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Opinion No. 13-100

Constitutionality of Proposed "Local Government Interference Protection Act"

QUESTION

Do the provisions of Senate Bill 965/House Bill 540 of the 108th Tennessee General Assembly, 1st Sess. (2013), as amended in the Tennessee House of Representatives (hereinafter "SB965") violate the United States or Tennessee Constitutions?

OPINION

Yes. The provisions of SB965 imposing pre-litigation requirements for claims alleging "establishment clause" violations under the Tennessee Constitution would violate the right of freedom of worship provision of Article I, Section 3 of the Tennessee Constitution and the open access to courts provision of Article I, Section 17 of the Tennessee Constitution. The provisions creating a criminal offense prohibiting certain communications would violate the First Amendment to the United States Constitution and Article I, Section 19, of the Tennessee Constitution and would be void for vagueness under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[1] This response pretermits the need to examine any other possible constitutional issues with SB965.

ANALYSIS

SB965[2] would amend Tennessee Code Annotated, Title 29, relative to "Remedies and Special Proceedings" in judicial proceedings, by adding a new chapter called the "Local Government Interference Protection Act." SB965, Section 5(a)(1), specifies:

[1] This Office cannot anticipate all possible factual situations in which SB965, if enacted, might be applied or any "as applied" constitutional challenges that might develop. See generally Waters v. Farr, 291 S.W.3d 873, 922-23 (Tenn. 2009) (Koch, J., concurring in part and dissenting in part) (discussing distinctions between "as applied" and "facial" constitutional challenges). Accordingly, such "as applied" challenges are outside the scope of this opinion.

[2] A copy of SB965 and the amendment are attached to this opinion. The amendment has been introduced and adopted in the Tennessee House of Representatives but has not yet been introduced in the Tennessee Senate. See http://www.legislature.state.tn.us/.

> At least sixty (60) days prior to any claimant filing an establishment clause claim against a local government unit or local government servant, the claimant or the claimant's attorney shall provide written notice [by certified mail, return receipt requested] of the potential claim to the local government unit or local public servant who the claimant intends to name as a defendant. No such action shall be commenced until such notice has been provided. [3]

The written notice shall state: (A) the state constitutional provision alleged to be violated; (B) the specific facts that constitute the alleged violation of the constitutional provision; (C) that the local government unit or local public servant has a sixty-day period in which to respond, and; (D) that the local government unit or local public servant "should contact legal counsel regarding any questions about the notice or the local government unit or local public servant's rights under state law." *Id.* at Section 5(a)(3).[4]

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[3] Section 5(a)(1) applies only to establishment clause claims arising under the Tennessee Constitution and does not cover any federal constitutional claims. More specifically, Section 4 provides the following definitions for the act:

> (1) "Claimant" means any person asserting an alleged violation of the establishment clause without or prior to filing an establishment clause claim, or any person filing an establishment clause claim against a local government unit or local public servant;
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> (2) "Establishment clause" means the portion of article 1, section 3 of the constitution of Tennessee that prohibits laws respecting an establishment of religion or mode of worship;
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> (3) "Establishment clause claim" or "claim" means any allegation or contention asserted in support of or in opposition to any complaint, lawsuit, or other pleading filed in any state or federal court of this state, and which claim alleges a violation of the establishment clause;
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> (4) "Local government unit" means any municipality, county, including any county having a metropolitan form of government, or school district in this state. "Local government unit" includes any governing body, court, board, commission, committee or department of a municipality, county, or school district; [and]
>
> (5) "Local public servant" means any official, employee, member, or agent of a local government unit[.]

[4] Section 5 also specifies:

> (f) Notices provided pursuant to this section shall not be used to request the production of documents for purposes of litigation or to request public records from the local government unit or local public servant.

In general, the Tennessee Public Records Act, codified at Tenn. Code Ann. §§ 10-7-101 to -702, does not look at the intent of the person requesting production of public records. To the extent this provision may be interpreted as prohibiting only persons who may intend to pursue a State "establishment clause" claim from requesting and obtaining otherwise public records from a local government unit or local public servant separately from the required notice to be given pursuant to Section 5(a)(1), it is constitutionally suspect. *See generally Amelkin v. McClure*, 330 F.3d 822, 828 (6th Cir. 2003) (noting that a state public records "statute would also be constitutionally suspect if it had singled out a small group for unfavorable treatment based either on the content or the viewpoint of the group's speech").

The local government unit or local public servant is provided a response time following the notice during which no establishment clause lawsuit may be initiated in a Tennessee state or federal court. SB965, Section 5(b), specifies:

> (b) Beginning with the date of notice, the local government unit or local public servant shall have sixty (60) days to respond by certified mail, return receipt requested, to the claimant, and shall state one (1) of the following:
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> (1) That a policy, practice, action or custom will be altered, or a resolution or written policy will be implemented, to bring the local government unit or local public servant into compliance with the establishment clause;
>
> (2) That the local government unit or local public servant challenges the validity of the alleged violation. The local government unit or local public servant may also state a rebuttal to the allegations;
>
> (3) That the alleged violation identified by the claimant is the same or similar to previous alleged violations that have been corrected to comply with the establishment clause, and that the policy, practice, action or custom has been altered, or a resolution or written policy has been implemented, to bring the local policy, practice, action or custom into compliance. The local government unit or local public servant shall also attach evidence that verifies the policy, practice, action or custom; or
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> (4) That the alleged violation is the same as a previous allegation that was determined not to be a violation.

SB965, Section 5 then provides:

> (1) If the local government unit or local public servant responds in the manner described in subdivision (b)(1), the local government unit or local public servant shall have one hundred twenty (120) days to alter its policy, practice, action or custom, or implement a resolution or written policy, to bring the policy, practice, action or custom into compliance with the establishment clause.
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> (2) If, within the one-hundred twenty-day period, the local government unit or local public servant has not taken action described by subdivision (b)(1) to bring the policy, practice, action or custom into compliance with the establishment clause, the claimant may file an establishment clause claim; provided, that the claimant submits the affidavit and accompanying documentation required by Section 6 of this act.
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> (3)(A) *If the local government unit or local public servant has taken action described by subdivision (b)(1) within the one-hundred twenty-day period*

> *prescribed by subdivision (c)(1), no establishment clause claim may be brought against the local government unit or local public servant.*
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> (B)(i) If the local government unit or local public servant takes action as described in subdivision (b)(1) in response to a written notice and the claimant disputes the constitutional validity of the action taken, the claimant shall send a second written notice by certified mail, return receipt requested, stating why the claimant believes the action taken fails to correct the alleged violation. The local government unit or local public servant shall have an additional thirty (30) days after the date of the second written notice to bring the policy, practice, action or custom into compliance with the establishment clause.
>
> (ii) If, within the thirty-day period, the local government unit or local public servant does not take action as described in subdivision (b)(1), the claimant may file an establishment clause claim; provided, that the claim submits the affidavit and accompanying documentation pursuant to Section 6 of this act.
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> (iii) *If the local government unit or local public servant takes action described in subdivision (b)(1) within the thirty-day period prescribed by subdivision (c)(3)(B)(i), no claim may be brought against the local government unit or local public servant.*
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> (4) If a claimant files an establishment clause claim prior to the expiration of the one-hundred twenty day period, or otherwise fails to comply with the requirements of this section or Section 6 of this act, the claimant shall not be entitled to receive, and the court shall order the claimant to pay, any litigation expenses, including attorney's fees, discretionary costs, and other costs.

SB965, § 5(c) (emphasis added). Section 5(d) provides that "[i]f the local government unit or local public servant responds pursuant to subdivision (b)(2) [that it challenges the validity of the alleged violation], the claimant may file an establishment clause claim, subject to any applicable statute of limitations,[5] any time after receipt of the response by the local government unit or local public servant."

Section 6(a) requires that any claimant or claimant's attorney filing a United States Constitution Establishment Clause claim must file an affidavit certifying and documenting that the statutory notice required by Section 5 was provided, along with a:

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[5] Section 5(e) alters the applicable statute of limitations by providing that:

> When notice is provided pursuant to this section, the statute of limitations applicable to any action asserting an establishment clause claim shall be extended for a period of one hundred fifty (150) days from the date of expiration of the statute of limitations.

> list of all lawsuits alleging violations of that portion of the first amendment to the United States constitution that prohibits laws respecting an establishment of religion, or article 1, section 3 of the constitution of Tennessee, or both, previously filed by the claimant and the claimant's attorney against other local government units or local public servants in this state within the previous twenty-four (24) months, which shall set forth the final disposition of these prior lawsuits, and if dismissed, the grounds for the dismissal[.]

SB965, § 6(a)(2)(A).

Turning to whether SB965 is constitutional, Article I, Section 3, of the Tennessee Constitution provides a right of freedom of worship:

> That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship.

Similar to the First Amendment's Establishment Clause, which prohibits laws "respecting an establishment of religion," the Tennessee Constitution's counterpart, contained in Article I, Section 3, prohibits giving a "preference . . . by law to any religious establishment or mode of worship." "Even though Tenn. Const. art. I, § 3, is 'practically synonymous' with the First Amendment [of the United States Constitution], the [Tennessee Supreme] Court has also observed that it contains a substantially stronger guaranty of religious freedom." *Martin v. Beer Board for City of Dickson*, 908 S.W.2d 941, 946 (Tenn. Ct. App. 1995) (upholding prohibition of selling beer on Sunday as not violating Tenn. Const. art. I, § 3). Tennessee courts nonetheless typically apply the same criteria as the United States Supreme Court in its federal Establishment Clause cases when addressing alleged violations of the Tennessee Constitution's counterpart. *Id.* at 949-51.

SB965 would establish certain pre-litigation "notice of claim" and governmental response time requirements, as well as other procedural requirements, which would be applicable only to a "claimant" who is asserting an allegation in a judicial proceeding that a local government unit or local public servant has engaged in action which is violative of Article I, Section 3 of the Tennessee Constitution. SB965 does not and could not apply to allegations in federal or state judicial proceedings that the actions of a local governmental unit or local public servant violate the Establishment Clause of the First Amendment of the United States Constitution. *See Felder v. Casey*, 487 U.S. 131, 139-53 (1988) (holding that state-law notice-of-claim statutes are preempted by the Supremacy Clause with respect to federal civil rights actions brought in state court pursuant to 42 U.S.C. § 1983); *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496, 512-516 (1982) (holding that exhaustion of state administration remedies is not a prerequisite to bringing an action under 42 U.S.C. § 1983).

SB965 is applicable only to claimants asserting a violation of the rights guaranteed by Article I, Section 3, of the Tennessee Constitution allegedly committed by a local government unit or a local public servant. It is without question that the free exercise of religion as reflected in the establishment clauses of the Tennessee and United States Constitutions is a fundamental constitutional right. *See, e.g., Johnson v. Robinson,* 415 U.S. 361, 375 n. 14 (1974) (court recognizing that "[u]nquestionably, the free exercise of religion is a fundamental constitutional right"). SB965 seeks to delay litigation by persons alleging a violation of this constitutional right under the Tennessee Constitution. Thus, an equal protection analysis of SB965 requires strict scrutiny of this legislative classification that interferes with the exercise of a fundamental right. *See State v. Tester,* 879 S.W.2d 823, 827-28 (Tenn. 1994). *Cf. Jackson v. HCA Health Services of Tennessee, Inc., d/b/a Centennial Medical Center, et al,* No. M2011-00582-COA-R3-CV (Tenn. Ct. App. April 18, 2012) (finding that requiring a certificate of good faith to be filed by plaintiffs in medical malpractice actions to be constitutional under a rational-basis test, as no fundamental right was involved in those tort cases). A legislative enactment reviewed under a strict scrutiny analysis will only be sustained if a state can demonstrate a compelling state interest and that the statute is narrowly tailored to meet the state's compelling interest. *Grutter v. Bollinger,* 539 U.S. 306, 333 (2003); *Shaw v. Hunt,* 517 U.S. 899, 908 (1996); *Doe v. Norris,* 751 S.W.2d 834, 842 (Tenn. 1988).

SB965 would not be sustained under a strict scrutiny review. SB965 sets forth the rationale supporting its enactment, stating that "the increase in lawsuits challenging prayer and invocations in public meetings and the display of historical documents has resulted in rising legal costs, including substantial attorney fee awards to plaintiffs, incurred by local governments to defend against such claims." SB965 § 3(7). The purpose of SB975 is "to create a safe harbor for local governments desiring to avoid needless litigation and to encourage them to adopt a resolution, a written policy governing invocation practices to the extent permissible under the Establishment Clause." *Id.* § 3(9). The goal of SB965 is to reduce "the threat of costly litigation expenses, and the potential loss of taxpayer money, resulting from ['establishment clause'] claims [that] seriously interferes with the efficient and economical operation of local governments." *Id.* § 3(8).

Reducing local government litigation expenses is unlikely to constitute a compelling state interest. *Cf. Shapiro v. Thompson,* 394 U.S. 618, 633 (1969) (stating that the "saving of welfare costs cannot justify an otherwise invidious classification"). Even assuming that reducing local government litigation costs may be found to constitute a compelling state interest, the provisions of SB965 are not narrowly tailored to accomplish that goal without interfering with a person's constitutional right to access to the courts to challenge an alleged violation of his or her free exercise of religion.[6] While SB965, Section 3, refers to concerns regarding lawsuits challenging

[6] The Tennessee Constitution provides:

> That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered *without sale, denial, or delay*. Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct.

Tenn. Const. art. I, § 17 (emphasis added).

prayer and invocations in public meetings and the display of historical documents, SB965 is not limited only to those specific challenges, but encompasses *any* judicial claim involving alleged violations by a local government of Article I, Section 3 of the Tennessee Constitution. Moreover, a substantial number of claimants asserting violations of Tennessee's "establishment clause" would likely assert immediate and irrevocable harm from the alleged violation.

Litigants asserting other types of legal claims who allege immediate and irrevocable harm may seek a temporary restraining order or temporary injunction from an appropriate court. Tenn. R. Civ. P. 65.[7] Courts have found that a demonstration of a likelihood of success on an alleged violation of a fundamental constitutional right, with a chilling effect on protected activity, may be sufficient to demonstrate immediate and irrevocable harm for purposes of granting preliminary injunctive relief. *See generally Elrod v. Burns*, 427 U.S. 347, 373 (1976) (noting that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 298-302 (D.C. Cir. 2006) (employing *Elrod* in finding that the Navy's alleged practice of giving denominational preference in violation of the Establishment Clause to certain chaplains constituted irreparable harm for purposes of issuing a preliminary injunction); *Baker v. Adams County/Ohio Valley School Board*, 310 F.3d 927, 929-30 (6th Cir. 2002) (citing *Elrod* when denying a stay pending appeal and noting the harm to high school students subjected to a continuing Establishment Clause violation from Ten Commandment displays in schools).

Furthermore, denying only claimants asserting "establishment clause" violations the ability to seek immediate judicial relief may result in those claimants being denied any effective relief as the alleged violations may have been completed during the pre-litigation notice and governmental response time. For example a particular objectionable prayer practice may have been scheduled for a graduation ceremony, sporting event, or other local governmental event that occurs during the notice and governmental response time. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 592-98 (1992) (finding that public school's inclusion of a "nonsectarian" prayer in voluntary school-graduation ceremony constituted impermissible establishment of religion in violation of Establishment Clause by coercing student to stand and remain silent during giving of prayer); *Doe v. Pittsylvania County, Va.*, 842 F.Supp 2d 927, 934-35 (W.D. Va. 2012) (finding irreparable harm to justify preliminary injunctive relief for claimant who regularly had

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[7] Tenn. R. Civ. P. 65.04(2) provides:

> A temporary injunction may be granted during the pendency of an action if it is clearly shown by verified complaint, affidavit or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action, or that the acts or omissions of the adverse party will tend to render such final judgment ineffectual.

Tenn. R. Civ. P. 65.03(1) authorizes a court to issue a temporary restraining order without notice to the adverse party in certain specified circumstances where it is clearly shown that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party can be heard in opposition.

unwelcome contact with Christian prayers routinely utilized to open county board meetings). A claimant may allege a violation due to the manner of presenting a holiday display, which may be removed after the holidays but before the end of the notice and governmental response time. *See ACLU of Illinois v. City of St. Charles*, 794 F.2d 265, 274-75 (7th Cir. 1986) (noting, in the context of challenging a city's display of a lighted Latin cross during Christmas season, that "[i]f preliminary injunctions were not available in cases [by persons with proper standing] to enforce the establishment clause, government might be able to erode the values the clause protects with a flood of temporary or intermittent infringements"). Removing the ability of a claimant to obtain immediate judicial relief regarding State "establishment clause" violations may also effectively deny that claimant meaningful access to the courts because Tennessee law does not recognize an implied private cause of action for damages based upon violations of the Tennessee Constitution. *Bowden Bldg. Corp. v. Tennessee Real Estate Comm'n*, 15 S.W.3d 434, 446 (Tenn. Ct. App. 1999); *Lee v. Ladd*, 834 S.W.2d 323, 324 (Tenn. Ct. App. 1992). *See Boling v. Gibson County*, No. 05-1129-T-AN, 2005 WL 1936299, at *2 (Tenn. Ct. App. Aug. 1, 2005). *See also Overstreet v. Lexington-Fayette Urban Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) (noting that irreparable harm is typically present if the harm "is not fully compensable by monetary damages").

SB965 provides that any State "establishment clause" claim shall, upon motion, be "dismissed with prejudice" if "the notice of claim is not provided" and documented, or if:

> The claim is duplicative of, or is the same or similar to, any count or contention in any lawsuit alleging violations of that portion of the first amendment to the United States constitution that prohibits laws respecting an establishment of religion, or article 1, section 3 of the constitution of Tennessee, or both, previously filed by the claimant *or the claimant's attorney* against other local government units or local public servants in this state within the previous twenty four (24) months, and all of the previous lawsuits were dismissed on the ground that the claimant failed to establish that there was no set of circumstances under which the challenged policy, practice, action or custom may be implemented in a manner that comports with the establishment clause of the constitution of the United States or this state.

SB965 § 6(c)(3) (emphasis added). Mandatory dismissal, with prejudice, of an "establishment clause" claim based upon the foregoing vague provision would constitutionally interfere with a claimant's constitutional right of access to the courts to assert an alleged constitutional violation. *See* Tenn. Const. art. I, § 17. The mandatory dismissal is required not only due to prior litigation by this particular claimant, but even due to prior litigation by the attorney chosen by the current claimant. In contrast to the situation where sanctions are imposed after a violation of Tennessee Rule of Civil Procedure 11 ("Rule 11") has been demonstrated due to repeated, frivolous, and vexatious litigation, there does not appear to exist a sufficient governmental interest in imposing such a mandatory dismissal *only* in cases wherein the claimant is asserting violations of the State "establishment clause." *See Hooker v. Sundquist*, 150 S.W.3d 406 (Tenn. Ct. App. 2004) (imposing a pre-litigation screening mechanism of short duration for a claimant-attorney for undisputed history of filing repetitious or frivolous lawsuits in violation of Rule 11). The requirements of Rule 11, pertaining to deterring abuse in the litigation process, are applicable in State "establishment clause" cases, just as in all other State-court litigation.

SB965 also creates a new criminal offense at Tenn. Code Ann. § 39-16-517. SB965 § 7. In doing so, SB965 incorporates the definitions of "local government" and "local public servant" utilized for the foregoing civil procedures. *Id.* § 7(a). SB965 then creates the following new offense:

> A person commits an offense who intentionally, without or prior to the filing of a complaint, lawsuit, or other legal action in any state court communicates, in writing or by electronic communication, with a local government unit or local public servant in an offensively repetitious manner with the intent to influence, persuade, or induce the local government unit or local public servant to terminate, halt or cease a particular policy, practice, action or custom and the person:
>
> (1) (A) Intends the communication to be a threat of initiating legal action against the local government unit or local public servant challenging the particular policy, practice, action or custom, and a reasonable person would perceive the communication to be a threat of initiating legal action; or
>
> (B) Makes a threat within the communication to initiate legal action against the local government unit or local public servant challenging the policy, practice, action or custom; and
>
> (2) Makes the communication knowing that it will alarm or annoy the local government unit or local public servant.

Id. at § 7(b). A violation of this provision is a Class C misdemeanor, punishable only by a fine of up to $2,500.00. *Id.* at § 7(a).

This criminal offense is facially unconstitutional as violative of the First Amendment of the United States Constitution and the right to freedom of speech under Article I, Section 19, of the Tennessee Constitution. In contrast to the prohibitions upheld in the general criminal harassment statute, *see* Tenn. Code Ann. § 39-17-308, the offense created by Section 7 is a content-based restriction on speech involving matters of public concern, namely a person advising a local government official that he or she will consider initiating legal action to halt or cease a particular local government policy or action. Regulations based upon the content of speech are presumptively invalid. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1982). Content-based restrictions on speech are subject to analysis under the strict-scrutiny test, which requires that a law advances a compelling state interest and is narrowly tailored to achieve that interest. *See, e.g., id.; State v. Smoky Mountain Secrets, Inc.*, 937 S.W.2d 905, 911 (Tenn. 1996); *Bemis Pentecostal Church v. State*, 731 S.W.2d 897, 903 (Tenn. 1987). There is no compelling state interest in a local governmental entity or local public servant being free from receiving written or electronic communications regarding a matter of public interest that includes a threat of initiating legal action and that may "alarm or annoy the local government unit or local public servant" as provided in Section 7 of SB965. *See Coates v. City of Cincinnati*, 402 U.S. 611, 615

(1971) (holding unconstitutional Cincinnati ordinance that made it unlawful for three or more persons to assemble on any public sidewalk and conduct themselves in a manner "annoying" to persons passing by, with the United States Supreme Court explaining in part that the "First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly because its exercise may be 'annoying' to some people").

Section 7, as amended, is also constitutionally invalid under federal due process standards as being "void for vagueness" because this provision fails to adequately define its prohibitions (such as what comprises "an offensively repetitious manner" and when the person should know "that it will alarm or annoy the local government unit or local public servant" in the context of "threatening" litigation) and what communication constitutes a violation. As the United States Supreme Court has observed:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined . . . . First, . . . laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. . . . Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.

Grayned v. City of Rockford, 408 U.S. 104, 108-10 (1972). *See also City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *Coates v. City of Cincinnati*, 402 U.S. at 613-15. As this provision criminalizes speech that involves a matter of public concern, the more stringent standard for specificity applies because the vagueness may chill constitutionally protected speech. *See Davis-Kidd Booksellers, Inc. v. McWhether*, 866 S.W.2d 520, 531-33 (Tenn. 1993); *contrast State v. Lakatos*, 900 S.W.2d 699, 700-03 (Tenn. Crim. App. 1994) (upholding convictions for violating the telephone harassment statute, Tenn. Code Ann. 39-17-308(a)(2), rejecting free speech and vagueness challenges).

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