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Opinion No. 13-05

State Regulation of Student Organizations at Public and Private Colleges and Universities

QUESTION

Does House Bill 3576/Senate Bill 3597 of the 107th General Assembly, 2nd Sess. (2012) (hereinafter referred to as “HB3576”) violate the United States or Tennessee Constitutions?

OPINION

As applied to state institutions of higher learning, HB3576 would likely be held facially constitutional. The federal Equal Access Act, codified at 20 U.S.C. §§ 4071-74, is similar to the provisions of HB3576 related to state institutions and has been upheld against constitutional challenge. As applied to private institutions, HB3576 is constitutionally suspect because its provisions impose a possible unconstitutional condition on the receipt of state funds and raise equal protection concerns.

ANALYSIS

This request seeks guidance on the constitutional validity of HB3576 as passed by the General Assembly and vetoed by Governor Bill Haslam.¹ HB3576, as passed by the General Assembly, provides:

SECTION 1. Tennessee Code Annotated, Title 49, Chapter 7, Part 1, is amended by adding the following language as a new section: 49-7-150.

(a) No state higher education institution that grants recognition to any student organization shall discriminate against or deny recognition to a student organization, or deny to a student organization access to programs, funding, or facilities otherwise available to another student organization, on the basis of:

(1) The religious content of the organization’s speech including, but not limited to, worship; or

¹ This Office cannot effectively anticipate all possible factual situations in which HB3576 might be applied or “as applied” challenges that might develop against HB3576. *See generally Waters v. Farr*, 291 S.W.3d 873, 922-23 (Tenn. 2009) (Koch, J., concurring in part and dissenting in part) (discussing in depth distinctions between “as applied” and “facial” constitutional challenges). Accordingly, such “as applied” challenges are outside the scope of this opinion.

(2) The organization's exercise of its rights pursuant to subsection (b).

(b) A religious student organization may determine that the organization's religious mission requires that only persons professing the faith of the group and comporting themselves in conformity with it qualify to serve as members or leaders.

(c) As used in this section, "state higher education institution" means:

- (1) Any higher education institution governed by chapter 8 or 9 of this title; or
- (2) Any private higher education institution that receives payments from state funds derived directly from state tax revenues that annually total more than twenty-four million dollars (\$24,000,000).

(d) Any private higher education institution that receives payments from state funds derived directly from state tax revenues that annually total more than twenty-four million dollars (\$24,000,000) may adopt a policy that denies recognition to religious student organizations because they maintain leadership or membership criteria based on religious beliefs, but solely on the condition that:

- (1) The institution requires every recognized student organization, including organizations described in 20 U.S.C. § 1681 (a)(6)(A) (also known as "Title IX"), to accept as members all students who apply to be members; and
- (2) The institution does not allow any recognized student organization, including organizations described in 20 U.S.C. § 1681(a)(6)(A) (also known as "Title IX"), to set a numerical limit on membership or to use subjective qualifications for choosing its members.

(e) This section does not apply to any religious school, college, university, or other educational institution or institution of learning described in 42 U.S.C. § 2000e-2(e)(2).

SECTION 2. Subdivision (c)(2) and subsections (d) and (e) of Section 1 of this act are repealed June 30, 2013.

SECTION 3. This act shall take effect July 1, 2012, the public welfare requiring it.

As applied to state institutions, HB3576 would be constitutionally defensible. HB3576 would effectively prohibit state institutions of higher learning from denying any privilege or benefit to a student organization on the basis of either (1) the organization's religious speech or (2) the organization's exercise of its right to determine that "the organization's religious mission

requires that only persons professing the faith of the group and comporting themselves in conformity with it qualify to serve as members or leaders.” See HB3576, § 1.²

State institutions of higher learning are governmental agencies and possess only those powers expressly granted by statute and those powers required by necessary implication to enable them to fulfill their statutory mandate. *State ex rel. Comm’r of Transp. v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 768-69 (Tenn. Ct. App. 2001). State institutions are creatures of statute, with no inherent power of their own, and thus are required to implement the provisions of HB3576 if they are enacted into law. See *id.* See also Tenn. Code Ann. 49-8-101 to -1401 (establishing Tennessee university and community college system); Tenn. Code Ann. §§ 49-9-101 to -1502 (establishing University of Tennessee system).

Accordingly the determinative question is whether the implementation of HB3576 by Tennessee institutions of higher learning implicates constitutional concerns. Based upon a review of current authorities, it appears likely that state institutions’ enforcement of HB3576 would not raise constitutional concerns and specifically would not violate either the Establishment Clause³ or the Equal Protection Clause⁴ of the United States Constitution.

The federal Equal Access Act, codified at 20 U.S.C. §§ 4071-4074 (the “EAA”), currently requires public secondary schools that receive federal funding to recognize religious

² HB3576 in effect precludes a state institution from adopting a broad “all-comers” policy. An “all-comers” policy generally requires a student organization to accept all students who wish to join as a condition for official recognition and support from the state institution. See Jennifer J. Hennessy, Note, *University-Funded Discrimination: Unresolved Issues After the Supreme Court’s “Resolution” of the Circuit Split on University Funding for Discriminatory Organizations*, 96 Iowa L. Rev. 1767, 1769-87 (July, 2011). An “all-comers” policy thus effectively denies official recognition and support to a religious student organization that limits its membership and leadership positions to those persons who profess the faith of the group or comport themselves in conformity with the faith of the group. A number of universities have adopted an “all-comers” policy, and such policies have been challenged as being invalid under the United States Constitution. *Id.* at 1773-89. The United States Supreme Court has held that a public university does not transgress the Constitution by requiring a student group to allow all students to join the group in order to attain status as a university sponsored student group. *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, ___ U.S. ___, 130 S.Ct. 2971, 2979-95 (2010). See also *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F3d 790, 795-803 (9th Cir. 2011), *cert. denied*, ___ U.S. ___, 102 S.Ct. 1743 (2012) (upholding a public university’s non-discrimination policy that denied official recognition to student groups specifically because they discriminate in membership on the basis of religious belief).

³ The Establishment Clause is part of the First Amendment to the United States Constitution and states that “Congress shall make no law respecting an establishment of religion.” U.S. Const. amend I. The First Amendment, as well as many of the other amendments to the United States Constitution, are incorporated into the Due Process Clause of the Fourteenth Amendment and are therefore applicable to the states. See *Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968); *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). The Tennessee Constitution likewise contains a similar Establishment Clause, stating that “no preference shall ever be given, by law, to any religious establishments or mode of worship.” Tenn. Const. art. I, § 3.

⁴ The Equal Protection Clause of the United States Constitution provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. IV, § 1. The Tennessee Constitution contains a similar guarantee of equal protection in Article I, Section 8 and Article XI, Section 8. *Tennessee Small School Systems v. McWhorter*, 851 S.W.2d 139, 152-53 (Tenn. 1993).

student organizations that discriminate on the basis of religious belief, even where that discrimination would otherwise violate the school's non-discrimination policy. The EAA provides in relevant part:

It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

20 U.S.C. § 4071(a).

This provision of the EAA has been sustained against claims that it is unconstitutional. The United States Court of Appeals for the Second Circuit interpreted the EAA as prohibiting public secondary schools from denying official student group recognition to religious groups that discriminate on the basis of religion in the selection of their officers. *Hsu v. Roslyn Union Free School Dist.*, 85 F.3d 839, 848 (2d Cir.), *cert. denied*, 519 U.S. 1040 (1996). In *Hsu*, a school district refused to officially recognize a student-led bible study group because the group's charter required certain club officers to be Christians. *Id.* The Court held that the EAA required recognition of the bible study group, despite the group's religious belief discrimination. *Id.* The Second Circuit concluded that applying the EAA to require the school to extend official recognition to the bible study group was constitutional and rejected the school district's argument that recognition of the club would "draw the school into an establishment of religion or impair the school's efforts to prevent invidious discrimination." *Id.* The Court found that the club's limitation of its membership and officers to those who were admitted Christians did not *per se* violate the Establishment Clause or the Equal Protection Clause. The Second Circuit in so holding reasoned as follows:

Guaranteeing that these officers will be dedicated Christians assures that the Club's programs, in which any student is of course free to participate, will be imbued with certain qualities of commitment and spirituality. Thus, we conclude that the decision to allow only Christians to be President, Vice-President, or Music Coordinator is calculated to make a certain type of speech possible, and will affect the "religious . . . content of the speech at [the] meetings," within the meaning of the Equal Access Act.

. . . .

The right to free association for expressive purposes is implicit in the First Amendment free speech guarantee. *See NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449, 460-61, 78 S.Ct. 1163, 1170-71, 2 L.Ed.2d 1488 (1958); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233, 97 S.Ct. 1782, 1798, 52 L.Ed.2d 261 (1977).

. . . .

When the students' desire to hold a meeting covered by the Act involves a decision not to associate with other students, that decision, depending on its purpose, may constitute an exercise of the students' right of expressive association. On the one hand, an exclusion solely for reasons of hostility or cliquishness, with no direct bearing or effect on the group's speech, does not implicate the right to *expressive* association. But expressive association is implicated when the decision to exclude is made in order to foster the group's shared interest in particular speech. *See* William P. Marshall, *Discrimination and the Right of Association*, 81 *Nw. U.L. Rev.* 68, 78–80, 90–91 (1986). As the Court said in *Roberts [v. United States Jaycees]*, 468 U.S. 609 (1984), a regulation that prevents a group from excluding certain people “may impair the ability of the original members to *express only those views* that brought them together.” 468 U.S. at 623, 104 S.Ct. at 3252 (emphasis added).

....

Our holding is narrow. We do not hold that administrators must allow religious discrimination in the schools. Religious discrimination by student clubs will often be invidious and will rarely fall within our holding. However, when a sectarian religious club discriminates on the basis of religion for the purpose of assuring the sectarian religious character of its meetings, a school must allow it to do so unless that club's specific form of discrimination would be invidious (and would thereby violate the equal protection rights of other students), or would otherwise disrupt or impair the school's educational mission. Courts must be extremely reluctant to overrule the judgment of local school administrators who are responsible for making these sensitive decisions. But in this case, the only judgment Roslyn High School has made is that *every* instance of religious discrimination by a student group is invidious and disrupts the school's mission. Invidious discrimination entails more context-specific judgments.

Hsu, 85 F.3d at 858-59, 872-73 (emphasis in original).

The effect of the EAA as applied in *Hsu* is substantially similar to the apparent effect of HB3576 as applied to state institutions of higher learning. Under HB3576, such state institutions could not deny recognition or any privilege or benefit to an organization solely because it requires its members to commit to the religious mission of the organization. Accordingly, based on the reasoning in the *Hsu* case, HB3576 if enacted would be constitutionally defensible as applied to state institutions. *But see Truth v. Kent School District*, 542 F.3d 634, 645-48 (9th Cir. 2008), *overruled on other grounds by Los Angeles County, Cal. v. Humphries*, ___ U.S. ___, 131 S.Ct. 447 (2010) (*quoting Hsu*, 85 F.3d at 858 & n.17) (finding EAA did not preclude a school district from enacting a non-discrimination policy that refused to fund groups that excluded those who do not share Christian values from their general membership, noting *Hsu* and the EAA would not require “a religious test for membership or attendance” since “[i]t is difficult to understand how allowing non-Christians to attend the meetings and sing (or listen to) Christian prayers would change the Club's speech”).

At least one commentator has suggested that the EAA and the reasoning in *Hsu* would allow a state legislature to pass an act like HB3576 that regulates student-group forums at public universities. As this commentator reasoned:

Thus, Congress or a state legislature could pass an act similar to the Equal Access Act that regulates student-group forums at public universities. The act could mandate equal access--including the use of university facilities, communications channels, and funding from the student activity fee--for student groups regardless of the groups' religious, political, or philosophical speech and associational activities.

Critical to the success of such an Act is the recognition that a student group's exercise of speech or expressive association does not bear the imprimatur of the university. The majority in *Widmar [v. Vincent]*, 454 U.S. 263, 274], which provided the framework for the Equal Access Act, concluded that "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices." The Equal Access Act codified this concept by distinguishing between student-initiated speech and school-sponsored speech. Similarly, an equal access act for higher education could create a statutory open forum whenever a university opens a forum for student groups.

The act would need to be carefully drafted to protect both speech and expressive association rights. For example, the act could forbid a university from applying its nondiscrimination policy in a manner that interferes with a religious, political, or philosophical group's expressive association rights. The act could provide a policing provision recognizing a university's right and responsibility to maintain order and control. However, the act could require the application of strict scrutiny analysis to any restrictions imposed on access to a student-group forum.

David Brown, Comments, *Hey! Universities! Leave Them Kids Alone! Christian Legal Society v. Martinez and Conditioning Equal Access to a University's Student-Organization Forum*, 116 Penn. St. L. Rev. 163, 196-97 (Summer 2011) (footnotes omitted).

The question of HB3576's constitutionality as applied to private institutions of higher learning raises different issues. Unlike public institutions, which are creatures of statute whose powers must be exercised in conformity with statute, private institutions of higher learning possess standing to challenge laws that infringe on their constitutional rights. See *NAACP v. Button*, 371 U.S. 415, 428-29 (1963). By its terms, HB3576 applies to "any private higher education institutional that receives payments from state funds derived directly from state tax revenues that annually total more than twenty-four million dollars." HB3576, § 1(c)(2). Any impacted private institution is required to comply with certain conditions if the institution adopts a policy that "denies recognition to religious student organizations because they maintain leadership or membership criteria based on religious beliefs." HB3576, § 1(d) & (e).⁵ HB3576 thus seeks to impact how certain private institutions of higher learning structure their institution-

⁵ HB3576 is silent on any enforcement mechanism that might be implemented if a private institution fails to comply with this provision.

supported student associations and to influence the admission criteria of these student associations. *Id.*

These provisions are constitutionally problematic for two reasons. First, they utilize the receipt of state funds to impose an arguably unconstitutional condition on the receipt of such funds. Second, the lack of a rational basis for applying this provision to a very limited number of private institutions raises equal protection concerns.

HB3576 apparently conditions the receipt of state funds upon a private educational institution structuring its supported student associations in compliance with HB3576. If HB3576 had directly required a private educational institution to so structure its supported student associations, such legislative action would be constitutionally suspect as an impermissible legislative intrusion upon a private institution's implicit right under the First Amendment to the United States Constitution to freely associate with others in "a wide variety of political, social, economic, education, religious and cultural ends." *Boy Scouts of America v. Dale*, 530 U.S. 640, 647 (2000) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)). *See also Knox v. Service Employees Intern. Union, Local 1000*, ___ U.S. ___, 132 S.Ct. 2277, 2288-89 (2012).

The right to associate freely presupposes the right to refuse to associate. *Boy Scouts of America v. Dale*, 530 U.S. at 648 (citing *Roberts*, 468 U.S. at 623). In *Boy Scouts*, the United States Supreme Court held that a New Jersey public accommodation law requiring a private organization to accept into its membership a person whose homosexual advocacy was in opposition to the group's message violated the First Amendment freedom of association. *Id.* at 644. The Court expressed its concern that forcing the inclusion of a person whose presence would alter the expressive activity of a group would "interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one." *Id.* at 661. As the Court explained, "public or judicial disapproval of a tenet of an organization's expression does not justify a state's effort to compel the organization to accept members, where such acceptance would derogate from the organization's expressive message." *Id.*

Similarly, the United States District Court for the District of New Jersey held a statute that required all nursing home facilities in the state to include a resident of the facility on the board of directors was unconstitutional as applied to a nursing home owned and operated by a church. *Wiley Mission v. New Jersey*, Civil No. 10-3024 (RBK/JS), 2011 WL 3841437, at *13-16 (D.N.J. 2011). The *Wiley Mission* court agreed with the church that forcing it to accept a board member who may not share the church's religious beliefs would significantly affect the church's protected speech and violate its First Amendment freedom of expressive association. *Id.* To reach this conclusion, the court applied a three-step analysis based on the *Boy Scouts* decision, determining (1) whether the entity challenging the statute is an expressive association, (2) whether the "forced inclusion of the unwanted person in the group would 'significantly affect' the group's ability to engage in protected speech," and (3) whether the challenged statute is narrowly tailored to advance a compelling state interest in the least restrictive manner possible.

A court, in applying the *Boy Scouts/Wiley Mission* analysis, would likely find that a private educational institution constituted an expressive association engaged in protective

speech. *See Rumsfeld*, 547 U.S. at 61-70 (concluding law schools had a right of expressive association). The next step would be to determine whether curtailing the ability of certain private educational institutions to control the formation of student associations supported by the institution, including the prohibition of an “all comers” policy, would “significantly affect” that institution’s expressive activities. If so, then a court would next consider whether such legislation is narrowly tailored to advance a compelling state interest in the least restrictive manner possible.

It is probable that such an analysis would conclude that a state legislative action attempting to control how a private institution regulates its student associations would run afoul of the institution’s First Amendment protections. A private university, in establishing the criteria governing student associations supported by the university, is expressing its own views on the appropriate composition of bodies that exist under the university’s umbrella. Just as the United States Supreme Court concluded the First Amendment right of expressive association precluded the State of New Jersey from enacting a law to compel the Boy Scouts of America to accept an unwanted person in its organization, similarly a state legislature could not restrict a private university from expressing its view through university policy on how its financially supported student organizations must structure their membership requirements. *See Boy Scouts of America v. Dale*, 530 U.S. at 653-661.

HB3576 does not cure this probable constitutional deficiency by limiting its provisions on student associations to apply only to private institutions that receive annually a certain amount of state funds. It is well established under the “doctrine of unconstitutional conditions” that a state may not condition the receipt of state funds upon a private party’s surrender of a constitutional right. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 59-60 (2006); *L.L. Nelson Enterprises v. County of St. Louis, Missouri*, 673 F.3d 799, 805-06 (8th Cir. 2012); *State v. Netland*, 762 N.W.2d 202, 211-12 (Minn. 2009). HB3576 arguably runs afoul of the unconstitutional conditions doctrine by prefacing the receipt of state funds with the requirement that a private educational institution must structure its student associations in compliance with HB3576. *But see Rumsfeld*, 547 U.S. at 65 (federal law denying federal funding to law schools that prohibited military recruiters from access to the campus did not violate the First Amendment freedom of expressive association because the law schools retained the ability to speak out against military policy; HB3576 would not appear to fall within this exception).

HB3576 is also constitutionally suspect under the Equal Protection Clauses of the United States and Tennessee Constitutions. Both of these clauses guarantee that “all persons who are similarly situated will be treated alike by the government and by the law.” *Consolidated Waste Systems, LLC v. Metro Government of Nashville and Davidson County*, No. M2002-02582-COA-R3-CV, 2005 WL 1541860 at *7 (Tenn. Ct. App. June 30, 2005) (citing *Riggs v. Burson*, 941 S.W.2d 44, 52 (Tenn. 1997), *cert denied*, 522 U.S. 982 (1997); *Tennessee Small School Systems v. McWhorter*, 851 S.W.2d at 152. While these clauses do not prohibit governmental classifications of citizens (including private institutions), any such classification must have “a reasonable relationship to a legitimate state interest.” *Gallaher v. Elam*, 104 S.W.3d 455, 461 (Tenn. 2003). If the classification does not interfere with the exercise of a fundamental right or operate to the disadvantage of a suspect class, then there must only exist a rational basis for the

classification. *Romer v. Evans*, 517 U.S. 620, 631 (1995); *Gallaher*, 104 S.W.3d at 461. Under the rational basis test, a classification will be upheld “if any state of facts may *reasonably be conceived* to justify it.” *Gallaher*, 104 S.W.3d at 462 (quoting *Riggs v. Burson*, 941 S.W.2d at 53) (emphasis added). Where the classification impairs a fundamental right or subject class, it must be struck down unless it survives “strict scrutiny” by advancing a compelling governmental interest and being narrowly drawn. *See, e.g., Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 547 (1983); *Gallaher*, 104 S.W.3d at 460-61.

Even considering the wide latitude given the General Assembly in establishing classifications, it is difficult to conceive any rational or reasonable basis for the classification created by HB3576. The classification only includes private higher education institutions that receive “payments from state funds derived directly from state tax revenues that annually total more than twenty-four million dollars,” HB3576, § 1(c)(2), and then even excludes from this narrow class “any religious school, college, university, or other educational institution or institution of learning described in 42 U.S.C. § 2000e-2 (e)(2).” HB3576, § 2. The creation of such a narrowly drawn classification impacting a relatively few private institutions appears to lack any arguable rational basis and thus would be constitutionally suspect under an equal protection analysis. To the extent HB3576 is construed to impair the fundamental right of free association, it clearly would not survive a strict scrutiny analysis.

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