State Court Docket Watch: 2018 Edition

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The Federalist Society

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About State Court Docket Watch

In an effort to increase dialogue about state court jurisprudence, the Federalist Society presents State Court Docket Watch. This newsletter is one component of the State Courts Project, presenting original research on state court jurisprudence and illustrating new trends and ground-breaking decisions in the state courts. For more information, visit http://www.statecourtsguide.com/docket-watch/.

The thirty-five articles you'll find in this edition of State Court Docket Watch were all originally posted on the Fed Soc Blog at fedsoc.org. They are presented in the order in which they were published throughout 2018, but the table of contents at right lists them alphabetically by state for ease of reference.

About the Federalist Society

The Federalist Society for Law and Public Policy Studies is an organization of 40,000 lawyers, law students, scholars, and other individuals located in every state and law school in the nation who are interested in the current state of the legal order. The Federalist Society takes no position on particular legal or public policy questions, but is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.

The Federalist Society takes seriously its responsibility as a non-partisan institution engaged in fostering a serious dialogue about legal issues in the public square. We occasionally produce white papers on timely and contentious issues in the legal or public policy world, in an effort to widen understanding of the facts and principles involved and to contribute to dialogue.

Positions taken on specific issues in publications, however, are those of the author, and not reflective of an organizational stance. This paper presents a number of important issues, and is part of an ongoing conversation. We invite readers to share their responses, thoughts, and criticisms by writing to us at info@fedsoc.org, and, if requested, we will consider posting or airing those perspectives as well.

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Coloradans for a Better Future v. Campaign Integrity Watchdog

by Paul Sherman, a senior attorney at the Institute for Justice

In 2012, Colorado's Republican voters faced a choice in the campaign for Colorado University's Board of Regents: Brian Davidson or Matthew Arnold? The campaign made headlines after Arnold admitted to lying about his educational credentials. And in the heat of this debate, Coloradans for a Better Future (CBF)—a 527 political organization—ran two radio ads, one promoting Davidson and one criticizing Arnold.

Arnold lost the race. Unfortunately for CBF, Arnold would go on to become the most prolific complainant under Colorado's system of private campaign-finance enforcement. Under that system, "[a]ny person" can file a private lawsuit to enforce the state's campaign-finance laws. And since 2014, Arnold has filed over 70 complaints, either personally or through a company he founded, called Campaign Integrity Watchdog (CIW).

Following his electoral defeat, Arnold started filing complaints against CBF, alleging various violations of campaign-finance law. After weathering Arnold's third lawsuit, CBF filed a termination report with the Colorado Secretary of State. But this only prompted a fourth lawsuit by CIW, claiming that CBF failed to properly report the value of the time spent by an attorney filing the termination report as a campaign "contribution."

CIW lost before the Office of Administrative Courts, but the Colorado Court of Appeals reversed, holding that free or reduced-cost legal services to political organizations like CBF qualified as contributions either as undercompensated services under Colo. Rev. Stat. § 1-45-103(6)(b) or as "gifts" under Colo. Rev. Stat. § 1-45-103(6)(c)(I).

Represented by the Institute for Justice, CBF sought review before the Colorado Supreme Court. The Court granted review and on January 29, 2018, unanimously reversed the Court of Appeals.

The Colorado Supreme Court's ruling is a straightforward application of well-established principles of statutory interpretation, particularly the canon against surplussage and noscitur a sociis.

With regard to section 1-45-103(6)(b), concerning undercompensated services, the court noted that the value of these services is established in an amount "as determined by the candidate committee." Based on this language, the court reasoned that the provision applied only to services rendered to candidate committees; otherwise, the phrase "as determined by the candidate committee" would be surplussage. The court rejected CIW's argument that this interpretation led to absurd results, holding that "it is not absurd to make contribution laws stricter for candidate committees than for other entities."

As for section 1-45-103(6)(c)(I), concerning "gifts" to political organizations, the court held that the word "gift" referred only to monetary gifts. To support this interpretation, the court looked to the other terms surrounding "gift," which included "payment, loan, pledge, . . . advance of money, [and] guarantee of a loan." Invoking the "familiar principle of statutory construction that words grouped in a list should be given related meaning," the court had no trouble concluding that "gift" did not extend beyond monetary gifts. This interpretation also avoided surplussage in another subsection of the law, section 1-45-103(6)(c)(III), which regulates gifts of property.

The Colorado Supreme Court's ruling will provide important protection for political speakers in Colorado. Campaign-finance law is notoriously difficult to comply with, and those compliance problems are only exacerbated by Colorado's unique system of private campaign-finance enforcement. The Colorado Supreme Court's ruling in *Coloradans for a Better Future v. Campaign Integrity Watchdog* ensures that political speakers can seek the legal help they need to navigate Colorado's law without fear that doing so will open them up to retaliatory lawsuits from their political opponents.

League of Women Voters v. Commonwealth of Pennsylvania

by Jason Torchinsky, a partner at Holtzman Vogel Josefiak Torchinsky PLLC

In *League of Women Voters v. Commonwealth of Pennsylvania*, the Supreme Court of Pennsylvania determined that Pennsylvania's congressional districting plan, which had been in place since 2011, violates the Constitution of the Commonwealth of Pennsylvania. Based on this determination, a 5-2 partisan line vote (the majority comprising the Democrat members of the court), struck down the Plan and effectively reversed the lower court, which—serving as a special master—had held that the plan was constitutional and that Plaintiffs failed to articulate a judicially manageable standard.

In December 2011, following the results of the 2010 Census, the Pennsylvania General Assembly passed a redistricting plan which apportioned the state into 18 congressional districts. This plan was passed with bipartisan support and remained unchallenged for over five years and three congressional elections. In June 2017, a group of Pennsylvania residents brought suit in state court challenging the 2011 Plan, alleging that it violated their rights under the free expression, association, and equal protection provisions of the Pennsylvania Constitution. The Plaintiffs claimed that the General Assembly acted unconstitutionally in drawing the 2011 Plan because it did so at least in part to enhance the Republican Party's representation in Congress. The Plaintiffs argued that any partisan motive in congressional redistricting is unlawful under the Pennsylvania Constitution.

The Pennsylvania Commonwealth Court (the intermediate court in Pennsylvania, which has jurisdiction over election matters and acting as special master) concluded that the Plaintiffs had failed to show a violation of any provision of the Pennsylvania Constitution. Specifically, that court found that the Pennsylvania Supreme Court had previously and consistently construed the applicable state constitutional provisions as "coterminous" with their federal constitutional analogs, and therefore are analyzed under the same standards. These applicable standards are set forth in *Erfer v. Commonwealth*, 794 A.2d 325 (Pa. 2002) and *Davis v. Bandemer*, 478 U.S. 109 (1986), which require plaintiffs to establish intentional discrimination against an identifiable political group resulting in an actual discriminatory effect. The Commonwealth Court found that the Plaintiffs failed to present a "judicially manageable standard" by which to adjudicate a free-speech partisan gerrymandering claim under the Pennsylvania Constitution, and that the Plaintiffs had failed to satisfy the equal-protection standard in *Erfer*/*Bandemer*, because they had failed to show that an "identifiable" political group had suffered a cognizable burden on its representational rights.

The Supreme Court of Pennsylvania expedited its review of the Commonwealth Court's recommendation and, on January 22, 2018, issued its order striking the 2011 Plan as unconstitutional. That court held, while providing no opinion, that the 2011 Plan "plainly and palpably violates the Constitution of the Commonwealth of Pennsylvania." Remarkably the court did not identify which constitutional provisions the Plan violated, provide any reasoned basis for its ruling, or indicate how the General Assembly could satisfy the Pennsylvania Constitution when re-drawing congressional maps. The court further enjoined the use of the 2011 Plan in any further congressional elections, beginning with the primary on May 15, 2018. In so doing, the court gave the General Assembly until February 9, 2018, to pass an alternative plan for submission to the Governor of Pennsylvania for signature. The court reserved for itself the right to review and overturn any new reapportionment that is signed into law. The court also ordered the Pennsylvania executive branch to reschedule the 2018 elections if necessary but made clear that the court will adopt a plan of its own if the General Assembly does not enact a plan by February 9, 2018.

Two Justices dissented as to the substance of the order, and a third concurred in part but dissented on the timing of the implementation of the order. One dissenting opinion expressed concern that "the order striking down the 2011 Congressional map on the eve of our midterm elections, as well as the remedy proposed by the Court" raise "the implication that this Court may undertake the task of drawing a congressional map on its own," which "raises a serious federal constitutional concern." The other dissent similarly recognized that "[t]he crafting of congressional district boundaries is quintessentially a political endeavor assigned to state legislatures by the United States Constitution."

The Defendants, Michael C. Turzai, the Speaker of the Pennsylvania House of Representatives, and Joseph B. Scarnati III, the Pennsylvania Senate President Pro Tempore, sought stays from both the Pennsylvania Supreme Court and the U.S. Supreme Court. Both of these applications were denied, with two Justices of the Pennsylvania Supreme Court dissenting and one Justice of the Pennsylvania Supreme Court concurring in part and dissenting in part on due process grounds.

The result of the Pennsylvania Supreme Court's order in *League of Women Voter*s has the potential to have wide-sweeping ramifications. It risks throwing Pennsylvania's congressional campaigns into upheaval mere weeks before the nomination process was to set to commence. Moreover, the precedent set by a state court's striking and re-drawing of a properly enacted and apportioned congressional map, without expressly applicable state constitutional provisions, creates deep federalism and judicial activism concerns.

The risk of this action by the Pennsylvania Supreme Court is that across the country this may be the start of a trend towards redistricting cases alleging gerrymandering being brought in state courts to attempt to insulate them from U.S. Supreme Court review. This only raises the stakes for the judicial selection process, as this case could portend an increased role for the state-level judiciary in congressional redistricting disputes.

The author served as counsel in these cases, but the views expressed here are his own and do not necessarily reflect the views of his clients. At the time of this writing, there was no majority opinion issued and no congressional map in place for the 2018 elections.

Cooper v. Berger

by John E. Branch, III, a Partner at Shanahan McDougal, PLLC, and H. Denton Worrell, an Associate at Shanahan McDougal, PLLC

In *State ex rel. Cooper v. Berger*, No. 52PA17-2 (N.C. Jan. 26, 2018), the Supreme Court of North Carolina determined that a statute combining the North Carolina Board of Elections with the North Carolina Ethics Commission under a bipartisan, eight-member board (the "Board") was unconstitutional due to the Governor's inability to appoint a majority of the Board from his own political party. Not only does this decision expand upon recent separation-of-powers opinions increasing the power of the executive branch to the detriment of the legislature, but the Court's refusal to apply the political question doctrine calls into question its efficacy in North Carolina.

At issue, pursuant to a lawsuit filed by Governor Roy Cooper, was the makeup of the Board, specifically the change from a majority of the Board of Elections being appointed from the Governor's political party to a bipartisan eight-member Board.[1] Gov. Cooper argued that the Board's structure deprived him of control over it and infringed on his ability to see that the laws of North Carolina be executed. In response, the General Assembly contended that the Governor appointed the members of the Board, retained similar removal power as under prior law, and that the Board could not take any affirmative action without the vote of at least one of the appointees from the Governor's political party.

The majority of the Supreme Court of North Carolina, in a party-line decision, relying on the Chief Justice Mark Martin's 2016 majority opinion in *State ex rel. McCrory v. Berger*, held that the bipartisan makeup of the Board was unconstitutional. The Court determined that, absent the ability to appoint a majority of the Board from his political party, the Governor was left with "little control over the views and priorities" of the Board since the members of the political party opposing the Governor could, if they vote unanimously, block the implementation of the Governor's policy preferences. Thus, the majority held that a bipartisan Board unconstitutionally infringed on the Governor's ability to perform his core executive powers.

Chief Justice Martin, joined by Justice Barbara Jackson, argued in a dissenting opinion that the majority misapplied *McCrory*. Had the majority faithfully applied the prior decision, the Chief Justice argued, they would have found that the North Carolina Constitution required that the Governor have "enough control" over the Board to ensure that the laws are faithfully executed, and that "enough control" did not mean unlimited, unbridled, or even majority control. Rather, the Chief Justice argued, the constitution requires that "the Governor not be compelled to enforce laws while having little or no control over how that enforcement occurs," a requirement that the statute at issue met by allowing the Governor to appoint half of the Board's members from his political party.

Notably, this decision also has ramifications for the future of the political question doctrine in North Carolina. Unlike the three-judge trial court panel who initially dismissed the case as non-justiciable, the majority concluded that the political question doctrine did not necessitate dismissal of the Governor's claim because the Governor was not challenging the powers or duties that the General Assembly assigned to the Board but, instead, was challenging a reduction in his ability to control the elections Board which, in turn, diminished his ability to ensure that the laws are faithfully executed. While they did not join the majority's decision, Chief Justice Martin and Associate Justice Jackson did not challenge the majority's conclusion that the issues were justiciable.

Justice Paul Newby disagreed with the majority's assessment of the political question issue. Because the text of the constitution specifically reserved to the General Assembly the power to create and structure administrative agencies, including the power to alter the agencies, structure them as bipartisan, and house them outside of the executive branch, and that nothing in the constitution limited the ability of the General Assembly to create an independent, bipartisan Board, Justice Newby reasoned that the Court lacks the authority to intervene; the issue presents a non-justiciable political question. He concluded that the majority's new exception to the non-justiciability doctrine completely swallowed the rule: matters are now justiciable any time a party seeks to have the Court ascertain the meaning of a constitutional provision. Justice Newby warned that this new approach to separation-of-powers claims "unavoidably sounds the death knell" of non-justiciability doctrine and signals the Court's inevitable involvement in future power struggles, thereby undermining the public's confidence in the judiciary to remove itself from political entanglement.

After *Cooper v. Berger*, it is unclear what constraints the political question doctrine places upon North Carolina's judiciary. It is unquestioned that political power resides in the people of North Carolina, represented by their elected members of the General Assembly, who from a practical standpoint have controlled policymaking in the state throughout its history. While the North Carolina Constitution, from its first version in 1776 to the current version today, has favored a weak executive, the Supreme Court of North Carolina's recent decisions in *McCrory v. Berger* and *Cooper v. Berger* indicate that both the Governor's powers, and the Court's willingness to opine on political questions, will continue to increase in the future.

John Branch was appointed by Gov. Pat McCrory as Chairman of the North Carolina State Ethics Commission in 2017; he served as Chairman of the Bipartisan State Board of Elections and Ethics Enforcement in 2017 until the legislation at issue in Cooper v. Berger was passed.

1 The Ethics Commission, unlike the Board of Elections, was bipartisan and had eight voting members.

Gunderson v. State of Indiana

by David Johnson, Corporation Counsel for the City of Lawrence, Indiana

In *Gunderson v. State of Indiana*, the Indiana Supreme Court, unanimously, held that 1.) Indiana owns in public trust the bed of Lake Michigan up to the Ordinary High-Water Mark (OHWM), 2.) Indiana has not relinquished its interest in the property below the natural OHWM, which is the legal boundary between State-owned property and private property, and 3.) walking along the shores of Lake Michigan below the OHWM is a protected public use in Indiana.

Indiana's northwest border includes 45 miles of Lake Michigan shoreline. The Gundersons owned land on Lake Michigan in the Town of Long Beach, and the property's deed can be traced back to an 1829 federal survey that shows Lake Michigan as the northern boundary of the property.

In 2010, the Town of Long Beach adopted an Indiana Department of Natural Resources (DNR) administrative rule that created an artificial boundary line denoting the OHWM, which separated state-owned beaches from private property. The Gundersons protested and, after failed attempts to settle the dispute administratively, filed suit against Indiana and the DNR in 2014 for a declaratory judgment on the extent of their property rights and to quiet title on their property.

The Gundersons claimed the water's edge as the legal boundary of their property as reflected in their deed and based on Indiana's equal-footing title. As support for this claim, the Gundersons relied on the Northwest Ordinance, United States Supreme Court precedent, early State case law, federal law. The Northwest Ordinance provided that admission of new states would be on equal-footing with the original colonies, and navigable waters would remain free. The Gundersons argued that this limited the public trust to the waters. The court disagreed citing United States Supreme Court case law from 1845 to 1931, culminating with *United States v. Utah*, which chipped away at the effect of the Ordinance on equal-footing title. State case law followed a similar path. The Court concluded that the Northwest Ordinance had no effect on Indiana's title to the shores of Lake Michigan, but simply informed the State's understanding of public rights. The court held that, absent an express federal grant before 1816, lands below the OHWM could not be conveyed to private parties and that Indiana acquired equal footing lands up to the natural OHWM pursuant to case law and the Submerged Lands Act of 1953.

The Gundersons also argued that because Indiana's Lake Preservation Act specifically exempts Lake Michigan, and Indiana case law with respect to the southern border along the Ohio River expanded riparian rights to the Ordinary Low Water Mark (OLWM), the State had relinquished its interest. However, the court held that the State did not expressly abrogate its common-law responsibilities by exempting Lake Michigan in the Lake Preservation Act. In addition, the court clarified that case law cited with respect to riparian rights along the Ohio River applies only to the Ohio River and not Lake Michigan.

As for the DNR's administrative determination of the OHWM, the court held that the natural OHWM is the "legal boundary separating State-owned public trust land from privately-owned riparian land." To determine the OHWM, the court cited the common-law physical characteristics test and fluctuations in the water's edge which could change due to erosion or accretion.

Finally, the court declined to exercise its common-law authority to determine the scope of protected uses on the publicly owned land. While other state supreme courts have held that the public trust doctrine as a common-law doctrine should evolve to meet the public's expectations, the court declined to do so and held that, at a minimum, walking below the OHWM along the shores of Lake Michigan is a protected public use in Indiana. The court deferred to the Indiana General Assembly to recognize any additional public rights.

Local news reports have declared Indiana's beaches "open to all." With the Indiana General Assembly set to adjourn in less than a month, and few opportunities to recognize additional public rights, the court's decision could set up some interesting conflicts over the summer months when sun-starved Hoosiers invade the beaches of Lake Michigan to set up camp for a raucous day of fun in the sun.

Espinoza v. Montana Department of Revenue

by Erica Smith, an attorney with the Institute for Justice

School choice has been a hot political issue this year, and now it is firing up the courts as well. The U.S. Supreme Court has long held that the Establishment Clause allows the government to include religious options in school choice programs. But it is still unclear whether the government may exclude religious options from these programs. A case now at the Montana Supreme Court, *Espinoza v. Montana Department of Revenue*, raises this issue.

Espinoza involves Montana's new tax-credit scholarship program, enacted in 2015. The program encourages people to donate to private scholarship programs for low-income families, in exchange for a modest $150 tax credit. Soon after the program passed, however, the State Department of Revenue enacted a rule limiting scholarships to only families choosing nonreligious schools. The Department justified this rule on Montana's "Blaine Amendment," which prohibits "a "direct or indirect appropriation or payment from any public fund" from aiding religious institutions. Mont. Const. Art. X, § 6.

Last year, a Montana trial court ruled that the Department's rule was *ultra vires* as it contradicted the will of the legislature *and* it was not required by the Montana Constitution. As the court ruled, tax credits are not public appropriations, but instead simply allow taxpayers to keep more of their own money. This holding is backed up by the unanimous conclusion of courts across the country, including the U.S. Supreme Court. If the Montana Supreme Court disagrees, however, and finds that the Department's rule is in fact required by Montana's Blaine Amendment, then the Court will have to squarely address whether the federal Free Exercise and Establishment Clauses allow the government to discriminate against families choosing religious options. They do not.

One of the central tenets of the Religion Clauses is government neutrality toward religion, and the U.S. Supreme Court has consistently held that either a primary discriminatory purpose or a primary discriminatory effect is sufficient to violate both clauses. Here, excluding religious options from school choice programs has both the purpose and the effect of discriminating against religion. This conclusion is supported by *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017), decided last summer. *Trinity Lutheran* held that excluding a religious daycare from Missouri's grant program for playground resurfacing, just because the daycare was religious, violated the Free Exercise Clause. As the Court reasoned, Missouri's program "expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character" and "religious status." Id. at 2021.

The same is true of Montana's rule. The rule excludes religious schools from participating in the school-choice program solely because of their religious status. The rule also discriminates against religious parents who wish to send their children to a religious school that aligns with their beliefs. Instead, the rule forces parents to choose between their beliefs and receiving hundreds or even thousands of dollars in scholarship funds. This is exactly the type of coercive choice condemned by *Trinity Lutheran*. 137 S. Ct. at 2024. Such hostility toward religion is impermissible.

If the Montana Supreme Court disagrees, however, this case is likely to go to the U.S. Supreme Court. The Montana Supreme Court will be hearing arguments in the case on April 6, 2018.

Alamo Heights Independent School District v. Clark

by Mark Pulliam, a lawyer and writer in Austin, Texas

Texas's employment discrimination statute (the Texas Commission on Human Rights Act, codified in the Texas Labor Code at section 21.001 et seq.), like its federal counterpart (Title VII of the Civil Rights Act of 1964, 42 U.S.C. section 2000e et seq.), prohibits discrimination on the basis of enumerated characteristics, including "sex." Accordingly, an employer is forbidden to treat an applicant or employee differently because of that person's sex. Without a sex-based nexus, the employer's conduct may be rude, unfair, obnoxious, boorish, or insensitive, but will not constitute illegal sex discrimination.

Courts used to emphasize that Title VII and similar discrimination statutes (ADA, ADEA, etc.) do not create a general civility code for the workplace. Those readers old enough to remember the long-running comic strip Blondie can envision Mr. Dithers' habitual mistreatment of Dagwood Bumstead on the job, illustrating the reality that bosses can be uncouth and tyrannical, work is often stressful and unpleasant, and that the world is full of jerks and bullies. These notions were once so commonplace that they formed a running gag in one of America's most popular comics.

Employment discrimination laws do not prohibit all mistreatment, only specific types of discrimination. Insults, vulgarity, offensive comments, derogatory remarks, and other types of abuse are not forbidden unless they involve a statutory nexus. As I've pointed out elsewhere, long after the passage of Title VII, in the 1980s the Equal Employment Opportunity Commission, with the unfortunate acquiescence of the Supreme Court,[2] transformed the word "discrimination" (and the precise category of employment practices it encompassed) to include the much more amorphous term "sexual harassment." Yes, under Title VII and most state statutes, the rapidly-expanding body of "sexual harassment" law is actually being conducted as a form of "discrimination."

Of the two forms of sexual harassment recognized by the courts—quid pro quo and so-called "hostile work environment"—the former most closely resembled "discrimination" and may have even been cognizable as such without the innovation of "harassment." If a supervisor conditioned granting employment benefits (or threatened adverse consequences) based on a subordinate's submission to sexual favors, there is a strong nexus to the statutory ban of disparate treatment based on sex.

In our sex-drenched popular culture, however, the subjective nature of "hostile work environment" sexual harassment, often consisting of nothing more than offensive utterances—dirty jokes, suggestive comments, or risqué statements—generated the bulk of the litigation. Despite the Court's effort in *Harris v. Forklift Systems* to cabin claims to "severe" and "pervasive" situations, as a practical matter almost any alleged scenario could withstand a motion to dismiss. Title VII has been converted into a code of workplace etiquette. Especially when Title VII was interpreted to conflate allegations of "sex stereotyping"[3] with sex discrimination—in a case where a female was criticized for not being feminine enough—it was just a matter of time until the concept of "sexual harassment" lost any connection to sex discrimination.

That Rubicon was crossed in *Oncale v. Sundowner Offshore Services*,[4] where the Supreme Court (in a decision written by Justice Scalia) recognized a claim for "same-sex" sexual harassment. Boorish behavior by men toward other men, or women toward other women, became cognizable under Title VII, even though the required nexus of "because of sex" appeared to be wholly absent. Equal opportunity harassers—supervisors who are vulgar and abusive to employees regardless of sex—are by definition not engaged in conduct on the basis of sex. (*Hopkins* and *Oncale* are also being relied upon by activist judges to extend the coverage of Title VII to sexual orientation discrimination.)

In interpreting state statutes, the Texas Supreme Court is not bound by EEOC interpretations and Supreme Court precedents, even if the statutory language is similar or identical to Title VII. Thus, on April 6, the Texas Supreme Court issued a decision in *Alamo Heights Independent School District v. Clark* declining to liberally apply *Oncale* and ruling instead that sexually-themed comments by female employees directed at another female in the workplace are not actionable absent credible allegations of homosexual attraction—which were absent in *Clark*.

Justice Eva Guzman's carefully-reasoned opinion for a 6-2 majority (one newly-appointed justice declined to participate) stated that:

> Rather than sexual desire, the record is replete with evidence directly from Clark's complaints and deposition that Monterrubio and Boyer engaged in this behavior for other reasons. Monterrubio was jealous of Clark, viewed her as "snotty" and "high and mighty," thought she should quit her job to be a stay-at-home mom, did not like Clark's children or approve of her bringing them to school, was a bully who enjoyed getting a rise out of her, and along with her friend Boyer, simply did not like Clark. None of those motives are based on gender. Sexually tinged comments may be motivated by other reasons, such as personal animus, jealousy, or the desire to irritate or bully…. Motives like personal animus or bullying do not satisfy the because-of-sex requirement, even if the comments are profane, vulgar, or have sexual overtones.

Nor did Clark establish that the alleged conduct singled her out on the basis of her sex; her alleged harassers exhibited boorish and abusive behavior toward both male and female coworkers: "This evidence shows significant, similar inappropriate conduct toward both male and female co-workers, which does not raise an inference of discrimination based on sex."

2 Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986); Harris v. Forklift Systems, 510 U.S. 17 (1993).

3 Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

4 523 U.S. 75 (1998).

Justice Guzman correctly rejected a line of cases from other jurisdictions that have interpreted *Oncale* broadly:

> A line of opposite-gender harassment cases uses Oncale's "sex-specific and derogatory terms" language to argue that such behavior creates an inference of discrimination without regard to the underlying motivation. Such conduct could support an inference of sex discrimination in an opposite-gender case where, for example, the men in a mostly male environment mistreat a woman in gender-specific ways making it clear they disapprove of women in their workplace. Though we need not pass on the validity of the analysis these cases employ, at a minimum, they illustrate the importance of context; a woman harassing another woman in an all-female environment naturally raises different inferences than a man harassing the only woman in an otherwise male workplace . . . .
>
> Regardless of how it might apply in opposite-sex cases, a standard that considers only the sex-specific nature of harassing conduct without regard to motivation is clearly wrong in same-sex cases. The Supreme Court was abundantly clear that gender motivation is not established "merely because the words used have sexual content or connotations." The Court rejected pre-*Oncale* lower-court authority holding "workplace harassment that is sexual in content is always actionable, regardless of the harasser's sex, sexual orientation, or motivations." Consistent with *Oncale*, many courts in same-sex cases have recognized that crude, gender-specific vulgarity alone is insufficient to show that harassing behavior is because of gender.
>
> Furthermore, that a comment relates to a woman's body says nothing about the speaker's motive. The TCHRA is not a strict liability statute that mandates a finding of sex discrimination for any mention of a gender-specific body part. Motivation, informed by context, is the essential inquiry. Why matters. In other words, the bare act of one woman speaking to another woman about her female anatomy does not establish the comments were gender motivated.

Justice Guzman devastatingly refuted the arguments made by two dissenting justices, Jeff Boyd and Debra Lehrmann:

> The dissent's theory, which essentially imposes strict liability for any gender-specific comment, would lead to absurd results. Any mention of a gender-specific body part in the workplace would be off limits. So a female employee could not discuss breastfeeding struggles with a co-worker. Workplace breast cancer awareness campaigns would likely end, because how could the word "breast" be avoided? Some workplaces, such as a doctor's office, could hardly function under such a rule. And since the dissent's standard includes buttocks as gender-specific body parts, though everyone has them, even *Oncale*'s example of a football coach smacking players' behinds would be barred. The dissent would prohibit any conversation or conduct that "would not have occurred" to a person of another gender, including such innocuous topics as a pregnant worker's due date or asking to borrow a feminine hygiene product. It defies common sense to think this is what the Legislature had in mind when enacting the TCHRA, and it serves no one's interests to impose such preposterous requirements in the workplace.

Justice Guzman concluded her 66-page tour de force thusly:

> The purported harassment alleged in this case is repugnant and unacceptable in a civilized society. But we cannot step beyond the words of the statute or circumscribe the legal-sufficiency standard to vindicate a moral wrong merely because it is appalling. Neither the anti-discrimination laws nor the legal-sufficiency standard permit us to consider evidence apart from its context. This aspect of our de novo review jurisdiction is no novelty. We do not construe statutory language in isolation because context informs intent. We do not review defamatory statements in isolation because context informs meaning. In many different scenarios, we have acknowledged that, with respect to legal sufficiency, context is vital because the absence of evidence may not appear until the evidence is reviewed in context.

One of the reasons Texas has such a highly-rated civil justice system and a flourishing business environment is the excellence of its appellate courts, and especially the Texas Supreme Court. The decision in *Clark* is a showcase of sound textual analysis, keeping *Oncale* moored to the language of the relevant Texas statute.

Maine Senate v. Secretary of State

by Joshua Dunlap, a partner at Pierce Atwood LLP

In *Maine Senate v. Secretary of State*, the Maine Supreme Judicial Court (referred to as the "Law Court") was confronted with statutory interpretation and separation of powers issues relating to the implementation of ranked choice voting. The case – not the first ranked choice voting case that Maine's high court has considered – reached the Law Court under highly unusual procedural circumstances. Ultimately, the Law Court addressed only the statutory interpretation question, finding the constitutional issues non-justiciable.

The ranked choice voting saga leading to *Maine Senate* was convoluted. In November 2016, voters approved an initiative, the "Act to Establish Ranked-Choice Voting" ("RCV Act"), that would have implemented ranked choice voting ("RCV") for general elections in Maine for federal and state offices, as well as primaries. RCV, in contrast to simple plurality voting, requires a candidate to obtain a majority to prevail. Shortly thereafter, the Senate requested an advisory opinion from Maine's high court whether RCV complied with provisions in the Maine Constitution requiring that general elections for state office be determined by plurality. After considering the fascinating history behind those plurality provisions – which includes General Joshua Chamberlain (he of Civil War fame) averting a civil insurrection in 1880 after a contested election – the Court opined that RCV was unconstitutional. The Legislature then repealed RCV, but that repeal has been suspended by a people's veto referendum that would reinstate RCV for federal offices as well as primaries.

The people's veto set the stage for a new legal challenge. After the Secretary of State issued proposed implementing rules, the Senate initiated a lawsuit against the Secretary. Among the issues raised were the following: (1) whether primary elections must be determined by plurality, because the RCV Act had failed to amend a statute so stating; (2) whether the Secretary was authorized to spend money for RCV, absent legislative appropriation of funds for implementation; and (3) whether the Secretary could require state police to transport ballots for centralized counting without statutory authorization.

Because of the urgency of these questions, they were reported directly to the Law Court. The Law Court directed the parties to file 10-page position statements and held oral arguments, all within 24 hours. In a decision issued days later, the Law Court rejected the Senate's challenges.

The Law Court first took up the statutory issue. When the RCV Act was adopted, it created a statutory conflict because it expressly applied to primaries but left untouched a separate provision providing that primary elections were to be determined by plurality. The Law Court resolved this conflict by determining that the RCV Act – as the more recent statute – repealed the plurality requirement by implication.

The Law Court found the other questions non-justiciable, concluding that resolving them would violate the separation of powers. The Law Court declined to answer the question involving the Secretary of State's expenditure of funds because the Senate had provided "neither a constitutional basis . . . nor a statutory foundation" for the argument that the Secretary could not use remaining funds from a general appropriation to implement RCV. The Law Court also declined to reach the question of the Secretary's authority over ballot transportation because it perceived no "constitutional crisis sufficient" to compel it to adjudicate the question.

The Law Court's holdings on these two questions are notable, but likely limited given the unusual procedural posture of the case. The Law Court was ill-served by the abbreviated briefing schedule, which did not allow full development of the legal issues. The Senate had cited in its complaint Article IV of the Maine Constitution, which reserves to the Legislature all power to legislate and appropriate monies, as a basis for its claims. This argument was not substantially developed, given the brevity of the parties' position statements. Because it expressly premised its conclusion that the questions were non-justiciable on the absence of constitutional issues, however, the Law Court left open the possibility of future challenges to executive action when separation of powers arguments are fully presented to the Court.

The author represented the Maine House Republican Caucus in arguing that the Act to Establish Ranked-Choice Voting violated the Maine Constitution.

Lexington-Fayette Urban County Human Rights Commission v. Hands On Originals

by Jim Campbell, an attorney with Alliance Defending Freedom

May the government force a Democrat to make signs for a Republican politician, a gay man to create flyers opposing same-sex marriage, or a Jewish woman to print posters celebrating German pride? Whether government officials have that kind of power is the question before the Kentucky Supreme Court in *Lexington-Fayette Urban County Human Rights Commission v. Hands On Originals*.

At the center of the case is Blaine Adamson, the managing owner of a promotional print shop in Lexington, Kentucky named Hands On Originals. Adamson serves all people, but he cannot print messages that conflict with his conscience. In fact, he regularly declines orders because of their messages, turning down multiple requests for violent, offensive, and sexual messages throughout his many years running the company.

In 2012, Adamson declined to print shirts promoting a gay pride festival. He did so because what he was asked to print—the words "Lexington Pride Festival" over a rainbow-colored logo—communicates messages about human sexuality that conflict with his religious beliefs. Adamson nevertheless offered to connect the customer to another business that would print the shirts. Not satisfied with that, the customer filed a discrimination complaint against Adamson's business.

The first question in the case is whether Adamson violated Lexington's public-accommodation ordinance. The ordinance bans discrimination because of a customer's protected *status*, which includes sexual orientation. But it does not prohibit business owners from declining to create speech with *messages* they deem objectionable.

This is what the Kentucky Court of Appeals' lead opinion held. And it absolved Adamson of wrongdoing since he turned down the request because of the shirt's message rather than the customer's sexual orientation.

On appeal, the government argues that the ordinance should be interpreted differently. It claims that Adamson must print messages that have some connection to a protected status even though he has not printed, and will not print, those messages for anyone. Interpreting the law that way would mandate special—not equal—treatment for customers who want messages that relate to a protected status. Far from guaranteeing those customers the same goods available to others, it would empower them to expand the set of messages that Adamson must print.

If, however, the court determines that Adamson violated the ordinance, it must decide whether requiring him to print a message that conflicts with his conscience violates the First Amendment's prohibition on compelled speech. That freedom, as the United States Supreme Court has held, protects organizations—like publishers, printers, newspapers, and other media—that produce or distribute messages originating with others. The state trial court that reviewed Adamson's case held that this constitutional protection shields him and bars the government from ordering him to print messages that he deems objectionable.

This constitutional right to be free from compelled expression safeguards not just people of faith like Adamson but all individuals regardless of their views. That explains why some of Adamson's most vocal supporters are lesbian t-shirt printers from New Jersey. They recognize that if he does not have the right to decline messages that conflict with his conscience, neither do they.

The Kentucky Supreme Court granted review in this case in October 2017, and briefing was completed in April 2018. Oral argument, expected sometime in 2018, will provide the first glimpse into whether the justices think that the government has the power to commandeer a printer's press.

The author's organization represents Blaine Adamson and Hands On Originals in their case before the Kentucky Supreme Court.

State of Alaska v. Alaska Democratic Party

by Jason B. Torchinsky, a partner at Holtzman Vogel Josefiak Torchinsky PLLC

In *State of Alaska v. Alaska Democratic Party*, the Supreme Court of Alaska affirmed a lower courts ruling finding unconstitutional a statute forbidding independent candidates from seeking a the nomination in a party primary.[5]

As of February 2016, Alaska is second only to Arkansas in the percentage of independent voters, with 54% of registered voters unaffiliated with any political party.[6] In an apparent effort to reach more of these independent voters, the Alaska Democratic Party amended its bylaws to permit candidates not already registered with a political party to vie for that party's nomination.

The only thing preventing this seemingly innocuous change in party procedure was Alaska Statute § 15.25.030(a)(16). The targeted statute provides that "a member of a political party who seeks to become a candidate of the party in a primary election" must file an affidavit stating, in part, "that the candidate is registered to vote as a member of the political party whose nomination is being sought."[7] The Alaska Democratic Party brought suit challenging the statute as being in violation of both Article 1 § 5 of the Alaska Constitution and the First Amendment to the U.S. Constitution.

The Superior Court, relying on *State v. Green Party of Alaska*,[8] applied a four part test to determine: if a constitutional right was implicated; the severity of any infringement; and a tailoring analysis to determine if the state's infringement was justified. In conducting this analysis, the Superior Court relied heavily upon *Tashjian v. Republican Party of Connecticut*[9] and *Timmons v. Twin Cities Area New Party*.[10] The court found that political parties in Alaska have an "associational right" to "permit candidates of varying political affiliations to run in its primary." As such, the statute violated the Alaska and U.S. Constitutions.

The Alaska Supreme Court, due to the time constraints brought on by the upcoming Alaska primary elections, issued an order affirming the Superior Court's judgment. A full opinion has yet to be issued by the court. In a rare move, Chief Justice Stowers issued an opinion "dubitante," pending the other justices full reasoning in the final opinion. The Chief Justice doubts that the party affiliation rule substantially burdens the Alaska Democratic Party and that any minimal burden is justified by the State's reasonable interest.

Moving forward, it will be interesting to see if the Alaska Supreme Court will rely on the same or similar grounds as the Superior Court. Aside from the merits of this case, given the Chief Justice's doubts as to the Superior Court's reasoning, the final opinion in this case may shed some light on the innerworkings of the court.

5 The Supreme Court of the State of Alaska affirmed the Superior Courts ruling in a four sentence order indicating a full opinion will follow. At the time of this writing, a full opinion has yet to be issued.

6 https://ivn.us/2016/02/24/independent-voter-registration-by-state/.

7 Alaska Statute 15.25.030(a)(16).

8 118 P.3d 1054 (Alaska 2005).

9 479 U.S. 208 (1986).

10 530 U.S. 351 (1997).

Colorado Oil & Gas Conservation Commission v. Martinez

by Christian B. Corrigan, an attorney at Mountain States Legal Foundation

Are concerns over climate change sufficient to prevent all new oil and gas development in Colorado? In *Colorado Oil & Gas Conservation Commission v. Martinez*, the Colorado Supreme Court will decide if language in a statute's legislative declaration mandates that absolute protection of the public health, safety, and welfare is a precondition to the exercise of private property rights in oil and gas.

In late 2013, several minors, through their legal guardians, filed a petition for rulemaking with the Colorado Oil and Gas Conservation Commission ("Commission"). The minors sought to ban all new oil and gas drilling permits in the State of Colorado unless the Commission could prove that drilling would not impair other resources. Specifically, the minors asked the Commission to adopt a rule that would bar the Commission from issuing:

> [A]ny permits for the drilling of a well for oil and gas unless the best available science demonstrates, and an independent, third party organization confirms, that drilling can occur in a manner that does not cumulatively, with other actions, impair Colorado's atmosphere, water, wildlife, and land resources, does not adversely impact human health and does not contribute to climate change.

In support of their proposed rule, the minors alleged that science "unequivocally shows" that: (1) "hydraulic fracturing is adversely impacting human health and [impairing] Colorado's atmosphere, water, soil and wildlife resources"; (2) "[c]limate change is already occurring in the [S]tate of Colorado and is projected to significantly impact the state in the future." In addition, the minors alleged that "[t]he Public Trust Doctrine demands that Colorado act to preserve the atmosphere and provide a livable future for present and future generations of Colorado residents."

The Commission solicited and received written comments and held a hearing on the proposed rulemaking. At the conclusion of the rulemaking process, the Commission issued an order unanimously denying the petition. The minors then sought judicial review of the Commission's Order. On February 19, 2016, the Colorado District Court affirmed the Commission's Order. *Martinez v. Colorado Oil & Gas Conservation Comm'n*, No. 14CV32637 (D. Denver Feb. 19, 2016) ("Dist. Ct. Op."). Specifically, the District Court ruled the Colorado Oil and Gas Conservation Act (the "Act"), C.R.S. §§ 34-60-101 to 34-60-130, requires the Commission to balance the need for energy development with other state interests. Dist. Ct. Op. at 6–8. The District Court reached this conclusion by looking at the legislative declaration in the Act, wherein the Colorado General Assembly declared it "to be in the public interest to":

> Foster the responsible, balanced development, production, and utilization of the natural resources of oil and gas in the state of Colorado in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources[.]

C.R.S. § 34-60-102(1)(a)(I). The District Court interpreted this provision "to require[] a balance between the development of oil and gas resources and protecting public health, environment and wildlife." *Id.* at 6. The American Petroleum Institute and Colorado Petroleum Association joined the Commission as Defendant-Intervenors in the case.

On appeal, the Colorado Court of Appeals, in a 2-1 decision, reversed the judgment of the District Court. *Martinez v. Colorado Oil & Gas Conservation Comm'n*, No. 16CA0564, 2017 WL 1089556 (Mar. 23, 2017). In so doing, the Court of Appeals ruled the legislative declaration contained in C.R.S. § 34-60-101(1)(a)(I) does not require the Commission to balance oil and gas development "in a manner consistent with" the protection of public health, safety, welfare, etc. *Id.* at *4. Instead, the Court of Appeals interpreted the phrase "in a manner consistent with" as meaning "subject to," thereby subordinating the ability to develop oil and gas resources to the protection of public health, safety, welfare, etc. Id. at *5 ("This interpretation supports our conclusion that the language of the Act does not create a balancing test weighing safety and public health interests against development of oil and gas resources, but rather, the Act indicates that fostering balanced, nonwasteful [sic] development is in the public interest when that development is completed subject to the protection of public health, safety, and welfare, including protection of the environment and wildlife resources.").

Based on its interpretation, the Court of Appeals instructed the District Court to remand the case to the Commission so the Commission could reconsider the rulemaking petition. *Id.* at *8. On January 29, 2018, Colorado Supreme Court granted the Petition for Writ of Certiorari.

Petitioners argue that the Court of Appeals erred because legislative declarations cannot trump the operative provisions of statutes. They contend that under Colorado Law, a legislative declaration or purpose is one available aid in construing ambiguous statutes. *See* C.R.S. § 2-4-203(1)(g). But if a statute is clear and unambiguous, courts look no further and apply the words as written. The Court of Appeals admitted "the language of section 34-60-102(1)(a)(I) is clear and unambiguous." *Martinez*, 2017 WL 1089556 at *4. Thus, Petitioners contend, if the act was unambiguous, as both lower courts found, the court's only job would be to apply the plain meaning of the statute without resorting to other aids in statutory construction. In short, Petitioners say that the Court of Appeals allowed the tail (i.e., the legislative declaration) to wag the dog (i.e., the operative provisions), which essentially renders it impossible to drill an oil and gas well in Colorado.

Additionally, Petitioners argue that the Court of Appeals erred by interpreting the phrase "in a manner consistent with" in the legislative declaration as being synonymous with the subordinating phrase "subject to." They assert that the ordinary meaning of "consistent with" means to be "consistent, harmonious or in accordance with" and "consistent" means "compatibility, congruously, in harmony with …." *Webster's Third New Int'l Dictionary Unabridged* 484 (2002) ("Webster's"). Further, "balance" is defined as "measure[ing] competing interests and offset[ting] them appropriately." *Black's Law Dictionary* (10th ed. 2014). Whereas, "subject to" is "'subordinate' and 'subservient.'"

E.g., *Stupak-Thrall v. U.S.*, 89 F.3d 1269, 1285 (6th 1996) (Boggs, J., dissenting) (quoting *Black's Law Dictionary* 1287 (5th ed. 1979).

This decision could have a profound impact on mineral estates in Colorado. Under the Court of Appeals' interpretation, the Commission cannot balance oil and gas development with environmental concerns, but instead must deny all drilling permits unless it is proven that drilling and the concomitant development will have no environmental effects. *See Martinez*, 2017 WL 1089556 at *5. Because of the burden imposed by the Court of Appeals' interpretation, it is entirely possible that no new drilling permits will be issued in Colorado.

The author's organization filed an amicus curiae brief in support of the Petitioners in this case.

In the Matter of Property Seized from Jean Carlos Herrerra and Fernando Rodriguez

by Greg Glod, Manager of State Initiatives at Right on Crime

On May 25, the Iowa Supreme Court issued an opinion in the case *In the Matter of Property Seized from Jean Carlos Herrerra and Fernando Rodriguez* that will have major implications regarding how the state's civil asset forfeiture procedures will be conducted and in the process strengthened the constitutional and property rights of its citizens.

Civil asset forfeiture is the process by which law enforcement can legally seize and forfeit a person's property without charging an individual with a crime. The process is entirely civil in nature, which raises several constitutional issues, of which many came into play in this particular case.

In September 2015, an Iowa law enforcement officer spotted a car he been trained was routinely used in drug trafficking. The officer pulled the car over for speeding. Neither the driver nor passenger were the owner of the car. The officer questioned them separately and their stories did not match up on the purpose of their travel from New York to Los Angeles. The officer asked the driver if he consented to a search of the car to which the driver refused. A K-9 was already on the scene and alerted to odor of narcotics which triggered a search of the car that only found remnants of marijuana and drug paraphernalia. The car and its contents, which included some tools and an ice cream machine, were seized by law enforcement, who then executed a search warrant and a more in depth search of the vehicle, finding $44,990 in a hidden compartment.

The driver of the vehicle filed a motion to suppress and return the property. The court denied the motion because the driver and Rodriguez's combined answer to the state in the forfeiture proceeding did not comply with statute that requires claimants to state "the nature and extent of the claimant's interest in the property" or "the date, the identity of the transferor, and the circumstances of the claimant's acquisition of the interest in the property." The driver argued that he should not have to disclose this information until the motion to suppress was settled, citing the Fifth Amendment against self-incrimination. The property was forfeited to the state. The owner of the car, who was not in the vehicle at the time of the stop, Fernando Rodriguez, stated in a letter that as the innocent owner of the car, he would get attorney's fees if he successfully challenged the forfeiture.

Rodriguez subsequently filed a motion to suppress and a return of his car. This was granted with no objection from the State and pursuant to Iowa law, Rodriguez moved for attorney's fees as the prevailing party. The court denied the attorney's fees as he didn't technically win, but the State dropped the case. The Iowa Court of Appeals upheld the denial of the driver's motion to suppress and additionally affirmed the denial of attorney's fees, but remanded the case because the state failed to show probable cause for the forfeiture.

Upon its review of the case, the Iowa Supreme Court concluded three things. First, the court must rule on a motion to suppress if the evidence at issue is the basis for the forfeiture claim because the exclusionary rule, which does not allow law

enforcement to use evidence that was unconstitutionally obtained, applies to civil asset forfeiture proceedings as well.

Second, a claimant does not have to provide information required by statute in his answer to a forfeiture complaint before a motion to suppress hearing has concluded if they are invoking their Fifth Amendment right against self-incrimination and a claim possessory interest in the property at issue. The court reasoned that it is the government's initial burden to prove the grounds for the forfeiture. A person should not have to admit certain facts to the State that would help establish the State's claims until a court has ruled on what evidence is available to the State. Justice Thomas Waterman stated in the opinion the current statutory scheme "… puts [the driver] to a difficult choice between asserting his privilege against self-incrimination or foregoing his claim for return of the contested property."

Third, the term "prevailing party" includes situations where the State does not object to the return of the property. The court stressed how fee-shifting provisions are critical to highly complicated forfeiture proceedings to incentivize attorneys to take these cases to level the playing field.

Tetra Tech v. Wisconsin Department of Revenue

Charles J. Szafir, Executive Vice President at Wisconsin Institute for Law & Liberty

Across the country, conservatives and libertarians are making it a priority to roll back the administrative state. Over time, agencies at both the federal and state level have accrued seemingly unchecked regulatory power that infringes on our liberties and greatly blurs the lines separating the executive branch from the legislative and judicial branches.

Last week, the Wisconsin Supreme Court struck a major blow against the administrative state in a case called *Tetra Tech v. Wisconsin Department of Revenue*.

For decades, Wisconsin courts have, by default, deferred to administrative agencies' interpretations of state statutes. This has resulted in courts essentially abdicating their responsibility to interpret the law, opting instead to automatically use the interpretations of agency bureaucrats. While those bureaucrats may have expertise in their specialized fields, they are not experts at analyzing statutory language – that's the job of a judge. Yet judges were defaulting to their decisions even when the agency's interpretation of a law was less reasonable than a competing one. Even when the agency was enforcing its own interpretation against a private citizen.

This practice came to an end in *Tetra Tech*. While the facts of the case are a bit dense – relating to the definition of the word "processing" in our sales tax statute - the conclusion is not. In a strong, well-written decision, the newest Wisconsin Supreme Court Justice, Dan Kelly (former President of the Federalist Society Milwaukee Lawyers' Chapter), declared that the final say on what a statute means resides exclusively with the courts –not the executive branch.

As we learn in middle school (and as enshrined in the Wisconsin Constitution, though with more specificity), the legislature makes the laws, the judiciary interprets the laws, and the executive enforces the laws. This separation of powers, as Justice Kelly explained in his opinion, may not lead to "efficient" government. But that's not what the Founders envisioned. As Federalist No. 47 tells us "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, . . . may justly be pronounced the very definition of tyranny."

Such accumulation is the inevitable result when state agencies, tentacles of the Executive branch, make regulations that are only subject to minimal review from the courts. It empowers agencies to go rogue, bend the law, and further stack the deck in favor of government and against the people.

Kudos to the Wisconsin Supreme Court for ending the practice and concluding that "only the judiciary may authoritatively interpret and apply the law in cases before our courts. The executive may not intrude on this duty, and the judiciary may not cede it. If our deference doctrine allows either, we must reject it."

Fortunately Wisconsin's courts are not alone in rolling back the administrative state. Mississippi's high court recently – and unanimously – ended agency deference, and federal courts are also beginning to grapple with the question. Is *Chevron* deference to

federal agencies next? More than one U.S. Supreme Court Justice has called the doctrine into question. The answer may depend on who replaces Justice Anthony Kennedy.

Violet Dock Port, Inc, LLC v. St. Bernard Port, Harbor & Terminal District

by Christian Corrigan, an attorney at Mountain States Legal Foundation

One of this year's most acclaimed films, Little Pink House, has resurrected old wounds from the U.S. Supreme Court's infamous decision in *Kelo v. City of New London*, 545 U.S. 469 (2005). In *Kelo*, the Court ruled that the Fifth Amendment's Takings Clause, which allows the government to take private property only for "public use," could be used as part of an "economic development plan" to condemn houses in low income neighborhoods and turn them over to private corporations. According to the *Kelo* majority, the plan satisfied the Constitution's public use requirement because it served a "public purpose" by (allegedly) increasing tax revenue and bringing jobs to the community.

In the aftermath of the 5-4 decision, 44 states—including Louisiana—adopted stronger protections for property owners, mostly relating to the meaning of "public use" or "public purpose."[11] However, the Louisiana Constitution provides an exemption from these reforms by allowing the government to expropriate property for "public ports . . . to facilitate the transport of goods or persons in domestic or international commerce."[12] Since ports are often operated by government entities, it is no surprise that one of them would eventually utilize eminent domain to remove a private competitor.

Violet Dock Port Inc., LLC ("Violet") has been operating at its dock for decades on the Mississippi River near New Orleans. Violet had a significant revenue stream from Navy contracts (mainly from berthing and mooring vessels). It consistently reinvested its profits from the port in improvements. Most recently, Violet began making arrangements to expand its seventy-five acres of land into cargo operations.

St. Bernard Port, Harbor & Terminal District ("St. Bernard") is a local government entity that operates a public cargo port facility several miles upstream from Violet. St. Bernard wanted to expand its business but found the cost of building a new dock prohibitive. St. Bernard attempted to purchase Violet's facility, but the parties could not reach a deal because Violet's asking price was too high. Moreover, Violet's expansion into cargo operations would have put it into direct competition with St. Bernard for a thriving cargo business in the area.

Instead, St. Bernard hatched a scheme to acquire Violet's port via eminent domain and lease the space to another private entity. The plan was to purchase Violet's facility, improve it with a cargo facility, and then lease it to a private company called Associated Terminals, which was involved in the plan from the outset. St. Bernard then planned to use the revenues from the lease to make future improvements to the port.

Violet fought the condemnation as an unconstitutional taking under both the U.S. and Louisiana Constitutions. St. Bernard claimed it was not condemning Violet's dock to take over

11 Dana Berliner, *Looking Back Ten Years After* Kelo, 125 Yale L.J. Forum 82, 84 (2015).

12 La. Const. art. I, § 4(B)(6).

its existing Navy revenues and that it merely needed the property for expanding its cargo operations.

The trial court made a factual determination that the taking constituted a "public use" because the expansion served a public purpose under *Kelo*. Employing the highly deferential "manifestly erroneous" standard of review (which directly conflicts with decisions from four other state supreme courts), the Louisiana Supreme Court upheld the taking under both constitutions. *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., LLC*, 2017-0434 (La. Jan 30, 2018), 239 So. 3d 243. Thus, because the trial court had concluded from the facts that there was a public purpose, the Louisiana Supreme Court would not overturn that determination absent clear error.

Additionally, the court rejected a challenge under the Louisiana Constitution's mandate that "[n]o business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with a government enterprise." Violet argued that St. Bernard was attempting to halt competition from its proposed expansion into cargo operations. The trial court found that Violet's cargo operations were "negligible" at the time of condemnation, the two businesses were not in competition, and St. Bernard was merely responding to increased demand for cargo operation. However, in its funding applications seeking Louisiana Port Priority Program grants to purchase Violet, St. Bernard disclosed its plan to: (1) acquire the private port and lease it to Associated, (2) service Violet's existing customers, and (3) expand into the same type of cargo business that Violet was cultivating. Once again, the Louisiana Supreme Court deferred to the trial court's findings that St. Bernard was not attempting to take over Violet's revenue stream from its Navy contracts—just attempting to expand its cargo operations.

Last month, Violet filed a Petition for Writ of Certiorari with the U.S. Supreme Court, hoping to correct the Louisiana Supreme Court's application of *Kelo*. The questions presented are: (1) Did the Louisiana Supreme Court err when it held that the Fifth Amendment's "public use" requirement is a question of fact to be resolved in the trial court, subject only a manifest error review on appeal?; (2) Do the Fifth and Fourteenth Amendments prohibit government from taking a fully functioning private facility with the intent to lease it to another private entity to operate, with the revenues earned from those operations to be shared by both the local government entity and its favored private actor?

This case presents an important issue for property rights. First, as Petitioners argue, employing the "manifest error" standard of review severely undermines the judiciary's check against the misuse of government takings powers.

Second, Petitioner points out, "[i]n *Kelo*, the Court rejected application of bright-line rules in favor of fact specific analysis. As a result, property owners, courts, government, and scholars have been left to speculate about whether there is any limit left on the scope of government authority." Allowing government entities to seize competing businesses for the sole purpose of economic development would severely diminish any tangible post-*Kelo* limits on what is a permissible "public purpose." Moreover, the opportunity for governments to use eminent domain to protect their monopolies in conjunction with politically-connected private businesses would strike the same chords that triggered the outrage over Kelo.

The author's organization joined the National Federation of Independent Business's amicus curiae brief in support of Petitioner's writ of certiorari.

Citizens Protecting Michigan's Constitution v. Secretary of State

by Thomas Rheaume and Donovan Asmar, members of Bodman PLC's commercial litigation and appellate practice groups

On July 30, 2018, the Michigan Supreme Court in *Citizens Protecting Michigan's Constitution v. Secretary of State* ruled that a proposal by the Volunteers with the Voters Not Politicians (VNP) to create an independent redistricting commission may appear on Michigan's general election ballot.

The question before the Court was whether under the Michigan Constitution the voter initiative proposal was an "amendment" to the Constitution, which could be proposed by petition, or a "general revision" of the Constitution that could only be enacted through a constitutional convention.

The VNP proposal seeks to establish an independent redistricting commission composed of thirteen total members (four members from each major political party and five independent voters). All thirteen members would be randomly selected from a pool of candidates who have submitted applications, taken oaths, and met various other requirements. Under the proposal, the leaders of both parties in the Michigan Senate and House can strike, in total, 20 names from the applicant pools. A redistricting plan is adopted only with at least two votes from each subgroup, as well as a majority of the whole.

A sufficient number of signatures to support the placement of the petition on the ballot were collected, but Citizens Protecting Michigan's Constitution challenged the proposal, contending that the proposal was a "general revision" of the Michigan Constitution that could only be enacted through a constitutional convention.

In a 4-3 decision, the Michigan Supreme Court determined there was no controlling authority construing the meaning of the term "amendment" in Michigan's Constitution. Relying on non-textual sources such as the "Address to the People" by the Constitutions' framers, and records from various constitutional conventions, the majority created a new test to determine whether a proposal is an amendment. According to the Court, a voter-initiated amendment is permissible if it proposes changes that do not "significantly alter or abolish the form or structure of the government in a way that is tantamount to creating a new constitution." The Court reasoned that VNP's proposal did not significantly alter or abolish the structure of government because it would leave the form and structure of the government in essentially the same state as contemplated by Michigan's 1963 Constitution. Addressing the significant argument that the proposal disrupts the separation of powers, the Court held that while the Legislature had been responsible for drafting redistricting plans, that power was not derived from the Constitution. In comparison to the former constitutional provision, which created a bipartisan commission for redistricting – a provision that was previously struck down because it could not be severed from unconstitutional apportionment standards of the Constitution – the Court held the proposal actually "increases, slightly, the Legislature's participation in the process. . . . And the Legislature's new, minor role does not come at the expense of either of the other two branches, which have no real part in the process."

Chief Justice Stephen Markman, joined by Justices Brian Zahra and Kurtis Wilder, dissented. Chief Justice Markman opined that while the people possess the authority to restructure their own charter or government, the VNP proposal "reflects a fundamental alteration in the relationship between the people and their representatives" and is, therefore, not just an amendment of the Constitution but a "general revision" of the Constitution that requires a constitutional convention. The proposal would create a "super-administrative" commission to carry out "the foundational role of self-government," which is exactly the type of proposal that warrants "the reflection, deliberation, and consensus decision-making" of a constitutional convention. "The VNP proposal would affect the foundational power of government by removing altogether from the legislative branch authority over redistricting and consolidating that power instead in an independent commission made up of 13 randomly selected individuals who are not in any way chosen by the people, representative of the people, or accountable to the people." Whatever the merits of the proposal, because it would effect a fundamental change of Michigan's Constitution and government, it warrants careful deliberation and placement on a ballot only after a constitutional convention.

In November 2018, Michigan voters will decide whether to amend their Constitution by adopting VNP's proposal.

Ex parte Jessie Livell Phillips

by Allen Mendenhall, associate dean at Faulkner University Thomas Goode Jones School of Law

Jessie Livell Phillips shot and killed his wife, Erica Phillips, on February 27, 2009. Testimony at trial indicated that Erica was pregnant when she died. Phillips was convicted of one count of capital murder for the deaths of two people, Erica and her unborn child, by one act. See § 13A-5-49(9), Ala. Code 1975 (regarding the aggravating circumstance of intentionally causing the death of two or more persons by one act or pursuant to one scheme or course of conduct). The jury unanimously recommended that Phillips be sentenced to death, and the trial court sentenced him to death.

The Alabama Court of Criminal Appeals, on appeal, affirmed Phillips's conviction and sentence. The Alabama Supreme Court granted Phillips's petition for a writ of certiorari and held oral argument in this case on the campus of Troy University in November 2017. A final decision by the Alabama Supreme Court is expected in 2018. Phillips is represented by Bryan Stevenson, Randall Susskind, and John William Dalton of the Equal Justice Initiative. Alabama Attorney General Steve Marshall, Alabama Chief Deputy Attorney General Clay Crenshaw, Alabama Solicitor General Andrew Brasher, and Alabama Assistant Attorney General Kristi Deason Hagood represent the State of Alabama.

The central issue before the Alabama Supreme Court is whether Phillips was properly convicted of the murder of "two or more persons" under § 13A-6-1, Ala. Code 1975, which defines "person" to include "an unborn child in utero at any stage of development, regardless of viability." Phillips contends that he lacked the specific intent to murder two people, and that his intent to kill only one person cannot be transferred to the unborn child. The State of Alabama argues that, if a defendant specifically intends to murder someone, the factual circumstances surrounding the murder are immaterial to the determination of whether the murder was capital.

Other issues on appeal involve the admissibility of a urine sample taken during Erica's autopsy as evidence of her pregnancy; the admissibility of a photograph of Erica's uterus, ovaries and fallopian tubes on the medical examiner's table; and whether the State of Alabama struck jurors based on their race in violation of the requirements in *Batson v. Kentucky*, 476 U.S. 79 (1986). *Ex parte Phillips* is the first capital murder case before the Alabama Supreme Court to specifically involve the definition of "person" in § 13A-6-1 to include an unborn child.

Regents of the University of California v. Superior Court

by Tom Gede, of Counsel at Morgan, Lewis & Bockius LLP, and former Deputy and Special Assistant Attorney General for the state of California

Once again California has moved ahead of other states in expanding exposure to tort liability, ruling a university has a duty to protect students from foreseeable violence. *Regents of the University of California v. Superior Court (Rosen)*, __ Cal.5th __ [2018 WL 2018 WL 1415703] (No. S230568, March 23, 2018). The California Supreme Court has led the nation in issuing similar pro-plaintiff decisions, such as its 1976 opinion in *Tarasoff v. Regents of the University of California*, where a mental health professional has a duty to individuals threatened by a patient.

In *Regents*, the facts also involved the mental health of a perpetrator. As a UCLA student in 2008, Damon Thompson reported hearing voices and wanting to hurt others. Staff at the UCLA hospital diagnosed him as possibly schizophrenic, and he agreed to take anti-psychotic medications and submit to sessions with the campus psychological services staff. Thompson apparently stopped taking the medications at some point, and his condition worsened over time. In October of 2009, in a UCLA chemistry lab, Thompson accused others of verbally harassing him, leading to referrals to the campus response team and psychiatric services. On October 8, Thompson repeatedly stabbed another student in the lab, Katharine Rosen.

Rosen, who survived the attack, sued the Regents and various UCLA employees for negligence, alleging UCLA had a "special relationship" with her as an enrolled student. Thus, she claimed, the university had a duty to protect her from reasonably foreseeable criminal conduct on its campus and in its buildings -- in this case, from a student whom UCLA knew to suffer from a serious and potentially dangerous mental illness. While the trial court found such a duty could exist, a divided Second District Court of Appeal overturned the trial court order, concluding: "[A] public university has no general duty to protect its students from the criminal acts of other students."

In reversing, Supreme Court Associate Justice Carol Corrigan wrote for the seven-member court, and following *Tarasoff*, found a duty to control (and protect) may arise if the defendant has a "special relationship" with the foreseeably dangerous person that entails an ability to control that person's conduct. The "special relationship" doctrine is an exception to the general rule there is no duty to protect others from the conduct of third parties. In reaching its conclusion, the Court examined today's changing college environment, in which:

> [C]olleges provide a discrete community for their students. For many students, college is the first time they have lived away from home. Although college students may no longer be minors under the law, they may still be learning how to navigate the world as adults. They are dependent on their college communities to provide structure, guidance, and a safe learning environment.

Thus, the Court concluded, the college-student relationship fits within the paradigm of a special relationship. Using factors in *Rowland v. Christian* (1968) 60 Cal.2d 108, the Court

also analyzed various considerations of public policy and foreseeability. As to the latter, it concluded violence against students in the classroom or during curricular activities, while rare, is a foreseeable occurrence. With this conclusion and based on other *Rowland* factors, the Court concluded considerations of public policy do not justify categorically barring an injured student's claims against the university.

A special concern of the Regents and many amici was whether recognizing a duty to warn and protect would discourage colleges from offering comprehensive mental health and crisis management services, much as UCLA provided to Damon Thompson. UCLA argued the effect of recognizing the duty here would give colleges an incentive to expel anyone who might pose a remote threat to others. The Court acknowledged this may in fact occur, and that schools might become reluctant to admit certain students or to offer mental health treatment. But the Court pointed to obligations the colleges already have under the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.), and under most violence prevention protocols adopted in the wake of the 2007 Virginia Tech shooting incident. The Court also dismissed concerns that this duty would deter students from seeking treatment or irreparably damage the psychotherapist-patient relationship. It referenced studies that have shown no evidence that patients have been discouraged from coming to therapy or that they fear breaches of their confidentiality. Ultimately, the Court found "[r]ecognizing that the university owes its students a duty of care under certain circumstances is unlikely to appreciably change this landscape." Finally, the Court noted the plaintiff must still prove a breach and the lack of immunities, and remanded the matter for further proceedings.

The opinion articulated the duty to warn or protect is limited to "curricular activities" and to activities "closely related to the delivery of educational services." On the latter point, Justice Ming Chin concurred in the judgment, but did not agree the duty to protect extends beyond the classroom.

The author is a member of the Board of Directors of University of California, Hastings College of the Law, but the College took no part in the litigation.

Board of Trustees of the University of Arkansas v. Matthew Andrews

by Lee Rudofsky, Senior Director of Walmart's Global Anti-Corruption Compliance program, and former Solicitor General of Arkansas

Article 5, section 20 of the Arkansas Constitution declares that "[t]he State of Arkansas shall never be made a defendant in any of her courts." In *Board of Trustees of the University of Arkansas v. Matthew Andrews*, 2018 Ark. 12, the Arkansas Supreme Court overruled more than 20 years of precedent and held—based on the text of section 20—that the state legislature may not waive sovereign immunity. The Court thus invalidated the portion of the Arkansas Minimum Wage Act purporting to waive sovereign immunity for the type of claim brought by Mr. Andrews. This decision sent shock waves through the state judiciary, the state legislature, and the state bar. Judges, legislators, and lawyers continue to debate the breadth or narrowness of the holding and its impact on various types of lawsuits against the state. Several cases already on the docket for this coming term will press the Arkansas Supreme Court to apply, broaden, refine, or narrow its decision in *Andrews*.

Matthew Andrews was a bookstore manager at a small publicly-funded community college that eventually became part of the University of Arkansas educational system. Andrews claimed that, during a portion of the time he worked at the bookstore, he was improperly classified as being exempt from the overtime pay requirements of the Arkansas Minimum Wage Act. The University moved to dismiss the suit, arguing that the University (as an instrumentality of the State) was immune from suit. The University acknowledged that the Arkansas Minimum Wage Act provided that "an employee may bring an action for equitable or monetary relief against an employer, *including the State of Arkansas or a political subdivision of the state*, if the employer pays the employee less than the minimum wage, *including overtime wages*, to which the employee is entitled . . . ." Ark. Code Ann. 11-4-218(e)(emphasis added). The University further acknowledged that, since 1996, the Arkansas Supreme Court had (in numerous cases concerning several different statutes) directly and impliedly sustained the state legislature's authority to waive sovereign immunity by statute. Nonetheless, the University argued that such legislative waivers of sovereign immunity violated the plain language of Article 5, section 20 of the Arkansas Constitution. The University also noted that its position mirrored the position of the Arkansas Supreme Court from 1935 to 1996. The University explained that the Court's 1996 sea change occurred with nearly no discussion of the 60 years of prior caselaw and with no adversarial briefing on the issue—because the state Attorney General in 1996 effectively conceded the issue.

The state trial court denied the University's motion to dismiss, as required by the then-operative precedent of the State Supreme Court. The University appealed directly to the Arkansas Supreme Court, and the current Arkansas Attorney General, Leslie Rutledge, filed an amicus brief supporting the University's position. (Disclaimer: I was Solicitor General at the time and helped draft the brief.) The Arkansas Supreme Court, in a 5-2 decision, reversed the trial court. *First*, the Court noted that Article 5, Section 20 should be interpreted "precisely as it reads."

Andrews, 2018 Ark. 12 at *10. The state can't be a defendant in her courts, even if the state legislature desires otherwise. *Second*, and somewhat relatedly, the Court emphasized the historical context of this constitutional provision. "The drafters of the current constitution removed language from the 1868 constitution that provided the General Assembly with statutory authority to waive sovereign immunity and instead" said the state shall "never" be made a defendant in her courts. *Id.* at 11. Noting that "[t]he people of the State of Arkansas approved this change when ratifying the current constitution," the Court made clear that "the General Assembly does not have the power to override" or ignore this intentional change in language. *Id. Third*, the Court concluded that principles of *stare decisis* actually cut in favor of (or at least mitigate any problem with) following the 60 years of precedent—between 1935 and 1996—that preceded the unexplained and unreasoned 1996 sea change in the interpretation of Article 20, Section 5. *Id.*

Based on the foregoing reasoning, the Court invalidated the portion of the Arkansas Minimum Wage Act that waived sovereign immunity and dismissed the case. As it did so, however, the Court acknowledged the existence of a forum where Mr. Andrews could seek monetary relief—the Arkansas State Claims Commission, a body created by and subject to the ultimate control of the state legislature. *Id.* at 12. While not legally decisive, the existence of the Claims Commission appeared to provide the Court with comfort that claims like the one brought by Mr. Andrews would not be left without any avenue for redress.

In a strongly worded dissent, two Justices argued the majority's textual analysis of Article 5, section 20 was faulty and dangerous. The dissent's principal argument was that, in cases where the legislature waives sovereign immunity, the state is not "made a defendant" as that phrase was used in the state Constitution. Pointing to several possible dictionary definitions of the word "made," the dissent suggests "made" is best interpreted in this context as "compelled." *Id.* at 14 (Baker, J., dissenting). Under that view, the constitutional provision at issue allows for, expects, and is thus not inconsistent with statutory waivers of sovereign immunity.

The dissent did not engage with the majority's historical analysis—*i.e.*, the change in constitutional language from the former constitution to the current one—but instead chose a definition of "made" based on principles of stare decisis and concern with the results of the majority's definition. The dissent argued that the last 20 years of caselaw (not the 60 years prior to that) are the cases that must be followed unless they are "patently wrong" or "manifestly unjust." *Id.* at 17. Because the constitutional provision could reasonably be read to accommodate the more recent cases, by defining "made" as "compelled," the dissent would have done so. The dissent was especially concerned that the majority's contrary reading of the provision "effectively revive[s] the antiquated doctrine that 'the king can do no wrong.'" *Id*. Pointing to numerous laws waiving immunity and numerous types of cases against the state that might be affected by this ruling, the dissent decried "the implications" of the majority's decision as "astounding." *Id.* at 18.

The biggest open issues resulting the *Andrews* case are (1) whether actions for future injunctive relief may be maintained against state officials alleged to be acting illegally or unconstitutionally, and (2) whether actions brought against state agencies pursuant to the AAPA (Arkansas Administrative Procedure Act) may be maintained. Since *Andrews*, lower state courts have split pretty evenly on these issue. And while several justices in the *Andrews* majority have gone out of their way to caution that *Andrews* should be read very narrowly and to imply that *Andrews* will be limited to monetary relief cases, *see e.g., Arkansas Community Correction v. Barnes*, 2018 Ark. 122 at *4 (Wynne, J., concurring), the Arkansas Supreme Court has yet to directly address the issues. Stay tuned.

The People of the State of Illinois v. Walter Relerford

by Ilya Shapiro, senior fellow in constitutional studies at the Cato Institute

After interning, Walter Relerford interviewed for a position and continued sending emails and phone calls trying to get a job. He was then seen by and waved at the interviewer while shopping at CVS outside the office. Nevertheless, he was turned down for the position. He showed up unexpectedly at the office and was asked to leave—which he did. Relerford then posted on his Facebook page some obscene posts describing sex acts he would do with the interviewer. The interviewer did not have these posts, but a third party forwarded them to her. On these facts, Relerford was eventually convicted of stalking and cyberstalking and sentenced to 6 years imprisonment.

The cyberstalking statute prohibits knowingly causing a person to suffer emotional distress. There are several problems with this conviction which the appellate court recognized, reversing the conviction. The state then appealed the case to the Illinois Supreme Court. The Cato Institute, together with the Marion B. Berchner First Amendment Project, filed an amicus brief—prepared by the UCLA Law School First Amendment Clinic and noted scholar Eugene Volokh—asking the Illinois Supreme Court to reverse Relerford's conviction. While "true threats" aren't protected by the First Amendment, there must be an intent to threaten. While Relerford clearly scared the interviewer by his actions, the government needs to prove that this was his intent, which it didn't even try to do. The cyberstalking statue thus sweeps in a lot of constitutionally protected speech. Speech directed to a person, such as harassing phone calls, can be punished, but not merely speech about a person. Indeed, the U.S. Supreme Court recently considered a case, Snyder v. Phelps (2011), in which the Westboro Baptist Church picketed funerals of solders with signs like "Thank God for Dead Solders," language clearly designed to inflict emotional distress. The Court there correctly held that this disgusting speech, which intentionally causes severe emotional distress, is protected by the First Amendment from even a civil fine—let alone criminal jail time. The speech in these Facebook posts falls well within this precedent.

On August 14, 2018 the Illinois Supreme Court recognized the First Amendment problems with this case and affirmed the reversal of Relerford's conviction.

Cal Fire Local 2881 v. CalPERS

by Carol Matheis, who practices business litigation and insurance law in Newport Beach, California

The "California Rule" as it has come to be known, was set forth in the case of *Allen v. City of Long Beach*, a challenge to a 1951 city charter amendment that sought to raise the amount of employees' retirement contributions from 2% to 10%, and made other actuarial changes to the city employees' retirement plan. The court held that the proposed charter amendment impaired the contract rights of the employees it adversely affected. It stated a test that would become known as the "California Rule": changes to pension plans may be made, but if they result in disadvantage to employees, they should be accompanied by comparable new advantages.[13] Since 1955, this has locked California and the dozen or so other states that follow the rule into essentially being unable to alter their pensions, even when the plans have seemingly become financially unsustainable on their current path.

In 2013, the California Legislature enacted the Public Employee Reform Act (PEPRA), which reduced pension benefit formulas and increased employee contributions, but only for employees hired after January 1, 2013. What it also did, however, is change the pension rules so employees could no longer purchase "service credits." Since 2003, the pension system had offered, for considerable cost that was often financed, an opportunity for employees to "purchase" years of service (also referred to as "air time"). For example, having worked 10 years, an employee could purchase 5 years of service, so that their retirement pension payment would be based on 15 years' of service, rather than 10.

This ban on the purchase of service credits in the PEPRA is the subject of a case that was granted review in April 2017 by the California Supreme Court, *Cal Fire Local 2881 v. CalPERS*. Both lower courts had rejected the argument of the Cal Fire employees that the "California Rule" had been violated and found that CalPERS may make reasonable modifications and changes in the pension system and that flexibility is necessary "to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system and carry out its beneficent policy."[14]

Cal Fire Local 2881 v. CalPERS (the "Cal Fire" case) has been fully briefed and although oral arguments have not yet been scheduled, it is expected to be heard before the end of this year. The case was bought by a labor union whose pension benefits are administered by the California Public Employees Retirement Systems ("CalPERS"). The union sued in 2013, after PEPRA was enacted. The union's suit does not contest the application of the ban on purchase of service credits to future employees, but does

13 The operative language is, "To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages." Allen v. City of Long Beach, (1955) 48 Cal.2d 128).

14 Cal Fire Local 2881 v. CalPERS (2016) 7 Cal.App.5th 115 (Cal. Supreme Ct. review granted April 13, 2017), citing Kern v. City of Long Beach (1947) 29 Cal.2d 848, 854-855. See also Miller v. State of California (1977) 18 Ca.3d 811.

challenge the ban on purchase of airtime on the basis that the option to purchase such service credits is a vested pension benefit, that it affects deferred compensation, and its withdrawal is an impairment of employees' contract rights under the California Constitution's contract clause, thus allegedly violating the "California Rule."

Two other cases that grapple with related issues have also been accepted for review by California's Supreme Court: *Marin Association of Public Employees (MAPE) v. Marin County Employees Retirement Association*, and *Alameda County SDA et. al., v. Alameda County Employees Retirement System*. Marin county employees in *MAPE* sued the county over elimination of certain pay items from the calculation of an employee's final compensation for purposes of calculating a pension amount. In March 2018, *MAPE* was stayed pending the Supreme Court's hearing of the Alameda case. In *Alameda*, the Alameda County Deputy Sheriffs Association sued Alameda County, claiming PEPRA's elimination of certain pay items from the calculation of a sheriff's final compensation for purposes of calculating a pension amount was unconstitutional. The method of including various pay items in the calculation is know as a form of pension "spiking." Similar to *Cal Fire*, the issues of impairment of employees' contract rights under the California Constitution's contract clause, and violation of the California Rule as set forth in *Allen v. City of Long Beach* and its progeny, are implicated.

One of the first issues teed up in the *Cal Fire* case is whether the airtime service credit is a vested pension benefit, a vested right that would be impaired by the repeal contained in PEPRA. While the union argues in its pleadings that the Cal. Gov. Code repealed by PEPRA, Gov. Code Sec. 20909, created a vested right, the state of California argues that the offer of airtime service credit was an option to purchase, did not pertain to deferred compensation, and therefore does not implicate a vested pension benefit.

It is being argued by the state and its allies that the elimination of airtime service credits is not violative of the "California Rule" because it does not disadvantage employees, or if it is a disadvantage, it is not one courts are bound to protect. They argue that because the option to purchase such credits is not a benefit earned through years of service, but rather a commodity to be purchased, a commodity that heretofore has not been priced accurately. The benefit was supposed to be revenue neutral and it's cost was supposed to be borne by the employees, but heretofore, has resulted in vast underpricing.

Another big issue in these three pending cases is the creation of a contractual right, and its impairment pursuant to either the federal or the California constitutions. "A public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment. Such a pension right may not be destroyed, once vested, without impairing a contractual obligation of the employing entity."[15] However, not every impairment runs afoul of the contract clause.[16] Prohibitions against impairing contracts are not absolute, and an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose.[17] Whether a contractual right was created and thus impaired by PEPRA is at issue in these cases.

In an unusual move, Gov. Jerry Brown has asked the California Supreme Court to hear the cases this year, and in a very unusual move, has had the Office of the Governor's staff counsel represent the state, as opposed to the Attorney General's office. It is truly strange bedfellows when Gov. Jerry Brown is aligned with the California Business Roundtable and Howard Jarvis Taxpayers' Association. These three cases are very high stakes for California, its public employees, and its retirees. While the specter of retroactive benefits reductions strike fear in the hearts of state retirees and employees, it might be better for all concerned if the state of California were to win this round, in order to refine the "California Rule" and assist the state in getting it's CalPERS house in order. Calling the airtime service credit a vested right is a stretch, as is expansion over time of pay items to be included in the calculation of final pay for purposes of pension calculation. Lavish benefits and opportunities to "spike" pensions conferred over the last two decades exacerbated the underfunded pension liability facing the state. Without the state being able to whittle away these types of items in the name of fiscal responsibility, the whole system is left imperiled and that day of public default and retroactive benefit reduction is made more possible.

15 Betts v. Board of Administration of Public Employees Retirement System 21 Cal.3d 859, 863.

16 Allen v. Board of Administration (1983) 34 Cal.3d 114, 119.

17 United States Trust Co. of New York v. New Jersey (1977) 431 U.S. 1, 21.

North Dakota Legislative Assembly v. Burgum

by David Chapman, a solo lawyer with DJ Chapman Law, P.C., in Fargo, ND

The separation of powers between executive and legislative branches is an important and central feature of American governance on the state and federal levels. In the case of *North Dakota Legislative Assembly v. Burgum*, 2018 ND 189 (ND 2018), the North Dakota Supreme Court exercised its original jurisdiction under the state constitution to address a collision of constitutional power between the North Dakota Legislative Assembly and first term Governor Doug Burgum. At issue were five item vetoes exercised by Governor Burgum following the adjournment of the last regular session of the legislature.

I. Governor Burgum's Vetoes

North Dakota's Constitution provides the Governor the power of the item veto. Although the Governor attempted to veto items in five separate pieces of legislation, he later concurred with an Attorney General's opinion that three of his five vetoes were ineffective. Despite the concession, the North Dakota Supreme Court found that a justiciable controversy remained regarding all five vetoes. The Supreme Court held that a Governor cannot withdraw a veto, and cannot achieve the same outcome by agreeing with the Attorney General's non-binding opinion declaring a veto ineffective.

The item veto power is granted to the Governor in Article V, Section 9 of the North Dakota Constitution. This power allows the Governor to veto items within appropriations legislation without vetoing the entire bill so long as what is left is workable legislation. The veto relates specifically to appropriations and the Governor cannot veto a condition on an appropriation without vetoing the appropriation itself. The item veto is designed to prevent "log rolling" in which items that could not garner enough support to pass on their own are amalgamated into a larger bill which has enough support to pass through the legislature.

In order to make an appropriation of funds, the legislative assembly must specify the amount of the appropriation, the object or purpose of the appropriation, and the source of funds. The five vetoes at issue in the case all dealt with an aspect of an appropriations bill. The Court addressed all five of Governor Burgum's vetoes in turn.

A. The Workplace Safety Veto

The legislative assembly appropriated $2.25 million from the state's general and special funds for entrepreneurship grants and a voucher program. Of the total funds appropriated, a subsection of the bill attempted to dedicate $300,000 to *an organization providing workplace safety*. The Governor vetoed the expressly stated dedication of $300,000 to workplace safety.

In challenging the Governor's veto, the legislative assembly offered three main reasons why the veto was invalid. First, they argued that a veto of the $300,000 dedicated to an organization providing workplace safety did not subtract the $300,000 from the overall $2.25 million appropriation that was then available to the Governor to allocate as he wished. The crux of the argument was that the Governor could then graft his intent onto a $2.25 million appropriation and use the money as he wished. The court dismissed this argument and concluded that the legal effect of the Governor's veto was to reduce the overall appropriation by $300,000. The Governor had no power to actually change the syntax of the overall appropriation, which was summed up effectively by Justice Jerod Tufte in stating that: "[t]he veto power is an eraser, not a pencil."

Second, the legislative assembly offered that under North Dakota law an appropriation must specify the fund from which the appropriation springs, such as a general or special fund and that allocation of the $300,000 to an organization providing workplace safety did not specify any funding source. The court disagreed, finding that despite the failure to use the word "appropriation" specifically, the $300,000 was a small component that gave definition to the larger appropriation of $2.25 million. The court also disagreed that the Governor had to veto the entire appropriation because this would allow a legislative assembly that is hostile to a Governor to eliminate the item veto by consolidating all spending in one bill with an all or nothing approach.

Thirdly, the legislature argued that the $300,000 dedication of money to workplace safety was not an appropriation because it did not specify a funding source. This argument was swept aside because the $300,000 was part of the larger $2.25 million appropriation, which did specify a funding source.

B. The Credit Hour, Any Portion, Water Commission and IT Project Vetoes

The court also addressed four other vetoes and found them to be ineffective. In the Credit Hour Veto, the legislative assembly stated that: "It is the intent [of the legislature] . . . that future general fund appropriations [supporting a university nursing program] be adjusted . . . *for credit hours completed at the school*." The Governor excised by veto the "*for credit hours completed at the school*" language. The Court found the veto ineffective because the Governor's item veto does not extend to vetoing any portion of legislative intent.

The Any Portion Veto also involved a veto of legislative intent which prevented a university from shutting down "any portion" of their nursing program. By excising the "any portion" language, the Governor essentially changed legislative intent and allowed the university to shut down portions of its program so long as it did not shut down the whole program. This again exceeded the Governor's item veto power as it altered express legislative intent.

In the Water Commission Veto, the legislative assembly enacted an appropriations bill which stated that: ". . . funding designated in this section is for the specific purposes identified [but funds may be transferred among items] *subject to budget section approval and upon notification of the legislative management's water topics overview committee*." The Governor excised the "subject to budget section approval and upon notification of the legislative management's water topics overview committee." Again the court found this was a change of legislative intent and found the veto to be ineffective.

The IT Project Veto involved an appropriation in which the legislative assembly stated that: "[o]f the $3,600,000, $1,800,000 may be spent only upon approval of the budget section." The Governor excised this language. The court found this veto to be

ineffective because it was not a veto of an appropriation, but a condition on an appropriation. As the $3,600,000 remained in tact when the language was vetoed, the veto was not the veto of an appropriation.

II. Legislative Reservation Of Control Over Appropriations

A. The Water Commission Bill

Interestingly, although the Water Commission Veto and the IT Project Veto exceeded the veto authority of the Governor, the same legislative provisions also exceeded the power of the legislative assembly.

The court stated that the power to make law is legislative and the power to implement it is executive. A legislative assembly cannot delegate purely legislative functions to any other body. Limited discretion in implementation can be granted to the executive branch if the exercise of discretion is: ". . . constrained by 'reasonably clear guidelines' and a 'sufficiently objective standard.'" It is an impermissible grant of legislative power to give "unfettered discretion" to make choices in implementing legislation.

The court first addressed the "delegation" of power first in addressing the Water Commission bill. The Water Commission bill granted the Water Commission the power to transfer funds among various stated items, but stated that this ability was: "[s]ubject to budget section approval and upon notification to the legislative management's water topics review committee." The court found there were no rules or objectives within which the actions of the budget committee were restrained. The court found the budget section was given "unfettered discretion" and that the Water Commission bill ". . .unlawfully delegated legislative authority to the budget section."

However, despite this delegation of power violation, the more serious violation lay in the bill's encroachment upon executive power. The court concluded that in its improper delegation of the power of the whole legislature to a smaller component, namely, the budget committee, the legislature actually attempted to retain power over an appropriation once it had been made. The power to implement the law lay with the executive, but the legislative assembly made the implementation subject to approval of a smaller component of the legislative assembly. This action unconstitutionally encroached upon executive power. "[T]he legislature may not delegate to itself, or to a subset of its members, executive or judicial functions."

Concluding that although the actions of the legislature were impermissible, the legislature did not intend to grant the Water Commission "unfettered discretion" to transfer funds among purposes. Thus, striking the oversight of the budget committee also required striking the Water Commission's power to transfer funds.

B. The IT Project Bill

The Governor argued that the IT Project bill, which stated that: "[o]f the $3,600,000, $1,800,000 may be spent only upon approval of the budget section . . .", suffered from the same flaw as the Water Commission bill. The legislative assembly countered stating that the budget section merely conducted fact finding to determine whether the appropriation should be available for expenditure.

The court found the IT Project bill language provided no clear guidelines or objective standards for the budget committee and was an improper delegation. The court also found that the language was an unconstitutional encroachment on executive power in dismissing the legislative assembly's argument that the budget committee was merely conducting fact finding on how appropriated money should be spent. Legislative fact finding precedes the enactment of law and its signature by the Governor. The court stated that the fact finding in the case of the IT Project bill related to the application of the law and not its enactment. Application of the law is an executive function.

In wrapping up consideration of the IT Project bill, the court concluded that the total $3,600,000 appropriation was not to be reduced by $1,800,000 when it struck provisions granting the budget committee oversight. The court indicated that it had no more power than the Governor to rewrite an appropriations bill. Unlike the Water Commission bill where the legislative assembly never intended the Water Commission to have unfettered authority to transfer funds among various objectives, in the IT Project bill it was the intent of the legislative assembly to appropriate $3,600,000 to the IT Project regardless of the oversight language.

Electronic Classroom of Tomorrow v. Ohio Department of Education

by Douglas R. Cole, Erik J. Clark, and Carrie M. Lymanstall, all of Organ Cole LLP

In *Electronic Classroom of Tomorrow v. Ohio Department of Education*, the Ohio Supreme Court held that public funding of Ohio's public charter "e-schools" is based on each e-school student's actual participation in the e-school's curriculum, rather than based solely on the e-school's enrollment count.

The Court split 4-2 in the August 8, 2018 decision.

Ohio's e-school students do not attend a "brick-and-mortar" building for classes, but rather have a computer, usually in their homes, which they use to log into the school's online platform.

Ohio statutes provide that the Ohio Department of Education ("the Department") must fund all charter schools (Ohio law calls them "community schools"), including e-schools, "on a full-time equivalency basis, for each student enrolled." R.C. 3314.08(C)(1). Another section of that statute—the key section at issue in the case—explains what full-time equivalency, or "FTE," means:

> The department shall determine each community school student's percentage of full-time equivalency based on the percentage of learning opportunities offered by the community school to that student, reported either as number of hours or number of days, is of the total learning opportunities offered by the community school to a student who attends for the school's entire school year. However, no [e-school] shall be credited for any time a student spends participating in learning opportunities beyond ten hours within any period of twenty-four consecutive hours.

R.C. 3314.08(H)(3).

The Electronic Classroom of Tomorrow (known as "ECOT") was Ohio's largest e-school. In the 2015-2016 school year, more than 15,000 students were enrolled at ECOT, causing ECOT to claim more than $100 million in public funds.

The Department routinely reviews charter schools' (including e-schools) funding, and when it finds that a school has been overfunded, it exercises its right to reduce funding on a going-forward basis in order to "claw back" any monies due the department. Prior to 2016, the Department did not consistently check documentation regarding student participation at online schools as part of the funding review process. In 2016, the Department started looking at participation records based on concerns that had arisen regarding participation at certain other community schools that operated using a correspondence model (i.e., mailing school work to the students) and online model. Funding reviews for community schools typically occur on a five-year schedule, and in 2016, the Department was scheduled to review ECOT's public funding for the 2015-2016 school year.

Before that review occurred, ECOT filed suit, seeking injunctive relief prohibiting the Department from considering student participation data in determining funding. The trial court denied injunctive relief, and ultimately the Ohio Supreme Court affirmed.

By the plain language of the funding statute, "[a]n e-school cannot be credited for any time a student spends participating in learning opportunities beyond 10 hours within a 24-consecutive-hour period," Justice Patrick Fischer wrote for the Court. "By stating that the maximum daily credit for each student is ten hours, it is apparent that the legislature intended that an e-school will be credited for a student's participation for less than ten hours in a day. This calculation can be made only by referring to records that contain evidence of the duration of a student's participation in learning opportunities."

Justice Fischer added that another statute confirms this result. R.C. 3314.27 provides that e-schools "shall keep an accurate record of each student's participation in learning opportunities each day," and the record must be kept in a manner that can easily be submitted to the Department.

Justices Terrence O'Donnell and Sharon Kennedy wrote separate dissents.

Justice O'Donnell focused on the funding statute's use of the phrase "learning opportunities *offered by the community school*," which he interpreted to mean that funding should be based on enrollment, not participation.

"If the legislature had intended to condition funding on the duration of a student's participation in the learning opportunities offered by a community school, it could have expressed that intent by using a phrase such as 'based on the percentage of learning opportunities *participated in by* that student,' but it did not do so," Justice O'Donnell wrote.

Justice Kennedy added that the majority's analysis, based on the ten-hour-per-day cap that the majority found indicative of the relevance of actual participation, was "dubious at best."

"It is true that an e-school will not receive *credit* for any time that a student participates in learning activities for more than ten hours a day, but that does not mean that an e-school will be *funded* only for the amount of time that the student chooses to participate in the e-school's online educational platform," Justice Kennedy wrote.

But the majority rejected these arguments, noting that interpreting the funding statute to ignore student participation would render portions of the statute meaningless.

The authors were appointed as special counsel to the Ohio Attorney General to represent the Ohio Department of Education in this case.

Preterm-Cleveland, Inc. v. Kasich

by Benjamin Flowers, Solicitor General of Ohio

Preterm-Cleveland, Inc., v. Kasich,[18] establishes two important issues of Ohio constitutional law. First, a litigant who wishes to challenge the constitutionality of multiple parts of one law must separately establish standing as to each part. Second, an administrative burden that imposes no economic harm is not an "injury" for standing purposes.

I. Background

In 2013, Ohio passed a biennial budget bill with three categories of provisions relating to abortion.[19] The first category consists of the "Written Transfer Agreement Provisions." These provisions require certain abortion facilities to "have a written transfer agreement with a local hospital." Facilities must "file a copy of the written transfer agreement with [Ohio's] director of health," and "update the agreement 'every two years.'" In addition, the Written Transfer Agreement Provisions generally prohibit Ohio's director of health from renewing a facility's license "unless the 'most recent version of the updated written transfer agreement' on file is 'satisfactory.'"

The second category of provisions consists of the "Heartbeat Provisions." These forbid any "person" to "perform or induce an abortion . . . prior to determining if the unborn individual . . . has a detectable fetal heartbeat," except in cases of emergency. And in general, they prohibit any "person" from performing an abortion "until 24 hours after informing the pregnant woman in writing about the heartbeat and the statistical probability of bringing the unborn human individual to term." Those who violate these provisions are subject to civil damages and "disciplinary action" by the State Medical Board. Performing an abortion without first checking for a heartbeat is a first degree misdemeanor. Subsequent offenses are fourth degree misdemeanors.

Finally, there are the "Parenting and Pregnancy Provisions." This third category of provisions makes certain block grants unavailable to entities "involved in or associated with any abortion activities."

Preterm-Cleveland, Inc. is an abortion facility in Cleveland, Ohio. It claimed that the Written Transfer Agreement Provisions and Heartbeat Provisions negatively affected it. First, the Written Transfer Agreement Provisions allegedly imposed "new administrative burdens." For example, before the 2013 bill's passage, Preterm had a written transfer agreement with a local hospital that automatically renewed each year. After the bill's passage, that automatic renewal no longer sufficed; Preterm had to execute and file a new agreement every two years, which required more work than an automatic renewal.

As for the Heartbeat Provisions, these required Preterm to "amend its policies, procedures, and protocols concerning informed consent," "undertake new record keeping burdens," and "conduct extensive research" due to fear of "criminal prosecution and civil liability" for non-compliance. In addition, the 24-hour waiting period allegedly required it to schedule more follow-up visits.

Preterm sued the State (or more precisely, Ohio's governor, the State of Ohio, and a number of other state entities) in the Cuyahoga County Court of Common Pleas, arguing that the foregoing provisions violated Ohio's Single-Subject Clause. The Clause forbids the General Assembly from enacting any law that "contain[s] more than one subject." Preterm argued that the challenged provisions violated this restriction because they were insufficiently related to the state budget—the subject of the 2013 bill in which they were enacted.

In the trial court, the State moved for dismissal on jurisdictional grounds, arguing that Preterm lacked standing to sue. According to the State, Preterm faced no concrete harm: It already had a written transfer agreement. It was not even subject to the Heartbeat Provision's civil and criminal penalties, which apply only to "persons" who perform abortions, not clinics that facilitate them. And Preterm conceded that it suffered no harm at all from the Parenting and Pregnancy Provisions.

The trial court dismissed the claims against the State for lack of standing. But the Eighth District Court of Appeals reversed, in a 2-1 decision.

II. The Supreme Court Holds that Preterm Lacks Standing to Sue

The Ohio Supreme Court took jurisdiction to address the standing issues. It reversed by a 5-2 vote, holding that Ohio courts lacked standing to adjudicate the dispute. Justice O'Donnell wrote for the Court, establishing two important propositions along the way.

First, plaintiffs cannot establish standing with conclusory or speculative assertions that a law will expose them to "administrative burdens." The Ohio Constitution gives common pleas courts jurisdiction only over "justiciable matters." For a private litigant to establish the justiciability of a dispute, he "must generally show," among other things, that he has "suffered or is threatened with direct and concrete injury." *Preterm* stands for the proposition that administrative hassle alone is not a concrete injury: "Although a new law might impose administrative burdens that result in use of additional resources by a business," only plaintiffs with some risk of incurring actual expenses can sue.

This principle defeated Preterm's standing to challenge the Written Transfer Agreement Provisions. Though Preterm pointed to several new administrative requirements—such as the obligation to execute and file an updated contract every two years—the record did "not reflect that Preterm incurred or [was] at risk of incurring new expenses due to" those provisions.

Second, private litigants who challenge the constitutionality of state legislation "must establish standing as to each claim presented." The Supreme Court determined that Preterm had no standing to challenge the Heartbeat Provisions because it was not subject to those provisions' civil and criminal penalties. The Heartbeat Provisions are applicable only to "persons," and the Court interpreted this to include only the individuals who perform the abortions rather than clinics like Preterm that facilitate them. That could have been the end of the case: since the Parenting and Pregnancy Provisions admittedly did not harm

18 2018-Ohio-441, ¶ 5, 153 Ohio St. 3d 157, 159, 102 N.E.3d 461, 464 (Ohio 2018).

19 2013 Am.Sub.H.B. No. 59.

Preterm, Preterm had no standing to challenge any of the three categories of provisions. But the Court went a step further. It held that even if Preterm had standing to challenge the Written Transfer Agreement Provisions or the Heartbeat Provisions, it still lacked standing to challenge the Parenting and Pregnancy Provisions. This was so, it said, because "standing 'is not dispensed in gross.'" Instead, plaintiffs must establish standing as to every part of the law they wish to challenge. And because Preterm was not harmed by the Parenting and Pregnancy Provisions, it had no standing to challenge them regardless of its standing to challenge the other provisions.

Chief Justice O'Connor dissented, joined by Justice O'Neil. She parted ways with the majority on both of the key principles discussed above. First, she argued that an injury need not be economic in order to suffice for standing purposes. Her argument rested heavily on federal precedents that she read as establishing that "economic injury is not the only kind of injury that can support a plaintiff's standing." The majority's holding that administrative burdens are not a concrete-enough injury, she said, departed from this "well-established and uncontroversial principle."

Chief Justice O'Connor criticized the Court for even reaching the question whether plaintiffs can base standing for one claim on their having standing to bring another. Since the Court found that Preterm lacked standing over each claim individually, the dissent asked, why even address this? But if the Court was going to reach the issue, the Chief Justice said, it should have come out the other way; it should have held that Preterm could establish standing to challenge one part of the 2013 budget bill by establishing standing to challenge other parts. She provided no analysis, choosing instead to set forth her views in "summary form."

III. Standing Analysis in Ohio

Preterm v. Kasich's most obvious significance relates to Ohio standing law. Private litigants cannot hope to challenge a law's constitutionality by pointing to the administrative hassle it imposes. They must identify something more concrete, such as economic harm. Even then, they can challenge only the portions of the law that harm them; standing to bring one claim is not standing to bring all claims. These holdings make it harder for private litigants to seek relief from unconstitutional laws in court, and thus could work to keep policy disputes in the General Assembly and out of the courts. But that effect should not be overstated. *Preterm*'s holdings limit who can bring an issue to court, not what issues they may bring. Sophisticated parties will rarely have trouble finding a plaintiff who has suffered some degree of economic harm from a law they wish to challenge.

The more important lesson from *Preterm* may be one it makes only implicitly: state-law doctrines sometimes depart from their federal analogues. As Ohio's own Judge Jeffrey Sutton has argued, state constitutional provisions are independent sources of law, and courts ought not assume that state constitutional doctrine mirrors federal constitutional doctrine.[20] Chief Justice O'Connor's dissent made much of federal cases that she read to hold that administrative burdens alone are enough to confer standing under the "cases and controversies" language in Article III of the United States Constitution. Even if she is right, however, that is no reason to adopt those cases as a matter of state standing law—particularly since Ohio's standing requirement derives from a state constitutional provision that looks nothing like Article III.[21] The *Preterm* majority largely ignored federal doctrine relating to the question whether administrative burdens are a concrete injury. It thus stands for the obvious-but-often-overlooked proposition that Ohio courts may blaze their own trail when interpreting their own constitution.

20 *See* Jeffrey Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law (2018).

21 *Compare* Ohio Const., Art. IV, § 4(B) ("The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.") *with* U.S. Const. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.).

California Cannabis Coalition v. City of Upland

by Josh McDaniel, an appellate attorney at Horvitz & Levy, LLP

Unlike our federal structure of government, which places the legislative power exclusively in the hands of elected representatives, California's state constitution, like a handful of other states' constitutions, allows *voters* to legislate through the initiative process. This is known as "direct democracy."

In California, the people's initiative power has been described as "one of the most precious rights of our democratic process." Voter initiatives can be a way for the public to take action when politicians refuse to do so. In that way, the initiative power often operates as a check on the political branches. On the downside, it is why California's constitution is cluttered with hundreds of amendments, amassed into one of the longest constitutions in the world.

The California Supreme Court recently grappled with the initiative power in *California Cannabis Coalition v. City of Upland*, a case that has surprisingly little to do with marijuana. The local initiative at issue sought to allow up to three medical marijuana dispensaries in the City of Upland, provided that each dispensary paid a $75,000 annual fee, and requested that the initiative be voted on at a special election. After concluding that the "fee" was a general tax in disguise, the city council decided that the initiative had to be voted on in at the next November general election.

The initiative's proponents then sued, asserting that the initiative should be voted on in a special election as requested. The trial court ruled that California's constitution requires general tax increases to be decided by voters at a general election, but the court of appeal reversed, holding that the constitutional provision invoked by the trial court applies only to taxes imposed by "local government," not voters. The California Supreme Court granted review to decide the question.

The Supreme Court's majority opinion framed the case as a conflict between the people's constitutional right to legislate by initiative, on the one hand, and article XIII C of the state constitution, which limits the ability of "local governments ... to impose, extend, or increase any general tax." The question, according to the majority, was whether article XIII C restricted the ability of *voters* to impose taxes via initiative.

Article XIII C curbed local general tax increases by requiring such taxes to be approved by the voters at a general election—the idea being, as one court put it, that general taxes should be "voted on in general elections with their traditionally larger turnouts, not done in a corner in the middle of January in an odd-numbered year."

In a split decision, the high court ruled that voters are not bound by article XIII C's general election requirement. Adopting a clear-statement rule, the majority held that without a direct reference in the text to voter initiatives, or some other unambiguous indication, the court would not construe a provision to limit the people's initiative power. Because article XIII C's reference to "local governments" could refer simply to a local government entity like a city council, the court held that the provision did not apply to voter initiatives.

Dissenting from the majority's analysis, Justices Kruger and Liu questioned "by what authority" the majority purported to "dictate to legislative drafters the forms in which laws must be written to express the legislative intent." In their view, "[a] local government tax is a local government tax, no matter how it may have been legislated into being." They argued that applying article XIII C to voters would not, as the majority claimed, "squelch voters' initiative rights." Rather, the provision leaves voters free to propose initiative measures and "envisions a specific avenue for voter participation—approval at a general election."

Ultimately, the majority and the dissent agreed that, going forward, voters may "bind themselves by making it more difficult to enact initiatives in the future," just as Ulysses "tied himself to the mast so he could resist the Sirens' tempting song." This, of course, would raise separate questions not answered here: Would such self-imposed limits on the initiative power be constitutional? If so, would such limits ever amount to a structural constitutional change (a "revision," in California's vernacular), requiring a supermajority of the legislature and a majority vote of the electorate? These question will have to wait until voters decide to tie themselves to the mast.

Hunsucker v. Fallin

by A.J. Ferate, Of Counsel at Spencer Fane LLP

With certain limited exceptions, the Oklahoma Supreme Court has in the past followed the U.S. Supreme Court's seminal decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) when evaluating a party's standing to bring suit. This standard requires a litigant to, among other things, demonstrate that the challenged act causes the plaintiff "injury in fact" that is "concrete and particularized" to the plaintiff. This safeguard of the judicial process evaporated for public law actions in Oklahoma with the Oklahoma Supreme Court's 5-4 ruling in *Hunsucker v. Fallin*.

I. Background

In 2017, the Oklahoma Legislature passed the Impaired Driving Elimination Act 2. The new law enacted significant reforms in the state's DUI laws. It moved away from a system of administrative license revocations for drunk drivers (which had generated significant backlogs in administrative forums) to incentive programs that encouraged those arrested for impaired driving to consent to the installation of ignition interlock devices (which has been shown to reduce recidivism in other states.) The law made other changes to the state's drunk driving law regime as well, such as improved impairment testing procedures.

Four attorneys that regularly represent clients charged with DUI violations challenged the constitutionality of the new law, alleging that the law violated the state's constitutional requirement that all acts of the Legislature "embrace but one subject." The challengers attempt to demonstrate their standing in four ways.

First, the DUI attorneys speculated that the new law might impact them as licensed drivers should they be arrested at some unspecified time in the future for driving under the influence of alcohol. Second, they brought suit on behalf of future hypothetical clients that may be arrested for DUI, although that basis for standing had been rejected by the U.S. Supreme Court in *Kowalski v. Tesmer*, 543 U.S. 125 (2004). Third, the attorneys argued the new law could impact future business from hypothetical clients who would no longer be subject to administrative license revocations. Fourth, the challengers claimed they possessed "public interest" standing.

II. The Ruling

Without addressing the other claimed bases for standing, the Court accepted the challenger's final theory of "public interest" standing, asserting "discretion to grant standing to private parties to vindicate the public interest in cases presenting issues of great public importance." Justice Edmondson, writing for the five justice majority, wrote that the Court will exercise such discretion in cases where "there are 'competing policy considerations' and 'lively conflict between antagonistic demands.'" The Court also reasoned that granting standing was appropriate due to the exigent nature of the controversy (since the law was going into effect imminently) and by analogy to historical common-law prototypes in writs and bills in equity to test the legality of the conduct of public officials.

Having granted the challengers standing, the Court ruled that the new law did not meet Oklahoma's constitutional "single subject" rule. For the purposes of a single subject analysis, the court noted that the title of the act (referencing "impaired driving" as the subject) was "highly generalized," and instead chose to focus on the bill's uncodified "purpose" section, which focused on "administrative monitoring" of impaired drivers. Because the law addressed both administrative and criminal solutions to reducing impaired driving, the Court determined it did not embrace a single subject and therefore was unconstitutional. The Court also held that, because all portions of the law were tightly interrelated, even those aspects that related to "administrative monitoring" were not severable from the rest of the law.

Petitioners also challenged a portion of the law on *procedural* due process claims, but the majority took the liberty of deeming the law invalid under *substantive* due process.

III. The Dissent

Justice Wyrick, in a dissent joined by two of the other three Justices in the minority, criticized the "boundless" nature of the majority's "public interest" exception to standing, which he argued undermined the Oklahoma Constitution's separation of powers. "By limiting our jurisdiction to justiciable 'cases,'" Justice Wyrick writes, "the Constitution ensures that the judicial branch stays confined to its role of exercising judicial judgment rather than political will." Justice Wyrick continues:

"Let that sink in. The Court believes it can reduce to nil 'the *irreducible* constitutional minimum' of standing anytime it is presented with two parties disagreeing over important policy considerations. In other words, the Court can disregard constitutional limits on its jurisdiction anytime it is presented with *precisely the type of policy dispute that those constitutional limits are designed to bar it from deciding*. But nothing in our Constitution permits us to assume jurisdiction over a case merely because the issue it presents is 'important,' and the Court's invocation of the publici juris standard as a measure of justiciability is without precedent."

The dissent also provides a detailed criticism of the majority's single subject ruling. Justice Wyrick warns that the Court's "increasingly permissive standing rules and amorphous single-subject (and special-law) jurisprudence have created a potent one-two punch that allows the Court to judicially veto virtually any of the Legislature's and People's laws."

The dissent concludes by taking the majority to task for its *sua sponte* finding of a substantive due process violation. While the U.S. Supreme Court has only once invalidated a law under substantive due process's rational basis review, Justice Wyrick points out that "[t]his Court, however, has now done so twice in two years, this time to tell the Legislature that it 'clearly lies beyond the outer limits' of its power to enact a law allowing law enforcement to seize licenses from drunk drivers[.]"

IV. Impact

This case has significant implications for public law jurisprudence in Oklahoma. In such cases, there would seem to be little barrier to standing. Litigants challenging the state's new regulations on medical marijuana, for example, have already cited *Hunsucker* to attack rulemakings that do not apply to them. Meanwhile, the Court's increasingly uncertain single subject jurisprudence makes future legislative actions difficult. Finally, the

creation of a new substantive due process jurisprudence portends the expansion of the state supreme court's practice of questioning the justifications for any of the Legislature's policy choices.

Cooper v. Berger

by Andrew D. Brown, an Associate at Shanahan McDougal, PLLC

"A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." So reads Article 1, Section 35 of the North Carolina Constitution. Perhaps nowhere has North Carolina applied this maxim more frequently as of late than to the very institution charged with guarding the principle—its courts.

Change for the courts has been increasingly necessary, given the transformational developments in technology, legal practice, and society as a whole that have characterized the half century that has elapsed since North Carolina last overhauled its state court system. For example, Chief Justice Mark Martin convened a blue-ribbon commission in 2015 to undertake a comprehensive review of the state court system and recommend changes to better equip North Carolina's courts to meet modern needs. Outside of the judicial branch, leaders throughout the state have engaged in extensive debate over the structure and function of North Carolina's courts, and the North Carolina General Assembly has passed a fair amount of legislation bringing many of the ideas in the public square to fruition.

The most recent potential change to North Carolina's courts has come in the form of a proposed constitutional amendment that would alter how the state fills judicial vacancies between elections.[22] Since Reconstruction, North Carolina has selected its judges by election.[23] However, governors have long held the power to make appointments to vacant judicial seats. Although appointees must run in the next even-year election to keep the seat, one should not underestimate the importance of the appointment power: a recent analysis of election results from 2008-2014 revealed that approximately 90% of judicial appointees later won election to full terms.

In contrast to the current gubernatorial appointment model, the proposed amendment would create a "Nonpartisan Judicial Merit Commission" charged with receiving public nominations for judicial vacancies and then rating the nominees as qualified or not under state law "without regard to the nominee's partisan affiliation." The Commission's evaluations would then be forwarded to the General Assembly, which, in turn, would recommend at least two of the "qualified" nominees to the Governor. The Governor would then have ten days to make the appointment; otherwise the General Assembly could do so.[24]

In addition to drafting the proposed amendment itself, the General Assembly also drafted the language that will appear

22 The amendment is one of six that will appear on the ballot. The others, some of which are also subject to litigation, involve hunting and fishing rights, the rights of crime victims, voter identification requirements, lowering the cap on state income tax, and a restructuring of the state ethics and elections enforcement agency.

23 There is a very small group of judges known as "special superior court judges," who serve five-year, state-wide terms, upon express legislative authorization and gubernatorial appointment. This group includes judges that comprise the North Carolina Business Court.

24 The amendment also provides other contingency mechanisms should the normal process not fully function for some reason or another.

on the ballot to present the amendment to voters (the "Ballot Question"). The Ballot Question stated:

> Constitutional amendment to implement a nonpartisan merit-based system that relies on professional qualifications instead of political influence when nominating Justices and judges be selected to fill vacancies that occur between judicial elections.

On August 5, Governor Roy Cooper filed a lawsuit alleging, among other things, that the Ballot Question for the judicial vacancy amendment was constitutionally invalid because it failed "to describe [the] proposed amendment on the ballot in fair and accurate terms." Driven by imminent deadlines for printing and distributing ballots, litigation proceeded quickly.

On August 21, a three-judge panel[25] issued a 2-1 decision granting the Governor's Motion for Preliminary Injunction (at 122-152). The panel acknowledged the state's "beyond a reasonable doubt" standard for declaring unconstitutional an Act of the General Assembly; however, it also noted that it could identify no clear roadmap for analyzing the Governor's claim, which had no real precedent in North Carolina law. Citing a 1918 North Carolina Supreme Court decision stating that ballots should enable voters to "intelligently express their opinion," the panel focused its inquiry on whether the Ballot Question clearly and fairly described the substance, purpose, and effect of the amendment and whether it implied a position for or against the amendment. On these grounds, the panel concluded that the ballot question misrepresented or omitted aspects of the amendment to such a degree that the Governor was likely to succeed on the merits of his constitutional claim, thus warranting the preliminary injunction. One of the three judges dissented (at 158-172), concluding that the political question doctrine precluded the court's consideration of the question and that the Act as a whole was not so patently or fundamentally unfair as to violate substantive due process.

Although emergency appeals ensued, the legislature promptly reconvened to address the court's order. On August 27, the legislature approved new a Ballot Question for the amendment, which stated:

Constitutional amendment to change the process for filling judicial vacancies that occur between judicial elections from a process in which the Governor has sole appointment power to a process in which the people of the State nominate individuals to fill vacancies by way of a commission comprised of appointees made by the judicial, executive, and legislative branches charged with making recommendations to the legislature as to which nominees are deemed qualified; then the legislature will recommend at least two nominees to the Governor via legislative action not subject to gubernatorial veto; and the Governor will appoint judges from among these nominees.

The Governor immediately filed motions to amend the complaint and for a temporary restraining order. After a hearing, the panel issued a unanimous decision (at 337-351) on Friday, August 31 concluding that while perhaps not perfect, the new Ballot Question was not so misleading as to be facially unconstitutional beyond a reasonable doubt. Accordingly, the court denied the Governor's motion for a temporary restraining order.

The parties immediately appealed the Order directly to the state supreme court. On Tuesday, September 4, the Supreme Court issued an order unanimously affirming the trial court's decision and allowing the proposed language to appear on the November ballot.

25 Under N.C. Gen. Stat. § 1-267.1, a facial challenge to an act of the General Assembly is transferred to a three-judge panel of the superior court for adjudication.

by Jon Riches, Director of National Litigation at the Goldwater Institute

Does a passenger traveling with the owner of a private vehicle have a reasonable expectation of privacy that is violated if the government surreptitiously installs a Global Positioning Satellite ("GPS") device on the vehicle to monitor its movements? That was the question presented to the Arizona Supreme Court in *State v. Jean*. And it's one that appears increasingly important as technological surveillance devices become cost effective for – and thus more widely used by – law enforcement.

In a fractured opinion, the Court held that a passenger in a vehicle does have a reasonable expectation of privacy, and thus Fourth Amendment right, to be free from government's continued GPS tracking of the vehicle's movements. However, the Court declined to apply the exclusionary rule to prohibit the evidence obtained through the warrantless GPS tracking in this case, instead ruling that the good-faith exception applied.

The facts were not disputed. In February 2010, Appellant Emilio Jean rode in a commercial tractor-trailer from Georgia to Arizona with driver David Velez-Colon. Velez-Colon owned the truck and the two men took turns driving. State law enforcement officials became suspicious that the truck was being used to transport drugs and installed a GPS tracking device on the vehicle without obtaining a warrant. Law enforcement then monitored the truck's movements for three days, and assisted by the GPS location data, stopped the vehicle on its return from California to Arizona. A search of the trailer revealed 2,140 pounds of marijuana.

The State subsequently charged Jean (the passenger) with, among other things, transportation of marijuana. Jean moved to suppress the drug evidence, arguing that that state's warrantless use of the GPS tracking device violated his possessory and privacy rights under the Fourth and Fourteenth Amendments to the U.S Constitution and the Arizona Constitution's privacy provisions. The trial court denied the motion, and Jean was sentenced to a prison term of ten years. The court of appeals affirmed.

The Supreme Court first examined whether the warrantless GPS tracking violated Jean's Fourth Amendment rights because it involved a trespass – the police physically attached a tracking device to the vehicle. The Court concluded that, although the owner of a vehicle could challenge a government intrusion as a search under a trespass theory, a passenger could not because a passenger has no possessory interest in the vehicle, and thus no Fourth Amendment claim. But that did not end the Fourth Amendment analysis.

Observing that "GPS tracking is qualitatively different from visual surveillance," the Court went on to hold that passengers traveling with the owner of a private vehicle do have a reasonable expectation of privacy that is invaded when the government surreptitiously and continually tracks the vehicle's movements. The Court distinguished these facts from cases in which other forms of warrantless surveillance in public spaces were upheld because of the precision of GPS, the technology's ability to follow a subject whether they are in public or not, and its relatively low cost.

Despite finding a Fourth Amendment violation, the Court declined to apply the exclusionary rule to prohibit the evidence, reasoning that "the search was conducted in objectively reasonable reliance" on existing case law.

The case did not end well for Jean, but it did signal an important move for the Court, recognizing significant privacy interests in the face of new surveillance technologies. This can have lasting consequences, as law enforcement increasingly relies on drone and other technologies.

Additionally, although the Court declined to reach the question of whether Arizona's Constitution provides a greater privacy protection than the Fourth Amendment, because it was not properly raised below. In an interesting concurrence, Justice Clint Bolick observed that "Americans enjoy the protections of not one constitution but fifty-one." Justice Bolick went on to write that state constitutions can "provide greater protections of individual liberty and constraints on government power" than the U.S. Constitution, which is just a floor for the protection of rights.

Eyman v. Wyman; Ball and Gottlieb v. Wyman

by Joel Ard, an attorney with Immix Law Group in Seattle, and David DeWolf, a professor at Gonzaga Law

The Washington Supreme Court issued decisions in two cases addressing procedural mandates of the state constitution's 1906 amendment that reserved to the people the right to legislate by initiative. In *Eyman v. Wyman*, addressing initiatives to the legislature, all nine justices agreed that the legislature could not adopt and amend an initiative during the same session. In *Gottleib v. Wyman*, addressing initiatives to the people, the unanimous Court held that neither the Secretary of State nor the courts had any authority to police and enforce the constitutional mandate that the full text of a proposed initiative appear on signature petitions.

I. Washington's Initiative Amendment

Since 1906, voters in Washington can engage in direct legislation by initiative. The initiative process allows both initiatives to the people and initiatives to the legislature. If an initiative to the people gathers sufficient qualified signatures no later than four months prior to a general election, and is qualified by the Secretary of State, it appears on the November ballot.

Initiatives to the legislature are qualified prior to the start of the legislative session and are first presented for optional legislative action. The legislature may enact an initiative, may reject it including by taking no action on it, or may "propose a different [measure] dealing with the same subject." If the legislature enacts the initiative, it becomes law. If it rejects the initiative, the measure appears on the following general election ballot. If it proposes a different measure, both the initiative and the legislature's measure appear on the ballot, with tiered choices for voters: First whether to legislate at all, and second, which of the two measures to adopt. Notably, measures adopted by popular vote cannot be amended by the legislature within two years except by 2/3 supermajority.

Notably, in the 106 year history of the state initiative process, the legislature has not often adopted initiatives proposed to it, and only twice proposed a different measure for the fall ballot.

II. Eyman v. Wyman

The Secretary of State certified to the 2018 legislature Initiative No. 940, an initiative proposing changes to Washington police use-of-force and training law. After hearings on the initiative, and through discussions with initiative sponsors and representatives of state law enforcement agencies, the legislature drafted a bill amending the initiative. On the final day of the 2018 legislative session, the legislature adopted this amendatory bill. The bill expressly stated that it "amends I-940." The legislature established that it would take effect 91 days after passage, albeit conditioned on the adoption of I-940. The bill received majority votes in both chambers, and the governor's signature. The legislature immediately thereafter adopted I-940 by simple majority in both chambers, with the new law purportedly coming into force 90 days later, one day before the amendatory bill came into force. According to the legislature, I-940, as drafted by the sponsors and signed by several hundred thousand voters, would be law for 24 hours, after which the compromise amendatory bill, adopted a few hours earlier, would become and remain law. Neither measure would appear on the November 2018 ballot.

Prolific initiative sponsor Tim Eyman, joined by State Senator Michael Padden, sued the Secretary of State, seeking an order of mandamus that she place both I-940 and the amendatory measure on the November ballot. The Secretary of State took no position on her legal obligations. The Attorney General's office defended the legislature's actions as enacting both the initiative and amendatory measure, and the initiative sponsors intervened to argue in favor of both the enactment of the initiative and the amendatory measure.

Eyman and Padden argued that the legislature did not "adopt [I-940] without change or amendment." It adopted amendments, then adopted the initiative. No member voting on the initiative could consider that the initiative would become law as drafted and certified to the legislature. As such, the "amend then adopt" strategy constituted rejection of the initiative under the constitution. Any form of rejection – ignoring it, voting it down, or this novel approach of amending it first, then adopting it – resulted in a constitutional mandate to the Secretary to place the initiative on the November ballot. The amendatory measure, which passed by majority vote in both chambers, was a "different measure dealing with the same subject," which the constitution also compelled the Secretary to place on the November ballot.

The state and sponsors argued that the court could not entertain either argument. The "enrolled bill doctrine" limited the court to examining the face of the bill as enrolled in the legislature and as voted on. The four corners of each document that the legislature voted on showed only that the legislature voted in favor of the exact text of I-940 and voted in favor of the amendatory bill, which would take effect later in time. The enrolled bill of I-940 did not contain amendments, and neither enrolled bill showed which had passed earlier in time. They agreed that the Court might reject such actions but only if its review of the full text of the initiative and amendment revealed an obvious attempt to circumvent the initiative power. Because of the negotiated agreement between initiative sponsors and the legislature, they argued, the amendments advanced the policies of I-940 without "needlessly contorting the legislative process."

Eyman and Padden, in response, argued that in asking the Court to investigate and compare the policy objectives of the initiative and amendment, the state and sponsors invited their own violation of the enrolled bill doctrine, by encouraging the Court to look beyond the face of a bill that stated "this amends I-940," and made plain on its face that it was adopted prior to a vote on I-940. If the Court first decided whether an amendment advanced the policies of an initiative before determining whether the initiative had or had not been "adopted without change or amendment," it would exceed its proper role and ignore the plain mandate of the constitutional text.

The state supreme court ordered I-940 onto the November ballot, but declared that the amendatory bill had no force or effect. It issued three opinions and one concurrence. In an unusual structure, the court labeled the two opinions joined by five justices as to the disposition of I-940 as dissents, while it identified as "the lead opinion" a position joined by only four justices, which would have held that I-940 became law during the 2018 regular

session. Ultimately, five justices agreed that I-940 was not adopted without change or amendment during the 2018 regular session, and therefore had to appear on the November ballot. Four of those same justices would have held that the amendatory act constituted a "different [measure] dealing with the same subject" and also had to appear. One justice who voted for I-940 appearing on the ballot noted that the amendatory measure contained a clause that voided the measure if I-940 did not become law during the regular session. Giving force and effect to that legislative statement, the alternative no longer had any force and could not appear on the ballot.

Four justices would have held that the legislature, by voting on a document that contained the precise text of the initiative, thereby adopted it as law in the state. It therefore should not appear on the November ballot. Those four justices also agreed that the alternative measure could not become law because the legislature, by enacting it, violated the constitutional allocation of powers between the legislature and the people established by the initiative process.

Despite the very unusual organization and labeling of the various opinions, the final order to the Secretary was clear: I-940 would appear on the November ballot, alone, for a vote of the people. The amendatory measure would not. In fact, the legislature's position, that it had plenary power to enact and amend initiatives during a session, garnered no vote from any member of Washington's Supreme Court.

In a final interesting footnote, the legislative Office of Code Reviser has subsequently taken the position that I-940 was adopted and is law, and that the November vote is "advisory." As of this writing, in September 2018, it remains an unanswered question what law governs police use of force, and whether amendments to I-940, if it is adopted in the fall, require a supermajority in the legislature. At least one police officer facing legal action over use of force during the pendency of the litigation is considering a due process challenge based on the remaining open questions over the law governing police conduct in the state.

III. Ball and Gottlieb v. Wyman

The state constitution requires that every initiative petition circulated for voter signature contain the full text of the proposed measure. That text is constitutionally mandated to appear in three places: filed with the Secretary of State's office prior to circulating petitions, on the petitions, and in a voter information pamphlet. In early summer 2018, sponsors circulated Initiative No. 1639, which proposes new restrictions on firearms sales and storage in the state. While the text filed with the Secretary contains strikeouts and underlines showing deletions and additions to existing law, the petitions did not. Representatives of the Second Amendment Foundation and NRA sued, seeking an order of mandamus forbidding the Secretary of State to put the initiative on the fall ballot. According to plaintiffs, the courts were required to construe the initiative enabling statutes broadly to enforce the initiative amendment, which included the full text requirement. The statute further required the text to be readable, which the petitions were not. According to the plaintiffs, the appropriate broad reading of the statute requiring the Secretary to count signatures and certify the initiative also gave her the obligation to consider whether the petitions had the full text on them, and whether it was readable. Finally, they argued, the constitutional initiative amendment was "self-executing," so that if the legislature had declined to assign to the Secretary the obligation to police and enforce the full text requirement, the courts must do it.

The sponsors intervened, arguing that neither the secretary nor the courts had authority to police the full text requirement. They also argued that the petitions did contain all the words of the initiative, so that it complied with the requirement. Finally, they argued, the courts applied statutes implementing the initiative to put proposals on the ballot, not exclude them.

The Secretary took the position that the legislature had given her no statutory authority to take any action beyond counting the number of signatures. She did, however, request that the court exercise its mandamus authority, evaluate whether the petitions complied with the constitution and statute, and order her to exclude the initiative if it did not.

The trial court agreed with the sponsors and Secretary that the legislature had not given the Secretary any authority other than to count signatures. However, it concluded, the Court's constitutional mandamus authority extended to policing and enforcing the requirements of the initiative amendment to the constitution, including the full text requirement, as well as the statutory requirement that the text be readable. The petitions complied with neither, and the court ordered the secretary not to include the initiative on the November ballot.

The sponsors appealed to the state supreme court. In a 9-0 decision, the court agreed that the Secretary's authority, granted by the legislature, did not include any authority to consider whether a petition contained the "full text" of an initiative measure. It also concluded, contrary to the trial court's view, that the courts had no authority to police or enforce that requirement. Thus, whether or not the petitions had contained the full text of the measure, and whether or not that text was readable, because it garnered sufficient signatures, it must appear on the November ballot. As a result of this decision, absent legislative action to assign reviewing authority to the Secretary of State, no petition sponsor needs to comply with the first constitutional requirement of the state constitutional initiative process.

The authors were counsel to plaintiffs in both cases.

King v. Mississippi Military Department

by Andy Lowry, a partner in the Jackson, Mississippi office of Balch & Bingham, LLP

In an 8-0 decision on June 7, 2018, the Mississippi Supreme Court announced that it will no longer give any deference to state agencies' interpretations of their governing statutes. *King v. Miss. Military Dep't*, 245 So. 3d 404 (Miss. 2018). This holding marks a sharp departure from the traditional deference the Mississippi state courts had shown to state agencies, although as the decision correctly states, that deference had been eroding in recent years.

I. Background and Proceedings

Cindy King worked as a supervisor in the Environmental Office at Camp Shelby, Mississippi, and her employer was the Mississippi Military Department. The Department suspected her of misconduct, and after an investigation, terminated her employment pursuant to Miss. Code Ann. § 33 3 11(a) (Adjutant General "may remove any of [the Department's employees] at his discretion").

King appealed to the state Employee Appeals Board. The Department moved to dismiss her appeal because she was an at-will employee, rather than a state-service employee entitled to the Board's procedural protections. The Board's hearing officer interpreted § 33 3 11 as giving the Department's head the authority to fire King at his sole discretion, and when King appealed to the full Board, it affirmed that decision. King's appeal to Mississippi circuit court was likewise ineffective, and she appealed finally to the Mississippi Supreme Court.

II. Ruling

The decision in *King v. Mississippi Military Department* ultimately affirmed the ruling for the agency, but made it clear that the Court sees the judicial branch as the sole authority under the Mississippi Constitution when it comes to interpreting statutory law.

Writing for a unanimous Court, Justice Josiah Coleman[26] took note of the Court's precedents providing for *de novo* review of an administrative agency's interpretation of rules or statutes governing its operation, which however also required the courts to give "great deference to the agency's interpretation," based on the agency's presumed experience with everyday activities pursuant to those statutes. Nonetheless, the Court also noted, its recent decisions have tended to back away from "the contradiction inherent in *de novo* but deferential review" (¶ 9).

Furthermore, the Court held, Mississippi's constitution provides for "strict constitutional separation of powers" in the first section of its first article: while it is for the Legislature to enact statutes, it is for the judicial branch to interpret statutes once enacted. Article 1, Section 2 of the state constitution further forbids anyone in one branch of government to exercise any powers belonging to another branch. The Court held that, while executive-branch agencies must decide for themselves what statutes mean when the judicial branch has not spoken, it violates Article 1, Section 2 for the courts to give any deference to an agency's interpretation of a statute when that statute comes before the courts for interpretation.

The Court thus went on to hold (at ¶ 12):

> Pursuant to the foregoing reasoning, we announce today that we abandon the old standard of review giving deference to agency interpretations of statutes. Our pronouncements describing the level of deference were vague and contradictory, such that the deference could be anywhere on a spectrum from "great" to illusory. Moreover, in deciding no longer to give deference to agency interpretations, we step fully into the role the Constitution of 1890 provides for the courts[,] and the courts alone, to interpret statutes.

In so holding, the Court stated that it found "persuasive" the reasoning in a concurring opinion to *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016) (Gorsuch, J.). Concurring with his own decision for the court, then-Judge Gorsuch observed that, in the absence of judicial deference to the statutory interpretations of administrative agencies, "courts would then fulfill their duty to exercise their inde-pendent judgment about what the law is." *Gutierrez-Brizuela*, 834 F.3d at 1158 (Gorsuch, J., concurring) (quoted in *King* at ¶ 12).

Moving on to the merits of the case before it, the Court held that § 33 3 11 is in apparent conflict with § 25 9 131 and related statutes pertaining to the Employee Appeals Board. Applying the canon of statutory interpretation that a specific statute will control over a general one, the Court held that § 33-3-11 is the more specific statute as regards the termination of Department employees. Rejecting as fruitless King's argument for reading the statutes in pari materia, because even if the Board found for King it could not compel the Department to rehire her, the Court thus affirmed the Department's decision, but on the basis of its own *de novo* reading of the relevant statutes.

The *King* decision places Mississippi in the minority of state jurisdictions that squarely reject anything resembling *Chevron* deference, along with Delaware and Michigan, whose courts likewise cited their constitutional separation of powers in rejecting deference to agencies' statutory interpretations. *Pub. Water Supply v. DiPasquale*, 735 A.2d 378, 382 (Del. 1999); *In re Complaint of Rovas v. SBC Michigan*, 754 N.W.2d 259, 271–72 (Mich. 2008). Whether Mississippi will apply its new rule to agencies' interpretations of their own regulations, however, is not addressed by *King*, and thus remains a question for another day.

26 Chief Justice William L. Waller, Jr., who attained the rank of brigadier general in the Mississippi Army National Guard, did not participate in the decision of the case.

Savely v. Utah Highway Patrol

by Adam Pomeroy, a Deputy County Attorney at the Utah County Attorney's Office

Suppose a police officer takes cash from you saying it is being forfeited but that you can go to the local state courthouse and ask for it back. What would you think when you got to court and the government insisted you had to go to federal court instead? Is it just for government to change the rules halfway through the game? Does it comply with due process?

Savely v. Utah Highway Patrol[27] grappled with that issue. In technical terms: when a state law enforcement officer seizes money for forfeiture under color of state law but the state fails to initiate forfeiture proceedings and a federal law enforcement agency initiates them instead, do state courts or federal court have in *rem* jurisdiction over the money? By unanimously deciding that the state court has jurisdiction, the Utah Supreme Court has provided important guidance on which procedures and protections – federal or state – apply in a given case.

In November, 2016, Utah Highway Patrol seized nearly $500,000 cash from Kyle Savely. A UHP trooper stopped Mr. Savely for a minor traffic violation. When Mr. Savely refused a consensual search of his car, the trooper brought a K9 to the scene. After the dog alerted to the presence of drugs, the car was searched. No illicit substances were found, but the trooper did find fifty-two bundles of cash. The trooper seized the money and provided Mr. Savely an asset seizure notification form as required by Utah state law.[28]

Although the government later alluded to potential interstate criminal activity by Mr. Savely, no such charges have been brought against him. In fact, Mr. Savely was eventually found not guilty of the traffic offense after a bench trial that he himself did not even attend.[29]

After the seizure, the money sat in a UHP bank account. State law gives officials seventy-five days to begin forfeiture proceedings,[30] but no forfeiture proceedings were ever filed in state court. During this time, however, the DEA obtained a seizure warrant for the money from a federal magistrate judge so they could initiate federal forfeiture proceedings.

At the expiration of the seventy-five days Mr. Savely petitioned a state court for the return of his money. Although the state court originally agreed that the funds should be returned to Mr. Savely, the court reversed itself on a motion to reconsider and found that the seizure warrant issued by the federal magistrate had deprived state courts of in rem jurisdiction. Mr. Savely appealed.

All parties agreed that the first court to obtain in rem jurisdiction does so to the exclusion of all other courts. The question was whether the state district court or the federal district court did so first.

Mr. Savely contended that the state district court acquired in rem jurisdiction when UHP provided him with a notice of intent to seek forfeiture. Amicus for Mr. Savely, the Libertas Institute, argued that the relevant code provisions imbued state courts with in *rem* jurisdiction from the moment of seizure by a state agent.[31] UHP and its amicus, the United States, argued that in *rem* jurisdiction does not begin until there is a court filing. Thus, they contended that the federal court obtained in *rem* jurisdiction when the federal seizure warrant was requested.

To begin with, the Utah Supreme Court reviewed relevant state and federal law and concluded that it is possible for a state court to exercise in *rem* jurisdiction of a *res* even without any court filing. (This section of the opinion is particularly relevant for practitioners facing that issue in other courts.)[32] The question was whether Utah's statutes actually gave state courts jurisdiction without a filing in this situation.

On that question, the Court noted that various provisions of state law could be used to defend any of the positions taken by the parties. Finding ambiguity in the law, the court called it "one of those rare circumstances" where it was appropriate to turn to legislative history, which in this case was a contentious citizens' initiative. The history around the initiative "overwhelmingly" showed that "one of the main goals of the Act is to provide additional protections to property owners when the state holds their property for forfeiture." Thus, the Court found the ambiguity should be resolved in favor of ensuring that forfeitures in Utah would be under the protections provided by state law and not the lesser protections provided under federal law.

The Court then made two important findings. First, state courts obtain in *rem* jurisdiction over property no later than when the state holds it for forfeiture even if no proceedings have been filed in court. And second, Mr. Savely was correct: one way that property becomes held for forfeiture is when a seizing agency serves a notice of intent to seek forfeiture.

This ruling brought much needed clarity to the effect of serving a seizure notice: such notices imbue state courts with in *rem* jurisdiction with no further action needed.

However, the ruling left numerous other questions unresolved:

- When a state officer seizes property for forfeiture but fails to provide the required notice, when does in rem jurisdiction begin?
- Can a federal agency intervene between the seizure and the giving of notice and obtain federal jurisdiction?
- When a state officer happens to be cross-deputized as a federal agent, can the officer choose to issue a federal seizure notice instead of state seizure notice as is seemingly required by the statute?
- When state officers participate on a multi-jurisdiction taskforce with federal agents, how do state law requirements apply to their work?

27 2018 UT 44.

28 Utah Code Ann. 24-4-103(1).

29 Utah v. Savely, No. 165204385 (Summit Co. Just. Ct. Feb. 21, 2018).

30 Utah Code Ann 24-4-104(1)(a).

31 The Utah Supreme Court declined to consider this argument because the seizure and notice occurred concurrently.

32 2018 UT 44 at ¶¶19-24.

Black v. Central Puget Sound Regional Transit Authority

by Joel Ard, an attorney with Immix Law Group in Seattle

This lawsuit, now pending appeal to Washington's intermediate appellate court, seeks to enforce a constitutional limit on legislative power. Article II § 37 of the state constitution requires that "No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length." Plaintiffs are challenging a 2015 act that purported to allow a local government (Sound Transit, a regional transportation district) to levy a motor vehicle excise tax ("MVET"). A 2006 statute was already in place that specified how vehicles would be valued. The 2015 act didn't use the current valuation schedule, but instead directed the use of a repealed 1996 act in lieu of the 2006 statute as the basis for calculating a motor vehicle excise tax. Instead of setting forth "at full length" the 2006 statute and showing how it was being amended, the 2015 act simply said "Notwithstanding any other provision . . . ." Article II § 37 of the state constitution provision has repeatedly been invoked, successfully, by Sound Transit, to invalidate legislation obliging it to reduce taxes. Plaintiffs intend to see it applied to require the same level of strict compliance with the state constitution when legislation raises taxes.

An MVET is an annual tax levy, paid together with vehicle registration. The tax is calculated by multiplying the tax rate times a vehicle's starting value (often MSRP), times a valuation schedule or depreciation schedule that establishes by statute the decrease in value of a vehicle by age. MVETs have had a rocky and contentious history in Washington state, leading to the current litigation. CPSRTA, or Sound Transit, first received authority to levy an MVET at 0.3% of vehicle value starting in 1999. It issued bonds secured by that MVET revenue. The measure met with substantial opposition after imposition, in part due to the perception that the valuation schedule taxed vehicles based on gross overstatements of value. A statewide initiative repealed the authorization, and in ensuing litigation the state supreme court held that the repeal substantially impaired those bond contracts. Further, it held, it could not require Sound Transit to exercise its contractual authority to retire the bonds immediately, and therefore, Sound Transit could continue to levy the MVET for so long as the bonds remained outstanding.

In 2006, the legislature enacted a new valuation schedule, codified at RCW 82.44.035. The schedule lowered taxable value of vehicles by about 25% as compared to the repealed schedule. The schedule applies to "any locally imposed motor vehicle excise tax," but Sound Transit took the position that it was not required to use the new schedule for its existing MVET. Legislative history documents confirm that the 2006 legislature discussed the cost to Sound Transit of paying the Department of Licensing to use two valuation schedules in parallel only if and when it instituted a new MVET while its old MVET remained in force, and in 2010 the legislature confirmed that Sound Transit could continue to use the repealed schedule for the 1999 MVET.

In 2015 the legislature passed a bill that, among other things, authorized a new Sound Transit MVET. In doing so, it rendered the 2006 valuation schedule inapplicable for so long as the 1999 bonds remained outstanding. It did so by broad reference to the chapter in which the valuation schedule is codified, stating that the existing contents of that chapter should be disregarded in favor of the chapter as it existed in 1996 until such time as the old bonds have been retired.

Plaintiffs sued on behalf of the class of aggrieved taxpayers, and moved for summary judgment of the constitutional question prior to addressing class issues. The challenged act reads, in pertinent part, "Notwithstanding any other provision of this subsection or chapter 82.44 RCW . . . [a new MVET] must comply with chapter 82.44 RCW as it existed on January 1, 1996 . . ." According to plaintiffs, this amends existing RCW 82.44.035, which on its face provides the valuation schedule "For the purpose of determining any locally imposed motor vehicle excise tax." However, the amended section is not set out at full length in the new, amendatory act, triggering review under Article II § 37 of the constitution. While the state supreme court has identified a few exceptions to the requirement, this act does not fall into any of them. Relevant to the arguments presented to the trial court, it is not a complete act that incorporates existing law by reference, because it instead renders existing law inapplicable. It is also not an incidental amendment, because the act establishes an MVET, and the valuation schedule is key to the calculation of the MVET.

The state deferred any defense of constitutionality to Sound Transit, which argued that the first question was not whether the new act amended the old, but whether it was a "complete act." If so, amendatory or not, Art. II § 37 did not apply. Reading the entire five sentences as though everything referred to in them were actually reproduced in full, a person would understand his tax liability, rendering it a complete act. If it amended an existing act, it did so only incidentally, because the main purpose of the act was to authorize a tax, not establish a valuation schedule. Other statutes had similarly used the word "notwithstanding" to avoid application of existing law, including by suspending application of a law, and yet avoided the Supreme Court evaluating them under Art. II § 37. Therefore, they claimed, Art. II § 37 also did not govern this statute.

In the words of local news coverage, the trial court "provided little rationale for her choice" in adopting Sound Transit's position. The plaintiffs have noted their appeal to the state's intermediate appellate court.

1A Auto, Inc. v. Sullivan

by Jacob Huebert, a Senior Attorney at the Goldwater Institute

Massachusetts law bans for-profit corporations and other business entities from contributing to political candidates and committees. And, unlike federal law, it doesn't even allow businesses to make contributions indirectly through a PAC.

On the other hand, Massachusetts allows unions to give as much as $15,000 to the political candidates, committees, and parties they favor, and it allows them to create PACs to give even more.

In 2015, two small businesses represented by the Goldwater Institute sued to challenge this scheme for violating their rights under the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and similar provisions of the Massachusetts Constitution. In September 2018, the Massachusetts Supreme Judicial Court ruled against them.

The Massachusetts court concluded it was bound to uphold the ban under *FEC v. Beaumont*, in which the U.S. Supreme Court rejected a First Amendment challenge to the federal ban on corporate political contributions.

But the court did note that "the landscape of campaign finance law has changed significantly since *Beaumont*," particularly with *Citizens United v. FEC*. And it acknowledged that *Beaumont* upheld the federal ban based partly on two supposed government interests that *Citizens United* declared to be illegitimate purposes for campaign finance rules: protecting dissenting corporate shareholders and countering the "misuse" of corporate wealth to wield "undue influence [over] an officeholder's judgment." Still, the court believed it had to follow *Beaumont* because *Citizens United* didn't overrule it.

The plaintiffs, however, maintain that *Beaumont* shouldn't have doomed their claims in any event because the federal ban it upheld differed from the Massachusetts ban in two key respects: It gave corporations the option to make contributions indirectly through a PAC, and it applied equally to corporations and unions.

The Massachusetts court also rejected the plaintiffs' equal protection claim. It concluded that, if the ban on corporate contributions would tend to prevent corruption or the appearance of corruption at all (as the court assumed it would), it could survive the less-than-strict scrutiny the Supreme Court prescribed for challenges to campaign-contribution limits in *Buckley v. Valeo*. The court saw no problem with the state's failure to likewise limit unions, citing a Supreme Court decision stating that "policymakers may focus on their most pressing concerns."

A separate opinion from Massachusetts Chief Justice Scott L. Kafker concurred in the result but criticized the majority for so easily brushing aside the statute's discrimination in favor of unions and against businesses. But he too found *Beaumont* controlling unless and until the Supreme Court applies the reasoning of *Citizens United* to subject corporate-contribution bans to greater scrutiny.

State of Indiana v. Norfolk S. Ry. Co.

by David Johnson, Corporation Counsel for the City of Lawrence, Indiana

The Indiana Supreme Court unanimously held that Indiana's blocked-crossing statute is expressly preempted by the Interstate Commerce Commission Termination Act ("ICCTA"). Indiana's blocked-crossing statute prohibits railroads from blocking highway grade crossings for more than ten (10) minutes. A violation is a Class C infraction and subject to a $200 fine.

Between December 2014 and December 2015, Norfolk Southern Railway Company ("Norfolk Southern") received twenty-three (23) citations for blocking railroad crossings near its train yard in Northeastern Indiana. Norfolk Southern moved for summary judgment on the citations for violations arguing that the ICCTA and Federal Railroad Safety Act ("FRSA") expressly preempted Indiana's blocked-crossing statute. The trial court granted summary judgment finding that the ICCTA and the FRSA preempt the blocked-crossing statute. The State appealed, and the Court of Appeals reversed because neither the ICCTA nor the FRSA explicitly list blocked-crossing statutes as preempted.

The issues considered by the Indiana Supreme Court were: 1) whether the presumption against preemption applied in this case; and 2) whether the ICCTA and the FRSA expressly preempted Indiana's railroad blocked-crossing statute. The Court applied the presumption against preemption, and held that the blocked-crossing statute is expressly preempted by the ICCTA without addressing the FRSA.

First, the Court determined that the presumption against preemption applied. Generally, there is a strong presumption, rooted in federalism, against preemption. An exception to the rule applies in instances where the conduct being regulated has historically been within the purview of the federal government. *United States v. Locke*, 529 U.S. 89, 108 (2000). Norfolk Southern argued that the presumption should not be applied since rail transportation has historically been regulated by the federal government. In the case of railroads, the federal government has for well over a century provided regulation and oversight. However, while the Court considered the federal government's long-standing regulation of railroads, the Court distinguished between the regulation of railroads and the regulation of railroad crossings. Indiana has regulated blocked railroad crossings, the regulation of which remains a part of the State's police power, going back to the 1860s, and the blocked-crossing statute in its current form goes back to 1972. Because of the State's longstanding concern with blocked crossings, the Court applied *CSX Transp., Inc. v. Easterwood*, and held that the presumption against preemption applies since the presumption covers those matters that are traditionally regulated by the State as railroad crossings are. 507 U.S. 658 (1993).

Second, the test applied by the Court was whether Indiana's blocked-crossing statute had "the effect of managing or governing rail transportation." *Delaware v. Surface Transp. Bd.,* 859 F.3d 16, 19 (D.C. Cir. 2017) (internal quotations omitted). The ICCTA provides that the Surface Transportation Board's ("STB") jurisdiction over transportation by rail carriers and the remedies provided under the ICCTA are "exclusive and preempt the

remedies provided under . . . State law." 49 U.S.C. § 10501(b). The Court held that because Norfolk Southern would have to have shorter trains, move at faster speeds, or otherwise change its operational choices to comply with the statute, the blocked-crossing statute regulates transportation. The State argued that the ICCTA would only preempt the blocked-crossing statute if the regulatory impacts were economic, but the Court rejected that argument because the plain text of the ICCTA does not limit preemption to economic regulations. However, the Court was clear that State maintains its traditional authority over rail crossings. Because the ICCTA preempts Indiana's blocked-crossing statute, the Court did not address the FRSA.

Over the last year, several municipalities in and around central Indiana have had problems with trains blocking crossings for extended periods of time. Given the Court's ruling, municipalities have little recourse other than to, as the Court suggested, file complaints with the STB's Rail Customer and Public Assistance Program. Meanwhile, frustrated commuters are at the mercy of Congress and the federal government to provide relief at blocked railroad crossings.

Zarate v. Tennessee of Cosmetology and Barber Examiners

by Braden H. Boucek, Vice President of Legal Affairs at the Beacon Center of Tennessee

Why should a barber have to graduate high school? Barbers cut hair. They don't need to know calculus or explore themes of alienation in King Lear. So why does Tennessee require barbers have a high school diploma or a GED even before they can attend barber school? And then once in barber school, barbers are still required to get 1,500 of training, and then pass a state exam. Won't that ensure everything a barber could possibly need to know to ensure public safety? This is the question posed in Tennessee in *Zarate v. Tennessee of Cosmetology and Barber Examiners*.

The high school requirement appears irrational enough on its own. But when compared to other professions that do not require a high school degree, it becomes downright mind-blowing. Cosmetologists don't need to graduate high school and they have virtually the same job description. Other jobs in Tennessee that a person can do without a high school degree include Emergency Medical Responders, who provide lifesaving interventions in emergency situations, as well as governor, senator, and representative. If Elias wanted to save a life or write a law, his educational level would not disqualify him. Unfortunately, it does disqualify him from cutting hair.

Elias is the picture of the American determination, with a particular kind of spirit only found in a city as soulful as Memphis. He has not had an easy life. When he was a boy, his mother was pushing their stranded car off a busy road when a truck slammed into the back of the car, crushing her and sending Elias into a coma. Not long after, his father abandoned the family. At age thirteen (13), Elias was on his own in the streets of Memphis. Grandparents first cared for his younger brother and sister, but the situation was to get still worse.

Elias, although essentially homeless, still made it to his senior year of high school, attending classes by day, working odd jobs at night, and couch surfing when he needed sleep. But he had to drop out to begin assuming care of his brother and sister. His academic career was derailed for good. In the middle of his senior year, he dropped out and dedicated himself solely to their needs.

Now, ten (10) years later, Elias is settled down and a father of his own baby girl. He is ready for something more satisfying than just a job. He wants a career. And he has always had a dream of becoming a barber.

When he was a boy, he grew up around barbershops. He found the calling endlessly fascinating. He loves the scissors, the gowns, the white shirt, and the barber pole. Barbering is the perfect career for someone like Elias who is likeable, creative, hardworking and social. And it is one of the few stable professions with a pathway to business ownership available to persons without a high school degree. So why would Tennessee deny that to him?

Nothing is more American than Elias's relentless determination to rise in the face of this adversity. He wants nothing other than to redeem the most American of promises – to make sure that his family has it better than he did. He has sacrificed enough by delaying his dream in service of others. This would be his time, but for a Tennessee law with no legitimate justification.

It is hard not to see the hand of protectionism behind the scenes. The challenge is to try and even dream up another justification other than protecting licensed barbers from upstarts. And the high school requirement is not some relic; it was passed in 2015 as part of a sprawling "clean up" bill that never even mentioned that it was upping the standards for barbers. The legislators didn't even seem to know about it. Unsurprisingly, there is no record of consumer complaints over insufficiently educated barbers mentioned in the legislative record.

Typically, review of economic liberty claims falls under the rational basis test. Under this form of review, the government is given extreme latitude, a fact the government makes evident when responding to these claims. The government will argue that there is no such thing as a constitutionally arbitrary law when it comes to taking away a person's right to earn a living. Why should that be when we spend most of our time at our jobs? After our families, what else is more important? And even more arbitrary is the decision to a greater burden on barbers then are placed on other jobs, including ones that would seem to pose an equal (cosmetology) or greater (EMR) risk to public safety. If any case was calculated to test for whether such a thing as a constitutionally arbitrary law exists, this is it.

Tennessee typically follows the example of federal courts when it comes to economic liberty claims, but it has not really been put to the test recently. Of course, the states have their own constitutions. Those can and often do have different constitutional protections for liberty as befits a separate and equal sovereign. There's no reason why Tennessee or any other state should feel obligated to give the government this much rope to intrude on one of our most precious rights – the right to earn a living.

Tennessee was one of the first states created after the original thirteen. The principle interests of its founders were all economic as small farmers streamed across the Appalachian Mountains in search of good land after the Revolutionary War. Its people had a different experience. Its Constitution is a reflection of a distinct heritage. Economic liberty should be considered a vital and fundamental right in Tennessee.

State ex rel. McCann v. Delaware County Board of Elections

by Matthew R. Byrne, Of Counsel in Jackson Lewis, P.C.'s Cincinnati, Ohio office, and Julie E. Byrne, an attorney at J.P. Ashbrook, LLC in Ohio

On first glance, *State ex rel. McCann v. Delaware County Board of Elections*,[33] an expedited elections case decided by the Ohio Supreme Court, appears to be an unremarkable, run-of-the-mill statutory interpretation case. In *McCann*, the court addressed the question of whether petition forms used to place a township zoning referendum on the ballot were filled out correctly. One could imagine that few people other than the fine citizens of Harlem Township, Ohio would care about the Ohio Supreme Court's opinion on the matter.

But just as a book should not be judged by its cover, neither should court opinions be judged solely by the limited holdings that make their way to case summaries. In separate concurring and dissenting opinions in *McCann*, four of the Ohio Supreme Court's seven justices signaled their openness to ending Ohio's continued application of *Chevron* deference.

I. An Anti-*Chevron* Trend?

There has been much discussion in recent years regarding the possibility that the United States Supreme Court may revisit the standard for judicial deference to administrative agencies' interpretations of statutes set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[34] Speculation increased with the nominations and confirmations of Justices Neil Gorsuch and Brett Kavanaugh, both of whom have written opinions critical of *Chevron* deference. Then-Judge Gorsuch went right to the heart of criticisms that *Chevron* gives too much power to the administrative state when he wrote that "*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty."[35]

Concern about *Chevron* deference is not limited to the federal courts. In 2018, both the Wisconsin Supreme Court and the Mississippi Supreme Court issued decisions rejecting *Chevron*-style deference for judicial review of state administrative agency regulations.[36] Now, it appears that Ohio may soon join the small but growing list of states abandoning *Chevron*.

II. The *McCann* Decision: Background and Per Curiam

The *McCann* case arose in the context of a local zoning battle. Ohio law allows citizens to place certain referenda on the ballot if they gather enough voter signatures.[37] Signatures

33 State ex rel. McCann v. Del. Cty. Bd. of Elections, 2018-Ohio-3342, 2018 U.S. Dist. LEXIS 2055, 2018 WL 4026314 (Ohio Aug. 21, 2018).

34 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

35 Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

36 Tetra Tech EC, Inc. v. Wis. Dep't of Revenue, 382 Wis. 2d 496, 2018 WI 75, 914 N.W.2d 21 (Wis. 2018); King v. Miss. Military Dep't, 245 So.3d 404 (Miss. 2018).

37 *McCann*, 2018-Ohio-3342, at ¶ 2.

are collected on petition forms.[38] A group of citizens in Harlem Township, Ohio who wanted a zoning referendum placed on the ballot filed petitions with the Delaware County Board of Elections.[39] Two other citizens challenged the board of elections' decision to count the signatures on certain petitions they believed were defective under state law.[40] They sought a writ of prohibition from Ohio's highest court.[41]

The Ohio Supreme Court issued its decision on August 21, 2018. Three of the seven justices joined a per curiam decision finding that the writ of prohibition should be granted.[42] To reach this conclusion, the three justices explicitly relied on the Ohio Secretary of State's interpretation of the relevant Ohio election statute concerning petition circulators' obligations when completing a petition form.[43] The per curiam opinion stated that "This court has looked to the design of the secretary of state's forms to suggest the secretary's interpretation of statutes, to which this court typically gives 'great deference.'"[44] The per curiam opinion also stated that "the secretary's interpretation of the requirement on [petition] form 6-O is owed deference."[45]

The importance of *McCann*, however, lies not in the per curiam opinion, but in a concurrence and a dissent.

III. Justices DeWine and Fischer Concur in *McCann* to Criticize *Chevron*

Justice R. Patrick DeWine wrote a separate opinion, joined by Justice Patrick Fischer, concurring in the court's judgment only.[46] Like the three justices who joined the per curiam opinion, Justice DeWine concluded that the writ of prohibition should be granted, but he based this conclusion solely on the text of the relevant statute.[47] After referring to the per curiam opinion's "great deference" to the Ohio Secretary of State's interpretation of the relevant statute, Justice DeWine stated that "[i]n an appropriate case, we ought to take a hard look at our practice of deferring to statutory interpretations made by administrative agencies and nonjudicial officials."

Justice DeWine then explained in detail why he believed the court should more closely examine the issue of deference. He noted that "[j]udicial deference to an agency's interpretation of a statute is at odds with the separation-of-powers principle that is central to our state and federal Constitutions," and noted that the Ohio Constitution explicitly vests judicial power *only* in the state's courts.[48] Justice DeWine then quoted from three concurring and dissenting opinions written by Chief Justice John Roberts and Justice Clarence Thomas in which the Justices questioned deference to administrative agencies and emphasized the judiciary's need to protect its role in saying what the law is.[49] Justice DeWine stated that "judicial deference to administrative agencies on matters of legislative interpretation aggrandizes the power of the administrative state at the expense of the judiciary and officials directly accountable to the people."[50]

Justice DeWine also noted that federal *Chevron* deference "has come under severe and repeated criticism," that the U.S. Supreme Court "pulled back on the reach of *Chevron* deference" in *King v. Burwell*, and that Wisconsin and Mississippi recently "retreat[ed] from doctrines that afforded deference to agency interpretations of law."[51]

Justice DeWine also made the important point that Ohio's version of *Chevron* deference is "not well developed" and "could be seen as more expansive than . . . *Chevron*."[52] In support of this claim, he noted that the per curiam opinion, unlike *Chevron*, did not first conclude that the relevant statutory language was ambiguous before deferring to the Secretary of State's interpretation.[53]

IV. Justices Kennedy and French May Be Open to Reconsidering Deference

Justice Sharon Kennedy authored a dissenting opinion joined by Justice Judith French. Applying a textual analysis, Justice Kennedy disagreed with the conclusions of both the per curiam opinion and Justice DeWine's concurrence regarding the meaning of the relevant statute.[54] She explained that "[i]n construing a statute, we may not add or delete words" and concluded that the majority had done exactly that by requiring that the petition

38 *Id.* at ¶¶ 14-17.

39 *Id.* at ¶ 2.

40 *Id.* at ¶¶ 8-10.

41 *Id.* at ¶ 10.

42 *Id.* at ¶¶ 1-25.

43 *Id.* at ¶¶ 20, 23.

44 *Id.* at ¶ 20.

45 *Id.* at ¶ 23.

46 *Id.* at ¶¶ 26-34.

47 *Id.* at ¶¶ 26-29.

48 *Id.* at ¶ 30 (quoting Ohio Const., Art. IV, § 1).

49 *Id.* at ¶ 31 (quoting Michigan v. Environmental Protection Agency, __ U.S. __, 135 S. Ct. 2699, 2712, 192 L. Ed. 2d 674 (2015) (Thomas, J., concurring) ("deference to administrative agency interpretations of the law "wrests from Courts the ultimate interpretive authority to 'say what the law is,' . . . and hands it over to the Executive"); Perez v. Mtge. Bankers Assn., __ U.S. __, 135 S. Ct. 1199, 1219, 191 L.Ed. 2d 186 (2015) (Thomas, J., concurring) (discussing the judiciary's role in providing an independent check on the executive branch); City of Arlington v. FCC, 569 U.S. 290, 312-317, 133 S.Ct. 1863, 185 L.Ed. 2d 941 (2013) (Roberts, C.J., dissenting) (discussing problems with the growing power of the administrative state and *Chevron* deference)).

50 *Id.* at ¶ 31 (citing *City of Arlington*, 569 U.S. at 312-17).

51 *Id.* at ¶ 33 (citing Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 Geo. J. L. & Pub. Pol'y 103 (2018); Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187 (2016)); King v. Burwell, __ U.S. __, 135 S. Ct. 2480, 2488-2489, 192 L. Ed. 2d 483 (2015); *Miss. Military Dep't*, 245 So.3d 404; *Tetra Tech EC*, 382 Wis. 2d 496.

52 *McCann*, 2018-Ohio-3342, at ¶ 32.

53 *Id.*

54 *Id.* at ¶¶ 35-50.

circulator physically write in the number of signatures on the petition form.[55]

In a footnote, Justice Kennedy wrote, "I will leave for another day the issue whether the judicial branch truly owes deference to administrative agencies' interpretations of statutes."[56] But while Justice Kennedy could have said nothing more about deference, she went further, quoting Justice Anthony Kennedy's concurrence in *Pereira v. Sessions*:

> [I]t seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* . . . and how courts have implemented that decision. The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary.[57]

It appears, then, that Justices Kennedy and French may share the concerns of Justices DeWine and Fischer that the Ohio Supreme Court's *Chevron*-style deference to administrative agency interpretations may not have respected the Ohio Constitution's vesting of judicial power solely in the courts. These four justices constitute a majority of the Ohio Supreme Court.

V. Bottom Line

A majority of Ohio Supreme Court justices have essentially issued an invitation for a challenge to *Chevron*-style deference under Ohio state law. Any takers?

55 *Id.*at ¶ 50.

56 *Id.* at ¶ 44 n. 2.

57 *Id.* (quoting Pereira v. Sessions, __ U.S. __, 138 S. Ct. 2105, 2120, 201 L. Ed. 2d 433 (2018) (Kennedy, J., concurring)).

State ex rel. Blankenship v. Warner

By Elbert Lin and Katy Boatman, attorneys at Hunton Andrews Kurth LLP

After Don Blankenship lost his primary bid to be the Republican candidate in the 2018 U.S. Senate race in West Virginia, he changed his party registration to The Constitution Party and filed an application to run in the general election as that party's candidate. But West Virginia, like more than forty other states, has a sore loser law that prevents primary losers from changing parties and running in general elections. Citing that law, the West Virginia Secretary of State denied his application.

Mr. Blankenship and The Constitution Party directly petitioned West Virginia's highest court, the Supreme Court of Appeals, for a writ of mandamus to force the Secretary of State to add him to the ballot. The petition included both a statutory challenge to the Secretary of State's denial of his application and a constitutional challenge to the sore loser law. The case had to be resolved quickly in light of the upcoming general election, so the case was briefed in less than a month and argued on August 29, 2018. The court denied the writ the same day the case was argued. The Supreme Court of Appeals unanimously agreed with the Secretary of State and the West Virginia Republican Party, which had intervened in the case, on every issue that it decided.[58]

First, the court held that the plain language of West Virginia's statute disallowed Mr. Blankenship's sore loser campaign. The statute provides that groups of citizens who are not members of a party recognized by state law—which includes The Constitution Party, since West Virginia recognizes only the Democratic, Libertarian, Mountain, and Republican parties—"may nominate candidates who are not already candidates in the primary election" for the general election.[59] Mr. Blankenship and The Constitution Party argued that the statute's words—"who are not already candidates in the primary election"—mean that the law's limitation only applies during the pendency of the primary election. Because Mr. Blankenship filed to run in the general election several months after he lost the primary election, they claimed, the statute did not bar his candidacy. The court rejected that construction of the statute as unreasonable because it would lead to the absurd result of allowing a primary candidate "simply to wait until the conclusion of the primary election to file his or her nomination certificate" and then participate in the general election.[60] The court held that the law "prevents unsuccessful primary election candidates from subsequently running as nomination-certificate candidates in the general election."[61]

Second, the court held that the sore loser statute was constitutional under both the U.S. and West Virginia constitutions. States have the authority to prescribe reasonable rules for the conduct of elections.[62] Burdens imposed on minor

58 *See* State ex rel. Blankenship v. Warner, No. 18-0712, 2018 WL 4904729 (W. Va. Oct. 5, 2018).

59 W. Va. Code **§ 3-5-23(a).**

60 *Blankenship*, 2018 WL 4904729, at *5.

61 *Id.* at *6.

62 *Id.* at *1.

parties and their candidates are justified by the "correspondingly weighty" state interests in ballot integrity and political stability.[63] And the burden on Mr. Blankenship was not large. He was required only to "choose between the two paths for a spot on the general election ballot: the path for recognized parties or the one for independents and unrecognized parties."[64] The court held the sore loser law did not violate the rights to either free association or equal protection. The law was reasonable and nondiscriminatory, and it was justified by the state's important regulatory interests.

Both authors were counsel for the West Virginia Republican Party in the case discussed. Mr. Lin is the former Solicitor General of West Virginia.

63 Timmons v. Twin Cities Area New Party, 520 U.S. 351, 369 (1997).

64 *Blankenship*, 2018 WL 4904729, at *10.