

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

April 5, 2019

Opinion No. 19-05

Constitutionality of Population Bracket Differences for Drug-Free School Zones

Question 1

Would legislation that reduces the drug-free school zones from 1000 feet to 500 feet in counties having a population of 300,000 or more be deemed unconstitutional?

Opinion 1

If the population bracket differences in the proposed legislation relate to a matter in respect of which a difference in population could furnish a rational basis for diversity of laws, the classification is likely to be deemed constitutional.

ANALYSIS

Tennessee Code Annotated § 39-17-432 provides enhanced criminal penalties for drug offenses occurring “on the grounds or facilities of any school or within one thousand (1000) feet of the real property that comprises a public or private elementary school, middle school, secondary school, preschool, child care agency, or public library, recreational center or park.” Tenn. Code Ann. § 39-17-432(b)(1). The express intent of the statute is to create drug-free zones to protect vulnerable persons and provide an environment in which they can learn, play, and enjoy themselves without the distractions and dangers inherent in illegal drug activities. *Id.*, § 39-17-432(a).

Proposed legislation would decrease the size of these drug-free zones (“drug-free school zones”) from 1000 feet to 500 feet in any county having a population of 300,000 or more according to the 2010 federal census or any subsequent census. In essence, the proposed legislation creates a variation from the generally applicable law based on population. It reduces the size of drug-free school zones from 1000 feet to 500 feet in Shelby County, Davidson County, Knox County, and Hamilton County, which are the only counties with a population of 300,000 or more according to the 2010 census. According to the request for this opinion, the reason for this reduction is “to create equity in the law in respect to differences in population densities in urban and rural counties.”¹

¹ Tennessee Code Annotated § 49-2-116 authorizes counties and municipalities to establish school safety zones that extend 1000 feet from school property in which the delivery or sale of a controlled substances to a minor will subject the offender to enhanced punishment. The same proposed legislation would allow the school safety zone to consist of the territory located within 500 feet of the school property in counties having a population of 300,000 or more according to the 2010 federal census or any subsequent census.

Exemptions to or variations from a general law based on population brackets potentially implicate two provisions of the Tennessee Constitution: article XI, section 8 and article I, section 8. The former restricts the legislature from enacting “special legislation” for the benefit of specific individuals or localities in an arbitrary or capricious manner. The latter guarantees equal protection of the laws.

Legislative classifications, such as population brackets, enjoy a presumption of validity if they have “a reasonable relationship to a legitimate state interest.” *Doe v. Norris*, 751 S.W.2d 834, 841 (Tenn. 1988). Thus, a classification based on population brackets will generally pass constitutional muster if there is some conceivable reason—i.e., any “rational basis”—to justify the classification.

In determining the reasonableness of a statute under either Article XI, Section 8 or Article I, Section 8, the analysis is essentially the same. Generally, the legislation “need not, on its face, contain the reasons for a certain classification.” *Civil Serv. Merit Bd. v. Burson*, 816 S.W.2d 725, 731 (Tenn. 1991), citing *Stalcup v. City of Gatlinburg*, 577 S.W.2d 439, 442 (Tenn. 1978). Rather, “[i]f any possible reason can be conceived to justify the classification it will be upheld and deemed reasonable.” *Id.* Reasonableness, however, depends upon the facts of the case, and no general rule can be formulated for its determination. *See Harrison v. Schrader*, 569 S.W.2d 822, 825-26 (Tenn. 1978); Tenn. Op. Att’y Gen. 99-112 (May 13, 1999). In the case of legislation which classifies by population bracket, the justification for the classification must itself relate to population. *Nolichuckey Sand Co. v. Huddleston*, 896 S.W.2d 782, 789 (Tenn. Ct. App. 1994) (citing *Leech v. Wayne County*, 588 S.W.2d 270, 280 (Tenn. 1979) (Henry, J., dissenting)). In other words, there must be some reason relating specifically to differences in population that would justify varying the general prohibition contained in . . . [the law] based upon population size. In the absence of such a basis supporting population brackets, the legislation would be deemed unconstitutional.

Op. Tenn. Att’y Gen. 99-226 (Dec. 3, 1999) (citations modified). *See also* Op. Tenn. Att’y Gen. 13-37 (May 2, 2013); Op. Tenn. Att’y Gen. 09-116 (June 11, 2009); Op. Tenn. Att’y Gen. 09-102 (May 28, 2009); Op. Tenn. Att’y Gen. 09-53 (Apr. 9, 2009); Op. Tenn. Att’y Gen. 08-185 (Dec. 12, 2008) in which this Office has addressed the constitutionality of local exemptions from laws of statewide applicability based on population brackets.

The rational basis test accords the General Assembly “the initial discretion to determine what is ‘different’ and what is ‘the same’” and allows it “considerable latitude in making those determinations.” *Gallaher v. Elam*, 104 S.W.3d 455, 461 (Tenn. 2003). Courts uphold classifications “if any state of facts may reasonably be conceived to justify it.” *Id.* The legislature may make distinctions and treat various groups differently so long as the classification is not arbitrary. If any state of facts can reasonably be conceived to justify the classification or if the reasonableness of the class is fairly debatable, the statute will be upheld. *See Gallaher*, 104 S.W.3d at 462; *Harrison*, 569 S.W.2d at 825-26; Op. Tenn. Att’y Gen. 13-37 (May 2, 2013). Thus, a classification based on population will be upheld if it “relates to a matter in respect of which a difference in population would furnish a rational basis for diversity of laws.” *State ex rel. Bales v. Hamilton County*, 95 S.W.2d 618, 619 (1936).

Under these legal principles, the population bracket variations in the proposed legislation will be deemed constitutional as long as there is a reason relating specifically to differences in population that could possibly justify the variation from the generally applicable law. If population is a rational basis for identifying and dealing effectively with specific target areas of the legislation, the population brackets should be justifiable. But if there is no rational basis on which to justify the population bracket exemption at issue, it will be deemed unconstitutional. *See, e.g.,* Op. Tenn. Att’y Gen. 08-185 (Dec. 12, 2008) (statutory population exemption applicable only to a single county likely to be deemed unconstitutional).

The reason offered for decreasing the drug-free school zone area only in densely populated counties is “to create equity in the law in respect to differences in population densities in urban and rural counties.” The express purpose of the legislation creating the 1000-foot drug-free school zones is to protect vulnerable persons—mainly children—from illegal drug activities where they learn and play. Tenn. Code Ann. § 39-17-432(a). It is not immediately obvious how smaller drug-free school zones in more densely populated areas relate to or further this legislative purpose since it would seem that there are more such vulnerable people in the more densely populated places. Nor is it clear how the proposed *variation in the law* between larger and smaller counties will result in “*equity in the law* in respect to differences in population densities in urban and rural counties.”

However, if it can be shown that a rational basis does exist for the proposed legislation—i.e., if there is a reason that could possibly justify the variation from the generally applicable law based on population—then the proposed legislation would likely survive a constitutional challenge.

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

Requested by:

The Honorable Scott E. Cepicky
State Representative
510 Cordell Hull Building
Nashville, Tennessee 37243