STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

March 17, 2014

Opinion No. 14-31

Constitutionality of Legislation that would Prohibit Mass Picketing

QUESTIONS

1. Does H.B. 1688, 108th Gen. Assem. (2014) (hereinafter "HB1688"),[1] present an invalid content-based restriction on speech under the First Amendment to the United States Constitution and/or Article I, § 19, of the Tennessee Constitution?

2. Are any of the provisions of HB1688 contrary to United States or Tennessee Supreme Court jurisprudence regarding the freedom of speech or freedom of assembly?

3. Is HB1688 contrary to any provision of the National Labor Relations Act and therefore invalid under Article VI of the United States Constitution?

OPINIONS

1. Yes.

2. Yes.

3. HB1688 could be preempted by the National Labor Relations Act, at least in part.

ANALYSIS

1 and 2. Tenn. Code Ann. § 39-17-307(a) currently makes it a criminal offense to obstruct a highway or other public passageway. HB1688 would add new subsections (c) through (i) to the statute. New subsections (c) and (d) provide that "[i]t is no defense to prosecution that an organization or individual engages in mass picketing to further an objective in the context of a labor dispute" and make it an offense to "engage[] in mass picketing activity in the context of a strike, lockout, or other labor dispute." H.B. 1688, § 1. New subsection (e) defines the term "mass

[1] On February 26, 2014, the House Consumer and Human Resources Subcommittee recommended HB1688 for passage as amended (drafting code number 012464) (copy attached). This opinion addresses that amended version of the bill.

picketing"; subsection (f) provides that (e) shall not apply to mass picketing at any governmental building; subsection (g) defines "labor dispute"; and subsection (h) allows a business or property owner to seek injunctive relief without showing irreparable harm "[i]f, in a labor dispute, an organization or individual is engaged in mass picketing at a business or private residence." *Id.* Subsection (i) provides that nothing in the bill should be construed "to alter, modify or amend the protections afforded under the federal labor laws." *Id.* HB1688, therefore, is clearly directed at mass picketing activities by individuals or organizations in the context of a labor dispute.

The Free Speech Clause of the First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." Similarly, Article I, § 19, of the Tennessee Constitution states in relevant part that "[t]he free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty."[2] Peaceable assembly is protected by the First Amendment and "cannot be made a crime." *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937).[3] But the government may regulate "violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984).

"[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002) (internal quotation marks omitted). As a result, the Constitution "demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality." *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 660 (2004). Government regulations of speech are content-neutral if they are justified without reference to the content or viewpoint of the regulated speech. *Bays v. City of Fairborn*, 668 F.3d 814, 821 (6th Cir. 2012). A government restriction is content-based if it was adopted because of disagreement with the message the speech conveys. *Id.*

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[2] Article 1, § 19, provides protection of free-speech rights at least as broad as that provided by the First Amendment. *Doe v. Doe*, 127 S.W.3d 728, 732 (Tenn. 2004) (citing *Leech v. Am. Booksellers Ass'n, Inc.*, 582 S.W.2d 738, 745 (Tenn.1979)).

[3] The United States Supreme Court has tended to treat the right of assembly as a facet of the right of free expression. *See* Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. Rev. 543, 589 n.10 (2009); *see also Nat'l Ass'n for Advancement of Colored People v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (recognizing that there is a "close nexus between the freedoms of speech and assembly"). Accordingly, this opinion focuses on the free-speech implications of HB1688.

HB1688 presents a content-based restriction upon speech. It would criminalize "any form of mass picketing activity *in the context of a strike, lockout, or other labor dispute*" (emphasis added). *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 100 (1972) ("The central problem with [the city's] ordinance is that it describes permissible picketing in terms of its subject matter."). It could be said that HB1688 would prohibit conduct in the labor-dispute context that is already made unlawful by Tenn. Code Ann. § 39-17-307.[4] But it cannot be said that that is all that HB1688 would do. *See Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 210 (3d Cir. 2001) ("[R]egulations cannot be insulated from First Amendment challenge . . . based on the argument that they do no more than prohibit conduct that is already unlawful."). HB1688 includes labor-dispute-specific proscriptions on conduct that do not apply in non-labor contexts.[5] Furthermore, the injunction provision of HB1688 (new subsection (h)) would establish a different standard for business and private-property owners who are the targets of labor-related mass picketing.[6]

"Content-based restrictions are presumptively invalid . . . ." *Doe v. Doe*, 127 S.W.3d 728, 732 (Tenn. 2004). In order to overcome the presumption, the State must demonstrate that the restriction passes strict scrutiny, i.e., that it is (1) justified by a compelling government interest and (2) narrowly drawn to serve that interest. *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011); *accord Doe*, 127 S.W.3d at 732. The State must specifically identify an "actual problem" in need of solving, and the curtailment of free speech must be actually necessary to the solution. *Id.* "It is rare that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000). Content-based restrictions on speech have been permitted, as a general matter, only when confined to the few "historic and traditional categories [of expression]." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *Simon &*

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[4] For example, HB1688 would prohibit obstructing with a person's body ingress and egress of a place of employment (under new subsection (e)(1)(A)), while Tenn. Code Ann. § 39-17-307(a) already prohibits obstructing by a person's acts any place used for the passage of persons.

[5] For example, HB1688 would prohibit picketing a private residence so as to interfere with the resident's right to quiet enjoyment and would make such offense a Class B, rather than a Class C, misdemeanor (under new subsection (e)(4)). *See United Food & Commercial Workers Local 99 v. Bennett*, 934 F.Supp.2d 1167, 1196 (D. Ariz. 2013) (invalidating legislative enactment that mandated greater penalties for defamation of an employer, even though defamation was already actionable under Arizona law). New subsection (e)(4) goes on to say that the prohibition on picketing a private residence would not apply "to the extent that the same is protected under the United States Constitution and the Constitution of Tennessee," but this serves only to beg the constitutional question.

[6] As was the case in *Mosley*, 408 U.S. 92, because the bill would treat labor-dispute picketing differently, the First Amendment inquiry is intertwined with an equal-protection concern. *See id.* at 95; *see also Carey v. Brown*, 447 U.S. 455, 461-62 (1980) (invalidating on equal-protection grounds a statute distinguishing between labor and non-labor picketing).

Schuster, *Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring)) (internal quotation marks omitted). These categories include advocacy intended and likely to incite imminent lawless action; obscenity; defamation; speech integral to criminal conduct; "fighting words"; child pornography; fraud; true threats; and speech presenting some grave and imminent threat the government has the power to prevent. *United States v. Alvarez*, 132 S. Ct. 2537, 2543-44 (2012) (citations omitted).

The preamble to HB1688 declares that "the state has a compelling interest in protecting the safety and well-being of the public from violence, threats of violence, intimidation and other disruptive behavior that may be caused by mass picketing." Protecting the safety and well-being of the public may well be a compelling state interest, *see State v. Crain*, 972 S.W.2d 13, 16 (Tenn. Crim. App. 1998) (finding that the State has a compelling interest in maintaining the safety of the roads and protecting the public), but it is not at all clear that the risk of such harms *in the labor-dispute context* is sufficiently compelling so as to justify the bill's content-based restrictions on speech. The preamble asserts that these harms "may" be caused by mass picketing, but "[m]ere speculation of harm does not constitute a compelling state interest." *Consolidated Edison Co. of N.Y., Inc. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 543 (1980); *see also Brown,* 131 S.Ct. at 2739 (rejecting state's argument that legislature may make a predictive judgment about a link between a certain activity and a harm as a basis for taking preemptive action on speech). Furthermore, even if the State has a sufficiently compelling public-safety interest in prohibiting mass picketing, the bill's prohibitions on "any form of mass picketing in labor disputes" would not be narrowly tailored to serve that interest. *See Mosley,* 408 U.S. at 101 ("Some labor picketing is peaceful, some disorderly; the same is true of picketing on other themes."). In either event, HB1688, targeted as it is at labor-dispute picketing activities, would likely run afoul of the First Amendment. *See United Food & Commercial Workers Local 99 v. Bennett*, 934 F.Supp.2d 1167, 1193-94 (D. Ariz. 2013) (amendments to Arizona law which singled out labor picketing activities for special sanction and regulation were invalid as viewpoint-discriminatory and simultaneously underinclusive and overinclusive); *CF&I Steel*, *L.P. v. United Steel Workers of Am.*, 23 P.3d 1197, 1204 (Colo. 2001) ("[t]he regulation's categorical prohibition of picketing arising from labor disputes is not narrowly tailored to advance the state's interest in residential privacy, and therefore it violates the First Amendment"); *Davis v. Village of Newburgh Hts.*, 642 F.Supp. 413 (N.D. Ohio 1986) (municipal ordinance that regulated only labor picketing was content-based and unconstitutional); *Pineros Y Campesinos Unidos v. Goldschmidt*, 790 F.Supp. 216 (D. Ore. 1990) (statute prohibiting farm workers from picketing a farm during harvest time was content-based and unconstitutional).

3. Article VI, Clause 2, of the United States Constitution provides that "the Laws of the United States which shall be made in Pursuance [of the

Constitution] . . . shall be the supreme Law of the Land." State law, therefore, may be preempted by federal law, either expressly or impliedly. *See* Tenn. Att'y Gen. Op. 14-20, at 2 (Feb. 19, 2014). The National Labor Relations Act (NLRA) contains no express preemption provision, but the United States Supreme Court has held that Congress implicitly mandated two types of preemption as necessary to implement federal labor policy. *See Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 65 (2008). The form most applicable to this analysis is known as *Garmon* preemption. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). *Garmon* preemption "is intended to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the 'integrated scheme of regulation' established by the NLRA." *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 613 (1986).

Under the theory of *Garmon* preemption, states are prohibited from regulating activities that are "protected by § 7 of the NLRA, or constitute an unfair labor practice under § 8." *Bldg. & Const. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 224 (1993); *see Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters,* 436 U.S. 180, 190 (1978) (determining whether preemption is justified "under either the arguably protected or the arguably prohibited branch of the *Garmon* doctrine"). Regard for the federal system, though, requires courts "not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act" or where the conduct touches on interests "deeply rooted in local feeling and responsibility." *Garmon*, 359 U.S. at 243-44. *See Sears Roebuck,* 436 U.S. at 207 (holding that state court not deprived of jurisdiction over trespass action). Thus, states may regulate "mass picketing[,] obstructive picketing, or picketing that threatens or results in violence." *Id.* at 220 (Brennan, J., dissenting) (citing cases).

Nevertheless, parts of HB1688 could be preempted. Section 7 of the NLRA gives employees the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. This protection includes peaceful picketing activities. *See Int'l Longshoremen's Local 1416, AFL-CIO v. Ariadne Shipping Co.*, 397 U.S. 195, 200-01 (1970). Some of HB1688's proscriptions arguably extend into this sphere and would thus be preempted to that extent by the NLRA. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 729 (1966) (agreeing that the permissible scope of state remedies does not include consequences from peaceful picketing and other union activity); *see also Garmon*, 359 U.S. at 247 (states may regulate "conduct marked by violence and imminent threats to the public order"). For example, one engaged in peaceful picketing activities under § 7 could conceivably prevent the pursuit of lawful work "by means of disturbance or nuisance" under the bill's new subsection (e)(2). The bill's provision in subsection (i) that it "shall not be interpreted to alter, modify or amend the protections afforded under the federal labor laws" would not save the

state law from preemption in such an instance. *See United Food & Commercial Workers Local 99*, 934 F. Supp. 2d at 1193 (invalidating under § 7 of the NLRA an Arizona legislative enactment prohibiting picketing for purpose of inducing an employer or self-employed person to join or contribute to a labor organization); *see also Bldg. & Const. Trades Council*, 507 U.S. at 225 (holding that *Garmon* preemption extends to activities *arguably* protected or prohibited by the NLRA).[7]

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[7] The NLRA does not apply when the employer is a state or any political subdivision thereof. 29 U.S.C. § 152(2). Nor does it apply to agricultural laborers, domestic servants, employees of immediate family members, independent contractors, supervisors, or railroad laborers. 29 U.S.C. § 152(3). Thus, HB1688 would not be preempted as to these specific employers and employees.

Amendment No. _____

_____
Signature of Sponsor

FILED
Date _____
Time _____
Clerk _____
Comm. Amdt. _____
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AMEND Senate Bill No. 1661* **House Bill No. 1688**

by deleting all language after the enacting clause and by substituting instead the following language:

SECTION 1. Tennessee Code Annotated, Section 39-17-307, is amended by designating the existing language of subsections (c) and (d) as subsections (j) and (k) and adding the following as new subsections (c) through (i):

(c) It is no defense to prosecution that an organization or individual engages in mass picketing to further an objective in the context of a labor dispute.

(d) A person commits an offense who, without legal privilege, intentionally, knowingly or recklessly engages in any form of mass picketing activity in the context of a strike, lockout, or other labor dispute.

(e) For the purposes of this section, "mass picketing" includes:

(1) The stationing of a person representing an organization to apprise the public, by signs or other means, of the existence of a labor dispute pursuant to the National Labor Relations Act, 29 U.S.C. 151 et seq., and the Labor Management Relations Act, 29 U.S.C. 141 et seq., which prevents an individual from the reasonable ingress to and egress from an entrance or exit, to or from any place of employment:

(A) By obstructing the ingress and egress with the person's body; or,

(B) By placing a vehicle or other physical obstruction for such purpose;

(2) Preventing the pursuit of any lawful work or employment by means of disturbance or nuisance;

(3) Constituting as civil rights intimidation as defined in T.C.A. § 39-17-309(b); or

(4) Picketing a private residence that has the effect of interfering with the resident's right to quiet enjoyment shall be a Class B misdemeanor, or where the picketing of the private residence has the effect of inciting violence or intimidation shall be a Class A misdemeanor; provided, that such mass picketing shall not be prohibited to the extent that the same is protected under the United States Constitution and the Constitution of Tennessee. This subdivision (e)(4) shall not apply to private residences that are also places of employment and the targeted picketing in question relates to or is targeted at such employment.

(f) Subsection (e) shall not apply to mass picketing at any governmental building or facility.

(g) For purposes of this section, "labor dispute" means any controversy concerning the terms of conditions of employment, or concerning the association of representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relationship of employer and employee.

(h) If, in a labor dispute, an organization or individual is engaged in mass picketing at a business or private residence, the business or property owner shall be able to seek injunctive relief without the showing of irreparable harm. Upon proper showing, a person or business who is injured or threatened with injury shall be afforded relief in any court of competent jurisdiction to enjoin any behavior made unlawful by subsection (d).

(i) Nothing in this section shall be interpreted to alter, modify or amend the protections afforded under the federal labor laws, including the National Labor Relations

Act, compiled in 29 U.S.C. § 131 et seq. or the Labor Management Relations Act, compiled in 29 U.S.C. § 401-531 et seq.

SECTION 2. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 3. This act shall take effect upon becoming a law, the public welfare requiring it.