IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MAINSTREAM MARKETING SERVICES, INC., TMG MARKETING, INC., and AMERICAN TELESERVICES ASSOCIATION, Plaintiffs-Appellees,	)	No. 03-1429
v.	)	
FEDERAL TRADE COMMISSION, Defendant-Appellant.	)	

DEFENDANT FEDERAL TRADE COMMISSION'S EMERGENCY MOTION FOR A STAY PENDING APPEAL AND EXPEDITED BRIEFING AND ARGUMENT

Pursuant to Fed. R. App. P. 8(a) and Tenth Circuit Rule 8.1, Appellant Federal Trade Commission ("FTC") moves this Court for an emergency stay pending appeal of the district court's Order of September 25, 2003 ("Order"), which enjoins enforcement of provisions of the FTC's Telemarketing Sales Rule that create the nationwide do-not-call registry for telemarketers. The FTC sought a stay from the district court, which it denied September 29 ("Stay Order"). Because the registry is scheduled to go into effect on October 1, 2003, we request that this Court act on this Motion with the greatest possible expedition.

The district court's order, if allowed to remain in effect, will not only deprive millions of Americans of the protection they expressly have requested from unwanted, intrusive telemarketing calls, but will also conflict with a ruling of a

motions panel of this Court, issued on September 26, 2003. See Mainstream Marketing Services, Inc. v. FCC, No. 03-9571. There, this Court denied a stay of the FCC's parallel do-not-call registry, recognizing a strong public interest in allowing the rules to go into effect and concluding that the arguments advanced against the rule were unlikely to prevail. Id. at 3. Despite the differing procedural postures of the cases, the salient factors are the same in both: virtually identical issues of First Amendment law, and the balance of equities between affording consumers the relief that Congress has mandated, versus allowing the telemarketing industry to continue business as usual. Cf. Stay Order at 17-18. Moreover, although this Court's order of September 26, 2003, contemplates that the FCC rules will go into effect tomorrow as scheduled, the orders below also create legal and practical complications for the FCC and a number of states (and the telemarketers who must comply with the FCC's rules), to the extent those systems are dependent on the FTC system but the FTC is prevented from cooperating in any way with other entities by the orders below and the court's broad interpretation of those orders. See Stay Order at 18. To assure consistency with the ruling in the parallel FCC litigation, this Court should stay the order of the court below, and allow the do-not-call registry to be implemented in an orderly and coordinated fashion, pending appeal.[1]

[1] We are complying with the district court's Order of September 25. On September 26, we took steps to put a halt to any transfer of the do-not-call registry. As a result, the registry is not available to the FCC, states, or telemarketers. Until the

The FTC also proposes that this appeal be expedited, as the FCC case has been, so that a single merits panel of this Court can consider the two matters.

BACKGROUND

In 1994, Congress passed the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101, et seq. The Act ordered the FTC to prescribe rules prohibiting deceptive or abusive telemarketing, and to include "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," 15 U.S.C. § 6102 (a). The FTC's original Rule (60 Fed. Reg. 43842 (1995)) prohibited a number of deceptive practices, as well as abusive practices such as a telemarketer's use of threats or obscene language; causing a consumer's telephone to ring repeatedly or continuously with intent to annoy; calling a consumer who has stated that she does not wish to be called (the company-specific do-not-call provision); calling before 8:00 a.m. or after 9:00 p.m.; and failing promptly to disclose the nature of the telemarketing call. 16 C.F.R. § 310.4. All of these provisions applied only to entities engaged in telemarketing to induce the purchase of goods or services.

On January 30, 2002, the FTC published its Notice of Proposed Rulemaking

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court issued its Stay Order, we believed in good faith we could continue to accept consumer registrations. Based on the Stay Order, we will cease this practice.

("NPRM") to amend the Rule. 67 Fed. Reg. 4492.[2] The FTC noted that the company-specific do-not-call provision of the original rule had been widely criticized as inadequate to protect consumer privacy from unwanted telemarketing calls. Accordingly, the NPRM proposed, inter alia, the establishment of a national "do-not-call" registry for consumers who want to limit the number of telemarketing calls they receive. 67 Fed. Reg. 4516-20. The FTC's amendments were promulgated on January 29, 2003. 68 Fed. Reg. 4580. The amended Rule retains the original Rule's requirements, including the company-specific do-not-call provision, but makes several significant additions, including creation of the national "do-not-call" registry.

A consumer's decision to place a telephone number on the do-not-call registry is entirely voluntary, and consumers who do not participate in the registry remain free to invoke the Rule's company-specific do-not-call provision. A consumer who has placed a phone number on the registry still may receive calls from telemarketers with whom she has an established business relationship, or from telemarketers to whom she has given written authorization to call. A telemarketer subject to the Rule must gain access to the registry, and is assessed a charge based upon the number of area codes of data that the company desires. Law enforcement agencies that enforce the Rule can gain access to the registry and determine whether and when a particular

[2] The FTC received and considered over 64,000 comments in response to the NPRM. During the rulemaking, the FTC also conducted a three-day public forum at which interested parties presented views regarding the proposed amendments.

telephone number was added to the registry, and whether and when a particular telemarketer gained access to the registry. 68 Fed. Reg. 4628-41. Congress subsequently passed legislation expressly authorizing the FTC to use funds derived from telemarketer fees to implement and enforce the do-not-call registry, and the FTC promulgated rules establishing such fees. See P.L. 108-7, 117 Stat. 96; P.L. 108-10, 117 Stat. 557; 68 Fed. Reg. 45134 (Jul. 31, 2003).[3]

As this Court is aware, the Federal Communications Commission has also exercised its authority, pursuant to the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, to promulgate a national do-not-call list. During the FCC's rulemaking do-not-call proceeding, Congress directed the FCC to "consult and coordinate with the [FTC] to maximize consistency with" the FTC's amended Rule. P.L. 108-10, 117 Stat. 557. The FCC's final rules accordingly require for-profit entities subject to its jurisdiction, engaged in commercial telemarketing, to comply with the do-not-call registry created by the FTC's Rule. 47 C.F.R. § 64.1200(c)(2). The FCC's rule applies to most entities subject to the FTC's jurisdiction and also to commercial entities and activities that are outside the FTC's jurisdiction (including financial institutions and common carrier activities). Furthermore, as a result of the FCC's rule, the TCPA precludes states from creating state do-not-call registries

[3] Each seller covered by the Rule must pay an annual fee of $25 per area code of data accessed (after five free area codes), with maximum annual fee of $7375.

unless those states include on their registries "the part of such single national database that relates to such State." 47 U.S.C. § 227(e)(2).

Plaintiffs filed their complaint in this matter on January 29, 2003, before the United States District Court for the District of Colorado. They challenged the Rule provisions establishing the do-not-call registry. The parties filed cross-motions for summary judgment. Plaintiffs argued that the FTC lacked authority to create the registry, that the registry violated their constitutional rights under the First Amendment, and that, in creating the registry, the FTC had acted arbitrarily and capriciously. On September 25, 2003, the court (per Judge Nottingham) granted plaintiffs' motion for summary judgment with respect to the do-not-call registry.[4] The court held that the FTC's Rule violated plaintiffs' First Amendment rights and enjoined the FTC from enforcing those provisions of the Rule that implement the registry. On September 26, the FTC filed its notice of appeal and moved the district court for an emergency stay pending appeal. The court held a hearing on that motion on September 29, 2003, and denied it in an order later that day. In that order, the court applied a stringent standard, on the theory that an order allowing enforcement of the congressionally-ratified do-not-call registry pending appeal would effect a change in the "status quo." Stay Order at 2-3. The court ruled that the economic interests of the

[4] Plaintiffs' complaint also had sought to overturn the Rule's prohibition of abandoned telemarketing calls. The court's September 25 Order upheld that ban.

telemarketing industry and its employees outweighed the interests that tens of millions of citizens have expressed in securing a greater level of peace in their homes. Id. at 7. The court expanded upon its analysis of the First Amendment issues (id. at 9-16), and further clarified its view that the Amendment is violated simply by the FTC's "creating and implementing" the registry (id. at 18).

The plaintiffs in the present case have also petitioned this Court for review of the FCC's rule, and moved this Court for a stay pending appeal of those provisions of the that rule that require covered entities to comply with the FTC's do-not-call registry. Mainstream Marketing v. FCC, supra. They argued that they were likely to succeed with a constitutional challenge that was virtually identical to the one they raised in the present case. On September 26, 2003, this Court (per Judges Seymour, Ebel and Henry) denied their motion for a stay. This Court recognized both the "public interest in respecting 'residential privacy,'" and "the strong expectation interest" of the millions of Americans who had signed up for the registry, and held that petitioners had not shown a substantial likelihood of success on the merits. The FCC's rule is scheduled to take effect on October 1, 2003.[5]

[5] Another group of plaintiffs have filed a separate challenge to the registry. U.S. Security, et al. v. FTC, No. CIV-03-122-W (W.D. Okla). They also argued that the registry was outside the FTC's authority and unconstitutional. On September 23, 2003, the district court (per Judge West) issued an order holding that the registry was invalid because the FTC lacked statutory authority to create it. On September 24, the FTC filed its notice of appeal of the court's decision and moved the district court for an emergency stay pending appeal. On September 25, the district court denied the

ARGUMENT

As shown below, the FTC satisfies all of the criteria pertinent to a stay pending appeal: 1) likelihood of success on appeal; 2) irreparable harm if the stay is not granted; 3) absence of harm to opposing parties if the stay is granted; and 4) harm to the public interest. See Spain v. Podrebarac, 68 F.3d 1246, 1247 (10th Cir. 1995). Contrary to the district court's supposition (Stay Order at 2-3), these standards are not heightened on the theory that the FTC seeks to change the "status quo" or achieve "all the relief it seeks on appeal." As this Court has recently noted, determination of the "status quo" can be elusive, and is often defined by the interaction of relevant statutory schemes. See O Centro Espirita Beneficiente Uniao de Vegetal v. Ashcroft, No. 02-2323, slip op. 14-16 (Sept. 4, 2003). Here, the status quo is defined not only by the existing statutory authority under which the FTC acts, but by a number of other do-not-call provisions including the FCC's rule – which this Court permitted to go into effect by last week's order – and a number of state provisions, many of which are already in effect. As explained below, the district court's ruling threatens the implementation of all of these provisions, thus dramatically altering the status quo.

Moreover, the district court ignored the principle that congressional enactments are presumptively constitutional, a factor weighing significantly in favor of a stay.

FTC's stay motion. On the same day, both houses of Congress passed H.R. 3161, reaffirming the FTC's authority to create the registry, and expressly ratifying the registry the FTC had already created. President Bush signed H.R. 3161 yesterday.

See Bowen v. Kendrick, 483 U.S. 1304 (1987) (Rehnquist, C.J., in chambers). The order below effectively invalidates Congress's express ratification of the FTC's rule. This Court should stay that ruling, pending an expedited appeal.

1. The FTC is likely to succeed on the merits of its appeal because the district court reached the unprecedented conclusion that telemarketers have a constitutional right to make commercial telemarketing calls to consumers who have indicated that they do not want such calls. This holding is at odds with the commercial speech doctrine, which rests on the premise that a "consumer's interest in the free flow of commercial information * * * may be as keen, if not keener by far, than his interest in the day's most urgent political debate." Rubin v. Coors Brewing Co., 514 U.S. 476, 481-82 (1995). But consumers have no such interest with respect to telemarketing calls they have specifically indicated they do not want to receive.

Indeed, the court's holding is at odds with the Supreme Court's decision in Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970). There, the Court found no First Amendment violation in a statute that allows consumers to put a halt to mailings from any mailer who has sent that consumer "any advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative * * *." 39 U.S.C. § 3008. Like the registry, this statute applies only to commercial speech, mailings that advertise something for sale. The Court held that the scheme was not unconstitutional because the consumer

had the absolute right to determine whether to put a halt to mail from any particular sender. The do-not-call registry is the same. It merely creates a mechanism whereby a consumer may put a halt to unwanted commercial telemarketing. The consumer, not the government, makes the decision to restrict telemarketing.

The district court, however, incorrectly distinguished Rowan, opining that here the "registry sufficiently involves the government in the regulation of commercial speech to implicate the First Amendment * * * [because] by exempting charitable solicitors from the * * * registry, [the FTC] has imposed a content-based limitation on what the consumer may ban from his home." Order at 17-18. The court was under the misimpression that the statute in Rowan gave consumers the discretion to put a halt to the mail from any sender. To the contrary, that statute applies only to commercial advertisers; the same noncommercial speakers whom the do-not-call registry will not restrict are also outside the reach of 39 U.S.C. § 3008.[6]

Moreover, the court also erred in its application of the Central Hudson test.[7]

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[6] The court also erred in finding support in United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000), see Order at 19. There the Court overturned a statute that effectively limited the broadcast of sexually-oriented programming to the hours between 10 p.m. and 6 a.m. Unlike the registry, the burden there fell on fully protected speech, and was imposed by the government, not by any exercise of consumer choice. Indeed, the court noted that another statutory provision, which (like the registry here) permitted consumers to request broadcasters to block certain channels, constituted a constitutionally acceptable alternative.

[7] Under Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980), a regulation of nondeceptive commercial speech survives First Amend-

With respect to the first prong of that test, the court correctly recognized that the interest the registry is designed to further, protecting consumers from unwanted telemarketing calls, is a substantial one. Millions of consumers have signed up for the registry in the hope that it would shield them from the abuse of unwanted telemarketing calls. As the court below noted, "[t]he government's interest in protecting the well-being, tranquility, and privacy of the home is of the highest order in a free and civilized society." Order at 19-20, citing Frisby v. Schultz, 487 U.S. 474, 484 (1988); see Rowan, 397 U.S. at 736-37 ("a mailer's right to communicate must stop at the mailbox of an unreceptive addressee").

Nevertheless, the court incorrectly analyzed the second prong of the Central Hudson test, the requirement that the registry must materially advance the government's interest in protecting consumers from unwanted telemarketing calls. The court conceded that the registry "might eliminate anywhere from forty to sixty percent of all telemarketing calls for those who subscribe, a substantial amount of unwanted calls." Order at 22. Indeed, as a result of the FCC's rule – which covers telemarketing by entities outside the FTC's jurisdictional reach, such as banks and common carriers, the registry will likely shield consumers from a substantially greater percentage of unwanted calls. Accordingly, the registry materially advances the interest at stake.

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ment scrutiny if 1) the government has a substantial interest; 2) the regulation directly advances the interest; and 3) the regulation is reasonably tailored to do so.

See United States v. Edge Broadcasting Co., 509 U.S. 418, 431(1993) (upholding regulation restricting lottery ads from 11% of radio listening time in affected area).

The court below, however, ruled that the registry could not pass muster because the registry does not also apply to charitable solicitations, which constitute fully protected speech, see Riley v. National Fed. of the Blind, 487 U.S. 781, 787-88 (1988). The court criticized the rule's accommodation of protected charitable solicitation as "content based," and therefore – in its view – impermissible under City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993).[8] Order at 23-25. The court appears to have ruled out any distinction between commercial and non-commercial speech in the regulation of telemarketing. This reasoning is erroneous, for three reasons.

First, the court flatly erred in supposing that there is "no doubt" that calls soliciting charitable contributions are equally as invasive as commercial calls. Order at 24. On the contrary, as the Eighth Circuit recognized in Missouri v. American Blast Fax, Inc., 323 F.3d 649 (8th Cir. 2003), Congress itself, in enacting the TCPA, concluded that "non-commercial calls * * * are less intrusive to consumers because they are more expected." Id. at 655 (quoting H.R. Rep. No. 102-317, at 16 (1991). The court below erred in dismissing this express congressional finding, in a closely-

[8] The court below also relied on R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377 (1992), and Regan v. Time, Inc., 468 U.S. 641 (1984). Order at 23. Those cases are irrelevant, however, because neither involved commercial speech restrictions.

related enactment, as "irrelevant." Stay Order at 12 n.5.

Moreover, the court below misunderstood the FTC's conclusion that charitable solicitors are less likely to engage in abusive telemarketing practices.[9] While it is true that charitable solicitors may also engage in fraudulent practices (cf. Order at 24), the FTC was focusing on a different aspect of the problem. For eight years, the Rule has contained a company-specific do-not-call provision. Due to the limitations of the FTC's statutory jurisdiction (not "illogical distinctions" the FTC has "always made," Stay Op. at 12), that provision applied only to commercial telemarketers until March 2003. The record shows that this provision failed to achieve its goal with respect to commercial telemarketers because those they frequently ignored consumers' requests to be put on company-specific lists. 68 Fed. Reg. 4629. Thus, the need for stronger measures for such telemarketers was established. The FTC, however, has no comparable experience or evidence regarding for-profit telemarketers who solicit on behalf of charities, whom Congress only recently made subject to the Telemarketing Act. Accordingly, the record provides ample reason, directly related to the abuses the

[9] The court below erroneously interpreted the FTC's statement (68 Fed. Reg. at 4637) as concluding that charitable solicitation poses precisely the same concerns as commercial solicitation. Stay Order at 12. On the contrary, the Commission simply rejected the comments of charitable solicitors that their actions posed no such concerns, in support of its conclusion that charitable solicitation conducted by for-profit entities still must be subject to the company-specific do-not-call provisions.

registry addresses, for treating charitable solicitations differently.[10]

Second, the court below ignored the context in which the Supreme Court decided Discovery Network. There, the ordinance's exception for non-commercial newsracks resulted in its being ineffectual in addressing the public purpose in question – preventing the clutter and disruption on city sidewalks – because only a minuscule proportion of existing newsracks were covered. 507 U.S. at 418. Here, by contrast, the rule covers the vast majority of telephone solicitations, especially in light of the FCC's complementary rule. This fact sharply distinguishes Discovery Network, as the Ninth Circuit recognized in Destination Ventures, Ltd. v. FCC, 46 F.3d 54 (9th Cir. 1995). There, the court upheld a prohibition on unsolicited faxes that applied only to commercial faxes. The court held that Discovery Network did not require the FCC to distinguish the harm caused by commercial and noncommercial faxes because it was undisputed that commercial faxes caused the bulk of the problem. 46 F.3d at 55. Where, as here, the regulation substantially furthers the government's goal, Discovery Network does not prevent the government from regulating commercial

[10] This case differs greatly from Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173 (1999), see Order at 24, involving a restriction of casino advertising as a way to discourage compulsive gambling. The Court was skeptical of this interest because the government simultaneously supported and permitted advertising for casinos owned by Native Americans, and because the restrictions targeted speech as an indirect means of discouraging gambling. Here, by contrast, the federal policy of Congress, the FTC, and the FCC is entirely consistent and is aimed directly at the invasions of privacy engendered by commercial telemarketing.

speech merely because it has not also regulated fully protected speech. This is what the Supreme Court meant in United States v. Edge Broadcasting Co., 509 U.S. 418, 434 (1993), when it said that there is no constitutional requirement that the government "make progress on every front before it can make progress on any front."

Third, in assessing the "fit" of the do-not-call registry under Central Hudson, the court below failed to take into account the minimal nature of any governmental intrusion on speech. Unlike the ordinance in Discovery Network, the do-not-call registry does not ban any speech outright; it only facilitates consumer choice as to whether particular speech is welcome. Even assuming the district court correctly concluded that the registry nevertheless imposes some burden on speech (Order at 17-18), the degree of any such restriction must surely be relevant to assessing whether the measure is "narrowly tailored to achieve the desired objective." Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 480 (1989); cf. Lanphere & Urbaniak v. Colorado, 21 F.3d 1508, 1515-16 (10th Cir. 1994) (when restriction entails "an indirect barrier to commercial speech," "the 'reasonable fit' test of Fox is more easily satisfied"). Here, the do-not-call registry has been tailored carefully, allowing commercial telemarketing to be directed at all except those consumers who have specifically requested that they be spared such intrusions. Such a system is entirely consonant with the underlying purpose of the commercial speech doctrine – i.e., enhancing consumer welfare by ensuring the availability of information

consumers value. Rubin v. Coors, 514 U.S. at 481-82.

2. There will be irreparable harm if a stay is not granted. Already, consumers have registered more than 50 million telephone numbers onto the registry, indicated that they find telemarketing calls abusive and they want them stopped. Although the court below recognized that "protecting the well-being, tranquility, and privacy of the home is of the highest order in a free and civilized society" (Order at 20), it nevertheless dismissed such harms as inconsequential in comparison with the economic harms allegedly suffered by telemarketers. Stay Order at 7. Such an approach fallaciously accords the full economic value to the time of telemarketers, while devaluing the time, effort, and aggravation experienced by householders each and every time they answer an unwanted call. That detriment to individual consumers – multiplied tens of millions of times over – is a weighty and entirely irreparable harm that the district court improperly ignored. Moreover, the district court's dismissive suggestion that consumers can resort to "self-help" by confronting telemarketers (id.) ignores the fact that the stress and annoyance of such confrontations is precisely what many consumers seek to avoid by exercising their right to block such calls. By contrast, this Court, in its stay ruling in the FCC litigation, properly appreciated "the strong expectation interest of the many millions of Americans who have registered" on the do-not-call registry. Order of Sept. 26, 2003, No. 03-9571, at 3.

The court below also erred in supposing that these harms to consumers will be

ameliorated by other do-not-call provisions, such those imposed by the states. Stay Order at 6. A state is required by the TCPA to include the part of the FTC's registry that relates to that state if it wants to enforce its own do-not-call registry, 47 U.S.C. § 227(e)(2). But the breadth of the district court's First Amendment theory – which finds a constitutional violation in the mere creation and implementation of the registry (Stay Order at 18) – apparently precludes the FTC from even maintaining the registry for the use of other entities, such as the states or the FCC, and, as a result of the Order, the FTC is not supplying the registry to them.[11]

3. Any interim harm to plaintiffs, moreover, will be quite limited. Although the court below accepted at face value plaintiffs' assertions of economic losses and "devastating" layoffs (Stay Order at 4-5), it ignored the fact the only calls telemarketers are precluded from making are those to households that have expressly requested not to receive such solicitations. Those express requests not only vitiate any supposed infringement of First Amendment rights, but they make any assertion

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[11] This clarification of the district court's ruling – which plaintiff telemarketers actively sought – also apparently puts to rest any notion that the expressed preferences of tens of millions of consumers not to receive telemarketing calls can be used as a part of any "voluntary" compliance program. See www.the-dma.org/cgi/dispnewsstand?article=1494 (statement of the Direct Marketing Association, another telemarketing industry trade association that has challenged the constitutionality of the registry, that it "remains committed to respecting * * * the wishes of all consumers no matter how those wishes have been expressed"). If the FTC cannot constitutionally maintain the registry, there is no way to honor the wishes so expressed.

that valuable sales opportunities will be lost speculative in the extreme. Telemarketers would remain free, of course, to call consumers who have not signed up for the registry. Thus, plaintiffs have failed to show the likelihood of any significant irreparable injury if, during the limited time necessary for an expedited appeal, they must confine their telemarketing to those who have not signed up for the registry.

4. The public interest clearly favors the grant of a stay. Tens of millions of consumers have signed up for the registry with the expectation that, after October 1, 2003, the registry will put a halt to the dinnertime din of unwanted telemarketing. Such unwanted calls abuse those on receiving end. Further, it is hard to imagine a more graphic expression of public interest than the congressional response to the September 23, 2003, decision in U.S. Security et al. v. FTC, No. CIV-03-122-W (W.D. Okla.), holding that the FTC lacked statutory authority to create the registry. Within only 48 hours of that decision, both houses of Congress passed legislation expressly ratifying the registry. As Congressman Tauzin stated:

> The bill leaves no doubt as to the intent of Congress. The FTC wants this list. The President of the United States wants this list, and more importantly, 50 million Americans, who are growing impatient about being interrupted at mealtime by unwanted and unnecessary harassing telemarketing calls, want this list. And this Congress is going to make sure they have this list today.

Cong. Rec. H8916-17 (daily ed. Sept. 25, 2003). In light of this dramatic and express congressional action, allowing the district court's order to stand would not only

negate the considered judgment of the FTC, but would also effectively nullify an Act of Congress. In repeated stay situations, it has been recognized that "'[t]he presumption of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of applicants in balancing hardships.'" See Bowen v. Kendrick, 483 U.S. 1304 (1987) (Rehnquist, C.J., in chambers) (quoting Walters v. National Ass'n of Radiation Survivors, 468 U.S. 1323, 1324 (1984) (Rehnquist, C.J., in chambers)).

Further, a stay is necessary to prevent regulatory confusion and disarray. This Court has denied a stay of the FCC's do-not-call rules, which require entities subject to the FCC's jurisdiction to comply with the FTC's registry. The FCC has stated that it intends to commence enforcement, on October 1, 2003, "against telemarketers that have obtained the Do-Not-Call list from the FTC."Statement of Sept. 29, 2003, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-239219A1.pdf. The future of such enforcement is clouded, however, if the FTC is unable to maintain and update the registry, and if telemarketers are unable to gain access to it. Similarly, the order of the court below calls into question the ability of any state to enforce a do-not-call requirement, for the reasons discussed above. To avoid such regulatory confusion, and to provide consistency with this Court's ruling in the FCC litigation, the Court should stay the injunction issued by the court below.

5. In its order in the FCC case, this Court called for expedition of the

proceedings there, in order to ensure the prompt resolution of the important issues posed. The Clerk subsequently issued an order providing for prompt briefing, and argument to a merits panel in January 2004. We respectfully request that the present appeal be set on a comparable schedule so that, in the interest of judicial economy, the two matters may be set for argument together.

CONCLUSION

Because FTC has satisfied all four criteria set forth in Tenth Circuit Rule 8.1, this Court should grant a stay of the portion of the Order of September 25, 2003, that enjoins enforcement of the FTC's nationwide do-not-call registry. This appeal should be expedited, in coordination with Mainstream Marketing Services, Inc. v. Federal Communications Commission, No. 03-9571.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2003, I served a copy of the Federal Trade Commission's Emergency Motion for a Stay Pending Appeal and Expediting Briefing and Argument on plaintiffs-appellees by sending that copy by e-mail to:

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