

No. 03-1429

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

MAINSTREAM MARKETING SERVICES, INC., et al.,

Plaintiffs-Appellees,

v.

FEDERAL TRADE COMMISSION, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the
District of Colorado, Case No. 03 N 0184
The Honorable Edward W. Nottingham, Judge Presiding

**BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF
DEFENDANTS-APPELLANTS URGING REVERSAL**

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STATEMENT OF INTEREST^{1/}

AARP is a non-partisan, non-profit organization with more than 35 million members aged 50 and older. As the largest membership organization representing the interests of older Americans, AARP has a longstanding interest and involvement in combating telemarketing abuses and educating consumers about dealing with unwanted sales calls. While AARP's concerns about telemarketing arose due to widespread fraudulent practices that targeted older persons (and those concerns continue), these initial concerns led to an expanded focus on effective means to reduce numerous, repeated intrusions into people's homes by callers trying to sell myriad products and services. AARP thus has devoted significant resources for nearly a decade to all facets of federal and state telemarketing laws and regulations designed to reduce unwanted and unwelcome telemarketing sales calls, to ban fraudulent and deceptive telemarketing practices, and to provide adequate remedies for victims.

In 1995, in recognition of the fact that older people are favored targets of fraudulent telemarketers, AARP made federal and state legislative and regulatory initiatives and public education on this issue a priority. For example, AARP participated in the Federal Trade Commission's (FTC) promulgation of the Telemarketing Sales Rule (TSR), 16 C.F.R. § 310 (2002), submitting extensive

^{1/} Counsel for the parties have consented to the filing of this brief.

written comments in response to two notices of proposed rulemaking and appearing at a three-day public hearing convened by the Commission. AARP has supported continued FTC monitoring of the TSR to determine necessary improvements, and was an active participant in the agency's subsequent proceedings to revise the Rule, submitting written comments and participating in an FTC-sponsored workshop in the summer of 2002.

In addition, AARP has been an active partner with state and federal law enforcement and consumer protection agencies, supporting the investigation and prosecution of fraudulent telemarketers. For example, in 1995, AARP members became undercover witnesses for the FBI and attorneys general, tape recording conversations with suspected fraudulent telemarketers. The recordings became the foundation for "Operation Senior Sentinel" prosecutions, as they revealed the actual misrepresentations and deceptive pitches made to convince consumers to make purchases or otherwise send money. On a related front, AARP has filed *amicus* briefs in federal and state court cases involving the enforcement of telemarketing and sweepstakes statutes, and AARP attorneys have represented victims of sweepstakes promotions linked to magazine subscription packages.

AARP also has focused on educating consumers about how to identify and avoid fraudulent pitches and steps they should take to enforce their rights when

they have been defrauded. AARP released several publications and public service announcements and published articles to advance this goal, and worked with state and federal law enforcement and regulatory agencies, as well as consumer and industry groups, to develop consumer education messages.

AARP surveys of its members and others indicate that an overwhelming number of people view telemarketing sales calls as an invasion of privacy and support the creation of “do not call” lists as a way to stop these unwanted intrusions. AARP actively supports federal and state laws and regulations to reduce the number of unwanted sales calls and to give consumers a say in whether they receive such calls. Since 1998, AARP has led the fight for state do not call laws, served as one of the lead sponsors on more than twenty state do not call law campaigns, and continues active campaigns in states that have yet to enact such laws. AARP also submitted comments during the FTC’s proceedings to amend the TSR to create the national “Do Not Call” registry, calling it “a well-reasoned approach to address the concern AARP’s members have expressed regarding their inability to stem the volume of telemarketing calls, particularly in states that currently lack Do-Not-Call laws.” AARP supported creation of the national registry as long as it did not preempt states’ efforts to establish stronger consumer protections. Letter from David Certner to Don Clark, FTC Office of the Secretary

2 (Mar. 29, 2002) (on file with AARP). In July 2002, AARP submitted testimony to Congress in connection with reauthorization of the FTC, focusing on creation of the national registry, *see Hearing on Federal Trade Commission Reauthorization Before the Consumer Affairs, Foreign Commerce and Tourism Subcomm. of the Senate Commerce, Science and Transp. Comm.* (July 17, 2002) (testimony of AARP Board Member Charles Mendoza), at <http://www.aarp.org/press/testimony/2002/071702.html>, and, most recently, after the lower court's ruling AARP testified before the Senate to highlight the importance of implementing and enforcing the national registry. *See Hearing on the National Do Not Call Registry Before the Senate Comm. on Commerce, Science and Transp.* (Sept. 30, 2003) (testimony of AARP Board Member Lee Hammond) (on file with AARP).

Because of AARP's concerns about the repeated invasions of privacy perpetrated by telemarketers, and fraudulent pitches that target older people, AARP submits this brief as *amicus curiae* in support of Appellants.

ARGUMENT

I. TELEMARKETING FRAUD IS RAMPANT AND COSTLY.

Telemarketing fraud robs Americans of billions of dollars every year and has been called "one of the most pervasive forms of white-collar crime" in the

United States. United States-Canada Working Group, *United States-Canada Cooperation Against Cross-Border Telemarketing Fraud, Report to President Bill Clinton and Prime Minister Jean Chrétien* (Nov. 1997). Many victims are older people, specifically targeted by fraudulent telemarketers. AARP research, described more fully below, has shown that older people are inundated by telemarketers and seem particularly vulnerable to fraudulent pitches; they seem unable to spot fraud when it is occurring, have difficulty terminating sales calls, and repeatedly take the bait set by fraudulent telemarketers. While the research provides no easy answer as to why people fall for fraudulent telemarketing schemes, it does show that victims have a great deal of difficulty differentiating between fraudulent and legitimate calls.

Because many people do not realize that they are victims, and many others are unwilling to report these frauds to law enforcement agencies, there is no way to quantify with any certainty either the number of victims or the dollars lost to these scams. As this Court noted, however, “Congress found that consumers lose an estimated \$40 billion each year in ‘telemarketing’ fraud and are victimized by other forms of ‘telemarketing’ deception and abuse.” *FTC v. Mainstream Marketing Servs., Inc.*, 2003 U.S. App. LEXIS 20366, at *19 (10th Cir. Oct. 7,

2003). *See* Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6101(3) (2002).

Various congressional committees and subcommittees have held hearings on this issue. Describing his reaction to the briefing materials for one hearing, a Congressman stated: “I was stunned to learn how seemingly impervious many of these telemarketing and boiler room practices are to effective criminal prosecution. These guys are like termites. Once they are in business, you can’t seem to get rid of them.” *The Nature and Extent of Telemarketing Fraud and Federal and State Law Enforcement Efforts to Combat It: Hearings Before the Commerce, Consumer, and Monetary Affairs Subcomm. of the House Comm. on Gov’t Operations*, 101st Cong. 3 (1990)^{2/} (opening statement of Rep. J. Dennis Hastert). He noted that older people often lose their life savings, and that “[v]ery rarely are these funds ever recovered, even when there is prosecution.” *Id.*

Another subcommittee member characterized telemarketing fraud as a “devastating crime, robbing unsuspecting victims, not only of their money but of their self-esteem and their financial independence.” *Id.* at 4 (opening statement of Rep. Frank Horton).

^{2/} Congressional findings and recommendations based on this two-day hearing are found in Comm. on Gov’t Operations, *The Scourge of Telemarketing Fraud: What Can Be Done Against It?*, H.R. Rep. No. 102-421 (1991).

The testimony is replete with examples of people who lost significant sums of money to fraudulent telemarketers. An 84-year-old Georgia widow poignantly described how she lost \$20,000, the entire legacy left to her by her husband and their entire life savings, in an investment scam sold by a telemarketer. *Id.* at 11 (testimony of Grace L. Singletary). She stated that she had spent many years as a schoolteacher and thought of herself as an intelligent person, but that the caller sounded like someone she could trust and his persuasive manner convinced her. She described her constant worry about “a future without any savings,” and asked the subcommittee “to stop this kind of sophisticated thievery.” *Id.* at 14, 15.

Similar sentiment and examples surfaced at a later Senate hearing. Former Senator and Committee Chairman William Cohen stated:

Everyday, senior citizens across the Nation are besieged by telemarketers who invade the privacy of their homes seeking donations to charities or making promises that are too good to be true. Telemarketing scams . . . run the gamut from small fly-by-night operators to sophisticated organized crime rings that establish boiler rooms in several cities. Whatever their size, these telephone thugs share the common motto of “reach out and scam someone,” using high pressure sales tactics and slick talk to lure their victims into sending them hundreds -- indeed, even thousands -- of dollars.

Telescams Exposed: How Telemarketers Target The Elderly: Hearing Before the Senate Special Comm. on Aging, 104th Cong. 1 (1996) (opening statement of Sen.

William Cohen). He noted that tape recordings and transcripts of calls obtained during “Senior Sentinel” revealed “how unscrupulous callers engage in what amounts to ‘teleterrorism’ by verbally abusing, insulting and berating the senior citizens they call.” *Id.* at 2.

II. AARP RESEARCH DEMONSTRATES VULNERABILITY TO TELEMARKETING FRAUD.

In order to better understand the motivations of telemarketing fraud victims and, thereby, design an effective campaign to help them avoid being victimized, AARP sponsored the first large-scale survey ever to investigate telemarketing fraud among older people. Since the Court found that the “FTC’s justification[] of preventing abusive and coercive sales practices . . . [is a] substantial government interest[],” *FTC v. Mainstream Marketing Servs., Inc.*, 2003 U.S. App. LEXIS 20366, at *10, AARP respectfully suggests that a discussion of this research will assist the Court in understanding the dynamics at play in telemarketing fraud and the importance of giving consumers the tools necessary to stop unwanted calls.

The AARP Survey, conducted by Princeton Survey Research Associates, paints a surprising portrait of victims and debunks some of the theories previously advanced to explain why older people seem particularly vulnerable to telemarketing fraud. AARP, *Telemarketing Fraud and Older Americans: An*

AARP Survey (1996) (on file with AARP). As described more fully below, the victims are relatively affluent, well educated, and informed; they are active in their communities; and they express many of the same attitudes about telemarketers that are widely held by people who do not fall prey to fraudulent schemes. This description stands in marked contrast to the prevailing view of older victims, based on anecdotal evidence, as socially isolated, ill-informed, confused, and committed to old-fashioned ideas about how one should treat strangers who call on the phone. The Survey confirmed, however, that thousands of people take the bait set by fraudulent telemarketers every day.

The Survey is based on interviews with 745 telemarketing fraud victims aged fifty and older. All of the victims were identified as participants in at least one of a number of fraudulent telemarketing schemes investigated and prosecuted at the state or federal level. Many of the names appeared on lists maintained by the telemarketers themselves that prosecutors obtained during their investigations. It is interesting to note that the people on the telemarketers' lists did not necessarily think of themselves as victims of fraud. All of the victims were notified of the prosecution of the telemarketer and their inclusion on a list of victims as part of the case. The prosecutors noted, however, that many, if not most, victims continued to believe they had not been defrauded. In fact, many felt

they would have received their vacation, prize, car, etc., if only the Attorney General or U.S. Attorney had not shut down the telemarketer's operation.

1. Victim profile

The Survey confirmed that older people appear to fall victim to telemarketing fraud much more than younger people. More than half (56%) the victims^{3/} contacted for this survey based on prosecutors' lists were aged fifty and older, while then-current census data indicated that only 36% of the adult population was in this age group. *Id.* at 4. Among the victims, 14% were seventy-five and older, while only 7% of the adult population was in this age bracket. *Id.*

2. Social networks and activities

Contrary to the prevailing image of older telemarketing fraud victims derived from anecdotal evidence, the Survey showed they were not socially isolated. Older victims had living arrangements that were similar to older people in general. Only 28% of the victims lived alone, compared to census figures indicating that 21% of all people aged fifty and older lived alone. *Id.* Older telemarketing fraud victims had extensive networks of family and friends with whom they were in regular, close contact. Eighty percent of victims lived near

^{3/} Throughout the Survey, "older fraud victims" and "victims" are used as a shorthand to refer to people fifty and older who were victims of telemarketing fraud.

family, and almost all (96%) lived near friends. *Id.* Many victims (41%) visited with a friend or relative in the week before the survey interview and almost half (47%) had a telephone conversation with a friend or family member during that period. *Id.* Only 1% of the older victims had not had any personal contact with someone close to them in the week preceding the interview. *Id.*

Again, contrary to popular belief, older victims were quite active in their communities. Almost two-thirds (64%) had attended a religious institution at least once during the week before the interview. *Id.* In addition, in the week before the interview, half the victims (54%) had attended a club or social group meeting, 38% did volunteer work, and 12% went to a movie or show. *Id.* at 5.

3. Media exposure

Older victims were very attentive to news and consumer information. Eight in ten regularly read newspapers and magazines and watched the local news. *Id.* at 6. Seventy percent of victims subscribed to cable television, and 75% of those (52% of all victims) regularly watched cable news programs. *Id.* Nearly four in ten victims watched television talk shows, such as “Oprah” or “Geraldo,” at least sometimes, with comparable numbers listening to call-in radio shows. *Id.* Almost all victims (90%) reported hearing or reading about companies that take advantage

of people by selling them worthless products or services, or by tricking them into giving money for nothing. *Id.*

4. Demographics

Survey participants were more affluent and better educated than other people fifty and older. Almost all victims owned their own homes, and nearly a third had a college degree. *Id.* at 7. Slightly fewer than one-half of the victims (43%) had annual household incomes of \$30,000 or more, compared with just over one-third (38%) of all adults 50 and older. *Id.* Forty-three percent had assets, excluding home equity, of at least \$50,000, and 28% reported assets of at least \$100,000. *Id.* Survey interviewers gave victims high scores for their articulateness and comprehension. In assessments completed after each interview, they said 73% of victims had no trouble answering survey questions, 72% had no difficulty understanding the questions, and 50% had an excellent ability to think and reason clearly. *Id.*

5. Contacts with telemarketers

The Survey questioned victims about their contact with telemarketers, and found they were “besieged” by them. *Id.* at 9. Almost half (46%) the victims had received a telemarketing call within the week before the interview, and 8% had been called that day. *Id.* Four in ten (42%) said they received twenty or more

calls during the prior six months from telemarketers who asked for a charitable contribution, tried to sell them something, or talked to them about a sweepstakes or contest. *Id.* Among victims aged fifty to sixty-four, 49% of men and 48% of women had received twenty or more solicitations in the prior month. *Id.*

Quite surprisingly, older telemarketing fraud victims said they did not like phone solicitations, tried to avoid them, and viewed them with skepticism. Two thirds (68%) said that when a telemarketer called they tried to get off the phone as quickly as possible. *Id.* at 10. Still, one fourth (28%) said they usually listened to what the caller had to say. *Id.* Victims who lived alone were slightly more likely to listen to the pitch (32%) than those who lived with others (26%), and one-third (30%) of victims 75 and older said they usually listen, compared with a quarter (25%) of victims under 75. *Id.*

Eighty percent of victims said they did not enjoy getting telemarketing calls and almost all (97%) said that if they had a choice, they would reduce the number of calls they received. *Id.* at 10. Despite their behavior, almost all victims (90%) believed it was acceptable to hang up on a persistent telemarketer, and three-quarters (77%) rejected the idea that good manners compelled them to respond with a donation or purchase when a telemarketer offered to send a gift. *Id.* A

majority (58%) of victims thought that most companies that sell products or services through telemarketing were trying to take advantage of consumers. *Id.*

6. Inability to recognize fraud

A surprising finding, given that respondents were victims, is that they generally knew what to do to avoid being defrauded by a telemarketer. When asked how a friend or relative should deal with these situations, without any prompting about possible responses, almost all victims (96%) described an action that could be effective in preventing fraud. *Id.* at 11. For example, 44% said people should just hang up on telemarketers, 9% said to ask for written offer confirmations, and 5% said to call the authorities. *Id.* Yet, victims also said it was hard to spot fraud. Two-thirds (68%) said most people like them would find it hard to tell when someone was selling worthless products or services or trying to trick them into giving money for nothing. *Id.* at 17-18. The most affluent victims were most in doubt about how to tell honest pitches from fraudulent ones. Three-quarters (73%) of victims with at least \$20,000 in assets, compared with 60% of victims with fewer assets, said telemarketing fraud was hard to detect. *Id.* at 18.

7. Reluctance to seek assistance or advice

Victims had trouble recognizing deceptive practices and finding effective strategies for rejecting strangers' requests for money. These difficulties were

exacerbated by their reluctance to seek advice or assistance about financial matters. Almost half (47%) the victims said they never asked friends or family members for advice or help with problems; 79% did not seek advice with respect to managing money; 58% did not ask for help understanding official documents; and 55% did not seek assistance with decisions about buying products and services. *Id.* at 21. While 75% of victims who had sent money as part of a sweepstakes said they were not pleased with the outcome, almost half (47%) of them did not complain, discuss the situation, or try to get help once they realized they had been defrauded. *Id.* at 22.

This research showed there is no easy way to explain why people fall for fraudulent telemarketing schemes. What emerges fairly clearly, however, is that people find it very hard to hang up on telemarketers and to differentiate between fraudulent and legitimate pitches. Moreover, as this Court noted, the

FTC found that the original [Telemarketing Sales] Rule's company-specific do-not-call list was inadequate to prevent the type of abusive commercial calls it was intended to prohibit. . . . It concluded that the national do-no-call list will also prevent fraud or abuse in some cases by protecting vulnerable consumers from exploitative telemarketers.

FTC v. Mainstream Marketing Servs., Inc., 2003 U.S. App. LEXIS 20366, at *21-22 (citations omitted). Many consumers who sign up for the national registry

based on their desire to stop unwanted sales calls are likely to approach the telemarketing calls they continue to receive with heightened skepticism and thus be better armed to protect themselves against fraud. Moreover, the registry provides a potent weapon to prosecute telemarketers who violate the rule because it will be much easier to prove they have continued to call people who have registered than it has been to establish a case of fraud.

III. CONSUMERS REPEATEDLY INDICATE THEY VALUE THEIR PRIVACY AND DO NOT WANT TO RECEIVE SALES CALLS.

The American public could not have sent a louder or clearer message about its desire to stop sales calls, having registered more than 50 million telephone numbers before the lower court declared the national registry unconstitutional. *See* President Signs Do Not Call Registry, Remarks by the President on the Do Not Call Registry (Sept. 29, 2003), *at* <http://www.whitehouse.gov/news/releases/2003/09/20030929-10.html>; *FTC v. Mainstream Marketing Servs., Inc.*, No. 03-1429, FTC's Emergency Motion for A Stay Pending Appeal and Expedited Briefing and Argument at 16 (filed Sept. 30, 2003). The inability of consumers to terminate unwanted calls once they occur and to identify fraudulent calls underscores the importance of giving consumers a way to avoid calls. Consumers repeatedly have expressed their desire for such a choice. *See, e.g.*, AARP

Testimony Before the Ohio Senate Public Utilities Comm. (Mar. 4. 2003)
(statement of Bessie King Jackson, Exec. Council) (“more than 1 million New York households had signed up for the state ‘Do-Not-Call’ list by the time it took effect on April 1, 2001. More than 332,000 phone lines were listed on Missouri’s ‘Do-Not-Call’ list within a short time of its passage. And nearly one-third of Connecticut’s households are on that state’s ‘Do Not Call’ list”) (on file with AARP).

Surveys conducted for AARP to gauge support for state “do-not-call” lists established that consumers receive numerous telemarketing calls, overwhelmingly view these calls as unwanted intrusions into their privacy, and favor having the choice to opt out of receiving those calls. For example, in a survey of Minnesotans aged eighteen and over, more than three-fourths (77%) of respondents indicated they received telemarketing calls more than once a week. Ninety percent of respondents expressed negative views toward these calls, with 82% saying they are an invasion of privacy and unwelcome intrusion, 6% calling them a consumer rip-off, and 2% saying they are annoying. Joanne Binette, AARP, *Minnesota Telemarketing Fraud and “Do Not Call” List: An AARP Survey* 2 (2001), at http://research.aarp.org/consume/mn_telemarketing.pdf. Most (94%) Minnesota residents indicated strong (89%) or some (5%) support for a new state

law that would give people the option of placing their name and phone number on a do-not-call list so that telemarketers would be prohibited from calling them; almost 90% said they were very (75%) or somewhat (14%) likely to register for such a list if given the option. *Id.* at 3.

A survey of New Hampshire residents eighteen and older produced similar results. The vast majority of respondents expressed negative views of telemarketing calls, with 84% viewing them as an invasion of privacy and unwanted intrusion, and another 10% saying they are a consumer rip-off. Katherine Bridges, AARP, *AARP New Hampshire Telemarketing and “Do Not Call” List Survey 4* (2003), at http://research.aarp.org/consume/nh_telemarketing.pdf. This survey was conducted after the FTC proposed a national registry, and most (94%) New Hampshire residents strongly (85%) or somewhat (9%) supported a new state do-no-call list that would provide greater protection than the national list. *Id.* at 2. Similarly, nearly three-fourths (74%) of New Jersey residents eighteen and older received telemarketing calls more than once a week, and 90% expressed negative views of such calls: 77% viewed them as an invasion of privacy and an unwelcome intrusion, 10% said they are a consumer rip-off, and 3% characterized them as annoying. Katherine Bridges, AARP, *AARP New Jersey Telemarketing and “Do Not Call” List Survey 4* (2002), at <http://research>.

aarp.org/consume/nj_telemarketing.pdf. Most (94%) respondents strongly (89%) or somewhat (5%) support a new state law that would give them the option of placing their names and phone numbers on a do not call list to stop telemarketers from calling them. *Id.* at 5. Similar results were found in Michigan, Missouri, and South Dakota. See Jennifer Sauer, AARP, *Michigan Telemarketing Fraud and “Do Not Call” List: An AARP Survey* (2001), at http://research.aarp.org/consume/mi_telemarketing.pdf; Joanne Binette, AARP, *Missouri “Do Not Call” List: An AARP Survey* (2002), at http://research.aarp.org/consume/mo_telemarketing.pdf; Mildred DePallo, AARP, *South Dakota “Do Not Call” List: An AARP Survey* (2002), at http://research.aarp.org/consume/sd_telemarketing.pdf.

CONCLUSION

While AARP’s research debunked many of the theories about why older people are particularly vulnerable to telemarketing fraud, it did not diminish the fact that fraudulent telemarketers specifically target them and that they fall for the scams. If one fact clearly emerged from the research, it is that older victims find it extremely difficult, if not impossible, to distinguish between fraudulent and legitimate pitches. AARP research also showed that numerous consumers consider telemarketing sales calls unwanted invasions of their privacy and see do-not-call lists as an important way to enable them to express their choice not to

receive such calls. AARP respectfully urges the Court to reverse the lower court and allow the FTC to continue to enforce its national registry to further its substantial interests both in preventing abusive and coercive sales practices and protecting privacy. *FTC v. Mainstream Marketing Servs., Inc.*, 2003 U.S. App. LEXIS 20366, at 9-10 (citing *Edenfield v. Fane*, 507 U.S. 761, 768-69 (1993) and *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 737 (1970)).

October 16, 2003

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