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**OFFICE OF THE**  
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Opinion No. 10-10

Constitutionality of criminal penalties for unauthorized sale, possession and use of fireworks

**QUESTIONS**

1. Do statutes criminalizing the sale of fireworks in counties having a population of greater than 200,000 according to the 1980 census or any subsequent census violate Article I, § 8 of the Tennessee Constitution?
2. Is pending legislation authorizing local governments to opt-in to fireworks laws that impose criminal penalties for violations thereof constitutional?

**OPINIONS**

1. No.
2. The pending legislation is defensible against constitutional challenges.

**ANALYSIS**

1. It is generally a Class C misdemeanor for any person to sell at retail any Class C common fireworks within counties having a population of greater than 200,000 according to a 1980 or subsequent census.<sup>1</sup> Tenn. Code Ann. §§ 68-104-112(a)(4), -114(a). Retail sale of such fireworks is generally legal in other counties if the retailer first obtains a valid permit from the state fire marshal. Tenn. Code Ann. § 68-104-102(a). Requests for the issuance of a permanent retailer's or seasonal retailer's permit must be accompanied by a statement, signed by the chief executive officer (or designee) of the county or municipality where the fireworks are to be sold, indicating that such sales are permissible in that county or municipality. Tenn. Code Ann. § 68-104-105(a).

Article I, § 8 of the Tennessee Constitution provides “[t]hat no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any

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<sup>1</sup> “Class C common fireworks” is defined as all articles of fireworks classified as D.O.T. Class C common fireworks in the regulations of the United States Department of Transportation. Tenn. Code Ann. § 68-104-101(2). The pending legislation would substitute the term “consumer fireworks” for “Class C common fireworks.” Section 1 of the bill provides: “‘Consumer fireworks’ means fireworks that have been approved by the U.S. Consumer Product Safety Commission as legally being available for sale to and use by consumers for their personal use.”

manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.” This section guarantees due process of law and “is synonymous with the due process clause of the Fourteenth Amendment to the United States Constitution.” *Newton v. Cox*, 878 S.W.2d 105, 110 (Tenn. 1994). Unless a “fundamental right” is implicated, statutory deprivations or restrictions of rights are analyzed under a “rational basis” standard. *Riggs v. Burson*, 941 S.W.2d 44, 51 (Tenn. 1997). In applying this standard, a statute will survive a substantive due process challenge if it “bears a reasonable relation to a proper legislative purpose and is neither arbitrary nor discriminatory.” *Newton*, 878 S.W.2d at 110 (quoting *Nebbia v. New York*, 291 U.S. 502, 537 (1934)).

Article I, § 8, along with Article XI, § 8, also encompass the equal protection guarantee.<sup>2</sup> *State v. Tester*, 879 S.W.2d 823, 827 (Tenn. 1994); *State v. Whitehead*, 43 S.W.3d 921, 925 (Tenn. Crim. App. 2000). The equal protection provisions of the Tennessee Constitution provide “essentially the same protection” as the equal protection clause of the Fourteenth Amendment to the United States Constitution. *Id.* (both quoting *Tennessee Small School Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993)). These provisions guarantee that “all persons similarly circumstanced shall be treated alike.” *Tennessee Small School Sys.*, 851 S.W.2d at 153 (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). Unless a “fundamental right” or “suspect class” is at issue, the validity of a legislative classification under an equal protection analysis is determined by a “rational basis test.” *Tester*, 879 S.W.2d at 828. “Under this standard, if some reasonable basis can be found for the classification, or if any state of facts may reasonably be conceived to justify it, the classification will be upheld.” *Id.* (quoting *Tennessee Small School Sys.*, 851 S.W.2d at 153).

The retail sale of fireworks does not implicate a “fundamental right,” nor do retailers of fireworks constitute a “suspect class.”<sup>3</sup> Consequently, statutory deprivations and legislative classifications regarding such sales do not violate Article I, § 8 as long as some rational basis justifies them. In 1984, the Tennessee Supreme Court held that a private act prohibiting the sale of fireworks in Knox County did not violate Article I, § 8. *Harwell v. Leech*, 672 S.W.2d 761, 764 (Tenn. 1984). At that time, fireworks sales were generally permitted in the state during certain times of the year. *Id.* at 762. But in upholding the ban of fireworks sales in Knox County, the Supreme Court said:

The validity of an act of the Legislature attempting a classification of the counties of the state is largely influenced by the character of the legislation. The

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<sup>2</sup> Article XI, § 8 provides: “The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunitie[s], or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law. No corporation shall be created or its powers increased or diminished by special laws but the General Assembly shall provide by general laws for the organization of all corporations, hereafter created, which laws may, at any time, be altered or repealed and so such alteration or repeal shall interfere with or divest rights which have become vested.”

<sup>3</sup> A “fundamental right” is a right guaranteed either explicitly or implicitly by the constitution and includes rights such as speech, association, voting and privacy. See *Whitehead*, 43 S.W.3d at 925. “Suspect classifications” involve inherently suspect distinctions such as those based on race, gender, alienage and national origin. See *id.*

legislation in question is clearly designed to protect the health and welfare of the citizens of Knox County, which has a very large population. The likelihood of injury resulting from the use or misuse of fireworks is greater in a thickly populated county than in a county with a small population. We are satisfied that this Act relates to a matter in respect of which a difference in population would furnish a rational basis for diversity of laws.

*Id.* at 764 (citations omitted). For the same reasons, Tennessee courts would likely conclude that the statutory ban of fireworks sales in counties having a population of greater than 200,000 according to a 1980 or subsequent census does not violate Article I, § 8.

2. A copy of Senate Bill 731/House Bill 276 accompanied the opinion request. The pending legislation proposes to revise the current statutory scheme of regulating consumer fireworks by local governments. In relevant part, section 7 of the bill repeals the current statutory prohibition of retail fireworks sales in counties with populations exceeding 200,000; subsection 3(a)(1) generally authorizes the legislative bodies of local governments to permit or prohibit the sale, possession and use of consumer fireworks within their respective jurisdictions, provided that local governments cannot prohibit such sale and possession by a retailer with a permit to sell consumer fireworks at a permanent location on the date the act becomes effective; subsection 3(a)(2) establishes guidelines for local governments that authorize the retail sale of consumer fireworks to follow for issuance of sales permits through the state fire marshal; subsection 3(d)(1) provides that consumer fireworks held for sale at retail in any local jurisdiction that has prohibited or not approved such sale are contraband and subject to confiscation by law enforcement officials of that jurisdiction; subsection 3(d)(2) establishes a criminal offense for shipping consumer fireworks into any local jurisdiction for purposes of possession for sale at retail, or for selling consumer fireworks in any local jurisdiction, where that jurisdiction has prohibited or not approved the sale or possession of such fireworks;<sup>4</sup> and section 10 preempts the regulation of consumer fireworks by local governments by private act.

Following the bill's enactment, holders of a permanent retailer's permit on the effective date of the act may continue to sell and possess consumer fireworks wherever they are located, but all other sale, possession and use of consumer fireworks would be illegal statewide. Sale, possession and use of consumer fireworks would become permissible only in municipalities and counties that expressly authorize these activities, and then subject to the limits imposed by the local government in accordance with the terms of the pending legislation. Accordingly, the sale, possession and use of consumer fireworks could be legal in certain municipalities and counties but illegal in others, depending on the action of local legislative bodies to permit or prohibit such activities within their respective jurisdictions. The question presented is whether such pending legislation is constitutional. This question implicates delegation of legislative authority under Article II, § 3, as well as the due process and equal protection provisions of Article 1, § 8 and Article XI, § 8.

Article II, § 3 requires legislation to be complete at the time of its passage. Legislation that derives its efficacy from further action by local governments or popular vote is invalid. *Jones v. Haynes*, 424 S.W.2d 197, 198 (Tenn. 1968). The legislature, therefore, cannot

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<sup>4</sup> Such violations would be a Class C misdemeanor. See Tenn. Code Ann. § 68-104-114(a).

constitutionally delegate to local governments its authority to declare certain conduct a crime and to prescribe punishment for that offense. *State v. Toole*, 457 S.W.2d 269, 270 (Tenn. 1970). Under the legal framework of local option law, however, the legislature is authorized to permit local governments to decide the operation and enforcement of a law of general applicability that is complete at the time of its enactment. This framework was set forth in *Clark v. State ex rel. Bobo*, 113 S.W.2d 374 (Tenn. 1938). In that case, the Tennessee Supreme Court upheld the constitutionality of a local option law that legalized the manufacture of liquor in counties that voted to authorize such manufacture. *Id.* at 381. The Supreme Court reasoned that, while the legislature may not delegate its authority to make a law, it may make a duly-enacted law operative only on the happening of a certain event, such as the county elections in that case. *Id.* at 376. In such instances, the law is complete upon its legislative enactment, and the local option authorized thereunder is not for or against the law but merely concerns its implementation in a particular locality.<sup>5</sup> *Id.* at 376-377.

The pending legislation fits the *Clark* analysis. The bill and existing statutes determine the scope of fireworks regulation, and they proscribe certain conduct related to the sale, possession and use of consumer fireworks, as well as establish the penalties for engaging in that conduct. The pending legislation would become effective following its enactment by the General Assembly regardless of the outcome of the local government actions authorized by the bill. While the legislative body of any municipality or county may act to bring its locality within the terms of the prescribed fireworks regulation, the bill's effectiveness as a law of the State of Tennessee does not hinge on such action. Accordingly, the pending legislation is defensible against a challenge under Article II, § 3 that the General Assembly has impermissibly delegated to local governments its authority to declare illegal certain conduct related to the sale, possession and use of fireworks.

Article XI, § 8 constrains the legislature from suspending the general law of the land to benefit a particular individual or individuals without a rational basis. This constitutional prohibition is not triggered, and analysis under this section is not appropriate, unless the statute in question contradicts some general law that has mandatory state-wide application. *Civil Serv. Merit Bd. v. Burson*, 816 S.W.2d 725, 731 (Tenn. 1991). The "general law" subject to contradiction must be a statute. *Id.* Even if a contradiction between the statute in question and a general law is found to exist, the legislative act is still valid if there is a rational basis for the distinction drawn by the legislature. *Stalcup v. City of Gatlinburg*, 577 S.W.2d 439, 442 (Tenn. 1978). If any reason can be conceived to justify the distinction, it will be upheld. *Id.*

The pending legislation would repeal the current statutory ban on retail sale of fireworks in counties with populations exceeding 200,000 and would generally authorize the legislative bodies of local governments to permit or prohibit the sale, possession and use of consumer fireworks within their respective jurisdictions. Following the bill's enactment, the regulation of consumer fireworks would be by local option. This office is unable to find any statute of mandatory state-wide application whose provisions would be contradicted or undermined by the

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<sup>5</sup> Examples of current local option laws include the manufacture and sale of alcoholic beverages, Tenn. Code Ann. 57-3-106; carrying of handguns in public parks, Tenn. Code Ann. § 39-17-1311(d); pari-mutual wagering, Tenn. Code Ann. § 4-36-401; wheel taxes, Tenn. Code Ann. § 5-8-102; metropolitan form of government, Tenn. Code Ann. § 7-2-106; and local-option sales tax, Tenn. Code Ann. § 67-6-705.

provisions of the bill. The pending legislation, therefore, does not violate Article XI, § 8. Moreover, even if a provision of the bill were found to contradict a statute of mandatory state-wide application, it may still be defensible against a constitutional challenge under Article XI, § 8. As discussed more fully below, a local government's action to increase sales tax revenues from retail fireworks sales within its jurisdiction, as well as local circumstances surrounding the sale, possession and use of consumer fireworks, could provide a rational basis for the distinction.

As discussed previously in this opinion, statutory deprivations and legislative classifications regarding consumer fireworks must survive only a "rational basis" review under Article I, § 8. *See Tester*, 879 S.W.2d at 828. Accordingly, the pending legislation would not violate Article I, § 8 if some reasonable basis or conceived state of facts could justify the disparate treatment of fireworks regulation among municipalities and counties, which may occur following the bill's enactment. In *Op. Tenn. Att'y Gen. 98-076* (Apr. 6, 1998), this office opined that the City of East Ridge's "desire for higher sales tax revenues could serve as a constitutionally defensible rational basis" for special legislation authorizing the retail sale of fireworks within its jurisdiction. This rationale may be applied to any local government that permits the retail sale of consumer fireworks within its jurisdiction pursuant to the terms of the pending legislation. Additionally, the sale, possession and use of consumer fireworks, like that of intoxicating liquors, may be differently regarded in different localities depending on local circumstances. *See Clark*, 113 S.W.2d at 376. With respect to the bill's provisions that authorize permanent retailers to continue selling consumer fireworks from their current locations, Tennessee courts have upheld grandfather clauses that exempt existing businesses from newly imposed operating restrictions. *Fleet Transp. Co. v. Tennessee Pub. Serv. Comm'n*, 545 S.W.2d 4, 8 (Tenn. 1976). Courts have reasoned that such clauses are supported by the rational basis of protecting the vested interests of existing businesses. *Id.* at 7. For these reasons, the pending legislation is defensible against a challenge under Article I, § 8, though its enactment may result in legalizing the sale, possession and use of consumer fireworks in some municipalities and counties but not in others.

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