IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 98-4158

AMERICAN TARGET ADVERTISING, INC.,
Plaintiff-Appellant,

v.

FRANCINE A. GIANI,
Defendant-Appellee.

BRIEF AMICUS CURIAE OF THE FREE SPEECH DEFENSE AND EDUCATION FUND, ET AL. IN SUPPORT OF APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION
Case No. 2:97-CV-610B

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STATEMENT OF INTEREST OF THE FREE SPEECH DEFENSE AND EDUCATION FUND, INC. AND ITS CO-*AMICI CURIAE*

This *Amicus Curiae* Brief is submitted on behalf of the Free Speech Defense and Education Fund, Inc. ("FSDEF"), a nonprofit educational organization dedicated to the defense of First Amendment rights. FSDEF, incorporated in 1995 in Maryland, is a nonpartisan educational organization exempt under section 501(c)(3) of the Internal Revenue Code ("IRC").

Joining as co-*amicus* is the Free Speech Coalition, Inc. (McLean, Virginia), a nonpartisan section 501(c)(4) organization dedicated to the protection of constitutional rights, including freedom of speech. Its members include nonprofit organizations which communicate and solicit contributions throughout the country, as well as for-profit firms that assist such nonprofits.

Joining as co-*amici* are the following IRC section 501(c)(3) charitable/educational organizations that use direct mail nationally as part of their educational and fundraising efforts:

- American Center for Law & Justice (Washington, DC)
- American Studies Center (Washington, DC)
- Americans Back in Charge Foundation (Washington, DC)
- America's Future Inc. (St. Louis, MO)
- Citizens United Foundation (Fairfax, VA)
- The Claremont Institute (Claremont, CA)
- Free Congress Research & Education Foundation (Washington, DC)
- The Lincoln Institute for Research and Education, Inc. (Washington, DC)
- Local Government Council (Washington, DC)
- National Center for Cardiac Information (Burke, VA)
- Policy Analysis Center (Burke, VA)
- Second Amendment Foundation (Bellevue, WA)
- United States Equestrian Team, Inc. (Gladstone, NJ)
- United States Taxpayers Institute (Vienna, VA)
- Young America's Foundation (Herndon, VA)

Also joining as co-*amici* are the following IRC section 501(c)(4) social welfare organizations (also considered "charities" under the Utah Act) that use direct mail nationally as part of their educational and fundraising efforts:

- American Conservative Union (Alexandria, VA)

- Christian Coalition (Chesapeake, VA)
- Citizens United (Fairfax, VA)
- Council for Government Reform (Annandale, VA)
- Council of Volunteer Americans, Inc. (Annandale, VA)
- The Seniors Coalition (Fairfax, VA)
- 60 Plus Association (Arlington, VA)
- TREA Senior Citizens League (Alexandria, VA)
- United Seniors Association Inc. (Fairfax, VA)

Finally, joining as co-*amici* are the following for-profit organizations, direct mail agencies assisting nonprofit organizations with their educational and fundraising program:

- Concepts Direct, Inc. (Richmond, VA)
- The Delta Group USA, Inc. (Annandale, VA)
- Morgan-Meredith & Associates (Chantilly, VA)
- Richard Norman Company (Reston, VA)
- Squire & Heartfield Direct, Inc. (Oakton, VA)
- Stephen Winchell & Associates (Arlington, VA)

Like countless organizations throughout the nation, FSDEF and its co-*amici* have a strong interest in the matters raised in this litigation.[1] Utah's Charitable Solicitations Act, as applied in this case, adversely affects the exercise of First Amendment rights, imposing a prior restraint on the dissemination of ideas. In addition, Utah's Act reaches beyond its borders and controls the out-of-state activities of out-of-state nonprofits and their fundraising consultants.

As other states have similar statutes, FSDEF and its co-amici face cumulative regulatory and tax barriers, which have substantial and adverse impact on their First Amendment rights. Since this Nation was founded, Americans have been free to communicate on public policy issues with fellow citizens in every state. Any state regulation that chills such communication — including mass mailings generated by using modern technology, and periodicals, including

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[1] Counsel for these *amici* sought and obtained the written consent of the parties to the filing of this *amicus curiae* brief. Copies of the letters evidencing the parties' consent appear as Appendix D. *See* Fed.R.App.P. 29.

newsletters — strikes at the fundamental right of Americans to speak and to assemble and consult with others to exercise more effectively their rights of association and petition.

ISSUES PRESENTED

1. Did the District Court err in holding that the Utah Act, as applied, does not violate appellant's right to Due Process of Law?

2. Did the District Court err in holding that the Utah Act, as applied, does not violate appellant's rights under the Commerce Clause?

3. Did the District Court err in holding that the Utah Act does not violate appellant's First Amendment rights to freedom of speech, press, association and petition?

STATEMENT OF THE CASE

The Utah Charitable Solicitations Act ("the Utah Act") regulates and requires the licensure of out-of-state professional fundraising counsel ("PFCs") who advise nonresident organizations soliciting charitable contributions in Utah. Under the Act, PFCs must (i) apply for a state license, file various documents, and make certain disclosures to the Utah Division of Consumer Protection, (ii) pay a $250 annual registration fee (license tax), and (iii) secure a $25,000 bond or letter of credit. If they do not obtain a Utah state license, their clients are not permitted to use the U.S. Mail to communicate with to residents of Utah while, even incidentally, soliciting contributions. *See* Utah Code Ann., sec. 13-22-1, *et seq.* (1953, Supp. 1997).

Appellant American Target Advertising, Inc. ("ATA"), a Virginia for-profit corporation, provides consulting services to nonprofit organizations that use direct mail to communicate with and solicit funds from the general public. ATA was retained by Judicial Watch, a nonprofit organization incorporated and operating in the District of Columbia, to plan, manage, counsel and prepare materials relating to Judicial Watch's program to disseminate public policy

information and ideas to, and solicit funds from, the American public. When Judicial Watch applied to register under the Utah Act, the application was denied because ATA had not registered with the Utah Division of Consumer Protection.[2]

ATA filed suit against the Director of Utah's Division of Consumer Protection, seeking, *inter alia*, injunctive relief against enforcement of the Act. Following limited discovery, the parties filed cross-motions for summary judgment. On August 18, 1998, the District Court sustained the Utah Act in its entirety and ordered that ATA's suit be dismissed.

SUMMARY OF ARGUMENT

Utah's Charitable Solicitations Act, as applied to ATA, violates ATA's Due Process rights. There is simply no nexus between ATA and Utah justifying any licensing jurisdiction over ATA whatsoever. There is no evidence that ATA "purposefully directed" any activities to take place in Utah, nor that ATA established any presence in Utah at all.

Utah's Act, as applied to ATA, also violates ATA's rights under the Commerce Clause. There is no "substantial nexus" between ATA and Utah justifying any tax or regulation of ATA whatsoever. Furthermore, the Utah Act imposes an excessive burden upon ATA's interstate operations without redounding to any legitimate benefit to the State.

Utah's Act also violates ATA's First and Fourteenth Amendment rights. It imposes a discriminatory prior restraint upon nonprofit solicitors and the residents of Utah. It also grants unconstitutional discretion to Utah government authorities.

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[2] Later, the Division of Consumer Protection granted Judicial Watch a license contingent on its agreement not to correspond with Utah residents using materials developed with any assistance from ATA.

ARGUMENT

I. THE UTAH ACT, AS APPLIED TO ATA, VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

The court below found "that American Target has 'purposely directed' its fundraising efforts toward residents of [Utah]." Based solely upon that finding, and relying exclusively upon Burger King Corp. v. Rudcewicz, 471 U.S. 462 (1985), the district judge ruled that "American Target [having] established minimum contacts with the State of Utah so as to subject itself to the jurisdiction of Utah courts..., Utah may therefore require American Target to submit to the requirements of the Utah Charitable Solicitations Act without violating the Due Process Clause of the Fourteenth Amendment." Slip op. p. 18. This ruling is clearly erroneous.

As the U.S. Supreme Court observed in Quill Corp. v. North Dakota, 504 U.S. 298 (1992), a state regulation or tax is not justified where an out-of-state business has merely "purposefully directed its activities" towards that state's residents. Rather, there must **also** be evidence that the out-of-state business (as opposed to a client of the out-of-state business) has engaged "in continuous and widespread solicitation of business within a State" (or in other activities comparable in magnitude), and that the tax (or regulation) imposed be "related to the benefits" that the out-of-state business "receives from access to the State." Only after finding **all three** factors — **not just the one** erroneously found by the court below — did the Court rule in Quill that the Due Process Clause "does not bar enforcement of that State's use tax." *Id.*, 504 U.S. at 308.

As concurring Justice Antonin Scalia explained, the Quill ruling did not "mean that the due process standards for adjudicative jurisdiction and those for legislative (or prescriptive) jurisdiction are necessarily identical...." *Id.*, 504 U.S. at 319-20. To illustrate this point, Justice

Scalia cited two previous Court decisions: Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987), and American Oil Company v. Neill, 380 U.S. 451 (1965).

In Asahi, an "adjudicative jurisdiction" case, the Court applied the "purposely directed" test, ruling that a foreign company's "mere awareness" that its product might be sold in the forum state did not meet the Burger King requirement of Due Process. 480 U.S. at 105, 108-12. By contrast, in American Oil, a "legislative jurisdiction" case, the Court applied a more rigorous formula. In addition to its review of the "foreseeability" that a company's goods would enter the taxing state, the court also examined whether the company had contributed to that entry by other acts within the state. Finding that it had not, the Court ruled that the state's excise tax on a transaction that took place wholly outside the state violated the company's due process rights. 380 U.S. at 457-59. Since this case involves legislative jurisdiction, the Due Process standard in Quill and American Oil applies in this case, not the standard in Burger King.

A. ATA Did Not Have a Taxable or Regulatory Presence in Utah

The district court erred in ignoring the fact that ATA had no contacts with Utah. While it was "reasonably foreseeable" that ATA's assistance to Judicial Watch would result in Judicial Watch's communications to Utah residents, foreseeability does not meet the "purposeful direction" requirement of the first prong of the three-part Quill test. *See* Asahi, *supra*, 480 U.S. at 108-112. Nor have ATA's actions met either of the other two prongs of that test.

In Quill, the Court ruled that a state may tax an out-of-state business that has engaged in "continuous and widespread business within a State" (*e.g.,* by sending its "catalogues" or its "drummers" into that state). ATA has not engaged in any such activity. Judicial Watch, not ATA, makes the decision to send solicitation mailings, some of which go to Utah. Judicial Watch sends those mailings on its own behalf, certainly not as a "drummer" for ATA. Thus, no

evidence exists that ATA has made any contact whatsoever with the state of Utah, much less engaged in the "magnitude" of contacts required by the Quill Due Process test.

Likewise, even though required by Quill, Utah has introduced absolutely no evidence that it offers "benefits" to ATA that are related in any way to the burdens that would be imposed on ATA should it be required to register under the Utah law. Utah seeks to force ATA to register, thereby imposing an impermissible extraterritorial regulatory burden on ATA. In American Oil, the U.S. Supreme Court struck down Idaho's imposition of an excise tax upon an out-of-state sale of motor fuel that was later to be shipped into Idaho. The Court found the imposition of the tax unconstitutional because "it was applied to a sale made outside Idaho" and because there were no in-state activities that "contributed in any way to the procurement or performance" of the out-of-state sale. American Oil, *supra*, 380 U.S. at 455, 459.

American Oil applies with equal force in this case. The contract between Judicial Watch and ATA was made and performed in Virginia. Neither entity engaged in activity in Utah that contributed to either the "procurement" or the "performance" of that contract. Anticipation that this contract could result in Judicial Watch determining to mail some of its solicitations to Utah is not sufficient to establish the required Due Process nexus. *Id.*, 380 U.S. at 455.

B. ATA Did Not "Purposefully Direct" Solicitations Into Utah

Even if the Burger King Due Process standard were applied, Utah still lacks jurisdiction to regulate ATA. The dispute in Burger King grew directly out of a contract which had a substantial connection with Florida, the forum state. Burger King, *supra*, 471 U.S. at 479. Defendant "entered into a carefully structured 20-year relationship that envisioned continuing and wide-reaching contracts with Burger King in Florida" involving "long-term and exacting regulation of his business from Burger King's Miami headquarters" and providing that disputes

would be governed by Florida law. *Id*. at 480. Defendant thereby "purposefully availed himself of the benefits and protections of Florida's laws." *Id*. at 481-82.

By contrast, this case involves a business relationship between a District of Columbia corporation (Judicial Watch) and a Virginia corporation (ATA) which did not involve "continuing and wide-reaching contacts with" Utah. The relationship between Judicial Watch and ATA had nothing to do with the State of Utah or with Utah law. Serving Judicial Watch only in an advisory capacity, ATA did not control Judicial Watch's mailing of First Amendment-protected communications to Utah residents. Thus, the fundraising efforts were those of Judicial Watch, not ATA. At most, ATA was "merely aware" that some of Judicial Watch's mailings would end up in Utah mailboxes. Awareness, standing alone, is not sufficient to meet Burger King's Due Process standard. Asahi, *supra*, 480 U.S. at 105, 108-112.

Such is the law of this Circuit. "Mere foreseeability...is not a sufficient benchmark for exercising personal jurisdiction.... There must be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Trierweiler v. Croxton and Trench Holding Corp., 90 F.3d 1523, 1534 (10th Cir. 1996). Purposeful availment "requires actions by the Defendant which 'create a **substantial connection** with the forum state.'" OMI Holdings v. Royal Insurance, 149 F.3d 1086, 1998 U.S. App. LEXIS 14717 at *11 (10th Cir. 1998) (emphasis added). Under this test, courts must examine "the quantity and quality" of contacts with the forum state, a task not undertaken by the court below. As the Trierweiler court ruled, "'[p]urposeful availment analysis turns upon whether the defendant's contacts are attributable to his own actions [and generally] requires...affirmative conduct by the defendant which allows or promotes the transaction of business within the forum state.'" 90 F.3d at 1535.

II. AS APPLIED TO ATA, THE UTAH ACT VIOLATES THE COMMERCE CLAUSE

The court below misapplied the U.S. Supreme Court's tests determining whether the Utah Act violates the Commerce Clause. It found that the Act does not directly regulate interstate commerce because it subjects ATA "to Utah regulations only to the extent that it provides consulting services in connection with charitable solicitations in Utah" and because that regulation "does not have the "'practical effect' of... controll[ing] [professional fund-raisers] in other states." Slip op. p. 16. It also found that there was no "indirect" regulation of interstate commerce because the "challenged provisions" of the Utah Act "are reasonable necessary to prevent and remedy the effects of fraud" and "[a]ny resulting burdens on interstate commerce are minimal by comparison." Slip op. p. 17. Both rulings are erroneous.

Provision of "consulting services in connection with charitable solicitations in Utah" does not give Utah regulatory power over ATA; and just because the Utah Act does not "control" the acts of ATA in other states, does not make the Act constitutional. The questions are whether there is a "substantial nexus" between Utah and ATA and whether Utah confers benefits upon ATA equivalent to the burdens imposed upon it. Quill, *supra*, 504 U.S. at 312, 313.

Even where there are such a nexus and mutual benefits, the Commerce Clause prohibits application of the Utah Act to ATA if the burdens placed upon ATA are excessive in relation to the benefits accruing to Utah from regulating ATA. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). To apply this test, courts must weigh the burdens and benefits with careful attention to the facts. *See, e.g.*, Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981). The court below failed to conduct such an analysis, offering only conclusions based upon generalities.

A. The Utah Act is a Direct Tax or Direct Regulation of Interstate Commerce

Because of the Commerce Clause's "structural concerns about the effects of state regulations on the national economy" Quill, *supra*, 504 U.S. at 312, the U.S. Supreme Court has always insisted upon both: (1) a "substantial nexus" between the state and the taxed or regulated entity and (2) "a relationship between the tax and State-provided service [or a relationship between the regulation and the State's local interest] so as to ensure the State taxation [or regulation] does not unduly burden interstate commerce." While these concerns may appear similar to those discussed in the Due Process section above, the U.S. Supreme Court has ruled that "a corporation may have the 'minimum contacts' with a taxing [or regulating] State required by the Due Process Clause, and yet lack the 'substantial nexus' with that State as required by the Commerce Clause." *Id.* at 313.

First, the substantial nexus test requires proof that the taxed or regulated entity has some kind of physical presence in the taxing or regulating state. If that presence is no more than mailing letters into a state, then there is no "substantial nexus" with that state. *See* Quill, *supra*, 504 U.S. at 311. **ATA has not even done that, for it is Judicial Watch, not ATA, that mails letters containing solicitations into Utah.** By only contributing to another's communications by mail, ATA is engaged in "a discrete realm of commercial activity that is free from interstate taxation" or regulation, because it has not established a "substantial nexus" with any state, except Virginia, where it physically conducts its consulting business. *See* Quill, *supra*, 504 U.S. at 315.

Second, the "burden/benefit" test is designed to protect interstate business from state regulations and taxes that, in effect, project a state's taxing or regulatory power outside its boundaries into other states and, thereby, unconstitutionally burden interstate commerce. As for the imposition of a tax, there must be some corresponding benefit conferred by the state upon the

taxed entity; otherwise, the state is simply taking advantage of that entity to increase its revenues. *See* discussion of Complete Auto Transit v. Brady, 430 U.S. 274 (1977) in Quill, *supra,* 504 U.S. at 313. In this case, the Utah Act seeks to impose a registration/licensing fee — in practical effect a tax — upon ATA, which derives no benefit whatsoever from the State of Utah because it has no presence and does no business whatsoever in that state.

B. The Utah Act is an Indirect Regulation of Interstate Commerce

Even when a state has a substantial nexus permitting a tax or regulation, the tax or regulation cannot impose an excessive burden on interstate commerce without a countervailing legitimate local benefit. There can be no question that the Utah Act unnecessarily burdens ATA's interstate commercial activities. Indeed, under the Act, ATA (and every professional fundraising consultant in the country) must either register in Utah, pay a $250 license fee, and obtain a $25,000 bond from a Utah surety (or a $25,000 line of credit) for Utah's benefit. The alternative is to forego completely advising clients on national fundraising drives that might potentially include even a minimal number of Utah residents as potential donors. Since it is unlikely that any charitable organization would want to purge all Utah residents from owned or rented lists, or to develop a different solicitation (designed by a Utah-licensed fundraising consultant) to Utah than is sent to residents of the other 49 states, the Utah Act serves to regulate and impose a single state's standards on an entire national industry. There can be no question that the requirements of the Utah Act unnecessarily burden interstate commerce. *See, e.g.*, Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 42-44 (1980).

Utah, however, is not alone. At least 41 states, plus the District of Columbia and an unknown number of counties and municipalities, require annual licensing and registration of nonprofit organizations soliciting funds from the public. Licensure, registration, or other

regulation of professional fundraising counsel is presently required by at least 28 states, and additional counties and cities, where such advisors are obligated to pay registration fees (license taxes) and meet further bonding requirements.[3] *See* Appendices A, B and C. Such state and local regulation of fundraising solicitations has become pervasive, burdensome, and financially confiscatory. The financial burdens of licensure and registration are daunting for both nonprofits and professional fundraising counsel. The financial and administrative burdens imposed by these statutes impede and restrain nonprofits' communication with, and dissemination of information and ideas to, the American people. Because Judicial Watch, and thousands of other nonprofit organizations in this country, address political, public policy issues of national interest, unduly burdensome state and local regulation can have a devastating cumulative effect on such communications. Registration fees (license taxes) cost charitable organizations and their professional fundraising counsel several thousand dollars annually.[4] Additionally, various states, including Utah, impose requirements upon professional fundraising counsel, such as to post bonds or lines of credit, totaling at least $130,000. *See* Appendices B and C. The administrative costs of compliance with these statutes are also substantial, and often are coupled with the need to hire professionals to address the dozens of state registration and licensing procedures.

The cumulative effect of these laws on nonprofit/charitable organizations is clearly substantial. Before even a single letter is mailed, start-up organizations, like Judicial Watch — seeking to educate or mobilize Americans on national policy issues — require significant initial

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[3] *See* collection of statutory, regulatory and administrative burdens, collected in Philanthropy Monthly Survey of State Laws Regulating Charitable Solicitation and in CCH Exempt Organizations Reporter, "State Law Registration Reporting," ¶¶ 750-995.

[4] Appendix B indicates that fees on nonprofits and on PFCs in six states alone (Florida, Maryland, Massachusetts, New Jersey, Tennessee, and Utah) could total $2,950.

capital just to comply with the state law requirements. The net effect of such parochial laws is to "Balkanize" America, imposing burdensome licensure and regulatory requirements that isolate American citizens in a particular state from their fellow citizens.

Surely, the free flow of mailings on public policy matters on the nation's "information highways" is as vital to the nation as the free flow of truck traffic on its asphalt highways. With respect to the latter, the U.S. Supreme Court has consistently offered constitutional relief to truck traffic when disrupted by state "safety" regulations, upon finding that such disruption is not justified by the claimed safety benefits. *See, e.g.*, Raymond Motor Transport, Inc. v. Rice, 434 U.S. 429 (1978); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959). Likewise, the Utah Act should be struck down since the claimed benefits from preventing fraud do not justify the disruption that it creates in the interstate traffic of ideas.

Utah has made no effort to show why it must require ATA to register and post a bond in order to protect its residents from fraud. Any such alleged purpose is already served by its requirement that Judicial Watch register. Nor has Utah shown why its residents need access to information about ATA when Utah authorities have access to information about Judicial Watch. Nor has Utah shown that the information which it requires from ATA could not easily be found on the Internet or secured from Virginia, where ATA is registered.

In short, Utah need not — indeed, it cannot — project its regulatory power across the country, and well beyond Judicial Watch which sent the letters, especially in an effort to force ATA and Judicial Watch to alter a contractual relationship consummated and completed wholly outside the state of Utah. *See* Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 583-84 (1986).

III. THE UTAH ACT VIOLATES THE FIRST AND FOURTEENTH AMENDMENT GUARANTEES OF FREEDOM OF SPEECH, ASSOCIATION, AND PETITION

The court below apparently assumed that the only constitutional measure applicable to a First Amendment challenge to a charitable solicitation statute is the rule established by the U.S. Supreme Court in Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980). Slip op. pp. 5-13. This is not true. The Court in Schaumburg also reviewed and commented favorably on decisions involving charitable solicitations which had applied traditional First Amendment standards, including "prior restraint." *Id.*, 444 U.S. at 628-32. The Court's decision in Schaumburg did not discard those rules, but merely added to them. Hence, contrary to the assumption of the court below, the Schaumburg formula is not the only relevant First Amendment standard protecting charitable solicitations.

Further, the court below failed to apply correctly the Schaumburg test itself. The Utah Act requires the Director of the Division of Consumer Protection to deny or revoke a license only when the Director finds that such action is in the "public interest." By granting the Director such power to act in the "public interest" and without defining that term, the Utah Act has conferred upon the Director the very kind of impermissible discretion that Schaumburg and its progeny sought to prevent. *See, e.g.,* Riley v. National Federation of the Blind, 487 U.S. 781, 801 (1988).

A. The Utah Act is an Unconstitutional Prior Restraint

Utah law imposes requirements on direct mail to the public that contains **charitable** solicitations, but not on direct mail to the public that contains **commercial** solicitations. This is pure content-based regulation of protected speech, favoring one kind of speech over another. This Utah cannot do. As the U.S. Supreme Court ruled in Rosenberger v. University of Virginia, 515 U.S. 819, 132 L.Ed 2d 700, 714-15 (1995), citing Simon & Schuster, Inc. v. N.Y. Crime

Victims Bd., 502 U.S. 105, 115, (1991): "In the realm of private speech or expression, government regulation may not favor one speaker over another.... Discrimination against speech because of its message is presumed to be unconstitutional...."

In this case, Utah has prohibited Judicial Watch (or any other nonprofit) from mailing public policy information into the state with fundraising solicitations developed with advice and counsel from ATA (or any other professional fundraising counsel) — unless the professional fundraising counsel agrees to register, to pay Utah's registration fee, to put up a bond, and to subject itself to Utah's jurisdiction. No comparable requirements apply to any type of commercial enterprise that ATA (or any other professional fundraising counsel) may have advised. To the extent that a commercial enterprise may have sought counsel from ATA on the use of direct mail to engage in grass roots lobbying to affect the outcome of a public policy debate, or to advertise merchandise for sale, the Utah Act would not apply. Thus, a nonprofit organization soliciting money to oppose a state initiative establishing off-track betting would be governed by the Act, but a commercial gaming interest's communications soliciting support for the very same state initiative would not.[5] There is no Constitutional basis for such content-based discrimination. *See* Police Dept. Of Chicago v. Mosley, 408 U.S. 92, 94-97 (1972) (striking down an anti-picketing statute that exempted labor picketing).

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[5] Additional unacceptable consequences can be envisioned if Utah were permitted to engage in content-based discrimination against fund-soliciting nonprofit organizations, including:

- regulating grass roots lobbying efforts by nonprofits opposing higher defense spending, while exempting grass roots lobbying by commercial defense contractors supporting higher defense spending; and
- regulating nonprofits engaged in issue advocacy supporting limitations on firearm ownership, while exempting commercial firearms interests opposing such legislation.

Nor is there any Constitutional basis for Utah's requirement that charities register and pay a license fee before making mailings disseminating ideas which contain incidental solicitations for donations when there is no such requirement for commercial enterprises making similar mailings. Thus, if Judicial Watch should offer a particular book as a premium for a contribution to support its free speech activities, the Utah Act requires it to be licensed and to pay the registration fee. On the other hand, if a commercial seller should offer to sell the same book, it need not be licensed or pay a registration fee. As was the case with the New York law in Simon & Schuster, *supra*, the Utah law "singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content," thereby "establish[ing] a financial disincentive to create or publish works with a particular content." *Id.*, 502 U.S. at 116, 118. The requirements and burdens imposed by the Utah Act are therefore purely content-based, are discriminatory, and are unlawful.

Not only does the Utah Act place a prior discriminatory restraint upon Judicial Watch as a disseminator of ideas, it places a prior restraint on the receipt of ideas by Utah residents. The U.S. Supreme Court has clearly "established that the Constitution protects the right to receive information and ideas." Stanley v. Georgia, 394 U.S. 557, 564 (1969). In the area of free speech, "the protection afforded is to the communication, to its source and to its recipients both." Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976). Significantly, the Court in Stanley accorded First Amendment protection to the possession of obscene matter, 394 U.S. at 559, and in Virginia Pharmacy Board protected speech that "does 'no more than propose a commercial transaction,'" 425 U.S. at 762. The core political

speech at issue in the instant case should receive even greater Constitutional protection than the speech at issue in either of those cases.[6]

The Utah Act violates the First Amendment rights of Utah residents. It has chilled Judicial Watch's communication with them. But for the Utah Act, Judicial Watch would have included Utah residents in its nationwide mailings on matters of public policy. The First Amendment does not permit governments to interject themselves as intermediaries between door-to-door solicitors of financial support for the promulgation of ideas and the occupier of a home. Martin v. City of Struthers, 319 U.S. 141, 146-47 (1943). Nor can Utah place itself between the U.S. mails and its residents, for the "householder [must be] the exclusive and final judge of what will cross his threshold...." Rowan v. Post Office Dept., 397 U.S. 728 (1970). By preventing First Amendment-protected correspondence from entering Utah households, the Utah Act unconstitutionally interposes itself upon the flow of Constitutionally-protected speech, and deprives not just the senders, but also the receivers, of their First Amendment freedom of speech and press. And because the subject matter of Judicial Watch's mailings concern matters of national importance, Utah's interference with those mailings deprives Utah's residents of their freedom of assembly, a privilege and immunity of United States citizenship. *See* Hague v. CIO, 307 U.S. 496, 512-14 (1939).

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[6] The Utah Act applies to requests for "anything of value ... on the representation that it will be used for a charitable purpose." Utah Code Ann., sec. 13-22-2(3). "Charitable purposes," in turn refer to charitable or civic ends, including benevolent, educational and social welfare or advocacy, along with others. Utah Code Ann., sec. 12-22-2(2). This discriminatory focus on non-commercial speech is also ironic, given that commercial speech historically has enjoyed *less* Constitutional protection than non-commercial speech. *See, e.g.,* Central Hudson Gas v. Public Service Comm., 447 U.S. 557, 561-63 (1980).

B. The Utah Act is Not Narrowly Tailored to Meet a Compelling State Interest

Because the Utah Act also substantially encumbers protected speech, it must be narrowly tailored to meet a compelling state interest. Schaumburg, *supra,* 444 U.S. at 633-38; Secretary of State v. Munson, 467 U.S. 947, 959-68 (1984); and Riley, *supra*, 487 U.S. at 784-803. To meet this standard, the language of the Act must be carefully examined to determine whether its provisions have been narrowly drawn to further the purpose of protecting the people from fraud.

The district court found that the Act authorized the Director of Consumer Affairs to deny or revoke a license to solicit charitable donations upon finding one or more of eight statutorily defined acts of wrongdoing if such denial or revocation is found to be in the "public interest." Slip. op. pp. 11-13. The Act does not even attempt a definition of the "public interest," thereby opening the door to discriminate among applicants based upon factors totally unrelated to the purpose of the statute. Courts have consistently struck down statutes that grant licensors such broad discretion without clearly and specifically defined legal standards. *See, e.g.,* Lovell v. City of Griffin, 303 U.S. 444 (1938), and cases cited in Schaumburg, *supra,* 444 U.S. at 628-32.

As for the specified eight acts of wrongdoing, only four are tailored to limit discretion. The other four fail to place adequate rein on that discretion. For example, the Director may reject an application for registration if it is "incomplete or misleading in any material respect"; or if "an injunction or administrative order" has been entered against the applicant "based on a finding of a lack of integrity, dishonesty, or mental incompetence of the applicant"; or if the applicant "has materially misrepresented or caused to be misrepresented the purpose and manner in which contributed funds and property will be used in connection with any solicitation"; or that the applying "consultant has failed reasonably to supervise its agents or employees."

These provisions appear to grant the Director authority as broad as that granted to

regulators in the North Carolina statute, which was struck down in Riley, *supra*. In Riley, the Court found that the state of North Carolina could not, even for the purpose of deterring fraud, impose a standard of "reasonableness" upon a professional fund raiser, ruling that "the State's generalized interest in unilaterally imposing its notions of fairness on the fundraising contract is constitutionally invalid." Riley, *supra*, 487 U.S. at 792.

The Utah Act allows the Director to impose her "notion of fairness" upon a license applicant. She may deny the application because she finds it "incomplete or misleading"; because she finds the applicant lacks "integrity" or honesty; because she finds a "misrepresentation [of] the purpose and manner in which contributed funds and property will be used"; and even if she believes the applicant "has failed reasonably to supervise its agents or employees." Such grants of authority smack of unconstitutional paternalism and censorship, easily susceptible of abuse. They are not genuine efforts to protect the public from fraud.[7] *See* Riley, *supra*, 487 U.S. 790-91.

The Act makes government officials unsupervised gatekeepers of First Amendment-protected speech. Such standardless power violates the rule of Schneider v. State, 308 U.S. 147, 163-64 (1939), that door-to-door canvassing cannot be subjected to government assessment of "good character" or "absence of fraud." The government cannot "in the name of preventing fraudulent appeals, subject door-to-door advocacy and communication of views to [such a] discretionary permit requirement." Schaumberg, *supra*, 444 U.S. at 629, *quoting* Schneider.

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[7] That the constitutionally-intrusive Utah Act serves no legitimate purpose is evident from the established state and federal laws actually combatting fraud. *See, e.g.*, Utah Code Ann., secs. 76-10-1801, 78-27-24; 18 U.S.C. secs. 1341-1346; 39 U.S.C., sec. 3005.

CONCLUSION

For the foregoing reasons, these *amici curiae* support the Appellant in seeking the reversal of the opinion of the District Court below, and a ruling that the Utah Act, both facially and as applied to ATA and Judicial Watch, should be stricken as unconstitutional.

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