STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

June 20, 2025

Opinion No. 25-013

Constitutionality of Provision Governing Continuing Education Requirements for Professional Bail Bondsmen and Bonding Agents

Question

Tennessee Code Annotated § 40-11-404 mandates that the Tennessee Association of Professional Bail Agents provide all continuing education courses that are statutorily required for bail bond professionals. Does the statute create a monopoly in violation of article I, section 22 of the Tennessee Constitution?

Opinion

Likely not.

ANALYSIS

In 1996, the General Assembly passed legislation mandating continuing education requirements for bail bond professionals. *See* 1996 Pub. Acts, ch. 856. At its root, the legislation required bail bondsmen and bail bonding agents to obtain eight hours of continuing education credits annually. *Id.* But of relevance here, it also mandated that the Tennessee Association of Professional Bail Agents ("the Association") provide the required continuing education courses. *Id.* This mandate for the Association's involvement is now codified at Tenn. Code Ann. § 40-11-404, *see* Tenn. Code Ann. § 40-11-404(a),[1] and under the statute, the Association may charge up to $450 annually for the required eight hours of continuing education. *See id.* § 40-11-404(b).

The question presented asks whether § 40-11-404 creates a monopoly in violation of article I, section 22 of the Tennessee Constitution. When analyzing constitutional issues, the Supreme Court "indulge[s] every presumption and resolve[s] every doubt in favor of constitutionality." *Lynch v. City of Jellico*, 205 S.W.3d 384, 390 (Tenn. 2006) (quotations omitted). And if a party "brings a facial challenge," the "presumption of constitutionality applies with even greater force."

[1] In connection with the statutory mandate that the Association "shall provide all continuing education courses," Tenn. Code Ann. § 40-11-404(a), § 40-11-404 additionally states that the Association "shall either provide or contract for a minimum of eight (8) hours of in-person continuing education classes to be held on a regular basis in each of the grand divisions." *Id.* § 40-11-404(b). Moreover, the statute notes that the Association "is authorized to subcontract with any of its sub associations for classes." *Id.* Further, the Association is now permitted to "provide or contract for one (1) or more virtual classes." *Id.*

Waters v. Farr, 291 S.W.3d 873, 882 (Tenn. 2009); *see also Fisher v. Hargett*, 604 S.W.3d 381, 398 (Tenn. 2020).[2]

Ultimately, we do not think that a plaintiff challenging § 40-11-404 could carry the "especially heavy legal burden" of establishing facial invalidity. *Fisher*, 604 S.W.3d at 398.

Legal Principles Surrounding the Tennessee Constitution's Anti-Monopoly Provision

Article I, section 22 of the Tennessee Constitution provides "[t]hat perpetuities and monopolies are contrary to the genius of a free State, and shall not be allowed." Tenn. Const., art. I, § 22. While the language of this section may appear broad, almost two centuries of case law has clarified limitations on its scope. Not every exclusive right constitutes a "monopoly" within the meaning of the Tennessee Constitution. The Tennessee Supreme Court has explained that a monopoly is "an exclusive right granted to a few, *which was previously a common right*." *City of Watauga v. City of Johnson City*, 589 S.W.2d 901, 904 (Tenn. 1979) (emphasis added). And thus, "[i]f there is no common right in existence prior to the granting of the privilege for franchise, the grant is not a monopoly." *Id.*

The Tennessee Court of Appeals' decision in *James Cable Partners, L.P. v. City of Jamestown*, 818 S.W.2d 338 (Tenn. Ct. App. 1991), illustrates this point. There, the Court of Appeals addressed a situation where a city had granted an exclusive right to use its streets for the operation of a communications system. *Id.* at 345. In discussing why this exclusive grant could not be classified as a monopoly, the Court of Appeals succinctly explained that, "prior to this grant," "[i]t certainly was not a common right to use the streets of the city [in the manner allowed by the exclusive franchise[3]]." *Id.*

And even when there *is* a monopoly, courts have made clear that it does not automatically follow that the monopoly is a constitutionally prohibited one. In fact, "[i]t is settled law that the anti monopoly clause of our constitution does not prohibit the legislature from granting a monopoly, in so far as such monopoly has a reasonable tendency to aid in the promotion of the health, safety, morals and well being of the people." *Checker Cab Co. v. City of Johnson City*, 216 S.W.2d 335, 337 (Tenn. 1948). That does not mean that a monopoly can "be validly created merely by connecting such creation with the exercise of a police power." *Id.* But the law is also clear that courts cannot interfere in matters that are "exclusively a legislative prerogative." *Id.* And "if the monopoly created has a legitimate relation to the public purpose sought to be accomplished in the exercise of the police power," a court is not permitted to declare the monopoly

[2] Any assessments of "as applied" constitutional challenges that might possibly be lodged relative to the statute are outside the scope of this Opinion. As this Office has noted before, the type of analysis surrounding "as applied" constitutional questions "involves the building of a factual record in the courts regarding the practical effects of the statute as applied to a particular set of circumstances." Tenn. Att'y Gen. Op. 78-306 (July 27, 1978); *see also Waters*, 291 S.W.3d at 923 (Koch, J., concurring in part and dissenting in part) (discussing how "as applied" challenges require courts to consider constitutionality on a case-by-case basis).

[3] Our supplementation of the quote simply tracks the clarifying gloss a different panel of the Court of Appeals offered many years later. *See Trails End Campground, LLC v. Brimstone Recreation, LLC*, No. E2014-00336-COA-R3-CV, 2015 WL 388313, at *10 (Tenn. Ct. App. Jan. 29, 2015) (noting that the statement in *James Cable Partners* that there was no common right to use the city's streets "certainly must be interpreted to mean that [the city's] citizens did not have the right to use the streets *in the manner allowed by the exclusive franchise*").

invalid simply because it thinks some other method would have accomplished the purpose sought. *Id.* In the end, "[i]f in the exercise of such police power an incidental monopoly happens to be created, it is not one which offends the anti-monopoly clause of our Constitution." *Landman v. Kizer*, 255 S.W.2d 6, 7 (Tenn. 1953).

Application of the Governing Legal Principles

In view of these principles, we find it unlikely that a court would conclude that § 40-11-404 creates an unconstitutional monopoly. First, it is not clear that there is even a monopoly within the meaning of the Tennessee Constitution. A monopoly, after all, exists when there is "an exclusive right granted to a few, *which was previously a common right*," *City of Watauga*, 589 S.W.2d at 904 (emphasis added), and here, we struggle to see how the right granted to the Association meets this standard. A common right exists "if a person had the right or liberty to do a certain act or engage in a particular business." Tenn. Att'y Gen. Op. 17-43 (Sept. 25, 2017) (citing *City of Memphis v. Memphis Water Co.*, 52 Tenn. 495, 529 (1871)). If the challenged statute *creates* the market (here, a market for statutorily required continuing education), then it is hard to see how any pre-existing right could exist. And here, the Association has *always* had the exclusive right at issue. Thus, even assuming that a Tennessee court might hold that a "common right" could be created by statute, § 40-11-404 has never done so. The 1996 legislation mandated that the Association "provide all continuing education courses," 1996 Pub. Acts, ch. 856, and that has remained the case to the present day. *See* Tenn. Code Ann. § 40-11-404(a). Because the Association has always had the exclusive charge to provide or contract for the statutorily required continuing education, there is simply no support for the notion that there was ever any common right for others to provide it.

In this way, the circumstances surrounding § 40-11-404(a) differ from the circumstances addressed by a North Carolina appellate court in *Rockford-Cohen Group, LLC v. North Carolina Department of Insurance*, 749 S.E.2d 469 (N.C. Ct. App. 2013). In that case, the North Carolina Court of Appeals considered whether a law that assigned bail bondsmen training to a single group violated the State's constitutional prohibition on monopolies.[4] *Id.* at 472. But as ultimately proved to be significant, the precise question entailed consideration of the "[legislative] decision to assign creditable bail bondsmen training to one particular group, **where previously anyone could apply to the Commissioner of Insurance to provide such training**." *Id.* (emphasis added). In ultimately reasoning that a prior common right existed, the court looked at the prior iteration of the statute that was in question. *See id.* at 473-74. Specifically, the court emphasized that the State's General Assembly had "created the right to apply to provide creditable bail bondsmen training in the previous version of this statute." *Id.* at 473. And thus, in the court's opinion, the common right that was lost was "the right to be considered by the Commissioner of Insurance for approval" to provide creditable training. *Id.*

Here, of course, we have very different circumstances. Even accepting the underlying premise that a statutory scheme of this nature could create some type of a "common right" (a proposition that is far from clear), the statutory history that surrounds § 40-11-404 does not

[4] Like Tennessee, North Carolina has an anti-monopoly provision in its Constitution, practically identical to our own. *See* N.C. Const., art. I, § 34 ("Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed.").

evidence any pre-existing right. Again, there is simply no support for the notion that there was ever any right for others to provide the required continuing education at issue, and for that reason alone, we think it is doubtful that a Tennessee court would regard § 40-11-404 as contravening the anti-monopoly provision of the Tennessee Constitution. *See Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 567 (1837) (discussing that a monopoly involves "withdrawing that which is a common right, from the community, and vesting it in one or more individuals, to the exclusion of all others").[5]

Regardless, even assuming a withdrawn common right, § 40-11-404 likely does not qualify as an unlawful monopoly. As discussed earlier, a monopoly is not prohibited if it "has a reasonable tendency to aid in the promotion of the health, safety, morals and well being of the people." *Checker Cab Co.*, 216 S.W.2d at 337. And thus, even if a court determined that § 40-11-404 created a monopoly, it would still look to see whether the monopoly created has a reasonable tendency to serve the public purposes just referenced.[6]

Here, we are skeptical that a Tennessee court would conclude that the authority given to the Association under § 40-11-404 lacks a "reasonable tendency to aid in the promotion of the health, safety, morals and well being of the people." *Id.* The nexus between bail bond professionals and the criminal justice system implicates real public safety considerations,[7] and a court could find that the uniformity in the education created by § 40-11-404 thus helps to generally promote safety for the public. For instance, a court might reason that the adoption of a uniform educational program provides the State with an opportunity to more easily track that education and ensure that bail bond professionals are in fact receiving the necessary knowledge that their jobs require. This justification is certainly rational and in furtherance of "the health, safety, morals and well being of the people." *Id.*; *see also Dial-A-Page, Inc. v. Bissell*, 823 S.W.2d 202, 206 (Tenn. Ct. App. 1991) (following up its overview of the guidance in *Checker Cab* by noting that "[t]he test for determining whether the legislature has correctly exercised its police power in regulating an activity is the rational basis test"); *Esquinance v. Polk Cnty. Educ. Ass'n*, 195 S.W.3d 35, 47 (Tenn. Ct. App. 2005) (quoting the discussion from *Dial-A-Page* about rational-basis review). The upshot is that a constitutional challenge to § 40-11-404 would not automatically be successful simply because a court concluded that a prior common right was implicated by the grant to the Association.

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[5] Tennessee courts have positively cited this decision in their anti-monopoly jurisprudence, principally in connection with the understanding that a monopoly is "an exclusive right granted to a few, which was previously a common right." *See, e.g.*, *City of Watauga*, 589 S.W.2d at 904.

[6] Of note, the decision of the North Carolina Court of Appeals that was referenced earlier failed to engage in any additional analysis. The court simply determined that the statute in question concerned something that was previously a common right and held it to be unconstitutional. *Rockford-Cohen Group, LLC*, 749 S.E.2d at 474. In alluding to the abruptness of this decision, one commentator—now an Associate Justice on the North Carolina Supreme Court—noted as follows: "It is unclear from the opinion whether the court of appeals reached this conclusion because there was no rational basis for the exclusive right, or whether the court applied some other test." Richard Dietz, *Factories of Generic Constitutionalism*, 14 Elon L. Rev. 1, 19 n.119 (2022).

[7] For one, bail bondsmen are given authority to make arrests. *See* Tenn. Code Ann. § 40-11-133. But even outside of that discrete concern, there is another connection to public safety: Bail bond professionals can, in effect, help to further crime prevention. As one commentator has observed in relation to this point, by allowing bail bondsmen to apprehend bail jumpers, States are able to ensure that police manpower is devoted elsewhere. Holly J. Joiner, Note, *Private Police: Defending the Power of Professional Bail Bondsmen*, 32 Ind. L. Rev. 1413, 1428 (1999).

All things considered, then, we do not believe it is likely that a court would conclude that § 40-11-404 creates an unconstitutional monopoly in light of the case law. First, we struggle to see how the statute implicates a common right. And as a result, we do not think there is even a monopoly within the parlance of article I, section 22 of the Tennessee Constitution. But, again, even if our understanding of that issue might somehow be in error, a court could still uphold the statute if it were to conclude that it has a "reasonable tendency to aid in the promotion of the health, safety, morals and well being of the people." *Checker Cab Co.*, 216 S.W.2d at 337.

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