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Opinion No. 06-106

Constitutionality of proposed legislation banning the distribution of sexual devices.

QUESTION

Is the legislation contained in former House Bill 3798 and Senate Bill 3794,[1] which purported to ban the distribution of sexual devices except for educational, medical, and historical purposes, unconstitutional under either the United States or Tennessee constitutions?

OPINION

The proposed legislation in H.B. 3798 is not per se unconstitutional under the United States Constitution. In 2005, the United States Supreme Court declined an opportunity to review the constitutionality of a substantially similar Alabama statute, *Williams v. King*, 543 U.S. 1152 (2005), leaving undisturbed an Eleventh Circuit ruling that upheld the constitutionality of a statute proscribing the sale of sexual devices. Indeed, at least seven states, Alabama, Colorado, Georgia, Kansas, Louisiana, Mississippi, and Texas, have enacted similar statutes, which have withstood constitutional challenges in federal and state courts.[2]

The "right of privacy" implicitly contained in the Tennessee Constitution is broader than the guarantee of substantive due process contained in the Fourteenth Amendment. However, because Tennessee courts are unlikely to deem the right to use sexual devices a "fundamental right" of Tennessee citizens, H.B. 3798 also likely passes constitutional muster in Tennessee.

ANALYSIS

H.B. 3798 proposed the enactment of new Tennessee Code Annotated section 39-17-921, which would outlaw the distribution and wholesale distribution of sexual devices in Tennessee. The bill defined a "sexual device" as "any three-dimensional device designed or marketed as useful primarily for the stimulation of human genital organs." The bill prohibited the distribution, but not the use or possession, of sexual devices. The bill also did not prohibit Tennessee residents from

[1]House Bill 3798 and Senate Bill 3794 are identical and will be referred to as "H.B. 3798" or "the bill." H.B. 3798 was withdrawn on March 9, 2006.

[2]*See e.g.*, Ala. Code 13A-12-200.2; Colo. Rev. Stat. Ann. § 18-7-101(3); Ga. Code Ann. § 16-12-80(c); La. Rev. Stat. Ann. § 14:106.1; Kan. Stat. Ann. § 21-4301; Miss. Code Ann. § 97-29-105; Tex. Penal Code Ann. § 43.21(a)(7).

purchasing such devices out of state and bringing them to Tennessee, nor did it prohibit the sale of ordinary vibrators and body massagers that, although useful as sexual aids, were not "designed or marketed . . . primarily" for that purpose.

The bill excepted three categories of persons from its application: (1) distributors of sexual devices to specified faculty members or students associated with institutions of higher learning; (2) licensed physicians and psychologists who prescribed such devices in the course of medical or pscychological treatment; and (3) any person acting in his capacity as an employee of a public or university library, recognized historical society, or museum accorded charitable status by the federal government. Violation of this section constituted a Class A misdemeanor.

Opponents of laws banning the sale of sexual devices typically have employed four constitutional challenges to such laws: violation of substantive due process or the "right of privacy," denial of equal protection, restriction of freedom of expression, and vagueness or overbreadth.[3] In almost every case, federal and state courts have rejected claimants' equal protection, freedom of expression, and vagueness or overbreadth claims.[4] However, claims involving the infringement of substantive due process under the Fourteenth Amendment, which provides "heightened protection against government interference with certain fundamental rights and liberty interests," *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), have proven the most regular and significant challenges to these laws.

Because the Constitution has not historically been recognized to protect a person's right to use sexual devices, H.B. 3798 likely would not be found to violate the substantive due process guarantee of the Fourteenth Amendment. Neither the Sixth Circuit nor the Supreme Court have addressed the constitutionality of laws prohibiting the distribution of sexual devices; however, the Eleventh Circuit recently decided a case involving a substantive due process challenge to a comparable Alabama statute. *Williams v. Attorney General of Alabama*, 378 F.3d 1232 (11th Cir. 2004), *cert. denied*, 543 U.S. 1152 (2005) (hereinafter *Williams*); *Williams v. Pryor*, 240 F.3d 944 (11th Cir. 2001) (hereinafter *Pryor*). Like H.B. 3798, the Alabama statute prohibited the sale, but not the use or possession, of sexual devices.[5] Like H.B. 3798, it also exempted the distribution of sexual devices for medical and educational purposes. *See* Ala. Code 13A-12-200.2; *Williams*, 378

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[3]For a comprehensive list and full discussion of such cases, see David C. Minneman, *Constitutionality of State Statutes Banning Distribution of Sexual Devices*, 94 A.L.R.5th 497 (2006).

[4]*But see State v. Hughes*, 792 P.2d 1023 (Kan. 1990) (holding that a prior version of the Kansas obscenity statute was unconstitutionally overbroad in that, unlike H.B. 3798, it failed to include an exception for legitimate medical and psychological uses of sexual devices); *This That and Other Gift and Tobacco v. Cobb County*, 285 F.3d 1319 (11th Cir. 2002) (holding that Georgia statute constituted impermissible burden on freedom of commercial speech in that, unlike H.B. 3798, it criminalized advertisement to all consumers, including those to whom the devices legally could be sold).

[5]H.B. 3798 was broader than the Alabama statute in at least one significant respect: it criminalized the "exhibit[ion]" of such devices, "offers to do so, [and] possess[ion of] such devices with the intent to do so." Such exhibition did not appear to be limited to exhibition for purposes of distribution, thus, the legislation apparently criminalized the mere showing, or offering to show, one's sexual device to another person.

F.3d at 1233.

"Statutes that infringe fundamental rights, or that make distinctions based on suspect classifications such as race or national origin, are subject to strict scrutiny, which requires that the statute be narrowly tailored to achieve a compelling government interest." *Pryor*, 240 F.3d at 947-48 (citing *Reno v. Flores*, 507 U.S. 292, 301-02 (1993); *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995)). "On the other hand, 'if a law neither burdens a fundamental right nor targets a suspect class, [a court] will uphold the law so long as it bears a rational relation to some legitimate end.'" *Id.* (quoting *Romer v. Evans*, 517 U.S. 620, 632 (1996)). "A statute is constitutional under rational basis scrutiny so long as there is *any reasonably conceivable state of facts* that could provide a rational basis for the statute." *Id.* (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993)) (emphasis in original) (internal quotations omitted).

In *Pryor*, the Eleventh Circuit reversed the district court's determination that the Alabama statute lacked a rational basis, finding that "[Alabama's] interest in public morality is a legitimate interest rationally served by the statute." 240 F.3d at 949. The court reasoned, "The crafting and safeguarding of public morality has long been an established part of the States' plenary police power to legislate and indisputably is a legitimate government interest under rational basis review." *Id.* Finding the record before it insufficient to determine whether the statute involved a "fundamental right," which merited a heightened level of scrutiny, the *Pryor* Court remanded the case for further consideration by the district court. *Id.* at 955-56.

On remand, the district court found that the statute impermissibly burdened a fundamental right to "sexual privacy" and failed the resulting strict scrutiny review. *Williams v. Pryor*, 220 F. Supp. 2d 1257, 1296, 1304 (N.D. Ala. 2002). On appeal, the Eleventh Circuit again reversed the district court, finding that the lower court erred in its broad framing of the right and in its analysis of Supreme Court precedent regarding the fundamental nature of that right. *Williams*, 378 F.3d at 1239-45.

Williams delineated the appropriate analysis under relevant Supreme Court precedent for determining whether a statute banning the distribution of sexual devices burdens a fundamental right. *Id.* at 1239 (reciting the "*Glucksberg* Analysis"). First, when analyzing the possible recognition of a new fundamental right, one "must begin with a careful description of the asserted right." *Id.* (citing *Reno*, 507 U.S. at 302; *Glucksberg*, 521 U.S. at 721). Second, and most importantly, one "must determine whether this asserted right, carefully described, is one of 'those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.'" *Id.* (citing *Glucksberg*, 521 U.S. at 720-21).

The *Williams* Court found that the lower court had abandoned its initial, careful framing of the right ("an individual's liberty to use sexual devices when engaging in lawful, private, sexual activity") for a more broadly framed right, that of "sexual privacy." *Id.* at 1239. The *Williams* Court rejected this broad framing of the right, holding that such a framing encompassed activities other

than the use of sexual devices and that such a broad inquiry would require consideration of many questions not in the record before the court. *Id.* Citing *Glucksberg* and *Reno*, the court instead determined that the right must be framed in reference to the scope of the statute at issue, namely, "the right to use sexual devices when engaging in lawful, private sexual activity."[6] *Id.* at 1240-42. Although the Alabama statute (and H.B. 3798) criminalized the sale or distribution of sexual devices, "[f]or purposes of constitutional analysis, restrictions on the ability to purchase an item are tantamount to restrictions on the use of that item." *Id.* at 1242 (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 688 (1977)). Thus, when analyzing the constitutionality of a bill banning the distribution of sexual devices, the issue should be framed as if the legislation banned the mere use of such devices.

Having carefully framed the right as a "right to use sexual devices when engaging in lawful, private sexual activity," *id.*, the *Williams* Court then turned to the "crucial inquiry," whether the right was "objectively, deeply rooted in this Nation's history and tradition and . . . implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed." *Id.* (citing *Glucksberg*, 521 U.S. at 720-21) (internal quotations omitted). This inquiry focuses on whether there exists a history and tradition of *protection* of the framed right and, to a lesser extent, whether there exists a history of State non-interference with the right or an absence of State proscription against the activity. *Id.* at 1242, 1244. There appears to be little, if any, historical protection of the right to use sexual devices. *Id.* at 1245. As the *Williams* Court found, "[n]ot only does the record before us fail to evidence such a deeply rooted right, but it suggests that, to the extent that sex toys historically have attracted the attention of the law, it has been in the context of proscription, not protection."[7] *Id.* Therefore, the right to use sexual devices does not appear to be a fundamental one, and it is the opinion of this Office that H.B. 3798 would likely survive mere rational basis review and be upheld under the United States Constitution. *See Romer*, 517 U.S. at 632.

Article I, Section 8, of the Tennessee Constitution states: "[N]o man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the

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[6]In *Glucksberg*, the Supreme Court rejected the petitioner's framing of the right as "a liberty interest in determining the time and manner of one's death," instead employing the more narrow "right to commit suicide which itself includes a right to assistance in doing so." 521 U.S. at 722, 724. In *Reno*, the Court rejected the respondents' framing of the right as "freedom from physical restraint" choosing instead to analyse the more narrow "right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child-care institution." 507 U.S. at 299, 302.

[7]"The chief example of this proscription is the 'Comstock Laws,' federal and state legislation adopted in the late 1800s. The federal Comstock Act of 1873 was a criminal statute directed at 'the suppression of Trade in and Circulation of obscene Literature and Articles of immoral Use.' . . . Various states also enacted similar statutes prohibiting the sale of such articles. *See, e.g.*, Conn. Gen. Stat. § 1325 (1902); Mass. Gen. Laws Ann. ch. 272 § 21 (West 2004) (passed 1879)." *Williams*, 378 F.3d at 1245 (internal citations omitted).

law of the land." This "law of the land" clause, and related provisions of the Tennessee Constitution, have been recognized to constitute a "right of privacy" in Tennessee. *Davis v. Davis*, 842 S.W.2d 588, 599-600 (Tenn. 1992); *see* Tenn. Const. art. I, § 3 (freedom of worship); art. I, § 7 (prohibiting unreasonable searches and seizures); art. I, § 19 (freedom of speech and press); art. I, § 27 (regulating the quartering of soldiers). Courts of this state have held that this right of privacy is more extensive than the guarantee of substantive due process in the Fourteenth Amendment, thus, it is possible that a stronger case could be made for the unconstitutionality of H.B. 3798 under Tennessee law. *See, e.g.*, *Campbell v. Sundquist*, 926 S.W.2d 250, 261-62 (Tenn. Ct. App. 1996) ("[A]n adult's right to engage in consensual and noncommercial sexual activities in the privacy of that adult's home is a matter of intimate personal concern which is at the heart of Tennessee's protection of the right to privacy.").

Like the protections of substantive due process under the Fourteenth Amendment, the Tennessee right of privacy provides heightened protection for "fundamental rights." *Smith v. State*, 6 S.W.3d 512, 515-16 (Tenn. Crim. App. 1999) (app. denied Sep. 14, 1999). Our Supreme Court has never developed or adopted a test for determining what constitutes a fundamental right for the purposes of right-of-privacy analysis under the Tennessee Constitution; however, the Court has noted that "the right to privacy incorporates some of the attributes of the federal constitutional right to privacy and, in any given fact situation, may also share some of its contours." *Davis*, 842 S.W.2d at 600.

In *Smith v. State*, the Court of Criminal Appeals engaged in perhaps the most thorough examination to date of what constitutes a fundamental right under the Tennessee Constitution, concluding that the right to participate in adult consensual incest was not a fundamental right protected by the Tennessee right of privacy. 6 S.W.3d at 519. In making this determination, the *Smith* Court adopted the two-pronged *Glucksberg* test, carefully describing the asserted right and then looking to the "historical notions," "traditions[,] and collective conscience of our people," to determine whether the right was fundamental. *Id.* at 517 (citing *Glucksberg*, 521 U.S. at 708-710, 720-21). As seen previously, under this framework, the right to use sexual devices does not appear to have merited historical protection but, rather, proscription. Therefore, such a right is unlikely to be deemed fundamental, and any proscriptive Tennessee legislation would face mere rational basis review. Accordingly, it is the opinion of this Office that H.B. 3798 would not likely be found to constitute an impermissible burden on the right of privacy contained in the Tennessee Constitution.

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