits. The FCC's do-not-call rules are an entirely reasonable regulation of commercial speech. The rules are plainly authorized by the TCPA and the Do-Not-Call Act, and are well within the government's powers under the First Amendment.

1. The Do-Not-Call Rules Are Narrowly Tailored to Advance The Government's Substantial Interests in Protecting Residential Privacy.

Under the well-settled principles set forth by the Supreme Court in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), regulations of commercial speech are valid as long as they implement a substantial government interest, directly advance that interest, and are "narrowly tailored" to serve that interest. *Id*. at 563-66 (1980).[4]

By establishing a mechanism by which persons who do not wish to receive telemarketing calls at home can do so, the FCC's do-not-call rules advance the government's substantial interest in protecting residential privacy.

1. The Supreme Court has "repeatedly held that individuals are not required to welcome unwanted speech into their homes and that the government may protect this freedom." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). Thus, in *Rowan v. United States Post Office*, 397 U.S. 728, 737-738 (1970), the Court upheld a statute that permitted a person to require that a mailer remove his name from its mailing lists. In doing so, the Court

[4] Petitioners do not dispute that the FCC's do-not-call rules regulate commercial speech. As we have explained, the do-not-call rules apply only to "telephone solicitations," defined to mean a telephone call or message "for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services." 47 U.S.C. 227(a)(3). Because telephone solicitations do "no more than propose a commercial transaction," they "fit[] soundly within the definition of commercial speech." *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232-33 (10th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000).

emphasized that it has "traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property." *Id*. at 737. *See also Martin v. City of Struthers*, 319 U.S. 141, 148 (1943) (noting that a regulation "which would make it an offense for any person to ring a bell of a householder who has appropriately indicated that he is unwilling to be disturbed" would be constitutional); *Federal Communications Comm'n v. Pacifica Found*., 438 U.S. 726, 748 (1978) ("[I]n the privacy of the home, . . . the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.").

Petitioners contend that the Supreme Court in *Rowan* held "that the law at issue there was constitutional *only* because it effectuated homeowners' specific, individualized preferences." Pet. Motion at 8 (citing *Rowan*, 397 U.S. at 737). But *Rowan* simply emphasized it was "*the householder and not the postmaster* who determined what mail was provocative and should not be sent." *See Unsolicited Telephone Calls*, 77 FCC 2d 1023, 1035 (1980) (emphasis added). *Rowan* says nothing about ensuring that a homeowner must be able to express an individualized preference.[5] In any event, the FCC's do-not-call rules *do permit* consumers

[5] Indeed, to the extent *Rowan* discusses the issue at all, the Court was careful to reject the notion. *See* 397 U.S. at 738 (stating that "the continuing operative effect of a mailing ban once imposed" did not pose a constitutional issue, since "the citizen cannot be put to the burden of determining on repeated occasions whether the offending mailer has altered its material so as to make it acceptable.").

to effectuate their individual preferences by allowing them to choose not to enroll in the do-not-call registry and instead to avail themselves of the company-specific do-not-call rules.

2. The FCC's do-not-call rules directly advance the government's substantial interests in protecting residential privacy. Among other things, the rules address "the inadequacies of the company-specific approach" resulting from "the failure of many telemarketers to honor do-not-call requests" and "the impossibility of relating such requests in the case of 'dead air' or hang-up calls initiated by predictive dialers"; as well as the "the burdens of [having to make] do-not-call requests for every such call, particularly on the elderly and individuals with disabilities," and "the costs imposed on consumers in acquiring technologies to reduce the number of unwanted calls." *Order* at para. 19. *See also Order* at para. 66.

These are not mere "petty annoyances." *Order* at para. 29. Instead, the "cumulative effect of these disruptions in the lives of millions of Americans each day is significant." *Id*. Indeed, the FCC found that "[c]onsumer frustration with telemarketing practices has reached a point in which many consumers no longer answer their telephones while others disconnect their phones during some hours of the day to maintain their privacy." *Order* at para. 29. This is particularly unfortunate, the agency

noted, given that "[t]he telephone network is the primary means for many consumers to remain in contact with public safety organizations and family members in times of illness or emergency." *Id*. Moreover, as the agency observed, "[t]he history of state-administered do-not-call lists demonstrates that such do-not-call programs have a positive impact on the ability of many consumers to protect their privacy by reducing the number of unwanted telephone solicitations that they receive each day." *Order* at para. 67.

3. Nor are the rules more extensive than necessary to protect residential privacy. In the commercial speech context, the fit required by the First Amendment between legislative means and ends does not have to be "perfect," but simply "reasonable." *Florida Bar v. Went for It, Inc*., 515 U.S. 618, 632 (1995). *See also Moser v. FCC*, 46 F.3d 970, 975 (9th Cir. 1995). In this case, the do-not-call rules "do not absolutely ban telemarketing calls," but simply "provide a mechanism by which individual consumers may choose not to receive telemarketing calls." *Order* at para. 71. The consumer continues to retain the option to choose not to be placed on the do-not-call list. Thus, the rules permit consumers to precisely express their preferences for receiving telemarketing calls. In addition, as the FCC noted, "there are many other ways available to market products to consumers, such as newspapers, television, radio advertising and direct

mail." *Order* at para. 71. The rules also do not restrict telemarketing calls to consumers who have consented to such calls, 47 C.F.R. 64.1200(f)(9)(i), or who have an established business relationship with the company – evidenced by a purchase within the past 18 months or an inquiry within the past three months. 47 C.F.R. 64.1200(f)(3); (f)(9)(ii). Taken as a whole, the rules are thus a carefully focused means of advancing the government's substantial interest in protecting residential privacy.

2. The Distinction between Commercial and Noncommercial Callers Is Permissible.

Petitioners' chief contention is that the *Order* unconstitutionally discriminates against commercial speech because it exempts solicitations by nonprofit organizations from the registry. Pet. Motion at 9-11. Petitioners' contention is unavailing. The exemption for solicitations by nonprofit organizations is explicit in the TCPA, which authorizes the FCC to promulgate rules regulating "telephone solicitations," 47 U.S.C. 227(c), but defines such solicitations to exclude, among other things, "a call or message . . . by a tax exempt nonprofit organization." 47 U.S.C. 227(a)(3)(C). Thus, to the extent petitioners challenge the distinction, they are quarreling with Congress, not the FCC.

Nor is there any basis on which to conclude that the FCC's decision to exclude nonprofit solicitations from do-not-call regulation is

unconstitutional. In the first place, petitioners expressly concede the constitutionality of the FCC's company-specific do-not-call rules. Pet. Mot. 7-8. But those rules, like the new rules, were promulgated under the TCPA and drew the identical distinction between commercial telemarketing and solicitation on behalf of noncommercial entities. *See* 47 C.F.R. 64.1200(f)(9)(iii) (2002) (the term "telephone solicitation" does not include a call or message "[b]y or on behalf of a tax-exempt nonprofit organization"). Petitioners do not explain how that distinction can be constitutional for one set of rules but not for the other.

In any event, Congress found that commercial and noncommercial solicitations do not pose the same harms. As Congress explained, "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) (citing poll taken by the National Association of Consumer Agency Administrators which showed that the overwhelming majority of consumer complaints involved commercial calls). Indeed, the FCC noted that the data submitted with petitioner ATA's own comments appeared to show that "approximately twice as many consumers find charitable calls 'more acceptable' than other types of unsolicited calls." *Order* at para. 73 n.233.

Moreover, under the First Amendment, regulation of nonprofit solicitation is subject to greater scrutiny than regulation of solicitations involving commercial speech. *See Metromedia v. San Diego*, 453 U.S. 490, 513 (1981); *Amended TSR Rule*, 68 Fed. Reg. at 4636 n.675. Thus, Congress has greater power to regulate commercial speech than noncommercial solicitations. Finally, even where First Amendment speech is concerned, Congress is free to "regulate one aspect of a problem without regulating all others." *Missouri ex rel. Nixon v. American Blast Fax*, 323 F.2d 649, 656 n.4 (8th Cir. 2003) (citing *United States* v. *Edge Broad. Co*., 509 U.S. 418, 434 (1993)). In this case, the evidence suggests that commercial telephone calls posed the principal problem in this area. Accordingly, it was well within Congress's power to regulate commercial telemarketing even if it could be argued that noncommercial solicitation might pose similar harms.

Indeed, every court of appeals that has considered the issue thus far has upheld the TCPA's distinction between commercial companies and noncommercial organizations. For example, in *Missouri ex. rel. Nixon v. American Blast Fax, Inc.* the Eighth Circuit upheld the distinction between commercial and noncommercial fax advertising. 323 F.3d 649 (8th Cir. 2003). In doing so, the court relied upon evidence in the legislative record

establishing that commercial calls to consumers "constitute[d] the bulk of all telemarketing calls," *and* that they were more intrusive than calls from nonprofit organizations. *American Blast Fax*, 323 F.3d at 655, 658 (citing H.R. Rep. No. 102-317, at 16 (1991)). The court of appeals then concluded that it was reasonable for the government to distinguish between commercial and noncommercial entities when attempting to address the costs associated with unsolicited fax advertisements. 323 F.3d at 654-58. The Ninth Circuit reached a similar conclusion when it sustained the distinction between commercial and noncommercial fax advertising. *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54, 55 (9th Cir. 1995). Petitioners do little to address the significance of these decisions, which are directly on point.

B. Petitioners' Claimed Irreparable Harm Does Not Justify a Stay

Petitioners urge this Court to "assume" that they will suffer irreparable injury because they will be deprived of their speech rights by the do-not-call rules. Pet. Motion at 18. But as we have explained, the rules fall well within the government's power to regulation commercial speech under *Central Hudson*. Thus, petitioners' claimed free speech injury has no basis.

In addition, petitioners claim irreparable injury based upon the loss of "over two million jobs" in the telemarketing industry as a result of the registry. Pet. Motion at 18. This assertion is not supported by competent

evidence, and the extent of the economic dislocation petitioners may experience as a result of the *Order* is utterly speculative. Petitioners' calculation of job loss resulting from the registry is not based on any affidavits concerning the impact on specific firms, but solely on "evidence" before the FTC that the do-not-call registry would lead to a loss of "40 to 60 percent" of telemarketing jobs, and petitioners' allegation that "outbound telemarketing accounts for more than four million jobs." Pet. Mot. 18. But the evidence of harm before the FTC is no more supported than in petitioners' present motion. On the contrary, the FTC emphasized that while "individual sellers and telemarketing firms estimated that they might have to lay off up to 50 percent of their employees if such a registry were to go into effect," the firms "offered no analysis to substantiate their claims regarding the impact of the national registry." *Amended TSR Rule*, 68 Fed. Reg. at 4631 & n. 620. The FTC also pointed out that, in fact, the "do-not-call" registry might "actually benefit rather than harm industry," since "telemarketers would reduce time spent calling consumers who do not want to receive telemarketing calls and would be able to focus their calls only on those who do not object to such calls." *Id*. at 4632.

More importantly, petitioners have not attempted to identify the job loss resulting only from the *Order*, as opposed to the do-not-call measures

adopted by the FTC and individual states. Even if petitioners obtain a stay of the *Order* from this Court, petitioners remain subject to the national do-not-call registry adopted by the FTC, state do-not-call statutes in effect in 36 states, and the company-specific rules that have been in place since 1992.

Curiously, although petitioners have challenged the FTC's rules, *see Mainstream Marketing Services, Inc. v. Federal Trade Commission*, Civil Action No. 03-N-0184 (MJW) (D. Colo. filed January 29, 2003), they have withdrawn their motion for a preliminary injunction in their challenge to those rules. Petitioners have said they may renew their request for an injunction if the court "has not yet ruled on" the pending cross-motions for summary judgment sufficiently in advance of the October 1, 2003, effective date of the FTC's rules, *see* Notice of Withdrawal of Plaintiffs' Motion for Preliminary Injunction, dated May 23, 2003, but to date they have not re-filed their motion.[6]

It is anomalous, to say the least, that petitioners now seek an expedited stay from this Court based upon claims of extensive irreparable

[6] In related litigation filed by other parties, a district court issued an order denying plaintiff's request for a preliminary injunction to enjoin enforcement of the abandoned call and preacquired account information portions of the FTC's amended Telemarketing Sales Rule. *Order*, *U.S. Security v. Federal Trade Commission*, filed March 26, 2003, No. Case CIV-03-122-W (attached as Exhibit A). In denying the request for a preliminary injunction, the district court concluded that "plaintiffs have failed to show a substantial likelihood that they will prevail on the merits . . ."; and that the "potential harm and of abusive and unfair telemarketing acts and practices that consumers will suffer if enforcement of these two amendments is delayed outweighs any potential harm to the plaintiffs." The court also concluded that "[t]here is a strong public interest against abusive and invasive practices and acts by the telemarketing industry." Exhibit A at 4, 6.

injury, but have not acted to enjoin the FTC rules giving rise to much of the same claimed injury. The uncertain amount of economic dislocation resulting from the *Order* does not justify a stay, especially given petitioners' failure to come close to satisfying the other three factors.

C. A Stay Would Unduly Harm the Interest of Consumers Who Have Registered On the "Do-Not-Call" List, and Is Not in the Public Interest

Finally, the public interest weighs heavily against a stay in this case. There is an overwhelming interest in implementing the do-not-call registry – more than 48 million telephone numbers have been registered and there is manifestly a strong public desire for additional protection from commercial telephone solicitations. If a stay were granted, the tens of millions of individuals who have registered their telephone numbers would have their expectations of privacy protection frustrated, and would continue to experience the disruptions associated with the company-specific approach the FCC has found wanting.

Moreover, the FCC's do-not-call rules are the result of the agency's exercise of its authority under the TCPA and the Do-Not-Call Act, and are consistent with the FTC's rules as well as the laws of the 36 states to have addressed the issue. The public interest determinations implicit in these

laws and regulations are also entitled to great weight in the Court's assessment of factors relevant to evaluating the request for a stay.

Conclusion

For the foregoing reasons, petitioners' request for a stay pending appeal should be denied.

Respectfully submitted,

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