Nos. 03-1429, 03-6258, 03-9571, 03-9594

In the United States Court of Appeals for the Tenth Circuit

FEDERAL TRADE COMMISSION,

Defendant-Appellant,

v.

MAINSTREAM MARKETING SERVICES, INC., ET AL.,

Plaintiffs-Appellees.

On Appeal from the United States District Court for the District of Colorado,
No. 03-N-0184, The Hon. Edward W. Nottingham, Judge

FEDERAL TRADE COMMISSION,

Defendant-Appellant,

v.

U.S. SECURITY, ET AL.,

Plaintiffs-Appellees.

On Appeal from the United States District Court for the Western District of Oklahoma,
No. Civ. 03-122-W, The Hon. Lee R. West, Judge

MAINSTREAM MARKETING SERVICES, INC., ET AL.,
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

On Appeal from the Federal Communications Commission

**SURREPLY BRIEF FOR
MAINSTREAM MARKETING SERVICES, INC., TMG MARKETING, INC.
AND AMERICAN TELESERVICES ASSOCIATION**

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FCC	Respondent Federal Communications Commission
Mainstream	Plaintiff-Appellee/Petitioner Mainstream Marketing Services, Inc.
TMG	Plaintiff-Appellee/Petitioner TMG Marketing, Inc.
ATA	Plaintiff-Appellee/Petitioner American Teleservices Association
DMA	Plaintiff-Appellee Direct Marketing Association, Inc.
CompTel	Petitioner Competitive Telecommunications Association
Gov. Br. or Government's Brief	Consolidated Opening Brief of Appellant FTC, Respondent FCC, and Intervenor United States of America
Pet. Br.	Brief for Plaintiffs-Appellees/Petitioners Mainstream Marketing Services, Inc., *et al.*, and Plaintiffs-Appellees U.S. Security, *et al.*
Gov. Rep.	Consolidated Reply Brief of Appellant FTC, Respondent FCC, and Intervenor United States of America
J.A.	Appendix to Government's Brief
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CompTel Br.	Brief of Petitioner Competitive Telecommunications Association
Sup. App.	Supplemental Appendix to Mainstream Surreply Brief
Valentine & Kennelly Affidavits	Affidavits of Lynda Valentine and Cleve Kennelly, in *U.S. Security, et al. v. FTC*, Case No. 03-122-W (W.D. Okla.) (P.A.0734-59)
Telemarketing Act	Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-6108 (11a-18a)
TCPA	Telephone Consumer Protection Act, 47 U.S.C. § 227 (1a-10a)
TSR	Telemarketing Sales Rule, 16 C.F.R. §§ 310.1-310.9 (22a-37a)
DNCR	Do-Not-Call Registry

FTC Order	*Amended Telemarketing Sales Rule*, 68 Fed. Reg. 4580 (2003) (J.A. 214-314)
FTC Fee Order	*Amended Telemarketing Sales Rule Fees*, 68 Fed. Reg. 45134 (2003) (P.A. 0016-29)
FCC Order	*Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014 (2003) (J.A. 894-1058)
FCC NPRM	*Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 17 FCC Rcd. 17459 (2002)
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H. Rep. 102-317	House Report (Energy and Commerce Committee) No. 102-317, Nov. 15, 1991 (to accompany H.R. 1304)
ATA Reply	Reply Comments of the American Teleservices Association, *Implementation of the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, filed January 31, 2003 (P.A. 0243-305)
DMA Fee	Comments of the Direct Marketing Association, Inc., FTC File No. R411001 (Revised Notice of Proposed Rulemaking on Collection of User Fees for Telemarketing Sales Rule), May 1, 2003 (Sup. App. 0782-800)
Mey	Comments of Diana Mey, February 28, 2000 Request for Comment (Sup. App. 0866-899)
Shields	Comments of Joe Shields, *Implementation of the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, filed Dec. 3, 2002 (Sup. App. 0900-15)
West	Comment of Sandra S. West, *Implementation of the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, filed Nov. 4, 2002 (Sup. App. 0916)

Durle	Comment of Joseph A. Durle, *Implementation of the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, filed Nov. 18, 2002 (Sup. App. 0917)
Johnson	Comment of Benjamin Philip Johnson, *Implementation of the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, filed Oct. 29, 2002 (Sup. App. 0918)
Meyer	Comment of Karen M. Meyer, *Implementation of the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, filed Dec. 2, 2002 (Sup. App. 0919)
Gardner	Comment of Anne Gardner, February 28, 2000 Request for Comment (Sup. App. 0920)

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The government's assumption that commercial speech restrictions should be judged by the same standard as time, place or manner restrictions, Gov. Rep. 3 (citing *United States v. Edge Broad. Co.*, 509 U.S. 418, 429 (1993)), fails to accurately set forth the relevant burden of proof articulated in more recent commercial speech cases. "The *Central Hudson* test is significantly stricter than the rational basis test," and requires the government "to prove that the regulation 'directly advances' that interest and is 'not more extensive than necessary to serve that interest.'" *Thompson v. W. States Med. Ctr.,* 535 U.S. 357, 374 (2002) (citation omitted). This means the government must "carefully calculat[e] the costs and benefits associated with the burden on speech imposed," *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 528 (2001), and if it could "achieve its interests in a manner that … restricts less speech, [it] must do so." *W. States Med. Ctr.,* 535 U.S. at 371. Where the record before an agency fails to demonstrate that obvious and substantially less restrictive alternatives are inadequate, it has failed to meet its burden. *U.S. West v. FCC*, 182 F.3d 1224, 1238-39 (10th Cir. 2001) (rejecting FCC's reliance on "common sense judgment based on experience" because "[t]he burden under the fourth prong of *Central Hudson* is significantly higher").

I. The DNCR Will Not Materially Advance The Government's Interest

At oral argument the government repeated its claim that its principal estimate regarding the proportion of calls it expects the DNCR will block is based on the predictions of lost business put forward by the telemarketing industry – estimates that neither agency accepted. *See also* Gov. Br. 35 n.9. It also suggested that experience with Missouri law supports its claims and it continued to rely on data in H. Rep. 102-317. But it is difficult to reconcile continued reliance on this 1991 data since the FCC based its NPRM on the need to

account for "significant changes" in telemarketing since 1992. *FCC Order* at 14017. It is noteworthy that the evidence in the House Report persuaded Congress to require FCC investigation into whether additional authority was needed, 47 U.S.C. § 227(c)(1)(D), because it acknowledged that charitable or political calls can "in pockets of the country – represent as serious a problem as commercial solicitations." [1] This suggests the Court should not rely on data from a particular state because of significant regional variations. [2] Here, however, the government actively avoided collecting new data on what types of calls are made, by whom, and the extent to which calls are welcome or unwanted. *See*, *e.g.*, *FCC NPRM* at 1748-49.

This lack of hard information lead the government to misread *Discovery Network* and *Edge Broadcasting* to suggest that a commercial speech regulation that reduces 3 to 4% of a given problem is "paltry" but that a solution that addresses 11% of the problem represents a "material advancement" of the government's interest. But this misreads both cases. *Rubin*, *Utah Licensed Beverage* and *Greater New Orleans Broadcasting* could not have been decided as they

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[1] H. Rep. 102-317 at 16-17. It is impossible to know why Congress suggested this might be true only in "pockets" of the country since the House Report contained data on only 13 states. It also is significant that the House data relates only to complaints, which the FCC concluded was the type of data that should not form the basis for "revis[ing] or adopt[ing] new rules under the TCPA." *FCC Order* at 14140. *See infra* note 7 (FCC's recent action against AT&T shows high "false positive" rate for complaints).

[2] The claim that Missouri reduced calls by 70 to 80% came from a discussion at an FTC workshop focused on the established business relationship ("EBR") exemption. June 2002 Tr. at 107-121. (Sup. App. 0763-77) The context in which the claim was made raises the question whether it relates to a reduction in all calls or just commercial calls. No data was presented to support the overall estimate which admittedly was based on "anecdotal information." *Id.* at 118-119. (Sup. App. 0774-75) As part of this discussion, AARP testified that it had conducted a survey with the Missouri Attorney General's office "which found that three-fourths of consumers do not believe that a business relationship exemption was justified." *Id.* at 119. (Sup. App. 0775)

were if *Central Hudson* required the government to show only somewhat more than a "paltry" impact on the problem. Like the situation here, each of these cases invalidated commercial speech regulations that were undermined by exemptions, and none of the cases attempted to quantify how much of the problem was affected by the exclusions. Moreover, it is not the case, as suggested at oral argument, that where exemptions invalidate a commercial speech regime, only allowances for other *commercial* speech are relevant. [3]

The government mischaracterizes Appellees' claims as involving only underinclusiveness, Gov. Rep. 2, 5, 9, 18, but the problem is not just that the DNCR blocks only some unwanted calls while allowing others; it is the lack of correlation between individual preferences and the categories it imposes. *See FTC Order* at 4593 (discussing Information Policy Institute Study of consumer preferences). The FTC even explained how a registry approach overblocks speech because consumers will register even if it means sacrificing calls they otherwise would permit, *id.* at 4636, while underblocking speech because the categories crafted by the government allow many unwelcome calls. *Id.* at 4637, 4593 (finding consumers are annoyed regardless whether a call is commercial or charitable and adopting EBR exception though 60% of comments opposed it). Yet even if the record supported the government's assumption that people react more negatively to a ringing telephone when the

[3] *See Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1068, 1072 (10th Cir. 2001) (exemptions included state public service messages promoting safe drinking and "informational materials" from hotels); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 179 (1999) (exemptions included allowances for "gift enterprises" or similar schemes by, *inter alia*, non-profit organizations, just as here exemptions include sales and solicitations by charities); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995) (exemptions included statements made to comply with federally required disclosures of alcohol content on wine labels and state-mandated disclosures for beer labels).

purpose of the call is purely commercial, the DNCR's exemptions do not hew to a straight commercial/noncommercial distinction: non-profit organizations can call numbers on the DNCR to sell goods or services to obtain proceeds used for charitable missions, while for-profit entities cannot direct "image" advertising to DNCR registrants, even absent a sale. Similarly, companies having an EBR with DNCR registrants can call them but the company's competitors cannot. CompTel Br. 3-6.

II. The DNCR Is More Restrictive Than Necessary

Fortunately, more closely tailored solutions exist. For example, the FTC explained that the company-specific approach provides a "direct correlation between the governmental interest and the regulatory means employed." *FTC Order* at 4636. But the government concluded it could not rely on an appropriately tailored regulation that – unlike the DNCR – precisely matches consumer preferences, because of its assumption that the company-specific rules had failed. However, the record does not support this conclusion.

Burden on Speech. The record is clear that the government failed to "carefully "calculate" the burden imposed by the DNCR on commercial speech. *FCC Order* at 14039; *FTC Order* at 4631-32 (conclusory dismissals of evidence regarding adverse impact). In addition, the DNCR virtually ensures restriction of far more speech than necessary because it allows anyone with an email address to use the Internet to place multiple telephone numbers – including those of other people – on the DNCR without their knowledge or

approval. [4] At oral argument, the government acknowledged this problem, but asserted that procedures are in place to prevent one person from registering too many numbers. However, this does not address the inherent problem of "list pollution" that has been well documented. [5]

Narrow Tailoring. Both in its papers and at oral argument the government contrasts the narrow tailoring requirement as discussed in *Discovery Network* where "Cincinnati failed even to consider means for advancing its aesthetic and safety concerns that would not have barred commercial speech," Gov. Br. 47, with the current record where it asserts FTC and FCC enforcement experience justifies a more restrictive rule for commercial telemarketers. But the record here is quite clear that the company-specific rules were never enforced by the agencies. Pet. Br. 10-12. In response to clear record evidence that the "do-not-call" rules were not a priority and there was no tangible effort to enforce them, the government lists a few cases in a footnote. Gov. Rep. 15 n.7. But listing two FCC administrative letters (sent in the latter half of 2002) is not much to show for 10 years' enforcement history, and the three cases involving private lawsuits are irrelevant to the agencies' actions. The two unpublished cases that the FTC claims to have brought rested

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[4] *FTC Order* at 4639; Valentine & Kennelly Affidavits. (P.A. 0734-59) *Compare Rowan v. Post Office Dept.*, 397 U.S. 728, 730 & n.1 (1970) (regulation allows blocking of unwanted mail only for specific addressee and children under 19); *id.* at 741 (Brennan, J., concurring).

[5] *See* DMA Fee at 13 (Sup. App. 0795); June 2002 Tr. at 143 (staff statement that FTC "did not … initially suggest Internet registration [due to] difficulty of obtaining adequate verification"). (Sup. App. 0779) *Cf.* http://www.ftc.gov/opa/2003/09/030917dncstates.pdf (data showing three-quarters of registrations directly received are via Internet).

almost entirely on fraud allegations. [6] Most significantly, the FCC announced on November 3, 2003, a proposed $780,000 forfeiture on AT&T for violations of the company-specific rules, but in doing so confirmed that "*[t]his is the Commission's first major Do-Not-Call enforcement action*." [7]

Given this enforcement history, it should come as no surprise that the vast majority of people were entirely ignorant of the company-specific rules. Pet. Br. 9-10 (citing, *inter alia*, AARP study in FTC record that less than 5% in nationwide survey knew rules existed). The actual record thus undermines the government's sweeping assertion that the "overwhelming response to the establishment of the registry indicates[ ] millions of consumers have found [company-specific] rules inadequate to protect their privacy." Gov. Rep. 10. In fact, what the response really shows is that the public was glad the government finally had adopted some rules, since most were ignorant that any previous regulations existed. This overlooks

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[6] *FTC v. Epic Resorts LLC*, No. 6:00CV105ORL-19-C (M.D. Fla.) was settled without any finding of liability. (Sup. App. 0817-34) The thrust of the FTC's complaint alleged fraudulent practices, and only one minor count out of seven claimed any "do-not-call" violation. (Sup. App. 801-811) The only other case the government cites for FTC actions, *FTC v. 1st Financial Solutions*, No. 01-C-8790 (N.D. Ill.), likewise included "do-not-call" violations only as an afterthought in a larger fraud prosecution. The FTC characterized the case as involving "[d]eceptive practices in violation of Section 5 and the Telemarketing Sales Rule" without reference to "do-not-call" issues (Sup. App. 0850) and listed the case in its "Telemarketing Fraud Enforcement Action Announcements." (Sup. App. 0851)

[7] News Release, Nov. 3, 2003 (emphasis added) (Sup. App. 0856) The Notice of Apparent Liability also demonstrates the hazard of counting raw numbers of complaints to show the magnitude of the "do-not-call" problem. The FCC investigated 360 complaints against AT&T, determined that only 142 (40%) warranted further inquiry, and ultimately found only 78 to be actionable (involving 29 complainants). Thus, the false positive rate was approximately 78% even if all 78 of the complaints ultimately are deemed valid after AT&T has an opportunity to respond. *AT&T Corp.*, FCC 03-267, ¶ 3 (rel. Nov. 3, 2003) ("*AT&T NAL*"). (Sup. App. 0859)

entirely evidence in the record that education makes such rules more effective. *See* DNC-Tr. at 92, 188, 212 (P.A. 0576, 0600, 0604); RR-Tr. at 406. (P.A. 0640) It also ignores case law indicating that providing information about a given problem, and enforcing existing laws, are obvious less restrictive alternatives in any *Central Hudson* analysis. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 507 (1996); *Revo v. Disciplinary Bd.*, 106 F.3d 929, 936 (10th Cir. 1997).

Lacking any true enforcement experience, the government now claims the company-specific rules are inherently flawed "even if it were always possible to make a do-not-call request and even if such request were promptly honored" because "the consumer must respond to thousands of calls from an ever-growing number of solicitors." Gov. Rep. 10-11. But this cannot be reconciled with the government's claim that company-specific rules will be effective for noncommercial and EBR calls in the absence of an enforcement history that proves otherwise. Gov. Br. 12. The government's claim that noncommercial callers have more of an incentive to obey the company-specific rules is unsupported by the record and is illogical. [8] Nor can the Court credit the government's purported distinction that some noncommercial entities created voluntary no-call lists, since the commercial telemarketing industry pioneered the concept. *Compare* Gov. Br. 49 *with* Pet. Br. 18. Reference to the sheer number of potential calls (in reliance on the number of businesses that make telemarketing

[8] *FTC Order* at 4637. The FTC's conclusion on this point is based on the assertions of the Hudson Bay Company. But the EBR exemption is predicated on the assumption that businesses want to maintain good relations with customers to promote ongoing relationships, and the incentives are no different for new competitive businesses. *See generally* CompTel Br. If anything, callers who just want to "deliver a message" may have less incentive to worry about consumer reactions.

calls) likewise does not provide a distinction, since all of those businesses have established relationships, and there is no shortage of nonprofit organizations.

The government's assertion that consumers would have to make "thousands" of requests is typical of the hyperbole that infects this case, but is undermined by the record. Indeed, the commenters that supplied specific data about their actual experience by keeping logs of their telemarketing calls confirmed that the number of calls was far from overwhelming. For example, the government cites the comments of Diana Mey, "a consumer [who] taped and logged all the telemarketing calls she received over a two-year period." Gov. Rep. 12. However, review of her "log" indicated that she received about 105 calls in 28 months, or just under one per week, including hang-ups, EBR and noncommercial calls. (Sup. App. 0866-99) This is very similar to the experience of Joe Shields, an official of Private Citizen, who submitted a detailed log of 212 telephone solicitations from August 1999 to August 2002. (Sup. App. at 0900-15) This translates into about six calls per month, or just under 1.36 calls per week from all sources, including political and charitable organizations. Assuming the total number of telemarketing calls claimed by the government (16 billion per year) is correct, the experience of these two commenters is consistent with the expected average, given the number of phone lines in the U.S. [9]

[9] *See* Pet. Br. 14-15 & n17. While the government cites a few comments submitted by individuals who claim to have received 10- 20 calls per day, many are described as abandoned calls, which are addressed by other rules. *See* Gov. Rep. 11 n.5 (citing West ("Somedays I have over 20 calls" including those where "no one speaks of a second or two [so] I know it is a computer call"), Durle ("receive[s] up to 20 calls per day where many were just a machine dialing and hanging up"), Johnson ("receiving up to 10 calls per day from telemarketers [that left] answering machine … filled with hang-up[s]"), Meyer ("receives up to 10 … calls per day" that are "sometimes computer calls") (Sup. App. 0916-19)). Indeed,

To be sure, both of these commenters supported creation of the DNCR and were cited in the final orders of both agencies. *See FCC Order* 14117, 14121 (citing Shields); *FTC Order* at 4629, 4646, 4655-56 (citing Mey). However, what is vital for present purposes are not the policy preferences of the various commenters, but the facts submitted on the record. [10] And while these and other commenters described what appear to be some apparent rule violations, the record provides no reason to believe that the violations would have occurred under a scenario in which the agencies are enforcing their rules. [11] The FTC noted that when it enforced its rules against fraud – which present many of the same practical difficulties – occurrence of fraud dropped dramatically. DNC-Tr. at 10. (P.A. 0571)

Where the agencies (and the comments they rely upon) describe particular reasons for the rules' presumed failure, those problems are addressed by rule changes that do not restrict speech as does the DNCR. Callers that hang up before company-specific requests can be made or that refuse to log requests, Gov. Rep. 12, 14 (citing Mey, Burkart de Varona, ACUTA), now must comply with rules precluding interference with "do-not-call" rights. 16 C.F.R. § 310.4(b)(1)(ii). Where there have been difficulties identifying the entity calling in order to make a company-specific request or lodge a complaint, Gov. Rep. 13-14 (citing

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the FCC reported that 41% of telemarketing calls are not completed, which suggests much of the problem will be addressed by abandoned call rules. *See FCC Order* at 14021 n.28.

[10] For example, the government cited comments of Anne Gardner for the proposition that the company-specific rules do not work, Gov. Rep. 12 n.6, when her actual statement was "[t]elling them not to call again does seem to work, but it would be good if there was a central do-not-call list they had to consult first." (Sup. App. 0920)

[11] *See AT&T NAL* (proposing $780,000 forfeiture). All of the purported rule violations described by the commenters presumably would be addressed by the agencies' new focus on

ACUTA, Burkart), new Caller ID rules (and enforcement of disclosure requirements) address the problem. 16 C.F.R. § 310.4(b)(4); 47 C.F.R. § 64.1200(a)(6). And where commenters reported continued calls even after a company-specific request is lodged, Gov. Rep. 12-13 & n.12 (citing Mey, Anderson, Harper, Heagy, Nova, Nurik, Gardner, Gilchrist), new rules requiring companies to honor company-specific requests in 30 days or less will reduce or eliminate such post-request calls. 47 C.F.R. § 64.1200(d)(3).

Claims that the rules are deficient because it is difficult to sign up or that consumers have no way of verifying their requests also could have been addressed by additional rule changes suggested by ATA and others. But the agencies rejected changes that would have remedied these problems, including additional means of lodging and confirming company-specific requests.[12] Because the government must give the less intrusive alternatives it adopted a chance to work, and explain why those it rejected would fail, the DNCR is overly restrictive. *E.g.*, *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 758-759 (1996).

III. The DNCR Fees Are Unconstitutional

Admissions in the *FTC Fee Order* and at argument that proceeds from DNCR registry fees are being used for purposes other than enforcing the "do-not-call" rules are fatal to any constitutional defense of the fees. The FTC acknowledged it will use the fees for enforce-

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enforcement. *E.g.*, Gov. Rep. 12-13 & n.12 (citing NAAG, Anderson, Harper, Heagy, Nova, Nurik, Gardner, Gilchrist).

[12] *See* Pet. Br. 47. The government's claim that industry opposed such measures is untrue. *Compare* Gov. Rep. 15 *with* ATA Reply Comments at 19 (supporting toll-free and

ment of the TSR's fraud rules, including infrastructure upgrades (*e.g.*, the Consumer Sentinel database). The law is clear that when the government imposes fees on protected speech, as does the DNCR, it "may charge no more than the amount needed to cover administrative costs" for the specific regulation at issue, and it is "prohibited from raising revenue under the guise of defraying its administrative costs." *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1205 (11th Cir. 1991). Accordingly, the DNCR fees are unconstitutional.

Respectfully submitted,

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web-based company-specific registration). (P.A. 0271) Company-specific requests placed by 800 number or online could ensure adequate verification, unlike the DNCR procedures.