

MAINSTREAM MARKETING SERVICES V. FTC

358 F.3d 1228 (10th Cir. 2004)

The Tenth Circuit held that implementing an opt-in national do-not-call registry that restricts commercial sales calls is a valid commercial speech regulation and not barred by the First Amendment. The court noted that it was unsure of the constitutionality of such a registry if it were to restrict political or charitable callers.

The do-not-call registry is a product of regulations promulgated by the Federal Trade Commission and the Federal Communications Commission and allows for consumers to place their phone number on a list to prohibit commercial telemarketers from calling. Telemarketers are required to pay a fee to obtain the list and have three months to remove the numbers from their call lists. The restrictions of the registry apply only to calls made by or on behalf of sellers of goods or services, not to charitable or political fundraising calls. Numerous telemarketing companies and their trade association challenged the validity of the registry. After conflicting rulings in the district courts, the appeals were consolidated.

The Tenth Circuit upheld the do-not-call registry on all grounds. On the primary issue, validity under the First Amendment, the court found the registry to be a restriction on commercial speech and applied the *Central Hudson* test, which requires that a regulation on commercial speech be (1) narrowly tailored (2) to directly advance (3) a substantial government interest. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). The court held that enacting the do-not-call registry reasonably furthered the government interests of protecting the privacy of individuals in their homes and protecting consumers against the risk of fraudulent and abusive solicitation. The registry was narrowly tailored because it blocked calls that presented the type of problems the government was trying to avoid and because it was an opt-in program that protected those who had explicitly requested not to be called by telemarketers. Consumers who do not mind being contacted can refrain from placing their name on the list or affirmatively give consent to certain groups to receive calls. Likewise, telemarketers can still reach consumers through mailings or other advertisement and may even reach those on the registry with whom they have an established business relationship unless the consumer has requested to be placed on the company's do-not-call list. The court rejected a number of alternatives proposed by telemarketers to use a system of company-specific lists, finding these individual lists overly burdensome to consumers.

The court also found that the fee charged to obtain the lists is permissible because it defrays the cost of implementing, maintaining, and enforcing the registry, that the business relationship exception was not adopted in an arbitrary and capricious manner, and that the Federal Trade Commission had statutory authority to enact the national do-not-call registry.