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Opinion No. 07-24

Constitutionality of Senate Bill 125

QUESTION

Whether Senate Bill 125, the "Tennesseans' Right-to-Privacy Act of 2007," violates the constitutionally protected free speech rights of persons making telephone solicitations?

OPINION

It is the opinion of this office that the proposed legislation, while raising significant issues regarding regulation of political speech, can be defended against claims that it violates the First Amendment interests of affected telephone solicitors.

ANALYSIS

I. The Proposed Legislation:

To address the growing problem of increased telephone solicitations and to allow Tennesseans to regain privacy and peacefulness from such intrusions into their homes, the General Assembly enacted the Tennessee Do-Not-Call Telephone Solicitation Law in 1999. Tenn. Code Ann. §§ 65-4-401 — 410 (2004 & Supp. 2006). The Do-Not-Call Law permits a subscriber of residential telephone service to enroll the subscriber's telephone number on a do-not-call list maintained by the Tennessee Regulatory Authority. The Do-Not-Call Law prohibits "telephone solicitation" of subscribers who are enrolled on the list. Thus, subscribers who choose to place their telephone numbers on the do-not-call list are protected from unwanted telephone solicitations that invade the privacy of their homes.

Senate Bill 125 would amend the definition of do-not-call "telephone solicitation" to:

1. Prohibit any voice communication over a telephone that requests a charitable or political contribution or other donation or gift;

2. Prohibit any communication over a telephone that utilizes automatic dialing-announcing equipment ("ADAD call") to effectuate a voice communication for any commercial, political, charitable, or other purpose;

3. Allow communications made by a local education agency or institution for the purpose of contacting current students, parents or guardians of current students, or officials or employees of the agency or institution; and

4. Allow communications made by a law enforcement or other public safety or health agency for the purpose of giving notification of an actual or threatened emergency.

Senate Bill 125 also would prohibit the following "telephone solicitations" that are permitted under the present Do-Not-Call Law:

1. Telephone solicitations by a bona fide member, volunteer, or direct employee of a not-for-profit organization exempt from paying taxes under I.R.C. § 501(c); and

2. Telephone solicitations by a direct employee of a business not engaged in telemarketing services if the communication is not made as part of a telemarketing campaign and if the business has a reasonable belief that the specific person who is receiving the voice communication is considering purchasing the service or product sold or leased by the business and the call is directed specifically to that person.

II. First Amendment Analysis:

Although the First Amendment guards stringently against governmental interference with the free exchange of ideas, it does not prevent private citizens from choosing not to listen to unwanted solicitations and communications, especially in their own homes. The proposed legislation advances and protects this privacy interest by restricting unwanted telephone calls that disturb the peacefulness of the home. By restricting telephone calls from political campaigners and candidates for public office, however, the proposed legislation affects political speech interests, which interests also are highly regarded and protected by the First Amendment. A survey of the case law did not reveal any controlling or persuasive authority weighing these equally important First Amendment interests under the circumstances presented in this case. Nonetheless, if the proposed legislation is enacted and subsequently challenged on First Amendment grounds, convincing arguments can be made that the First Amendment rights of speakers are not abridged when, as in this case, the state is acting merely to shield an unwilling listener from unwelcomed speech.

In deciding the First Amendment interests of speakers, the United States Supreme Court has recognized "the significant difference between state restrictions on a speaker's right to address a willing audience and those that protect listeners from unwanted communication." *Hill v. Colorado*, 530 U.S. 703, 715-716 (2000). The right of an unwilling listener to avoid unwelcomed communication is an aspect of the broader "right to be left alone." *Id.* at 716. The "right to be left alone" has been characterized as "the most comprehensive of rights and the right most valued by civilized men." *Id*. (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928)). "[N]o one has the right to press even 'good' ideas on an unwilling recipient." *Rowan v. United States Post Office Dept.*, 397 U.S. 728, 738 (1970).

There is also a recognizable privacy interest in avoiding unwelcomed communications. *Hill*, 530 U.S. at 716. This right to avoid unwelcomed speech applies with special force in the privacy of the home. *Rowan*, 397 U.S. at 738. The state may legislate to protect its citizens from such unwanted intrusions:

> The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.
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> One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different. That we are often "captives" outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere. Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.

Frisby v. Schultz, 487 U.S. 474, 484-485 (1988) (citations omitted).

Tennessee's Do-Not-Call Law protects the privacy of Tennesseans in their homes by facilitating the choice of individual listeners to restrict intrusive telephone solicitations by registering their telephone numbers on the do-not-call list. Through this registration, the individual sends a clear message that such communications are unwanted and unwelcomed in the home. State regulations that protect the right of the unwilling listener to avoid unwelcomed speech are constitutionally valid if they are subject to appropriate "time, place, and manner" regulation. *Hill*, 530 U.S. at 725-726. "Time, place, and manner" restrictions are not subject to strict scrutiny and are sustainable if they are content neutral and narrowly tailored to serve a substantial governmental interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

On the other hand, individual privacy rights are not the only concern in this case, for the proposed legislation also disturbs the speech interests of political campaigners and candidates for public office. If Senate Bill 125 is enacted, these speakers would not be permitted to solicit contributions by calling the telephone numbers that Tennesseans have registered on the do-not-call list; nor would they be allowed to use ADAD calls to reach these numbers for any political purpose.

"The First Amendment affords the broadest protection to . . . political expression in order to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995) (citation omitted). The United States Supreme Court further observed that a major purpose of the First Amendment was to protect a speaker's right to freely discuss governmental affairs, including candidates for public office, and that debates of such public issues "should be uninhibited, robust, and wide-open." *Id.* at 346 (citation omitted). Therefore, strict scrutiny is applied to state regulation of the content of political speech; such regulation will not be upheld as constitutional unless it is

narrowly tailored to serve an overriding state interest. *Id.* at 347.

Accordingly, a threshold question arises as to whether the proposed legislation regulates the telephone solicitations of political speakers without regard to their content or, alternatively, whether it regulates the content of such communications. The answer to this question determines whether the proposed legislation must survive a strict scrutiny standard of review or a more tolerant intermediate scrutiny standard. As stated in *Ward*:

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. A government regulation is content neutral if it can be justified without reference to the content of the regulated speech.

Ward, 491 U.S. at 791 (citations omitted). There are arguments that these criteria are satisfied in this case.

The proposed legislation does not regulate speech on the basis of any governmental disagreement with the content of a telephone solicitor's message. With respect to the communications proscribed by the legislation, the do-not-call restrictions apply equally to all telephone solicitors, regardless of viewpoint and content of speech. The Do-Not-Call Law, moreover, was adopted to protect the right of Tennesseans to free themselves from unwanted intrusions that disturb the peacefulness and privacy of their homes, notwithstanding the particular content of the solicitations.

The fact that the Do-Not-Call Law exempts certain groups from its regulation is a factor that must be considered, but it is not necessarily fatal to the argument that the legislation is content neutral. For instance, in *Bland v. Fessler*, 88 F.3d 729, 733-734 (9th Cir. 1996), *cert. denied*, 519 U.S. 1009 (1996), the Ninth Circuit Court of Appeals found a California statute restricting ADAD calls, which contained statutory exemptions for educational institutions and public safety officials, to be content neutral because the exemptions were not based strictly on content but on existing relationships implying consent to receive the calls, or messages the subscriber wanted to hear, or both. This "existing relationship" rationale provides a credible basis for maintaining that the proposed legislation is content neutral despite its exemptions for certain calls from educational institutions and public safety and health officials.

The content-neutrality of a Minnesota statute restricting ADAD calls was examined in *Van Bergen v. Minnesota*, 59 F.3d 1541, 1550 (8th Cir. 1995). Although not directly on point, this case is of special interest because it dealt with the regulation of telephone calls within the context of political speech concerns. In *Van Bergen*, the Eighth Circuit Court of Appeals determined that a statute that restricted a gubernatorial candidate from placing ADAD calls to reach potential voters

was content neutral because it applied broadly to all callers and because the statutory exemptions, which are analogous to Tennessee's, were based on an existing relationship between the caller and the subscriber that implied the subscriber's consent to receive the call. *Id.* at 1550. The *Van Bergen* court ultimately held that the statute was constitutional even though it restricted the political speech interests of a candidate for public office. *Id.* at 1556. However, there are at least two distinguishing characteristics between the circumstances in *Van Bergen* and the proposed legislation that could cause a reviewing court to conclude that Senate Bill 125 constitutes content-based regulation of speech.

First, the statute under consideration in *Van Bergen* did not prohibit live operator telephone calls for the purpose of obtaining consent from subscribers to receive an ADAD message. *Van Bergen*, 59 F.3d at 1551. Thus, the *Van Bergen* court reasoned that the delivery of all messages was based on the expressed or implied consent of the subscriber to receive them rather than their content. *Id.* There is no similar provision in the Tennessee legislation for a live caller to obtain the consent of the subscriber to receive a telephone message. But, *Van Bergen* was not a do-not-call list case. An opportunity-for-consent provision probably is unnecessary in the Tennessee legislation because the subscriber's voluntary registration on the do-not-call list impliedly denies the subscriber's consent to receive the caller's message.[1] An additional point in support of the content-neutral argument is that requiring such a provision would defeat the primary purpose of the Do-Not-Call Law, which is to prevent unwelcomed telephone calls that disturb the privacy of the home.

Second, *Van Bergen* was an ADAD call case that did not address the rights of political campaigners and candidates to solicit contributions via live telephone calls. The proposed legislation, however, would prohibit live telephone calls requesting political contributions but apparently would allow such calls for other political purposes. It is arguable that this distinction constitutes content-based regulation of speech because the proposed legislation limits permissible calls to certain types of messages. A speaker's right to engage the public in political and social debate, as well as to seek support from them for the advancement of the speaker's views, certainly implicates First Amendment freedoms. For instance, in *Martin v. Struthers*, 319 U.S. 141, 147-148 (1943), the United States Supreme Court held that a speaker's right to knock or ring at the door of a household outweighed the governmental interest in residential privacy. The Court concluded that the householder, as opposed to the government, should decide whether to listen to the speaker's message. *Id.* In balancing the speech interests of door-to-door speakers with the residential privacy interests of householders, the Court emphasized that governmental regulation was unwarranted because householders could protect their interests by posting a "no solicitation" sign on the door. *Id.* at 148.

Although there are plausible grounds for a reviewing court to conclude that the proposed

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[1] With respect to persons already enrolled on the do-not-call list as of the date the proposed legislation becomes effective, they may, of course, remove themselves from the list if they wish to receive the types of messages prohibited by the bill. The arguments in defense of the proposed legislation would be strengthened if the bill were amended to require persons already on the do-not-call list to give their assent to the expanded categories of proscribed communications.

legislation regulates speech based on its content, such a conclusion is not assured. A key factor that militates in favor of sustaining the content-neutrality position is that the subscriber, not the government, consents to either listen or not through the subscriber's voluntary decision regarding registration of the subscriber's number on the do-not-call list. It can be argued reasonably that the subscriber's do-not-call registration is akin to the householder's posting of the "no solicitation" sign alluded to in *Martin v. Struthers*. *Martin*, 319 U.S. at 148. Furthermore, a regulation that serves a purpose unrelated to the content of speech, which the Do-Not-Call Law unquestionably does, is deemed content neutral even if it has an incidental effect on some speakers or messages but not others. *Ward*, 491 U.S. at 791.

Nevertheless, if a reviewing court determined that the proposed legislation constitutes content-based regulation of political speech, the chances of its being upheld would diminish. In such cases, the regulation of speech is subjected to exacting scrutiny and is sustained only if it is narrowly tailored to serve an overriding governmental interest. *McIntyre*, 514 U.S. at 347. An overriding interest must be compelling, and there must be no less restrictive means available to achieve it. *Id.* The protection of residential privacy rights is an important state interest, but restraining political speech strikes at the core of First Amendment values. If the proposed legislation were subjected to strict scrutiny, the position that it is constitutional would be more difficult to argue.

If, however, a reviewing court determined that the proposed legislation is content neutral (and, as set forth above, there are strong arguments that it is), it likely would be declared constitutional because the applicable standard of review is much less rigorous than the standard for content-based regulations. Content neutral regulations of speech are sustainable if they serve a substantial governmental interest and are narrowly tailored. *Ward*, 491 U.S. at 791. "[W]hen a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal." *Hill*, 530 U.S. at 726.

Residential privacy is a substantial governmental interest, which interest the state may legislate to protect. *Frisby*, 487 U.S. at 484-485. The expressed legislative purpose of the Do-Not-Call Law, as amended by the proposed legislation, is to promote and protect residential privacy. Also, the proposed legislation does not entirely foreclose any means of communication. Solicitors may still convey their messages through, for example, door-to-door distribution of information, multi-media advertisements, bulk mailings, and street leaflets, posters and signs. *See Van Bergen*, 59 F.3d at 1556; *Bland*, 88 F.3d at 736. And, significantly, solicitors may still conduct telephone solicitations of individuals who want to receive them. Only those individuals who have chosen not to be disturbed in their homes by unwelcomed solicitations are off limits. Thus, the Do-Not-Call Law would appear to satisfy the tailoring requirement for content neutral regulations because it does not restrain speech directed to the home of a willing listener.

Reviewing courts have found that other do-not-call regulations pose no First Amendment problems when subjected to intermediate scrutiny standards. The national do-not-call registry, created in 2003 by the Federal Trade Commission and the Federal Communications Commission, has survived a First Amendment claim that it violated commercial free speech rights. The national

do-not-call registry regulations are similar to Tennessee's in that they both prohibit most commercial telemarketers from calling telephone numbers that consumers have registered on a do-not-call list. In *Mainstream Marketing Services, Inc. v. Federal Trade Comm'n*, 358 F.3d 1228, 1246 (10th Cir. 2004), *cert. denied*, 543 U.S. 812 (2004), the Tenth Circuit Court of Appeals held that the national registry's regulations were consistent with the limits the First Amendment imposes on laws restricting commercial speech. Similarly, a Federal Trade Commission regulation that restricted charitable solicitations of individuals who registered their telephone numbers on a charity-specific do-not-call list, was found to strike the proper balance between the speech interests of charities and the need to protect the public from excessive intrusions into the home. *National Federation of the Blind v. Federal Trade Comm'n*, 420 F.3d 331, 351 (4th Cir. 2005), *cert. denied*, 126 S.Ct. 2058 (2006).

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