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Opinion No. 07-68

The Constitutionality of Proposed Amendments to TENN. CODE ANN. §§ 39-17-902 & -911.

QUESTION

Are the proposed amendments to TENN. CODE ANN. §§ 39-17-902 and -911 set forth in Senate Bill 14 and House Bill 1108 constitutional? [1]

OPINION

Given the extensive federal regulation of the content of programming on television, it is possible that a court could determine that SB 14/ HB 1108 is preempted to the extent it applies to public or private television broadcasts. Moreover, Section 4 of the proposed amendment to TENN. CODE ANN. § 39-17-911 is constitutionally suspect under the First Amendment because it lacks a "safe-harbor" provision to allow the broadcasting of indecent material during hours when minors are unlikely to be viewing television, does not directly advance the governmental interest in restricting a minor's access to material harmful to minors, and is more extensive than is necessary to serve that interest.

ANALYSIS

Sections 1 and 2

Sections 1 and 2 of the Bill seek to amend TENN. CODE ANN. § 39-17-902, which regulates obscene material. Section 1 is a general prohibition on advertising or promoting the sale, distribution, exhibition, or display of obscene material. Specifically, Section 1 deletes the first sentence of subsection (a) of TENN. CODE ANN. § 39-17-902 and substitutes instead the following:

> (a) It is unlawful to knowingly produce, send or cause to be sent, or bring or cause to be brought, into this state for sale, distribution, exhibition or display, or to advertise or promote in this state the

[1] This Office received separate requests from Representative Rob Briley and Representative Frank Buck seeking an opinion as to the constitutionality of SB14/HB1108. This Opinion addresses both requests.

> sale, distribution, exhibition or display, or in this state to prepare for distribution, publish, print, exhibit, distribute, or offer to distribute, or to possess with intent to distribute or to exhibit or offer to distribute any obscene matter, or to do any of the aforementioned with any matter found legally obscene that violates the requirements of 18 U.S.C. § 2257.

Section 2 imposes criminal liability upon an owner or employee of a public, private, or cable television company that knows, or has reason to know, material or matter is obscene and either: (1) solicits, accepts, or causes to be solicited or accepted, advertising for the obscene material or matter; or (2) promotes or advertises the obscene material or matter. The United States Supreme Court has consistently recognized that "States have a long-recognized legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodation, as long as these regulations do not run afoul of specific constitutional prohibitions." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57 (1973); *Miller v. California*, 413 U.S. 15 (1973); *See also State v. Martin*, 719 S.W.2d 522 (Tenn. 1986). To the extent that Sections 1 and 2 would regulate the content of programming on public or private television, SB 14/ HB 1108 may be preempted by federal law. Otherwise, this office believes these sections would withstand constitutional challenge.

A. Preemption

The prohibition on advertising or promoting obscene material in Section 1 is broad enough to include advertising or promoting conducted on television. Section 2, moreover, specifically targets the advertising or promotion of obscene material on television. Therefore, both sections regulate the content of programming on television, which is an area over which the federal government, through the Federal Communications Commission ("F.C.C."), has extensive regulatory control. Determining whether these sections would be preempted by federal law requires a different analysis for public or private television stations and cable operators because the federal laws regulating the two areas are distinct.

1. Cable television

The power Congress delegated to the F.C.C. plainly comprises authority to regulate the signals carried by cable television systems. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984). Generally, the regulation of content on cable television is within the exclusive domain of the F.C.C. *Id.* at 705-07. Congress has already provided extensive regulation of obscene or indecent material over cable television systems. *See, e.g.*, 47 U.S.C. § 531(e) (authorizing a cable operator to refuse to transmit a program containing obscenity, indecency or nudity on channels designated for public, educational, or government use); 47 U.S.C. § 532(c)(2) (authorizing a cable operator to refuse to transmit a program containing obscenity, indecency or nudity on commercial channels); 47 U.S.C. § 532(j)(1) (granting authority to the F.C.C. to promulgate rules and regulations designed to limit the access of children to indecent programming). This regulation includes imposing criminal liability upon anyone who transmits obscene material over any cable system. 42 U.S.C. § 559; *see also* 18 U.S.C. § 1468.

However, Congress explicitly preserved the power of a State to regulate obscenity. 47 U.S.C. § 558 ("Nothing in this subchapter shall be deemed to affect the criminal or civil liability of cable programmers or cable operators pursuant to the Federal, State, or local law of . . . obscenity); 18 U.S.C. § 1468 ("Nothing in this chapter, or the Cable Communications Policy Act of 1984, or any other provision of Federal law, is intended to interfere with or preempt the power of the States . . . to regulate the uttering of language that is obscene . . . the distribution of matter that is obscene . . . by means of cable television or subscription services on television."); *Jones v. Wilkinson*, 800 F.2d 989, 991 (10th Cir. 1986), *aff'd by Wilkinson v. Jones*, 480 U.S. 926 (1987). Thus, to the extent SB 14/HB 1108 seeks to regulate the advertising or promotion of obscene material on cable television, it is not preempted by federal law.

2. Public or private television

To the extent SB 14/ HB 1108 regulates the content of programming on public or private television, it may be preempted by federal law. The United States Supreme Court has emphasized that the terms, purposes, and history of the Communications Act of 1934 all indicate that Congress "formulated a unified and comprehensive regulatory system for the (broadcasting) industry." *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137(1940). The Act's provisions are explicitly applicable to "all interstate and foreign communication by wire or radio." 47 U.S.C. § 152(a). Congress specifically delegated its authority to regulate the broadcasting industry to the F.C.C. 47 U.S.C. § 151. The Commission's authority extends to all regulatory actions "necessary to ensure the achievement of the Commission's statutory responsibilities." *F.C.C. v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979). The Act "applies to every phase of television and it is clear that Congress intended the regulatory scheme set out by it therein to be exclusive of State action." *Allen B. DuMont Laboratories v. Carrol*, 184 F.2d 153, 155 (3rd Cir. 1950); *see also Chartwell Communications Group v. Westbrook*, 637 F.2d 459 (6th Cir. 1980) (citing *Dumont* favorably).

Congress has expressed its intent to regulate the transmission of obscene material by providing the F.C.C. with authority to suspend the license of any operator who transmits "communications containing profane or obscene words, language, or meaning." 47 U.S.C. § 303(m)(1)(D); *see also Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 432 (1963). The F.C.C., pursuant to its authority to promulgate rules and regulations, has further provided that "[n]o licensee of a . . . television broadcast station shall broadcast any material that is obscene." 47 C.F.R. § 73.3999. Congress has even criminalized the broadcast of obscene language. 18 U.S.C. § 1464.

Given the extensive regulation of public and private television, it is possible that SB 14/ HB 1108 would be subject to a constitutional challenge on the basis of preemption. "[T]he question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belongs to it as to exclude the State, must be answered by a judgment upon the particular case." *Head*, 374 U.S. at 431 (citation omitted). Unlike the laws regulating cable television, Congress has never explicitly preserved the States' power to regulate obscenity on public or private television. On the other hand, some other states have passed legislation similar to SB 14/ HB 1108, and none of these statutes have been challenged on the basis of preemption. *See* N.C. Gen. Stat. § 14-190.1(f) ("It shall be unlawful for a person, firm or

corporation to advertise or otherwise promote the sale of material represented or held out by said person, firm or corporation as obscene."); Conn. Gen. Stat. § 53a-193 (prohibiting the promotion of obscene material or performances where "promotion" includes advertising); Va. Code Ann. § 18.2-376 ("It shall be unlawful for any person knowingly to prepare, print, publish, or circulate, or cause to be prepared, printed, published or circulated, any notice or advertisement of any obscene item . . . performance or exhibition . . . ."). It nevertheless remains possible that a court could determine that SB 14/ HB 1108 is preempted to the extent it applies to public or private television broadcasts.

B. Commerce Clause

Because of the State's interest in regulating the use of obscene material in local commerce, it appears that Sections 1 and 2 would not run afoul of the Commerce Clause by interfering with interstate commerce. *See Paris Adult Theatre I*, 413 U.S. at 57. The Supreme Court has held that "[i]t is well settled that actions are within the domain of the Commerce Clause if they burden interstate commerce or impede its free flow." *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 389 (1994) (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31 (1937)). The dormant Commerce Clause denies "the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys., Inc. v. Dep't of Environmental Quality*, 511 U.S. 93, 98 (1994). Sections 1 and 2 of the Bill do not discriminate against interstate commerce because they regulate evenhandedly to effectuate the State's legitimate interest in regulating the use of obscene material in local commerce. Moreover, Sections 1 and 2 do not impose unreasonable burdens on interstate commerce that are "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see C & A Carbone, Inc.*, 511 U.S. at 389. Accordingly, this office believes these sections would withstand a constitutional challenge under the Commerce Clause.

C. First Amendment Issues

The United States Supreme Court has ruled obscene matter is not within the protection afforded by the First Amendment. *Roth v. United States*, 354 U.S. 476, 484-85 (1957). Section 1 specifically adds language to TENN. CODE ANN. § 39-17-902 making it unlawful "to advertise or promote in this state the sale, distribution, exhibition or display . . . any obscene matter." Section 2 imposes criminal liability upon an owner or employee of a public, private, or cable television company that knows, or has reason to know, material or matter is obscene and either: (1) solicits, accepts, or causes to be solicited or accepted, advertising for the obscene material or matter; or (2) promotes or advertises the obscene material or matter. Under these proposed amendments, it would be unlawful for a person or an owner or employee of a public, private, or cable television company to advertise or promote the sale, distribution, exhibition or display of any obscene matter, even though the advertisement or promotion itself might not be obscene.

Because Sections 1 and 2 of SB 14/ HB 1108 makes it unlawful to advertise or promote the sale, distribution, exhibition or display of any obscene matter, the Bill must be analyzed under the United States Supreme Court's well-established commercial speech doctrine set forth in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980). "The First

Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation." *Id*. at 561. Nevertheless, the Supreme Court has recognized "the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455-456 (1978). "The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. . . . The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 562-63. The Supreme Court explained:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566.

Therefore, for commercial speech to fall within the protections of the First Amendment, it must concern lawful activity and not be misleading. *Id.* If this requirement is satisfied, commercial speech may still be restricted, but only where the asserted governmental interest is substantial, the regulation directly advances that interest, and the regulation is no more extensive than necessary to serve that interest. *Id.; see also Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 (1994). When these standards are applied to Sections 1 and 2 of SB 14/ HB 1108, it appears that the advertising ban contained in those proposed amendments to the statute would not violate the First Amendment. Advertising for the sale, distribution, exhibition or display of any obscene matter would involve an unlawful activity prohibited by statute. TENN. CODE ANN. § 39-17-902(a). The Tennessee obscenity statute makes it unlawful "to knowingly produce, send or cause to be sent, or bring or cause to be brought, into this state for sale, distribution, exhibition or display, or in this state to prepare for distribution, publish, print, exhibit, distribute, or offer to distribute, or to possess with intent to distribute or to exhibit or offer to distribute any obscene matter." *Id.* Under Tennessee law, advertisements for the sale, distribution, exhibition or display of any obscene matter do not concern lawful activity. *Id.* Accordingly, because advertising for the sale, distribution, exhibition or display of any obscene matter involves an unlawful activity prohibited by statute, such commercial speech does not fall within the protections of the First Amendment. *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 566; *see Ginzburg v. United States*, 383 U.S. 463, 464-66 (1966) (holding that, where circulars advertising certain publications were concededly not obscene, convictions under the federal obscenity statute for mailing advertising could be sustained in view of the evidence of defendant's pandering – "the business of purveying textual or graphic matter openly advertised

to appeal to the erotic interest of their customers" - in the sale and publicity of the obscene publications).

Additionally, the request asks whether the "knows, or has reason to know" standard comports with the First Amendment to the United States Constitution and/ or the free speech guarantees contained in the Tennessee Constitution. It is the opinion of this office that the "knows, or has reason to know" standard is permissible under both the federal and state constitutions. As noted above, States can regulate obscenity. Section 2 regulates obscenity by creating a criminal offense for promoting or advertising obscene material. The "knows, or has reason to know" standard does not impermissibly shift any burden upon citizens. Rather, it is an element of the offense that must be proven by the prosecution beyond a reasonable doubt. The United States Supreme Court has held that a statute dispensing with any *mens rea* requirement as to the contents of an obscene book would violate the First Amendment because of the potential chilling effect of such a law on free expression. *Smith v. California*, 361 U.S. 147, 154 (1959). Then, in *Ginsberg v. New York*, 390 U.S. 629, 643-45 (1968), the Court upheld a New York statute which prohibited the "knowing" distribution of obscene materials to minors. "Knowingly" was defined in the statute as "knowledge" of, or "reason to know" of, the character and content of the material. *Id*. Finally, the Court held that the constitutional *mens rea* requirement is satisfied if the defendant knows the contents of the obscene materials and their "character and nature;" he need not know they are legally obscene. *Hamling v. United States*, 418 U.S. 87, 123-24 (1974). Therefore, by providing that the station owner or cable operator must "know or have reason to know" that the material is obscene, SB 14/ HB 1108 comports with the First Amendment. Accordingly, for these reasons, this office believes Section 2 would withstand a constitutional challenge.

Section 4

Section 4 is similar to Section 2, except that it prohibits the promotion or advertising of material that is "harmful to minors." The term "harmful to minors" is defined in TENN. CODE ANN. § 39-17-901(6),[2] and the definition is very similar to the definition of "broadcast indecency" used by the F.C.C.[3] The United States Supreme Court has recognized that "a state may constitutionally employ a variable obscenity standard which restricts the rights of minors to obtain certain sexually related materials that are not obscene as to adults." *Ginsberg v. New York*, 390 U.S. 629 (1968). The type of regulation of sexually explicit materials permitted under *Ginsberg* is not, however, without limitations. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975) (citations omitted). "Sexual expression which is indecent but not obscene is protected by the First Amendment." *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126-27 (1989). The government may regulate indecent material, "but to withstand

[2]It is defined as "that quality of any description or representation, in whatever form, of nudity, sexual excitement, sexual conduct, excess violence or sadomasochistic abuse when the matter or performance: (A) Would be found by the average person applying contemporary community standards to appeal predominantly to the prurient, shameful or morbid interests of minors; (B) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and (C) Taken as whole lacks serious literary, artistic, political or scientific values for minors."

[3]It is defined as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary standards for the broadcast medium, sexual or excretory activities or organs."

constitutional scrutiny, it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." *Id.*

The First Amendment has been interpreted to require the F.C.C. to allow the broadcast of indecent material during hours when minors are unlikely to be viewing television. *Action for Children's Television v. F.C.C.*, 58 F.3d 654, 665 (D.C. Cir. 1995). This time restriction operates as a balance between the competing interests of the First Amendment and the protection of minors. *Id*. As a result, the F.C.C. has adopted regulations specifically addressing the issue. 47 C.F.R. § 73.3999. These regulations recognize a "safe-harbor" during the hours of 10 p.m. to 6 a.m. in which indecent material may be broadcast.

Section 4 of SB 14/ HB 1108 contains no such "safe-harbor." It prohibits the promotion or advertising of material that is harmful to minors at any time of day. Though the definitions of "indecency" in the federal scheme and "harmful to minors" in the proposed legislation are not identical, there is significant overlap between the two. Thus, Section 4 prohibits activity that is otherwise allowed under federal law. This brings Section 4 in direct conflict with the extensive federal regulatory system. As such, it would likely be preempted by federal law. Additionally, because Section 4 does not balance the rights of adults to view indecent material with the governmental interest of protecting minors, it would likely be subject to a First Amendment challenge.

Furthermore, because Section 4 seeks to restrict advertising "for any material that is harmful to minors," the Bill must be analyzed under the United States Supreme Court's commercial speech doctrine set forth in *Central Hudson Gas & Elec. Corp*. For commercial speech to fall within the protections of the First Amendment, it must concern lawful activity and not be misleading. *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 566. If this requirement is satisfied, commercial speech may still be restricted, but only where the asserted governmental interest is substantial, the regulation directly advances that interest, and the regulation is no more extensive than necessary to serve that interest. *Id.*

As explained above, the governmental interest asserted for the Bill is to restrict a minor's access to material harmful to minors. Under the regulations adopted by the F.C.C., broadcasting within a safe-harbor of 10 p.m. to 6 a.m. material that is harmful to minors or indecent is lawful activity. *Sable Communications of California, Inc.*, 492 U.S. at 126-2747; *Action for Children's Television*, 58 F.3d at 665; *see* 47 C.F.R. § 73.3999. Accordingly, Section 4 appears to violate the First Amendment because it does not contain a safe-harbor provision allowing the broadcasting of advertisements for material that is harmful to minors or indecent during hours when minors are unlikely to be viewing television. Nor does Section 4 directly advance the governmental interest to restrict a minor's access to material harmful to minors, and the regulation is more extensive than is necessary to serve that interest. Indeed, the Bill seeks to prohibit the broadcasting of advertisements for material that is harmful to minors during the exact same time period that broadcasters are allowed by federal law to broadcast material that is harmful to minors or indecent, *i.e.*, from 10 p.m. to 6 a.m. While the State has a legitimate interest in restricting a minor's access to material that is harmful to minors, "the First and Fourteenth Amendments require that the restriction be no more extensive than is necessary to serve the state interest." *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 572. Section 4 is more

extensive than is necessary to serve that interest because it lacks the requisite safe-harbor provision.

Accordingly, Section 4 is constitutionally suspect under the First Amendment because it lacks a "safe-harbor" provision to allow the broadcasting of indecent material during hours when children are unlikely to be watching television, does not directly advance the governmental interest in restricting a minor's access to material harmful to minors, and is more extensive than is necessary to serve that interest.

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