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Opinion No. 03-011

Constitutionality of classification of political promotion calls as telemarketing/telephone solicitation

QUESTION

Can political promotion calls be constitutionally classified as telemarketing /telephone solicitation?

OPINION

The constitutionality of classification of political promotion calls as telemarketing or telephone solicitations depends on the purpose, application and context of the classification. Presently, Tennessee's laws specifically governing telemarketing and telephone solicitations apply only to purely commercial speech, not political promotional speech, which is non-commercial speech. Any proposed classification of political promotional calls as telemarketing or telephone solicitations through redefinition of those terms within Tennessee's consumer protection telemarketing regulatory scheme would be constitutionally suspect, unless the regulation of political speech triggered by the redefinition constitutes the least restrictive means available to protect a compelling state interest.

ANALYSIS

Tennessee's consumer protection telemarketing laws and no call rules do not classify political promotions calls as telemarketing or telephone solicitations. The Tennessee Consumer Protection Telemarketing Act of 1990 concerns commercial speech only. Tenn. Code Ann. § 47-18-1526(a)(4) provides:

> 'Telephonic sales call' means a call made by a telephone solicitor to a consumer, for the purpose of soliciting a sale of any consumer goods or services, or for the purpose of soliciting an extension of credit for consumer goods or services, or for the purpose of obtaining information that will or may be used by the solicitor or a third party

> for the direct solicitation of a sale of consumer goods or services or an extension of credit for such purposes or in connection with prizes, gifts or awards presentations;

Under this section, no telephonic sales call, as defined above, can be made to any residential, mobile or telephonic paging device telephone number unless the person or entity making the call has instituted procedures for maintaining a list of persons who do not wish to receive telephone solicitations made by or on behalf of that person or entity. *See* Tenn. Code Ann. § 47-18-1526(b). Additionally, if the telephone number of the caller is unlisted or if the caller is using telephone equipment which blocks the caller ID function of the phone called, no telephonic sales call can be made. Tenn.Code Ann. § 47-18-1526 (c)(1).

Tennessee's other telemarketing statute, Tenn. Code Ann. § 65-4-401 (no call rule) does not reach political promotional calls. Under Tenn. Code Ann. § 65-4-401(6)(A):

> 'Telephone soliciting' means any voice communication over a telephone originating from Tennessee or elsewhere that: (i) Promotes or encourages, directly or indirectly, the purchase of, rental of, or investment in property, goods, or services; (ii) Refers a residential subscriber to another person for the purpose of promoting or encouraging the purchase of, rental of, or investment in property, goods, or services; or (iii) Requests a charitable contribution except as provided for in subdivision (6)(B)(ii);

Tenn. Code Ann. § 65-4-402 mandates that any person or entity making a telephone solicitation to any residential subscriber in the state identify itself and the organization represented. Further, absent permission, telephone solicitations can only be made between 8 a.m. and 9 p.m. Circumvention of any caller ID service used by the residential subscriber is prohibited. Tenn. Code Ann. § 65-4-403. If a residential subscriber has given notice to the Tennessee Regulatory Authority of his or her objection to receiving telephone solicitations, in accordance with regulations, no person or entity can knowingly make or cause to be made any telephone solicitation to that subscriber. Tenn. Code Ann. § 65-4-404.

These consumer protection statutes, enacted to curb consumer fraud and abuse by telemarketers selling products, concern purely commercial transactions in the marketplace. The courts look to the natural and ordinary meaning of the language used in a statute, without forced or subtle construction, that would limit or extend the meaning of the language. *Carson Creek Vacation Resorts, Inc., v. State Department of Revenue,* 865 S.W.2d (Tenn. 1993). Where language within

the four corners of the statute is plain, clear and unambiguous and the enactment is within legislative competency, it is the courts' duty to obey and enforce the Act as written. *Id*. Consequently, Tennessee's telemarketing regulatory scheme as presently written does not apply to political promotional calls. Political promotional calls may be subject to other statutes, regulations or rules, *e.g.*, campaign finance laws, election laws.

Speech which merely proposes a commercial transaction has been, traditionally, subject to government regulation. *United States v. Edge Broad. Co.*, 509 U.S. 418, 426, 113 S. Ct. 2696, 125 L. Ed. 2d 345 (1993). In 1976, the Supreme Court held that commercial speech, usually defined as speech that does no more than propose a commercial transaction, is protected by the First Amendment. *Virginial State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* , 425 U.S. 748, 762, 96 S. Ct. 1817, 48 L. Ed.2d 346 (1976). However, commercial speech enjoys only a "limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 477, 109 S. Ct. 3028, 3033, 106 L. Ed.2d 388, 402 (1989). First Amendment doctrine and common sense have always supported a distinction between speech that supports a certain political view, *i.e*., political speech, and speech urging the purchase of a particular soft drink, *i.e*., commercial speech. *Transportation Alternatives, Inc., v. City of New York*, 218 F.Supp.2d 423 (S.D. N.Y. 2002).

Commercial speech is subject to modes of regulation that "might be impermissible in the realm of noncommercial expression." *Bowden Building Corporation v. Tennessee Real Estate Commission*, 15 S.W.3d 434, 444 (Tenn. Ct. App. 1999). Whether a communication combining noncommercial and commercial elements, *e.g*., political promotional call, can be classified as commercial speech depends on factors such as whether the communication is an advertisement, whether the communication makes reference to a specific product, and whether the speaker has an economic motivation for the communication. *Bolger v. Youngs Drug Products Corp*., 463 U.S. 60, 66, 103 S. Ct. 2875, 2880, 77 L. Ed. 2d 469 (1983). None of these factors alone renders the speech in question commercial; the presence of all three factors provides "strong support" for such a determination. *Id*. at 66-67, 103 S. Ct. at 2879-81. Political promotional calls, whether exchanging ideas, providing information regarding a candidate's positions, or asking for votes and/or money constitute, in our opinion, noncommercial, political speech. The fact that a candidate for public office or his campaign workers might solicit a financial contribution as well as a vote would not convert political promotional speech into commercial speech.

Ideological speech enjoys the greatest protection under the United States Constitution. *See Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S. Ct. 209, 215, 13 L. Ed. 2d 125 (1964) ("The First and Fourteenth Amendments embody our 'profound and national commitment to the principles that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'") (citations omitted). The constitutional guarantee of free speech "serves significant societal interests"

wholly apart from the speakers' interest in self-expression. *Pacific Gas & Electric Company v. Public Utilities Comm. of California, et al.*, 475 U.S. 1, 8, 106 S. Ct. 903, 907, 89 L. Ed. 2d 1 (1986) (relying on *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776, 98 S. Ct. 1407, 1415, 55 L. Ed.2d 707 (1978)). In *Pacific Gas*, the U.S. Supreme Court opined that by protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information. *Id*. at 106 S. Ct. 907. The Court discussed its earlier decisions in *First National Bank of Boston v. Bellotti*, *supra* (invalidating a state prohibition aimed at speech by corporations that sought to influence the outcome of a state referendum) and *Consolidated Edison Co., v. Public Service Comm'n of N.Y.*, 447 U.S. 530, 544, 100 S. Ct. 2326, 2337, 65 L. Ed. 2d 319 (1980) (invalidating state order prohibiting a privately owned utility company from discussing controversial political issues in its billing envelopes). In both of those cases, the Court's critical considerations were that the State sought to abridge speech that the First Amendment is designed to protect, and that such prohibitions limited the range of information and ideas to which the public is exposed. *Pacific Gas*, 106 S.Ct. 903, 907.

Information concerning matters of public concern is fully protected and implicitly encouraged by the First Amendment. *Thornhill v. Alabama*, 310 U.S. 88, 102, 60 S. Ct. 736, 743, 84 L. Ed. 1093 (1940). "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Burson v. Freeman*, 504 U.S. 191, 196, 112 S. Ct. 1846, 119 L. Ed. 5 (1992) (quoting *Mills v. Alabama*, 384 U.S. at 218, 86 S. Ct. at 1437). "For speech concerning public affairs is more than self-expression; it is the essence of self-government." 504 U.S. at 196 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S. Ct. 209, 216, 13 L. Ed. 2d 125 (1964)).

The prohibitions of the First Amendment of the U.S. Constitution and Article I, § 19 of Tennessee's constitution are not absolute. *Elrod v. Burns*, 427 U.S. 347, 360, 96 S.Ct. 2673, 49 L. Ed. 2d 547 (1979); *H.& L Messengers, Inc, v. City of Brentwood*, 577 S.W.2d 444 (Tenn. 1979). "Courts apply heightened scrutiny to restrictions on such cherished freedoms as political speech and religious expression, for which this country has 'marched our sons and daughters off to war,'" *People of Illinois v. Jones*, 702 N.E.2d 984, 988, 299 Ill.App.3d 739, 744 (1998) (citing *Young v. American MiniTheatres, Inc*., 427 U.S. 50, 70, 96 S.Ct. 2440, 2452, 49 L. Ed. 2d 310, 326 (1976)). Under a strict scrutiny test, traditionally applicable to non-commercial speech, any burden placed on free speech rights must be justified by a compelling State interest. The least intrusive means must be utilized by the State to achieve its goal, and the means chosen must bear a substantial relation to the interest being served by the statute in question. *Bemis Pentecostal Church v. State*, 731 S.W.2d 897, 903 (Tenn. 1987), *appeal dismissed*, 485 U.S. 930, 108 S.Ct. 1102, 99 L. Ed.2d 264 (1988), *rehearing denied*, 485 U.S. 1029, 108 S.Ct 1587, 99 L. Ed. 2d 902 (1988).

In assessing the constitutionality of any classification of political promotional speech (non-commercial speech) under the First Amendment, the initial step is to determine whether such a classification is content-neutral or content-based. *See Burson v. Freeman*, 504 U.S. 191, 112 S. Ct. 1846, 119 L. Ed. 2d 5 (1992). Restriction solely of political speech is content based. *Id*. at 196. Some content-based restrictions have been held to raise Fourteenth Amendment equal protection concerns because, in the course of regulating speech, such restrictions differentiate between types of speech. *See Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972) (exemption of labor picketing from ban on picketing near schools violates Fourteenth Amendment right to equal protection). The level of scrutiny applied to any proposed classification of political promotional speech as telemarketing for regulatory purposes likely would be exacting. *See Burson v. Freeman*, 504 U.S. 191, 198, 112 S. Ct. 1846, 1851, 119 L. Ed. 2d (1992). Under the strict scrutiny test, the State would be required to show that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id*. at 198. (citations omitted). The State would also have to demonstrate that the regulation of political speech or any classification of it is necessary to serve the asserted interest. *Id*. at 199. It is unlikely that a proposed classification of political promotional speech as telemarketing for regulatory purposes under our consumer protection statutory scheme would survive such scrutiny. Political promotional speech may be subject to other regulation, *e.g*., campaign finance laws and election laws.

In *Emison v. Catalano*, 951. Supp. 714, 722, (E.D. Tenn. 1996) the Court, relying on *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), recognized the "fundamental importance of the constitutional rights associated with speaking out in political campaigns, joining with other citizens in support of or in opposition to political issues and candidates, and making contributions and expenditures to support candidates and causes." *Id*. at 722. The court in *Emison* concluded that *non*-incumbent legislative candidates may not constitutionally be prohibited from campaign fund-raising while the legislature is in session. That is not to say, however, that a prohibition on fund-raising (by telephone solicitation or otherwise) by *incumbent* legislators during session would not be constitutionally defensible. *See* Op.Tenn.Atty.Gen. 00-011 (January 24, 2000).

In sum, it is the opinion of this office that any proposed classification of political promotional speech as telemarketing or telephone solicitation through redefinition of those terms, within the current consumer protection regulatory scheme, would be constitutionally suspect.

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