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October 16, 1987

The Honorable Gary Giordano
Arizona State Representative
State Capitol - House Wing
Phoenix, Arizona 85007

The Honorable Wayne Stump
Arizona State Senator
State Capitol - Senate Wing
Phoenix, Arizona 85007

Re: I87-125 (R86-106)

Dear Representative Giordano and Senator Stump:

You requested our opinion whether the automated telephone solicitation offense, as set forth in Laws 1986 (2nd Reg. Sess.) Ch. 359, § 13-2918, renumbered § 13-2919, violates the First Amendment of the United States Constitution. A.R.S. § 13-2919 provides as follows:

A. A person shall not use an automated system for the selection and dialing of telephone numbers and the playing of a recorded message for the purpose of soliciting persons to purchase goods or services or requesting survey information if the results are to be used directly for the purpose of soliciting persons to purchase goods or services.

B. A person who violates this section is guilty of a class 2 misdemeanor.

It is our opinion that A.R.S. § 13-2919 is not unconstitutional.

A.R.S. § 13-2919 only regulates speech pertaining to purchasing goods or services. Thus it applies solely to

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commercial speech. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762, 96 S.Ct. 1817, 1825, 48 L.Ed.2d 346, 358 (1976). Even if the recorded messages contain useful information in addition to the solicitation, they nevertheless constitute commercial speech. See Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 64-68, 103 S.Ct. 2875, 2879-2881, 77 L.Ed.2d 469, 476-478 (1983).

Commercial speech is protected by the First Amendment. Virginia State Board of Pharmacy, 425 U.S. at 762, 96 S.Ct. at 1825-1826, 48 L.Ed.2d at 359; Bigelow v. Virginia, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975). However, the Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression. Youngs Drug, 463 U.S. at 64-65, 103 S.Ct. at 2879, 77 L.Ed.2d at 476; City of Watseka v. Illinois Public Action Council, 796 F.2d 1547, 1550 n.9 (7th Cir. 1986), aff'd, ___ U.S. ___, 107 S.Ct. 919, 93 L.Ed.2d 972 (1987) (distinguishing the constitutional restriction of door-to-door commercial solicitation from the unconstitutional restriction of all door-to-door solicitation, including political canvassing). For example, commercial speech loses constitutional protection if it is unlawful, false, or misleading. Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977). Therefore, although the recorded messages that A.R.S. § 13-2919 prohibits are constitutionally shielded, they enjoy only limited protection.

States can regulate or even prohibit the time, place, and manner of expressing protected speech. Erznoznik v. City of Jacksonville, 422 U.S. 205, 209, 95 S.Ct. 2268, 2272, 45 L.Ed.2d 125, 130 (1975). Three criteria must be met. Such regulation is not unconstitutional if it "serve[s] a significant governmental interest and leave[s] ample alternative channels for communication," Consolidated Edison Company of New York, Inc. v. Public Service Commission of New York, 447 U.S. 530, 535, 100 S.Ct. 2326, 2332, 65 L.Ed.2d 319, 326 (1980), and is neutral regarding the content of the regulated speech. Pacific Gas & Electric Company v. Public Utilities Commission of California, 475 U.S. 1, ___, 106 S.Ct. 903, 914, 89 L.Ed.2d 1, 15 (1986); Clark v. Community for Creative Non-Violence, 468 U.S. 228, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1986).

Analyzed under that three-part test, A.R.S. § 13-2919 is not an unconstitutional regulation of manner of speech. First, A.R.S. § 13-2919 serves the "significant governmental

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interest" of protecting the privacy of the home from uninvited interruption and annoyance. Cohen v. California, 403 U.S. 15, 21, 91 S.Ct. 1780, 1786, 29 L.Ed.2d 284, 292 (1971). The Supreme Court has upheld the preservation of the tranquility of the home in numerous cases. E.g., Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 638, 100 S.Ct. 826, 837, 63 L.Ed.2d 73, 88-89 (1980); Hynes v. Mayor and Council of Borough of Oradell, 425 U.S. 610, 618-619, 96 S.Ct. 1755, 1759-1760, 48 L.Ed.2d 243, 251-152 (1976). In Carey v. Brown, 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980), it declared that "[P]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, . . ." is a state interest "of the highest order." 447 U.S. at 471, 100 S.Ct. at 2295-2296, 65 L.Ed.2d at 276. Similarly business enterprises are entitled to be free from annoying interruptions so as to accomplish their work. See Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949); see also Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788, 811, 105 S.Ct. 3439, 3454, 87 L.Ed.2d 567, 585 (1985) (concerning the disruptive impact interrupting speech would have on the workplace.)

This "high order" governmental interest in shielding the public from annoyances has become even more urgent due to the greater opportunity for interruptions that modern technology and urbanization offers. See Rowan v. United States Post Office Department, 397 U.S. 728, 736, 90 S.Ct. 1484, 1490, 25 L.Ed.2d 736, 742-743 (1970); Breard v. City of Alexandria, La., 341 U.S. 622, 626-627, 71 S.Ct. 920, 924, 95 L.Ed. 1233, 1239-1240 (1951). Due to automated dialing systems, advance tape recording capabilities and the growth industry of collecting and marketing telephone numbers, the percentage of uninvited calls is quickly closing on invited ones. Furthermore, it is precisely this succession of uninvited calls that "may lessen the peaceful enjoyment of a home as much as a neighborhood glue factory or railroad yard . . ." Martin v. City of Struthers, Ohio, 319 U.S. 141, 144, 63 S.Ct. 862, 864, 87 L.Ed. 1313, 1317 (1943).

However, not all forms of expression directed at the home are sufficiently disruptive to be regulated. For example, inserts in a utility company's billings are not subject to regulation because a customer can simply "avert his eyes" by throwing away objectionable materials. Consolidated Edison, 447

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U.S. at 542, 100 S.Ct. at 2336, 65 L.Ed.2d at 331. But the state can regulate speech which pervades the peace of a home when it is broadcast from blaring soundtrucks. Kovacs, 336 U.S. at 86, 69 S.Ct. at 453, 93 L.Ed. at 522. Moreover, the state can regulate door-to-door solicitation which interrupts and summons residents from their peaceful preoccupations. See Breard, 341 U.S. at 632, 71 S.Ct. at 927, 95 L.Ed. at 1242.

Uninvited telephone calls, similar to uninvited solicitors at the door, disturb residents and workers, summoning them to the telephone. See generally Breard, 341 U.S. at 626-27, 71 S.Ct. at 924, 95 L.Ed. at 1239-1240; Consolidated Edison, 447 U.S. at 542, 100 S.Ct. at 2336, 65 L.Ed.2d at 331; Cohen, 403 U.S. at 21, 91 S.Ct. at 1786, 29 L.Ed.2d at 292. Nor is the disruption remedied by promptly hanging up the receiver any more than an assault is remedied by retreating after the first blow. See Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726, 748-749, 98 S.Ct. 3026, 3040, 57 L.Ed.2d 1073, 1093. ("One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.") Therefore, because uninvited telephone solicitations, like unwanted door-to-door salespersons, disturb and summon residents, see Breard, and residents cannot readily escape the noise and interruption the calls produce, see Kovacs, the state has a "significant governmental interest" in prohibiting them.

Second, automated telephone solicitors have numerous other means of selling products. Personal telephone solicitations are not prohibited. Furthermore, "usual methods of solicitation - radio, periodicals, mail, local agencies - are open" to commercial sales. Breard, 341 U.S. at 631-32, 71 S.Ct. at 927, 95 L.Ed. at 1242. Therefore, "ample alternative channels for communication" remain for businesses after A.R.S. § 13-2919 prohibited automated telephone solicitation.

Third, the commercial speech that A.R.S. § 13-2919 prohibits is neutral in terms of content. The statute bans all automated recorded telephone solicitations. That ban does not turn on any particular subject matter of speech, except that it relates to "purchase of goods or services." See contra Pacific Gas, 475 U.S. at _____, 106 S.Ct. at 914, 89 L.Ed. at 15 (the Public Utilities Commission should have awarded access to publishing alternative viewpoints in a utility billing insert to the public at large, not to a selected organization; Carey, 447

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U.S. at 461, 100 S.Ct. at 2290, 65 L.Ed.2d at 270 (statute prohibiting labor picketing but permitting that of other matters was not content-neutral.)

In sum, because the automated telephone solicitation statute, A.R.S. § 13-2919, serves the significant government interest of protecting the privacy of the home and workplace from uninvited disruptions, leaves numerous alternative means of commercial communication open to sellers, and is content-neutral, it constitutes a permissible time, place, and manner regulation of commercial speech. Therefore, it is our opinion that A.R.S. § 13-2919 is not unconstitutional.

Sincerely,



BOB CORBIN
Attorney General

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