STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

September 9, 2014

Opinion No. 14-81

Constitutionality of Legislation Providing for Neighborhood Injunctions

QUESTION

Would the legislation that was House Bill 1982 of the 108th General Assembly, as amended (hereinafter "HB1982"),[1] which would allow a homeowners' association or other neighborhood group to request an injunction to prohibit a criminal offender from entering the boundaries of the residential area, violate the United States or Tennessee Constitution?

OPINION

HB1982 is defensible against a facial constitutional challenge.

ANALYSIS

HB1982 would add a new section, 40-35-123, to the Tennessee Code, which would provide as follows:

> A homeowners' association, as defined in § 68-14-302, neighborhood association, neighborhood watch or any organized group of citizens that reside within a residential area, may seek an injunction or restraining order prohibiting an offender from entering the boundaries of the residential area, if:
>
> > (1) The offender has been convicted of three (3) or more separate offenses of theft, as defined in §39-14-103; burglary, as defined in § 39-14-402; rape, as defined in § 39-13-503; or criminal homicide, as defined [in] § 39-13-201; and
> >
> > (2) Three (3) or more of the offenses were committed within the boundaries of the residential area.

Injunctions would last for one year unless modified or dissolved, and could be renewed by the plaintiff.

[1] There was only one amendment to House Bill 1982, HA1081 (Drafting Code 014392).

A legislative act is facially constitutional[2] unless "no set of circumstances exist[s] under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 525 (Tenn. 1993). HB1982 is defensible against a facial challenge based on the non-delegation doctrine, substantive due process and equal protection, procedural due process, and the prohibition against double jeopardy.

First, HB1982 does not run afoul of the non-delegation doctrine. The General Assembly may not delegate its legislative power to private individuals, *see Gallaher v. Elam*, 104 S.W.3d 455, 464 (Tenn. 2003), and it might be contended that HB1982 endows homeowners' associations ("HOAs") with legislative power to determine whether the offenders should be excluded from certain residential areas. But while HOAs choose whether to enforce a remedy with which they have been provided, they make no public policy in doing so. *Cf. Davis v. Blount County Beer Board*, 621 S.W.2d 149, 150 (Tenn. 1981) (upholding consent provision of liquor zoning ordinance, stating: "The effect of a protest is to deny the permit, but that effect is derived from the legislative enactment and the ordinance passed pursuant thereto, not from the residence owner."). In this regard, HB1982 is similar to the law of nuisance, which has traditionally allowed injunctions at the instance of private parties. *See, e.g., State v. Persica*, 168 S.W. 1056, 1059 (Tenn. 1914) ("Nor can it be doubted that the law-making power of the state may, within constitutional limits, prescribe such an agency as is provided for in this act to represent the interest of the public in setting in motion such a law as this.").

Second, HB1982 is defensible against a substantive-due-process or equal-protection challenge. Unless legislation infringes a fundamental right or targets a suspect class, it will stand if it passes rational-basis scrutiny. *Romer v. Evans*, 517 U.S. 620, 631 (1996); *Fritts v. Wallace*, 723 S.W.2d 948, 949 (Tenn. 1987). To do so, it must merely "bear[] a rational relation to some legitimate end." *Romer*, 517 U.S. at 631; *see Fritts*, 723 S.W.2d at 949 ("if the court is able to conceive of a rational basis for the regulatory measures that is reasonably related to the legitimate government interest in protecting the public, the measure must be sustained"). It is irrelevant whether the reasons given actually motivated the legislature; rather, the question is whether some rational basis exists upon which the legislature could have based the challenged law. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993); *see also Fritts*, 723 S.W.2d at 949.

One can readily conceive of a rational basis for HB1982: persons who have been convicted of three offenses carried out in a particular residential area have

[2] This opinion assumes that an injunction obtained under the auspices of HB1982 would constitute state action triggering the protections of the Constitution. *See, e.g., NCAA v. Tarkanian*, 488 U.S. 179, 192 (1988) (noting that State may be sufficiently involved in conduct of private party to treat the conduct as state action where "the State creates the legal framework governing the conduct" or "it delegates its authority to the private actor").

demonstrated a proclivity for committing crimes there, and prohibiting them from entering the area might prevent them from committing more. The analysis is slightly different for equal-protection purposes; rather than identify a rational reason for excluding the offenders, a reviewing court must find a rational reason for treating thieves, burglars, rapists, and killers differently from other persons. HB1982 does not, for example, apply to offenders convicted of arson. But legislation "does not violate the Equal Protection Clause merely because the classifications [it makes] are imperfect." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). A law can be underinclusive or overinclusive without running afoul of the Equal Protection Clause. *New York Transit Authority v. Beazer*, 440 U.S. 568, 592 n.38 (1979). Barring the class of offenders that the legislation does is reasonably likely to safeguard the neighborhood.

The United States Court of Appeals for the Sixth Circuit, however, has recognized a limited right to intrastate travel, i.e., the right to travel locally through public spaces and roadways. *See Johnson v. City of Cincinnati*, 310 F.3d 484, 498 (6th Cir. 2002). In *Johnson*, the court found this right to be implicated by a city ordinance that banned persons convicted of drug crimes from entering "drug exclusion zones." The court also found that the ordinance implicated the right to freedom of intimate association where it infringed on one's rights to participate in the upbringing of grandchildren and to visit one's attorney. *Id.* at 501 (citing, *inter alia*, *Roberts v. United States Jaycees*, 468 U.S. 609, 617-618 (1984)). Applying strict scrutiny, the court concluded that the ordinance was not narrowly tailored to advancing the governmental interest of protecting the quality of life in the drug exclusion zone and struck the law down. *Id.* at 506.

Johnson thus suggests that some injunctions issued under HB1982 might be subject to strict scrutiny, which, in practice, is a very difficult standard to meet. But the neighborhood at issue in *Johnson* comprised nearly 10,000 residents; it contained a large historic district and a fast-growing entertainment district. *Id.* at 502. It also contained one plaintiff's grandchildren and another's lawyer. *Id.* at 505. Injunctions issued under HB1982 may not have such broad application; they might define relatively small areas that do not significantly trench upon an offender's interests in localized travel or freedom of association. Because these applications could withstand constitutional scrutiny, the legislation is not facially unconstitutional.

Third, HB1982 does not facially violate procedural-due-process rights. Procedural due process generally guarantees that individuals be given notice and an opportunity to have their legal claims heard at a meaningful time and in a meaningful manner. *See Mathews v. Eldridge,* 424 U.S. 319, 333 (1976); *Mansell v. Bridgestone Firestone N. Am. Tire, LLC,* 417 S.W.3d 393, 407 (Tenn. 2013). Although HB1982 does not specify the procedure by which an HOA can obtain an injunction, it does require that the HOA or other neighborhood group "seek" one; in other words, an injunction does not issue automatically upon an offender's third conviction. Some

sort of proceeding must therefore take place at which the HOA demonstrates that the offender has committed three qualifying offenses within the residential area. Tenn. R. Civ. P. 65, which covers injunctions and restraining orders, and applicable judicial decisions would therefore presumably apply. Affording an offender the opportunity to be heard may be constitutionally required, but trial courts can, as a practical matter, afford adequate process when confronted with an application for an injunction under HB1982.

Fourth and finally, HB1982 can be defended against a double-jeopardy challenge. Both the Fifth Amendment to the United States Constitution and Article I, § 10, of the Tennessee Constitution provide that no person shall "for the same offence . . . be twice put in jeopardy of life or limb." Among the fundamental guarantees encompassed in the principle of double jeopardy is the protection against multiple punishments for the same offense. *See Waters v. Farr*, 291 S.W.3d 873, 892 (Tenn. 2009). The Double Jeopardy Clauses do not "prohibit the imposition of all additional sanctions that could, 'in common parlance,' be described as punishment." *Id.* (quoting *Hudson v. United States*, 522 U.S. 93, 98–99 (1997)). Instead, the Clauses protect "only against the imposition of multiple *criminal* punishments for the same offense, and then only when such occurs in successive proceedings." *Id.* (quoting *Hudson*, 522 U.S. at 99) (emphasis in *Hudson*).

Determining whether an injunction entered under HB1982 is criminal or civil in nature for double-jeopardy purposes involves application of a two-pronged, multi-factored analysis.[3] First, courts ascertain "whether the legislature, 'in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.' " *Id.* at 893 (quoting *Hudson*, 522 U.S. at 99). Second, even if the legislature intended to establish a civil penalty, courts review the statutory scheme to ensure that it is not "so punitive[,] either in purpose or effect," as to turn the intended civil sanction into a criminal punishment. *Id.* (quoting *Hudson*, 522 U.S. at 99); *see also id.* (identifying the seven non-dispositive factors used to guide this inquiry).

HB1982 does not contain an explicit civil or criminal label, nor does it imply a legislative preference for one or the other.[4] But the seven guideposts tip the balance

---

[3] A similar test is used to determine whether a law constitutes retroactive punishment forbidden by the *Ex Post Facto* Clause. *See Smith v. Doe*, 538 U.S. 84, 97 (2002). But an offender's challenge to HB1982 on *ex post facto* grounds would necessarily be an as-applied constitutional challenge rather than a facial one.

[4] HB1982 does purport to amend Chapter 35 of Title 40, which is part of the Tennessee Criminal Sentencing Reform Act of 1989, but the manner of codification is not dispositive. *Smith v. Doe*, 538 U.S. 84, 94 (2002). The legislation requires action by a private party, while criminal sanctions are generally sought by the government. And injunctions enforceable upon pain of contempt of court are more traditionally viewed as civil rather than criminal in nature. *See, e.g.*, Tenn. R. Civ. P. 65.06.

in favor of a *civil* regulatory scheme. An act's rational connection to a nonpunitive purpose is a "most significant" factor, *Smith v. Doe*, 538 U.S. 84, 102 (2002), and as discussed above, HB1982 has a legitimate nonpunitive purpose in safeguarding neighborhood safety, which is advanced by banning offenders who have repeatedly committed crimes there.[5] Also, the requirement of three convictions, the nexus between the geographical scope of the injunction and the place of commission of the offenses, the fact that the injunction is not automatically triggered by conviction, and the ability to modify or dissolve the injunction are all features that strongly suggest that the legislation is not excessive in relation to its regulatory purpose. Finally, bans on entering particular neighborhoods have not historically been regarded as punishment. *Cf. Doe v. Miller*, 405 F.3d 700, 720 (8th Cir. 2005) (stating that residency restriction on sex offenders "is unlike banishment in important respects, and we do not believe it is of a type that is traditionally punitive").

ROBERT E. COOPER, JR.
Attorney General and Reporter

JOSEPH F. WHALEN
Acting Solicitor General

JAMES E. GAYLORD
Senior Counsel

Requested by:

The Honorable Antonio Parkinson
State Representative
36 Legislative Plaza
Nashville, Tennessee 37243

[5] HB1982 might deter commission of the enumerated offenses (or at least repeated commission of them in the same area), but this factor is entitled to little weight in this analysis. As the United States Supreme Court has observed, a deterrence argument of this character "proves too much. Any number of governmental programs might deter crime without imposing punishment." *Smith*, 538 U.S. at 102.