STATE OF TENNESSE
OFFICE OF THE ATTORNEY GENERAL

March 10, 2015

Opinion No. 15-17

Higher Bond Fees for Non-Resident Defendants

Question

Whether an amendment to Tenn. Code Ann. § 40-11-316(a)[1] allowing professional bondsmen to charge an additional five percent premium on bonds written for nonresident defendants would be constitutional.

Opinion

The proposed amendment may be defensible against constitutional challenges.[2] It would likely survive challenges brought under either the federal or the Tennessee Equal Protection Clauses. Survival in the face of a challenge under the federal Privileges and Immunities Clause or the dormant Commerce Clause is possible, but less likely.

ANALYSIS

We have been asked to evaluate the constitutionality of a proposed amendment to Tenn. Code Ann. § 40-11-316(a) that would allow bondsmen to charge an additional five percent premium on bonds written for criminal defendants who do not reside in Tennessee. We assess this proposal against the Equal Protection guarantees of the federal and state constitutions, the Privileges and Immunities Clause of Article IV of the federal constitution, and the dormant Commerce Clause of the federal constitution.

In Tennessee, the right to bail is mandatory except in capital cases. *Wallace v. State*, 245 S.W.2d 192 (Tenn. 1952); Tenn. Const. art. 1, § 15. The purpose of bail is to secure the appearance of a person accused but not proved to be guilty while, at the same time, relieving him of imprisonment and the state of the burden of keeping him. *Wallace v. State*, 245 S.W.2d at 194. To that end, the General Assembly has enacted the Release from Custody and Bail Reform Act of 1978, a comprehensive statutory bail scheme found in Chapter 11, Title 40, of the Tennessee Code.

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[1] We note that, if such an amendment is enacted, other portions of the Code, for example Tenn. Code Ann. § 40-11-151, would also have to be amended to reflect the change.

[2] We have not been provided with the text of the proposed amendment. This opinion, therefore, addresses the general concept of allowing professional bondsmen to charge a higher premium to nonresident criminal defendants than to their in-state counterparts, but should not be taken as an opinion on any particular draft or formulation of the proposed legislation.

Under the Act, bail is set as low as the court determines is necessary to reasonably assure the appearance of the defendant. Tenn. Code Ann. § 40-11-118(b). In fixing the amount, the court considers a variety of factors, including the defendant's length of residence in the community and his ties thereto. *See id.* § 40-11-118(b)(1), (8), (9). There are four different types of bail security[3] a defendant may post to obtain his release pending trial:

(1) a cash deposit bond, which is a sum of money in cash equal to the amount of bail, deposited with the clerk of court;

(2) a bond secured by real estate located in this state;

(3) a bond secured by a written agreement signed by the defendant and at least two sufficient sureties who are not professional bondsmen or attorneys; and

(4) a bond secured by a professional bail bondsman.

See id. §§ 40-11-118, -122; *State v. Clements*, 925 S.W.2d 224, 225 (Tenn. 1996).

A professional bondsman, as regulated by Tennessee, is a person authorized to write bail bond contracts by a court of record with criminal jurisdiction. *See* Tenn. Code Ann. §§ 40-11-124, -301(4). In return for these services, the bondsman receives from the defendant a fee known as a "premium." *See id.* § 40-11-316(a).

At present, the premium is capped at ten percent of the face value of the bond for the first twelve months in which charges are pending.[4] *Id.* By allowing an additional premium to be charged to out-of-state criminal defendants who seek to obtain a surety bond the proposed amendment would treat resident defendants more favorably than nonresident defendants. This discrimination between residents and nonresidents could potentially give rise to constitutional challenges.

I. Equal Protection

The federal Equal Protection Clause provides that "no State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. Likewise, article I, section 8, and article XI, section 8, of the Tennessee Constitution "guarantee equal privileges and immunities for all those similarly situated." *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993). The state equal protection guarantee is coextensive with the equal protection provisions of the United States Constitution. *Calaway ex rel. Calaway v. Schucker*, 193 S.W.3d 509, 518 (Tenn. 2005).

[3] Defendants may also be released on personal recognizance or upon execution of an unsecured appearance bond. Tenn. Code Ann. § 40-11-115(a).

[4] Premium renewal fees assessed after the first twelve months are capped at twenty percent of the original fee. Tenn. Code Ann. § 40-11-316(a). Appellate bonds are subject to a single additional premium of ten percent of the face value of the appearance bond for the appellate court. *Id.*

Both the United States Supreme Court and the Tennessee Supreme Court utilize three standards of scrutiny in examining equal protection claims, depending on the right asserted: strict scrutiny; intermediate scrutiny; or "rational basis" scrutiny. *Tenn. Small Sch. Sys.*, 851 S.W.2d at 153. Equal protection "requires strict scrutiny of a legislative classification only when the classification interferes with the exercise of a 'fundamental right' (e.g., right to vote, right of privacy), or operates to the peculiar disadvantage of a 'suspect class' (e.g., age or race)." *State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994). Rights "are fundamental when they are either implicitly or explicitly protected by a constitutional provision." *Tenn. Small Sch. Sys.*, 851 S.W.2d at 152. Intermediate scrutiny only applies when the classification involves a quasi-suspect class, such as gender or illegitimacy. *Craig v. Boren*, 429 U.S. 190, 198–99 (1976). If the classification does not interfere with the exercise of a fundamental right or does not disadvantage a suspect or quasi-suspect class, "judicial inquiry into the legislative choice is limited to whether the classifications have a reasonable relationship to a legitimate state interest." *Doe v. Norris*, 751 S.W.2d 834, 841 (Tenn. 1988). "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." *Tenn. Small Sch. Sys.*, 851 S.W.2d at 153.

A. Federal Equal Protection Clause

There does not appear to be any fundamental right to bail or bail fees for purposes of the federal Equal Protection Clause. Several cases have either held that there is no fundamental federal right to bail or have applied rational basis scrutiny to equal protection claims embracing bail fee classifications. *Schilb v. Kuebel*, 404 U.S. 357 (1971), involved an equal protection challenge to a bail program that allowed court clerks to retain one percent of the total bail amount as an administrative fee for a particular class of bail bonds. 404 U.S. 357, 358-59 (1971). While the Supreme Court acknowledged the importance of bail, it stated "we are not at all concerned here with any fundamental right to bail or with any Eighth Amendment-Fourteenth Amendment question of bail excessiveness." *Id.* at 365. The one percent cost-retention provision, it continued, "smacks of administrative detail and of procedure and is hardly to be classified as a 'fundamental' right or as based upon any suspect criterion." *Id.*; *see also Broussard v. Parish of Orleans*, 318 F.3d 644, 654, 657 (5th Cir. 2003) (citing *Schilb* for the view that "bail fees are at most administrative charges, which fail to invoke any fundamental right"). Accordingly, the Court measured the fee-retention provision against the rational basis standard and found no equal protection violation. *Schilb*, 404 U.S. at 367-68.

Further, "non-residence and out-of-state citizenship have not been deemed suspect classifications for equal protection purposes." *Levanti v. Tippen*, 585 F. Supp. 499, 507 (S.D. Cal. 1984); *see Frey v. Comptroller of Treasury*, 29 A.3d 475, 514 n.19 (Md. 2011) ("The classification in this case is based on state citizenship and thus is not suspect."). Consequently, substantial arguments can be made that the proposed amendment should be subject only to rational basis scrutiny.

The proposed amendment would likely survive that relatively undemanding standard. The potential purpose underlying the amendment—seeing that bondsmen are appropriately compensated for the risk of ensuring the appearance of nonresident defendants—is a legitimate one. Allowing (but not requiring) the bondsmen to collect an additional premium from this class

of clientele is reasonably related to that end. While it is true that not all nonresidents pose an enhanced risk of flight, and that residency is already a consideration in the bail-setting process, these facts probably do not render the amendment so "lacking in rationality to the point where equal protection considerations require that [it] be struck down." *Schilb*, 404 U.S. at 368; *see Broussard*, 318 F.3d at 660 (finding bail fees not to be arbitrary for substantive due process purposes [e]ven though the connection between the bail fees charged and the administration of the bail-bond system may be somewhat tenuous"). The amendment would set a ceiling on bond premiums, not a floor, and the legislature can reasonably rely on market discipline to see that the purposes of the amendment are carried out.

B. State Equal Protection Clause

Tennessee's equal protection guarantee might present a closer question, since the right to bail is fundamental here. *Wallace*, 245 S.W.2d at 194. "The right to bail, however, does not ensure a criminal defendant's ability to pay the amount of bail set by the court." *In re Sanford & Sons Bail Bonds, Inc.*, 96 S.W.3d 199, 202 (Tenn. Crim. App. 2002), *no perm. app. filed.*

Because the proposed amendment arguably affects only the "ability to pay" for a certain type of bail security—and only in certain instances—rather than the right to bail itself, it arguably does not significantly interfere with the exercise of a fundamental right. In that case, rational basis scrutiny would be appropriate. As already described, the amendment would be defensible on the rational basis standard, especially since it would only allow private actors to collect an additional premium for nonresident bonds, and nonresidents would have other means of posting a bail security.

Thus, the proposed amendment would likely survive challenges brought under either the federal or the Tennessee Equal Protection Clauses. However, as discussed below, its survival if challenged under the federal Privileges and Immunities Clause or the dormant Commerce Clause, while possible, is more problematic.

II. Privileges and Immunities

The Privileges and Immunities Clause of Article IV of the United States Constitution provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. The purpose of this provision is to "plac[e] the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Lunding v. New York Tax App. Trib.*, 522 U.S. 287, 296 (1998) (quoting *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869)).

This does not mean, however, that state citizenship or residency may never be used by a state to distinguish among persons. *McBurney v. Young*, 133 S. Ct. 1709, 1714 (2013). Nor does it mean that a state must always apply all its laws or all its services equally to anyone, resident or nonresident, who asks it so to do. *Id.*

Rather, the Privileges and Immunities Clause protects only those privileges and immunities that are "fundamental." *Id.* When a challenged measure that distinguishes between residents and

nonresidents deprives the nonresidents of a fundamental right protected by the Clause, the measure will be held invalid unless (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the state's objective. *Barnard v. Thorstenn*, 489 U.S. 546, 552 (1989).

A. Fundamental Right

The proposed amendment arguably impinges on two rights: (1) the right to admission to bail; and, (2) the right of a nonresident to transact business—i.e., the right to enter into a surety contract—on the same footing as a resident. The first question, then, is whether either of these rights is a fundamental right protected by the Privileges and Immunities Clause.

Because the Equal Protection Clause and the Privileges and Immunities Clause have different purposes, what is "fundamental" for equal protection analysis is not the same as what is "fundamental" under the Privileges and Immunities Clause. Like the Commerce Clause, the Privileges and Immunities Clause was designed to create a national economic union. Accordingly, fundamental privileges and immunities protected by the Clause encompass "such basic and essential activities, interference with which would frustrate the purposes of the formation of the Union . . . ." *Baldwin v. Fish and Game Comm'n*, 436 U.S. 371, 387 (1978); *see id.* at 383 ("Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally.").

In a case the Supreme Court has described as "the first, and long the leading, explication" of the Privileges and Immunities Clause," *Baldwin v. Fish and Game Comm'n*, 436 U.S. at 384, Justice Washington, sitting as Circuit Justice, described these activities as including:

> [t]he right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state . . . .

Corfield v. Coryell, 6 F.Cas. 546, 552 (Washington, Circuit Justice, C.C. Pa. 1823).

Admission to bail has not itself been identified as a fundamental privilege, suggesting that viable arguments might be made in support of the proposed amendment. Indeed, the Excessive Bail Clause of the federal Bill of Rights has not been incorporated against the states through the Fourteenth Amendment, and the Supreme Court has not directly ruled that the Clause extends a constitutional "right to bail" before conviction in criminal cases. *See Bell v. Wolfish*, 441 U.S. 520, 534 n.15 (1979) (reserving the question whether any governmental interest besides guaranteeing an accused's presence at trial may justify pretrial detention); *Garson v. Perlman*, 541 F. Supp. 2d 515, 526 (E.D.N.Y. 2008) (noting the lack of incorporation).[5] Some lower courts have

[5] *Compare Schilb v. Kuebel*, 404 U.S. 357, 365 (1971) ("Bail, of course, is basic to our system of law . . . ."), *and Stack v. Boyle*, 342 U.S. 1, 4 (1951) (recognizing the "traditional right to freedom before conviction [which] permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction"); *with*

ruled that it does not. *See United States v. Edwards*, 430 A.2d 1321, 1327 (D.C. Cir. 1981) (en banc); *Virgin Islands v. Dowdye*, Criminal No. ST-06-CR-0000128, 2006 WL 3042957, at *17 (V.I. Super. Oct. 12, 2006). As one court put it in the equal protection context, "historically, bail was not deemed to be a 'fundamental' constitutional right; the Bill of Rights did not expressly incorporate a 'fundamental' right to bail; and the case law does not establish that there is a 'fundamental' right to bail before conviction . . . ." *Dowdye*, 2006 WL 3042957, at *17.

On the other hand, Tennessee recognizes its own constitutional right to bail to be "fundamental." *Wallace*, 245 S.W.2d at 194. And Tennessee has its own constitutional prohibition on excessive bail. Tenn. Const. art. 1, § 16.

The proposition that the right to bail is fundamental because it is guaranteed by the Tennessee Constitution might be countered by focusing on the lack of substantive economic impact of the proposed additional premium. Whether the right to bail bears importantly on the coherence of the Union as a whole is at least debatable. Given *Schilb*'s treatment of bail fees as "administrative" charges, an argument could be made that the proposed amendment would simply add an administrative charge that does not impinge on any fundamental privilege. *See, e.g., Katona v. City of Cheyenne*, 686 F. Supp. 287, 293 (D. Wyo. 1988) (holding that ordinance requiring non-residents to post a bond for traffic offenses passed scrutiny under the Privileges and Immunities Clause because "[n]othing in the bond policy impedes interstate commerce, frustrates the exercise of federal power, or interferes with a non-resident's right to pursue a livelihood in Wyoming"). It might be argued, too, that the additional premium that bondsmen could collect from nonresidents under the amendment still would represent a relatively small portion of the total bail amount. Additionally, employment of a professional bondsmen is but one of four ways that a nonresident might post a bail security. *See* Tenn. Code Ann. §§ 40-11-124, -301(4). Finally, although the amendment would allow bondsmen to charge nonresidents an additional premium, it would not compel them to do so.

Among the economic-centric privileges protected as fundamental is the privilege of the citizens of State A to do business in State B on terms of substantial equality with the citizens of State B. *Supreme Court of N. H.* v. *Piper*, 470 U.S. 274 (1985) (holding that the interest in practicing law is a protected privilege and that state bar residency requirements violate the Privileges and Immunities Clause). *See also Ward v. Maryland*, 12 Wall. 418 (1871) (invalidating a statute that required nonresidents to pay $ 300 per year for a license to trade in goods not manufactured in Maryland, while resident traders paid a fee varying from $ 12 to $ 150); *Toomer v. Witsell*, 334 U.S. 385, 395 (1948) (holding that nonresident fishermen could not be required to pay a license fee of $ 2,500 for each shrimp boat owned when residents were charged only $ 25 per boat); *Hicklin v. Orbeck*, 437 U.S. 518 (1978), (state statute with a resident hiring preference for all employment related to the development of the state's oil and gas resources held violative of the Clause).

The privileges and immunities analysis of the proposed amendment must, therefore, also consider the fact that bail bonds are contracts and quintessentially involve the transaction of

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United States v. Salerno, 481 U.S. 739, 754 (1987) (questioning whether "the Excessive Bail Clause speaks at all to Congress' power to define the classes of criminal arrestees who shall be admitted to bail"), *and Carlson v. Landon*, 342 U.S. 524, 546 (1952) ("the very language of the Amendment fails to say all arrests are bailable").

business. *In re Sanford & Sons Bail Bonds, Inc.*, 96 S.W.3d 199, 202 (Tenn. Crim. App. 2002), *no perm. app. filed*. Thus, the proposed amendment does burden a fundamental privilege.

By allowing price discrimination in contract transactions on the basis of residence, the proposed amendment could be said to impinge on the privilege of nonresidents to do business in Tennessee on terms of substantial equality with Tennessee residents. Though the provision would not disadvantage out-of-state bondsmen, the Supreme Court has explained that "[e]conomic protectionism is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other States." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 577-78 (1997). On this basis, a court may find that the discrimination inherent in the proposed amendment violates the Privileges and Immunities Clause because it deprives nonresidents of the protected privilege of doing business on an equal basis with residents.

B. Substantial Relationship

If the proposed amendment is found to deprive nonresidents of a protected privilege, it might not survive the substantial relationship test. In determining whether discrimination against nonresidents bears a substantial relation to the state's objectives, courts consider, among other things, "whether less restrictive means of regulation are available." *Barnard*, 489 U.S. at 552-53.

We have no legislative findings or statement of purpose for the proposed amendment. Nevertheless, it seems likely that the amendment rests on a view that nonresident arrestees pose a greater risk of flight and that, at present, bondsmen are not adequately compensated for that risk. In fact, the amendment could represent a legislative judgment that nonresidents sometimes are unable to obtain professional bail bonds because the bondsmen cannot charge an appropriate premium. Such a reason for the difference in treatment arguably would be substantial.

The means chosen to achieve that objective, however, fit imperfectly. Some nonresidents doubtless present a higher risk of failure to appear, but not all do, and the amendment would allow bondsmen to exact a higher fee regardless. Perhaps more significantly, bondsmen are already compensated in some measure for risks associated with non-residency. Bail is set as low as is necessary reasonably to assure the defendant's appearance, and the courts consider length of residence in and ties to the community in doing so. Tenn. Code Ann. § 40-11-118(a), (b). Since bond premiums are capped at a percentage of the bail, *id.* § 40-11-316(a), an additional fee could be viewed as a status-based surplus. Moreover, alternative, less restrictive means of regulation are conceivable: the legislature could allow for higher premiums based on ties-in-fact to the community, rather than on mere status as a nonresident.

Thus, the proposed amendment would be susceptible to constitutional challenge under the Privileges and Immunities Clause if bail fees are held to burden a fundamental privilege, such as the right to bail or, more likely, the privilege to contract, and if there is a finding that less restrictive means of regulation are available to accomplish the purpose of the proposed amendment.

III. Dormant Commerce Clause

The Commerce Clause of the United States Constitution provides Congress with the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. "Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys. v. Dep't Envtl. Quality*, 511 U.S. 93, 98 (1994). Often referred to as the "dormant" Commerce Clause, this limitation on the authority of state and local governments applies "even when Congress has failed to legislate on the subject." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995).

As discussed above, bail bonds are contracts in which not only the bondsmen as merchants but also the arrested defendants as consumers have an economic interest. Thus, a dormant Commerce Clause challenge to the proposed amendment is colorable because the proposed amendment treats in-state and out-of-state economic interests differently and, in doing so, benefits the in-state residents and burdens the out-of-state residents.

State regulations that discriminate against interstate commerce are subject to a "virtually per se rule of invalidity." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Discrimination for these purposes means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys.*, 511 U.S. at 99. Since the proposed amendment would discriminate in this sense, it is subject to the rule of per se invalidity.

However, a state regulation having only "incidental" effects on interstate commerce "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Thus, there is a potentially viable argument against per se invalidity. That argument would be that the proposed amendment has only incidental effects on interstate commerce and is unlikely to produce the sort of "economic Balkanization" against which the Clause is designed to protect. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 577-78 (1997). The market for bail bonds is local in an important sense; the contracts are executed and performed within Tennessee, and few consumers are likely to enter interstate commerce with an eye to purchasing bail bonding services in Tennessee on the chance that they will be arrested here. Too, the government is a party to the bail bond contract. *See Sanford & Sons*, 96 S.W.3d at 202 (stating that the "bail bond itself is a contract between the government on the one side and the criminal defendant and his surety on the other"). The State might thus be regarded as a "market participant" that can favor its own citizens over others without running afoul of the Commerce Clause. *See, e.g., Dep't of Revenue v. Davis*, 553 U.S. 328, 339 (2008) (discussing the market participant exception to the dormant Commerce Clause in a different context). Finally, bail bonding is, as the Court of Criminal appeals has observed, a "profit-driven" industry. *Sanford & Sons*, 96 S.W.3d at 202. Bondsmen thoroughly assess the risk of flight before writing a bond, *see id.*, and presumably can do so in determining what premium to demand. The amendment would allow these private actors to charge nonresidents a higher fee, but it would not compel them to do so if business considerations counseled otherwise. As a result, the proposed amendment could be viewed as imposing, at most,

an incidental burden on interstate commerce that is not "clearly excessive" in relation to local benefits.

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