IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 03-N-184 (MJW)

MAINSTREAM MARKETING SERVICES, INC., et al.

Plaintiffs,

v.

FEDERAL TRADE COMMISSION,

Defendant.

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR AN EMERGENCY STAY PENDING APPEAL

Pursuant to Fed. R. App. P. 8(a)(1), defendant Federal Trade Commission hereby moves for a stay pending appeal of that portion of this Court's Order of September 25, 2003, that enjoins the FTC from enforcing those provisions of its Telemarketing Sales Rule, 16 C.F.R. Part 310, that create and implement a do-not-call registry for telemarketers.[1] The Rule's registry provisions that protect consumers from unwanted telemarekting calls were scheduled to take effect on October 1, 2003. We also respectfully request that this Court give expedited consideration to this Motion to give the parties adequate time to plan their conduct, as appropriate, or to give the Tenth Circuit adequate time, before October 1, to consider the matter.

Tenth Circuit Rule 8.1 requires that the FTC's application address 1) the likelihood of success on appeal; 2) the threat of irreparable harm if the stay is not granted; 3) the absence of

---

[1] Simultaneous with the filing of this Motion, the FTC has filed its Notice of Appeal of the September 25 Order.

harm to opposing parties if the stay is granted; and 4) any risk of harm to the public interest. See Spain v. Podrebarac, 68 F.3d 1246, 1247 (10th Cir. 1995). The Commission's application satisfies all four of these criteria.

1. The FTC is likely to succeed on the merits because this Court erred in its application of the Central Hudson test and obliterates the constitutional distinction between fully-protected speech and commercial speech. With respect to the Central Hudson test, this Court recognized, quite correctly, that the interest the registry is designed to protect 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 this Court 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).

However, this 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. This Court concedes 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 a complementary rule promulgated by the FCC enforcing the Telephone Consumer Protection Act, 47 U.S.C. § 227, the registry may well shield consumers from as many as eighty percent of unwanted calls. Nonetheless, this Court holds that the registry fails this prong of the test because charitable solicitations, which, under the First Amendment, constitute fully protected speech, not commercial speech, see Riley v. National Federation of the Blind of North Carolina, Inc., 487

U.S. 781, 787-88 (1988), are not covered.

What evidently troubles this Court is that the charitable solicitations not covered by the registry are defined by their content and, in this Court's opinion, the FTC did not show that the abuse caused by unwanted charitable solicitations was any different from the abuse caused by unwanted commercial telemarketing. Order at 22-26. However, the FTC did make such a showing. In particular, industry comments in the rulemaking record explained that charitable solicitors are less likely to engage in abusive telemarketing practices. 68 Fed. Reg. 4637. This Court misunderstood this to mean only that charitable solicitors are less likely to engage in fraud. Order at 24. The FTC meant something quite different. For eight years, the Rule has contained a company-specific do-not-call provision, which was intended to shield consumers from unwanted telemarketing calls. Until March 31, 2003, this provision applied only to commercial telemarketers. The record shows that this provision failed to achieve its goal with respect to commercial telemarketing calls because those telemarketers frequently ignored consumers' requests to be put on company-specific lists. 68 Fed. Reg. 4629. The FTC, however, has no evidence that for-profit telemarketers who solicit on behalf of charities will ignore the company-specific provision, which has applied to them only since March 31, 2003. There is also no reason to believe that, with respect to charitable solicitors, the company-specific provision will not achieve the FTC's goal of protecting consumers from unwanted telemarketing.[2]

---

[2] Indeed, when Congress passed the Telephone Consumer Protection Act, which authorizes the FCC to regulate telemarketing, it found that non-commercial calls are less intrusive to consumers. H.R. Rep. 102-317 at 16 (1991). This congressional determination also supports the distinction drawn by the Rule.

This Court misreads City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993), to require the FTC to justify any exclusion from the registry's coverage by a reason related not just to the content of the speech but to the interest the registry is seeking to further. Order at 22-23. As explained above, the FTC does have such a reason. But in any event, although Discovery Network faulted the city for failing to show that commercial newsracks (prohibited by the city) caused more litter than non-commercial newsracks (allowed by the city), it did so because commercial newsracks constituted only a minuscule percentage of the newsracks on Cincinnati sidewalks. See Order at 22.

Absent the showing that the city failed to make, the ordinance, which limited the speech of the advertisers who used the commercial newsracks, made virtually no progress toward the city's goal of cleaner streets. (Moreover, the Cincinnati ordinance banned speech by banning newsracks. The registry bans no speech but allows consumers to opt-out of receiving unwanted telemarketing calls. This Court failed to take account of how lightly, if at all, the registry actually restricts speech.) Here, this Court has conceded that the registry (even without the FCC's rule) makes substantial progress toward the goal of protecting consumers from unwanted telemarketing. Thus, the registry does satisfy the second prong of the Central Hudson test. Where, as here, the regulation furthers the government's goal, Discovery Network does not prevent the government from regulating commercial 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."

This Court also overlooked Missouri v. American Blast Fax, Inc., 323 F.3d 649 (8th Cir. 2003), where the court upheld a prohibition of unsolicited faxes that applied only to commercial faxes based on a congressional determination "that commercial calls constitute the bulk of all telemarketing calls." Id. 323 F.3d at 658 (emphasis added). The challengers raised Discovery Network, but the court had no trouble finding that the congressional determination constituted sufficient justification for the distinction drawn by the regulation. As explained above, the record here is even more compelling.

In any event, the commercial speech doctrine "creates a category of speech defined by content but afforded only qualified [First Amendment] protection * * *." Trans Union Corp. v. FTC, 267 F.3d 1138, 1141-42 (D.C. Cir. 2001). Indeed, restrictions on commercial speech are routinely content-based. That is, they impose a restriction on some, but not all, speech based on the content of that speech. Missouri ex rel. Nixon v. American Blast Fax, Inc., supra, (evaluating ban on unsolicited faxes that applied only to certain commercial faxes); Trans Union Corp. v. FTC, supra (evaluating restriction that applied only to the dissemination of credit reports); Anderson v. Treadwell, 294 F.3d 453 (2d Cir. 2002) (upholding statute that shielded consumers from real estate solicitations).[3] This Court's First Amendment analysis is contrary to all of these

[3] Indeed, the logic of this Court's decision would presumably overturn the Rule's company-specific do-not-call provision and its calling time restrictions, which prohibit telemarketers from calling before 8 a.m. or after 9 p.m., because these provisions, like the registry, apply to only certain categories of telemarketers (neither provision applies to charitable or political solicitation).

decisions, and would have the effect of requiring the government to ignore the clear distinction between commercial and fully protected speech. The FTC is likely to succeed on the merits in having this decision overturned.[4]

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. By doing this, millions of consumers have indicated that they find unwanted telemarketing calls to be abusive and they want them stopped. Again, as this Court noted, "protecting the well-being, tranquility, and privacy of the home is of the highest order in a free and civilized society." Order at 20. The Rule's registry provisions that protect consumers were scheduled to take effect on October 1, 2003. If this Court's Order is not stayed, these consumers will continue, after that date, to receive abusive telemarketing calls. There is no remedy for the countless intrusions on privacy such abusive calls will impose on these consumers during the time an appeal in this case is pending.

3. Plaintiffs, moreover, will not be harmed if a stay is granted. A stay will prevent telemarketers from calling only those consumers who have signed up for the registry and who

---

[4] In Mainstream Marketing Services, Inc. et al. v. FCC, No. 03-9571 (10th Cir.), the plaintiffs in this case also brought a petition challenging the FCC's rules that require entities subject to its jurisdiction to comply with the FTC's do-not-call registry. In conjunction with that petition, the petitioners sought a stay raising constitutional arguments similar to the ones they raised in this case. On September 26, 2003, the Tenth Circuit denied the stay holding that the petitioners had failed to show a substantial likelihood of success on the merits. The court also held that the "public interest in respecting 'residential privacy,'" and "the strong expectation interest of the many millions of Americans who have registered with [the do-not-call registry] weigh[] in favor of denying the stay."

have expressly declared their lack of interest in telemarketing sales pitches. Indeed, the Direct Marketing Association, a telemarketing industry trade association, has recently stated that it "remains committed to respecting * * * the wishes of all consumers no matter how those wishes have been expressed." See www.the-dma.org/cgi/dispnewsstand?article=1494. Telemarketers would remain free, of course, to call those consumers who have not signed up for the registry. Moreover, if plaintiffs were to prevail on appeal, the telemarketers would then be free to call those consumers who had registered. Thus, plaintiffs will not be irreparably harmed if, during the pendency of the FTC's appeal, they 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 of the United States District for the Western District Court of Oklahoma in U.S. Security et al. v. FTC, No. CIV-03-122-W, holding that the FTC lacked statutory 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. S8916-17 (daily ed. Sept. 25, 2003). Plainly, the public interest will be harmed and Congress' will will be thwarted if those consumers do not receive the expected protection from unwanted telemarketing.

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.

Respectfully submitted,

WILLIAM E. KOVACIC
General Counsel

JOHN D. GRAUBERT
Principal Deputy General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

LAWRENCE DeMILLE-WAGMAN
Federal Trade Commission
600 Pennsylvania Ave., N.W.,
Room H-582
Washington, D.C. 20580
(202) 326-2448
Facsimile (202) 326-2477
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2003, I served a copy of Defendants' Memorandum of Points and Authorities in Support of Its Emergency Motion for a Stay Pending Appeal on plaintiffs by sending that copy by e-mail and by facsimile transmission to:

Robert Corn-Revere
Ronald G. London
Davis Wright Tremaine LLP
1500 K Street, N.W., Suite 450
Washington, D.C. 20005-1272.

_____
Lawrence DeMille-Wagman