SUPREME COURT OF THE UNITED STATES

No. 91–1594

FRED H. EDENFIELD, ET AL., PETITIONERS *v.* SCOTT FANE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[April 26, 1993]

JUSTICE O'CONNOR, dissenting.

I continue to believe that this Court took a wrong turn with *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977), and that it has compounded this error by finding increasingly unprofessional forms of attorney advertising to be protected speech. See *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626 (1985); *Shapero* v. *Kentucky Bar Assn.*, 486 U. S. 466 (1988); *Peel* v. *Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U. S. 91 (1990) (plurality opinion). These cases consistently focus on whether the challenged advertisement directly harms the listener: whether it is false or misleading, or amounts to "overreaching, invasion of privacy, [or] the exercise of undue influence," *Shapero*, *supra*, at 475. This focus is too narrow. In my view, the States have the broader authority to prohibit commercial speech that, albeit not directly harmful to the listener, is inconsistent with the speaker's membership in a learned profession and therefore damaging to the profession and society at large. See *Zauderer*, *supra*, at 676–677 (O'CONNOR, J., concurring in part, concurring in judgment in part, and dissenting in part); *Shapero*, *supra*, at 488–491 (O'CONNOR, J., dissenting); *Peel*, *supra*, at 119 (O'CONNOR, J., dissenting). In particular, the States may prohibit certain "forms of competition usual in the business world," *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 792 (1975) (internal quotation marks omitted), on the grounds that pure profit seeking degrades the public-spirited culture of

the profession and that a particular profit-seeking practice is inadequately justified in terms of consumer welfare or other social benefits. Commercialization has an incremental, indirect, yet profound effect on professional culture, as lawyers know all too well.

But even if I agreed that the States may target only professional speech that directly harms the listener, I still would dissent in this case. *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978), held that an attorney could be sanctioned for the in-person solicitation of two particularly vulnerable potential clients, because of the inherent risk under such circumstances that the attorney's speech would be directly harmful, and because a simple prohibition on fraud or overreaching would be difficult to enforce in the context of in-person solicitation. See *id.*, at 464–468. The result reached by the majority today cannot be squared with *Ohralik*.

Although *Ohralik* preceded *Central Hudson Gas & Electric* v. *Public Service Comm'n of New York*, 447 U. S. 557 (1980), this Court has understood *Ohralik* to mean that a rule prohibiting in-person solicitation by attorneys would satisfy the *Central Hudson* test. See *Shapero*, *supra,* at 472. Such a rule would "directly advanc[e] the governmental interest [and would not be] more extensive than is necessary to serve that interest." *Central Hudson*, *supra*, at 566. A substantial fraction of in-person solicitations are inherently conducive to overreaching or otherwise harmful speech, and these potentially harmful solicitations cannot be singled out in advance (or so a reasonable legislator could believe).

I see no constitutional difference between a rule prohibiting in-person solicitation by attorneys, and a rule prohibiting in-person solicitation by certified public accountants (CPA's). The attorney's rhetorical power derives not only from his specific training in the art of persuasion, see *ante*, at 13, but more generally from his *professional expertise*. His certified status as an expert in a complex subject

matter—the law—empowers the attorney to overawe inexpert clients. CPA's have an analogous power. The drafters of Fla. Admin. Code §21A–24.002(2)(c) (1992) reasonably could have envisioned circumstances analogous to those in *Ohralik*, where there is a substantial risk that the CPA will use his professional expertise to mislead or coerce a naive potential client.

Indeed, the majority scrupulously declines to question the validity of Florida's rule. The majority never analyzes the rule itself under *Central Hudson*, cf. *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U. S. 328, 340–344 (1986) (analyzing "facial" validity of law regulating commercial speech by employing *Central Hudson* test), but instead seeks to avoid this analysis by characterizing Fane's suit as an "as-applied" challenge. See *ante*, at 1, 5, 9, 12. I am surprised that the majority has taken this approach without explaining or even articulating the underlying assumption: that a commercial speaker can claim First Amendment protection for particular instances of prohibited commercial speech, even where the prohibitory law satisfies *Central Hudson*. *Board of Trustees of State Univ. of N. Y.* v. *Fox*, 492 U. S. 469 (1989), appears to say the opposite, see *id.*, at 476–486, and we recently granted certiorari in a case that poses precisely this issue, see *United States* v. *Edge Broadcasting Co.*, 506 U. S. ___ (1992).

In any event, the instant case is *not* an "as-applied" challenge, in the sense that a speaker points to special features of his own speech as constitutionally protected from a valid law. Cf. *Zauderer*, *supra,* at 644. The majority obscures this point by stating that Florida's rule "cannot be sustained as applied to Fane's proposed speech," *ante*, at 5, and by paraphrasing Fane's affidavit at length to show that he does not propose to solicit vulnerable clients, *ante*, at 14. But I do not understand the relevance of that affidavit here, because the broad remedy granted by the District Court goes well beyond Fane's own speech.

> "Florida Administrative Code, §§21A-24.002(2) and (3), places an unconstitutional ban on protected commercial speech in violation of the first . . . amendmen[t]. The Board of Accountancy and State are hereby enjoined from enforcing that

> regulation as it is applied to CPAs who seek clients through in-person, direct, uninvited solicitation in the business context." App. 88.

Even if the majority is correct that a law satisfying *Central Hudson* cannot be applied to harmless commercial speech, and that Fane's proposed speech will indeed be harmless, these two premises do not justify an injunction against the enforcement of the antisolicitation rule *to all CPA's*.

The majority also relies on the fact that petitioners were enjoined only from enforcing the rule in the "business context." See *ante*, at 1, 9. Yet this narrowing of focus, without more, does not salvage the District Court's remedy. I fail to see why §21A–24.002(2)(c) should be valid overall, but not "in the business context." Small businesses comprise the vast majority of business establishments in the United States, see U. S. Dept. of Commerce, Statistical Abstract of the United States 526 (1992). The drafters of Florida's rule reasonably could have believed that the average small businessman is no more sophisticated than the average individual who is wealthy enough to hire a CPA for his personal affairs.

In short, I do not see how the result reached by the majority is consistent with the validity of §21A–24.002(2)(c). In failing to state otherwise, the majority implies that the rule itself satisfies *Central Hudson*, and I agree, but on that precise grounds I would reverse the judgment of the Court of Appeals.