Case No. 03-1429

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FEDERAL TRADE COMMISSION, et al., Defendants and Appellants, **v.** **MAINSTREAM MARKETING SERVICES, INC., et al.,** Plaintiffs and Appellees.

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

BRIEF OF AMICI CURIAE OF THE STATES, COMMONWEALTHS AND DISTRICT OF: ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DISTRICT OF COLUMBIA, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, PUERTO RICO, RHODE ISLAND, SOUTH DAKOTA, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA AND WYOMING

IN SUPPORT OF APPELLANTS' EMERGENCY MOTION FOR A STAY PENDING APPEAL

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INTEREST OF AMICI

Consumer protection is a field traditionally regulated by the States as part of their historic police powers. *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989). In this matter in particular, state Attorneys General have been authorized by Congress to enforce the Federal Trade Commission's ("FTC") no-call list regulations:

> Whenever an attorney general of any State has reason to believe that the interests of the residents of that State have been or are being threatened or adversely affected because any person has engaged or is engaging in a pattern or practice of telemarketing which violates any rule of the Commission under section 6102 of this title, the State, as parens patriae, may bring a civil action on behalf of its residents in an appropriate district court of the United States to enjoin such telemarketing, to enforce compliance with such rule of the Commission, to obtain damages, restitution, or

> other compensation on behalf of residents of such State, or to obtain such further and other relief as the court may deem appropriate.

15 U.S.C. § 6103. Accordingly, the States and the citizens they represent have a vital interest in the effective enforcement of the do-not-call regulations challenged in this action.

In addition, twenty-three States do not have a state no-call list under their state laws or they rely on the FTC list in order to enforce no-call laws in their states. Thus, these States have a direct interest in the viability of the FTC's no-call list.

ARGUMENT

The above-referenced States and Commonwealths write to emphasize to the Court the important public interests which will be harmed if the district court's judgment is not stayed while the appeal is pending.

Tenth Circuit Rule 8.1 specifies the factors relevant to a ruling on this motion. The States endorse, generally, the position that defendants have taken on these factors in defendants' moving papers. The principal purpose of this brief is to focus on one factor in particular: the public interest.

I.

THE PUBLIC INTEREST FAVORS ALLOWING PEOPLE TO PROTECT THEMSELVES FROM UNWANTED AND INTRUSIVE TELEMARKETING CALLS

There are several aspects of the public interest which are at stake here. Foremost is the interest that members of the public have in what is sometime called "the protection of residential privacy.," *Frisby v. Schultz*, 487 U.S. 474, 484, 108 S. Ct 2495, 2502 (1988), elsewhere identified as "'the right to be left alone' that one of our wisest Justices characterized as 'the most comprehensive of rights and the right most valued by civilized men.'" *Hill v. Colorado*, 530 U.S. 703, 716-717 (2000) (quoting *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928) (Brandeis J., dissenting); *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 610 P. 2d 436 (1980). The importance of this right is expressed in the laws of numerous States in numerous ways. In California, for example, the right to privacy is a fundamental inalienable right. Cal. Const. Art. 1, §1. California has adopted its own do-not-call statute in order to protect that right. See Cal. Bus. & Prof. Code §§ 17590 et seq. The States have recognized this important right in a variety of ways. *See* Appendix A for a sampling of state laws protecting residential privacy.

That interest is presented here in a particularly compelling form, because the regulatory scheme at issue protects only those individuals who choose to participate. The privacy interests at stake are those of the millions of Americans

who have affirmatively acted to invoke the government's assistance in protecting those interests. There can be no doubt as to the public interest, because the public has made its views quite clear.

Finally, the importance of this right to residential privacy can be gauged by the Congressional response to the order issued on September 23, 2003 by the U.S. District Court for the Western District of Oklahoma in *U.S. Security, et al. v. Federal Trade Comm'n* (No. CIV-03-122-W). Both houses of Congress, in a show of bipartisan unity normally reserved for Mother's Day proclamations, acted to express their determination that the FTC must be permitted to proceed with the do-not-call program.[1] This strong support from the Congress and the President reflects the high value that Americans place on the privacy protections offered by the national registry.

This Court has cautioned against injunctions that block enforcement of a

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1 The bill, H.R. 3161, passed the House with 412 votes in favor, 8 opposed, and 14 not voting. 149 Cong. Rec. H8921 (daily ed. Sept. 25, 2003). In the Senate, 95 Senators voted in favor, and 5 were not present. 149 Cong. Rec. S11,966 (daily ed. Sept. 25, 2003). The President signed the bill on September 29, 2003. *See* White House Statement of September 29, 2003, available at <http://www.whitehouse.gov/news/releases/2003/09/20030929-10.html>.

law without due consideration for the public interests supporting the legislation. In *O Centro Espirita Beneficiente Uniao de Vegetal v. Ashcroft*, 314 F.3d 463 (10th Cir. 2002), the district court enjoined the government from enforcing the Controlled Substances Act as to use of a hallucinogenic substance for religious ceremonies. The government sought this Court's stay of that order pending appeal. *Id.* at 465. Recognizing that enforcement would burden the plaintiff's First Amendment right to the free exercise of religion, the Court nevertheless granted the stay. The Court recognized that "[t]he government suffers irreparable injury when its criminal laws are enjoined without adequately considering the unique legislative findings in this field." *Id.* at 467. The Court relied, in particular, on Congressional findings that the Controlled Substances Act was necessary to protect "the health and general welfare of the American people." *Id.* at 467 (quoting Controlled Substances Act).

Here, the impact of the district court's ruling is far more palpable. Though it is, of course, important to enforce laws that advance generalized public interests, the law at issue here does more, because it protects the interests of tens of millions of individuals who have turned to the government for help.

Indeed, it was the potential for such disruption that explains the remarkable *speed* with which Congress reacted to the Oklahoma decision. The new legislation was prepared, debated and enacted, all within 24 hours.

Congress's rapid response was a clear indication of the public interest, not just in the implementation of the national registry, but in having the entire Do Not Call program take effect *as planned, without delay*.

II.

THE PUBLIC INTEREST FAVORS ALLOWING THE FTC REGULATIONS TO TAKE EFFECT ON OCTOBER 1

If Congress's purpose had been simply to ensure that the do-not-call program would eventually take effect, it could have acted at a more normal legislative pace, or simply awaited an appeal of the original ruling. Instead, Congress acted quickly, because of a clear desire to see the do-not-call regulations take effect on the date promised to each of the individuals who registered more than 50 million residential telephone numbers. One after another, members of Congress rose to emphasize the importance of proceeding on October 1.

- "We in Congress must act quickly, because this registry is due to go into effect in just 1 week on October 1. . . . On October 1, let's make sure that the millions of Americans who want their privacy protected from these telemarketers are not disappointed." 149 Cong. Rec. S11,966 (daily ed. Sept. 25, 2003) (remarks of Sen. Feinstein)

- "Rather than waiting for an appeals court to overturn this wrongheaded decision, we must act quickly so that Americans do not have to suffer the needless and unwarranted intrusions into their lives by aggressive telemarketing. Unwanted telemarketing calls have reached unacceptable levels in our country. By one estimate, telemarketers attempt almost 105 million calls daily; implementation of the Do Not Call list would reduce these calls by almost 80 percent." 149 Cong. Rec. S11,965 (daily ed. Sept. 25, 2003) (remarks of Sen.

Burns).

- "The registry is scheduled to go into effect in less than one week. And we are here to make sure that it stays on schedule." 149 Cong. Rec. H8917 (daily ed. Sept. 25, 2003) (remarks of Rep. Dingell).

- "With the passage of this legislation, the Federal Trade Commission . . . will be able to implement its do-not-call registry without interruption or delay." 149 Cong. Rec. H8918 (daily ed. Sept. 25, 2003) (remarks of Rep. Tauzin.) *See also* Appendix B for additional legislative comments.

Through its prompt actions, and through the express statements of numerous members, Congress has recognized that any delay in the FTC's do-not-call program would be injurious to the public interest. Fifty million people were promised that the program, and the relief from unwanted telemarketing calls, would begin on October 1.

This Court protected against disruptions to the public in *Otero Savings and Loan Assoc. v. Federal Reserve Bank of Kansas City*, 665 F.2d 275 (10th Cir. 1981), in which this Court reviewed a preliminary injunction issued by the district court.[2] The district court's order had the effect of requiring the Federal Reserve Bank to continue to process checks issued by certain savings and loan associations; without the preliminary injunction, the savings and loans would have had to terminate service to 19,000 customers. Addressing the "public interest" factor, the

2 Though *Otero* concerned a preliminary injunction rather than a motion for stay pending appeal, this Court has recognized that the two types of motions rely

Court endorsed the district court's reasoning that the injunction favored the public interest "because it would prevent the disruption and confusion" to 19,000 customers. Here, a stay would prevent "disruption and confusion" of millions of people, each of whom was advised that do-not-call enforcement would commence on October 1, 2003.

Delay in the planned implementation would particularly burden members of the public in States which would already have had similar protections under state law, protections delayed in the name of cooperation with the federal government. California, for example, enacted legislation in 2001 to establish a state-operated do-not-call list, effective at the start of 2003. 2001 Cal. Stats. 2001 Ch. 695. California devoted considerable resources to develop the regulatory and technological infrastructure needed to create the list and enforce the prohibition on calls to the listed telephone numbers. While these preparations were underway, the Federal Trade Commission announced its proposal to establish and maintain a single national registry, and to work cooperatively with the States on enforcement efforts. Recognizing the opportunity to achieve more comprehensive protection through state-federal cooperation, California halted its preparations for a state-maintained list and opted to base its enforcement efforts on the national registry. *See* Cal. Sen. Bill No.

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on the same factors. *See O Centro*, 314 F.3d at 466.

33, 2003-2004 Legislative Session. Though this approach necessitated some delay from the original plan, the delay was thought acceptable because of the FTC's commitment to have the program operational by the Fall of 2003. Other states have acted similarly, and find themselves in the same difficult situation.

While states that have their own do-not-call laws and registries retain independent authority to enforce those laws, the district court's decision, if not stayed, means that Californians and residents of similarly situated States may be worse off than if the FTC and the Congress had never acted or requested state cooperation in the federal program. For example, under California's original plan, a state-maintained list would already be in effect, protecting Californians from unwanted intrusions. Unless this Court acts, states in the same position as California may have to return to their original plans, now much delayed. That outcome would cause states to incur additional expenses to operate registries, result in unnecessary administrative duplication, and inevitably make the States more cautious about future efforts to coordinate state and federal efforts.

III.

THE THREAT TO THE PUBLIC INTEREST OUTWEIGHS ANY BURDEN ON PLAINTIFFS

In balancing these important public interests against the interests of the plaintiffs, the Court should consider the impact of its own September 26, 2003 order in *Mainstream Marketing Services, Inc v. Federal Communications Comm'n*

(Docket No. 03-9571). As a result of that order, it is apparent that plaintiffs would not be injured in the least by a stay pending appeal. Plaintiffs will be prohibited by the FCC's regulations from making most telemarketing calls to telephone numbers listed on the national registry. There is no discernable additional burden if plaintiffs are also held to the FTC's nearly identical regulations.

Denial of the stay, however, would have a significant impact on the public interest. If the district court's order is not stayed as to the FTC, it may also hamper the ability of the FCC and the States to enforce their own laws and regulations. The do-not-call program reflects a high degree of inter-agency and inter-governmental cooperation and coordination. The FCC regulations, and the laws of several States, could be impaired if there is not a functioning FTC registry, and the FTC is expected to play central a role in administration and enforcement of the entire do-not-call program.

Respectfully submitted this _____ day of September, 2003

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CERTIFICATE OF SERVICE

This is to certify that on this _____ day of September, 2003 I have duly served the within Brief of Amici Curiae of certain States and Commonwealths in Support of Appellant's Emergency Motion for a Stay Pending Appeal herein by depositing copies of the same in the United States mail, first-class postage prepaid, at Denver, Colorado addressed as follows:

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