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Opinion No. 09-73

Constitutionality of House Bill 2099

QUESTION

Whether proposed legislation, which makes it a class C misdemeanor to knowingly wear pants below one's waistline, in a public place, in a manner that exposes one's underwear or bare buttocks, is constitutional.

OPINION

The proposed legislation is arguably unconstitutionally vague, because it does not set forth a standard for its violation that may be readily understood. If passed, the legislation could also be vulnerable to constitutional attack on substantive due process grounds, because it arguably interferes with a liberty interest to dress as one chooses. Additionally, the proposed statute could be challenged as violating the protections of the First Amendment and the Equal Protection Clause, although the likelihood of success of such challenges is unclear.

ANALYSIS

The proposed bill states:

> It is an offense for any person to knowingly wear pants below the person's waistline, in a public place, in a manner that exposes the person's underwear or bare buttocks.
>
> "Public place" means any location frequented by the public, or where the public is present or likely to be present, or where a person may reasonably be expected to be observed by members of the public. "Public place" includes, but is not limited to, streets, sidewalks, parks, beaches, business and commercial establishments, whether for profit or not-for-profit and whether open to the public at large or where entrance is limited by a cover charge or membership requirement, bottle clubs, hotels, motels, restaurants, night clubs, country clubs, cabarets and meeting facilities utilized by any religious, social, fraternal or similar organizations.

> "Underwear" means an article of personal wear that is worn between the skin and an outer layer of clothing. "Underwear" includes, but is not limited to, boxer shorts and thongs.

The proposed legislation is popularly known as the "saggy pants" bill. Several cities in other states have enacted similar bills, but Tennessee would be the first state to enact such legislation. There is no controlling authority directly on point.[1] Additionally, no state appellate court has issued an opinion on such legislation. We outline below several constitutional theories on which the legislation might be challenged.

I. Vagueness

Due process of law requires, among other things, notice of what the law prohibits. Laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford,* 408 U.S. 104, 108, (1972). Criminal statutes "must 'define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited....' " *Davis-Kidd Booksellers, Inc. v. McWherter,* 866 S.W.2d 520, 532 (Tenn. 1993) (quoting *Kolender v. Lawson,* 461 U.S. 352, 358 (1983)). A statute is unconstitutionally vague, therefore, if it does not serve sufficient notice of what is prohibited, forcing "'men of common intelligence [to] necessarily guess at its meaning.' " *Davis-Kidd,* 866 S.W.2d at 532 (quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 607 (1973)); *see also Leech v. Am. Booksellers Ass'n, Inc.*, 582 S.W.2d 738, 746 (Tenn. 1979).

In addition to the requirement of notice, the vagueness doctrine requires that statutes provide "minimal guidelines to govern law enforcement." *Davis-Kidd*, 866 S.W.2d at 532. Because "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application," *Grayned*, 408 U.S. at 108-09, "the requirement that a legislature establish minimal guidelines to govern law enforcement" is the more important aspect of the vagueness doctrine. *Smith v. Goguen* 415 U.S. 566, 574 (1974).

The Sixth Circuit has outlined the principles to be applied in a void-for-vagueness challenge:

> In examining a facial challenge, this court must first "determine whether the enactment reaches a substantial amount of constitutionally protected conduct." Where the enactment does not reach constitutionally protected conduct, the complainant may succeed in a vagueness claim "only if the enactment is impermissibly vague in all of its applications." Therefore, vagueness claims not involving First Amendment freedoms must be examined in light of the facts of the particular case at hand and not as to the statute's facial validity. However, even in

[1] It is reported that, on April 22, 2009, a Palm Beach County Judge declared unconstitutional a Riviera Beach, Florida, local ordinance, which made it unlawful to appear in public wearing pants below the waist exposing skin or undergarments based on the due process clause of the Fourteenth amendment.
See http://www.palmbeachpost.com/localnews/content/local_news/epaper/2009/0422saggy.html.

> cases not involving First Amendment rights, we have recognized that courts may engage in a facial analysis where the enactment imposes criminal sanctions.

Belle Maer Harbor v. Charter Tp. of Harrison, 170 F.3d 553, 557 (6th Cir. 1999) (citations omitted).

As currently drafted, the proposed legislation is subject to being found unconstitutionally vague because of the imprecise terms "waistline" and "exposed." Representative Towns stated that the waistline is where "your hands fall on your hips." However, the dictionary lists three possible definitions of a waistline:

- The natural indentation of the body at the waist; or
- The part of a garment that covers the narrowest part of the waist; or
- The part above or below it as the current fashion demands.

The American Heritage Dictionary of the English Language, 4th ed. Boston: Houghton Mifflin, 2000. www.bartleby.com/61/. The variety of definitions and common understanding of the term "waistline" would make it difficult for a person of "reasonable intelligence" to understand precisely the conduct prohibited and would potentially make enforcement arbitrary.

Additionally, it is unclear what degree of exposure would result in a violation of the proposed statute. For example, would a violation occur when a male has just the waistband of his underwear showing? At what point is it "too much?" Or perhaps when a female sits down wearing "low-rise" jeans and her underwear becomes visible? Would a violation occur if a person raises his or her arms and the lifting of the shirt causes undergarments to be exposed?

Based on the current wording of the statute, it appears unlikely that the legislation provides law enforcement with minimum guidelines for enforcement or provides persons of reasonable intelligence with sufficient information to understand what conduct is forbidden. The statute is therefore vulnerable to attack on the ground that it is unconstitutionally vague.

II. Substantive Due Process

The Due Process Clause of the Fourteenth Amendment protects an individual liberty interest in a person's appearance. Over thirty years ago, the United States Supreme Court assumed, without deciding, that people have a liberty interest in their personal appearance. *Kelley v. Johnson,* 425 U.S. 238 (1976). Since that time the "nation's courts have assumed or found [a liberty interest] in a veritable fashion show of different factual scenarios." *Zalewska v. County of Sullivan,* 316 F.3d 314, 321 (2nd Cir. 2003); *see also Rathert v. Village of Peotone*, 903 F.2d 510, 514 (7th Cir. 1990) (recognizing a liberty in personal appearance, but upholding a regulation prohibiting police officers wearing earrings); *DeWeese v. Town of Palm Beach,* 812 F.2d 1365, 1367 (11th Cir. 1987) (striking down a regulation that prohibited shirtless male joggers as unreasonable); *Domico v. Rapides Parish Sch. Bd.*, 675 F.2d 100, 101 (5th Cir. 1982) (prohibition against beards applied to teachers in public school upheld even though a liberty interest existed); *Neinast v. Board of Trustees of Columbus Metropolitan Library*, 346 F.3d 585, 598 (6th Cir. 2003) (recognizing a liberty interest in appearance, but finding that a regulation

requiring library patrons to wear shoes reasonable). Yet, the Sixth Circuit has declined to find that the liberty interest in personal appearance is a fundamental right.[2] *Neinast,* 346 F.3d at 598.

Thus, in the Sixth Circuit at least, the proposed bill would be subject to rational basis review, because it does not implicate a fundamental right. *Id.* "Even foolish and misdirected provisions are generally valid if subject only to rational basis review." *Craigmiles v. Giles,* 312 F.3d 220, 223-24 (6th Cir. 2002). Consequently, a court would likely only overturn the "saggy pants" law if it "is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [legislature's] actions were irrational." *Kimel v. Florida Bd. of Regents,* 528 U.S. 62 (2000) (quotation omitted). For a potential plaintiff to prevail, they must negate "every conceivable basis that might support" the prohibition of persons wearing pants that show their underwear. *Craigmiles,* 312 F.3d at 224 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356 (1973)).

Only one federal circuit has squarely addressed the issue of a statute or regulation that attempts to control the personal appearance choices of the general public. Almost every case involving regulations of a person's appearance has occurred in the employment or school context, but Palm Beach, Florida, via ordinance, banned shirtless joggers from the streets. *DeWeese,* 812 F.2d at 1365. The town claimed that the ordinance satisfied the rational basis test because it was designed to: (1) stabilize its land values and maintain its role as a residential community; and (2) to maintain the history, tradition, identity, and quality of life of the town. *Id.* at 1367. The Eleventh Circuit could "divine" no rational way that the ordinance related to property values. *Id.* at 1367. Regarding the second rationale, the Court commented that it was "a mere circumlocution for enforcing the town fathers' view of the proper fashion for personal dress in Palm Beach." *Id.* at 1368.

In finding that no rational basis existed, the Eleventh Circuit relied on dicta contained in an opinion by then Judge, now Justice, Stevens in *Miller v. School District No. 167,* 495 F.2d 658, 664 (7th Cir. 1974), where he opined that "some restrictions might be so extreme that they would readily be condemned as unconstitutional." Additionally, he observed:

> We do not have a case in which the sovereign insists that every citizen must wear a brown shirt to demonstrate his patriotism. Fortunately, intervention of the federal judiciary has not been required during the brief history of our Republic in order to avoid intolerable instances of required conformity like that following the Manchus' invasion of China in 1644, or the official prohibition of beards during the reign of Peter the Great. *See Crews v. Cloncs,* 432 F.2d 1259, 1264, n. 7.
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> Consider Judge Cooley's comment on Justice Field's opinion in Ho Ah Kow, supra, in which he stated in part: 'There is and can be no authority in the state to punish as criminal such practices or fashions as are indifferent in themselves, and the observance of which does not prejudice the community or interfere with the proper liberty of any of its members. No better illustration of one's rightful liberty

[2] A fundamental right is generally expressed in the bill of rights, but also includes the right to privacy. *See Griswold v. Conneticut,* 381 U.S. 479 (1965).

> in this regard can be given than the fashion of wearing the hair. If the wearing of a queue can be made unlawful, so may be the wearing of curls by a lady or of a mustache by a beau, and the state may, at its discretion, fix a standard of hair-dressing to which all shall conform. The conclusive answer to any such legislation is, that it meddles with what is no concern of the state, and therefore invades private right.' 18 Am. Law Reg. 685, also quoted in the margin of 12 Fed.Cas. at 254.

Id.

An additional step in the rational basis analysis is whether or not the type of restriction is common. The virtual absence of statutes or ordinances similar to the instant one seriously undermines any argument that the measure is supported by a rational basis. *DeWeese,* 812 F.2d at 1369.

The Court held that the ordinance prohibiting shirtless joggers did not pass constitutional muster and opined that regulations of this nature will violate the constitution, "absent identification of some rational basis which has not yet been brought to our attention and which is beyond our present imagination." *DeWeese,* 812 F.2d at 1369-70.

Although not binding precedent on either the Tennessee state or federal courts, *DeWeese* would be persuasive authority for courts considering a constitutional attack on the legislation. The text of the bill does not articulate the purpose of the bill, and the legislative history concerning the proposed statute is scant, consisting mainly of proceedings held on March 25, 2009. During that hearing, legislators articulated several purposes for the act: teaching character and decency; mandating proper dress, which individuals should have been taught at home; and cleanliness concerns, particularly as applied to food-servers who were improperly dressed. Given that this statute would apply universally, *DeWeese* would suggest that these reasons are not sufficient because the bill seeks to prohibit something the sponsors find distatesful and offensive –the showing of underwear, which are articles of clothing.

III. First Amendment

The First Amendment to the United States Constitution protects the right to free speech, including "expressive conduct." *United States v. O'Brien,* 391 U.S. 367, 376 (1968). To qualify as "expressive conduct" there must be an intent to convey a particularized message, which others are likely to understand. *Texas v. Johnson,* 491 U.S. 397, 404 (1989). The bar is not set high; "a narrow, succinctly articulable message is not a condition of constitutional protection." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557, 569 (1995). Otherwise, the First Amendment "would never reach the unquestionably shielded painting of Jackson Pollack, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." *Id.*

It is unlikely that wearing "saggy pants" is entitled to First Amendment protection.[3] "The wearing of a particular type or style of clothing usually is not seen as expressive conduct." *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 507-08 (1969). A litigant challenging the law on this ground would have to establish that a person was seeking to convey a particularized message, and that the message would be understood by others. A general statement that a person "likes" to dress that way would not suffice. *See Blau v. Fort Thomas Public School District, et. al.*, 401 F.3d 381, 388-390 (6th Cir. 2005) (finding that a middle school student's preference for clothes that "made her feel good" was not entitled to First Amendment protection).

The Second Circuit has refused to find that a woman wearing a skirt because of a "deeply held cultural belief" conveyed a particularized message. *Zalewska*, 316 F.3d at 320. The plaintiff, Grazyna Zalewska, was employed by the Sullivan County Transportation Department when the department passed a dress code requiring that all employees wear a uniform consisting only of pants. *Id.* at 317. She sued the County for infringement of her First Amendment rights because she was no longer able to wear a skirt. The court acknowledged that clothing can be an important form of self-expression. *Id.* at 319. For familial and cultural reasons, Zalewska never had worn pants. *Id.* at 317. However, the court found that such a broad statement communicated a "vague and unfocused" message that at best was entitled to minimal First Amendment protection. *Id.* at 319. Additionally, the court found that such a broad message could not be readily understood because "no particularized communication can be divined simply from a woman wearing a skirt." *Id.* at 320.

The United States District Court for New Mexico found that wearing saggy pants could convey a particularized message, but that the message would not be readily understood. *Bivens v. Albuquerque Public Schools*, 899 F. Supp. 556, 561 (D.N.M. 1995). The plaintiff challenged his suspension from high school for violation of the dress code against wearing sagging pants as a violation of his First Amendment right to freedom of speech, expression and association. *Id.* at 558. The court found that the plaintiff had alleged a "sufficiently particularized" message of expressing his link with black culture and identifying with the style of black urban youth. *Id.* at 561. However, that message was unlikely to be understood. "Sagging is not necessarily associated with a single racial or cultural group, and sagging is seen by some merely as a fashion trend followed by many adolescents all over the United States." *Id.* at 561. The court found that the plaintiff had not carried his burden to demonstrate that the message of saggy pants was readily understood by others.

One recent commentator has suggested that the wearers of saggy pants may be seeking to identify themselves with their "neighborhood roots or socio-economic background" or to embrace the "hip-hop lifestyle." Anglica M. Sinopole, Comment, *"No Saggy Pants": A Review of the First Amendment Issues Presented by the State's Regulation of Fashion in Public Streets*, 113 Penn St. L. Rev. 329, 336-37 (Summer 2008). Additional messages could be "rebellion against conformity with expected societal standards" or an expression of youth. *Id.* The majority

[3] Article I, Section 19 of the Tennessee Constitution is at least as broad as the First Amendment. Since the body of law interpreting the First Amendment is larger, we will proceed under that analysis. *Leech v. American Booksellers Ass'n, Inc.*, 582 S.W.2d 738, 745 (Tenn.1979).

of reasons articulated above are “cultural” reasons, similar to the messages that were found to be “vague and unfocused” in *Zalewska*. If, a court did find that wearing saggy pants conveyed a particularized message, as the court in *Bivens* did, it is doubtful that meaning could be ascertained from the showing of one’s under garments or backside.

The wearer of saggy pants could claim that the activity is civil disobedience intended to protest the existence of “saggy pants” laws. Such motive might have a stronger claim to the status of expressive conduct, but it seems unlikely that a court would find that it rises to the level of protected conduct. *See Troster v. Pennsylvania State Dept. of Corrections*, 65 F.3d 1086 (3rd Cir. 1995) (expressing concern about using the First Amendment as a means to violate laws and later claiming that the action was done as a means of protesting the law).

IV. Equal Protection Clause

The statute might also be challenged under the Equal Protection Clause. The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, S 1. The Supreme Court has stated that the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). By the plain language of the statute, all who wear pants that sit below the waistline so as to display the wearer’s underwear will be subject to a fine and community service. Therefore, this statute would not violate the equal protection clause on its face.

The guarantee of equal protection is not limited to the enactment of fair and impartial legislation; the protection extends to a law’s application. Nonetheless, the Supreme Court will not find that a law is unconstitutional solely because it has a racially disproportionate impact; rather it must reflect a racially discriminatory purpose. *Washington v. Davis*, 426 U.S. 229, 239 (1976). In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Supreme Court identified five factors that are relevant for determining whether facially neutral state action was motivated by a racially discriminatory purpose: (1) the impact of the official action on particular racial groups, (2) the historical background of the challenged decision, especially if it reveals numerous actions being taken for discriminatory purposes, (3) the sequence of events that preceded the state action, (4) procedural or substantive departures from the government's normal procedural process, and (5) the legislative or administrative history. 429 U.S. 252, 266-68 (1977).

While “sagging” is not necessarily associated with any single racial group, a weak argument could be advanced that the law targets minority groups or adolescents. However, without an actual case in which to apply the above factors, we are unable to determine if a court would find that the statute violates the Equal Protection Clause.

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