

STATE OF TENNESSEE
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Opinion No. 13-101

Constitutionality of Criminal Statute Regarding Admission of Minors to Movies

QUESTION

Does Tenn. Code Ann. § 39-17-907(b) violate the First Amendment of the United States Constitution?

OPINION

The provisions of Tenn. Code Ann. § 39-17-907(b), prior to its amendment by Chapter 459 of the 2013 Tennessee Public Acts (“Chapter 459”), are unconstitutional on First Amendment grounds. The provisions of Tenn. Code Ann. § 39-17-907(b) as amended by Chapter 459 are facially constitutionally defensible.

ANALYSIS

After receipt of this opinion request, Tenn. Code Ann. § 39-17-907(b) was deleted and replaced in its entirety by Chapter 459 of the 2013 Tennessee Public Acts. The language of Tenn. Code Ann. § 39-17-907(b) prior to this amendment stated the statute’s purpose was to ensure that various operators of motion pictures maintain adequate supervision to prevent minors from purchasing a ticket to a movie designated by the Motion Picture Association of America, Inc. (“MPAA”) as appropriate for minors and then proceeding to view a movie deemed inappropriate for minors by the MPAA. Tenn. Code Ann. § 39-17-907(b) (2010). The statute specifically provided as follows:

Each theater at which two (2) or more motion pictures are shown in the same building shall maintain adequate supervision of the customers to prevent minors from purchasing a ticket or admission pass to a motion picture designated by the rating board of the Motion Picture Association of America by the letter “G” for general audiences or “PG” for all ages, parental guidance advised, and then viewing a motion picture designated “R” for restricted audiences, persons under eighteen (18) years of age not admitted unless accompanied by parent or adult guardian, or “X,” persons under eighteen (18) years of age not admitted.

Id. A violation of this subsection was a Class A misdemeanor. Tenn. Code Ann. § 39-17-907(c) (2010).

The 2013 amendment deleted the prior version of Tenn. Code Ann. § 39-17-907(b) and replaced it with the following language:

No minor under the age of eighteen (18) years old may be admitted to a movie theatre if the movie has been found to be "harmful to minors" pursuant to § 39-17-901. It is a deceptive practice under title 47, chapter 18, part 1, to advertise or promote a motion picture as having a rating other than the rating that has been assigned to it.

2013 Tenn. Pub. Acts ch. 459, § 1. *See also* Tenn. Code Ann. § 39-17-907(b) (2013 Supp.). This provision became effective on May 20, 2013, the date it was signed by the Governor. *See* 2013 Tenn. Pub. Acts ch. 459, § 2. The term "harmful to minors" is defined by Tenn. Code Ann. § 39-17-901 as follows:

(6) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual excitement, sexual conduct, excess violence or sadomasochistic abuse when the matter or performance:

(A) Would be found by the average person applying contemporary community standards to appeal predominantly to the prurient, shameful or morbid interests of minors;

(B) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and

(C) Taken as whole lacks serious literary, artistic, political or scientific values for minors.

Tenn. Code Ann. § 39-17-901(6). Violation of Tenn. Code Ann. § 39-17-907(b) as amended by Chapter 459 is a Class A misdemeanor. Tenn. Code Ann. § 39-17-907(c) (2013 Supp.).

The MPAA referenced in the prior version of Tenn. Code Ann. § 39-17-907(b) is a trade association having as members producers and distributors of motion pictures, home video, and television programs.¹ MPAA members, together with "the overwhelming majority of filmmakers," agree to submit their theatrically released movies for rating to the Classification and Ratings Administration.² Ratings are assigned by a board of parents who consider such factors as violence, sex, language and drug use and then assign a rating they believe the majority of American parents would give a movie.³ The ratings are as follows: "G"—General Audiences. All ages admitted; "PG"—Parental Guidance Suggested. Some material may not be suitable for children; "PG-13"—Parents Strongly Cautioned. Some material may be inappropriate for children under 13; "R"—Restricted. Children under 17 require accompanying

¹ MPAA, *About Us*, <http://www.mpa.org/About> (last visited Nov. 4, 2013).

² MPAA, *Film Ratings*, <http://www.mpa.org/ratings> (last visited Nov. 4, 2013).

³ *Id.*

parent or adult guardian; and “NC-17”—No one 17 and under admitted.⁴ Members of the National Association of Theater Owners, a trade association for owners and operators of motion-picture theater companies, agree to enforce the ratings by refusing to admit children to “R”-rated motion pictures unless they are accompanied by a parent or guardian and refusing to admit children to “NC-17”-rated motion pictures at all.⁵ *See generally* Richard M. Mosk, *Motion Picture Ratings in the United States*, 15 *Cardozo Arts & Ent. L.J.* 135 (1997).

The prior language of Tenn. Code Ann. § 39-17-907(b) in essence criminalized the failure of operators of theaters showing two or more motion pictures to adequately supervise minors to prevent those minors from viewing motion pictures deemed inappropriate under standards voluntarily adopted by the MPAA and its members. The enactment of this statute thereby converted a voluntary agreement by private individuals and entities into state action, triggering the protections of the United States Constitution. *See Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 718 (Tenn. 1997) (stating that “[i]t is well-settled that constitutional guarantees restrain government conduct and generally do not restrain the conduct of private individuals”). *See also Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982); *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 992-94 (9th Cir. 2013); *Ghaith v. Rauschenberger*, 778 F. Supp. 2d 787, 791 (E.D. Mich. 2011), *aff’d*, 493 F. App’x. 731 (6th Cir. 2012); Tenn. Att’y Gen. Op. 13-55, at 2 (July 12, 2013).

The “liberty of expression” by means of motion pictures is protected speech under the First Amendment, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952); *New Riveria Arts Theatre v. State ex rel. Davis*, 219 Tenn. 652, 658-59, 412 S.W.2d 890, 893 (1967), and prior restraints on speech are presumptively unconstitutional. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975).⁶ Laws that punish after the fact, but impose restrictions on the content of protected speech, are subject to strict scrutiny. *Brown v. Entm’t Merch. Ass’n*, 131 S. Ct. 2729, 2738 (2011). Such laws are invalid unless justified by a compelling governmental interest and drawn narrowly to serve that interest. *Id.* In contrast, content-neutral restrictions that impose an incidental burden on speech are subject to an intermediate level of scrutiny and will be sustained if they further an important or substantial governmental interest and do not burden substantially more speech than is necessary to further that interest. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642, 662 (1994).

The United States Supreme Court has recently examined the relationship between the First Amendment’s protection of free speech and a state’s regulation of the content of materials intended for distribution to minors. In *Brown v. Entm’t Merch Ass’n*, 131 S.Ct. 2729 (2011), the

⁴ MPAA, *How to Read a Rating*, <http://www.mpa.org/ratings/how-to-read-a-rating> (last visited Nov. 4, 2013). The provisions of Tenn. Code Ann. § 39-17-907(b) no longer accurately reflect the current MPAA ratings.

⁵ NATO, *Survey of Exhibition Industry Practices*, <http://www.natoonline.org/UNIC-NATOSurveyUSAnswers.pdf> (last visited Nov. 4, 2013).

⁶ The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech.” U.S. Const., amend. 1. The First Amendment is incorporated into the Due Process Clause of the Fourteenth Amendment to the United States Constitution and thereby made applicable to the states. *See Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968).

Supreme Court invalidated under the First and Fourteenth Amendments to the United States Constitution a California law imposing restrictions and labeling requirements on the sale or rental of “violent video games” to minors. In so holding, the Court reaffirmed that “minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.” *Id.* at 2735-36 (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 212-13 (1975)). While the Court acknowledged that states possess “legitimate power to protect children from harm,” the Court stressed that such authority “does not include a free-floating power to restrict the ideas to which children may be exposed.” *Id.* at 2736. Accordingly, the Court reiterated that the First Amendment prevents a state from suppressing “[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription . . . solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.” *Id.* (quoting *Erznoznik*, 422 U.S. at 213-14).

By criminalizing the failure of a movie theater owner to ensure that a minor who purchases a ticket to a “G” rated movie does not then view a movie deemed inappropriate for minors, the State under the prior provisions of Tenn. Code Ann. § 39-17-907(b) was indirectly regulating what the State could not directly regulate under the First Amendment. These restrictions in effect used the State criminal code to require theater owners to adequately supervise minors in order to prohibit minors from viewing a broad category of films, either entirely or only with adult supervision, subject to the evolving standards of the MPAA and its members. Such regulation of minors’ access to various motion pictures is neither “narrow” nor “well-defined” as required by the First Amendment, and thus traverses the aforementioned limitations imposed on states by the First Amendment. *Brown*, 131 S.Ct. at 2735-36.

Several courts have invalidated under a First Amendment analysis a government’s attempt to adopt and impose MPAA voluntary standards as a governmental standard for the viewing of movies. In finding that the First Amendment precluded a state university from banning the showing of all “X”-rated movies on campus, a federal district court recognized that “it is well-established that the Motion Picture ratings may not be used as a standard for a determination of constitutional status” and that the “standards by which the motion picture industry rates its films do not correspond to the . . . criteria for determining whether an item merits constitutional protection or not.” *Swope v. Lubbers*, 560 F. Supp. 1328, 1334 (W.D. Mich. 1983). *Accord Borger v. Bisciglia*, 888 F. Supp. 97, 100 (E.D. Wis. 1995) (“It is true that a private organization’s rating system cannot be used to determine whether a movie receives constitutional protection. For instance, a city cannot rely on the rating system to determine which movies are ‘obscene speech’ and thereby less protected.”); *Engdahl v. City of Kenosha*, 317 F. Supp. 1133, 1136 (E.D. Wis. 1970) (holding that an ordinance prohibiting minors from viewing “adult” motion pictures, defined by reference to MPAA standards, was an invalid prior restraint on First Amendment freedoms). *See also Motion Picture Ass’n of Am. v. Specter*, 315 F. Supp. 824, 826 (E.D. Pa. 1970) (“The conclusory standards ‘suitable for family or children’s viewing’ and ‘not suitable for family or children’s viewing’ are left undefined in the statute and the attempted recourse to Association ratings is of no avail”); *DPR, Inc., v. City of Pittsburg*, 953 P.2d 231, 243 (Kan. Ct. App. 1998) (“It is not a crime to view movies which do not bear the rating of the Motion Picture Association of America, and we have no doubt there is a protected First Amendment right to do so”).

Chapter 459 essentially rewrote Tenn. Code Ann. § 39-17-907(b) to preclude the admission of minors under the age of 18 years old to a movie theatre if the movie has been found “harmful to minors” pursuant to Tenn. Code Ann. § 39-17-901 and to make it “a deceptive practice under title 47, chapter 18, part 1, to advertise or promote a motion picture as having a rating that has been assigned to it.” 2013 Tenn. Pub. Acts 459, § 1. Both provisions of the revised Tenn. Code Ann. § 39-17-907(b) are constitutionally defensible. The Tennessee Supreme Court has held that the term “material harmful to minors,” as defined by Tenn. Code Ann. § 39-17-901(b), is readily susceptible to a constitutional narrowing construction that applies only to materials deemed “obscene” and therefore “lack[ing] serious literary, artistic, political, or scientific value for a reasonable seventeen-year old minor.” *Davis Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 522, 528 (Tenn. 1993). *See also* Tenn. Att’y Gen. Op. 99-108, at 1 (May 10, 1999).⁷ Thus, within these parameters developed by the Tennessee Supreme Court, denying admission of a minor to a movie theatre showing a movie that has been found “harmful to minors” as defined by Tenn. Code Ann. § 39-17-901(6) is facially constitutionally defensible against a First Amendment challenge. Furthermore, the General Assembly pursuant to the State’s broad police powers also may constitutionally prohibit theatre owners from advertising or promoting a motion picture as having a rating other than the rating that has been assigned to it. Here, the State is arguably requiring that a movie that has been rated is promoted or advertised as rated to ensure that the public has the correct information on a movie’s rating and may act appropriately based on the reliability of that information. *See SNPCO, Inc. v City of Jefferson City*, 363 S.W.3d 467, 472 (Tenn. 2012) (recognizing that “State governments may enact any laws reasonably related to the health, safety, welfare, and morals of the people, subject only to the constraints imposed by the federal and state constitutions”); *Epstein v. State*, 211 Tenn. 633, 639, 366 S.W.2d 914, 917 (1963) (confirming that the State may reasonably regulate a business “for the benefit of the public and to prevent frauds upon it”).

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⁷ This Office cannot effectively anticipate all possible factual situations in which Tenn. Code Ann. 39-17-907(b) as amended might be applied or “as applied” challenges that might develop against this statute. *See generally Waters v. Farr*, 291 S.W.3d 873, 922-23 (Tenn. 2009) (Koch, J., concurring in part and dissenting in part) (discussing in depth distinctions between “as applied” and “facial” constitutional challenges). Accordingly, such “as applied” challenges are outside the scope of this opinion.

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