Do nonprofits have a constitutional right to canvass?

Nonprofit organizations and consumer rights groups are locked in an ongoing legal debate about personal privacy, the First Amendment and the legality of door-to-door canvassing.

For the last several years, Ohio has been at the forefront of the ongoing struggle between personal privacy and the First Amendment. Nonprofit organizations throughout the United States have been challenged by municipalities regarding the extent to which they can conduct door-to-door advocacy and fundraising—otherwise known as canvassing. One of the more notable challengers of these laws has been Ohio Citizen Action (OCA), a consumer and environmental rights group with offices throughout the state. OCA argues that it raises the majority of its funds and recruits most of its members through just the sort of door-to-door advocacy that many municipalities have sought to limit.

Expression under the First Amendment is largely divided into two different types of speech. There is so-called pure speech, which is speech that seeks to convey an idea or position without concern for commercial gain, and there is commercial speech. Whereas the Supreme Court originally envisioned the “commercial speech doctrine” to cover “purely commercial advertising,” its application has since been expanded to include other, non-advertising forms of expression. For years, canvassing performed by nonprofits, which includes a fundraising component, has been relegated to something of a First Amendment nether world, viewed to be not quite commercial speech, but not quite pure speech either.

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This issue has only become a source of judicial concern within the past several years, as more and more municipalities have sought to place limits on when secular-based nonprofits can canvass and who they can approach. Many of these restrictions initially took the form of licensing requirements that required nonprofits to submit names and other statistical information of canvassers to various municipal governments, which would then decide who could canvass within city limits and often placed time restrictions on canvassing activities. In the 2003 case of Ohio Citizen Action v. City of Mentor-On-The-Lake, the Northern District of Ohio found Mentor-on-the-Lake’s licensing ordinance to be “facially invalid under the First Amendment free speech clause to the extent that the ordinance prohibited persons from going door to door to communicate their social, political, or religious ideas and positions without first having obtained a license.”

However, the city of Parma has done more than merely license canvassers. After the enactment of the Telemarketing Sales Rule in 2003 (creating the “Do Not Call” registry), Parma adopted its own “No Solicitation” law that includes an opt-in alternative to the blanket laws, where municipal residents could prohibit all persons from canvassing or soliciting their homes without a license. The opt-in version of the law works similarly to the national Do Not Call registry, where local residents can place their addresses on the list to warn solicitors that they do not want to be visited. Parma enacted its law in 2006, which does not create any exceptions for charitable or other noncommercial groups.

By Geoffrey D. Korff
The existing case law is unclear on the constitutionality of opt-in “Do Not Knock” laws. The apparent constitutional test that applies in such situations was set forth by the Supreme Court in 1980, in the case of Central Hudson Gas & Electric Corporation v. Public Service Commission.4

The Central Hudson test first asks whether regulation is targeting truthful, commercial speech for a legal product or service. If it is, the Court then required the government to prove that it had a substantial interest in regulating the speech; the regulation would directly advance that interest; and the restriction on speech must not be more excessive than necessary, i.e., it must be narrowly tailored.5 This test is a form of intermediate scrutiny, as contrasted with content-based limitations on noncommercial speech, which face strict scrutiny.6 Any restriction of commercial speech must directly advance the state’s interest.7

However, the contours of exactly what constitutes “commercial speech” are still poorly defined. The Supreme Court has since applied the Central Hudson test to arrive at a variety of incongruous outcomes, due to a general inability to determine when speech does indeed do more than simply propose a commercial transaction.8 Although the question of opt-in Do Not Knock registries has not reached the Supreme Court, the constitutionality of the Do Not Call registry did receive a good deal of coverage from the Tenth Circuit in the case of Mainstream Marketing Services, Inc. v. FTC.9 In this case, the Tenth Circuit held that the national Do Not Call registry was designed to “reduce intrusions into personal privacy and the risk of telemarketing fraud and abuse that accompany unwanted telephone solicitation.” The Court went on to rule that the Do Not Call registry directly advances those goals. Important (and directly on-point for the issue of canvassing) was the 10th Circuit’s holding that the Telemarketing Sales Rule was narrowly tailored because of its opt-in nature, which ensured that it would not prevent speech from reaching a willing listener.

And this is generally where the analysis leaves us. It is worth noting however, that the Do Not Call registry was specifically designed to deal with purely commercial speech, and the Supreme Court has dealt much more leniently with nonprofit organizations that combine speech and fundraising, recognizing that the dissemination of ideas and raising funds are often inextricably tied. However, both municipalities and many nonprofits are still left with a great deal of uncertainty as to what restraints apply within the existing constitutional framework. It has long been the case that “individuals are not required to welcome unwanted speech into their homes and that the government may protect this freedom,” but precisely what protections exist for the canvasser seeking to spread a political message still remains unclear.10

With the ability to raise funds “being the lifeblood of a charity,” it is hard to presage how the Supreme Court will reconcile this seemingly contrary mish-mash of legal precedent.11 But the jurisprudence is still developing, as organizations like OCA and others continue to challenge municipal regulations, limiting their ability to canvass. It will likely take a Supreme Court ruling that directly addresses this issue to define the extent to which canvassing limitations can be placed on nonprofit groups. Until then, those of us with an eye toward this issue will just have to wait and see.

Author bio

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Endnotes

1 The Supreme Court first separated commercial speech from pure speech in Valentine v. Chrestensen, 316 U.S. 52 (1942).
2 Valentine, supra note 1, at 54.
5 Id. at 564.
6 Content-neutral limitations may still be placed on fully protected speech so long as they only regulate the time, place and manner in which the speech is made. See Clark v. Community for Creative Non-Violence, 468 U.S. 288, 292 (1984).
7 Central Hudson Gas, supra note 4, at 564.
9 Mainstream Mktg. Servs., Inc. v. FTC, 358 F.3d 1228 (10th Cir. 2004).