STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

September 25, 2019

Opinion No. 19-18

Constitutionality of Population Bracket in 2019 Tenn. Pub. Acts, ch. 350

Question

Does 2019 Tenn. Pub. Acts, ch. 350, which applies only to Madison County by means of a narrow population bracket, raise constitutional concerns?

Opinion

Yes.

ANALYSIS

Public Chapter 350 amends Tenn. Code Ann., title 49, ch. 2, part 2, to add a procedure that allows the registered voters of a county to petition for an election to recall a member of the local board of education. 2019 Tenn. Pub. Acts, ch. 350, § 1, *codified at* Tenn. Code Ann. § 49-2-213. But this new section "only applies in counties having a population of not less than ninety-eight thousand two hundred (98,200) nor more than ninety-eight thousand three hundred (98,300), according to the 2010 federal census or any subsequent federal census." Tenn. Code Ann. § 49-2-213(e). Because of this narrow population bracket, the recall procedure currently applies only to Madison County, as the legislature apparently intended it to do. *See 2010 Census – Tennessee*, U.S. Census Bureau[1]; *see also* House Session B, Debate on S.B. 0185, 111th Gen. Assem., at 1:00:53 (May 1, 2019) (statement of Rep. Todd) (noting the population bracket "restricts [the bill] to Madison County only").

Public Chapter 350 also includes a severability clause: "If any provision of this act or its application to any person or circumstance is held invalid, then the invalidity shall not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to that end the provisions of this act shall be severable." 2019 Tenn. Pub. Acts, ch. 350, § 2.

A public act that applies only to a single county raises potential concern under three separate provisions of the Tennessee Constitution. Article I, section 8, generally provides for equal protection of the laws. *See Civil Serv. Merit Bd. v. Burson*, 816 S.W.2d 725, 730-32 (Tenn. 1991); Tenn. Att'y Gen. Op. 18-10 (Mar. 14, 2018). Article XI, section 8, prevents "suspend[ing] any general law for the benefit of any particular individual" or "passing any law for the benefit of

[1] Available at https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF.

individuals inconsistent with the general laws of the land." And article XI, section 9, prohibits legislation that is "private or local in form or effect [and] applicable to a particular county or municipality" unless the legislation also depends on local approval. *See Civil Serv. Merit Bd.*, 816 S.W.2d at 729 (alteration in original) (quoting Tenn. Const. art. XI, § 9); *see also Farris v. Blanton*, 528 S.W.2d 549, 551-52 (Tenn. 1975) (noting that section 9 applies to "legislation [that] was [not] designed to apply to any other county").

To pass muster under article I, section 8, and article XI, section 8, legislative classifications, including distinctions among counties based on population, must have "a reasonable relationship to a legitimate state interest." *Doe v. Norris*, 751 S.W.2d 834, 841 (Tenn. 1988). As this Office has explained on numerous occasions, legislative classifications based on population brackets do enjoy a presumption of constitutionality, but they must also be supported by some justification related to population. *See* Tenn. Att'y Gen. Op. 19-05 (Apr. 5, 2019) (collecting past opinions). Statutory population brackets

> 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.

Id. The legislation "need not, on its face, contain the reasons for a certain classification," *Civil Serv. Merit Bd.*, 816 S.W.2d at 731; such classifications should be upheld if "any state of facts may reasonably be conceived to justify" the distinction. *Riggs v. Burson*, 941 S.W.2d 44, 53 (Tenn. 1997).

Neither the text of Public Chapter 350 nor its legislative history provides a rationale for the distinction it creates between Madison County and all other counties with respect to the recall of members of local boards of education. Nor is any rational basis for such a distinction readily apparent.[2]

Absent a rational basis for the distinction between Madison County and all other counties, Public Chapter 350 raises constitutional concerns under article I, section 8, and article XI, section 8, of the Tennessee Constitution. *See Knoxville's Cmty. Dev. Corp. v. Knox Cty.*, 665 S.W.2d 704, 705 (Tenn. 1984) (finding "no reason to justify the discriminatory classification" of a narrow population bracket); Tenn. Att'y Gen. Op. 18-18 (Apr. 4, 2018) (concluding legislation that applied only to Obion County by means of a narrow population bracket lacked any apparent rational basis and raised constitutional concerns); Tenn. Att'y Gen. Op. 08-185 (Dec. 12, 2008)

[2] During discussion on the bill, some legislators noted that some counties already provide a procedure for recalling members of local school boards of education in their charters. *See* House Session, Debate on S.B. 0185, 111th Gen. Assem., at 2:25:16-54 (Apr. 30, 2019) (statement of Rep. Todd). But the bill's sponsor also recognized that most counties do not have such a procedure, *see id.*, and the discussion of the bill in the General Assembly does not suggest a reason that Madison County is differently situated than all other counties in Tennessee. Indeed, the bill's sponsor indicated that the problem addressed by the bill was *not* limited to Madison County and argued that the provisions of the bill should have statewide application for that reason. *See* House Session A, Debate on S.B. 0185, 111th Gen. Assemb., at 40:17 (May 1, 2019) (statement of Rep. Todd).

(finding impermissible class legislation when a population bracket only included Hamilton County, and "there ha[d] been no subsequent amendments to the law exempting counties in other population brackets from the 'general' requirements . . . to suggest that it has ceased to be a law of general application").

Public Chapter 350 could also raise concerns under article XI, section 9, of the Tennessee Constitution, which prohibits legislation that is, in effect, applicable only to a particular county if the legislation does not provide for local approval. Public Chapter 350 applies only to Madison County currently and does not provide for local approval. Moreover, in contrast to other legislation that courts have held not to implicate article XI, section 9, the population bracket in Public Chapter 350 is so narrow that it is unlikely to ever apply to another county. *See Civil Serv. Merit Bd.*, 816 S.W.2d at 729 (holding that legislation that applied only to municipalities with populations of at least 300,000 that did not have a mayor-aldermanic form of government was "*potentially* applicable throughout the state" and thus "not local in effect even though at the time of its passage it might have applied to [only one county]"). Public Chapter 350 does not establish a minimum threshold that other counties may ultimately reach, nor does it apply broadly to particular types of municipal governments; it instead appears to be "designed to apply" only to Madison County and to affect local matters there, i.e. the recall of a member of the local board of education. *Farris*, 528 S.W.2d at 552. Accordingly, Public Chapter 350 raises constitutional concerns under article XI, section 9. *See Leech v. Wayne County*, 588 S.W.2d 270, 274 (Tenn. 1979); Tenn. Att'y Gen. Op. 18-18; Tenn. Att'y Gen. Op. 97-47 (Apr. 14, 1997).

"The inclusion of a severability clause in [a] statute has been held . . . to evidence an intent on the part of the legislature to have the valid parts of the statute enforced if some other portion of the statute has been declared unconstitutional." *Lowe's Cos. v. Cardwell*, 813 S.W.2d 428, 431 (Tenn. 1991) (citing *Catlett v. State*, 336 S.W.2d 8 (Tenn. 1960)). Generally, "a court may, under appropriate circumstances and in keeping with the expressed intent of a legislative body, elide an unconstitutional portion of a statute and find the remaining provisions to be constitutional and effective." *Id.* at 430. But if an unconstitutional portion of a statute is "so interwoven with other portions" of the statute that the legislature would not have passed the law without that portion, the entire statute will be held unconstitutional. *Hart v. City of Johnson City*, 801 S.W.2d 512, 518 (Tenn. 1990) (internal quotation marks omitted).

Here, if a court determines the population bracket in Public Chapter 350 to be unconstitutional, the severability clause in the act would most likely not save the whole act from being declared unconstitutional. Severing the population bracket that was designed to include only Madison County would transform a law that applies only to one county into a law that applies to every county in Tennessee. Because that result is directly contrary to the intent of the legislature, a court would most likely decline to engage in "judicial legislation" by severing the population bracket. *See Hart*, 801 S.W.2d at 518 (internal quotation marks omitted). Confronted with a similar question in *Hart*, the Tennessee Supreme Court declined to sever the population classifications from the act at issue. To do so, it explained, would have "creat[ed] a population class of all 95 Tennessee counties in order to uphold the Act, . . . including 81 counties which were expressly excluded from the Act by their elected representatives." *Id.*

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