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Opinion No. 13-20

Limitation on Authority of Higher Education Institutions to Exercise Police Powers

QUESTIONS

1. Does House Bill 1150/Senate Bill 1241 of the 108th General Assembly, 1st Sess. (2013) ("SB1241") violate either the First Amendment or the Equal Protection Clause of the United States Constitution?

2. Do either Tenn. Code Ann. § 4-21-802(a) or Tenn. Code Ann. § 4-21-803(a) violate the United States Constitution?

OPINIONS

1. SB1241 would likely be held facially constitutional as applied to state institutions of higher learning. As applied to private institutions, SB1241 is constitutionally suspect because it imposes a possible unconstitutional condition on the receipt of a valuable state benefit.

2. Both statutes are defensible from a facial constitutional challenge. Whether the statutes apply in a particular case and whether such application might implicate constitutional rights of speech, association or equal protection will depend upon the facts of that case and are beyond the scope of this opinion.

ANALYSIS

Tenn. Code Ann. § 49-7-118 confers the benefit of the State's police power on certain institutions of higher learning, including universities and community colleges within the Board of Regents and University of Tennessee systems and private universities meeting certain size, geographic and accreditation criteria. *See* Tenn. Code Ann. § 49-7-118. The powers granted by Tenn. Code Ann. § 49-7-118 include the power to (1) commission police officers; (2) set qualifications for those officers; (3) enter mutual assistance agreements with other law enforcement agencies; and (4) exercise all powers necessary to enforce state laws on property owned by the institution. *Id*.

SB1241 would condition the police powers conferred by Tenn. Code Ann. § 49-7-118 upon the institution structuring its financially supported student organizations in the manner provided by SB1241. SB1241[1] provides as follows:

> SECTION 1**.** Tennessee Code Annotated, Section 49-7-118, is amended by adding the following language as a new subsection (a) and by redesignating subsequent subsections accordingly:
>
> (a) The authority granted to institutions of higher education under this section may only be exercised and maintained by those institutions that meet all requirements of this section applicable to the institution and that:
>
> (1) Do not discriminate against or deny recognition to a student organization, or deny to a student organization access to any programs, opportunities, channels of communication, or facilities otherwise available to any other student organization on the basis of:
>
> (A) The religious content of the organization's speech; or
>
> (B) The organization's exercise of its rights pursuant to subdivision (a)(2); or
>
> (2) Do not prohibit a religious student organization from determining 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 in good standing or leaders.
>
> SECTION 2. This act shall take effect July 1, 2013, the public welfare requiring it.

1. This Office recently opined that House Bill 3576/Senate Bill 3597 of the 107th General Assembly, 2nd Sess. (2012) ("HB3576") was likely facially constitutional as applied to public universities but constitutionally suspect as applied to private universities because it imposed an unconstitutional condition on the receipt of a valuable government benefit. *See* Tenn. Att'y Gen. Op. 13-05 (Jan. 11, 2013). For similar reasons, SB1241 is likely facially constitutional as applied to public universities and constitutionally suspect as applied to private universities.

SB1241, like HB3576, denies a State benefit to an institution of higher learning that discriminates against or denies recognition to any student organization on the basis of (1) that organization's religious speech or (2) that organization's requirements for membership or leadership. HB3576 conditioned the receipt of State funds upon a private educational institution structuring its supported student associations in compliance with HB3576, Tenn. Att'y Gen. Op. 13-05 at 7, whereas SB1241 conditions a public or private educational institution's ability to commission and administer its own police force on the institution structuring its supported student associations in accordance with SB1241.

[1] This Office is unaware of any amendments to SB1241 as of this date.

As explained in Tenn. Att'y Gen. Op. 13-05, the State can constitutionally impose such a requirement on its own public institutions. Those public institutions are arms and instruments of the State and possess no rights or powers not conveyed by the State. Thus, the State may impose the non-discrimination requirement in SB1241 on public institutions because the requirement, as an exercise of state control over its own agent, does not violate any constitutional limitation on state power. *See* Tenn. Att'y Gen. Op. 13-05 at 2-6. *See also Hsu v. Roslyn Union Free School Dist.*, 85 F.3d 839, 848 (2d Cir. 1996), *cert. denied*, 519 U.S. 1040 (1996); 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, 196-197 (Summer 2011).

As applied to private institutions, the constitutional inquiry is different. The non-discrimination requirement contained in SB1241 is substantially similar to the non-discrimination provisions of HB3576. For the reasons outlined in Tenn. Att'y Gen. Op. 13-05, this non-discrimination requirement, as applied to private universities, likely violates the private universities' right to free association protected by the First Amendment to the United States Constitution.[2] *See* Tenn. Att'y Gen. Op. 13-05 at 6-8.

The constitutional infirmity of SB1241 is not cured by the fact that it withdraws the police power from private universities that exercise their right to free association rather than simply banning, outright, the exercise of that constitutional right. It is well established that the State may not condition continued receipt of a valuable state benefit (here, the exercise of the State's police power to commission and maintain a police force) on a private institution's compliance with an unconstitutional condition. *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). Because SB1241 arguably imposes an unconstitutional condition, it is facially constitutionally suspect.

SB1241 as it impacts private universities also facially violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. That amendment provides, in part, that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., amend. XIV, §1.

When a law creates a suspect classification (e.g. race or religion) or impacts a fundamental right (such as the rights guaranteed by the First Amendment), the Equal Protection

[2] The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. 1. Free speech includes not only the right to associate but also the right to refuse to associate. *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)). The First Amendment is incorporated into the Due Process Clause of the Fourteenth Amendment to the United States Constitution and thereby made applicable to the states. *See Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968).

Clause requires the law be reviewed under the "strict scrutiny" standard. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312-13 (1976). In order to meet this heightened standard a review, a state is required to demonstrate that the law under review is narrowly tailored to advance a compelling government interest. *Grutter*, 539 U.S. at 326; *Roberts v. United States Jaycees*, 468 U.S. 609, 626 (1984).

As previously discussed SB1241 impacts a private university's First Amendment right of free association and distinguishes between those universities that organize their student groups in conformity with SB1241 and those that do not. This classification thus impacts a fundamental right – a private university's First Amendment right to free association – and would be reviewed under the strict scrutiny standard. The General Assembly has an interest in how the State delegates its police power to a private university. Even if that interest is compelling, the General Assembly cannot assert that interest through an unrelated requirement that a private university abandon its right of free association. *See, e.g.*, *Morse v. Republican Party of Virginia*, 517 U.S. 186, 228 (citing *Buckley v. Valeo*, 424 U.S. 1, 24-5 (1976)) (recognizing that "governmental action that may have the effect of curtailing freedom to associate is subject to the closest scrutiny"). *See also Roberts*, 468 U.S. at 626 (stating that the application of a state nondiscrimination law is only permissible where a state uses "the least restrictive means of achieving its ends").

2. Turning to the second question posed, Tenn. Code Ann. § 4-21-802(a) and Tenn. Code Ann. § 4-21-803(a) are defensible from a facial constitutional challenge. These statutes collectively generally prohibit the expenditure of State funds, or the entering into by the State of commercial agreements, with a facility or club that discriminates "on the basis of sex, race, creed, color, religion, ancestry, national origin or disability." Tenn. Code Ann. §§ 4-21-802, -803. The United States Supreme Court has recognized in some situations that a state can selectively fund programs to encourage certain activities or use its spending powers to remedy private discrimination without violating the Constitution. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 193 (1991); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (plurality opinion). *See also Hill v. Kemp*, 645 F. Supp. 2d 992, 999-1006 (N.D. Okla. 2009) (quoting *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 211 (2003) (federal district court stating that "(w)hen the government creates a spending program, it is also entitled to define the limits of the program and impose requirements for the distribution of funds"). Accordingly, a court would likely find that the statutes in question could survive a facial challenge. *Cf. United States v. Stevens*, 559 U.S. 460 (2010) (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)) (setting out standard for facial constitutional challenge). Whether the statutes apply in a particular case and whether such application might implicate constitutional rights of speech, association or equal protection will depend upon the facts of that case and are beyond the scope of this opinion. *See Waters v. Farr*, 291 S.W.3d 873, 922-23 (Tenn. 2009) (Koch, J., concurring in part and dissenting in part) (discussing distinctions between "as applied" and "facial" constitutional challenges).

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