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October 2, 2008

Opinion No. 08-151

Constitutionality of State Welcome Center Brochure Policy

QUESTIONS

1. Is the State Welcome Center Brochure Policy, which was created by the Tennessee Department of Tourist Development to govern the approval process for the display of promotional materials in Tennessee Welcome Centers and Rest Areas, constitutional?

2. May the Tennessee Department of Tourist Development deny placement of the Christian Heritage Center=s brochures in Tennessee=s Welcome Centers?

OPINIONS

1. Yes, the State Welcome Center Brochure Policy, governing the approval process for the display of promotional materials in Tennessee State Welcome Centers and Rest Areas, is constitutional as a reasonable regulation of expression in a non-public forum.

2. Yes, insofar as the brochure is one proscribed by the Policy, and the Tennessee Department of Tourist Development applies its Policy to the brochure in a way that is viewpoint neutral, not arbitrary, capricious, or invidious.

ANALYSIS

Title 4 of the Tennessee Code creates and establishes the Department of Tourist Development (Athe Department@). *See* Tenn. Code Ann. ' 4-3-2201. The statute has created the Tourism Division within the Department. *See* Tenn. Code Ann. ' 4-3-2204. The Tourism Division:

> shall promote new investment in the tourist industry, provide comprehensive services to existing tourist enterprises, promote in other states the attractions of Tennessee, distribute Tennessee informational publications and supervise the system of welcome centers in the state.

Tenn. Code Ann. ' 4-3-2204(b).

The Department is instructed to pursue the following goals:

> (a) It is the intent of the state to promote and facilitate Tennessee=s natural beauty and bountiful attractions. To the extent permitted by federal laws and regulations and the requirements of the federal highway administrator, all welcome centers supervised by the department may have photographs, posters, maps, music, books and other items that illustrate Tennessee=s unique heritage and wealth of endeavors, from the historic to the peculiar, the traditional to the frivolous. Each welcome center may place an emphasis on events and sites that are within a fifty-mile radius within Tennessee.
>
> (b) The commissioner of tourist development shall develop promotional content and train staff members regarding all aspects of Tennessee life that are endearing to its citizens and captivating to its visitors. Emphasis may be placed on hidden treasures that a casual observer might miss, including natural sites such as waterfalls and caves, and man-made sites such as museums, seasonal events, and community celebrations. The commissioner of tourist development is encouraged to make Tennessee=s welcome centers a place for travelers to enjoy and linger as tired limbs are stretched and eyes are rested.

Tenn. Code Ann. ' 4-3-2209.

The Department=s commissioner shall:

> (1) Collect, compile and distribute literature as to the facilities, advantages and attractions of the state, the historic, recreational and scenic points and places of interest within the state and the transportation and highway facilities of the state;
>
> (2) Plan and conduct a program of information and publicity designed to attract to the state tourists, visitors and other interested persons from outside the state, and also encourage and coordinate the efforts of other public and private organizations or groups of citizens to publicize the facilities and attractions of the state for the same purposes;
>
> (3) Publicize the material and economic advantages of the state that render it a desirable place for business and residence; and
>
> (4) Carry on such educational programs as are necessary to familiarize the people of the state with the scenic, historical, industrial, recreational and agricultural advantages or needs of the state.

Tenn. Code Ann. ' 4-3-2206(a). To carry out these purposes and goals, the commissioner is authorized in relevant part to:

> (1) Form contracts with agencies of any type or wherever situated, that will tend to promote the objectives of advertising Tennessee to nonresidents;
>
> (2) Gather and compile, in accordance with the rules, regulations, policies and procedures of the state publications committee, information from branches of the state government and others, that will promote authentic information for advertising purposes.

Tenn. Code Ann. ' ' 4-3-2206(b)(1) and (2).

To implement its statutory initiatives, the Department has created, by rule, the Tennessee Welcome Center Division (ATWCD@). *See* Tenn. Comp. R. & Regs. 1670-4-1-.01. The TWCD Aoperates 13 Welcome Centers along the interstate highway system in Tennessee. Each of the Welcome Centers is equipped with a toll-free telephone system allowing travelers to make hotel, motel, and campground reservations anywhere in Tennessee.@ *http://state.tn.us/tourdev/index.html.* Additionally, Athe Welcome Centers provide tourist information . . . in our competitive effort with the other southeastern states to sell tourists to visit in the State of Tennessee.@ Tenn. Comp. R. & Regs. 1670-4-1-.01.

Both the Welcome Centers and Rest Areas[1] located on the interstate highways throughout Tennessee display various printed promotional materials (Abrochures@) that require the TWCD=s

[1]Safety Rest Areas are located throughout the interstate system and are defined by federal statute as:

> an area where motor vehicle operators can park their vehicles and rest, where food, fuel, and lodging services are not available, and that is located on a segment of highway with respect to which the Secretary determines there is a shortage of public and private areas at which motor vehicle operators can park their vehicles

approval prior to their placement in the Welcome Centers= and Rest Areas= brochure racks. Approval is subject to the TWDC=s Brochure Policy. *See* TWCD C Brochure Policy (APolicy@), p. 1.[2] The Policy prohibits ASolicitation of any kind for any purpose . . . including the distribution or dissemination of literature and materials, except as provided for in the guidelines stated below.@ *See* Policy, p. 1.

The Policy permits A[a]ny Tennessee tourist attraction or tourism-related business@ to seek approval for the placement of its brochures in Welcome Centers and Rest Areas and requires the organization seeking approval to make a written request to the Department of Tourist Development including two copies of the relevant brochure. *See* Policy, p. 1. Moreover, the display of all brochures is subject to space availability and must Apromote **TENNESSEE** and furnish pertinent information to visitors about Tennessee points of interest.@ *See* Policy, p. 2. Specifically, A[b]rochures on hotels, motels, campgrounds, and restaurants must contain 100% Tennessee information. All other brochures must contain at least 85% Tennessee information.@ *See* Policy, p. 3. For approval, brochures Ashould bear an in-state heading@ (emphasis omitted) and are subject to size, shape, and grammar requirements. *See* Policy, p. 2-3. Finally, brochures containing coupons or discounts must contain the expiration date and all applicable restrictions. *See* Policy, p. 3.

In addition to these minimum requirements, the Policy enumerates specific APublications Not Approved@ that it proscribes from display and distribution if:

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and rest.

National Highway System Designation Act of 1995, Pub. L. No. 104-59, S. 440, 104th Cong. ' 310(a) (1995) (codified as amended at 23 U.S.C. ' 131 (1995)). Federal law further permits State transportation departments to:

> permit information directories and advertising pamphlets to be made available at safety rest areas. Subject to the approval of the Secretary, a State may also establish information centers at safety rest areas and other travel information systems within the rights-of-way for the purpose of informing the public of places of interest within the State and providing such other information as a State may consider desirable.

National Highway System Designation Act of 1995, 23 U.S.C. ' 131 (1995).

[2] The Tennessee Welcome Center Division=s Brochure Policy can be found on the Internet at http://www.tnvacation.com/industry/Welcome%20Center%20Policy.pdf.

1. The brochure is devoted to the advertisement of real estate.
2. The brochure promotes membership.
3. The brochure promotes time-share. This includes establishments that do not rent to the traveling public daily or those establishments that offer a gift or discount in exchange for attendance at a sales presentation or discount.
4. The brochure is political or promotes religious beliefs in nature or content.
5. The brochure depicts something obscene or contains offensive language or pictures that could be defined by the Department as being in bad taste.
6. Advertising has been sold on the basis that is [sic] would be displayed or distributed through the Centers without permission of the Department of Tourist Development. Publications should contact the Department of Tourist Development, Welcome Center Division, before selling advertising and make a presentation on the content, design, distribution, etc. of the publication.
7. The brochure represents a property that has changed names since the brochure was originally printed and approved.
8. The brochure has a coupon with a special rate or discount but has no expiration date. No expiration dates or rates will be altered by Center personnel or approved if handwritten.
9. The brochure does not advertise and publicize the tourist attractions, natural resources, history or tourism industry of the State of Tennessee.
10. The brochure exclusively promotes gambling casinos.
11. The brochure represents a property for which the Department has received many complaints.
12. The brochure has classified ads.
13. The brochure advertises or promotes an out-of-state mail order web site.
14. The brochure has expired coupons. They will be pulled from the racks and/or center.

See Policy, p. 4.

In the event that a brochure is not approved for display and distribution, the requesting organization will be notified of the decision in writing, and Welcome Center staff may retain the brochure as reference material in answering visitor inquiries. *See* Policy, p. 3.

1. You have specifically asked whether the Policy to approve brochures for display and distribution at Welcome Centers and Rest Areas is constitutional. The answer requires an application of the First Amendment to the United States Constitution to the Policy.

The First Amendment to the United States Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

In *Perry Education Association v. Perry Local Educators= Association*, 460 U.S. 37 (1983), the Supreme Court addressed the applicability of the First Amendment to the state=s restriction of expression on government property. AThe existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.@ *Id.* at 44. The *Perry* Court engaged in a two-part analysis, first requiring a determination of the character of government property: public fora, fora made public by designation, or non-public fora. *Id.* at 45-46. The second part of the analysis, the level of scrutiny applied to the challenged restriction of expression, was determined by the type of fora. *Id*.

A. Determination of Forum

Government property categorized as public fora are those Aplaces which by long tradition or by government fiat have been devoted to assembly and debate,@ exemplified by Astreets and parks which >have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.=@ *Perry*, 460 U.S. at 45 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). Expression in the traditional public forum is afforded the greatest level of protection, and governmental restriction upon such expression is subject to the highest level of scrutiny:

> For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Id. (citations omitted).

The second category of government property, fora made public by designation, is that which the government Ahas opened for use by the public as a place for expressive activity.@ *Perry*, 460 U.S. at 45. Examples of designated public fora include university meeting facilities and municipal theaters. *See Widmar v. Vincent*, 454 U.S. 263 (1981); *see also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). State restrictions upon expression in a designated public forum are subject to the same scrutiny and review as restrictions in the traditional public forum. *Perry*, 460 U.S. at 46.

Finally, the third type of government property is the non-public forum. The AFirst Amendment does not guarantee access to property simply because it is owned or controlled by the government.@ *United States Postal Service v. Greenburgh Civic Ass'n*, 453 U.S. 114, 129 (1981). Non-public fora are those in which Athe principal function of the property would be disrupted by expressive activity.@ *Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788, 804 (1985). The Supreme Court has found non-public fora on military bases, *Greer v. Spock*, 424 U.S. 828 (1976), jails and prisons, *Adderley v. Florida*, 385 U.S. 39 (1966), and *Jones v. North Carolina Prisoners= Union*, 433 U.S. 119 (1977), and the advertising space made available on city public transportation, *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). State restrictions upon speech in the non-public forum need only be Areasonable in light of the purpose which the forum at issue serves.@ *Sentinel Comm. Co. v. Watts*, 936 F.2d 1189, 1205 (11th Cir. 1991), quoting *Perry*, 460 U.S. at 49.

To determine the constitutionality of the TWCD=s Policy for approving brochures for display and distribution at State Welcome Centers and Rest Areas, it is first necessary to determine the category of forum into which Welcome Centers and Rest Areas fall. The Eleventh Circuit Court of Appeals has addressed this issue in *Sentinel Comm.*, 936 F.2d at 1207. In that case, a newspaper publisher challenged Florida=s approval scheme for the placement of newsracks at interstate rest areas. The court examined the purpose and nature of the rest areas and concluded that they are non-public fora. *Id.* at 1204.

First, the court determined that rest areas, despite their topographical similarities to municipal parks, are not traditional public fora for expressive activity. *See Sentinel Comm.*, 936 F.2d at 1203-1204. A[S]afety rest areas are hardly the kind of public property that has >by long tradition or by governmental fiat . . . been devoted to assembly and debate.=@ *Id.* at 1204 (citing *Perry*, 460 U.S. at 45.) The court summarized the purpose of rest areas thusly:

> Safety rest areas are off-roadway spaces with provisions for emergency stopping and resting by motorists for short periods. They have freeway-type entrance and exit connections, parking areas, benches and tables and usually have toilets and water supply, where proper maintenance and supervision are assured. They may be designed for short-time picnic use in addition to parking of vehicles for short periods. They are not to be planned for use as local parks.

Id. (citing *A Guide on Safety Rest Areas for the National System of Interstate and Defense Highways 2*, AAASHO (1968)) (emphasis omitted).

Moreover, the court recognized that some forms of expressive activity take place at these rest areas but rejected the argument that this amounted to a designation of a public forum by the government. A[T]he practice of allowing some speech activity on interstate property does not amount to the dedication of such property to speech activities.@ *Id.*, citation omitted. AThat such activity occurs in the context of the forum created does not imply that the forum thereby becomes

a public forum for First Amendment purposes.@ *Cornelius*, 473 U.S. at 805. Because rest areas are neither traditional public fora, nor specifically designated to provide an expressive forum, the court held that they are non-public fora. *Sentinel Comm.*, 936 F.2d at 1204.

Similarly, the Ninth Circuit in *Jacobson v. Bonine*, 123 F.3d 1272, 1274 (9th Cir. 1997), held that rest areas and their surrounding walkways are non-public fora. *Jacobson* involved a magazine publisher who challenged the constitutionality of a fee charged by the state of Arizona for distributing magazines via coin-operated news racks located at Arizona rest stops. The court agreed with the *Sentinel Comm.* court that rest stops are not traditional public fora, in that they Aare relatively modern creations that have never existed independently of the Interstate System; they are optional appendages that are intended, as part of the System, to facilitate safe and efficient travel by motorists along the System=s highways.@ *Id.* at 1274 (quotations omitted). In concluding that rest stop areas are non-public fora, the court additionally rejected the argument that rest areas have been designated by the government as public fora:

> Although people may sit down and relax at interstate rest stop areas, to talk or read a newspaper, as a break from travel, the government did not dedicate the property for First Amendment activity.

Id.

Accordingly, the Tennessee State Welcome Centers and Rest Areas, which have been described as Aa place for travelers to enjoy and linger as tired limbs are stretched and eyes are rested,@ Tenn. Code Ann. ' 4-3-2209(b), would likely be classified as non-public fora subject to reasonable State restrictions of expression. *See also Jacobsen v. Howard*, 109 F.3d 1268 (8th Cir. 1997) (plaintiff concedes and the court assumes as correct the district court=s decision that rest areas were non-public fora).

B. Reasonableness of Restriction

In a non-public forum, the State may restrict the time, place, and manner of expression:

> [D]istinctions [of time, place, and manner] may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.

Perry, 460 U.S. 37 at 49.

In general, content-based State restrictions of speech are prohibited. *Davenport v. Washington Educ. Ass=n*, 127 S.Ct. 2372, 2380 (2007). However, Ait is also black-letter law that, when the government permits speech on government property that is a nonpublic forum, it can exclude speakers on the basis of their subject matter, so long as the distinctions drawn are

viewpoint neutral and reasonable in light of the purpose served by the forum.@ *Id*. In *Lehman v. City of Shaker Heights*, the Supreme Court upheld a ban upon all speech related to political advertising appearing on city buses, which the Court deemed not a public forum, as a permissible restriction upon subject matter. 418 U.S. 298, 304 (1974). Again, in *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, the Supreme Court found constitutional the prohibition of political campaign signs on utility poles in a non-public forum. 466 U.S. 789, 815 (1984). The Court found that the regulation restricted all political subject matter and in no way sought to Aregulate speech in ways that favor[ed] some viewpoint or ideas at the expense of others.@ *Id.* at 804-805. Accordingly, the State may restrict the time, place, and manner of expression made in a non-public forum, and the restrictions may be based on the subject matter of the speech, provided that the restrictions are Areasonable and not an effort to suppress expression merely because public officials oppose the speaker=s view.@ *Perry*, 460 U.S. at 46.

Here, the non-public fora at issue are the Welcome Centers and Rest Areas. The TWDC=s Policy seeks to regulate access to the brochure racks located on government property. For the Policy to be constitutional, it need only be Areasonable in light of the purpose which the forum at issue serves.@ *Sentinel Comm.*, 936 F.2d at 1205, quoting *Perry*, 460 U.S. at 49. Also, the Policy=s restrictions may prohibit certain subject matter, but the restrictions must be viewpoint neutral. *Cornelius*, 473 U.S. at 812.

The stated purpose of the Welcome Centers and Rest Areas is to provide Aa place for travelers to enjoy and linger as tired limbs are stretched and eyes are rested,@ Tenn. Code Ann. ' 4-3-2209(b). To facilitate this goal, the Department has undertaken to use the Welcome Centers and Rest Areas Ato promote and facilitate Tennessee=s natural beauty and bountiful attractions.@ Tenn. Code Ann. ' 4-3-2209(a). The brochure racks, in particular, are used, as permitted by federal law, to display Aphotographs, posters, maps, music, books and other items that illustrate Tennessee=s unique heritage and wealth of endeavors, from the historic to the peculiar, the traditional to the frivolous.@ Tenn. Code Ann. ' 4-3-2209 (a). Hence, the Policy, insofar as it requires the subject matter of the promotional materials displayed in its brochure racks to truthfully Apromote **TENNESSEE** and furnish pertinent information to visitors about Tennessee points of interest,@ Policy, p. 2, is reasonably related to the Department=s statutory goals of using the State Welcome Centers and Rest Areas Ato promote and facilitate Tennessee=s natural beauty and bountiful attractions.@ Tenn. Code Ann. ' 4-3-2209(a). Accordingly, the Policy=s restrictions on the content of materials displayed in the brochure racks would likely be held constitutional.

Utilizing the same analysis, the Policy=s outright prohibition of specific subject matter would also be constitutional. *See* TWDC=s Policy, p. 4. AContent-based exclusions of speech in a non-public forum need only be viewpoint neutral and reasonable in relation to the forum=s purpose. *See N.Y. Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 128 (2d Cir.), cert. denied, 525 U.S. 824, 119 S.Ct. 68, 142 L.Ed.2d 53 (1998).@ *Hotel Employees & Restaurant Employees Union, Local 100 of New York, N.Y. & Vicinity, AFL CIO v. City of New York Department of Parks & Recreation*, 311 F.3d 534, 553 (2nd Cir. 2002). The restrictions stated in the Policy do not attempt to restrict expression based on the viewpoint of the speaker, only on the subject matter of

the speech. Because the prohibited content would not further the Department=s goal of promoting the state and its attractions, these restrictions would likely be reasonable and accordingly would not run afoul of the First Amendment.[3]

2. You have also asked whether it is constitutional to deny placement of the Christian Heritage Center=s brochures in Tennessee=s Welcome Centers. The Christian Heritage Center is located on the Campus of Crown College in Powell, Tennessee.[4] It is described as a museum Adedicated to continuing our Christian Heritage. Displayed within its halls are vivid testimonies to the lives and ministries of men and women who served Christ through Bible preaching, pioneering in world evangelism, writing Christ-honoring music, as well as other avenues of service.@ *Id.* It should be noted that the brochure has not been provided to this Office.

In general, application of the TWCD=s Policy must not be Aarbitrary, capricious, or invidious.@ *Lehman*, 418 U.S. at 303. Therefore, should the TWDC determine that this brochure is one proscribed by the Policy, *i.e.*, it contains expired coupons, does not publicize Tennessee history, it *promotes* religious beliefs in nature or content, or it fails to meet the criteria for size and shape, *etc.*, the TWCD may decline to display the material. However, refusal to display the brochure because the religious viewpoint held by the applicants is Christianity, as opposed to another religious viewpoint, *e.g.*, Judaism or Buddhism, would be unconstitutional.

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[3]For the reasons previously stated, the Policy would also likely be constitutional if subjected to analysis under the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court in *Perry* held that absent a fundamental right of access to the government property, speech discrimination would be constitutional provided that it was rationally related to the state=s legitimate interest, an analysis essentially identical to the First Amendment analysis. *Perry*, 460 U.S. at 54. The Court concluded that because there was no fundamental right of access to what it had determined was a non-public forum, Athe state may draw distinctions which relate to the special purpose for which the property is used.@ *Id.* at 54. Because the Court had already determined that the speech restriction was reasonably related to the state=s legitimate interest, it found no merit to the Equal Protection argument. *Id.* at 54. Likewise here, because the Rest Areas and Welcome Centers are non-public fora, applicants for brochure placement would have no fundamental right of access to the brochure racks on the government property. Therefore, the policy=s speech restrictions would likely satisfy the Equal Protection Clause under a rational basis analysis.

[4]*See http://www.thecrowncollege.com/ChristianHeritageCenter/.*

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