STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

March 21, 2014

Opinion No. 14-35

Constitutionality of Legislation to Abate Gang-Related Conduct

QUESTIONS

1. In Section 4 of Senate Bill 1634/House Bill 1430, 108th General Assembly (2014) (hereinafter "SB1634"), does new subdivision (b)(3) of Tenn. Code Ann. § 29-3-110 violate due process under the United States or Tennessee Constitution as applied to a person not named in a nuisance-abatement lawsuit but stopped by police on suspicion of being a gang member?

2. Does proof by a preponderance of the evidence in new subdivision (b)(1) violate any constitutional rights as applied to innocent conduct?

3. Is the term "prevailing constitutional case law" in new subdivision (b)(3) unconstitutionally vague?

4. Is the term "gang member," as used in new subdivision (b)(3), defined in an unconstitutionally overbroad manner?

5. Does new subdivision (b)(3)(A) violate a constitutional right to associate as applied to a gang member who has never committed a crime and who is associating for innocent purposes?

6. Does new subdivision (b)(3) violate the Constitution as applied to a large geographically defined area?

7. Is an injunction entered under new subdivision (b)(3) overbroad as applied to enjoin potential innocent conduct in the geographically defined area?

8. Does new subdivision (b)(3)(B) violate a constitutional right to freedom of movement as applied to a person who has never before carried out any gang operations in the public ground, place, or space from which he is being banned?

9. Does an injunction entered under this bill allow for an unconstitutionally overbroad application by police officers to suspect anyone as a gang member?

OPINIONS

1. SB1634 may be constitutionally applied to a person not named in a nuisance-abatement lawsuit. Due process may require, though, that such a person be afforded an adequate opportunity to contest whether he is a gang member before the injunction could be enforced against him.

2. The preponderance-of-the-evidence standard of proof may be susceptible to challenge on due-process grounds.

3. No. The "prevailing constitutional case law" provision does not affect the ability of gang members to understand and comply with either the law or a resulting injunction.

4. The definition of "gang member" is defensible against an overbreadth challenge.

5. to 9. Specific questions concerning how SB1634's injunction provisions might be applied cannot be answered in the abstract. The constitutional validity of a particular injunction issued under Tenn. Code Ann. § 29-3-110(b), as amended by SB1634, cannot be assessed without knowing the specific terms of that injunction.

ANALYSIS

Under Tenn. Code Ann. § 29-3-101, a nuisance includes a criminal gang that regularly engages in gang-related conduct. Tenn. Code Ann. § 29-3-101(a)(2)(B). "Gang related conduct" occurs when one or more criminal gang members regularly engage in any of the conduct listed in Tenn. Code Ann. § 29-3-101(a)(2)(B)(i)-(xi). For purposes of this statute, the terms "criminal gang" and "criminal gang member" are both defined in Tenn. Code Ann. § 40-35-121(a)(1)-(2).

Nuisance-abatement injunctions may be obtained and enforced under the procedures set forth in Tenn. Code Ann. §§ 29-3-102 to -111. SB1634 would work several changes to this statutory scheme in the context of gang-related conduct. Among other things, the bill would add the following new subdivision to § 29-3-110(b):

> (3) In addition to the relief permitted in subdivision (b)(2), the court may designate a certain geographically defined area or areas in any temporary or permanent gang injunction, which are narrowly tailored in compliance with prevailing constitutional case law for (1) or more of the following purposes:
>
> > (A) Preventing the gang from gathering in public in groups of two (2) or more members; and

> (B) Preventing any gang member from entering any public ground, place, or space where the gang has been found to have carried out its operations.

SB1634, § 4. New subdivision (b)(1) specifies that the standard of proof for nuisance-abatement actions is preponderance of the evidence and that neither a conviction nor a delinquency finding is required in order to meet that standard for actions to abate gang-related conduct. *Id.*

A statute is facially constitutional unless there is "no set of circumstances . . . under which the Act would be valid." *Davis–Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 525 (Tenn. 1993).[1] Where a statute is facially constitutional, the constitutionality of its application will depend heavily on the particular facts of each case—especially so where, as here, the statute authorizes the issuance of an injunction. In *People ex rel. Gallo v. Acuna*, 929 P.2d 596 (Cal. 1997), for example, a case involving a gang-related injunction entered pursuant to a state public-nuisance statute, the constitutional challenge was to the injunction, not to the statute. 929 P.2d at 601; *see id.* at 610 ("Defendants do not attack the public nuisance statute itself, . . . they attack the terms of the interlocutory decree . . . ."). Consequently, questions concerning how SB1634's injunctive provisions might be applied cannot be answered in the abstract, as any as-applied challenge would focus upon the scope and wording of the court's order.

Nevertheless, some general propositions can be gleaned from the caselaw, and some questions regarding the facial validity of SB1634 can be answered. In *Acuna*, the California Supreme Court sustained an injunction that forbade named defendants from "standing, sitting, walking, driving, gathering, or appearing anywhere in public view with any other defendant" or known gang member in a particular geographical area. *Acuna*, 929 P.2d at 608. It did so against a First Amendment associational challenge, a claim that the injunction was substantively overbroad, and a contention that the defendants could not be bound except on proof that each possessed a "specific intent to further an unlawful aim embraced by" the gang. *Id.* at 608-609, 614-18. As for the associational challenge, the court concluded that the activities of the gang and its members in the safety zone were not "private" or "intimate" as constitutionally defined such that they would command protection under the First Amendment. *Id.* at 609. Regarding the substantive limits of the injunction, the court ruled that the provision passed constitutional muster

[1] In the First Amendment arena, a statute can also be unconstitutionally overbroad if it threatens protected interests of persons not before the court by encompassing within its scope conduct that would constitute an exercise of their free speech. *See Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

> [g]iven the limited area within which the superior court's injunction operates, the absence of any showing of constitutionally protected activity by gang members within that area, the aggravated nature of gang misconduct, the fact that even within Rocksprings gang members may associate freely out of public view, and the kind of narrow yet irreducible arbitrariness that inheres in such line-drawing . . . .

Id. at 616. Finally, the court found that individualized proof of specific intent was not a condition to entry of the injunction in light of evidence that the gang and its members present in the area were responsible for the nuisance, that each of the individual defendants either admitted gang membership or was identified as a gang member, and that each was observed by police in the neighborhood. *Id.* at 618.

Section 4 of SB1634, under new subdivision (b)(3)(A), authorizes the issuance of an injunction that likewise prohibits a gang from gathering in public, and *Acuna* supports the conclusion that this provision may be constitutionally applied.

New subdivision (b)(3)(B) authorizes the issuance of an injunction that prohibits any gang *member* from entering any public space where the gang has been found to carry out its operations. In sustaining the injunction in *Acuna*, the court emphasized "the threat of *collective* conduct of gang members loitering in a specific and narrowly described neighborhood." 929 P.2d at 615. And in *Johnson v. City of Cincinnati*, 310 F.3d 484, 498 (6th Cir. 2002), the United States Court of Appeals for the Sixth Circuit, recognizing a "right to travel locally through public spaces and roadways," subjected a "drug exclusion zone" ordinance to strict scrutiny and struck it down. 310 F.3d at 502, 505, 506. Strict scrutiny is typically a difficult standard to meet. Nevertheless, the bill's requirement that such an injunction be limited to the site of prior gang-related conduct and the overarching requirement in subdivision (b)(3) that the geographically defined area be "narrowly tailored" support the conclusion that this provision may be constitutionally applied. *See, e.g., Thompson v. Ashe*, 250 F.3d 399, 406-07 (6th Cir. 2001) (sustaining a "no trespass" list that banned individuals who had been involved in drug or violent criminal activities from entering certain public housing developments against a substantive-due-process challenge).

1. Section 2 of SB1634 would amend Tenn. Code Ann. § 29-3-103 to provide that petitions for the abatement of gang-related conduct "may be brought against the gang itself to which the gang members belong." It thus makes clear that the bill is meant to be applied both to individual gang members and to gangs as organizations. In general, an injunction against an organization can run through its members, and unnamed members are accorded sufficient process through the opportunity to defend criminal-contempt accusations. *See, e.g., Acuna*, 929 P.2d at 617-18. In *Vasquez v. Rackauckas*, 734 F.3d 1025 (9th Cir. 2013), however, the United States Court of Appeals for the Ninth Circuit contested that proposition in

the context of an injunction for gang-related conduct. Because a gang injunction "prohibits an enormous range of quotidian conduct that, on its face, is not indicative of an individual's gang membership, or any other connection to the enjoined gang," the court suggested that post-arrest contempt proceedings may be an inadequate procedural safeguard of members' liberty interests. *Id.* at 1052.

This decision is, of course, not controlling in Tennessee; it does indicate, though, that due process may require that a person not named in a gang nuisance lawsuit be afforded an adequate opportunity to contest whether he is a gang member before the injunction could be enforced against him. But Section 2 of SB1634 may still be constitutionally applied; the State could make separate provision, either in the injunction itself or in a "robust, neutral administrative process," *id.* at 1054, to afford additional process for unnamed gang members.

2. In Section 4 of SB1634, new subdivision (b)(1) establishes a preponderance-of-the-evidence standard of proof; in gang nuisance actions, this standard may be susceptible to challenge on due-process grounds. California requires proof by clear and convincing evidence, the need for which "arises both from constitutional due process and more general public policy considerations." *People v. Englebrecht*, 88 Cal. App. 4th 1236, 1255-56, 106 Cal. Rptr. 2d 738, 751-52 (2001). The Ninth Circuit has noted this standard of proof with approval. *See Vasquez*, 734 F.3d at 1045.

More generally, determining what procedural-due-process protections a particular situation demands follows a three-part inquiry: (1) the private interest involved; (2) the risk of erroneous deprivation of the interest; and (3) the government's interests, including fiscal or administrative burdens. *Howell v. State*, 151 S.W.3d 450, 462 (Tenn. 2004). In a somewhat different context, the Ninth Circuit concluded that putative gang members' liberty interests with respect to a particular gang injunction were "truly weighty" since the terms of the order "restrict freedom of movement and use of public places because of the actions of others, over which one may have no control, and do so without regard to whether the individual engaging in the banned activities" is a gang member. *Vasquez*, 734 F.3d at 1042-43, 1045. The court also opined, on the record of that case, that "[d]etermining whether an individual is an active gang member presents a considerable risk of error." *Id.* at 1046.

3. A law is not void for vagueness if an ordinary person exercising ordinary common sense can sufficiently understand the law and comply with it. *See Moncier v. Board of Prof'l Resp.*, 406 S.W.3d 139, 152 (Tenn. 2013). The "prevailing constitutional case law" provision in new subdivision (b)(3) of SB1634 is directed to trial courts in the fashioning of injunctions. It does not relate to the ability of gang members to understand and comply with either the law or a resulting injunction.

4. The constitutional test for overbreadth is whether the statute's language overreaches unlawful conduct and encompasses activity that is constitutionally protected. *State v. Pickett*, 211 S.W.3d 696, 702 (Tenn. 2007). Here, the term "gang member," as used in new subdivision (b)(3)(B), is defined by existing law. *See* Tenn. Code Ann. § 40-35-121(a)(2). Designation as a gang member can require only that law enforcement reliably identify a person as such, *see id*. § 40-35-121(a)(2)(C), (E), (G), but the person must also be a member of a "criminal gang," which is an organization that has as one of its activities the commission of criminal acts, *id.* § 40-35-121(a)(1)(A). Further, in order to constitute a nuisance, the criminal gang must regularly engage in gang-related conduct, much of which is criminal or plainly tortious in nature. *See id.* § 29-3-101(a)(2)(B). These aspects of the definition of "criminal gang" suggest that there is little risk that third parties will curtail any constitutionally protected activity on account of the statute. The statutory definition of "gang member" is defensible against an overbreadth challenge.

5. to 9. As discussed above, specific questions concerning how SB1634's injunctive provisions might be applied cannot be answered in the abstract. The constitutional validity of a particular injunction issued under Tenn. Code Ann. § 29-3-110(b), as amended by SB1634, cannot be assessed without knowing the specific terms of that injunction.

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