State Court Docket Watch: 2021 Edition

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The Federalist Society

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State Court Docket Watch: 2021 Edition

About State Court Docket Watch

In an effort to increase dialogue about state court jurisprudence, the Federalist Society presents State Court Docket Watch. This publication is one component of the State Courts Project, presenting original articles on state court jurisprudence and illustrating new trends and ground-breaking decisions in the state courts.

For more information, please visit statecourtsguide.com/docket-watch.

The thirty-eight articles you'll find in this edition of State Court Docket Watch were all originally published at fedsoc.org. They are presented alphabetically by state.

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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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ALABAMA

Barnett v. Jones

By Barrett Bowdre

Published November 1, 2021

About the Author:

Barrett Bowdre serves as deputy solicitor general in the Alabama Attorney General's Office, where he helps to oversee the state's appellate docket and defend the state's interests in state and federal courts throughout the country. He is a former law clerk to Judge Paul J. Kelly, Jr., of the U.S. Court of Appeals for the Tenth Circuit, then-Chief Judge W. Keith Watkins of the U.S. District Court for the Middle District of Alabama, and then-Chief Judge Ed Carnes of the U.S. Court of Appeals for the Eleventh Circuit. He holds a J.D., summa cum laude, from the University of Alabama School of Law and a B.A., cum laude, from Furman University. Before attending law school, he worked as a research assistant at the American Enterprise Institute, where he researched civic education initiatives and helped compile literary anthologies exploring the American character.

Note from the Editor:

In its recent opinion in *Barnett v. Jones*,[1] the Alabama Supreme Court applied textual rules to interpret the Alabama Constitution. In a notable concurrence, the majority opinion's author, Justice Jay Mitchell, joined by Chief Justice Tom Parker, wrote separately to encourage litigants and amici curiae to focus their efforts on explicating the original public meaning of the state's constitutional provisions.

Background

Section 105 of the Alabama Constitution prohibits the state legislature from enacting any "special, private, or local law" that applies only to a certain county or subdivision if the "matter of said law is provided for by a general law."[2] At issue in *Barnett* was whether a local law directing a large portion of Morgan County's proceeds from a general taxing statute violated this prohibition.

Three provisions were at issue. First, the statewide taxing statute—the Simplified Seller Use Tax Remittance Act[3]—mandated the collection of certain use taxes from the online sales of goods and services. The statute directed 40% of the net tax proceeds to be distributed among the counties, based on each county's population, "and deposited into the general fund of the respective county commission."[4]

Second, the Budget Control Act, another general law, required each county commission to adopt an annual, balanced budget detailing the "anticipated revenue of the county for all public funds under its supervision and control" and estimating all "expenditures for county operations"—including funding required by state law, such as paying for the probate judge, sheriff, and the county jail.[5]

Third, the relevant local law—which applied only to Morgan County—provided: "[A]fter Morgan County retains five percent of the gross proceeds for administrative purposes, the remaining proceeds of the simplified seller use tax distributed to Morgan County . . . shall be allocated by the county commission" and distributed pursuant to a set formula to boards of education and volunteer fire departments within the county.[6]

The Court's Opinion

The dispute over the local law arose when the Morgan County Commission refused to transfer the tax proceeds to the

1 *See* No. 1190470, 2021 WL 1937259, -- So. 3d -- (Ala. May 14, 2021).

2 Ala. Const. art. IV, § 105.

3 Ala. Code § 40-23-191 *et seq.*

4 Ala. Code 40-23-197(b).

5 Ala. Code § 11-8-3(a)1), (c).

6 Act No. 2019-272, § 2, *available at* https://arc-sos.state.al.us/ucp/B19149AA.A0D.pdf.

listed entities, and members of the boards of education sued to get their funding.[7]

The Alabama Supreme Court agreed with the boards of education. It explained that "the key to assessing a local law under § 105 is determining the subject covered by the general law or—in the phrasing of the text of § 105—determining the 'case' or 'matter' 'provided for' by the general law."[8] While admitting that it had not always been consistent in how it applied Section 105's limitation—at times focusing on whether there was a "substantial difference" between the local and general laws, at other times applying a "variance" test—the court emphasized that Section 105 does "not speak of substantial differences, variances, or result comparisons," but "speak[s] in terms of cases and matters provided for."[9]

The court determined that the local law for Morgan County did not cover the same "case" or "matter" "provided for" by either the taxing statute or the Budget Control Act. It explained that the taxing statute "creates a tax and then provides directions for the distribution and initial deposit of the tax proceeds" in each county commission's general fund, "[b]ut after the proceeds are distributed," the taxing statute "ceases to speak."[10] "By contrast," the court said, the local law "covers what happens to Morgan County's portion of the [tax] proceeds *after* it is deposited in Morgan County's general fund."[11]

Neither did the Budget Control Act change matters for the court. While that Act requires counties to have a balanced budget and mandates certain items that counties must fund "at a minimum," the court explained that the Act does not "grant county commissions the discretion over remaining funds after those required items are funded" or "prevent the Legislature from requiring counties to fund additional items—like public education."[12] Thus, the court concluded, "[w]hile the 'case' or 'matter' addressed by the Budget Control Act may subsume the subject of county budgeting procedures, it does not cover the subject of the Legislature's ability to appropriate funds sent to counties"—which is all Morgan County's local law did.

There were a number of separate writings. Chief Justice Parker, in addition to joining Justice Mitchell's concurrence (discussed below), wrote separately to clarify that he understood the main opinion's use of the word "appropriation" as simply a generic word "for direction of tax revenue to particular recipients," not as "having any bearing on the meaning of 'appropriation' in other contexts."[13] Justice Brady E. Mendheim, Jr. concurred with the court's result, but joined only the part of the opinion applying § 105 to the local act, not its historical overview.[14] Justice Greg Shaw concurred only in the result, writing separately to explain his view that § 105 "does not prohibit a local law from conflicting with a presumption" that the general taxing statute provides the county commission with discretion to spend the money directed to it. Rather, Justice Shaw said, § 105 "is limited to prohibiting a local law from providing for a case or matter that a general law—not a general principle—provides."[15] And Justice William B. Sellers, joined by Justice Michael F. Bolin, dissented. They noted that both the general taxing statute and the Budget Control Act "designate that a percentage of the total use-tax funds collected pursuant to the [taxing statute] are to be spent by the county commissions in this State on county operations generally," while the local law "requires the Morgan County Commission to give nearly all of the use-tax revenue it receives under the [taxing statute] to the county and city school systems in Morgan County, which will spend the money on public education, not on the general operations of the county."[16] As the dissenters saw it, then, "[t]he matter regulated by the Local Act, i.e., how and by whom county-designated use-tax revenue generated under the [taxing statute] will be spent, is a matter already provided for by the general laws at issue," and thus violates Section 105.[17]

Justice Mitchell's Concurrence

Justice Mitchell—the author of the majority opinion—wrote separately to "state [his] view that our courts should interpret the Alabama Constitution of 1901 in accordance with its original public meaning and to invite parties and amici curiae in future cases to provide scholarship and arguments that help [the court] do that."[18] His separate writing was joined by Chief Justice Parker.

"It is critical to interpret the Alabama Constitution according to its text," Justice Mitchell wrote, "[b]ut the key to understanding any text is its context."[19] "Thus, to keep courts from improperly changing the law to fit contemporary policy preferences, it is important to give words the meaning they had *at the time the law was adopted*."[20]

Justice Mitchell explained that the search for the original public meaning of a constitutional provision is not "an attempt to discover and give effect to the intent of the drafters," but "the objective meaning of the text itself—because that is the law that was adopted by the public."[21] "[O]riginal public meaning," he wrote, "is 'simply shorthand for the meaning *the people*

7 *Barnett*, 2021 WL 1937259, at *1-2.

8 *Id.* at *3.

9 *Id.* at *4-5.

10 *Id.*

11 *Id.* (emphasis added).

12 *Id.* at *6.

13 *Id.* at *7 (Parker, C.J., concurring specially).

14 *Id.* at *9 (Mendheim, J., concurring in part and concurring in the result).

15 *Id.* at *9-10 (Shaw, J., concurring in the result).

16 *Id.* at *10 (Sellers, J., dissenting).

17 *Id.* at *11.

18 *Id.* at *7 (Mitchell, J., concurring specially)

19 *Id.*

20 *Id.*

21 *Id.*

understood a provision to have at the time they enacted it.'"[22] Recognizing that "[a]scertaining the original public meaning of a constitutional provision can be arduous," Justice Mitchell noted that "th[e] job is made easier when scholarship is generated and issues before [the court] are briefed from that perspective."[23] In this case, he explained, "it would have been helpful to have research and arguments" about the original public meaning of Section 105, particularly "[w]hat the words 'case' or 'matter' were understood by the Alabama public to mean in 1901."[24] Thus, he "encourage[d] parties and amici curiae in future state-constitutional cases to provide appropriate research and arguments about the original public meaning of they provision they are asking [the court] to interpret."[25]

22 *Id.* (emphasis in original) (quoting Olevik v. State, 806 S.E.2d 505, 513 (Ga. 2017)).

23 *Id.* at *8.

24 *Id.* at *9.

25 *Id.*

ARIZONA

State v. Mixton

By Timothy Sandefur

Published March 4, 2021

About the Author:

Timothy Sandefur is Vice President for Litigation at the Goldwater Institute. Before joining Goldwater, he served 15 years as a litigator at the Pacific Legal Foundation, where he won important victories for economic liberty in several states. He is the author of four books, *Cornerstone of Liberty: Property Rights in 21st Century America* (coauthored with Christina Sandefur, 2016), *The Right to Earn A Living* (2010), T*he Conscience of The Constitution* (2014), and *The Permission Society* (2016), as well as some 45 scholarly articles on subjects ranging from eminent domain and economic liberty to antitrust, copyright, slavery and the Civil War, and political issues in Shakespeare, ancient Greek drama, Star Trek, and The Walking Dead. He is an Adjunct Scholar with the Cato Institute, a graduate of Hillsdale College and Chapman University School of Law.

Note from the Editor:

The author of this article, Timothy Sandefur, filed an amicus brief in support of the defendant on behalf of the Goldwater Institute.

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Arizona's Constitution is virtually unique in its treatment of searches and seizures. Unlike its federal counterpart, which prohibits only "unreasonable" searches of "persons, houses, papers, and effects," the Arizona Constitution promises that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."[1] Only Washington State's Constitution—from which this language was copied—contains the same language.[2]

In *State v. Mixton,*[3] the Arizona Supreme Court was asked to interpret this Clause in a way that would, in the words of Judge Jeffrey Sutton, "extend greater protections [for individual rights] than the Federal Constitution."[4] The court rejected this invitation and instead relied on what it called "the value in uniformity with federal law"[5] to interpret the Clause as essentially identical with the Fourth Amendment.

Mixton was a child pornography case in which officers obtained information about the defendant's physical location by delivering a subpoena to a software company which operates a messaging application that Mixton used to receive illegal images. Courts applying the Fourth Amendment have applied the so-called third party doctrine to hold that officers need not obtain a warrant before seeking evidence from someone to whom the suspect has voluntarily given the information.[6] Accordingly, the Arizona Supreme Court held that officers had not violated Mixton's Fourth Amendment rights.[7] But Mixton also argued that the state's Private Affairs Clause nevertheless required officers to obtain a warrant, citing Washington court decisions that have refused to adopt the third party doctrine under that state's Private Affairs Clause.[8]

This argument confronted an anomaly, however: despite the fact that the two states' Private Affairs Clauses are identical, Arizona courts have almost entirely ignored Washington Private Affairs precedent. Indeed, while the Evergreen State's courts have

1 Ariz. Const. art. II § 8.

2 Wash. Const. art. I § 7. Washington's Constitution was written in 1889; Arizona's in 1910. In the later twentieth century, other states began adding express protections for "privacy" to their state constitutions, but these provisions were focused primarily on rights of personal intimacy, whereas the Washington and Arizona constitutions' reference to "private affairs" had a broader sweep. *See* Timothy Sandefur, *The Arizona "Private Affairs" Clause,* 51 Ariz. St. L.J. 723, 726–40 (2019).

3 No. CR-19-0276-PR, 2021 WL 79751 (Ariz. Jan. 11, 2021).

4 Jeffrey S. Sutton, 51 Imperfect Solutions 66 (2018).

5 *Mixton*, 2021 WL 79751 at *7.

6 United States v. Miller, 425 U.S. 435 (1976); Smith v. Maryland, 442 U.S. 735 (1979).

7 *Mixton*, 2021 WL 79751 at **2–6.

8 State v. Gunwall, 106 Wash. 2d 54 (1986); State v. Miles, 160 Wash. 2d 236 (2007).

developed a robust state-based jurisprudence interpreting that state's clause,[9] Arizona courts have done the opposite. In its first Private Affairs case—*Malmin v. State*[10] in 1926—the Arizona Supreme Court declared that "although different in its language" from the federal Constitution, the clause "is of the same general effect and purpose as the Fourth Amendment, and for that reason, decisions on the right of search under the latter are well in point."[11] Since then, with only a few relatively insignificant exceptions,[12] Arizona courts have interpreted the clause as if it were identical to the Fourth Amendment. This is incongruous, given that Arizona courts have followed Washington precedent when interpreting other provisions of its constitution that were copied from Washington's.[13] Some have argued that it contravenes the Arizona's founders' intentions; they expressly rejected the proposal to copy the Fourth Amendment's language because they hoped to provide Arizonans with greater protections than those available under the federal Constitution.[14]

Perhaps the most significant difference between the federal and state constitutions is that the Private Affairs Clause contains no reference to reasonableness; unlike the Fourth Amendment, the clause requires "lawful authority" for all searches, whether reasonable or not. This absence of a "reasonableness" element has led Washington courts to reject many of the exceptions to the warrant requirement fashioned by federal courts, because those exceptions have arisen from interpretations of "reasonableness." For example, the Fourth Amendment does not require warrants for mandatory traffic checkpoints[15] or inventory searches,[16] because these are not "unreasonable." But Washington courts have refused to adopt these exceptions under the Private Affairs Clause, because the clause bars even reasonable searches absent lawful authority.[17] Arizona courts, however, have done the reverse. Since *Malmin*, they have interpreted the clause as essentially identical to the Fourth Amendment. Until *Mixton*, however, it never explained why.

In its 4-3 decision, the court ruled that officers did not violate Mixton's rights under the clause and offered five reasons why it followed federal Fourth Amendment precedent instead of Washington Private Affairs Clause precedent. First, pointing to *Malmin*, it observed that "since statehood," Arizona courts have viewed the clause as effectively redundant of the Fourth Amendment.[18] Second, it claimed there was no "affirmative evidence" that the clause's authors specifically intended to bar "use of a subpoena to obtain a business record to facilitate a legitimate criminal investigation."[19] Third, officers had not read the "*contents* of [Mixton's] communication[s]," but only acquired location information.[20] Fourth, there is "utility" in having "uniform state and federal criminal rules," and state courts have reached a "consensus" that such location information is not constitutionally protected.[21] Finally, although the clause does not expressly refer to reasonableness, determining whether something is a private affair "necessarily include[s] an assessment of the reasonableness" of that claim.[22]

The three dissenters called this reasoning "curious and perplexing."[23] First, the dissenters argued that although it is true that, since *Malmin,* Arizona courts have viewed the clause as effectively redundant of the Fourth Amendment, that does not mean that *Malmin* was right.[24] Second, the Arizona constitutional convention's records are notoriously spotty, but Arizona courts have nevertheless followed Washington precedent relating to other clauses borrowed from that state's constitution, and the records of debates over the Private Affairs Clause are sufficient to show that the clause's wording "*was deliberately chosen as an alternative*" to the Fourth Amendment, in order to provide stronger protections for personal information.[25] Third, while *Mixton* did not involve the contents of communications, information about "which websites a person has visited" is nevertheless personally revealing.[26] As for the value of "uniformity with federal law,"[27] or a consensus among the states,

9 *See* Sandefur, *supra* note 2 at 757–61.

10 30 Ariz. 258 (1926).

11 *Id.* at 261.

12 Those exceptions only began in the 1980s, when the Arizona Supreme Court for the first time asserted that the clause provides stronger protections for individual rights than the federal Constitution. In *State v. Bolt,* 142 Ariz. 260 (1984), and *State v. Ault*, 154 Ariz. 207 (1987), it held that the clause provides stronger protections for searches of the home. In *Rasmussen v. Fleming*, 154 Ariz. 207 (1987), it declared that the right to refuse medical treatment was a private affair protected by the clause. These exceptions to *Malmin*, however, are relatively insignificant given that subsequent federal decisions held that the federal Constitution protects these rights as well—and that the Fourth Amendment is already at its strongest in cases involving homes. *See* Sandefur, *supra* note 2 at 763-65.

13 *See, e.g.,* Bailey v. Myers, 206 Ariz. 224, 230 (Ct. App. 2003); Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm'n, 160 Ariz. 350, 355 (1989).

14 *See* Sandefur, *supra* note 2 at 726; Charles W. Johnson & Scott P. Beetham, *The Origin of Article I, Section 7 of the Washington State Constitution*, 31 Seattle U. L. Rev. 431, 435–36 (2008).

15 *See, e.g.,* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 451–55 (1990).

16 *See, e.g.,* S. Dakota v. Opperman, 428 U.S. 364, 368–71 (1976).

17 *See* State v. Stroud, 720 P.2d 436, 441 (Wash. 1986) (inventory searches); City of Seattle v. Mesiani, 755 P.2d 775, 777 (Wash. 1988) (checkpoints).

18 *Mixton*, 2021 WL 79751 at *6.

19 *Id.* at *8.

20 *Id.* at *3.

21 *Id.* at *13.

22 *Id.* at *9.

23 *Id.* at *20 (Bolick, J., dissenting).

24 *Id.* at *19–20 (Bolick, J., dissenting).

25 *Id.* at **18, 23 n.3 (Bolick, J., dissenting); *see also* Sandefur, *supra* note 2 at 735–36; Johnson & Beetham, *supra* note 14 at 444–47, 454–56.

26 *Mixton*, 2021 WL 79751 at *26 (Bolick, J., dissenting) (citation omitted).

27 *Id.* at *7.

the framers and adopters of Arizona's Constitution rejected uniformity by choosing not to copy the Fourth Amendment,[28] and the "consensus" of other states is irrelevant, since their constitutions contain no Private Affairs Clauses.[29]

The dissenters argued that the majority's final reason—that reasonableness is inherent in the privacy determination—was more plausible, but they preferred a more objective approach: "we would ask (1) whether the search encompasses intimate details of a person's life, and (2) whether the disclosure of information was made for a limited purpose and not for release to other persons for other reasons."[30] This, they argued, would avoid the "inherent subjectivity" of that plagues Fourth Amendment reasonableness inquiries.[31]

The *Mixton* decision has significance far beyond the question of searches and seizures, however. As the dissenters asked, "if the framers wanted to craft language that would be enforced on its own terms, how could they have better done so than to reject one set of words and deliberately adopt another?"[32] If the fact that the state constitution's language differs *entirely* from that of the federal Constitution—because its framers wanted the two documents to mean different things—can be overlooked in service of a policy of uniformity, then "by what standard we will determine when to give independent meaning to our state constitutional language in other contexts[?]"[33] Whether the majority's desire to harmonize state and federal law will also affect other state constitutional provisions must await further decisions.

28 *Id.* at *18 (Bolick, J., dissenting).

29 *Id.* at *24 (Bolick, J., dissenting).

30 *Id.* at *26 (Bolick, J., dissenting).

31 *Id.* at **22 n.2, 25 (Bolick, J., dissenting).

32 *Id.* at *18 (Bolick, J., dissenting).

33 *Id.* at *20 (Bolick, J., dissenting).

ARIZONA

Schires v. Carlat

By Paul Avelar

Published June 21, 2021

About the Author:

Paul Avelar is the Managing Attorney of the Institute for Justice Arizona Office. He joined the Institute in March 2010 and litigates free speech, property rights, economic liberty, school choice and other constitutional cases in federal and state courts.

Prior to joining IJ-AZ, Paul worked as an attorney in Philadelphia. He clerked for Judge Roger Miner on the 2nd U.S. Circuit Court of Appeals, Justice Andrew Hurwitz on the Arizona Supreme Court, and Judge Daniel Barker on the Arizona Court of Appeals.

Paul graduated manga cum laude from the Arizona State University College of Law in 2004 and was elected to the Order of the Coif. He received his undergraduate degree from Princeton University in 2000.

Note from the Editor:

Mr. Avelar served on an outside moot panel for the taxpayers' attorneys (the Goldwater Institute) in advance of this case's argument to the Arizona Supreme Court.

Like many other western states, Arizona's years as a territory were marked by economic interests—especially eastern-owned railroads, banks, and mines—controlling government for their own benefits. Due both to federal policy and outright corruption, the territorial government funded private enterprises, granted private monopolies, gave away public resources, and regulated for private benefit, not public purpose. When Arizona finally became a state in 1912, several provisions of its constitution sought to prevent such government favoritism of private interests at the expense of the public.[1]

Among these anti-favoritism clauses is the Gift Clause. It provides that "[n]either the state, nor any county, city, town, municipality, or other subdivision of the state shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation."[2] The purpose of the clause is "to prevent governmental bodies from depleting the public treasury by giving advantages to special interests or by engaging in non-public enterprises."[3]

A decade ago, in *Turken v. Gordon*, the Arizona Supreme Court admitted that its jurisprudence under the Gift Clause had been inconsistent and therefore set out to clarify it. First, it reaffirmed a two-prong test: An "expenditure does not violate the Gift Clause if (1) it has a public purpose, and (2) in return for its expenditure, the governmental entity receives consideration that 'is not so inequitable and unreasonable that it amounts to an abuse of discretion, thus providing a subsidy to the private entity.'"[4] Second, it clarified the adequacy of the consideration is determined only by the objective fair market value of that which is bargained for as performance, and does not include anticipated indirect benefits when not bargained for as part of the agreement.[5]

Under this test, the *Turken* court determined the challenged expenditure likely violated the Gift Clause. In that case, a commercial property developer told the City of Phoenix that it needed financial assistance to complete one of its developments. In the name of economic development, the city agreed to pay the developer more than $97 million. In exchange, the developer gave the city, for a period of 45 years, 200 spaces in a parking garage for the exclusive use of commuters and 2,980 spaces for the non-exclusive use of the general public. The city also anticipated increased tax revenue would come from the

1 Paul Avelar & Keith Diggs, *Economic Liberty and the Arizona Constitution: A Survey of Forgotten History*, 49 Ariz. St. L.J. 355, 388-92 (2017).

2 Ariz. Const. art. 9, § 7.

3 Wistuber v. Paradise Valley Unified Sch. Dist., 687 P.2d 354, 357 (Ariz. 1984).

4 224 P.3d 158, 161-64 (Ariz. 2010).

5 *Id.* at 165-66.

completed development. But the court held that the anticipated increased tax revenue did not count as part of the bargained-for exchange, only the parking rights did. The court recognized those rights were almost certainly not worth the $97 million paid, but it refused to invalidate the contract and declared its ruling to be "prospective only" because of the confusion in the case law.

Six years later, in *Cheatham v. DiCiccio*,[6] the court added a gloss on *Turken*'s consideration prong. The court said it would defer to the decisions of elected officials in Gift Clause cases, both with regard to public purpose and in determining whether consideration received was equitable and reasonable. *Cheatham* was a challenge to release-time provisions in a police union contract. In a 3-2 decision, the court upheld the release-time provisions because they were part of a bargained-for labor contract to provide a public service, and the challengers had not proven gross disproportionality of consideration of the release-time provisions.

The tension between *Turken*'s focus on the *objective* fair market value of bargained-for consideration and *Cheatham*'s *deference* to the government on that issue set up the court's recent decision in *Schires v. Carlat*.[7]

In 2010, the City of Peoria launched an economic development program. It would pay money to businesses in desirable fields, including higher education and technology, to get them to expand in or relocate to the city. It would also reimburse property owners for making tenant improvements to vacant commercial buildings in the "P83 District."

As part of this program, in 2015, the city contracted with Huntington University, a private school, to open a branch in the P83 District. HU would lease space in the P83 District for a campus to offer undergraduate degrees in digital media, refrain from offering similar programs in other Arizona cities for seven years, and participate in "economic development activities" with the city to attract other targeted industries. In return, the city would pay HU up to $1,875,000 over a three-year period if HU met specified "performance thresholds" that tracked HU's progress in opening and operating its campus. In turn, HU leased a building in the P83 District from Arrowhead Equities. The city agreed to reimburse Arrowhead up to $737,596 for renovating its building to suit HU's needs, contingent on Arrowhead meeting certain "performance criteria" tied to Arrowhead's performance of its lease obligations.

Both parts of this transaction—city payments to HU and to Arrowhead—were challenged by taxpayers in *Schires*.

In a unanimous opinion, the court again took steps to clarify its two-prong Gift Clause test. First, it clarified that the party asserting a Gift Clause violation bears the burden of proving it.[8] Second, with regard to the public benefit prong, it directed courts to consider both direct and indirect benefits of an expenditure.[9] Third, it said courts should also defer to the government under the public benefit prong.[10] But, fourth, it maintained that indirect (not bargained-for) benefits are not part of the consideration prong.[11] And fifth, the court clarified that judicial deference to the government's assessment of value is not appropriate under the consideration prong because that prong is an objective inquiry, and previous statements to the contrary are now "disapprove[d]."[12]

The court held that both parts of the transaction challenged in *Schires* violated the Gift Clause The expenditures had a public purpose: economic development.[13] But the expenditures failed the "primary check on government expenditures for Gift Clause purposes," the consideration prong.[14] The amount paid by the city far exceeded the bargained-for return. The city claimed that its expenditures would result in several million dollars' worth of economic development. But this amount consisted almost entirely of anticipated indirect benefits—the economic development that would come from having HU in P83. These anticipated effects were not bargained-for consideration. Anticipated tax revenue was also not bargained-for consideration because it would separately arise as an obligation under law and was not a part of the contract.[15] In the end, the court found, these agreements were

> no different than a hamburger chain promising to operate in Peoria in exchange for monetary incentives paid by the City in hope of stimulating the local economy. A private business will usually, if not always, generate some economic impact and, consequently, permitting such impacts to justify public funding of private ventures would eviscerate the Gift Clause.[16]

Following *Schires*, therefore, Arizona government entities will still be able to engage in economic development. But they will need to do so without using the outright giveaways to private entities that both *Turken* and *Schires* invalidated.

6 379 P.3d 211 (Ariz. 2016).

7 480 P.3d 639 (Ariz. 2021).

8 *Id.* at 643.

9 *Id.*

10 *Id.*

11 *Id.* at 644

12 *Id.* at 646.

13 *Id.* at 644.

14 *Id.*

15 *Id.* at 645-46.

16 *Id.* at 645.

CALIFORNIA

In re Humphrey

By Craig Trainor

Published November 18, 2021

About the Author:

Craig W. Trainor is a criminal defense and civil rights lawyer with a New York City-based law practice. He litigates cases in New York state court and the United States District Court for the Southern and Eastern Districts of New York. He has tried numerous cases to verdict, from unlawful gun possession to racketeering conspiracy, and secured substantial financial compensation for his clients whose civil rights and liberties had been violated by state actors.

Trainor is a cum laude graduate of the Catholic University of America, Columbus School of Law, where he was a national moot court champion and an articles editor of the law school's flagship journal, and a magna cum laude graduate of the City University of New York at John Jay College of Criminal Justice, where he earned a bachelor's degree in government with honors. Born and raised in Brooklyn, Trainor was a longtime resident of Manhattan who now proudly calls Virginia home.

Note from the Editor:

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On May 23, 2017, Kenneth Humphrey, a 66-year-old four-strike offender under California law,[1] followed a 79-year-old man "into his Fillmore District apartment in San Francisco, threatened to put a pillowcase over his head, and demanded money."[2] Humphrey threw the elderly man's cellphone to the ground when he claimed that he had no money. Upon this show of force, the victim acquiesced and handed over $2. Humphrey then stole another $5 and a bottle of cologne from the man. Prior to walking out the door, Humphrey placed the victim's walker out of reach in another room.

Humphrey was subsequently apprehended and charged with "first degree residential robbery and burglary against an elderly victim, inflicting injury on an elder adult, and misdemeanor theft from an elder adult."[3] At his May 31, 2017, arraignment, "Humphrey sought release on his own recognizance (OR) without any condition of money bail," citing "his advanced age, his community ties as a lifelong resident of San Francisco, and his unemployment and financial condition."[4] The prosecutor, however, requested $600,000 bail and an order of protection. The trial court granted the prosecution's bail request and denied Humphrey's application for release.

Humphrey appealed the trial court's bail decision by requesting a formal bail hearing, which the court granted. At the bail hearing, the trial court found "unusual circumstances" warranting a reduction of bail from $600,000 to $350,000, but it again rejected Humphrey's application for OR release.[5] In making its determination, the trial court considered the severity of the crimes charged, Humphrey's prior criminal activity and propensity to engage in similar crimes, the threat Humphrey presented to public safety, and the risk of flight. The court also required Humphrey to participate in a residential treatment program for substance abuse. In reaching its decision, the trial court did not consider Humphrey's inability to afford bail, or "whether nonfinancial conditions of release could meaningfully address public safety concerns or flight risk."[6]

Humphrey again appealed the conditions of his pretrial detention, filing a writ of habeas corpus in the California Court of Appeal. The appellate court granted the writ, and a new bail hearing resulted in the trial court releasing Humphrey on various nonfinancial conditions, such as electronic monitoring and another residential treatment program for drug abuse.

1 *In re Humphrey*, 11 Cal.5th 135, 144 (2021) (citing CA Penal §§ 667(b)—(i), 1170.12(a)—(d)).

2 *Id.*

3 *Id.* at 143-44.

4 *Id.* at 144.

5 *Id.* at 145.

6 *Id.*

None of the parties petitioned for review. Nevertheless, the San Francisco District Attorney's Office requested that the California Supreme Court "address the constitutionality of money bail as currently used in California as well as the proper role of public and victim safety in making bail determinations."[7] On its own motion, the court granted review of these issues.[8]

Upon that review, the court held that "[t]he common practice of conditioning freedom solely on whether an arrestee can afford bail is unconstitutional," and that "where a financial condition is nonetheless necessary, the court must consider the arrestee's ability to pay the stated amount of bail—and may not effectively detain the arrestee 'solely because' the arrestee 'lacked the resources' to post bail."[9]

Animated by the proposition that "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception," the court adopted the defendant's framing of the issue as "whether it is constitutional to incarcerate a defendant solely because he lacks financial resources."[10] In holding it is not, the court relied on the U.S. Supreme Court's decision in *Bearden v. Georgia*.[11]

In *Bearden*, the defendant, who pleaded guilty to theft of stolen property and burglary, with a sentence of three years probation, was unable to satisfy a court-ordered fine and restitution after he lost his job. He informed the probation office that he could no longer afford to pay the fine and restitution on time. At his probation violation hearing, the court did not inquire as to his ability to pay and revoked his probation. Writing for the Court, Justice Sandra Day O'Connor explained, "if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person because he lacked the resources to pay it."[12]

Bearden addressed whether the Fourteenth Amendment prohibits the state from revoking the probation of a post-conviction defendant for his inability to pay a fine and restitution. *Humphrey*, conversely, concerns a pretrial defendant's ability to pay a given sum of cash bail. In appealing to *Bearden's* rationale, the court rested its reliance upon its perception of "a theme" related to fundamental fairness in the context of indigent probationers.[13]

The court also offered another rationale for its decision: a cash bail amount that is patently unaffordable to an individual defendant is tantamount to remand or a pretrial detention order. In other words, "if a court does not consider an arrestee's ability to pay, it cannot know whether requiring money bail in a particular amount is likely to operate as the functional equivalent of a pretrial detention order."[14] And pretrial detention requires that the trial court find by "clear and convincing evidence" that "no less restrictive alternative will reasonably vindicate" California's interest in victim and public safety.[15]

By these lights, then, pretrial custody that results from a defendant's inability to pay the amount of bail that the court deems necessary "is impermissible unless no less restrictive conditions of release" can ensure public and victim safety.[16] This logic moved the court to extend the clear and convincing evidentiary standard to apply in cash bail determinations, effectively ensuring a court can only set cash bail beyond the defendant's financial resources where pretrial detention is the only means to ensure victim and public safety and the defendant's appearance in court.[17]

Against this backdrop, the court distilled its new constitutional framework for bail decisions:

> An arrestee may not be held in custody pending trial unless the court has made an individualized determination that (1) the arrestee has the financial ability to pay, but nonetheless failed to pay, the amount of bail the court finds reasonably necessary to protect compelling government interests; or (2) detention is necessary to protect victim or public safety, or ensure the defendant's appearance, and there is clear and convincing evidence that no less restrictive alternative will reasonably vindicate those interests.[18]

The court acknowledged that Humphrey's "claim joins a 'clear and growing movement' that is reexamining the use of money bail as a means of pretrial detention."[19] With the *Humphrey* decision, the California Supreme Court ratified the concerns of that movement.

7 *Humphrey*, 11 Cal.5th at 146-47.

8 The court acknowledged that "[n]o party petitioned for review," but "upon request by several entities. . . which had not been designated a party in the Court of Appeal," the court "granted review on our own motion to address the constitutionality of money bail as currently used in California as well as the proper role of public and victim safety in making bail determinations." *Id.* Despite Humphrey being released from pretrial detention without money bail conditions, the court examined these questions "to address 'important issues that are capable of repetition yet may evade review' and 'to provide guidance for future cases.'" *Id.* at n.2.

9 *Id.* at 143.

10 *Id.* at 149.

11 461 U.S. 660 (1983).

12 *Id.* at 667-68.

13 *Humphrey*, 11 Cal.5th at 149.

14 *Id.* at 151.

15 *Id.* at 151-52.

16 *Id.*

17 The court reasoned that, "[i]n determining what kind of threat to victim or public safety is required, we look to the standard set forth in article I, section 12 of the California Constitution." *Id.* at 153. Under Article I, § 12 of the California Constitution,

> A person shall be released on bail by sufficient sureties, except for (a) Capital crimes when the facts are evident or the presumption great; (b) Felony offenses involving acts of violence on another person . . . when the facts are evident or the presumption great and the court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others.

18 *Humphrey*, 11 Cal.5th at 156.

19 *Id.* at 142-43 (quoting *O'Donnell v. Harris County*, 251 F. Supp. 3d 1052, 1084 (S.D. Tex. 2017)).

FLORIDA

In Re: Amendments to Florida Rule of Civil Procedure 1.510

By Jason Gonzalez, Rachel Procaccini

Published April 1, 2021

About the Authors:

Jason Gonzalez is the Managing Partner of the Tallahassee office of Shutts & Bowen LLP and is Chairman of the Firm's Appellate Practice Group.

Over the course of his career, Jason has been at the forefront of emerging legal developments, helping to shape Florida's justice system. Jason was the chief advisor to the Governor on the appointment of 64 Florida judges and four Florida Supreme Court Justices. The *Tampa Bay Times* notes that he "has played a historic role in the shaping of Florida's Supreme Court." Jason has also served as Chairman of the First District Court of Appeals Judicial Nominating Commission and Chairman of the Second Judicial Circuit Judicial Nominating Commission, as well as two terms as General Counsel and former Executive Board Member of the Republican Party of Florida. Prior to joining Shutts, Jason served as General Counsel to the Florida Governor and as Gubernatorial Appointee to the Florida Supreme Court Judicial Nominating Commission.

Rachel Procaccini earned her Juris Doctor from the University of North Carolina School of Law, where she was Vice President of Communications for the UNC Law student chapter of the Federalist Society. Upon graduating, Rachel served as a law clerk to the Honorable David A. Faber, Senior United States District Court Judge of the United States District Court for the Southern District of West Virginia. Rachel then went on to practice appellate litigation and political law at a law firm in Florida. Rachel currently serves as Counsel for the Consumer Advocate Unit within the Office of the Tennessee Attorney General.

Note from the Editor:

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On December 31, 2020, the Florida Supreme Court prospectively amended Florida Rule of Civil Procedure 1.510(c), adopting the federal summary judgment standard. The Florida Supreme Court stated that, "[t]hrough this amendment, we align Florida's summary judgment standard with that of the federal courts and of the supermajority of states that have already adopted the federal summary judgment standard."[1] After an opportunity for public comment, the amendment will become effective May 1, 2021.[2]

What is the Underlying *Wilsonart* Case About?

The case that precipitated the amendment to Florida's summary judgment standard was *Wilsonart, LLC, et al. v. Lopez*, in which the Florida Supreme Court reviewed a trial court's decision in a fatal rear-end automobile accident case.[3] In *Wilsonart*, the trial court granted summary judgment for the defendants, reasoning that the eyewitness's testimony and the plaintiff's expert's opinion were so blatantly contradicted by video evidence that they could not create a genuine issue of material fact.

Florida's Fifth District Court of Appeal ("Fifth DCA") reversed the trial court's decision and held that even though the video was compelling and directly contradicted the eyewitness testimony, Florida's summary judgment standard requires the motion to be denied "if the record raises the *slightest doubt* that material issues could be present."[4] The Fifth DCA then certified a question of great public importance to the Florida Supreme Court: whether clear video evidence that completely negates eyewitness testimony should be an exception to the summary judgment rule in Florida.[5]

In accepting review of the case, the Florida Supreme Court sua sponte requested that the parties brief the question of whether Florida should adopt the federal summary judgment standard.[6] After receiving briefs from both parties and ten *amicus curiae*, the Florida Supreme Court heard oral argument on October 8, 2020.

Ultimately, the Florida Supreme Court chose not to amend Florida's summary judgment standard through its

1 *In re Amendments to Fla. Rule of Civil Procedure 1.510.*, No. SC20-1490, 2020 WL 7778179, at *1 (Fla. December 31, 2020).

2 *Id.*

3 No. SC19-1336 (Fla. Dec. 31, 2020).

4 *See Lopez v. Wilsonart, LLC*, 275 So. 3d 831, 833 (Fla. 5th DCA 2019) (emphasis added) (citation omitted), *review granted*, No. SC19-1336, 2019 WL 5188546 (Fla. Oct. 15, 2019), and *approved*, No. SC19-1336, 2020 WL 7778226 (Fla. Dec. 31, 2020).

5 *See Lopez*, 275 So. 3d at 834.

6 *Wilsonart, LLC v. Lopez*, No. SC19-1336, 2019 WL 5188546, at *1 (Fla. Oct. 15, 2019).

Wilsonart opinion, but rather opted to enact the change through a prospective rule amendment.[7] As to the Fifth DCA's certified question, the Florida Supreme Court held that they saw "no reason to adopt an ad hoc video evidence exception to the existing summary judgment standard on the eve of that amendment."[8] Thus, the Florida Supreme Court answered "no" to the certified question and approved the result in the Fifth DCA.[9]

The Summary Judgment Rule Amendment

While Florida's prior summary judgment rule is "materially indistinguishable" from the federal rule in a textual sense, it does not align with the actual federal standard.[10]

The federal summary judgment standard is set forth in a series of United States Supreme Court cases—*Celotex Corp. v. Catrett*,[11] *Anderson v. Liberty Lobby, Inc.,*[12] and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,[13]—known as the "*Celotex* Trilogy." The Florida Supreme Court pointed out "three particularly consequential differences" between the prior Florida and federal summary judgment standards.[14] First, the United States Supreme Court cases explain that the same standard should be applied for a summary judgment motion (made before trial) and a directed verdict motion (made during trial). That standard is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."[15]

Second, in contrast to the prior Florida standard, under the federal standard, a summary judgment motion requires the party with the burden of proof at trial to make a showing that sufficient evidence exists to support all of the essential elements of the cause of action.[16] Under the prior Florida summary judgment standard, the party seeking summary judgment has the "burden of proving a negative, i.e., the non-existence of a genuine issue of material fact," and must do so "conclusively," so that "[t]he proof must be such as to overcome all reasonable inferences which may be drawn in favor of the opposing party."[17] Thus, the moving party will no longer be required to conclusively disprove or negate the nonmovant's case theory in Florida state courts.

Third, adopting the federal summary judgment standard will narrow the Florida courts' previous "expansive understanding of what constitutes a genuine (i.e., triable) issue of material fact."[18] The federal test is whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[19]

The Florida Supreme Court expressed that its goal in adopting the federal summary judgment standard is "to improve the fairness and efficiency of Florida's civil justice system, to relieve parties from the expense and burdens of meritless litigation, and to save the work of juries for cases where there are real factual disputes that need resolution."[20] The prior Florida and federal summary judgment standards share the same broad purpose: "to secure the just, speedy, and inexpensive determination of every action."[21] Thus, the Florida Supreme Court determined that "[t]he federal summary judgment standard better comports with the current text and purpose of rule 1.510 and that adopting that standard is in the best interest of our state."[22]

The Florida Supreme Court asked for comments on "whether the effective implementation of the amendment requires any additional, ancillary amendments to rule 1.510," whether additional portions of Federal Rule 56 should be added to Rule 1.510, and whether "rule 1.510 should be replaced in its entirety with the text of Rule 56."[23] Comments were due on or before March 2, 2021, with an opportunity for commenters to participate in oral argument.

7 *Wilsonart, LLC v. Lopez*, No. SC19-1336, 2020 WL 7778226, at *2 (Fla. Dec. 31, 2020).

8 *Id.*

9 *Id.*

10 *See In re Amendments to Fla. Rule of Civil Procedure 1.510.*, at *1.

11 477 U.S. 317 (1986).

12 477 U.S. 242 (1986).

13 475 U.S. 574 (1986).

14 *In re Amendments to Fla. Rule of Civil Procedure 1.510.*, at *1.

15 *Id.* (citing *Anderson*, 477 U.S. at 251-52).

16 *Celotex*, 477 U.S. at 322.

17 *Holl v. Talcott*, 191 So. 2d 40, 43 (Fla. 1966) (citations omitted).

18 *In re Amendments to Florida Rule of Civil Procedure 1.510.*, at *2.

19 *Id.* (citing *Anderson*, 477 U.S. at 248)).

20 *Id.*

21 *Id.* at *1 (citing Fla. R. Civ. P. 1.010).

22 *Id.* at *2.

23 *Id.* at *3.

IOWA

State v. Wright

By John G. Wrench

Published July 22, 2021

About the Author:

John Wrench is a Constitutional Law Fellow at the Institute for Justice. John grew up outside of Ithaca, New York, and received his law degree from the Case Western Reserve University School of Law in 2019. During law school, he served as editor in chief of the Case Western Reserve Journal of International Law and was a member of the Federalist Society. John interned in his law school's First Amendment Litigation Clinic and was a judicial extern to the Honorable Paul E. Davison in the Southern District of New York. John graduated from Pace University in 2015 with a Bachelor of Arts in Philosophy and Religious Studies.

Note from the Editor:

Article I, Section 8 of the Iowa Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated."[1] Although Art. I, § 8 is (except for a semi-colon) linguistically indistinguishable from the Fourth Amendment, the Iowa Supreme Court is often asked to interpret the provision more broadly than its federal analog.

In *State v. Wright*,[2] the Iowa Supreme Court considered whether a police officer violated Art. I, § 8 by searching someone's trash in an alleyway without a warrant or probable cause on three separate occasions. Despite federal[3] and state appellate[4] decisions upholding similar "trash grabs," the court exercised its authority to interpret the Iowa Constitution independently and held that the warrantless searches violated Art. I, § 8.[5]

These searches occurred after a Clear Lake, Iowa police officer concluded that Wright matched the description of a suspected local drug dealer. At night, the officer visited an alleyway behind Wright's house and found opaque garbage bags, which he collected and subsequently searched at the police department. The officer returned to collect more garbage from the alleyway twice over the following months, finding poppy seeds and a piece of fabric that tested positive for morphine. Based on that evidence, the officer obtained and executed a search warrant. At Wright's home, the police found two grams of marijuana and several capsules of a prescription drug for which Wright had no prescription.

In his motion to suppress, Wright raised two arguments: That the officer had physically trespassed on Wright's property and that Wright had a reasonable expectation of privacy in his garbage. Both of Wright's arguments relied on a Clear Lake ordinance making it unlawful "for any person to . . . [t]ake or collect any solid waste which has been placed out for collection on any premises, unless such person is an authorized solid waste collector."[6]

In a 4-3 decision, the court held that the officer's warrantless search of Wright's garbage violated Art. I, § 8 of the Iowa Constitution. All four justices in the majority agreed on several points. First, the court held that the garbage bags were Wright's "effects" despite being placed in the alleyway.[7] The majority reasoned that Wright did not truly abandon his garbage; rather, he "agreed only to convey his property to a

1 Iowa Const. art. I, § 8.

2 No. 19-0180, 2021 WL 2483567 (Iowa June 18, 2021).

3 California v. Greenwood, 486 U.S. 35 (1988).

4 *See, e.g.*, State v. Henderson, 435 N.W.2d 394 (Iowa Ct. App. 1988).

5 *Wright*, 2021 WL 2483567 at *16–17.

6 *Id.* at *15.

7 *Id.* at *13–14.

licensed collector."[8] The court next defined "trespass" to mean "any transgression or offense against the law of nature, of society, or of the country in which we live; whether it relate[s] to a man's person, or his property."[9] Applying that definition, the court relied on the trash collection ordinance to hold that the officer conducted unconstitutional trespasses in two ways. On one hand, the officer's searches constituted a physical trespass on Wright's effects because the ordinance prevented anyone other than Wright or a garbage collector from taking the garbage. On the other hand, Wright had a reasonable expectation of privacy "based on [the ordinance] that his garbage bags would be accessed only by a licensed collector under contract with the city."[10] Lastly, four justices held that "the utility of warrantless trash grabs" is irrelevant to the court's constitutional analysis.[11]

Three of the four justices joined a portion of the majority opinion discussing the evolution of search and seizure jurisprudence in state and federal courts. Those justices concluded that:

1. The original meaning of "reasonableness," in both the Fourth Amendment and Art. I, § 8, referred to violations against the "reason of the common law" rather than reasonableness in a "relativistic, balancing sense";[12]

2. Iowa courts adhered to this original understanding of Art. I, § 8 until the incorporation of the Bill of Rights, after which Iowa courts adopted two innovations in Fourth Amendment doctrine: a "relativistic" understanding of reasonableness and the displacement of common law trespass with a focus on the party's reasonable expectation of privacy;[13]

3. In recent years, the Iowa Supreme Court has rejected a "lockstep approach" in favor of a "more historical approach" to Art. I, § 8, mirrored in the U.S. Supreme Court's increasing skepticism of *Katz* and renewed emphasis on a trespass-based theory of the Fourth Amendment;[14]

4. Because Art. I, § 8 is "tied to common law trespass," an officer engaged in general criminal investigation violates those protections by "commit[ting] a trespass against a citizen's house, papers, or effects" without a warrant supported by probable cause.[15]

Justice Brent Appel's concurring opinion emphasized the importance of independent constitutional interpretation and cataloged the U.S. Supreme Court's "unsatisfactory approach to search and seizure matters."[16] Despite joining the majority's conclusion that the warrantless search violated Art. I, § 8, he cautioned against "search and seizure formalism" and the dismissal of *Katz*'s "reasonable expectation of privacy" test.[17]

Each of the dissenting justices authored a separate opinion highlighting their disagreements with the majority's approach. First, the dissenters noted that Wright's arguments were centered around an anti-scavenging law focused on health and safety, not privacy or property, and that the majority erred in relying on a series of unraised arguments.[18] Second, the dissenters argued that the majority wrongly equated the framers' "focus[ ] on protecting private *homes* from searches pursuant to general warrants" with protecting "discarded trash."[19] And because Wright did "not make a separate argument under the Iowa Constitution" for protecting garbage, the dissenters declined to diverge from the Fourth Amendment.[20] Third, the dissenters argued that Wright lacked standing because the garbage was abandoned and thus not an "effect" under Art. I, § 8.[21]

The dissenters' chief criticism was that the majority, through its reliance on Clear Lake's trash collection ordinance, adopted a "new de facto test" that prevents police from doing anything that private citizens cannot do.[22] The dissenters further argued that the majority's test calls into question a variety of law enforcement privileges, including "increased arrest authority," the right to enter private property to make an arrest, and using roadblocks for vehicle stops.[23] The majority replied that its holding does not implicate those issues and, therefore, that "[t]he dissents are directed at monsters of their own making."[24]

Wright is a significant development in the Iowa Supreme Court's interpretation of Art. I, § 8. Since 2010, the court has largely rejected lockstep interpretation in favor of independent constitutional interpretation.[25] All four justices in the majority

8 *Id.* at *14.

9 *Id.* at *14 (quoting 3 William Blackstone, *Commentaries on the Laws of England* 208 (1768)).

10 *Id.* at *17. The majority noted that positive law is "merely one form of evidence of the limits of a peace officer's authority to act without a warrant." *Id.* at *16.

11 *Id.* at *18 ("[T]he utility of warrantless activity is not the issue under our constitution.").

12 *Id.* at *5.

13 *Id.* at *7–8.

14 *Id.* at *8–10.

15 *Id.* at *11.

16 *Id.* at *22. (Appel, J., concurring specially); *see also id.* at *21 ("A recent book by Judge Jeff Sutton demolished the argument that state courts should simply follow federal law.") (citing Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law (2018)).

17 *Id.* at *25.

18 *Id.* at *26–28 (Christensen, C.J., dissenting).

19 *Id.* at *45 (Waterman, J., dissenting).

20 *Id.* at *38 (Christensen, C.J., dissenting).

21 *Id.* at *50 (Mansfield, J., dissenting).

22 *Id.* at *44 (Waterman, J., dissenting).

23 *Id.* at *43 (Christensen, C.J., dissenting).

24 *Id.* at *11 & n. 5.

25 *See* State v. Ochoa, 792 N.W.2d 260, 267 (2010) ("[W]e will engage in independent analysis of the content of our state search and seizure

continued that approach, while the dissenters indicated a willingness to interpret Art. I, § 8 independently when confronted with the sort of evidence they believe Wright failed to present.[26] Time will tell whether non-controlling portions of the majority opinion are ultimately adopted by four justices or, alternatively, whether the dissenters' understanding of Art. I, § 8 prevails. Future cases will undoubtedly require the court to choose between lockstep and independent interpretation, and to clarify the role of positive law in the court's constitutional analyses.

provisions."); *see also* State v. Short, 851 N.W.2d 474 (2014) (affirming the court's "approach to independent state constitutional law under article I, section 8").

26 *See, e.g.*, *Wright*, 2021 WL 2483567 at *38 (Christensen, C.J., dissenting) ("[T]o make an independent argument under the state clause takes homework—in texts, in history, in alternative approaches to analysis. It is not enough to ask the state court to reject a Supreme Court opinion on the comparable federal clause merely because one prefers the opposite result.") (quoting Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. Balt. L. Rev. 379, 392 (1980)).

IOWA

In the Matter of Adopting Felony Conviction Challenge for Cause Amendments to Chapter 1 Rules of Civil Procedure and Chapter 2 Rules of Criminal Procedure

By GianCarlo Canaparo

Published October 4, 2021

About the Author:

GianCarlo Canaparo is a legal fellow in The Heritage Foundation's Edwin Meese III Center for Legal and Judicial Studies. Canaparo researches, writes, speaks, and testifies on regulatory policy, the federal courts, and constitutional law.

In addition to Heritage publications, Canaparo's scholarship has appeared in numerous law reviews including the *Harvard Journal of Law and Public Policy*, the *Notre Dame Law Review*, the *Administrative Law Review*, and the *Georgetown Journal of Law and Public Policy*.

His analysis has appeared in *Fox News*, *The National Review*, T*he Washington Times*, *Law 360*, Federalist Society Blog, and other outlets.

In addition to his scholarly work, Canaparo co-hosts The Heritage Foundation's *SCOTUS 101* podcast, which follows and explains each week's happenings at the Supreme Court and features interviews with prominent judges, advocates, and academics.

Canaparo joined Heritage in 2019 after serving for two years as a law clerk to a federal district court judge. Before his clerkship, he spent three years as an associate at the law firm of Skadden, Arps, Slate, Meagher & Flom.

Canaparo holds a law degree from Georgetown University, where he was a published editor of the Georgetown Law Journal. He earned his bachelor's degree in economics from the University of California at Davis.

Note from the Editor:

On February 19, the Iowa Supreme Court amended the state rules of civil and criminal procedure so that prospective jurors may not be removed because of a prior felony conviction.[1] The decision follows an executive order signed by Iowa Governor Kim Reynolds on August 5, 2020, that restored certain of the "rights of citizenship" to felons after they have served their sentences.[2] The governor asserted this power under Article IV, section 16 of the Iowa constitution, which gives the governor the power to grant reprieves, commutations, and pardons, and the power to suspend fines and forfeitures.[3]

The governor's order uses broad language that is fairly read to restore all citizenship rights lost because of a felony conviction except the right to possess a firearm, which the order explicitly exempts.[4]

By restoring all rights of citizenship—except the right to possess a firearm—to felons, the order caused the Iowa Supreme Court to reevaluate two rules of procedure. Civil Rule 1.915(6)(a) and Criminal Rule 2.18(5)(a) permit for-cause challenges to prospective jurors on the grounds that they have a prior felony conviction "unless it can be established through the juror's testimony or otherwise that the juror's rights of citizenship have been restored."[5]

Given the governor's order, the Iowa Supreme Court concluded that those rules should be amended so that they do not apply to anyone covered by the order.[6]

For felons in Iowa, the governor's order and the state Supreme Court's decision means that upon completion of their terms of imprisonment, parole, probation, or supervised release, they may vote, hold office, serve on a jury, and otherwise enjoy all the rights of citizens except the right to possess a firearm.

The governor's order restores felons' citizenship rights even if a felon has not paid any of the monetary obligations arising from his conviction, including restitution to his victims.

1 In the Matter of Adopting Felony Conviction Challenge for Cause Amendments to Chapter 1 of Civil Procedure and Chapter 2 Rules of Criminal Procedure, Order of Feb. 19, 2021 (Iowa) (herein after "In the Matter").

2 Iowa Exec. Order No. 7 (Aug. 5, 2020).

3 *Id.* (citing Iowa Const. Art. IV, § 16).

4 *See id.* at § IX ("I will restore the rights of citizenship, *including* that of voting and qualification to hold office . . . .") (emphasis added).

5 Iowa R. Civ. P. 1.915(6)(a); Iowa R. Crim. P. 2.18(5)(a).

6 In the Matter, at *1.

ILLINOIS

Guns Save Lives, Inc. v. Ali

By Amy Swearer

Published December 20, 2021

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Note from the Editor:

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On October 21, 2021, the Illinois Supreme Court struck down two Cook County gun and ammunition tax ordinances as violations of the state constitution's uniformity clause.[1] The case, *Guns Save Lives, Inc. v. Ali*,[2] revolved around a county-specific $25 tax on the retail purchase of firearms ["firearm tax"], a five cent-per-cartridge tax on the retail sale of centerfire ammunition, and a one cent-per-cartridge tax on the retail sale of rimfire ammunition [collectively, the "ammunition tax"]. The revenue generated from the firearm tax was not directed toward any specific fund or program, while the revenue generated from the ammunition tax was directed toward the general public safety fund.

The plaintiffs – a resident of Cook County, a Cook County gun store, and an Illinois Second Amendment advocacy group – filed suit against the County, seeking injunctive and declaratory relief. They argued, in part, that the taxes constituted facial violations of the Second Amendment and the corresponding provision of the Illinois Constitution, and that they were preempted by aspects of the state's Firearm Owner's Identification (FOID) Card Act and Concealed Carry Act. Importantly, the plaintiffs also alleged that the taxes violated the state constitution's uniformity clause, which provides that: "[i]n any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly. Exemptions, credits, refunds and other allowances shall be reasonable."[3]

The state trial court held that the individual and retailer plaintiffs lacked standing with respect to the firearm tax, but that the advocacy group had associational standing to assert claims challenging both ordinances. The trial court then granted summary judgment in favor of the defendants, determining that the taxes constituted a proper exercise of Cook County's home rule taxing powers and did not meaningfully impede the plaintiffs' ability to exercise their right to keep and bear arms. Moreover, nothing in the language of the FOID Card Act or Concealed Carry Act preempted the county's taxing powers. Finally, the trial court concluded that the taxes did not violate the uniformity clause because they were substantially related to an important government interest, with revenue directed toward gun violence prevention.

The state appellate court affirmed the grant of summary judgment in favor of the County, finding, among other things, that the taxes did not restrict the plaintiff's ability to possess firearms and ammunition and did not violate the uniformity

1 *See* Cook County Code of Ordinances ch. 74, art. XX, §§ 74-665 through 74-675 (County Code). The firearms tax was adopted November 9, 2012, while the ammunition tax was adopted as an amendment to the same code section on November 18, 2015.

2 2021 IL 126014 (Ill. 2021).

3 Ill. Const. art. IX, § 2.

clause because the tax classifications were reasonably related to the objectives of the ordinances.[4]

A unanimous Illinois Supreme Court reversed and remanded with instructions to grant summary judgment in favor of the plaintiffs.[5] The court began its analysis by agreeing with both parties that the case involved only the County's taxing authority, and not the exercise of its regulatory powers. Accordingly, it first addressed the uniformity clause claim under the Illinois constitution, which it found dispositive of the issue. It explained that "[g]enerally, to survive strict scrutiny, a nonproperty tax classification must (1) be based on a real and substantial difference between the people taxed and those not taxed, and (2) bear some reasonable relationship to the object of the legislation or to public policy."[6] Because the plaintiffs had earlier abandoned their arguments under the first prong, the court's inquiry focused on the second prong requiring a reasonable relationship between the tax and the stated object of the tax.

The court agreed with the plaintiffs that the ordinances imposed a burden on the exercise of a core fundamental right to acquire a firearm and the ammunition necessary to use the firearm for self-defense. Acknowledging that this presented a new issue for which it had no analytical framework, the court looked to frameworks it had applied in similar contexts, including *Boynton v. Kusper*,[7] where it struck down a $10 tax on marriage licenses with revenue dedicated toward the prevention of domestic violence. Informed by its analysis in these parallel cases, the court concluded that "where a tax classification directly bears on a fundamental right…the tax classification must be substantially related to the object of the legislation."

The court concluded that, while the uniformity clause was not designed as a "straight jacket" imposed on counties and the effects of gun violence are certainly devastating, the taxes and the use of their proceeds in this case were "not sufficiently tied to the stated object of ameliorating these costs." The firearm tax ordinance did not direct revenue to any particular fund or program, much less one closely related to preventing gun violence, while the revenue generated from the ammunition tax was merely directed to a general public safety fund. The court explicitly declined to address the plaintiffs' other legal challenges.

Justice Michael J. Burke wrote a concurring opinion, agreeing that the county's special tax on firearms and ammunition violated the state constitution's uniformity clause.[8] He took issue, however, with the majority's analysis "because it leaves space for a municipality to enact a future tax – singling out guns and ammunition sales – that is more narrowly tailored to the purpose of ameliorating gun violence."[9] He accused the majority of "leading the County down a road of futility" because such an approach would still violate the Illinois Constitution. Justice Burke noted that, under article I, section 22 of the state constitution, the "right of the individual citizen to keep and bear arms" is "subject only to the police power."[10] Therefore, "while the government may regulate the right to keep and bear arms (within other constitutional limits, under its police power), by the plain terms of article I, section 22, it has no authority to single out the exercise of that right for taxation."[11]

Addressing arguments proffered by the defendants but unaddressed by the majority, Justice Burke noted that the "only result permitted by the plain text" of article I, section 22, is that the right cannot be subject to discriminatory taxation measures under the guise of the police power:

> Even if the statutes mentioned by the County did intend to specifically preserve for home rule units the power to tax handguns in the manner under consideration here, that would not show that the framers of our constitution intended to authorize a home-rule unit's discretionary taxation of firearms, where the text of that constitution clearly prohibits taxation that infringes on the right to keep and bear arms.[12]

The Cook County Board of Commissioners very quickly appeared to take a page from Justice Burke's hypothetical playbook on circumventing the court's analysis. On November 4, just two weeks after the Illinois Supreme Court's issued its ruling, the commission approved an amendment to the tax ordinances, specifically directing revenue toward gun violence prevention programs.[13]

4 *See Guns Save Lives, Inc. v. Ali*, 2020 IL App (1st) 181846 (Ill. App. 2020).

5 Chief Justice Anne M. Burke took no part in decision.

6 *Guns Save Lives, Inc. v. Ali*, 2021 IL 126014, ¶ 20 (Ill. 2021) (referencing Arangold Corp. v. Zehnder, 204 Ill. 2d 142, 147 (Ill. 2003)).

7 112 Ill. 2d 356 (1986) (striking down a $10 tax on marriage licenses as violating the due process clause and finding that the relationship between the purchase of a marriage license and domestic violence was too remote to satisfy the rational basis test, while also finding that the tax directly impeded the fundamental right to marry and that it failed to satisfy a heightened standard of review).

8 *Guns Save Lives, Inc. v. Ali*, 2021 IL 126014 (Ill. 2021) (Burke, J., concurring).

9 *Id.* at ¶ 47.

10 Ill. Const. art. I, § 22.

11 *Guns Save Lives, Inc. v. Ali*, 2021 IL 126014, ¶ 46 (Ill. 2021) (Burke, J., concurring).

12 *Id.* at ¶ 50.

13 *See* Alice Yin, *Cook County Guns and Ammo Tax, Struck Down by Illinois Supreme Court, Is Back on the Books for Now After Thursday Board Vote*, Chi. Tribune (Nov. 4, 2021 at 6:10 PM), https://www.chicagotribune.com/politics/ct-cook-county-guns-ammo-tax-20211104-n2bp6pxxq5a6jkdwotjeqotzza-story.html.

INDIANA

State v. Timbs

By Jeremiah Mosteller

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About the Author:

Jeremiah Mosteller serves as the Senior Policy Analyst for Criminal Justice at Americans for Prosperity, where he works alongside millions of activists and diverse coalition partners to advance positive criminal justice policies in 38 states and Congress. Before joining AFP, Jeremiah served on the criminal justice teams at the Due Process Institute, the Charles Koch Institute, and Prison Fellowship. Over his many years in this policy space, he has sought to make the criminal justice system more restorative, effective, and constructive while also upholding the rule of law and proper due process protections. Jeremiah is a graduate of Liberty University School of Law, where he also earned his Master's in Business Administration. He received his B.S. from Western Carolina University.

Note from the Editor:

An Eight-Year Battle

The Indiana Supreme Court has considered the state's use of civil asset forfeiture against Tyson Timbs three times.[1] In the first case, it reversed the ruling of both the trial court and the appellate court that the forfeiture of Timbs' Land Rover was "grossly disproportionate" and thus a violation of his Eighth Amendment right to be free from excessive fines. It did so because it believed the Eighth Amendment's Excessive Fines Clause had not been incorporated against the states.[2]

Two years later, the U.S. Supreme Court ruled in Timbs's case that the Excessive Fines Clause *was* incorporated against the states through the Fourteenth Amendment.[3] The Court unanimously stated that "the historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is overwhelming."[4] The Court also reaffirmed that civil in rem forfeitures are considered fines under the Eighth Amendment, but it provided lower courts with no guidance on how to determine whether an in rem civil forfeiture action is "excessive."[5]

Since the U.S. Supreme Court did not articulate a standard for how the Eighth Amendment should apply to in rem forfeitures—including the one at issue in the case—this job fell to the Indiana Supreme Court on remand. The court crafted a two-part test that requires judges to consider both "instrumentality" and "proportionality" to determine whether an in rem fine is constitutional.[6] The instrumentality prong requires the court to find that property was the "actual means by which an underlying offense was committed."[7] In determining whether a fine is proportional, judges must consider (1) the harshness of the punishment, (2) the severity of the underlying offenses, and (3) the claimant's culpability or blameworthiness

1 State v. Timbs, 169 N.E.3d 361 (Ind. 2021); State v. Timbs, 134 N.E.3d 12 (Ind. 2019); State v. Timbs, 84 N.E.3d 1179 (Ind. 2017).

2 *Timbs*, 84 N.E. 3d at 1181-85; *See also* State v. Timbs, 62 N.E.3d 472 (Ind. Ct. App. 2016).

3 *Timbs*, 139 S. Ct. at 687–91. *See* Christopher R. Green, *Timbs v. Indiana - Post-Decision SCOTUScast*, The Federalist Society (Mar. 20, 2019), https://fedsoc.org/commentary/podcasts/timbs-v-indiana-post-decision-scotuscast; Vikrant P. Reddy, *Courthouse Steps Decision Teleforum: Timbs v. Indiana*, The Federalist Society (Feb. 21, 2019), https://fedsoc.org/events/courthouse-steps-decision-teleforum-timbs-v-indiana.

4 *Timbs*, 139 S. Ct. at 689.

5 *Id.* at 689-91.

6 *Timbs*, 134 N.E.3d at 24-36 ("[T]o stay within the bounds of the excessive fines clause, a use-based fine must meet two requirements: (1) the property must be the actual means by which an underlying offense was committed, and (2) the harshness of the forfeiture penalty must not be grossly disproportional to the gravity of the offense and the claimant's culpability for the property's misuse.").

7 *Id.* at 27.

for the property's use.[8] If these three factors indicate that a seizure is grossly disproportional, it violates the Eighth Amendment's prohibition of excessive fines.

After formulating this test, the Indiana Supreme Court remanded the case to the trial court for it to analyze whether the proportionality requirement had been met, noting that the state had fulfilled the instrumentality requirement by showing that the seized property was related to the alleged offense.[9] The trial court held another hearing and found that Timbs had presented enough evidence to show that the forfeiture was grossly disproportional and therefore unconstitutional.[10] The state then filed another appeal arguing that the Indiana Supreme Court should overrule the standard it had created just two years before.[11]

Applying The New Standard

In this third consideration of the controversy between Tyson Timbs and the State of Indiana, the justices upheld and applied the standard they created less than two years ago. The justices said the state presented no compelling reason for them to "depart from the principles of stare decisis."[12] The justices then analyzed the proportionality prong of their own test based on the facts presented during the trial court's prior analysis by reviewing the harshness of punishment, the severity of the offenses, and Timbs's culpability.

Culpability

The justices described culpability as a spectrum ranging from "entirely innocent of the property's misuse" on the low end[13] to "used the property to commit the underlying offense" on the high end.[14] Timbs admitted that he had used the Land Rover during the first and third (uncompleted) heroin transactions. The justices agreed with the trial court that Timbs's culpability was at the high end of this spectrum.[15]

Harshness

To determine the harshness of the forfeiture in light of the circumstances of the case, the justices had previously noted that courts should consider the following factors:

1. the property's role in the underlying offense(s);
2. the property's use in other lawful or unlawful activities;
3. the extent to which the forfeiture would remedy the harm caused by the underlying offense(s);
4. the property's fair market value;
5. the other sanctions imposed on the property owner; and
6. the effects that the forfeiture will have on the property owner.[16]

Analyzing all of these factors, the justices agreed with the trial court that this forfeiture was significantly more punitive than remedial in nature, even though the vehicle was used in the underlying offense and other illegal activities.[17] They specifically noted that drug offenses are not "victimless," but that Timbs's offenses caused no "specific injuries to specific victims" as with violent or property crimes.[18] The facts that seemed to carry the most weight for Chief Justice Loretta Rush were that the seizure inhibited Timbs from maintaining employment and seeking treatment and that the forfeiture was imposed on top of one year in home detention, five years on probation, and an additional $1,200 in fees.[19] The court's analysis and the articulated factors seem to reveal that the justices will frown upon the use of forfeiture merely as a punitive sanction when another form of punishment has been imposed.

Severity

Severity is similar to harshness, but the court provided a partially different set of factors by which to determine whether the severity of the offense justified the forfeiture. Those factors include:

1. the seriousness of the offense,
   a) according to the possible statutory penalties;
   b) according to the sentence imposed;
   c) compared to other variations of the offense;
2. the actual harm caused by the offense committed; and
3. the relationship of the offense committed to any other criminal activity.

The justices strongly rejected key arguments made by the state and found that the severity of the offense was minimal and therefore this factor leaned against allowing forfeiture of the vehicle. The Chief Justice noted that the statutory maximum is relevant here, but that the maximum is reserved "for those who commit the worst variations of the crime" and that "the sentence *actually imposed* may provide even more precise insight into the

8 *Id.* at 35-38.

9 *Id.* at 39-40.

10 *Timbs*, 169 N.E.3d at 367.

11 *Id.* at 367-70.

12 *Id.* at 369-70.

13 Fifteen states have specifically adopted reforms to prevent the forfeiture of property from innocent owners of property being used in criminal activity without their permission or involvement, but most states still place the burden on property owners to prove their own innocence. *See* Institute for Justice, *Civil Forfeiture Reforms on the State Level* (2021), https://ij.org/activism/legislation/civil-forfeiture-legislative-highlights/; *see also* Lisa Knepper et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture*, Institute for Justice (3d ed. 2020), https://ij.org/wp-content/themes/ijorg/images/pfp3/policing-for-profit-3-web.pdf.

14 *Id.* at 372 (quoting *Timbs*, 134 N.E.3d at 37-38).

15 *Timbs*, 169 N.E.3d at 372.

16 *Id.* (citing *Timbs*, 134 N.E.3d at 36).

17 *Id.* at 373.

18 *Id.* at 373-74.

19 *Id.* at 373-75.

offense's severity."[20] This meant that Timbs's actual sentence of six years of suspended prison time—the statutory minimum—was more relevant to the severity determination than the statutory maximum of 20 years. The majority also noted that property owners suffering from addiction to illicit drugs does not categorically inflate the severity of any drug trafficking offenses but instead tends to explain why some individuals might engage in such activities.[21]

Ultimately, even in the face of high culpability and low severity, the majority agreed with the trial court that the forfeiture of Mr. Timbs's Land Rover was "grossly disproportional."[22] The Chief Justice clarified that simply because the seizure in the case was unconstitutional does not mean that all forfeitures in similar cases will be unconstitutional, and that judges must analyze the factors anew in future cases.[23]

Concurring Opinion – Subjectivity and the Rule of Law

Justice Geoffrey Slaughter's concurrence reiterates his dissent from the Indiana Supreme Court's second consideration of this controversy when it created the standard it applied in this case.[24] He only reluctantly accepted the majority's holding in this case because it is a "plausible and defensible" application of the precedent.[25] Citing a law review article written by Justice Antonia Scalia, Justice Slaughter noted that the harshness and severity requirements of the court's test rely on subjective analyses that can result in vastly different outcomes in cases with the same or similar facts.[26] He said that the test is "hard to square with the rule of law" and urged the court to rethink this subjective test.[27]

Dissenting Opinion – Proving the Concurrence

Justice Mark Massa—who joined the majority when it created the instrumentality and proportionality test—argued in his dissent that the court should have reached a different conclusion based on these facts.[28] He agreed that the forfeiture of the Range Rover was disproportional, but only *mildly* because he is "skeptical that dealing in heroin can ever be a crime of minimal severity" given the impact of the opioid crisis in Indiana.[29] The disagreement between Justice Massa and the majority opinion provides some credence to Justice Slaughter's concerns that the majority's test is subjective and open to manipulation so judges can achieve their desired outcomes.

20 *Id.* at 375 (quoting *Timbs*, 134 N.E.3d at 37).

21 *Timbs*, 169 N.E.3d at 375-376 ("They rather explained why he agreed to sell a small amount of drugs to an undercover officer—to help feed his addiction.")

22 *Id.* at 376-77.

23 *Id.*

24 *Timbs*, 134 N.E.3d at 40-41 (Slaughter, J., dissenting).

25 *Timbs*, 169 N.E.3d at 377-78, 380 (Slaughter, J., concurring).

26 *Id.* at 377-78 (Slaughter, J., concurring).

27 *Id.* at 378, 380-81 (Slaughter, J., concurring).

28 *Timbs*, 134 N.E.3d 12.

29 *Timbs*, 169 N.E.3d at 381-82 (Massa, J., dissenting).

KENTUCKY

Cameron v. Beshear

By J. Brooken Smith

Published October 7, 2021

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J. Brooken Smith is a founding member of Swansburg & Smith, PLLC. Licensed to practice in Kentucky, his practice focuses on representing businesses and employers in litigation and employment matters. Mr. Smith previously practiced with a large regional law firm for more than five years, representing businesses in a variety of legal disputes and defending employers in discrimination and other claims. Mr. Smith practices in state and federal courts throughout Kentucky.

Throughout his career, Mr. Smith has gained extensive experience in public service at the state and federal level. Before entering the private practice of law, Mr. Smith served as a law clerk for the Honorable Gregory F. Van Tatenhove, United States District Court Judge for the Eastern District of Kentucky. He served as the chief of staff for the Kentucky Labor Cabinet and, later, the Education and Workforce Development Cabinet. Mr. Smith also served as the *ex officio* chair of the Unemployment Insurance Commission, a three-member executive branch agency that hears administrative appeals of unemployment insurance claims.

Mr. Smith graduated from the University of Kentucky College of Law and earned a bachelor of arts in government from Georgetown University in Washington, D.C.

Note from the Editor:

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

As society grapples with the evolving nature of the COVID-19 pandemic, public policy disagreements about the government's response are spilling over into legal challenges, not only between affected citizens and public agencies, but also between executive and legislative branches of state government. These latter conflicts transcend debates over the wisdom and efficacy of specific COVID-19 policies and speak to a more fundamental question: which branch of government gets to set policy?

In Kentucky, this question arose amidst a tug-of-war contest between the state's Democratic governor and its Republican-dominated legislature over the governor's emergency powers. The Kentucky Supreme Court recently resolved this issue in *Cameron v. Beshear*.[1]

A Kentucky state law, KRS Chapter 39A, authorizes the governor to declare a state of emergency and to assume broad powers to respond to dire threats to public safety.[2] On March 6, 2020, Kentucky Governor Andy Beshear used that authority to declare a state of emergency relating to the COVID-19 pandemic.[3] Since then, his administration has directed the state government's efforts to abate the public health threat, including by compelling the closure of businesses[4] and houses of worship[5] and requiring the use of masks[6] and social distancing.[7]

Some of the state's actions have been challenged in court. Early in the pandemic, courts curtailed some restrictions, particularly those imposed on religious practice.[8] However, in *Beshear v. Acree*, the court held that the emergency powers set forth in KRS Chapter 39A do not violate the separation of powers provisions in the Kentucky Constitution.[9] Nevertheless, the court foreshadowed legislative and judicial battles to come

1 Cameron v. Beshear, __ S.W.3d __, 2021 WL 3730708 (Ky. 2021).

2 *See, e.g.,* KRS 39A.090; KRS 39A.100.

3 Executive Order No. 2020-215 (March 6, 2020).

4 *See, e.g.,* Executive Order No. 2020-246 (March 22, 2020).

5 *See, e.g.,* Order (March 19, 2020).

6 *See, e.g.,* Executive Order No. 2020-931 (Nov. 4, 2020).

7 *See, e.g.,* Executive Order No. 2020-243 (March 18, 2020).

8 *See, e.g.*, Roberts v. Neace, 958 F.3d 409 (6th Cir. 2020) (enjoining the enforcement of orders prohibiting drive-in church services so long as congregants adhere to certain public health requirements); Maryville Baptist Church, Inc. v. Beshear, 957 F.3d 610 (6th Cir. 2020) (same); Danville Christian Academy, Inc. v. Beshear, 503 F. Supp. 3d 516 (E.D. Ky. 2020) (enjoining enforcement of executive order prohibiting all in-person instruction at public and private schools); On Fire Christian Center, Inc. v. Fischer, 453 F. Supp. 3d 901 (W.D. Ky. 2020) (enjoining the enforcement of an order prohibiting individuals from attending drive-in religious services).

9 615 S.W.3d 780, 805-13 (Ky. 2020).

by recognizing that the General Assembly was free to roll these powers back.[10]

Acree set the stage for the 2021 Regular Session of the General Assembly almost two months later, when the legislature passed four laws curbing the governor's emergency powers.[11] House Bill 1 allowed most businesses to remain open for in-person services despite the state of emergency.[12] Senate Bill 1 limited many COVID-19-related executive orders to 30 days unless extended by the General Assembly, prevented the governor from renewing expired executive orders, and curbed the governor's emergency power to suspend statutes by requiring the approval of the attorney general.[13] Senate Bill 2 similarly placed a 30-day limit on regulations of in-person meetings and quarantine rules.[14] And House Joint Resolution 77 terminated several COVID-19 executive orders, including one requiring masks in public settings, and extended others.[15] The Kentucky House and Senate adopted each of these measures over the vetoes of Governor Beshear.

Governor Beshear challenged these enactments in court, arguing that they irreparably impaired his inherent authority under the Kentucky Constitution to respond to the pandemic. After the trial court enjoined the implementation of the new laws, the Kentucky Supreme Court, taking the case on direct appeal, unanimously rejected that proposition, finding that Kentucky law limits the executive branch to those powers specifically enumerated in the Constitution or in statutes: "[T]he Governor has no implied or emergency powers beyond that given him by the legislature, who, as elected officials, serve at the behest of the Commonwealth."[16] The court also reiterated its longstanding holding that in the realm of policymaking, the legislature is supreme: the "executive branch exists principally to do [the General Assembly's] bidding."[17]

The Kentucky Supreme Court's ruling in *Cameron* instructed the lower court to dissolve the injunction, allowing House Bill 1, Senate Bill 1, Senate Bill 2, and House Joint Resolution 77 to go into effect.[18] As part of its ruling, the court upheld the attorney general's veto over the governor's power to suspend statutes as "a valid exercise of the General Assembly's authority."[19] But it left the fate of the 30-day limit on emergency executive orders to another day since the issue had not been adequately briefed.[20]

Two justices concurred by a separate opinion. Justice Lisabeth Hughes, joined by Chief Justice John Minton, wrote separately to highlight "serious constitutional questions" concerning the time limits on emergency executive authority as set forth in Senate Bill 1.[21] The justices seemed to be particularly concerned that a 30-day limit on the governor's emergency powers might be inconsistent with existing constitutional structure, which strictly limits the duration of legislative sessions and confers considerable discretion on the governor to call special sessions of the General Assembly.[22] Justice Hughes implored the trial court to address these questions with the benefit of briefing by the governor and the attorney general.[23]

What does this mean for the balance of powers between Kentucky's executive and legislative branches, and for the state's response to emerging variants of COVID-19? First, *Cameron* strengthens the General Assembly's predominance over setting policy for the Commonwealth—even in an emergency. The legislature already enjoyed the structural advantage of being able to override the governor's veto by a simple majority in both chambers. While the governor can act under KRS Chapter 39A to avert crises, without any claim to "implied" emergency authority, the governor is largely powerless to prevent a determined legislative majority from overriding executive actions with which it disagrees when the legislature convenes in its regular sessions. The General Assembly is largely free to limit or expand emergency powers, block or extend particular executive actions, or to chart an entirely different course, as it sees fit. Though, as mentioned above, some recently enacted legislative limits on emergency powers still need to be sorted out, it is unlikely that controversial mandates will long endure without the buy-in of the General Assembly.

It remains to be seen whether, in the long run, *Cameron* will usher in a new era of executive-legislative cooperation, which some legislators urged early on in the pandemic and which Justice Hughes urged in her concurring opinion. But recent events have already put that prospect to the test. On September 4, 2021, Governor Beshear called a special session of the General Assembly to address the COVID-19 pandemic.[24] The special session revealed areas of common ground for the governor and the General Assembly, but it also exposed where they part ways. With the governor's approval, the legislature extended to January 15, 2022, the executive order declaring a state of emergency and

10 *Id.* at 812-13 ("While the authority exercised by the Governor in accordance with KRS Chapter 39A is necessarily broad, the checks on that authority are . . . judicial challenges to the existence of an emergency or to the content of a particular order or regulation; *legislative amendment or revocation of the emergency powers granted the Governor*; and finally, the 'ultimate check' of citizens holding the Governor accountable at the ballot box.") (emphasis added).

11 Bruce Schreiner, *Kentucky high court upholds governor's powers to fight virus*, Assoc. Press, Nov. 12, 2020, https://apnews.com/article/kentucky-coronavirus-pandemic-courts-58bccf785f63666fdcb25ca2f043c016.

12 House Bill 1, § 1 (2021 Regular Session).

13 Senate Bill 1, §§ 2, 4 (2021 Regular Session).

14 Senate Bill 2, § 22 (2021 Regular Session).

15 House Joint Resolution 77, §§ 1, 2,3, 4 (2021 Regular Session).

16 *Cameron*, 2021 WL 3730708, at *8.

17 *Id.* at *7 (quoting Brown v. Barkley, 628 S.W.2d 616, 623 (1982)).

18 *Id.* at *12 ("[C]onsidering that the challenged legislation was lawfully passed, the Governor's Complaint does not present a substantial legal question that would necessitate staying the effectiveness of the legislation.")

19 *Id.* at *10.

20 *Id.* at *9.

21 *Id.* at *13 (Hughes, J., concurring).

22 *Id.*

23 *Id.*

24 Proclamation by Andy Beshear, Governor of the Commonwealth of Kentucky (September 4, 2021).

more than 60 other executive orders and administrative actions,[25] and it directed federal funds[26] for COVID-19 testing and the development of monoclonal antibody treatment centers, among other things.[27] But it also blocked key priorities of the Beshear Administration by nullifying regulations mandating masks in public schools and childcare settings.[28] And it prohibited any similar statewide mask mandates until 2023.[29] As with House Bill 1, Senate Bill 1, Senate Bill 2, and House Joint Resolution 77 from earlier in the year, the General Assembly took these actions over Governor Beshear's veto.

25 House Joint Resolution 1 (2021 Special Session).

26 Kentucky law generally requires the General Assembly to authorize the expenditure of funds received from the federal government. *See* KRS 48.160 ("Each branch, by budget unit, shall submit in its budget recommendation a request for funds reasonably necessary to match anticipated federal funds which may become available during the biennium. The amount of anticipated federal funds shall also be specified."); KRS 48.300(1) ("The financial plan for each fiscal year as presented in the branch budget recommendation shall be adopted, with any modifications made by the General Assembly, by passage of a branch budget bill for each branch of government, and any revenue and other acts as necessary.").

27 Senate Bill 3, § 1 (2021 Special Session).

28 Senate Bill 1, §§ 1, 2 (2021 Special Session).

29 *Id.*; Senate Bill 2, §§ 10, 11 (2021 Special Session).

MASSACHUSETTS

DeWeese–Boyd v. Gordon College

By Jordan Lorence

Published September 10, 2021

About the Author:

Jordan Lorence serves as senior counsel and director of strategic engagement with Alliance Defending Freedom, where he plays a key role with the Strategic Relations & Training Team. His work has encompassed a broad range of litigation, with a primary focus on religious liberty, free speech, student privacy, conscience rights of creative professionals, and the First Amendment freedoms of public university students and professors.
Before officially joining the organization in 2001, Lorence was a productive allied attorney for many years, actively involved in significant litigation for ADF. He has also worked for the Home School Legal Defense Association, Concerned Women for America, and the American Center for Law and Justice. Lorence earned a J.D. from the University of Minnesota Law School and received a B.A. in journalism from Stanford University. He is admitted to the bar in Minnesota, Virginia, the District of Columbia, the U.S. Supreme Court, and multiple federal appellate and district courts.

Note from the Editor:

Mr. Lorence's organization, Alliance Defending Freedom, was retained by Gordon College to file an appeal with the U.S. Supreme Court, although he has had no direct involvement in the case.

DeWeese-Boyd v. Gordon College is an important case involving the scope of the First Amendment's "ministerial exception," which protects employment decisions made by religious groups. In this case, the Massachusetts Supreme Judicial Court ruled unanimously that although Gordon College is a Christian religious institution, the ministerial exception does not apply to Margaret DeWeese-Boyd's position at the college as associate professor of social work.[1] DeWeese-Boyd's lawsuit alleges Gordon College discriminated against her by denying her application to become a full professor based on her sex and her association with LGBTQ+ individuals, and the court's decision allows that lawsuit to proceed.[2]

The United States Supreme Court has recognized that the First Amendment creates a "ministerial exception" to protect from government review and interference the decisions of religious organizations to choose their "ministers," such as their leaders and teachers. This means a court cannot use a lawsuit to review and possibly override a religious group's decision to select or reject a person to serve as one of its ministers.

For example, the Supreme Court applied the ministerial exception in a discrimination lawsuit filed by a teacher (who was also an ordained minister) fired from her job at a Lutheran school. In *Hosanna-Tabor Evangelical Church and School v. E.E.O.C*, the Supreme Court ruled that:

> Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.[3]

The Supreme Court has since expanded the scope of the ministerial exception to include teachers whose jobs required them to teach religious tenets, as well as other subjects, in *Our Lady of Guadalupe School v. Morrissey-Berru*, which consolidated two cases involving the termination of teachers in Roman Catholic parochial schools in California.[4]

In *DeWeese-Boyd v. Gordon College*, the Massachusetts Supreme Judicial Court applied these precedents to decide two questions: 1) whether Gordon College was a religious institution covered by the ministerial exception, and 2) whether the professor of social work was a "minister" under this First Amendment doctrine.

1 DeWeese-Boyd v. Gordon College, 487 Mass. 31, 33, 163 N.E.3d 1000 (Mass. 2021).

2 *Id.* at 34.

3 565 U.S. 171, 188 (2012).

4 140 S. Ct. 2049 (2020).

The Massachusetts Supreme Judicial Court first explained the challenges created by exempting religious organizations from discrimination lawsuits brought by employees serving in ministerial positions:

> The application of the ministerial exception could eclipse, and thereby eliminate, civil law protection against discrimination within a religious institution; in contrast, the decision not to apply the exception could allow civil authorities to interfere with who is chosen to propagate religious doctrine, a violation of our country's historic understanding of the separation of church and State set out in the First Amendment to the United States Constitution.[5]

In answering the first question, the court had no problem finding that Gordon College was a religious institution. It pointed to obvious evidence of the college's Christian mission. For example, the Faculty Handbook calls the school a "Christian community."[6] Its bylaws state that Gordon College is dedicated to "[t]he historic, evangelical, biblical faith."[7] The court cited the testimony of Gordon College President D. Michael Lindsay, who said, "at Gordon, there are no nonsacred disciplines . . . Every subject matter that we pursue is informed by, shaped by, the Christian tradition."[8] The court concluded by saying, "[u]pon review of the abundant record concerning Gordon's obvious religious character, we conclude that it is a religious institution."[9]

In regard to the second question, the Massachusetts Supreme Judicial Court ruled that DeWeese-Boyd's job as a professor of social work was not a "minister" position protected by the First Amendment's ministerial exception.

The court came to this conclusion by following the directive from the U.S. Supreme Court on how to determine when a position is one protected by the ministerial exception. The U.S. Supreme Court "emphasized a functional analysis,"[10] the Massachusetts high court said, then it quoted *Our Lady of Guadalupe School*: "What matters, is what an employee does."[11] That means that a reviewing court must "take all relevant circumstances into account and . . . determine whether each particular position implicated the fundamental purpose of the exception."[12]

The court then compared the duties of the two parochial school teachers the U.S. Supreme Court found to be ministers in *Our Lady of Guadalupe* to the duties of Professor DeWeese-Boyd at Gordon College. It found nothing in Prof. DeWeese-Boyd's "title or training to provide decisive insight into resolving the difficult question whether she was a minister."[13] The court also stated that none of Prof. DeWeese-Boyd's duties at Gordon College were similar to the duties of the teachers in *Our Lady of Guadalupe School:*

> DeWeese-Boyd was not required to, and did not, teach classes on religion, pray with her students, or attend chapel with her students, like the plaintiffs in *Our Lady of Guadalupe*, 140 S. Ct. at 2066, nor did she lead students in devotional exercises or lead chapel services, like the plaintiff in *Hosanna-Tabor*, 565 U.S. at 192. We consider this a significant difference.[14]

The court then considered evidence showing that Gordon College considered its faculty members to be Christian ministers. In October 2016, Gordon College added this provision to its Faculty Handbook:

> One of the distinctives of Gordon College is that each member of faculty is expected to participate actively in the spiritual formation of our students into godly, biblically faithful ambassadors for Christ. Faculty members should seek to engage our students in meaningful ways to strengthen them in their faith walks with Christ. In the Gordon College context, faculty members are both educators and *ministers* to our students.[15]

The court downplayed the significance of this evidence that the college's professors are Christian ministers by pointing out that the legal counsel for the college drafted it, and that the college did not inform the faculty of this change to the handbook.[16] Many professors disputed this added language, saying it was inaccurate, misleading and a significant departure from the way the faculty members perceived their responsibilities and duties at the college.[17]

Additionally, the Massachusetts high court grappled with Gordon College's requirement that professors integrate their Christian faith into the academic disciplines they taught.[18] The court quoted school materials stating that "[t]he social work curriculum 'is informed by a Christian understanding of individuals, communities, and societies,' and seeks the 'integration and application of social work and Christian values . . . .'"[19] The court recognized that Gordon College required Professor DeWeese-Boyd to conduct her job with "integrative responsibility,"[20] that is, to apply Christian principles to the "decidedly nonsectarian"[21] field of social work. The court found

5 *DeWeese-Boyd*, 487 Mass. at 32.

6 *Id.* at 35.

7 *Id.*

8 *Id.*

9 *Id.* at 45.

10 *Id.* at 47.

11 *Our Lady of Guadalupe School*, 140 S. Ct at 2064.

12 *DeWeese-Boyd*, 487 Mass. at 46-47 (quoting *Our Lady of Guadalupe*, 140 S. Ct. at 2067).

13 *Id.* at 49.

14 *Id.* at 47.

15 *Id.* at 37-38 (emphasis added).

16 *Id.* at 38.

17 *Id.*

18 *Id.* at 47.

19 *Id.*

20 *Id.* at 48.

21 *Id.* at 47.

the college's requirement that professors integrate the Christian faith with their teaching to be "an important aspect of being a professor at Gordon."[22]

However, the court declined to expand the ministerial exception this broadly because the U.S. Supreme Court had not yet done so. The cases from the U.S. Supreme Court involved teachers with specific duties of "teaching . . . prescribed religious doctrine, or leading students in prayer or religious ritual."[23] The college did not require Prof. DeWeese-Boyd to do any of that. Without more direction from relevant Supreme Court precedent, the Massachusetts Supreme Judicial Court declined to rule that the ministerial exception applied to DeWeese-Boyd's position as a professor of social work.[24]

Therefore, the Massachusetts Supreme Judicial Court upheld the decision of the trial court finding that Prof. DeWeese-Boyd's teaching position did not make her a "minister" for purposes of the First Amendment's ministerial exception doctrine, which would have exempted Gordon College from her lawsuit.

Gordon College has appealed this decision to the U.S. Supreme Court, which will likely conference the case for consideration in December 2021.

22 *Id.* at 48.

23 *Id.*

24 *Id.* at 54-55.

MICHIGAN

Council of Organizations and Others for Education About Parochiaid v. State

By Thomas Rheaume, Jr., Gordon Kangas

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Note from the Editor:

Michigan's Supreme Court confirmed that the state's constitution permits reimbursement to religious schools for costs incurred from mandated health and safety measures. The case, *Council of Organizations and Others for Education About Parochiaid v. State of Michigan*, was decided on December 28, 2020, but the story begins decades earlier.[1]

In the summer of 1970, Public Act 100 became law in Michigan. It permitted the Michigan Department of Education to pay a portion of private school teachers' salaries, if those teachers taught only secular subjects.[2] That fall, Michigan voters approved Proposal C and thereby amended the state constitution by referendum to explicitly limit payments and other aid to nonpublic schools.[3] This rendered Public Act 100 unconstitutional, and it also raised questions about other funding arrangements.

The following year, the Michigan Supreme Court answered several certified questions concerning aid to nonpublic schools in *Traverse City School District v. Attorney General*.[4] The court held that "shared time"—an arrangement where private school students attend public schools for certain courses—remained constitutional even after the amendment because the public school still administered the courses and received the funding. State funding for "auxiliary services" such as hearing tests, street crossing guards, speech therapy, and other remedial services also remained constitutional because they are "health and safety measures" that "only incidentally benefit religion and do not constitute state support of or excessive entanglement in religion."[5] In a subsequent opinion, however, the Michigan Supreme Court held that the state could not pay for textbooks to be given or lent to private schools, because unlike auxiliary services that are "commodities 'incidental' to a school's maintenance and support," textbooks "are essential aids that constitute a 'primary' feature of the educational process and a 'primary' element required for any school to exist."[6]

These decisions framed the debate in the recent *Parochiaid* case. A 2016 law "appropriated $2.5 million in funds for the 2016–2017 school year 'to reimburse costs incurred by

1 Council of Orgs. & Others for Educ. about Parochiaid v. State, No. 158751, 2020 Mich. LEXIS 2290 (Dec. 28, 2020), *available at* https://courts.michigan.gov/Courts/MichiganSupremeCourt/Clerks/Recent%20Opinions/20-21%20Term%20Opinions/Council%20of%20Orgs-OP.pdf.

2 In re Legislature's Request for An Op., 180 N.W.2d 265, 266 n.2 (Mich. 1970).

3 *Parochiaid*, 2020 Mich. LEXIS 2290, at *7-9.

4 185 N.W.2d 9 (Mich. 1971).

5 *Id.* at 22.

6 Advisory Opinion re Constitutionality of 1974 PA 242, 228 N.W.2d 772, 773 (Mich. 1975).

nonpublic schools' for compliance with various state health, safety, and welfare mandates to be identified by the [Michigan] Department of Education[.]"[7] The ACLU of Michigan and other organizations and public schools filed suit, alleging that the law violated the Michigan Constitution's prohibition on nonpublic school funding.

A panel majority of the Michigan Court of Appeals held that the appropriation was constitutional. The majority reasoned that:

> Conducting criminal background checks, disposing of instruments containing mercury, and maintaining epinephrine autoinjectors, while mandatory, have nothing directly to do with teaching and educating students; these compliance actions are truly incidental to providing educational services and focus instead on a student's well-being, i.e., his or her health, safety, and welfare.[8]

The dissent disagreed with distinguishing costs as auxiliary and instead saw the majority's three examples as simply the cost of doing business as a school.[9] Because criminal background checks are mandated by state law, wrote the dissent, "they are by definition a primary element necessary for a school's operation," and because Michigan law forbids the employment of a teacher who has been convicted of a sexual crime, "[e]mploying legally qualified teachers is a primary function of a school."[10] The Michigan Supreme Court granted leave to appeal the decision, but when that court split evenly, the court of appeals' decision was affirmed.

Writing in favor of affirmance, Justice Stephen J. Markman began by recognizing, as the court had in *Traverse City*, that if Proposal C were read "literally," it would prohibit even police and fire services to a nonpublic school, which "would raise significant questions about whether the provision violates the Free Exercise Clause [of the U.S. Constitution] given its effect on religion."[11] And like the Court of Appeals, Justice Markman interpreted *Traverse City* as employing "distinct analyses" for auxiliary services and shared time to deal with the problem posed by a literal interpretation.[12] Auxiliary services are permissible under the Michigan Constitution because they are "general health and welfare measures."[13] "Proposal C was only understood to prohibit appropriations for nonpublic-school educational services," so health and welfare measures "simply fell outside the scope of Proposal C."[14] Shared time services are permissible under the Michigan Constitution because, despite being educational, the "control" remains within the public school system.[15] Justice Markman reasoned that "the auxiliary services permitted by *Traverse City* are substantively indistinguishable from the reimbursements permitted" by the 2016 law.[16] "If the state is constitutionally permitted to provide speech-correction services directly to nonpublic-school students without running afoul of Proposal C . . . the state should be able to facilitate those same services indirectly in the manner set forth by [the 2016 law]."[17] Justice Markman concluded that the law was therefore constitutional.

Writing in favor of reversal, Justice Megan Cavanaugh disagreed with that reading of *Traverse City*. Justice Cavanaugh took the *Traverse City* court to have followed a series of steps, which she would have applied.[18] First, a court must determine whether the law violates the Michigan Constitution. If it does, then the court must determine whether applying the Michigan Constitution would conflict with the U.S. Constitution. "If there is no conflict, then the funding is prohibited."[19] Otherwise, a court must decide "whether there is an alternative constitutional construction" that preserves the purpose of the Michigan Constitution's provision and "is consonant with a common understanding of the language used" in that provision.[20] In Justice Cavanaugh's view, the *Traverse City* court found that the 1970 law conflicted with the Michigan Constitution, but that this holding would put the Michigan Constitution in conflict with the U.S. Constitution.[21] So the *Traverse City* court engaged in a saving construction of the Michigan Constitution that would allow shared time and auxiliary services. Justice Cavanaugh believed that the opinion for affirmance misapplied these steps because, unlike the law challenged in *Traverse City*, the 2016 law did not raise overbreadth concerns under the U.S. Constitution, and thus there was no need to find an alternative construction of the Michigan Constitution.[22] Instead, she would have held that the law was invalid under a plain reading of the Michigan Constitution.[23]

7 *Parochiaid*, 2020 Mich. LEXIS 2290, at *2.

8 *Council of Orgs. & Others for Educ. About Parochiaid v. State*, 931 N.W.2d 65, 80 (Mich. Ct. App. 2018). The law permitted reimbursements for many other costs as well.

9 *Id.* at 84 (Gleicher, J., dissenting). The majority did not entirely disagree with the dissent's approach, but considered itself bound by the *Traverse City* precedent. *Id.* at 82 ("Were we restricted to solely examining and contemplating the language of Const. 1963, art. 8, § 2, *absent any other considerations and on a clean slate*, we might very well agree with our colleague's position.").

10 *Id.* at 89 (Gleicher, J., dissenting).

11 *Parochiaid*, 2020 Mich. LEXIS 2290, at *20 (citing *Traverse City*, 185 N.W.2d at 29) (Markman, J., writing for affirmance).

12 *Id.* at *22.

13 *Id.* at *23 (quoting *Traverse City*, 185 N.W.2d at 22).

14 *Id.* at *25.

15 *Id.* at *24.

16 *Id.* at *28–29.

17 *Id.*

18 *Id.* at *44 (Cavanaugh, J., writing for reversal).

19 *Id.*

20 *Id.* (quoting *Traverse City*, 185 N.W.2d at 18).

21 *Id.* at *46.

22 *Id.* at *51-53.

23 *Id.* at *63.

In light of the Supreme Court's even split, the Michigan Court of Appeals' opinion now controls. That court's decision provides the following test for future legislation:

> [T]he Legislature may allocate public funds to reimburse nonpublic schools for actual costs incurred in complying with state health, safety, and welfare laws. But the reimbursement may only occur if the action or performance that must be undertaken to comply with a health, safety, or welfare mandate (1) is, at most, merely incidental to teaching and providing educational services to nonpublic school students (noninstructional in nature), (2) does not constitute a primary function or element necessary for a nonpublic school to exist, operate, and survive, and (3) does not involve or result in excessive religious entanglement.[24]

That will be the test going forward in the event that future funding is provided for nonpublic schools.

24 *Parochiaid*, 931 N.W.2d at 68.

MINNESOTA

State v. Khalil

By Dean Mazzone

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Note from the Editor:

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the authors. We do invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

Note from the Massachusetts Attorney General's Office:

The author is an Assistant Attorney General in Massachusetts. This article represents the opinions and legal conclusions of its author and not necessarily those of the Office of the Attorney General. Opinions of the Attorney General are formal documents rendered pursuant to specific statutory authority.

Like many criminal cases, *Minnesota v. Khalil* "arises from an experience no person should ever have to endure."[1] As the Minnesota Supreme Court summarized the undisputed facts: the victim, "J.S. was intoxicated after drinking alcohol and taking a prescription narcotic. She went to a bar with a friend but was denied entry due to her intoxication. Appellant Francios Momolu Khalil approached J.S. outside of the bar and invited her to accompany him to a supposed party at a house. After arriving at the house, J.S. passed out and woke up to find Khalil [sexually penetrating] her."[2] Yet, as will be seen, Khalil could not be found guilty of the crime with which he was charged because there was no evidence presented that he knew or had reason to know that J.S. was "mentally incapacitated" as that term is defined in the applicable state statute.

Minnesota law provides that the crime of third-degree criminal sexual conduct consists of sexual penetration with another person when the actor knows or has reason to know that the victim is "mentally incapacitated."[3] The law, in turn, defines "mentally incapacitated" as "a person under the influence of alcohol, a narcotic, anesthetic, or any other substance, *administered to that person without the person's agreement*, lacks the judgment to give a reasoned consent to sexual contact or sexual penetration."[4]

The court was thus faced with the question "whether a person can be mentally incapacitated under the statute when the person voluntarily ingests alcohol, or whether the alcohol must be administered to the person without his or her agreement."[5] Holding that the statute at issue requires that the substance be administered to the person without consent, the Minnesota Supreme Court reversed Khalil's conviction.

As noted above, it is undisputed that on a night in 2017, the victim, J.S., "consumed approximately five shots of vodka and one pill of a prescription narcotic."[6] Later that same night she and a friend met Khalil and two other men outside a local bar.[7] J.S. then "blacked out" at a house in North Minneapolis where the group had gone, ostensibly to a party.[8] J.S. awoke some time later to find Khalil sexually penetrating her.[9] J.S. lost consciousness again, then awoke some time later and left the

1 State v. Khalil, 956 N.W.2d 627, 629 (2021).

2 *Id.*

3 *Id.*

4 *Id.* (emphasis added)

5 *Id.*

6 *Id.* at 630.

7 *Id.*

8 *Id.*

9 *Id.*

house with her friend.[10] J.S. then went to an area hospital to have a rape kit done, and she thereafter reported the incident to the police.[11] After an investigation, the State charged Khalil with one count of third-degree criminal sexual conduct involving a mentally incapacitated or physically helpless complainant.[12] The court noted that the State decided not to charge Khalil with the gross misdemeanor crime of fifth-degree criminal sexual conduct.[13] That lesser charge criminalizes nonconsensual sexual contact, and both parties on appeal conceded that Khalil's alleged conduct would fall within the ambit of that misdemeanor charge.[14]

At Khalil's trial, the judge instructed the jury that, to find Khalil guilty, they had to find that "Mr. Khalil knew or had reason to know that [the victim] was mentally incapacitated or physically helpless."[15] The judge went on to instruct the jury that "[a] person is mentally incapacitated if she lacks the judgment to give reasoned consent to sexual penetration due to the influence of alcohol, a narcotic, or any other substance administered without her agreement."[16]

During deliberations, the jury requested clarification on the element of mental incapacitation.[17] According to the court "the jury sought to clarify whether it was sufficient that [the victim] voluntarily consumed the alcohol or whether Khalil or another person had to have administered the alcohol to [the victim] without her agreement for her to qualify as mentally incapacitated under Minn. Stat. section 609.341, subd. 7."[18] The judge, over Khalil's objection, instructed the jury that "you can be mentally incapacitated following consumption of alcohol that one administers to one's self or narcotics that one administers to one's self or separately something else that's administered without someone's agreement."[19] The jury then convicted Khalil.[20]

On appeal, Khalil challenged the jury instruction on mental incapacity, arguing that it was inconsistent with the plain language of the statute.[21] A divided court of appeals rejected that argument and affirmed Khalil's conviction.[22] On further review, the Minnesota Supreme Court agreed with Khalil and reversed his conviction.[23]

Citing the plain language of the statute, the court determined that it was constrained to reverse. The court noted that while "[i]t is certainly true that a commonsense understanding of the term mentally incapacitated could include a person who cannot exercise judgment sufficiently to express consent due to intoxication resulting from the voluntary consumption of alcohol,"[24] the court's task is not merely to apply commonsense understandings of statutory terms. In this case, the court observed, "we do not look at the ordinary, commonsense understanding of mentally incapacitated because the Legislature expressly defined the term in the general definitions section of Minnesota's criminal sexual conduct statutes[.]"[25]

The court then noted again that that definition was straightforward: "mentally incapacitated," for purposes of the statute at issue, means "that a person under the influence of alcohol, a narcotic, anesthetic, or any other substance, *administered to that person without the person's agreement*, lacks the judgment to give a reasoned consent to sexual contact or penetration."[26] The court noted, and the State did not contend otherwise, that there was no evidence that Khalil knew or had reason to know that the victim was administered alcohol without her agreement.[27] But, the court stated, there was sufficient evidence that Khalil knew or had reason to know that the victim was under the influence of alcohol.[28] The court was thus faced with the question of whether the legislature's definition of mental incapacity, quoted above, was limited to "circumstances where the state of mental incapacitation results from consumption of alcohol administered to the complainant involuntarily without her agreement."[29] Rebuffing the State's contrary contention, the court held that, as a matter of pure statutory interpretation, it plainly was so limited. The trial judge's instructions did not reflect that and instead allowed the jury to convict on insufficient facts. This error warranted reversal.

Whether or not the statute as written is sensible or laudable, or something less, was not an issue for the court:

> Of course, we offer no judgment as to whether the Legislature's choice about the level of criminal liability and punishment that should be imposed on a person who sexually penetrates another person knowing (or negligently unaware) that the other person lacks the judgment to consent due to voluntary intoxication is appropriate. If the Legislature intended for the definition of mentally incapacitated to include voluntarily intoxicated persons, it

10 *Id.*

11 *Id.*

12 *Id. See also* Minn. Stat. section 609.344, subd. 1(d) (2020).

13 *Khalil*, 956 N.W.2d at 631.

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 State v. Khalil, 948 N.W. 2d 156, 163 (Minn. App. 2020)

23 *Khalil,* 956 N.W.2d at 643.

24 *Id.* at 632.

25 *Id.*

26 *Id.* (emphasis added).

27 *Id.*

28 *Id.*

29 *Id.*

is the Legislature's prerogative to reexamine the statute and amend it accordingly.[30]

The court further outlined in a comprehensive footnote the Minnesota Legislature's recent attempts to "sort out complex policy issues [by] amend[ing] Minnesota's criminal sexual conduct statutes, including revisions to address the Legislature's concern about a potential gap concerning sexual penetration of, or sexual conduct with, voluntarily intoxicated persons."[31] Thus, although the average person would surely agree that the defendant committed a grave wrong against the victim, the law as such, and as interpreted by the court, provided no basis for a conviction. And that, as the court observed, is the proper work of the people's representatives, not its courts of law.[32]

30 *Id.* at 642 (internal citation and quotation omitted).

31 *Id.* at 633 n.7.

32 *Id.* at 633.

MISSISSIPPI
Initiative Measure No. 65: Mayor Butler v. Watson

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Note from the Editor:

In *Butler v. Watson*,[1] the Mississippi Supreme Court confronted an anomaly in the state constitution's provision for proposing and enacting amendments through citizen initiatives. Voters had used this mechanism the previous November to adopt a medical-marijuana amendment, but the court held that the anomaly amounted to a self-destruct mechanism. The initiative provision, proposed by the legislature and added to the constitution in 1992, only functions properly if Mississippi has five congressional districts. Section 273(3) of the state constitution requires, "The signatures of the qualified electors from any congressional district shall not exceed one-fifth (1/5) of the total number of signatures required to qualify an initiative petition for placement upon the ballot."[2] Alas, Mississippi lost its fifth seat in the House following the 2000 census. In *Butler*, the court held 6-3 that the initiative process could not operate under these circumstances. "One-fifth" means one fifth, not a pro rata share,[3] and "any congressional district" means any congressional district today, not such a district back when Mississippi had five of them.[4] The three dissenters would have used the five old districts based on the 1990 census.[5]

Soon after the loss of the fifth House seat, some proposed fixing the § 273(3) anomaly, but the legislature left it in place. In 2011, Mississippi voters approved two citizen initiatives, one establishing a voter ID requirement[6] and another putting limits on eminent domain.[7] Prior to those votes, the Secretary of State asked the Attorney General about the § 273(3) issue and was told to count signatures using the old five 1990-census-based districts.[8] The same accommodation was used for the medical-marijuana initiative adopted in 2020. Shortly before the November vote, the mayor of the city of Madison and the city itself sued to stop the election under a provision giving the Mississippi Supreme Court original jurisdiction to assess the

1 2021 WL 1940821.

2 Miss. Const. § 273(3).

3 *Butler*, 2021 WL 1940821 at *6.

4 *Id*. at *8.

5 *Id*. at *14 (Maxwell, J., dissenting); *id*. at 18 (Chamberlin, J., joined by Kitchens, J., and joined in part by Maxwell, J., dissenting).

6 Miss. Const. § 249A.

7 Miss. Const. § 17A.

8 Re: Voter Initiative Law, Miss. Att'y Gen. Op., No. 2009-00001, 2009 WL 367638 (January 9, 2009). These five old congressional districts are still used to elect the ten judges on Mississippi's intermediate Court of Appeals. Judicial elections are not subject to the one-person-one-vote rule of *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Wesberry v. Sanders*, 376 U.S. 1 (1964). *See* Wells v. Edwards, 347 F. Supp. 453, 454 (M.D. La. 1972), summarily affirmed, 409 U.S. 1095 (1973).

"sufficiency of petitions."[9] While the court did not intervene in time to prevent the election from taking place, it later heard argument and then held in *Butler* that the proposal was improper: the medical-marijuana proposal "was placed on the ballot in violation of the Mississippi Constitution."[10]

The majority and dissent each charged the other with reading "congressional district" implicitly to mean "current congressional district."[11] This dispute turns on whether we imagine the term being used in the context of today or in the context of 1992. The majority read it in the context of 1992, distinguishing the use of "now existing" in another constitutional provision,[12] while the dissent would have imagined the use of the phrase today. Following the 2000 and 2010 censuses, the Mississippi legislature did not pass a redistricting bill; a federal court ended up drawing the four new district lines instead and redrawing them following the 2010 census.[13] The dissent suggested that this failure was an additional reason to read "congressional district" as limited to the post-1990-census lines drawn by the legislature.[14] The majority rejected this reading, however, on the ground that the legislature lacked the power to assign any other districts for § 273(3) purposes besides districts actually used to elect representatives.[15]

Butler is significant both because it finds the state's initiative process inoperable and also because of its approach to interpretation. A muscular textualism is evident first in the majority's hostility to purpose-based interpretation; the court's refusal to bend "one-fifth" into "pro rata share" reflects adherence to the precise text of the Constitution even when its relatively clear presumed purposes are frustrated. Second, the court follows fact-dependent textually-expressed meaning rather than sticking with historically-confined applications. The applications of an abstract, non-time-dated term like "congressional district" must change with the relevant facts, rather than being frozen in amber at the time of a provision's adoption.[16]

It is not clear what will happen to the two initiatives adopted in 2011. The legislature has itself passed legislation implementing the voter ID requirement, legislation that is presumably still effective even if it is no longer constitutionally required. The eminent domain rule forbidding the transfer of property within ten years of its acquisition by eminent domain would only be tested if the officials decided to take actions in the teeth that prohibition, which they have not done so far.[17] It is also not clear what will happen with the medical-marijuana issue itself; the governor has spoken of calling the legislature into session to pass a statute approximating what the voters approved in November.[18] Finally, an issue that the court did not address, but which it might clarify on rehearing, is the extent to which the voters' approval of the marijuana initiative at the polls might have cured its improper proposal. In Federalist 40, James Madison said the Constitution would be legitimate even though it was proposed by those who went beyond their limited commissions to revise the Articles of Confederation. Even if proposal was improper, ratification would "blot out antecedent errors and irregularities."[19] There are a few indications in some earlier Mississippi cases that approval by the voters can obviate improper proposal,[20] but the Court has not yet considered them.

9 *See* Miss. Const. § 273(9) ("The sufficiency of petitions shall be decided in the first instance by the Secretary of State, subject to review by the Supreme Court of the state, which shall have original and exclusive jurisdiction over all such cases.").

10 *Butler*, 2021 WL 1940821 at *12.

11 *Id*. at *8; *id.* at *18 (Chamberlin, J., dissenting).

12 *See* Miss. Const. § 213A ("member of such board from each congressional district of the state as *now existing*"). This is the same way that the U.S. Constitution uses the term "now existing": as a means of referring to the time at which the Constitution was adopted, not a later time at which it was in effect. The power of "States now existing" to import enslaved people was guaranteed until 1808, but that did not prevent Congress from immediately banning importation into future states like Ohio, as it had done in the Northwest Ordinance. *See* U.S. Const. art. I § 9 cl. 1.

13 *See* Smith v. Clark, 189 F. Supp. 2d 548 (S.D. Miss. 2002); Branch v. Smith, 538 U.S. 254 (2003); Mauldin v. Branch, 866 So.2d 429 (Miss. 2003); Smith v. Hosemann, 852 F. Supp. 2d 757 (S.D. Miss. 2011).

14 *Butler*, 2021 WL 1940821 at *14 (Maxwell, J., dissenting).

15 *Id*. at *11.

16 *Compare* Euclid v. Ambler Realty, 272 U.S. 365, 387 (1926) ("[W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. . . . [A] degree of elasticity is thus imparted not to the *meaning*, but to the *application* of constitutional principles . . . ").

17 The ten-year eminent-domain rule amendment was challenged prior to its adoption at the polls as an improper addition to the Bill of Rights—something not allowed for initiatives under section 273(5)(a)—but the Mississippi Supreme Court said the dispute was not ripe prior to the election. Speed v. Hoseman, 68 So.3d 1278 (Miss. 2011). This constitutional issue has remained open since then because no such transfers have been attempted.

18 See *Gov. Tate Reeves Supports Special Session for Medical Marijuana*, Daily Journal, June 15, 2021, available at https://www.djournal.com/news/state-news/gov-tate-reeves-supports-special-session-for-medical-marijuana/article_5cc940b6-d53f-5cc7-9dbc-96172b0fac89.html.

19 The Federalist Papers 253 (Clinton Rossiter, ed., 1961) (Madison); *see also* Akhil Reed Amar, America's Constitution: A Biography 8 & 506 (2005) (citing similar arguments from James Wilson, William Davie, William Maclaine, Richard Dobbs Spaight, Charles Cotesworth Pinkney, and Edmund Pendleton).

20 Judge Fisher's separate opinion in the splintered 1856 decision of *Green v. Weller*, 32 Miss. 650 (1856) (an opinion printed in the appendix to 33 Miss.), would have held that even if the legislature had not used the proper denominator in proposing an amendment—two thirds of the entire legislature rather than two thirds of the whole Senate—adoption at the polls cured this problem. *See also* Ex Parte Wren, 63 Miss. 512, 537 (1886) ("Were the question before us it is not improbable that we should concur in the view of Judge Fisher, as reported in the appendix of 33 Miss. Reports."); Hunt v. Wright, 11 So. 608, 610 (Miss. 1892) (violation of timing-of-revenue-bills rule in section 68 does not invalidate legislation); Lang v. Board of Supervisors, 75 So. 126, 128 (Miss. 1917) (violation of sufficient-title rule in section 71 does not invalidate legislation); In re Hooker, 87 So.3d 401, 414 (Miss. 2012) (violation of publication rule in section 124 does not invalidate pardon).

MONTANA

State v. Mercier

By Arthur Rizer

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About the Author:

Arthur Rizer is the Vice President for the Program on Technology, Criminal Justice and Civil Liberties at Lincoln Network. In addition to his work at Lincoln, Arthur is a visiting lecturer at University College London, and an adjunct professor at George Mason University's Antonin Scalia Law School. Arthur is also a member of Columbia University Justice Lab's Executive Session for the Future of Justice Policy, the Federalist Society's Executive Committee of the Criminal Law Practice Group, the Virginia Advisory Committee to the U.S. Commission on Civil Rights, and other advisory bodies.

Note from the Editor:

Presently, there is much uncertainty in Sixth Amendment Confrontation Clause jurisprudence in light of differences in tone and direction set by various United States Supreme Court rulings. The Montana Supreme Court's decision in *State v. Mercier* highlights these differences amid the challenge of interpreting constitutional rights in light of modern technological developments.[1]

In *Mercier*, the court was confronted with the question of whether a "defendant was denied his right under the United States and Montana Constitutions to confront witnesses against him when the State presented a foundational witness in real time by two-way videoconference."[2] To answer that question, the court was required to interpret the scope of the Sixth Amendment by examining the practical effect of new technology on the interests protected by the Confrontation Clause.

Mercier was taken into custody in late 2016 following a domestic dispute that resulted in the death of Sheena Devine. He was subsequently charged with three criminal offenses: Criminal Mischief for damaging Sheena's car by throwing rocks, Tampering with Physical Evidence (a phone that investigators discovered submerged in a pot of greasy water), and Deliberate Homicide.[3] Mercier pled guilty to Criminal Mischief, but not guilty to the other two counts. Mercier would defend by claiming Sheena's death was accidental and that he had not handled the phone in question.

After local technicians struggled to retrieve information from the water-damaged phone, it was delivered to Special Agent Brent Johnsrud of the Department of Homeland Security in Greeley, Colorado, who specialized in extracting data from electronics. Johnsrud extracted and analyzed the phone's data, determined that it belonged to Sheena, and prepared a written report of his findings. Photographs recovered during this process were the only evidence offered that Mercier had handled the phone that evening.[4]

Prior to trial, the State moved for leave to call Johnsrud to testify from Colorado by live two-way video. As grounds, the State offered that the $670 for roundtrip air travel and other travel expenses for purely foundational testimony was impractical.[5] The District Court overruled Mercier's objection, and Johnsrud testified via two-way videoconferencing. In doing so, the lower court failed to make "case specific" findings

1 01-26-2021, WL 248487 (Mont. 2021).

2 Slip op. at 2.

3 *Id.* at 4.

4 *Id.* at 4-5.

5 The State's request to excuse Agent Johnsrud from testifying in person was made prior to the COVID-19 pandemic and the sea change in courtroom procedure that followed.

demonstrating the necessity of the video.[6] Instead, the testimony was permitted under generalized concerns for judicial economy.[7]

Mercier also asked the jury, consistent with his version of the incident, to find him guilty of Negligent Homicide rather than Deliberate Homicide. To counter this position, the State offered two photographs from Sheena's phone, one of which was solid black, and the other a blurry image of Sheena's kitchen. The photographs were timestamped at 12:00:20 a.m. and 12:00:21 a.m. The angle at which the kitchen photograph was taken made it improbable that Sheena's daughters took it.[8]

Mercier was ultimately convicted on all counts and subsequently appealed his convictions on two counts. The Montana Supreme Court affirmed in part and reversed in part the defendant's convictions for deliberate homicide and tampering with physical evidence; it held that Mercier's constitutional right of confrontation was violated, requiring reversal of his conviction for tampering with physical evidence. In doing so, the court addressed a divergence in opinion amongst federal and state courts on two separate issues involving the continued utility of *Maryland v. Craig*:[9] (1) whether *Craig* extends to two-way video procedures and (2) whether its holding has been abrogated by the Supreme Court's landmark Confrontation Clause decision in *Crawford v. Washington*.[10]

By deciding the first question, *Mercier* held that *Craig* creates an exception to the Confrontation Clause if two requirements are met. It must first be established that denial of a face-to-face confrontation is necessary to further an important public policy. Second, the trial court must determine that the reliability of the testimony is otherwise assured. With respect to the second question, the court in *Mercier* was "not prepared to declare the proverbial death knell to *Craig* just yet, and prefer[ed] to await further direction from the Supreme Court."[11]

In *Coy v. Iowa*,[12] authored by Justice Scalia, the Court described the "literal right to 'confront' the witness at the time of trial" as forming "the core of the values furthered by the Confrontation Clause."[13] The Court explained, "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'"[14]

Several years later, however—over Justice Scalia's vigorous dissent—a majority of the Supreme Court redefined what was held in *Coy* to be an essential guarantee of face-to-face confrontation as a matter of constitutional "preference."[15] More recently, Justice Scalia›s view of the Confrontation Clause reemerged as the prevailing view when the Supreme Court radically altered the judicial understanding of it in *Crawford*.[16]

The decision in *Mercier* reflects the obvious tension between competing views of the Confrontation Clause. This evolving area of the law has presented difficult challenges for the courts and will likely continue to do so, absent some type of intervention. At a minimum, in a properly presented case, the United States Supreme Court will be forced to grant review and resolve the invariable tension that will continue to divide the lower courts on this important constitutional issue.[17]

Until then, courts and scholars will continue to debate *Crawford*'s impact on *Craig*. While many predict that the Supreme Court ultimately will not overrule *Craig*, one cannot read *Crawford* and *Coy* without appreciating the Supreme Court's sentiment that *Craig*-based decisions to override constitutionally favored face-to-face confrontation are important, high-stakes determinations.

6 *Id*. at 16.

7 *Id.*

8 *Id.* at 5.

9 497 U.S. 836 (1990).

10 541 U.S. 36, 124 S. Ct. 1354 (2004).

11 Slip op. at 15.

12 487 U.S. 1012 (1988).

13 *Coy,* at 1017-17 (quoting California v. Green, 399 U.S. 149, 157 (1970)) (emphasizing strongly that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact"). *Accord* Pennsylvania v. Ritchie, 480 U.S. 39, 51, 107 S. Ct. 989, 998 (1987) (stating that "[t]he Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination").

14 *Id.* at 1017 (quoting Pointer v. Texas, 380 U.S. 400, 404 (1965)) (A witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts."). *Id*. at 1019 (quoting, indirectly, Zechariah Chafee, The Blessings of Liberty 35 (1956)).

15 *Craig*, 497 U.S. at 849 . While the *Craig* Court adopted the more pragmatic, balancing-based approach, it nevertheless "reaffirm[ed] the importance of face-to-face confrontation with witnesses appearing at trial[.]"

16 *See Crawford*, 541 U.S. at 43, 54. (explaining that the constitutional text "is most naturally read as a reference to the right of confrontation at common law," with "[t]he common-law tradition [being understood as] one of live testimony in court subject to adversarial testing").

17 *Compare, e.g.*, Eileen A. Scallen, *Coping with* Crawford*: Confrontation of Children and Other Challenging Witnesses*, 35 Wm. Mitchell L. Rev. 1558, 1592-93 (2009) (taking the position that *Crawford* should not be read to overrule *Craig*), *with* David M. Wagner, *The End of the "Virtually Constitutional"? The Confrontation Right and* Crawford v. Washington *as a Prelude to Reversal of* Maryland v. Craig, 19 Regent U.L. Rev. 469 (2007) (suggesting the opposite view).

NEW JERSEY

In re Petition for Expungement of the Criminal Records Belonging to T.O.

By Anastasia Boden

Published June 28, 2021

About the Author:

Anastasia Boden is a senior attorney in the Pacific Legal Foundation's Economic Liberty Project, where she challenges anti-competitive licensing laws and laws that restrict freedom of speech.

A southern-California native, Anastasia earned her B.A. with Dean's Honors from the University of California, Santa Barbara. She was drawn east to attend law school at Georgetown, where she was Research Assistant to Professor Randy E. Barnett (aka the "Godfather" of the Obamacare challenge). Prior to joining PLF, she worked at the Cato Institute's Center for Constitutional Studies and at Washington Legal Foundation.

Note from the Editor:

In a recent opinion, the Supreme Court of New Jersey considered the scope of the governor's pardon power and how it interacts with the legislature's power to regulate the conditions of expungement. Ruling for the petitioner, the court opened the door for individuals to have their records expunged after a gubernatorial pardon, despite a statutory bar for those with multiple convictions.[1]

Writing for a unanimous court, Chief Justice Stuart Rabner didn't dwell long on petitioner T.O.'s crimes, noting simply that he had been convicted of assault and drug possession many years ago.[2] Instead, the Chief Justice elaborated on T.O.'s actions in the subsequent two decades, including his employment at a private corrections company, residential reentry facilities, jails, and drug treatment programs.[3] After his release from prison, T.O. led a "productive life," volunteering at a homeless shelter and creating a nonprofit group devoted to feeding the homeless.[4]

In 2017, with the support of friends, family members, and co-workers, T.O. applied for a pardon, which then-Governor Chris Christie granted. T.O. then petitioned a superior court to have his record expunged. The prosecutor acknowledged that "[i]f there is a person deserving of an expungement . . . it is [T.O.]."[5] However, the State opposed the petition based on a statute that prohibited people convicted of multiple crimes from applying for expungement. According to the State, a pardon had no effect on the statutory bar. The trial court agreed with the government both that T.O. deserved an expungement and that he was legally barred from one, concluding "I wish I could grant [the] application."[6]

The appellate court affirmed, reasoning that "expungement is not a right guaranteed by constitutional or common law; it is purely the product of legislation."[7] Because pardons erase neither the conduct underlying a conviction nor *all* of the consequences of that conviction, Governor Christie's pardon could not abrogate the statutory bar. The New Jersey Supreme Court subsequently granted review.

At the high court, T.O. argued that because pardons remove any legal disqualification triggered by the fact of conviction, the appellate court's interpretation of the expungement statute unconstitutionally interfered with the governor's pardon power. He further argued that while the statute was silent on the effect

1 *See* In re Petition for Expungement of the Criminal Record Belonging to T.O., A-55-19 (084009) (Jan. 11, 2009).

2 *Id.* at *3.

3 *Id.*

4 *Id.*

5 *Id.* at *8.

6 *Id.* at *5.

7 *Id.*

of pardons, his interpretation did not conflict with it and indeed was consistent with the legislature's goal of providing relief to reformed offenders.[8]

Various parties submitted amicus briefs in T.O.'s favor, including several former governors (Governor Christie among them). Together the governors argued not just that T.O.'s interpretation was required to avoid a separation powers of problem, but that expungement should occur automatically in all cases upon pardon.[9]

Other amici, including the ACLU of New Jersey, argued that nothing in the statute actually barred a pardonee with multiple convictions from applying for expungement and that the statute should be interpreted broadly given the legislature's recent amendments—which demonstrated an intent to provide broad relief to former offenders.[10] They also made policy arguments, arguing that expungement promotes employment and housing and reduces the likelihood of recidivism.

For its part, the State argued that there was no evidence that the legislature intended to allow expungement based on pardon. And because a pardon could not change the fact that T.O. had been convicted of two prior crimes, it could not supersede the statutory bar. While amici had noted that several states make pardonees eligible for expungement by statute or case law, New Jersey had not, and a majority of jurisdictions hold that a pardon does not remove the adjudication of guilt.[11]

The New Jersey Supreme Court reversed. It first reviewed the basics of expungement[12] and noted that the legislature had consistently amended the statute to expand eligibility. It next turned to the pardon power of the President of the United States, which it said "informs" the understanding of the gubernatorial pardon power. Based on the King of England's power to "forgive[] any crime, offence, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical,"[13] the presidential pardon removes all "penalties and disabilities" related to the pardoned crime and restores a person "to all his civil rights." According to the United States Supreme Court, a pardon makes a person "a new man," "gives him a new credit and capacity," and as far as the pardoned offense goes, "place[s] [him] beyond the reach of punishment of any kind."[14]

But there are limits on the president's pardon power. The Supreme Court has observed that a presidential pardon "does not make amends for the past," does not afford relief for past imprisonment, and doesn't provide compensation to those harmed.[15] For example, a pardoned landowner may not recover the money generated from the sale of his seized property.[16] It has also clarified that a pardon does not *overturn* a judgment; it instead "mitigates or sets aside punishment for a crime."[17] In sum, at the federal level, a pardon removes all penalties for the crime, but does not erase the fact of the crime, meaning that a pardon has a legal but not a moral effect.

Turning to the New Jersey constitution, the court cited state court cases holding that a pardon "does not restore" what the parties have already endured but instead "releases [them] from all future penalty.[18] As in federal cases, a pardon does not have any moral effect—it does not remove guilt or affect decisions dependent upon character. That is, if a law disqualifies a person from public employment or government benefit on the basis of having committed a certain crime, a pardon removes that disqualification. But if the employment or benefit depends on "character," the decision-maker may still consider the crime as part of that calculation. In sum, a gubernatorial pardon wipes out future legal consequences of the pardoned conviction, but it does not affect or rehabilitate a person's moral character.[19]

With this understanding, the New Jersey Supreme Court ruled that the pardon removed the legal consequences of T.O.'s convictions, including being disqualified from expungement.[20] But contrary to the former governors' assertion, expungement was not an automatic effect of a pardon. Instead, T.O. would still have to satisfy the other statutory criteria necessary to qualify and the burden would then shift to the State to show why the petition should not be granted—for example because of the circumstances of the offense or the harm that was caused.[21] Because there was nothing in the record demonstrating that T.O. should not receive expungement—indeed the appellate and trial court judges had agreed he deserved one—the court ruled that T.O.'s record should be expunged.[22]

At bottom, both the Supreme Court and the Court of Appeals believed there was a separation of powers problem. But while the Court of Appeals thought the executive was interfering

8 *Id.* at *6.

9 *Id.* at *8.

10 *Id.* at *7.

11 *Id.* at *9.

12 It observed, for example, that if a court grants expungement, "the arrest, conviction and any other proceedings related thereto shall be deemed not to have occurred, and the petitioner may answer any questions relating to their occurrence accordingly." N.J.S.A. 2C:52-27. However, a pardonee must still reveal information in expunged records when seeking employment with the judiciary, law enforcement, or a corrections agency.

13 Ex parte Wells, 59 U.S. 307, 311 (1856).

14 *Id.*

15 *See* Knote v. United States, 5 U.S. 149, 153 (1877).

16 *Id.* at *153-54.

17 Nixon v. United States, 506 U.S. 224, 232 (1993) (citation omitted).

18 *See* Cook v. Board of Chosen Freeholders, 26 N.J.L. 326, 329 (Sup. Ct. 1857).

19 The court also surveyed the effect of pardons in other states, noting that the case law was mixed. Some courts have held that a pardon does not entitle one to expungement, while others have held that it automatically entitles one to expungement. And in contrast to New Jersey, more than a dozen other states explicitly provide that a pardon makes a conviction eligible for expungement, including Arkansas, Connecticut, Delaware, Georgia, Illinois, Kentucky, Maryland, Massachusetts, Nebraska, North Carolina, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and West Virginia.

20 *See* In re Petition for Expungement of the Criminal Record Belonging to T.O., A-55-19 (084009) (Jan. 11, 2009) at *26.

21 *Id.* at *28.

22 *Id.* at *29.

with the legislative power, the Supreme Court saw the Court of Appeals' interpretation of legislative power as interfering with the executive power. The Court of Appeals had viewed expungement purely as a matter of legislative concern, meaning it focused very little on the scope of the pardon power and instead looked at the text of the expungement statute. And it used legislative intent to inform the text's silence with regard to the effect of a pardon. The Supreme Court, by contrast, determined that the governor enjoys a broad power to remove legal consequences of convictions through the pardon power, and thus that legislative intent was immaterial. Whatever the legislature thought of the eligibility of people who committed multiple crimes to apply for expungement, its legal obstacles are removed once the governor grants a pardon. That doesn't mean that individuals in New Jersey are constitutionally entitled to expungement once they are pardoned; it simply means the legislature cannot bar them from eligibility based solely on the pardoned crime.

NEW MEXICO
Grisham v. Romero

By GianCarlo Canaparo

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About the Author:

GianCarlo Canaparo is a legal fellow in The Heritage Foundation's Edwin Meese III Center for Legal and Judicial Studies. Canaparo researches, writes, speaks, and testifies on regulatory policy, the federal courts, and constitutional law.

In addition to Heritage publications, Canaparo's scholarship has appeared in numerous law reviews including the *Harvard Journal of Law and Public Policy*, the *Notre Dame Law Review*, the *Administrative Law Review*, and the *Georgetown Journal of Law and Public Policy*.

His analysis has appeared in *Fox News*, *The National Review*, T*he Washington Times*, *Law 360*, Federalist Society Blog, and other outlets.

In addition to his scholarly work, Canaparo co-hosts The Heritage Foundation's *SCOTUS 101* podcast, which follows and explains each week's happenings at the Supreme Court and features interviews with prominent judges, advocates, and academics.

Canaparo joined Heritage in 2019 after serving for two years as a law clerk to a federal district court judge. Before his clerkship, he spent three years as an associate at the law firm of Skadden, Arps, Slate, Meagher & Flom.

Canaparo holds a law degree from Georgetown University, where he was a published editor of the Georgetown Law Journal. He earned his bachelor's degree in economics from the University of California at Davis.

Note from the Editor:

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the authors. We invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

On February 15, 2021, the New Mexico Supreme Court rejected a challenge to an executive order that closed indoor dining at restaurants and breweries in response to COVID-19.[1]

The order, issued in July by the New Mexico Department of Health pursuant to a directive by the governor, sets up a tiered system based on infection statistics within counties. It forbids restaurants and breweries in "Red Level" counties from having indoor dining and requires them to limit outdoor dining to 25% capacity.[2]

A number of restaurants and the New Mexico Restaurant Association sued, arguing that the governor and secretary of the Department of Health lacked the power to impose the closures and that, regardless, the closures were arbitrary and capricious.[3]

A lower court granted a temporary restraining order in the plaintiffs' favor pending a hearing on an application for a preliminary injunction. The state supreme court, however, immediately stayed that order and took up the case pursuant to a writ of superintending control.[4]

Declaring that the court had no need for an evidentiary hearing, Justice Judith Nakamura, writing for a unanimous court, concluded that the defendants had the power to impose the closure and that the closure was not arbitrary or capricious.

On the first question—whether the governor and secretary had the power to order the closure—the plaintiffs argued that the order was unlawful because it was not issued in compliance with the State Rules Act (a state analogue to the Administrative Procedure Act).[5]

This argument had two parts. First, the plaintiffs argued that the Public Health Act[6] was not self-executing, and therefore the state legislature required the Department of Health to promulgate formal rules to implement it. The Department had not issued formal rules, and so, the plaintiffs argued, the closure was unlawful.

The court rejected this argument, concluding that although the act "does not expressly supply the means by which public places should be closed . . . . [t]he authorizing language *implies* execution through an order that may be deployed when necessary to protect public health."[7]

Second, plaintiffs argued that the State Rules Act's procedural requirements (public hearing and notice and

1 Grisham v. Romero, No. S-1-SC-38396, 2021 WL 608790 (N.M., Feb. 15, 2021).

2 *Id.* at 6.

3 *Id.* at 1.

4 *Id.* at 10.

5 N.M. Stat. Ann. § 14-4-1 (West).

6 N.M. Stat. Ann. § 24-1-3 (West).

7 *Grisham*, No. S-1-SC-38396 at 24 (emphasis added).

comment) applied to the order because it satisfied the definition of a "rule." Because the order was a rule, and because the government did not follow rulemaking procedures, the plaintiffs argued that the order was unenforceable.

The court initially conceded that the order "arguably meets the criteria" for a rule, which is defined as "a statement asserting a standard of conduct which has the force of law [and] affects the rights or obligations of those who fall within its ambit."[8] It concluded, however, that the legislature had exempted orders from the rulemaking requirements because the Department of Health Act lists, among the Department's powers, "administrative action" separately from "mak[ing] and adopt[ing] . . . reasonable procedural rules."[9] Put differently, the court drew a bright line between administrative actions that are "orders and instructions" and "procedural rules," holding that the State Rules Act applies to the latter but not to the former.[10]

This represents a substantial change in New Mexico administrative law, and it arguably implicitly overrules precedent that the court relied on in this opinion.

For example, in reaching this conclusion, the court cited *Livingston v. Ewing*[11] for the proposition that a resolution "limiting the space inside the Santa Fe Plaza's portal to Native American artisans was 'a rule for purposes of its promulgation.'"[12] That resolution, like the COVID-19 order at issue, was not a procedural rule, and yet it was subject to the State Rules Act, whereas the COVID-19 order is not. The court did not address this tension.

Several amici argued that the order was beyond the governor and secretary's powers because it amounted to a usurpation of legislative authority.[13] The court framed the question as "whether the July Order disrupts the proper balance between the executive and legislative branches and infringes on the legislative branch by, for instance, imposing through executive order substantive policy changes in an area reserved to the Legislature."[14] The court concluded that the order did not disrupt the balance of powers because "New Mexico has not entered a 'new normal,'" and because temporary emergency orders are not "long-term policy decisions."[15]

Having concluded that the governor and secretary had the authority to issue the order, the court turned next to whether the order was arbitrary and capricious and held that it was not.

Relying in part on Chief Justice John Roberts's solo opinion in *South Bay Pentecostal Church v. Newsom*,[16] for the proposition that the decision to lift pandemic-related restrictions "is a dynamic and fact-intensive matter," the court declined to remand the case for an evidentiary hearing. It held instead that the government's decision was entitled to the highest possible deference. In fact, the court held that even if the plaintiffs could show that "the closure measure had not been a success," the order still would not have been arbitrary and capricious because all the government needed to show was a "relation" between the order and the goal of suppressing COVID-19.[17] The government satisfied that burden here by supplying the affidavit of a doctor at the New Mexico Human Services Department stating that indoor dining presents a risk of COVID-19 transmission.

Oddly, the court derived this standard of deference from a case related to public health regulations, even though the court, at the same time, acknowledged that it had just held the order exempt from the State Rules Act, which applies to regulations.[18] Public hearings and notice and comment provide a basis for subsequent judicial deference, but the court did not explain why similar deference was warranted when those procedural requirements were absent.[19]

Justice David Thomson concurred to note that the court should be wary of extending such high deference to the executive when emergencies persist for a long period of time.[20] In his view, New Mexico *had* entered a "new normal." As such, "broad and vague statutes that grant emergency powers . . . may pose potential long-term consequences to our system of checks and balances."[21] Accordingly, the courts should employ "robust judicial review."[22] Still, he concluded, the facts of this case warranted deference.[23]

There are several lessons to draw from *Grisham*. The first is that the New Mexico courts seem to be highly skeptical of challenges to the state's COVID-19 orders. With deference set so high and the supreme court unwilling to remand for an

8 *Id*. at 25. Later in the opinion, the Court seemed to suggest, without explicitly saying so, that the order was different from a rule because "its function is in many ways more similar to that of an executive order." *Id*. at 29. The Court likely could not fully commit to that position, however, because to do so would be to equate the order with a statutorily defined "emergency order," for which detailed public findings are required and which has an expiration period. No public findings were entered with respect to this order and the expiration date would have expired. *See id*. at 28–29.

9 *Id*. at 26 (citing N.M. Stat. Ann. § 9-7-6 (West)).

10 *See id*. at 26 ("The DOH Act references the State Rules Act in connection with the Secretary's authority to adopt procedural rules, and *not* in connection with her authority to issue orders and instructions.") (emphasis in original).

11 652 P.2d 235 (N.M., 1982).

12 Grisham No. S-1-SC-38396 at 26 (citing *Livingston*, 652 P.2d at 337).

13 *See id*. at 31–32.

14 *Id*. at 32 (internal quotations omitted).

15 *Id*. (internal quotations omitted).

16 140 S. Ct. 1613, 1614 (2020) (mem.) (Roberts, C.J., concurring).

17 *Grisham*, No. S-1-SC-38396 at 42.

18 *Id*. at 36 (citing Rivas v. Bd. of Cosmetologists, 686 P.2d 934 (N.M., 1984); *see also* N.M. Stat. Ann. § 14-4-2(F) (requiring the formal rulemaking process for, among other things, "any regulation").

19 *See id*.

20 *Id*. at 44 (Thomson, J., concurring).

21 *Id*. at 45 (Thomson, J., concurring).

22 *Id*. at 44 (Thomson, J., concurring).

23 *Id*. at 52 (Thomson, J., concurring).

evidentiary hearing,[24] it is difficult to conceive of a case that would see a COVID-19 order overturned by a state court.

The second lesson is that the court has, perhaps inadvertently, potentially initiated a dramatic shift in state administrative law by exempting agency orders from the State Rules Act. Relatedly, because the court did not explicitly overrule *Livingston*—and even cited it favorably—state law on this issue is now unclear.

And finally, the last lesson to draw is that Justice Thomson's admonition that the courts ought to be vigilant against executive overreach can be seen as hollow. The majority opinion leaves little room for the judicial vigilance that he prescribes.

24 *Id.* at 43 ("Neither the Real Parties' nor Eddy County's criticisms nor the alleged overbreadth of the prohibition, even if further developed at an evidentiary hearing, would show that the prohibition is arbitrary or pretextual.").

NEW MEXICO

State v. Wilson

By Daniel Suhr

Published October 25, 2021

About the Author:

Daniel R. Suhr is a managing attorney at the Liberty Justice Center.

With colleague Brian Kelsey, he spearheads LJC's education reform practice, arguing against the ACLU to save scholarships for low-income parents in Tennessee and demanding that bureaucrats in Arizona do right by children with special needs and military families. Before joining LJC, he served as policy director for Wisconsin Governor Scott Walker, where he helped advance the Badger State's goal of statewide school choice.

Note from the Editor:

Daniel gratefully acknowledges the assistance of Andrew Wilson of the University of Georgia Law School on this article.

During the COVID-19 pandemic, the governor of New Mexico issued a series of public health orders (PHOs) which "restricted mass gatherings and the operations of certain businesses."[1] These restrictions have "consistently manifested as operational limitations on occupancy to the extent of closure of some categories of businesses."[2]

In response to these restrictions, twenty small businesses and business owners sued the State of New Mexico, its governor, and its secretary of the Department of Health in various state courts.[3] The plaintiffs sought just compensation for takings of and damage to their private property "due to the seizure, limitation and closure of their businesses pursuant to the public health emergency orders of the State."[4] At the request of the government defendants, the New Mexico Supreme Court issued a stay on all those cases in November 2020, consolidated them in a single petition, and ordered briefing on the issues. The court heard oral argument in January 2021, but it did not announce its decision until June.

The businesses brought a claim for compensation under the alternative theories that New Mexico's PHOs constituted regulatory takings under constitutional law or that they required just compensation under a state statute. The court ruled against the challengers on both theories.

The court first explained its decision to directly take a writ of supervisory jurisdiction over the lower courts and consolidate the cases before it. It held that the statewide nature of the case, the likelihood of future cases arising on the same topic, and the public's interest in settling the question in a timely manner "present[ed] exceptional circumstances justifying this Court's issuance of a writ of superintending control."[5] The court's decision is divided into analyses of the plaintiffs' constitutional and statutory claims, which this summary covers in turn.

Constitutional Analysis

The state officials (who were in the posture of petitioners) argued that the PHOs were not a taking because they stemmed from a "proper exercise of the State's police power to protect the public health," and alternatively that the PHOs' use regulations were "temporary and partial restrictions that are not compensable."[6] The businesses argued that the PHOs went beyond mere "regulatory police exercise" and that the court's issuance of a writ that the PHOs do not support claims for just

1 State v. Wilson, 489 P.3d 925, 930 (N.M. 2021).

2 *Id.*

3 *Id.* at 931.

4 *Id.*

5 *Id.* at 932.

6 *Id.* at 933.

compensation "would improperly foreclose their ability to bring fact-specific evidence under a takings inquiry or to show that the PHOs are 'unreasonable, arbitrary or capricious.'"[7]

The court first held that the PHOs were a valid exercise of the state's police power, citing many prior cases to the effect that state exercises of police power were not to be judicially invalidated whenever they are reasonably related to the "public safety, health or morals."[8] It then considered the interaction between police power and the New Mexico Constitution's equivalent to the federal Constitution's Takings Clause. It noted both the general rule that property owners are to be compensated for regulations that deprive them of the economically beneficial use of their property and the exception for regulations on uses of property that are harmful to the public health—the public nuisance exception.

The court held that the state's limitations on occupancy and "closure of certain categories of businesses" were a reasonable exercise of the police power because they were directly tied to the reasonable public health purpose of reducing the spread of COVID-19.[9] Without precluding future arbitrary and capricious challenges, it also held that "the State['s] . . . broad powers to act in the face of grave threats such as COVID-19" created a high evidentiary burden for plaintiffs to prove an arbitrary and capricious claim.[10]

The court held that the PHOs' restrictions and closures fell under the public nuisance exception because they were "reasonable use regulation[s] under the police power to prevent injury to the health of the community."[11] As such, the regulations were "insulated from further takings analysis."[12] It further held that the temporary nature of the PHO restrictions counted against finding a regulatory taking, pointing out that canonical regulatory takings cases such as *Pennsylvania Coal v. Mahon*[13] and *Lucas v. S.C. Coastal Council*[14] "were predicated on the permanent nature of the property deprivations at hand."[15] For these reasons, the court found that the challenged use restrictions could not support the plaintiffs' claims for just compensation for regulatory takings.[16]

Statutory Analysis

Next, the court addressed the plaintiffs' claims for just compensation under a provision of New Mexico's Public Health Emergency Response Act (PHERA) that states:

> The state shall pay just compensation to the owner of health care supplies, a health facility or *any other property* that is lawfully taken or appropriated by the secretary of health, the secretary of public safety or the director for temporary or permanent use during a public health emergency.[17]

The state officials argued that, consistent with the canon ejusdem generis, the term "any other property" was "bounded by the nature of its preceding specific terms: 'health care supplies' and 'health facility.'"[18] The businesses argued that the term should be construed broadly "consistent with the liberal construction given to statutes enacted for the protection of public health during an emergency."[19] The court came down on the side of the State, holding that "any other property" was limited to the healthcare context.

The court noted that ejusdem generis is both "a common law rule of construction" and, in New Mexico, "a statutory rule."[20] It then examined the definitions of "health care supplies" and "health facility" found elsewhere in PHERA. Using those definitions to guide its ejusdem generis inquiry, it determined that the disputed term "was legislatively intended to be a catch-all limited within the category of physical property that is directly taken or appropriated by the State and used for, or in connection with, a public health emergency."[21]

The court dispensed with the businesses' rules-of-construction arguments, reasoning that their interpretation of "any other property" as including "purely financial losses incurred by businesses impacted by the PHOs' occupancy limitations and closures" would render the specific terms adjacent to the catch-all term superfluous.[22] The court also found unpersuasive the businesses' contention that a narrow definition of "any other property" would prevent the state from utilizing property unrelated to healthcare but nonetheless "necessary to combat the public health crisis," such as refrigerated trucks for vaccine transport.[23]

Next, the court explained why a narrow interpretation of the compensation provision at issue was appropriate despite its earlier language of liberally construing public health statutes in an emergency.

First, it stated that the liberal construction statement applied to PHERA's penalty provision but not its compensation provision. The penalty provision, it reasoned, applied broadly

7 *Id.*

8 *Id.* at 934.

9 *Id.* at 938.

10 *Id.* at 939.

11 *Id.* at 940.

12 *Id.*

13 260 U.S. 393 (1922).

14 505 U.S. 1003 (1992).

15 *Wilson*, 489 P.3d at 941.

16 *Id.* at 942.

17 *Id.* at 943 (emphasis added).

18 *Id.*

19 *Id.* (quoting Grisham v. Reeb, 480 P.3d 852, 863 (N.M. 2020)).

20 *Wilson*, 489 P.3d at 944.

21 *Id.*

22 *Id.*

23 *Id.* at 945.

to "the special powers of the Secretary of Health and the general powers of her office, reflecting 'the legislative intent . . . to permit enforcement of all measures lawfully taken under the PHERA.'"[24] By contrast, the compensation provision was an explicit due process applicable only to actions taken under PHERA's special powers. As such, the court refused to apply its liberal construction of PHERA's penalty provision to the act's compensation provision.[25] Second, it reasoned that the plaintiffs' broad construction of "any other property" would lead to the absurd result of "unlimited liability authorized by the Legislature."[26] It noted the general rule that "A statute or rule is construed, if possible, to . . . avoid an unconstitutional, absurd or unachievable result."[27] Third, it found that plaintiffs had not exhausted their administrative remedies before seeking judicial relief as required by the statute.[28] Therefore, a judicial remedy was inappropriate.[29]

The court concluded that "the PHOs to date cannot support a claim for just compensation under either . . . the New Mexico Constitution or . . . the PHERA."[30] The opinion drew no concurrences or dissents.

24 *Id.* (quoting *Reeb*, 480 P.3d at 867).

25 *Id.*

26 *Id.* at 945-46.

27 *Id.* at 946.

28 *Id.*

29 *Id.*

30 *Id.*

OHIO

State v. Weber

By Joseph Greenlee

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About the Author:

Joseph Greenlee is an attorney in McCall, Idaho, the Director of Constitutional Studies at the Firearms Policy Coalition, and a Policy Advisor for Legal Affairs at the Heartland Institute.

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Note from the Editor:

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At 4:00 a.m. on February 17, 2018, Frederick Weber's wife called the police to report that her husband was intoxicated and holding a shotgun.[1] When officers arrived, Weber's wife told them, "Everything is okay, he put it away."[2] But when they entered the home, they saw Weber "holding the shotgun by the stock with one hand."[3] The officers ordered Weber to put the firearm down, so he did, asserting that it was unloaded.[4]

Weber repeatedly admitted to being intoxicated.[5] This was confirmed by the smell of alcohol on Weber, his slurred speech and bloodshot eyes,[6] his inability to perform a field sobriety test, and his difficulty in following the officers' instructions.[7] When the officers asked Weber what he was doing with the shotgun, Weber "seemed confused and could not give a definitive answer."[8] Later, Weber told them that he had the shotgun because he was unloading it so he could wipe it down.[9] The officers confirmed that it was indeed unloaded, as Weber had claimed when they arrived.[10]

Weber was charged for carrying a firearm while intoxicated.[11] Specifically, Ohio law provides that "[n]o person, while under the influence of alcohol or any drug of abuse, shall carry or use any firearm or dangerous ordnance."[12] A violation is a first-degree misdemeanor.[13]

After a bench trial, Weber was convicted and sentenced to ten days in jail (all ten days were suspended), one year of community control, eight hours of community service, and a $100 fine.[14]

The appeal of his conviction eventually reached the Supreme Court of Ohio, which considered (1) whether a prohibition on possessing a firearm while intoxicated at home is unconstitutional; (2) whether the statute violated Weber's Second Amendment rights as applied to the facts of his case;

1 State v. Weber, Slip Opinion No. 2020-Ohio-6832, at ¶ 2.

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.* at ¶ 3.

6 *Id.* at ¶¶ 3–4.

7 *Id.* at ¶ 3.

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.* at ¶ 5.

12 *Id.* (quoting R.C. 2923.15(A)).

13 *Id.* (citing R.C. 2923.15(B)).

14 *Id.*

and (3) whether all Second Amendment challenges should be reviewed under strict scrutiny.[15]

The court decided that the answer to each of these issues was, "no."

Addressing the appropriate standard of review, the court held that strict scrutiny should not apply to all Second Amendment challenges, and that it should not apply in this case.[16] Rather, the court applied intermediate scrutiny. To determine what level of scrutiny was appropriate, the court considered "how close" the law "comes to the core Second Amendment right and whether it imposes a severe burden on that right."[17] It determined that intermediate scrutiny was appropriate because even though the Second Amendment's "core protection" is "the right of law-abiding, responsible citizens to use arms *in defense of hearth and home*,"[18] the law's burden on that right was "at most . . . slight."[19] The law does not prohibit people who consume alcohol from owning or being in a house with a gun, it only prohibits them from carrying or using a gun.[20] Moreover, "an intoxicated person who attempts to carry or use a gun in an otherwise lawful manner is less likely to be able to do so safely and effectively."[21]

Intermediate scrutiny requires that the law "furthers an important governmental interest and does so by means that are substantially related to that interest."[22] The court held that forbidding intoxicated people from using or carrying a firearm furthers the important governmental interest in "protecting people from harm from the combination of firearms and alcohol."[23] The government's interest was important because "[w]hen an intoxicated person carries or uses a gun, either at home or outside the home, the impairment of cognitive functions and motor skills can result in harm to anyone around the intoxicated person and even to the intoxicated person himself or herself."[24] And the law was sufficiently tailored because it "targets the governmental interest directly, applying only to individuals who are intoxicated."[25] The court further determined that the specific facts of the case did not change the outcome, since the state's interest in preventing harm is just as important regardless of whether Weber was at home or his firearm unloaded.[26]

Justice Patrick DeWine concurred in the judgment only.[27] Justice DeWine believed that the court should have applied a test based on text, history, and tradition rather than heightened scrutiny.[28] Justice DeWine explained that the United States Supreme Court applied a text, history, and tradition test in its landmark Second Amendment case, *District of Columbia v. Heller*, and expressly rejected interest-balancing tests like intermediate scrutiny.[29] And while Justice DeWine noted that many federal circuit courts have adopted the interest-balancing heightened scrutiny test for Second Amendment cases, he also noted that many Supreme Court Justices have denounced the lower courts' application of the test as inconsistent with *Heller*.[30]

Analyzing the Second Amendment's text, history, and tradition, Justice DeWine determined that the law was constitutional for several reasons:

> First, the rationale that places someone who is currently mentally ill and unable to responsibly use a firearm outside the Second Amendment protection applies with equal force to someone who is intoxicated. Second, the best available evidence about the founding generation's understanding of the right to bear arms reveals that the right did not preclude restrictions on classes of people who presented a present danger to others. In addition, the founding generation closely tied its conception of a right to the use of reason and understood that one with a reduced ability to reason could be incapable of exercising a right. Finally, a review of legal prohibitions involving guns and alcohol in 18th- and 19th-century America adds further support for the proposition that [the law], as applied to Weber, is not inconsistent with the Second Amendment.[31]

Justice Patrick Fischer, joined by Justices Sharon Kennedy and Judith French, dissented. The dissenting justices agreed with Justice DeWine that the "laws and regulations challenged under the Second Amendment must be judged according to the text, history, and tradition of the Second Amendment."[32] "In *Heller*," the dissent explained, the Supreme Court "notably did not employ an interest-balancing test when faced with a Second Amendment challenge. Rather, the court resolved that case by focusing on the text, history, and tradition of the Second Amendment."[33] Two years later, "[i]n *McDonald* [*v.*

15 *Id.* at ¶ 6.

16 *Id.* at ¶ 25.

17 *Id.* at ¶ 26.

18 *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)) (emphasis in *Weber*).

19 *Id.* at ¶ 27.

20 *Id.* at ¶ 29.

21 *Id.* at ¶ 27.

22 *Id.* at ¶ 31.

23 *Id.* at ¶ 32.

24 *Id.* at ¶ 33.

25 *Id.* at ¶ 39.

26 *Id.* at ¶ 44. Weber "state[d] in passing" in his brief that the law violates the arms provision in the Ohio Constitution. But because he did not "discuss the text or history of" the provision, did not "discuss [Ohio Supreme Court] precedent on that provision," and did not "discuss how this provision differs from the Second Amendment," the court declined to address the argument. *Id.* at ¶ 48.

27 *Id.* at ¶ 57 (DeWine, J., concurring).

28 *Id.* at ¶ 69.

29 *Id.* at ¶ 64.

30 *Id.* at ¶¶ 66–67.

31 *Id.* at ¶ 77. Justice DeWine noted that some courts have adopted a test that limits the Second Amendment to "virtuous" citizens. But because he found "that explanation less persuasive and underprotective of the Second Amendment right," he declined to elaborate on it. *Id.* at ¶ 88 n.3.

32 *Id.* at ¶ 111 (Fischer, J., dissenting).

33 *Id.* at ¶ 119.

City of Chicago, 561 U.S. 742], the court employed a similar methodology to decide that the right to keep and bear arms is applicable to the states under the Fourteenth Amendment," again "rejecting an interest-balancing test in favor of an approach that focuses on the original understanding of the Second Amendment."[34]

While Justice DeWine conducted a historical analysis himself, the dissent wanted to "remand the cause to the court of appeals for further proceedings," so the parties could focus "on the text, history, and tradition of the Second Amendment."[35]

In sum, a majority of the court upheld the ban on possessing a firearm while intoxicated, but according to Justice DeWine, "[b]ecause a majority of the court today adopts this [text, history, and tradition] approach, going forward, lower courts in Ohio should follow the analytical framework used by the Supreme Court in *Heller* and assess Second Amendment claims based upon text, history, and tradition."[36]

34 *Id.* at ¶ 121.

35 *Id.* at ¶ 128.

36 *Id.* at ¶ 71 (DeWine, J., concurring).

OKLAHOMA

State ex rel. Attorney General of Oklahoma v. Johnson & Johnson

By Kateland R. Jackson

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Note from the Editor:

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In *Oklahoma ex rel. Hunter v. Johnson & Johnson*, the Oklahoma Supreme Court overturned a $465 million verdict against Johnson & Johnson (J&J) after the district court found J&J liable for violating Oklahoma's public nuisance law when it manufactured, marketed, and sold prescription opioids.[1] The Supreme Court, in a 5-1 ruling, held that the state's public nuisance statute, which historically has governed local land-based disturbances, does not apply to manufacturing, marketing, and selling products.[2] In lone dissent, Justice James Edmondson found that the state's public nuisance law covers manufacturing-related acts and argued that the majority read the statute too narrowly.[3]

Governments around the country have been seeking to use public nuisance causes of action to subject manufacturers to liability for a variety of social, environmental, and public health issues associated with products. The Oklahoma Supreme Court is now one of several state supreme courts to reject this use of public nuisance law.[4]

Background

The state of Oklahoma brought this lawsuit to make prescription opioid manufacturers pay the state's costs associated with opioid addiction in Oklahoma.[5] Like other states, Oklahoma has experienced an opioid epidemic, including "abuse and misuse of opioid medications, opioid use disorder, and thousands of opioid-related deaths."[6]

In June 2017, Oklahoma sued three pharmaceutical companies that manufactured, marketed, or sold opioids in Oklahoma: J&J, Purdue Pharma L.P. (Purdue), and Teva Pharmaceuticals USA, Inc. (Teva).[7] The state invoked Oklahoma's public nuisance statute, asserting that opioid abuse qualified as a public nuisance and the companies created this public nuisance in how they marketed their medications.[8] The

1 Oklahoma *ex rel.* Hunter v. Johnson & Johnson, 2021 WL 5191372 (Okl. Sup. Ct. Nov. 9, 2021).

2 *Id.* at *11.

3 *Id.* at *14-15, 27.

4 *See* State of R.I. v. Lead Indus. Ass'n, 951 A.2d 428 (R.I. 2008) (overturning verdict and rejecting district court's efforts to extend public nuisance to lead paint manufacturing); In re Lead Paint Litig., 924 A.2d 484 (N.J. 2007) (same); City of Chicago v. Beretta U.S. A. Corp., 821 N.E.2d 1099 (Ill. 2005) (declining to apply nuisance theory to firearms manufacturing).

5 2021 WL 5191372 at *2, n. 12.

6 This fact was never in dispute. *See* Oklahoma *ex rel.* Hunter v. Purdue Pharma L.P., et al., 2019 WL 9241510 at *1 (Okl. Dist. Nov. 15, 2019) (Final Judgment After Non-Jury Trial).

7 2021 WL 5191372 at *2.

8 *See* Okla. Stat. tit. 50, §§ 1 *et seq*.

state sought funds to abate this "nuisance," which it said was the costs of treating opioid abuse on a yearly basis.[9]

The state settled with Purdue (for $270 million) and Teva (for $85 million).[10] J&J defended itself against the public nuisance claim, arguing Oklahoma's public nuisance law, which historically has governed a variety of local land-based disturbances, does not apply to the manufacturing, marketing, or selling of a lawful product.[11]

The state countered that the language in its public nuisance statute was broad enough to cover these acts. The statute defines a "nuisance" as consisting of "unlawfully doing an act, or omitting to perform a duty, which act or omission . . . annoys, injures or endangers the comfort, repose, health, or safety or others," among other things.[12] The state argued manufacturing, marketing and selling a product that endangers the health or safety of others could qualify as a public nuisance.[13]

Other governments have similarly tried to use their states' public nuisance law in this way. For example, they have sued firearm manufacturers for the criminal misuse of guns, former manufacturers of lead pigment for lead paint in homes, and energy producers for local effects of climate change.[14] Most of these lawsuits have ultimately failed, as courts have held that public nuisance law does not subject manufacturers to liability for these types of harms.[15]

Oklahoma's case against J&J was the first opioid-manufacturing lawsuit in the nation to proceed to trial. The district court held a 33-day bench trial to determine whether J&J was responsible for creating a public nuisance under Oklahoma law by manufacturing, marketing, and selling opioid medications.[16] The state alleged that J&J engaged in a marketing campaign to spread the concept that physicians were undertreating pain.[17] The state also argued that J&J overstated the benefits of opioid pain management while failing to disclose the risks.[18] The parties called 42 witnesses, submitted 874 exhibits into evidence, and presented an additional 225 exhibits to the court.[19]

The trial concluded in July 2019, and the district court issued a $465 million verdict, which represented the state's costs for one year.[20] J&J appealed, again arguing that Oklahoma's public nuisance law cannot be used to impose liability on the company for costs associated with opioid misuse. Subjecting manufacturers to such liability, particularly for a product approved and regulated by the U.S. Food & Drug Administration, would expand public nuisance litigation beyond its original moorings.[21] The state cross-appealed for approximately $9.3 billion.[22]

The Court's Opinion

The Oklahoma Supreme Court held that "Oklahoma public nuisance law does not extend to the manufacturing, marketing, and selling of prescription opioids."[23] "The central focus of the State's complaints is that J&J was or should have been aware and that J&J failed to warn of the dangers associated with opioid abuse and addiction in promoting and marketing its opioid products. This classic articulation of tort law duties--to warn of or to make safe--sounds in product-related liability. Public nuisance and product-related liability are two distinct causes of action, each with boundaries that are not intended to overlap."[24]

The Oklahoma Supreme Court looked to the origins of the statute, which codified longstanding common law. Public nuisance originated in twelfth-century England as "a criminal writ to remedy actions or conditions that infringed on royal property or blocked public roads or waterways."[25] The king could bring a public nuisance claim to protect the public's right to use these public resources.[26] The remedies were either injunctive relief to stop the person from engaging in the public nuisance and/or abatement to make the person clean up his or her mess.[27] Over time, public nuisance law "came to cover a large, miscellaneous and diversified group of minor criminal offenses," such a pollution or vagrancy, that infringed on a public right in a local community.[28] As the court explained, the cause of action "has historically been linked to the use of land by the one creating the nuisance."[29]

9 2019 WL 9241510 at *1.

10 2021 WL 5191372 at *2, n. 11.

11 *Id.* at *2-3.

12 Okla. Stat. tit. 50, § 1.

13 2021 WL 5191372 at *2.

14 *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 543 (2006).

15 *Id.* at 552-61.

16 2021 WL 5191372 at *2.

17 *Id.*

18 *Id.*

19 2019 WL 9241510 at *1.

20 *See id.*; *see also* State of Oklahoma v. Purdue Pharma L.P., et al., 2019 WL 4019929 (Okl. Dist. Aug. 26, 2019) (Judgment After Non-Jury Trial).

21 *See* Oklahoma *ex rel.* Hunter v. Johnson & Johnson, No. 118,474, Apps.' Br. (Oct. 8, 2020); *see also* Br. for Amicus Curiae National Association of Manufacturers, at *10-11 (Oct. 19, 2020) (explaining that the district court's "framing opioid litigation under government public nuisance theory… blur[s] traditional liability law and… seek[s] to subject [market participants] to joint and several liability," creating the threat of massive and unpredictable liability in the marketplace).

22 2021 WL 5191372 at *3.

23 *Id.* at *2.

24 *Id.* at *5.

25 *Id.* at *3.

26 *Id.*

27 *Id.*

28 *Id.* at *4 (citing Restatement (Second) of Torts § 821B cmt. b (Am. Law Inst. 1979)).

29 *Id.*

For this reason, the court continued Oklahoma has "limited Oklahoma public nuisance liability to defendants (1) committing crimes constituting a nuisance, or (2) causing physical injury to property or participant in an offensive activity that rendered the property uninhabitable."[30] "Applying the nuisance statutes to lawful products as the State requests would create unlimited and unprincipled liability for product manufacturers; this is why our Court has never applied public nuisance law to the manufacturing, marketing, and selling of lawful products."[31]

The court then gave several reasons public nuisance law does not extend to manufacturers for the use or misuse of products. First, there is no public right to be free from opioid addiction, and any public nuisance caused by opioid abuse would occur at the local, not manufacturing level.[32]

Second, the manufacturer does not control its products once sold: they have no "control [over] the instrumentality alleged to constitute the nuisance at the time" the nuisance is created.[33]

Third, tort liability must be principled and limited, and applying public nuisance to downstream impacts of products would raise "the possibility that J&J could be held continuously liable."[34]

Finally, the court held that the remedy—$465 million for public funds spent on opioid addiction—is not the type of remedy that applies to public nuisance claims; it was neither injunctive relief to stop the public nuisance nor an abatement order: "The condition, opioid use and addiction, would not cease to exist even if J&J pays for the State's Abatement Plan."[35]

The court also said the remedy was improper because it was not right to make J&J pay for the alleged costs of treating all prescription opioids manufactured, marketed, or sold in the state given that J&J sold 3% of prescription opioids statewide.[36] "J&J should not be responsible for the harms caused by opioids that it never manufactured, marketed, or sold."[37]

30 *Id.*

31 *Id.* at *5.

32 *Id.* at *6-7.

33 *Id.* at *8-9 ("J&J ultimately could not control: (1) how wholesalers distributed its products, (2) how regulations and legislation governed the distribution of its products by prescribers and pharmacies; (3) how doctors prescribed its products, (4) how pharmacies dispersed its products, and (5) how individual patients used its product or how a patient responded to its product, regardless of any warning or instruction given.").

34 *Id.* at *8-9 (*citing* Tioga Public Sch. Dist. No. 15 of Williams Cnty., State of North Dakota v. United States Gypsum Co., 984 F.2d 915 (8th Cir. 1993)).

35 *Id.* at *9.

36 *Id.* at *2.

37 *Id.* at *9.

The Dissent

Justice Edmondson issued the lone dissent. He argued the majority's view of public nuisance is "too narrow."[38] He stated that the public nuisance statute provides a cause of action in "equity" and, therefore, could be extended to the manufacturing, marketing, and selling of opioid products in this case: "our society's concept of equity includes the idea that a defendant should be held legally responsible for damages proximately caused by that defendant and not others."[39]

He contended a property-based nexus "is not always a required element in a public nuisance common-law action."[40] "[A] common-law public nuisance may be created using a chattel or personal property as a means or instrument which causes an injury to a public right, and this type of action has been incorporated into our nuisance statute."[41] He continued that the fact that improperly manufacturing, marketing, and selling products may give rise to a product liability claim does not mean these acts cannot also give rise to a public nuisance action.[42]

In his view, "J&J's directed use of their personal property or goods in Oklahoma commerce, when combined with J&J's false and misleading safety representations of those goods, constitutes a public nuisance when those misrepresentations are causally linked to harm suffered by the public in Oklahoma and resulting in expenditures from the Public Purse."[43]

However, he disagreed with the trial court on two issues: the trial must be tied to conduct and damages in Oklahoma, and the remedy was really one for damages for past conduct. He would have sent the case to the lower court to focus on evidence tied to Oklahoma and "to recalculate damages based upon J&J's share of the market in the years it sold its opioids in Oklahoma."[44]

Conclusion

The Oklahoma Supreme Court's decision adds to the jurisprudence that manufacturers are not to be subject to public nuisance liability for social, environmental, or public health issues associated with the use or misuse of products. The elements of a public nuisance cause of action—a public right, unlawful conduct, causation and control—are not present in these cases. The case could impact opioid litigation in other states, as well as other efforts to assert public nuisance claims against manufacturers of other products that have downstream risks.

38 *Id.* at *27.

39 *Id.* at *13.

40 *Id.* at *14.

41 *Id.*

42 *Id.*

43 *Id.*

44 *Id.* at *12, *27.

OREGON

State v. Pittman

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Joseph V. DeMarco is a partner at DeMarco Law, PLLC where he focuses on counseling clients on complex issues involving information privacy and security, theft of intellectual property, computer intrusions, on-line fraud, and the lawful use of new technology. His years of experience in private practice and in government handling the most difficult cybercrime investigations handled by the United States Attorney's Office have made him one of the nation's most sought-after lawyers on Internet crime and the law relating to emerging technologies. In addition to his counsel practice, Mr. DeMarco serves as an Arbitrator, resolving complex commercial and high-technology disputes between businesses. He is on the National Panel of Neutrals of the American Arbitration Association (AAA) and Federal Arbitration, Inc. (FedArb).

Note from the Editor:

Article I, section 12 of the Oregon Constitution provides that "[n]o person shall . . . be compelled in any criminal prosecution to testify against himself."[1] Thus, to receive protection under Oregon's self-incrimination clause, a person's statement or conduct must be compelled, testimonial, and inculpatory.[2] In *State v. Pittman*, the Oregon Supreme Court considered whether a trial court's order compelling the defendant to unlock her phone qualified as compelling an incriminating, testimonial statement.[3]

Catrice Pittman crashed her car into a tree early one morning, injuring herself and her passengers. Along with the others, Pittman was rushed to the hospital to receive care for traumatic injuries. As hospital staff was administering care, they found in Pittman's clothing a wad of cash, a bag of white powder, and a pipe. Staff turned over the suspected contraband to police officers, who later confirmed that the powder was methamphetamine. In addition, inside the bag of methamphetamine were smaller clear plastic bags commonly used for packaging in individual drug transactions. Based on this evidence, prosecutors charged Pittman with multiple crimes, including narcotics offenses related to the illegal distribution of methamphetamine.[4]

During the course of their investigation, while attempting to take Pittman's statement at the hospital, police officer Brian Frazzini observed an iPhone inside Pittman's purse.[5] Officer Frazzini obtained a search warrant to seize and search the phone, but the passcode prevented any access to the contents of the device. Police officer Garon Boyce then obtained a second search warrant to compel Pittman to provide the code that would unlock the phone, but Pittman refused to comply. Prosecutors then filed a motion to compel Pittman to unlock the phone, arguing that even if disclosure was compelled, such an admission was a foregone conclusion of control over the phone since law enforcement had already confirmed that the device was in Pittman's possession. Pittman opposed the motion, arguing that compulsion would run afoul of Pittman's rights against self-incrimination under Article I, section 12 of the Oregon Constitution and the Fifth Amendment of the U.S. Constitution.[6] The trial court granted the state's motion, and the Oregon Court of Appeals affirmed.[7]

1 Ore. Const. art. I, § 12.

2 State v. Fish, 321 Or. 48, 53 (1995).

3 367 Or. 498, 508 (2021).

4 *Id.*

5 *Id.* at 501–02.

6 *Id.*

7 *Id.* at 503–04.

Before the Oregon Supreme Court were two related questions: First, as a threshold matter, did the court order improperly compel an act that would provide incriminating, testimonial evidence?[8] Second, if it did, did the court order violate Pittman's right against self-incrimination under the state and/or federal constitution?[9] In sum, the court held that unlocking a phone is testimonial under Article I, section 12 of the state constitution, and that compelling it was unconstitutional.[10] Because the Oregon court held that passcode disclosure violated the state constitution, it did not reach the federal question.[11]

In protecting defendants' cell phone passcodes from compelled disclosure, the *Pittman* court confronted an interesting conundrum: What is communicated when a person unlocks their phone with the passcode?[12] If unlocking the phone with a passcode is at all expressive, what incriminating information is conveyed?[13] Here, the court did not venture beyond the obvious fact that when a person conveys the passcode they express knowledge of the passcode.[14] Yet despite such testimony's seemingly limited significance,[15] the court reasoned that after a court order in such a case, a defendant would not be "in the same position she would have been in had she not provided that communication."[16] Put another way, the expressive act (entering a passcode) would indeed "provide information that the state did not already have, or it could bolster or add to information that the state already has[,]" thereby harming the defendant.[17] Accordingly, even if the state already knew the phone belonged to the defendant, there was a baseline cognizable constitutional harm (albeit a "reduced" one).[18] This constitutional injury—forced expression of knowledge of the passcode—was central in the court's analysis.

But the protections of the *Pittman* court's ruling are not absolute. In contrast to forcing the entry of a passcode, attempting to gain access to a biometrically-locked phone is, according to the court, less problematic. In such cases, the court explained, the defendant is only required to place her finger on the phone and this is of less constitutional import because "by performing that act, defendant would communicate only that she knew how to move her finger, not that she knew how to unlock the phone."[19] According to the court, any inculpatory value of this testimony would be next to nil, thus curing any potential constitutional infirmity. While this hypothetical is only dicta, in citing this example, the *Pittman* court may have rubber stamped a "biometric exception" to the law of self-incrimination.

The fact remains, however, that Oregon courts cannot order their defendants to unlock cell phones through passcodes. While biometric unlocking features have become commonplace, passcodes remain a primary key to cell-phone access. What's more, the logic of the *Pittman* opinion could apply directly to other passcode-locked digital devices, including tablets, personal computers, and external hard drives. While the *Pittman* court suggested it propounded a narrow rule,[20] it nonetheless rendered access to digital data far more elusive.

The sheer breadth of information now procedurally locked away makes *Pittman* protections expansive. A single smartphone can hold more data than all documents ever handwritten.[21] Given the wealth of personal information stored in the average person's phone, the investigative value of phone data is potentially enormous. Without the passcode, however, law enforcement may be unable to unlock highly secure phones like the iPhone, which are notoriously difficult to hack.[22] In 2016, for example, law enforcement agencies around the country had in their possession hundreds of iPhones still locked and thus unable to provide any investigative value.[23] Thus, without assistance from phone manufacturers or third-party digital forensics companies,[24] law enforcement agents may need to spend months or even years to crack a single iPhone password.[25]

The *Pittman* court's implicit biometric exception[26]—if that is a recognized exception to its Article I, section 12 holding moving forward—may render Oregonians' privacy protections less effectual. Each iPhone on sale on Apple's website provides biometric unlocking features,[27] and fingerprint unlocking has become standard in flagship smartphones for nearly every major manufacturer.[28] So long as smartphone users take advantage of this convenient feature, Oregon law enforcement may be able to pursue warrants compelling biometric unlocking. It remains to be seen, however, if this biometric exception will become positive law.

8 *Id.* at 505.

9 *Id.* at 505–06.

10 *Id.* at 508, 510.

11 *Id.* at 508.

12 *Id.* at 510.

13 *Id.*

14 *Id.* at 518.

15 *Id.* at 522.

16 *Id.* at 523.

17 *Id.*

18 *Id.*

19 *Id.* at 518.

20 *Id.* at 520.

21 Steven W. Brookreson, *37(E): The Effects of Change and a Call for More*, 86 UMKC L. Rev. 177, 177 (2017).

22 Shannon Lear, Note, *The Fight over Encryption: Reasons Why Congress Must Block the Government from Compelling Technology Companies to Create Backdoors into Their Devices*, 66 Clev. St. L. Rev. 443, 454–55 (2018).

23 *See Answers to your questions about Apple and security*, Apple, *available at* https://www.apple.com/customer-letter/answers/; Tim Cook, *A Letter to Our Customers*, Apple (Feb. 16, 2016), *available at* https://www.apple.com/customer-letter/.

24 Lear, *supra* note 30, at 455–56.

25 Wash. Post, *Why it's so hard to hack the iPhone*, Denver Post (Feb. 21, 2016 7:48 AM), *available at* https://www.denverpost.com/2016/02/21/why-its-so-hard-to-hack-the-iphone/.

26 367 Or. at 518.

27 *iPhone – Apple*, Apple, *available at* https://www.apple.com/iphone/.

28 Shams, *List of All Fingerprint Scanner Enabled Smartphones*, Web Cusp (Apr. 24, 2018), *available at* https://webcusp.com/list-of-all-fingerprint-scanner-enabled-smartphones/.

PENNSYLVANIA

Commonwealth v. Alexander

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Note from the Editor:

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Pennsylvania's highest court has extinguished the automobile exception to the warrant requirement. No warrant is required to search a car under the federal Fourth Amendment. In 1925's *Carroll v. United States*, the U.S. Supreme Court held that probable cause authorizes warrantless seizures "of contraband goods in the course of transportation."[1] Chief Justice William Howard Taft's opinion found precedent dating back to the American Founding that distinguishes seizing items "concealed in a movable vessel where they could readily be put out of reach of a search warrant" from entry into homes.[2]

The Court elaborated on *Carroll*'s so-called "automobile exception" in 1970's *Chambers v. Maroney*.[3] It held that the exception is justified by the exigent circumstances that are present when "an automobile [is] stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained."[4]

A reader could be forgiven for thinking that these justifications actually imply limits on warrantless searches of motor vehicles. For instance, what if the target auto were off the road and could not so easily drive away? The Supreme Court shut the door to questions like this in 1985's *California v. Carney*.[5] That case concerned a search of a parked but "fully mobile 'motor home' located in a public place."[6] The Court held that no warrant was required because even where a vehicle cannot be quickly moved, "the lesser expectation of privacy resulting from its use as a readily mobile vehicle" triggers the exception.[7] The reduced privacy results "from the pervasive regulation of vehicles capable of traveling on the public highways."[8] In light of *Carney*, the automobile exception itself become immovable: If there is probable cause to search a car, then no warrant is necessary.

Enter the Pennsylvania Supreme Court case *Commonwealth v. Alexander*,[9] which held that the automobile exception is incompatible with the commonwealth's constitution. This decision was particularly surprising given that a plurality of the same court approved of the automobile exception only six years earlier, in *Commonwealth v. Gary*.[10] The *Gary* plurality based

1 267 U.S. 132, 149.

2 *Id.* at 151.

3 399 U.S. 42.

4 *Id.* at 51.

5 471 U.S. 386.

6 *Id.* at 387.

7 *Id.* at 391.

8 *Id.* at 392.

9 No. 30 EAP 2019, 2020 Pa. LEXIS 6439 (2020).

10 625 Pa. 183 (2014).

its holding on four factors Pennsylvania uses in deciding when to distinguish the state constitution from the federal one: (1) Pennsylvania's constitutional text; (2) its case law; (3) other states' case law; and (4) policy.[11] *Gary* found these factors to weigh in favor of the automobile exception.

The *Alexander* court disagreed. I will omit the court's lengthy stare decisis analysis.[12] But here are *Alexander*'s findings as to the four constitutional factors above:

1. Pennsylvania's constitutional provision governing searches and seizures protects "possessions" and "things," not just the Fourth Amendment's "persons, houses, papers, and effects."[13] This broader language covers items on a person regardless of where he is, including in a car.[14]
2. Pre-*Gary* precedent afforded Pennsylvanians more search protections than does federal constitutional jurisprudence.[15]
3. "[M]ost states have adopted the federal exception"[16] . . .
4. . . . but Pennsylvania has a strong policy favoring privacy—so much so that it rejects the federal good-faith exception to the warrant requirement. "If the United States Constitution tips the scale towards law enforcement needs in analyzing Fourth Amendment questions, our own charter does not . . . ."[17]

Three of the four factors, then, favor stronger auto search protections under the Pennsylvania constitution. Therefore, the federal automobile exception cannot stand in the Keystone State. Without it, motor vehicle searches are analyzed just like any others: "Obtaining a warrant is the default rule. If an officer proceeds to conduct a warrantless search, a reviewing court will be required to determine whether exigent circumstances existed to justify the officer's judgment that obtaining a warrant was *not* reasonably practicable."[18] The presence of a chassis and wheels changes nothing.

Alexander featured one concurring and three dissenting opinions. Justice Max Baer's brief concurrence said that stare decisis is good, but that *Gary* was too wrong and too recent to merit its full protection.[19]

Chief Justice Thomas Saylor dissented. He found the majority's reliance on the constitutional reference to "possessions" overwrought, given the Fourth Amendment's mention of "effects."[20] He noted that the commonwealth constitution lacks any rule requiring the exclusion of evidence obtained unconstitutionally.[21] He said that the majority's ruling "impedes the effective enforcement of criminal laws in a fashion well beyond any impact that the framers might have envisioned."[22]

Justice Kevin Dougherty's dissent found no "special justification" for overruling *Gary*, as required by stare decisis.[23] But he did note his own "serious misgivings" about the automobile exception.[24]

Justice Sallie Mundy dissented based on stare decisis and her agreement with *Gary*.[25]

Alexander may be a minor protest against 100 years of federal search and seizure jurisprudence. But it did mark out a path for litigators to undermine longstanding federal doctrines using unique trends in state precedent. It also demonstrates that stare decisis only goes so far to protect decisions of recent vintage, and only works so much magic against the civil libertarian instincts of certain benches. These are lessons worth noting when litigating state constitutional issues.

11 *Alexander*, 2020 Pa. LEXIS 6439 at *21 (discussing *Gary*'s use of *Commonwealth v. Edmunds*, 526 Pa. 374 (1991)).

12 *See id.* at *41–55.

13 *Id.* at *57–58 (discussing Pa. Const. art. I § 8 ("The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.")); *contrast* U.S. Const. amend. IV.

14 *Id.*

15 *Id.* at *3–21.

16 *Id.* at *22.

17 *Id.* at *59–63.

18 *Id.* at *73.

19 *Id.* at *74–77 (Baer, J., concurring).

20 *Id.* at *77 (Saylor, C.J., dissenting).

21 Id. at *78–79.

22 *Id.* at *80.

23 *Id.* at *81 (Dougherty, J., dissenting).

24 *Id.* at *84.

25 *Id.* at *93 (Mundy, J., dissenting).

SOUTH CAROLINA

Wilson v. City of Columbia

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In *Wilson v. City of Columbia*,[1] the South Carolina Supreme Court held that a city ordinance mandating masks in public and private schools and daycares ran afoul of a state budget proviso prohibiting the use of state funds to enforce mask mandates in public schools.

In its 2021-2022 Appropriations Act, the South Carolina General Assembly included Proviso 1.108, which prohibits school districts and schools from using "any funds appropriated or authorized pursuant to this act to require that its students and/or employees wear a facemask at any of its education facilities."[2] The City of Columbia later passed two ordinances[3] that "mandate facemasks for 'all faculty, staff, children over the age of two (2), and visitors, in all buildings at public and private schools or daycares.'"[4] Attorney General Alan Wilson brought an action in the court's original jurisdiction seeking a declaratory judgment that Columbia's ordinances violated the state budget proviso.[5]

Writing for the majority, Justice John W. Kittredge focused closely on the language of the proviso. At the outset, the court made clear "that the wisdom or efficacy of mandating school children to wear facemasks to combat the coronavirus is not before [the court]."[6] Instead, the legal issues were whether the budget proviso was constitutional and, if so, whether the ordinances conflicted with the proviso and were thus invalid.[7]

On the first issue, Columbia argued that Proviso 1.108 violated the state constitution's one-subject rule.[8] Under that rule, "Every Act of resolution having the force of law shall relate to but one subject."[9] As the South Carolina Supreme Court has interpreted that rule, the "topics in the body of the act" must be "kindred in nature" and have "a legitimate and natural association with the subject of the title."[10] The title must "convey reasonable notice of the subject to the legislature and the public."[11] And a provision "in a general appropriations act"

1 No. 2021-000889, 2021 WL 3928992 (S.C. Sept. 2, 2021).

2 H. 4100, 124th Leg., 1st Reg. Sess. (S.C. 2021).

3 City of Columbia, S.C., Ordinance No. 2021-068 (Aug. 4, 2021); City of Columbia, S.C., Ordinance No. 2021-069 (Aug. 5, 2021).

4 *Wilson*, 2021 WL 3928992, at *2.

5 *Id.* at *1.

6 *Id.* at *3.

7 *Id.* at *4–5.

8 *Id.* at *4.

9 S.C. Const. art. III § 17.

10 *Wilson*, 2021 WL 3928992, at *4 (quoting Westvaco Corp. v. S.C. Dep't of Revenue, 467 S.E.2d. 739, 741 (S.C. 1995)).

11 *Id.* (quoting *Westvaco*, 467 S.E.2d. at 741).

complies with this requirement as long as it "reasonably and inherently relates to the raising and spending of tax monies."[12]

The court held that Proviso 1.108 met this standard for two reasons. First, the proviso "is reasonably and inherently related to the spending of tax money" because it sets limits on the use of funds allocated to the Department of Education by the act.[13] Second, the proviso "has a legitimate and natural association with the title of the Appropriations Act, as it regulates the expenditure of appropriated funds by K-12 schools."[14] Thus, the court ruled that the proviso does not violate the state constitution and "is accorded supremacy" over local laws.[15]

Columbia also argued that its ordinances did not conflict with the state law because the city would use other funds to enforce its mask mandate—not state-appropriated funds.[16] Rejecting this argument, the court said that

> [t]he notion that City employees would infiltrate the schools and, without any assistance from school personnel and without a penny of state funds, would be able to mandate masks and impose civil penalties for violations strains credulity and, in fact, is demonstrably false, as proven by the terms of the ordinances themselves.[17]

That is because the ordinances required school personnel to enforce the mandate or face sanctions and personal liability.[18] This requirement made evident the conflict between the state's proviso and the city's ordinances.

According to the court, in this type of "conflict between a State statute and a city ordinance," it is a "bedrock principle" that "the ordinance is void."[19] The court emphasized that "[l]ocal governments derive their police powers from the State,"[20] and that "the City ordinance could not make legal that which the State statute declared unlawful."[21] Columbia argued that it had authority under the state's Home Rule Act to unilaterally declare a state of emergency and "preserve the 'health, peace, order and good government of its citizens.'"[22] The court rejected this argument too, explaining that the home rule doctrine does not "serve[] as a license for local governments to countermand legislative enactment by the General Assembly."[23] Nor does the home rule doctrine narrow the preemptive scope of a state law where compliance with both the law and a local ordinance "is impossible."[24]

Justice George C. James, Jr. issued a concurring opinion that described the diverse viewpoints on mask mandates.[25] He emphasized that "[i]n spite of the explosion of public opinion on masks and mask mandates and the sometimes unfortunate manner in which these opinions are expressed, [the court's] focus and [the court's] authority are limited to applying the law."[26]

Justice Kaye G. Hearn wrote a separate opinion concurring only in the result, joined by Chief Justice Donald W. Beatty. In her view, the majority's description of the underlying "conflict as a debate between parental choice and government mandates" placed "an unnecessary political gloss on the issue."[27]

Wilson v. City of Columbia underscores the importance of text-driven legal analysis in resolving contentious disputes. Rather than address the underlying policy questions—questions that have engendered much discussion and disagreement—the court's opinion focused on the text of the relevant provisions. In that respect, it echoes the court's earlier opinion in *Creswick v. University of South Carolina*, which held that a state institution of higher education *could* impose a mask mandate because the proviso at issue only prohibited the use of state funds "to require that its students have received the COVID-19 vaccination in order to be present at the institution's facilities without being required to wear a facemask."[28] And in *Wilson*, the court underscored the precise contours of the law, pointedly refusing to hold that *all* local mask mandates would violate Proviso 1.108.[29] Instead, it held that Columbia's ordinances were in violation because, as written, they necessarily involved the use of state-appropriated funds to carry out the mask mandate in schools—the very use that Proviso 1.108 prohibits.[30] This narrow holding leaves open the possibility that local mask mandates not dependent on state funds could see a different fate. Finally, a federal district court recently limited the scope of the proviso as to K-12 schools on federal law grounds, holding that "disallowing school districts from mandating masks . . . discriminates against children with disabilities."[31] That litigation remains ongoing and could affect the proviso's implementation.

12 *Id.* (quoting Town of Hilton Head Island v. Morris, 484 S.E.2d 104, 107 (S.C. 1997)).

13 *Id.*

14 *Id.*

15 *Id.* at *6.

16 *Id.* at *4–5.

17 *Id.* at *4.

18 *Id.* at *5; City of Columbia, S.C., Ordinance No. 2021-069 (Aug. 5, 2021).

19 *Wilson*, 2021 WL 3928992, at *5 (quoting State v. Solomon, 245 S.C. 550, 575 (1965)).

20 *Id.* (quoting City of N. Charleston v. Harper, 410 S.E.2d 569, 571 (S.C. 1991)).

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.* at *6.

25 *Id.* at *7 (James, J., concurring).

26 *Id.*

27 *Id.* (Hearn, J., concurring).

28 No. 2021 000833, 2021 WL 3629915, at *1 (S.C. Aug. 17, 2021).

29 *Wilson*, 2021 WL 3928992, at *6.

30 *Id.* at *5.

31 Disability Rts. S.C. v. McMaster, No. CIV 3:21-02728, 2021 WL 4444841, at *11 (D.S.C. Sept. 28, 2021).

SOUTH DAKOTA

Hamen v. Hamlin County

By Anya Bidwell

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Anya Bidwell is an attorney with the Institute for Justice and a co-leader of its Project on Immunity and Accountability.
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Over the past fifty years, SWAT teams within local police departments have evolved from loosely staffed and lightly equipped operations to professional units with specifically designated personnel, training, and sophisticated weaponry.[1] This evolution brings into focus two questions. First, do takings clauses in the federal and state constitutions require governments to compensate property owners for the destruction caused during SWAT raids? Second, if officers conducting these raids act unreasonably, can qualified immunity shield them from constitutional claims for damages?

With its decision in *Hamen v. Hamlin County*, the Supreme Court of South Dakota became the latest appellate court to weigh in on these questions. It unanimously held that the state takings clause does not require compensation for damage done in the course of a law enforcement operation. It also generally agreed that in cases where officers act unreasonably, qualified immunity might not always shield them from liability.

In 1997, Gareth Hamen purchased a mobile home located within 200 yards of his house.[2] He renovated it and—when the opportunity presented itself—rented it.[3] Gareth's children also alternated staying there.[4]

Fast forward nineteen years, Gareth's son Gary Hamen was a wanted fugitive with an outstanding arrest warrant.[5] Reports indicated that Gary Hamen was armed and threatened to shoot himself and anyone who came near him.[6]

During the manhunt for Gary, the Hamlin County sheriff learned that Gary was inside the mobile home and asked for a local SWAT team to assist him in entering premises.[7] The team arrived with an armored vehicle and a drone, securing the perimeter around the mobile home and monitoring Gary's whereabouts.[8] Shortly thereafter, the sheriff asked for further reinforcements from another special-operations unit—the Codington County Special Response Team.[9]

Witness reports and drone footage indicated that Gary was no longer in the mobile home, and had been seen walking in the nearby river. Immediately before entering the home,

1 Daniel Ross, *The Evolution of SWAT Team Equipment from WWII Rifles to Bearcats*, PBS (May 4, 2016), https://www.pbs.org/independentlens/blog/the-evolution-of-swat-team-equipment-from-wwii-rifles-to-bearcats/.

2 Hamen v. Hamlin Cty., 2021 WL 501207, *1 (S.D. 2021).

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.* at *2.

the officers were made aware of these reports.[10] Regardless, the sheriff authorized both units to raid the mobile home on the chance Gary was still there.[11] The sheriff did so without requesting Gareth's permission and without a warrant.[12] During the raid, the officers used armored vehicles to ram through the mobile home's windows and its front and back doors, damaging the walls and the septic system.[13] Gareth estimated that the damage caused by the raid totaled $18,778.61.[14]

When Gareth sued Hamlin County, the sheriff, and various individual officers, he wanted two things to make him whole. First, he filed a claim for inverse condemnation under Article VI, § 13 of the South Dakota Constitution. According to the clause, "[p]rivate property shall not be taken for public use, or damaged, without just compensation."[15] Gareth's theory was that the damage caused by the officers during the raid of the mobile home was a damage or a taking, warranting just compensation.[16] Second, he filed two constitutional claims under 42 U.S.C. 1983, which authorizes suits against state and local officials—in federal and state courts—for violations of rights "secured by the Constitution and laws" of the United States.[17] The first 1983 claim questioned the legality of the warrantless entry into Gareth's mobile home.[18] The second one alleged that the officers used excessive force when they did so.[19]

The parties began their dispute in the Third Judicial Circuit Court, where plaintiffs (Gareth and his wife Sharla) and defendants (Hamlin County, the sheriff, and various John Doe officers) filed cross-motions for summary judgment.[20] That court granted summary judgment to Hamlin County, holding that there was no official policy or custom approving or condoning the damage caused to the mobile home, and denied the rest of the motions.[21] Hamlin County, along with the sheriff, nonetheless appealed, seeking clarity from the South Dakota Supreme Court on two very important and previously unanswered questions: First, are police power takings subject to the just compensation clause? And second, does qualified immunity bar suits against officers who acted unreasonably?

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.* at *3.

15 *Id.*

16 *Id.*

17 42 U.S.C. § 1983.

18 *Hamen*, 2021 WL 501207, at *3.

19 *Id.*

20 *Id.*

21 *Id.*

Issue I: Does the police power represent a categorical exception to the Just Compensation Clause?

Importantly, the parties did not dispute whether the actions of the special-unit teams in this case constituted an exercise of the police power. The question was whether such exercise represents a categorical exception to the just compensation clause, which is generally associated with the power of eminent domain or whether, as Justice Souter reasoned in an opinion that he wrote when he was a Justice of the New Hampshire Supreme Court, the "line between a non-compensable exercise of the police power and a compensable taking" depends on "balancing the respective interests of society and property owners."[22]

This was a question of first impression, and the South Dakota Supreme Court unanimously adopted the categorical rule: there is no right to just compensation under the South Dakota takings clause when law enforcement exercises police powers by damaging private property while executing a warrant or pursuing a fleeing felon.[23] The court primarily looked to decisions in other jurisdictions to reach its conclusion.

In California, the state's highest court concluded that a property owner was not entitled to just compensation when law enforcement deployed tear gas in his store to flush out a suspect. In the court's view, the actions of law enforcement were distinct from the function of taking or damaging property for public use.[24] The same categorical line was drawn in the highest courts of Oklahoma and Washington State, as well as in the U.S. Tenth Circuit Court of Appeals, when it was interpreting Colorado's takings clause.[25]

In Alaska, New Hampshire, Minnesota, and Texas, the courts rejected the categorical rule, reasoning that "simply labeling the actions of the police as an exercise of the police power cannot justify the disregard of the constitutional inhibitions."[26]

After reviewing the language of the takings clause of the South Dakota constitution—"[p]rivate property shall not be taken for public use, or damaged, without just compensation"—as well as its own decisions interpreting the term "public use," the South Dakota Supreme Court ultimately sided with those courts adopting the categorical approach, concluding that the public use and police power functions do not overlap and thus the use of police power, unlike the use of the power of eminent domain, cannot give rise to a compensable damage or taking.[27]

Issue II: Does qualified immunity protect the sheriff from liability, even if he acted unreasonably?

In addition to suing for just compensation, Gareth also sued for damages under a separate theory of liability: that the special-unit officers acted unreasonably when they rendered his

22 Soucy v. New Hampshire, 506 A.2d 288, 289 (N.H. 1985).

23 *Hamen*, 2021 WL 501207, at *7.

24 *Id.* at *5 (citing Customer Co. v. Sacramento, 895 P.2d 900, 901 (Cal. 1995)).

25 *Id.* at *5-6 (citing cases).

26 *Id.* at *6.

27 *Id.* at *7.

mobile home unusable. He argued that this unreasonableness manifested itself in two ways: first, through a warrantless entry into the mobile home, and second, through the use of excessive force when entering it.

As explained by *D.C. v. Wesby*, when a state employee is granted qualified immunity, a case can be dismissed before the facts are determined if a court decides that the violations were not clearly established in a federal appellate court of the relevant jurisdiction or in the United States Supreme Court. This is possible even if the allegations in the complaint are true and the alleged constitutional violations have occurred.[28]

Here, the court had to assess qualified immunity for claims of (1) warrantless search of the mobile home and (2) the use of excessive force. As to the former, the court determined that, assuming there was no objectively reasonable basis to enter the mobile home, as Gareth alleges, and assuming none of the exceptions to the Fourth Amendment apply, the law was clearly established enough that a reasonable officer should have known that what he was doing was unconstitutional.[29] Therefore, qualified immunity does not apply, and Gareth is allowed to go back to the state circuit court and prove that the sheriff violated his Fourth Amendment right when he entered the mobile home without a warrant.[30]

As to the latter, the court held that even assuming there was a use of excessive force, the right to be free from it was not clearly established, and so qualified immunity shields the sheriff from liability and prevents Gareth from going forward with this claim.[31] The court explained that the burden was on Gareth to find a precedent in the relevant jurisdiction holding that when officers use armored vehicles to enter a mobile home belonging to an uninvolved third-party while searching for a fleeing suspect who can potentially present a danger to himself and others, they violate the Fourth Amendment.[32] Because Gareth failed to do so, qualified immunity applied, preventing his claim from going forward.

Justices Kern and Devaney dissented on this point. According to them, the majority was wrong to conclude that "the use of force was not excessive under clearly established law."[33] In their view, "existing precedent may have provided sufficiently clear guidance to law enforcement faced with the circumstances present here."[34] Justice Kern did not provide a case to support this position. Rather, she turned to a well-known exception to the qualified immunity standard that has been rarely used—the so-called obviousness exception. First announced by the U.S. Supreme Court in *Hope v. Pelzer*, this exception allows some room when the violations are egregious enough that "unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances."[35] Justice Kern would have denied qualified immunity based on this obviousness exception and allowed the excessive force claim to proceed.[36]

Justice Gilbertson also filed a dissenting opinion. Unlike Justices Kern and Devaney, he dissented because in his view the qualified immunity standard was misapplied. He disagreed with the approach taken by the state circuit court, which he said should have "decided whether qualified immunity existed as a matter of law, and then either granted summary judgment or permitted the case to proceed to trial if it found immunity did not exist."[37] The circuit court had concluded that there was an issue of material fact and denied qualified immunity on that basis. According to Justice Gilbertson, this was wrong: "If the circuit court found the existence of disputed facts, it was to view the facts in a light favorable to the Hamens [the property owners], and then rule on the issue of qualified immunity."[38] Thus, instead of concluding that qualified immunity does not shield the sheriff on the unwarranted search claim, Justice Gilbertson would have remanded the question back to the district court.[39]

To summarize, the court had before it three questions to answer. First, whether property damage inflicted pursuant to an exercise of police powers can sometimes be compensable under South Dakota's takings clause. The answer to that was a unanimous no. Second, whether an officer who enters a home without a warrant to look for a fleeing suspect has qualified immunity from liability under the U.S. Constitution. The answer to that was also no. And third, whether qualified immunity shields an officer who rams through doors and windows of a third-party mobile home in the process of pursuing a fleeing suspect.[40] The answer to that was yes. Gareth can now go back to the state circuit court and continue his one remaining claim on the warrantless entry.

28 D.C. v. Wesby, 138 S. Ct. 577, 589 (2018).

29 *Hamen*, 2021 WL 501207, at *12.

30 *Id.* at *14.

31 *Id.* at *13-14.

32 *Id.*

33 *Id.* at *15.

34 *Id.* (quotation marks omitted).

35 *Wesby*, 138 S. Ct. at 590.

36 *Hamen*, 2021 WL 501207, at *17.

37 *Id.* at *18.

38 *Id.*

39 *Id.*

40 *Id.* at *2.

VERMONT

State v. Misch

By Prof. George Mocsary

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About the Author:

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Note from the Editor:

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In April 2018, Vermont banned magazines capable of holding more than 10 or 15 rounds in a rifle or handgun, respectively.[1] It exempted magazines possessed prior to April 11, 2018.[2] The ban was a response to a possible shooting threat to a school in Fair Haven, Vermont.[3] Defendant Misch allegedly purchased two thirty-round magazines in neighboring New Hampshire and was charged with violating the ban.[4] Mr. Misch challenged the law on multiple grounds,[5] including that it violated Article 16 of the Vermont constitution, which reads in its entirety:

> That the people have a right to bear arms for the defence of themselves and the State—and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power.[6]

Prompted by an amicus brief, the court first examined whether Article 16's text and historical context protected the right to bear arms "outside of the context of actual or potential militia service."[7] Beginning with the historical context surrounding the state's Declaration of Rights, it noted the great concern with maintaining state, rather than federal, control of the militia, especially under the shadow of a federal standing army.[8]

The court next looked at the meaning of "bear arms for the defense of . . . the State," opting to examine the import of "themselves" separately.[9] It first examined corpus linguistics studies showing that "bear arms" was typically, but not ubiquitously, used in a military context at the time of the state constitution's framing.[10] It then looked at the use of the phrase "bearing arms" in another provision of the Vermont constitution, which it found relates exclusively to military service.[11]

1 State of Vermont v. Misch, 2021 Vt. 10 ¶¶ 68-69.

2 *Id.* ¶ 68.

3 *Id.* ¶ 69.

4 *Id.* ¶ 2.

5 The court did not address Mr. Misch's other claims on the ground that they were not properly preserved. *Misch*, 2021 Vt. 10 ¶ 7 n.5.

6 Vt. Const. ch. 1, art. 16 (Chapter 1 is A Declaration of the Rights of the Inhabitants of the State of Vermont.")

7 *Misch*, 2021 Vt. 10 ¶¶ 10, 43 n.15.

8 *Id.* ¶¶ 13-14.

9 *Id.* ¶¶ 15, 24. Although Article 16, as originally drafted, used "defence," the court adopted the more modern "defense" spelling throughout its opinion.

10 *Id.* ¶ 17.

11 *Id.* ¶ 18.

The court concluded that, "[o]n this view, the right to bear arms, while an individual right, was an individual right in service of a collective responsibility."[12] It added that "Although the National Guard is the closest living descendant of the colonial-era militias, it is a distant cousin at best because the federal government controls its weapons and supplies."[13] Because the militia as envisioned by the state's founders "no longer exists," "the right to 'bear arms for the defense . . . of the State' is essentially obsolete. The predicate no longer exists in any meaningful way."[14]

Returning to the "for defense of themselves" language, the court compared the Vermont constitution's use of "people" with its use of "person[s]" to conclude that the document usually (but not always) "refers to 'the people' when recognizing rights associated with the body politic, to be exercised collectively."[15]

The court added that, although the Vermont right to bear arms "was likely designed to protect the right of the people to bear arms for the purpose of constituting and serving in the state militia," it added that "this interpretation does not foreclose the possibility that the provision can and should be understood to protect the right of individuals to own firearms for individual self-defense, independent of service in a state militia."[16] With that caution set forth, the court shifted to examining both precedent from Vermont and other states, and the history of firearms regulation in Vermont.

Relying on Vermont case law, including the famous *State v. Rosenthal*,[17] which struck a local licensing requirement for public carry, the justices concluded that (1) "By citing Article 16 [in *Rosenthal*] in support of our conclusion that carrying firearms is generally permitted under Vermont law, and stating that an ordinance restricting the individual use of firearms is 'repugnant to the Constitution,' we suggested that the right to bear arms applied without regard to a connection to state militia service"; (2) "the right to bear arms may be validly restricted by the Legislature," and (3) "restrictions on the right to bear arms, like most statutes, are presumed to be reasonable and valid."[18]

Surveying case law from other states, the court concluded that courts in those states have consistently construed their states' arms-bearing provisions "to protect an individual right to bear arms for self-defense."[19] The court similarly noted that state courts have interpreted their constitutional arms-bearing provisions lacking a reference to the people "themselves" as protecting an individual right.[20] It added that many state constitutions clearly describe an individual right to bear arms for self-defense.[21]

In the final step of analyzing whether Article 16 protects an individual right to possess and use a firearm for self-defense, the justices noted that although, "[r]elative to many other states, Vermont's historical regulation of firearms has been less extensive," various gun-safety regulations throughout the state's history indicate that the right is subject to reasonable regulation.[22]

The Vermont Supreme Court concluded that "Whereas we have previously relied on stated or unstated assumptions that the individual right to bear arms in self-defense exists but is not unlimited, we now expressly hold as much."[23] It stated that "this interpretation is the best available way to harmonize and honor the core principles of security and self-protection implicit in the right, the individual right to carry guns as implicitly recognized in our case law, and modern persuasive analysis from sister states."[24]

Proceeding to determine the test to be used in evaluating Article 16 challenges, the court opted for the reasonable-regulation test adopted by Vermont's and most other states' courts, instead of the Two-Part Test employed by most federal courts.[25] Under the reasonable-regulation standard, courts analyze whether the state reasonably exercises its police power in regulating the constitutionally protected conduct.[26] This balancing test "is distinct from rational-basis review because it "'demands not just a conceivable legitimate purpose but an actual one.'"[27] The court opined that this test was appropriate given the risks associated with firearm use.[28]

12 *Id.* ¶ 19.

13 *Id.* ¶ 22.

14 *Id.* ¶ 22-23. The court quotes a law review article for the proposition that the militia no longer exists. Although that article discusses the federal Second Amendment, the court presumably applied this reasoning to the "Vermont militia" to which its discussion was referring. *Id.* ¶ 22.

15 *Id.* ¶¶ 26-27.

16 *Id.* ¶ 31.

17 55 A. 610 (1903).

18 *Id.* ¶¶ 35, 36, 38.

19 *Id.* ¶¶ 40-41.

20 *Id.* ¶ 42.

21 *Id.* ¶ 42 n.14.

22 *Id.* ¶¶ 44-45.

23 *Id.* ¶ 48.

24 *Id.*

25 *Id.* ¶¶ 51-56, ¶ 53 n.18.

26 *Id.* ¶ 57. By contrast, "the Two-Part Test (also called the Two-Step Test) uses the familiar standards of strict scrutiny, intermediate scrutiny, and rational basis, depending on the circumstances." Johnson et al., Firearms Law and the Second Amendment: Regulation, Rights, and Policy 906 (2d ed. 2017). Further:

> Part One of the Two-Part Test asks "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. . . . If it does not, [the court's] inquiry is complete." If the answer to Step One is "yes," the court proceeds to Step Two to "evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid." The type of heightened scrutiny applied at Step Two depends on the severity of the burden on the Second Amendment right; the greater the burden, the greater the scrutiny.
>
> *Id.* (citing United States v. Marzzarella, 614 F.3d 85, 89, 97 (3d Cir. 2010)) (internal citations omitted).

27 *Id.* ¶¶ 57 (quoting Rocky Mountain Gun Owners, 2020 CO 66, ¶ 56), 66.

28 *Id.* ¶ 61.

Citing several studies arguing that the use of the banned magazines in mass shootings causes more injury, the court concluded that "it is reasonable to conclude that the limit on large-capacity magazines will have an appreciable impact in reducing the injuries and fatalities in the event of mass-shooting events."[29] Acknowledging that it did not cite "thoughtful analyses and arguments of those opposed to the legislation," and noting that the Vermont Legislature made no formal findings on the matter, the court stated that it listed only studies supporting the Legislature's position to show that the legislation was reasonable.[30] The court concluded its reasonableness analysis by determining that the law's burden on the right to bear arms was minimal because, among other reasons, few shots are fired in defensive encounters, and the banned magazines are rarely used in such situations.[31]

The Vermont Supreme Court thus upheld the ban on magazines capable of holding more than 10 or 15 rounds in a rifle or handgun.[32]

29 *Id.* ¶¶ 71-79. *Misch* is unusual in that its initially published version contained five statements suggesting that the legislature considered empirical data in passing the ban at issue. The Vermont Supreme Court withdrew that version and reissued the opinion without that language. The original version, with both the removed language marked and replacement language noted, is available at *Misch Revisions*, Firearms Regulation, http://firearmsregulation.org/Misch_revisions.pdf.

30 *Id.* ¶ 79.

31 *Id.* ¶¶ 82, 84. The court referred to the "Legislature's conclusion" that the law is not a significant burden on the right to bear arms for self-defense. *Id.* ¶ 82. *Misch* does not cite legislative material or other authority in support of this conclusion. It could not have done so, given the absence of legislative findings. *Id.* ¶¶ 71, 8p; *see supra* note 29.

32 *Id.* ¶ 89.

VIRGINIA

Loudoun County School Board v. Cross

By Cynthia Crawford

Published October 26, 2021

About the Author:

Cynthia Fleming Crawford is Senior Policy Counsel with Americans for Prosperity Foundation, focusing on regulatory issues, freedom of expression, and educational freedom. Ms. Crawford was counsel of record for AFPF's amicus brief in support of Petitioners in *Liu v. SEC* and for Cause of Action Institute amicus briefs in support of Petitioners in Publishers *Business Services, Inc. v. FTC* and *AMG Capital Management, LLC v. FTC.*

Note from the Editor:

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On August 30, 2021, the Virginia Supreme Court issued its decision in Loudoun County School Board v. Byron Tanner[1] affirming the circuit court's grant of a preliminary injunction to Byron Cross, a Loudoun County Public Schools teacher. This case has important implications for public employees in general and public school employees in particular, regarding their right to speak on matters of public interest that affect them personally.

Byron Cross had been an elementary school physical education teacher in Loudoun County Public Schools for eight years.[2] The Virginia Code requires the Department of Education to "develop and make available to each school board model policies concerning the treatment of transgender students in public elementary and secondary schools" and each school board to "adopt policies that are consistent with but may be more comprehensive than the model policies developed by the Department of Education."[3] On May 25, 2021, the Loudoun County School Board held a meeting to consider whether to adopt Policy 8040, "Rights of Transgender Students and Gender-Expansive Students."[4] If adopted, the policy would (1) allow students to use a name different than their legal name, (2) allow students to use gender pronouns different from those corresponding to their biological sex, (3) require school staff to use students' chosen name and gender pronouns, and (4) allow students to use school facilities and participate in extra-curricular activities consistent with their chosen gender identity.[5]

Cross registered to speak during the meeting's public comment period and delivered the following statement:

> My name is Tanner Cross. And I am speaking out of love for those who suffer with gender dysphoria. 60 Minutes, this past Sunday, interviewed over 30 young people who transitioned. But they felt led astray because lack of pushback, or how easy it was to make physical changes to their bodies in just 3 months. They are now de-transitioning. It is not my intention to hurt anyone. But there are certain truths that we must face when ready. We condemn school policies like 8040 and 8035 because it will damage children, defile the holy image of God. I love all of my students, but I will never lie to them regardless of the consequences. I'm a teacher but I serve God first. And I will not affirm that a biological boy can be a girl and vice versa because it is

1 Record No. 210584, Circuit Court No. CL21003254-00 ("Order"), https://adfmedialegalfiles.blob.core.windows.net/files/CrossOrderVSC.pdf.

2 *Id.* at 1.

3 Va. Code § 22.1-23.3(A) & (B).

4 *Order* at 2.

5 *Id* at 1–2.

against my religion. It's lying to a child. It's abuse to a child. And it's sinning against our God.[6]

Two days later, Cross was informed that he was being placed on administrative leave with pay and was under investigation for allegations that his conduct had a disruptive impact on the operations of Leesburg Elementary, where he taught. The letter also informed him he was banned from Loudoun County Public Schools property and events. Later that day, an email was sent to "all Leesburg Elementary parents and staff" informing them of Cross' suspension. Cross was informed his suspension was due to his public comments.[7]

Cross brought free speech claims under the Virginia Constitution, alleging retaliation, prior restraint, and chilling of his right to speak publicly as a private citizen.[8] Cross also claimed the Board had engaged in unconstitutional viewpoint discrimination by punishing him for expressing his opinion of the transgender policy, but not disciplining other employees who "expressed different views on proposed gender-identity education policy."[9] Cross also brought free exercise claims, contending his suspension substantially burdened his free exercise of religion by diminishing his ability to profess and maintain his opinions on religious matters.[10] Cross sought declaratory and injunctive relief directing the Board to, among other things, reinstate him and refrain from punishing him for speaking about the transgender policy.[11]

The Board argued Cross' public comments created a significant and continuing disruption at Leesburg Elementary because the principal had heard that parents were discussing Cross' comments on social media and that several parents had asked that Cross not teach their children; the superintendent had received emails expressing the harm transgender students suffer when their gender identity is not affirmed or their choice of preferred pronoun or name is not respected.[12] The Board also claimed Cross' public comments conflicted with existing Loudoun County Public Schools policies and state and federal law.[13] The Board argued that Cross' suspension was appropriate and claimed that Loudoun County Public Schools has a generally applicable practice of suspending with pay any employee whose speech or conduct disrupts Loudoun County Public Schools' operations and has suspended at least seven other employees for that reason in the past two years.[14]

The circuit court granted Cross' request for a temporary injunction, finding that Cross made his comments as a private citizen speaking on a matter of public concern and that he had demonstrated likelihood of success on both the free speech and free exercise claims.[15] On appeal, the Virginia Supreme Court described Article I, Section 12 of Virginia's Constitution as "coextensive with the free speech provisions of the federal First Amendment,"[16] stating that "it is settled law that the government may not take adverse employment actions against its employees in reprisal for their exercising their right to speak on matters of public concern."[17] The court then applied a two-step inquiry, where the first step asked whether Cross spoke on an "issue of social, political, or other interest to a community," and the second step required weighing Cross' interest in making his public comments against the Board's interest in providing effective and efficient services to the public.[18]

The school board did not dispute that Cross satisfied the first factor.[19] Regarding the second factor, the court found it significant that "Cross made those comments at a public Board meeting where one of the issues under consideration was whether to adopt the transgender policy," and that "in addition to expressing his religious views, Cross' comments also addressed his belief that allowing children to transition genders can harm their physical or mental wellbeing," a matter of "obvious and significant interest to Cross as a teacher and to the general public."[20] In addition, the proposed policy would burden his freedom of expression, compelling him to speak in a way he opposes for secular and spiritual reasons.[21]

Regarding the Board's asserted rationale for suspending Cross—"reasonably anticipated" disruption—the court found "no evidence" to corroborate the Board's claim that any such disruption would preclude Cross from fulfilling his duties.[22] The court found instead that although "Cross was suspended due to 'a neutral and generally applicable practice of utilizing suspension or paid administrative leave when an employee engages in speech or conduct that causes a disruption in the operations of the school,'" "any such practice would be unconstitutional to the extent the Defendants deploy it overzealously to thwart protected employee speech."[23] In sum, the government interest in restricting a teacher's First Amendment rights is limited to preventing "material or substantial interference or disruption," and the employer bears the "heavy burden" of demonstrating

6 *Id.* at 2.

7 *Id.*

8 *Id.* at 3.

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.* at 4–5.

13 *Id.* at 5.

14 *Id.* at 3, 5.

15 *Id.* at 6–7.

16 *Id.* at 9.

17 *Id.* (citing Pickering v. Bd. of Educ., 391 U.S. 563, 573 (1968); Love-Lane v. Martin, 355 F.3d 766, 776 (4th Cir. 2004)).

18 *Id.* (citing Urofsky v. Gilmore, 216 F.3d 401, 406-07 (4th Cir. 2000); Billioni v. Bryant, 998 F.3d 572, 576 (4th Cir. 2021)).

19 *Id.*

20 *Id.* at 9, 10.

21 *Id.* at 10.

22 *Id.* at 11, 12.

23 *Id.* at 12.

that the speech was too disruptive to warrant protection.[24] The School Board failed to carry that burden.

The issue of school authority over speech has been near the forefront of free speech law lately. Last term, in *Mahanoy Area School District v. B.L.*,[25] the United States Supreme Court addressed First Amendment limitations on public school regulation of off-campus student speech. This term, the Court has been asked to review First Amendment limits on school authority over employee speech.[26] And the issue of school control over student and teacher speech continues to generate headlines.[27] Here, the Virginia Supreme Court upheld rigorous First Amendment protections for teacher speech on matters of public importance. But with strong opinions on both sides, we can expect to see more cases involving the rights of government employees—and public school employees in particular—to speak in their personal capacity on issues of school policy and their personal beliefs.

24 *Id.* at 13.

25 141 S. Ct. 2038 (2021); *see also* Cynthia Fleming Crawford, *Cheerleading, social media, and free speech: What the Supreme Court's decision in Mahanoy School District v. B.L. means for students' First Amendment rights*, Americans for Prosperity (June 21, 2010), https://americansforprosperity.org/mahanoy-school-district-v-bl-students-free-speech/.

26 *See, e.g.*, Petition for Writ of *Certiorari*, Kennedy v. Bremerton School District, No. 21-418, (Sept. 14, 2021) https://www.supremecourt.gov/DocketPDF/21/21-418/192354/20210914133417114_FINAL%20Kennedy%20Cert%20Petition.pdf.

27 *See, e.g.*, Luke Gentile, *High school football players lead community in prayer after coaches were told they couldn't: 'Satan's power was defeated'*, Washington Examiner, Sept. 22, 2021, https://www.washingtonexaminer.com/news/tennessee-high-school-football-prayer-satan; *Settlement reached for teacher fired after Facebook post*, 21 WFMJ, Jan. 22, 2017, https://www.wfmj.com/story/34318672/settlement-reached-for-teacher-fired-after-facebook-post; Jo Yuroba, *Missouri teacher resigns after school tells him to remove Pride flag*, NBC News, Sept. 9, 2021, https://www.nbcnews.com/nbc-out/out-news/missouri-teacher-resigns-school-tells-remove-pride-flag-rcna1959.

WASHINGTON
State v. Blake
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Lynch has published a variety of articles in both the law journals and in opinion pieces for the New York Times, the Washington Post, the Wall Street Journal, the Los Angeles Times, and other newspapers. He has appeared on The PBS NewsHour, NBC Nightly News, ABC World News Tonight, and C-SPAN's Washington Journal. Lynch is a member of the Virginia, District of Columbia, and Supreme Court bars. He earned both a BS and a JD from Marquette University.

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Shannon Blake was arrested in Spokane, Washington in 2016. The police executed a search warrant that authorized the agents to look for evidence of stolen vehicles. Blake was one of three persons arrested at the scene. Later on, at the jail, a corrections officer discovered a small baggy in one of the pockets of Blake's jeans. That baggy contained a small amount of methamphetamine. The state charged Blake with possession of a controlled substance under Washington state law.[1]

Blake's case was tried before a judge. Following the state's case-in-chief, Blake advanced an affirmative defense that the drugs did not belong to her and that she was unaware of the fact that the baggy had been tucked into the coin pocket of the jeans. Blake testified that she had received the jeans secondhand just two days before her arrest. She further testified that she had never used meth and was not a drug user.[2]

The trial court found that Blake had not made a sufficient showing to sustain the affirmative defense that her possession had been "unwitting." Finding that Blake had possessed a controlled substance on the day of her arrest, the trial judge found her guilty of the offense.[3]

On appeal, Blake advanced a constitutional challenge to her conviction. Blake claimed the state had denied her due process because it had placed the legal burden upon her to prove that her drug possession had been unwitting. The court of appeals found no merit in Blake's legal claim and affirmed her conviction.[4] The Supreme Court of Washington granted review and, by a majority vote, agreed with Blake that the constitutional guarantee of due process was violated.[5]

This case is important because it sets a rare and noteworthy precedent in constitutional law: A legislative enactment is invalid because it exceeds the police power of a state legislature. While constitutional textbooks and scholars discuss the abstract boundaries of the police power, there are very few holdings in American jurisprudence that actually identify specific limits.[6]

The court's opinion explained that there were several reasons for this extraordinary precedent. First, the court noted that the Washington legislature enacted the only statute in the

1 RCW 69.50.4013

2 State of Washington v. Blake, No. 96873-0, slip op. at 4 (February 25, 2021).

3 *Id.*

4 *Id.*

5 *Id.* at 5.

6 "The [Supreme] Court has on only one occasion struck down a strict-liability crime, and this was in rather unusual circumstances. Though it has been argued that the ruling [Lambert v. California, note 12 *infra*] should be extended to proscribe strict-liability offenses more generally, this has not occurred. . . . Constitutional attacks in the state courts have, in the main, been equally unsuccessful." Wayne R. LaFave and Austin W. Scott, Criminal Law 246-247 (2d ed. 1986).

nation to combine strict liability with *felony* consequences.[7] Constitutional challenges in other jurisdictions had been rejected in the context of misdemeanor penalties and the question of whether felony consequences would pass constitutional muster was invariably left an open question. The court explained that because of the felony aspect of this case, "it is impossible to avoid the constitutional problem now."[8]

Second, courts have also commonly side-stepped constitutional controversy involving strict liability statutes by finding *implied* mens rea elements in statutes where they were otherwise absent.[9] Of course, when a mens rea element is deemed to be implied, the statute can no longer be considered a strict liability law. The court declined to imply a mens rea element in this case because it said there was "overwhelming evidence"[10] that the legislative intent was to implement a policy of strict liability. For that reason, the court set aside prior case law that had allowed an implied "unwitting defense" to the possession charge.[11]

After its discussion of proper statutory interpretation and its legal conclusion that the drug possession statute had to be treated as a strict liability law, the court turned to its constitutional analysis.

Notably, the *Blake* holding is grounded in both state *and* federal law. With respect to federal law, the court relied primarily upon a 60 year old case, *Lambert v. California*.[12] In *Lambert*, the Supreme Court invalidated an ordinance that made it a crime for a convicted person to remain in Los Angeles for more than five days without registering with local officials. The Supreme Court ruled that without any mens rea showing, a person could be convicted without having been aware of his duty to register. Such a law violated the federal constitutional guarantee of due process. Since the Washington drug possession statute criminalizes passive "nonconduct" without requiring the state to prove any mental state at all, the *Blake* majority opined that it also violates the due process clause of the Fourteenth Amendment.[13]

With respect to state constitutional law, the *Blake* majority relied upon *City of Seattle v. Pullman*.[14] In *Pullman*, the defendant challenged a Seattle ordinance that prohibited "accompanying a child during curfew hours."[15] The court invalidated that ordinance because it made "no distinction between conduct calculated to harm and that which is essentially innocent."[16] Like the curfew law, the *Blake* majority reasoned that the drug possession statute also violates the due process guarantee of the state constitution because it criminalizes "passive and innocent nonconduct with no mens rea or guilty mind."[17]

It is important to note that the *Blake* ruling does not eliminate the doctrine of strict criminal liability in Washington. According to the court, its ruling does not even invalidate the state drug possession statute—just a "portion"[18] of it. The *Blake* majority was alarmed by the fact that, under strict liability, mail carriers, roommates, and others, could be found guilty of felony drug possession without any awareness of wrongdoing on their part.[19] From now on, the government must prove that defendants know, or at least have good reason to know, of drugs in their possession.[20]

Justice Charles Johnson dissented, joined by Justices Barbara Madsen and Susan Owens. In their view, the case was simple and straightforward. The legislature "'has plenary power to criminalize conduct regardless of whether the actor intended wrongdoing.'"[21] There is no due process limitation upon the scope of the police power. Whether mens rea is an element of an offense is a matter to be determined by the legislature. Blake's constitutional objections were without merit and her conviction should have been affirmed.

Justice Debra Stephens filed an opinion concurring in part and dissenting in part. She thought the constitutional question could have been, and should have been, avoided. She would have revisited prior state court precedents and reinterpreted the drug possession statute as having an implied mens rea element. And on that basis, she would have vacated Blake's conviction. Stephens disagreed with the majority's constitutional analysis, which, she argued, "conflates the distinct elements of mens rea and actus reus and will undoubtedly lead to confusion and divergent application among the courts."[22]

7 *Blake*, No. 96873-0 at 2.

8 *Id.* at 27.

9 *Id*. at 22-24.

10 *Id.* at 21.

11 *Id.* at 20-21.

12 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed. 2d 228 (1957). The court also relied upon *Papachristou v. City of Jacksonville*, 505 U.S. 156, 92 S.Ct. 839, 31 L.Ed. 2d 110 (1972).

13 *Blake*, No. 96873-0 at 11-12.

14 82 Wn.2d 794, 514 P.2d 1059 (1973).

15 *Blake*, No. 96873-0 at 13 (citation omitted).

16 *Id.*

17 *Id.* at 14.

18 *Id*. at 31.

19 *Id*. at 15. For contrasting views on the doctrine of strict liability, see Timothy Lynch, ed., In the Name of Justice (2009).

20 *Blake*, No. 96873-0 at 30-31.

21 *Id.* at 2 (Johnson, J., dissenting) (citation omitted).

22 *Id.* at 27 (Stephens, J., concurring in part, dissenting in part).

WASHINGTON
Woods v. Seattle's Union Gospel Mission

By Seth Cooper

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Note from the Editor:

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On March 4, the Washington Supreme Court issued its decision in *Woods v. Seattle Union Gospel Mission*.[1] The case has important implications for religious liberty in Washington State, as it addresses the extent to which religious organizations are exempt from the state's law prohibiting discrimination in employment practices.

The case involves an employment discrimination lawsuit filed against the Seattle Union Gospel Mission (UGM) by Matthew Wood. UGM is an evangelical Christian nonprofit organization that provides services to Seattle's homeless population. UGM's legal aid clinic serves its guests and furthers the organization's gospel mission work.

Prior to applying for a staff attorney position at UGM's legal aid clinic, Woods informed UGM staff that he was in a same-sex relationship and could foresee entering into a same-sex marriage. UGM informed Wood that his same-sex relationship was contrary to biblical teaching and the ministry's policy that expected staff members to live by a biblical moral code that excludes certain behaviors, including homosexual behavior.

Woods filed a lawsuit against UGM, alleging discrimination for its refusal to hire him because of his sexual orientation. The King County Superior Court granted summary judgment in favor of UGM based on the religious employer exception to the Washington Law Against Discrimination (WLAD) that applies to hiring and other employment practices. Under RCW 49.60.040(11), the definition of an "employer" subject to the WLAD "does not include any religious or sectarian organization not organized for profit." The superior court ruled that UGM qualifies as a religious nonprofit employer and found that the job duties of its staff attorneys include providing spiritual counsel. The superior court determined that a trial would involve improper parsing of which UGM activities are secular and which are religious. The Washington Supreme Court accepted Woods' petition for direct review.

Woods challenged the constitutionality of the religious exemption and of its application in his case under the state constitution's Privileges or Immunities Clause. The Washington Supreme Court concluded that RCW 49.60.040(11) does not violate the Washington Constitution's article I, section 12 Privileges or Immunities Clause. Although the Court rejected Woods' facial challenge to the statutory exemption for religious employers, it concluded that as-applied challenges to the exemption could still be raised. The Washington Supreme Court has turned to recent federal case law involving the "ministerial exception" as a source of guidance for applying the religious employer exemption under the WLAD. The court therefore reversed and remanded the case to the trial court to determine whether UGM satisfies the First Amendment-based "ministerial exception" recognized by the U.S. Supreme Court.

1 ___ Wn.2d ___, 481 P.3d 1060.

Article I, section 12 provides: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."[2] In the opinion for the court, Justice Barbara Madsen wrote that article I, section 12 "was intended to prevent favoritism and special treatment to the few while disadvantaging others."[3]

The court applied a two-pronged test to determine the constitutionality of the religious employer exemption under article I, section 12: "(1) whether RCW 49.60.040(11) granted a privilege or immunity implicating a fundamental right and (2) if a privilege or immunity was granted, whether the distinction was based on reasonable grounds."[4]

According to the court, Woods satisfied the first prong because his case implicated two "fundamental rights": "the right to an individual's sexual orientation and the right to marry."[5] The court grounded those rights in *Lawrence v. Texas*, *Obergefell v. Hodges*, and Justice John Paul Stevens' dissent in *Bowers v. Hardwick*.[6] And in a footnote, the court indicated the fundamental "right to sexual orientation" also stems from the Washington Constitution's article I, sections 3, 7, and 12.[7]

However, the court concluded that Woods did not satisfy the second prong because "reasonable grounds exist for WLAD to distinguish religious and secular nonprofits."[8] First, the court viewed the WLAD's text as evidence for its own reasonableness. It observed that the inclusion of the religious employer exemption in the enacting legislation from 1949 and its continued existence "demonstrate that the legislature plainly intended to include the exemption in WLAD."[9] Second, the court found that the state's protection for religious liberty also supported the religious employer exemption. According to the court, article I, section 11 of the Washington Constitution provides *greater* protection for religious liberty than the U.S. Constitution's First Amendment.[10] Third, the court acknowledged that the U.S. Supreme Court "has upheld the exemption for religious organizations from federal discrimination suits in order to avoid state interference with religious freedoms."[11] The court agreed that avoidance of state interference with religion made it reasonable for the legislature to treat religious and secular nonprofit employers differently.

Despite its rejection of Woods' facial challenge, the court ruled that as-applied challenges could be raised against the religious employer exemption. And "[b]ecause WLAD contains no limitations on the scope of the exemption provided to religious organizations," the court sought guidance from the First Amendment "as to the appropriate parameters of the provision's application."[12] According to the court, "In order to balance Woods' fundamental rights with the religious protections guaranteed to SUGM, we hold that article I, section 12 is not offended if WLAD's exception for religious organizations is applied concerning the claims of a 'minister' as defined by *Our Lady of Guadalupe* and *Hosanna-Tabor*."[13]

Summarizing those cases, the court concluded that the proper inquiry does not hinge on the job title of the employee in question or on any specific checklist, but it instead focuses on the functions or duties to be performed by the employee in question. Accordingly, the court deemed it an open factual question "best left to the trial court" as to whether ministerial responsibilities are sufficiently present to qualify UGM staff attorneys as ministers and disallow Woods' employment discrimination claims. Nonetheless, the court opined that some criteria noted in the two U.S. Supreme Court decisions were present in Woods' case, while other criteria were not, and it called Justice Mary Yu's concurring opinion "helpful in this regard."[14]

In a concurring opinion, Justice Yu reluctantly concurred in the court's decision to remand "because there are factual questions regarding the duties of the staff attorney."[15] Justice Yu wrote that religious nonprofits should be "forewarned" that the court's decision "bars redefining every aspect of work life as 'ministerial,'" and she pledged the court will insist that trial courts closely review attempts by religious institutions to invoke the ministerial exception.[16]

Furthermore, Justice Yu wrote "to offer guidance" on the ministerial exception's application to Woods' case below. Discussing different aspects of the factual record, Justice Yu noted that "some of the circumstances weigh in favor of finding the ministerial exception applies,"[17] but she went on to assert that "the facts asserted in this record strongly support a conclusion

2 Wash. Const. art. I, § 12.

3 *Woods*, 481 P.3d at 1065 (citing Ockletree v. Franciscan Health Sys., 179 Wash. 2d 769, 776, 317 P.3d 1009 (2014) (additional citations omitted). Justice Madsen's opinion for the court was joined by Justices Charles Johnson, Sheryl Gordon McCloud, Susan Owens, and Mary Yu as well as Justice Pro Tempore Charles Wiggins.

4 *Id.* (citing Schroeder v. Weighall, 179 Wn.2d 566, 573, 316 P.3d 482 (2014)).

5 *Id.*

6 *Id.* (citing *Lawrence*, 539 U.S. 558, 577-78 (2003); *Obergefell*, 576 U.S. 644, 663-65 (2015); *Bowers*, 478 U.S. 186, 215-20 (1986) (Stevens, J., dissenting)).

7 *Id.* at 1066 n.3.

8 *Id.* at 1066.

9 *Id.* at 1067.

10 *Id.* (citing *Ockletree*, 179 Wn.2d at 784; First Covenant Church v. City of Seattle, 120 Wash.2d 203, 224, 840 P.2d 174 (1992) (noting that article I, section 11 of Washington's constitution is "stronger than the federal constitution")).

11 *Id.* (*Ockletree*, 179 Wn.2d at 784) (additional citation omitted).

12 *Id.*

13 *Id.* at 1069 (citing Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049 (2020); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n, 565 U.S. 171, 132 S. Ct. 694 (2012)).

14 *Id.* at 1070 (citing *id*. at 1071 (Yu, J., concurring)).

15 *Id.* at 1071 (Yu, J., concurring). Chief Justice Stephen González joined Justice Yu's concurrence.

16 *Id.*

17 *Id.*

that [a UGM] staff attorney cannot qualify for the ministerial exception as a matter of law."[18]

Justice Yu pointed to the court's "final authority over the practice of law and legal ethics in Washington" and the requirement that attorneys comply with the Washington Rules of Professional Conduct (RPCs).[19] She added that "[i]n the context of a nonprofit legal aid organization serving the civil legal needs of vulnerable populations, I believe it is simply not possible to simultaneously act as both an attorney and a minister while complying with the RPCs."[20] In her view, there was a very high risk that a client from a vulnerable population "would feel coerced into acquiescing" to UGM's religious purposes if its staff attorney tried to "simultaneously play the dual roles of lawyer and minister."[21]

Justice Deborah Stephens wrote an opinion concurring in part and dissenting in part.[22] She concurred in the reversal of the summary judgment granted by the superior court. But she dissented by concluding that the religious employer exemption violates article I, section 12's antifavoritism principles because it "favors religious nonprofits over all other employers without reasonable grounds."[23]

Justice Stephens criticized the majority's analysis for grounding a "fundamental right to marry" and a "fundamental right to sexual orientation" in the Due Process Clause of the federal Constitution. In her view, the court should have explicitly held those rights are "fundamental to state citizenship" under article I, section 12. According to Justice Stephens, federal due process rights and state citizenship rights are categorically distinct. And she wrote that "[i]t would be anachronistic for the framers of Washington's constitution in 1889 to have intended to safeguard rights that would not be protected under federal due process for a generation."[24]

Justice Stephens criticized the majority for minimizing the import of WLAD and its stated goal of antidiscrimination. She rejected the idea that the religious exemption furthered that goal.[25] And she also rejected the majority's characterization of the statute's purpose as including the safeguarding of religious free exercise.[26]

According to Justice Stephens, the majority erred by aligning the religious employer exemption with the First Amendment ministerial exception.[27] In her view, the ministerial exception is just a constitutional defense. Although she rejected UGM's claims that broad application of WLAD to its employment decisions would violate UGM's free exercise rights under the First Amendment and article I, Section 11 of the Washington State Constitution, Justice Stephens acknowledged that defense applies in "the "narrow context of ministerial employment," and she maintained that Woods' case should be remanded to consider it.[28]

18 *Id.* at 1072.

19 *Id.*

20 *Id.* at 1073.

21 *Id.*

22 *Id.* at 1073 (Stephens, J., concurring in part and dissenting in part). Justice Pro Tempore Mary Fairhurst joined Justice Stephens' partial concurrence and dissent.

23 *Id.* at 1074.

24 *Id.* at 1077 n.5.

25 *Id.* at 1078.

26 *Id.* at 1079.

27 *Id.*

28 *Id.* at 1081-84.

WASHINGTON
City of Seattle v. Long
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Published December 20, 2021

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Ashli is an associate attorney at Flynn & Associates, PLLC in Seattle, Washington. Her practice focuses on real estate transactions and trust and estate disputes.

Ashli is a 2021 graduate of Seattle University School of Law, and a 2015 graduate of Boston University's Frederic S. Pardee School of Global Studies where she double majored in International Relations and Political Science.

When COVID-19 shut down Washington State in March 2020, and domestic violence cases increased as a result, she became one of the founding legal interns in Seattle University's Domestic Violence Pop-Up Clinic. As an intern, with the mentorship of volunteer family law attorneys in Seattle, she assisted victims of domestic violence in filing for domestic violence protection orders. This assistance included helping victims navigate the remote filing process through a first-of-its-kind online filing platform, Legal Atoms.

Between finishing her undergraduate studies and beginning law school in 2018, she worked her way up through various positions at the Washington State Republican Party. First, as finance assistant. Then, as communications director. And, finally, as finance director.

Note from the Editor:

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Under Seattle's Traffic Code, a vehicle may not be parked on a city street for more than 72 hours.[1] Violators face a $44.00 fine, towing, and impoundment of their vehicles. The 72-hour parking rule was suspended in March 2020 because of COVID-19, and the city resumed enforcement in October 2021.[2] This suspension, coupled with an increase in vehicle residency due to the city's homelessness crisis, has led to a substantial increase in the number of vehicles permanently parked on the streets.

Washington's Homestead Act prevents unsecured creditors from seizing the property that a person uses as their home in order to satisfy a debt. The "homestead" consists of real or personal property that the owner or a dependent of the owner uses as a residence.[3] When the homestead is seized by unsecured creditors and sold to satisfy a debt, the Homestead Act exempts a portion of the proceeds so that the owner may use the funds to purchase a new homestead.[4]

In *City of Seattle v. Long*, the Supreme Court of Washington held that:

1. Washington's Homestead Act automatically protects personal property occupied as a principal residence, and no declaration that the personal property is a residence is required;[5]
2. Homestead Act claims on vehicles occupied as a principal residence are premature when the city has not threatened to sell the vehicle to collect impoundment fees;[6]
3. Impoundment and associated costs are fines, and that an ability to pay inquiry is necessary to determine if they violate the excessive fines clause;[7] and
4. While the payment plan imposed on Long was excessive, a reasonable fine may still be constitutional.[8]

Defendant Steven Long had been living in his truck while saving money for an apartment.[9] He worked as a general

1 Seattle Municipal Code (SMC) 11.72.440(B).

2 *Seattle Begins Enforcing 72-Hour Parking Rule*, King5.com (Oct. 16, 2021), https://www.king5.com/article/news/local/seattle/seattle-enforcing-72-hour-parking-rule-october-15/281-80652023-dc6c-4124-bb4b-01f5d30e2dd9.

3 RCW 6.13.010.

4 In May 2021, Senate Bill 5408 amended Washington State's Homestead Act. The changes were significant but were not relevant in this case.

5 City of Seattle v. Long, 493 P.3d 94, 101 (2021) (citing RCW 6.13.040).

6 *Id.* at 103.

7 *Id.* at 116.

8 *Id.*

9 *Id.*

tradesman making between $400.00 and $700.00 per month, which included the $100.00 he earned per month for being a member of the Confederated Salish and Kootenai Tribes of the Flathead Nation.[10] On July 5, 2016, Long's truck broke down in a gravel lot owned by the City of Seattle.[11] Long's truck remained parked on the lot for the next three months, and he continued to live in it.[12]

On October 5, 2016, Seattle police told Long that he was violating the 72-hour parking law by having his truck parked on the city lot, and that he would need to move his truck by at least one block to avoid being towed.[13] When Long failed to move his truck, it was towed by a city-contracted towing company.[14] After his truck was towed, Long slept outside.[15]

Additionally, Long received a $44.00 parking ticket; he contested it. At the hearing, the magistrate found that Long had parked illegally but decided to waive the $44.00 ticket and reduce the impoundment charges from $946.61 to $547.12.[16] To further assist Long, the magistrate approved a payment plan for the impoundment charges under which he would pay $50.00 per month until the $547.12 was paid in full; then he could retrieve his truck.[17]

Though Long never disputed that he had parked illegally, he appealed the magistrate's ruling permitting the impoundment of his car on three grounds. First, he argued the impoundment violated the state and federal constitutions' prohibitions of excessive fines.[18] Second, he argued the impoundment violated his right to substantive due process.[19] Third, he argued the impoundment violated the Homestead Act.[20] The superior court agreed that the impoundment was illegal based on his first and third claims but rejected his substantive due process claim.[21] The appellate court agreed based on the Homestead Act argument alone.[22]

The Washington State Supreme Court considered two main issues on appeal: First, does the homestead exemption automatically attach to personal property occupied as a principal residence?[23] Second, does the $547.12 impoundment cost constitute an excessive fine in violation of the Eighth Amendment?

The city contended that the Homestead Act did not apply to the impoundment of Long's truck because he did not file a declaration stating that his truck was his primary residence.[24] However, the court examined the plain meaning of the statute and held that the legislature intended occupied personal property to be automatically protected as a homestead, requiring a declaration only for unoccupied personal property.[25] However, the court also held that Long's Homestead Act argument was premature because the city was not selling Long's truck to satisfy the $547.12 he owed for impoundment charges, as in a typical debt-collection case; the city was merely holding the truck until Long could pay the charges.[26]

The parties disputed whether impoundment charges constituted a fine triggering an Eighth Amendment analysis. While the city argued that the charges were not a fine because impoundment was not permanent, Long argued that the charges were a fine because they were imposed as a penalty for violating the 72-hour parking law.[27] The court held that because the impoundment temporarily deprived Long of his truck, the associated costs were partially punitive and therefore constituted a fine.[28]

In determining whether the impoundment costs were an *excessive* fine, the court adopted the Ninth Circuit's four factor test for gross disproportionality: 1) the nature and extent of the crime; 2) whether the violation was related to other illegal activities; 3) the other penalties that may be imposed for the violation; and 4) the extent of the harm caused.[29] The court also added a fifth factor to this analysis: the person's ability to pay the fine.[30]

Applying this test to Long's case, the court reasoned that the first factor weighed in favor of a finding of excessiveness because violating the city's 72-hour parking rule is not "particularly egregious," especially considering that the rule was later suspended in March 2020 during the COVID-19 pandemic.[31] Likewise, with respect to the fourth factor, the extent of the harm caused was minimal because Long was not parked in a residential neighborhood, nor was he blocking or obstructing a roadway.[32] The harm to the city of having to pay the costs of impoundment upfront did not affect the court's proportionality determination.[33] Finally, the court considered the additional

10 *Id.*

11 *Id.* at 99.

12 *Id.*

13 *Id.*; SMC 11.72.440(B).

14 *Long*, 493 P.3d at 99.

15 *Id.* at 114.

16 *Id.* at 99.

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

23 RCW 6.13.040.

24 RCW 6.13.040(1).

25 *Long*, 493 P.3d at 103.

26 *Id.* at 106.

27 *Id.* at 109.

28 *Id.*

29 *Id.* at 111.

30 *Id.* at 114.

31 *Id.*

32 *Id.*

33 *Id.*

fifth factor and found that because Long only made $700.00 in his best months, and the impoundment of his truck deprived him of his tools and place to sleep, he had no reasonable ability to pay $547.12 to retrieve the truck.[34] A balancing of these five factors led the court to rule that the impoundment charges were unconstitutionally excessive.

Justice Steven Gonzalez concurred in the holding that Long's truck qualified as a homestead because he clearly lived in it. However, Gonzalez argued that Long's homestead claim was not premature because the Homestead Act protects vehicles used as primary residences from being towed in the first place, not just from being subject to forced sale.[35] As soon as the truck was towed, a lien was placed on it, and the posture of the case was such that the court could remedy that.[36]

Seattle resumed its 72-hour parking rule on October 15, 2021. Seattle Department of Transportation (SDOT) now claims that it "will not impound a vehicle with someone living in it unless it poses a specific risk to public health as inadequate sanitation causing a direct risk of illness or injury, inadequate protection leaving the occupants exposed to the weather, or other environmental, fire, health and safety hazards."[37] Also, if parking enforcement sees a vehicle with someone living in it parked in one spot for more than 72 hours, they are instructed by SDOT to attach information about support services to the warning notice.[38]

If the *Long* excessive fines test is applied to violators of the 72-hour parking law as the city resumes enforcement, the outcome will likely be fact dependent. For example, Long's violation was not found to be linked to other criminal activity. However, there may be violators who do violate the 72-hour law while committing crimes like arson, for instance.[39] Also, violators may be parked in more harmful areas than a gravel parking lot. Finally, violators may have means to pay the impoundment costs despite parking a vehicle residence on the streets of Seattle. Nevertheless, it will be interesting to see how *Long* sets a precedent for the future of parking enforcement and the Homestead Act.

34 *Id.*

35 493 P.3d at 116.

36 RCW 46.55.140(1).

37 *Seattle Begins Enforcing 72-Hour Parking Rule*, *supra* note 1.

38 *Id.*

39 *Seattle Nears Record Number of Fires Set at Homeless Camps this Year*, Komonews.com (Aug. 19, 2021), https://komonews.com/news/local/seattle-nears-record-number-of-fires-set-this-year-at-homeless-camps.

WASHINGTON
State Legislature v. Inslee
By GianCarlo Canaparo

Published December 20, 2021

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His analysis has appeared in *Fox News*, *The National Review*, T*he Washington Times*, *Law 360*, Federalist Society Blog, and other outlets.

In addition to his scholarly work, Canaparo co-hosts The Heritage Foundation's *SCOTUS 101* podcast, which follows and explains each week's happenings at the Supreme Court and features interviews with prominent judges, advocates, and academics.

Canaparo joined Heritage in 2019 after serving for two years as a law clerk to a federal district court judge. Before his clerkship, he spent three years as an associate at the law firm of Skadden, Arps, Slate, Meagher & Flom.

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On November 10, 2021, the Washington Supreme Court handed the state legislature a win and Governor Jay Inslee a loss when it held the governor violated the state constitution by vetoing a line in an appropriations bill.[1]

Washington's constitution gives the governor the power to veto whole bills, "an entire section" of a bill, and individual "appropriation items."[2] In this case, Governor Inslee vetoed a line in the appropriation bill's "conditions and limitations" section that prohibited the Department of Transportation from considering fuel type when giving certain transportation-related grants (the "fuel type condition").[3] After his veto, the legislature sued, seeking a declaratory judgement that the veto violated the state constitution.[4] In response, the governor argued that the fuel type condition was an "appropriation item" or, in the alternative, that it violated other parts of the state constitution.[5]

As to his first argument—that the fuel type condition was an "appropriations item"—the court disagreed with the governor. Beginning with the history of Article III, Section 12, the court held that it reflects a "clear intent to carefully limit this extraordinary [line-item veto] power."[6] That section was created to limit historical overreach by the executive into the affairs of the legislature, and therefore, when the court interprets "section[s]" or "appropriation items," it must defer to the legislature's formatting decisions.[7]

With respect to appropriation items, the court previously defined that term as "any budget proviso with a fiscal purpose contained in an omnibus appropriations bill."[8] Accordingly, a veto of anything less than "the whole proviso" is invalid.[9] When determining whether something is a whole proviso, the court again defers to the legislature's designation of sections and subsections, but that deference is not absolute.[10] The court does not defer if the legislature's designation "is obviously designed to circumvent the Governor's veto power."[11]

1 Washington State Legislature v. Inslee, No. 98835-8, 2021 WL 5227428 (Wash. Nov. 10, 2021) (herein after *Legislature v. Inslee*).

2 Wash. Const. art. III, § 12.

3 Legislature v. Inslee, at *1.

4 *Id.*

5 *Id.*

6 *Id.* at *2.

7 *Id.*, at *4.

8 *Id.*, at *5 (quoting Washington State Legislature v. Lowry, 931 P.2d 885, 893 (1997)).

9 *Id.*

10 *Id.* at *5–6.

11 *Id.* at *6 (quoting Lowry, 931 P.2d at 891).

In the present case, the court found no evidence that the legislature tried to immunize the fuel type condition from the governor's veto, and so, it deferred to the legislature's designation of that line as a condition upon a discrete appropriations item—not itself an appropriations item.[12]

Turning to the governor's second argument—that the fuel type condition was unconstitutional—the court rejected it too. That argument turned first on Article II, Section 19, which says "[n]o bill shall embrace more than one subject, and that shall be expressed in the title."[13] In past cases, the court held that Section 19 prohibits the legislature from including substantive law in appropriations bills.[14] Governor Inslee, therefore, argued that the fuel type condition was substantive law.[15]

The court disagreed. The legislature, it held, is free to attach "strings, or conditions of expenditure" to appropriations.[16] What's more, the fuel type condition is not substantive law because it does not amend existing statutory conditions on grant eligibility; rather, it simply prohibits an agency from adopting one particular criterion.[17]

The governor offered another constitutional argument, claiming that the fuel type condition violated Article II, Section 37, which says, "[n]o 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."[18] The governor argued that the fuel type condition violated that section because it amended the existing statute setting forth grant conditions without identifying it.[19]

Again, the court disagreed. The fuel type condition, the court explained, "neither creates nor affects any rights" and the duty it imposes on the Department of Transportation "can be determined without referring to any other statute or enactment."[20]

Justice Mary Yu, joined by Chief Justice Steven González, dissented, arguing that the majority had "erode[d] the distinction between general and line item vetoes" that prior precedent had recognized.[21] In her view, the fuel type condition was a whole appropriation item because it amounted to a discrete "nondollar budget proviso."[22]

Justice Yu also argued that the fuel type condition violated both Section 19 and Section 37 of Article II. As to both sections, she thought the condition was unconstitutional because it effectively modified the statute governing the criteria for funding conditions. Thus, it was substantive law, and it amended a statute without identifying it.

The ultimate import of the case is to limit somewhat the governor's line-item veto, and to increase the legislature's ability to insulate provisions from that veto.

12 *Id.* at *8.

13 Wash. Const. art. II, § 19.

14 Lowry, 931 P.2d at 895.

15 Legislature v. Inslee, at *11.

16 *Id.* at *11–12.

17 *Id.* at *13.

18 Wash. Const. art. II, § 37.

19 Legislature v. Inslee, at *14.

20 *Id.* (quoting Washington Educ. Ass'n v. State, 604 P.2d 950, 952 (1980)).

21 *Id.* at *16–17 (Yu, J., dissenting).

22 *Id.* at *20.

WASHINGTON
State v. Haag
By GianCarlo Canaparo

Published December 22, 2021

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GianCarlo Canaparo is a legal fellow in The Heritage Foundation's Edwin Meese III Center for Legal and Judicial Studies. Canaparo researches, writes, speaks, and testifies on regulatory policy, the federal courts, and constitutional law.

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On September 23, 2021, the Washington Supreme Court decided *State v. Haag* and vacated the 46-year sentence imposed on Timothy Haag for slowly strangling and drowning a seven-year-old girl, Rachel Dillard, when he was 17.[1] The state supreme court ordered the lower court to resentence Haag because it "gave undue emphasis to retributive factors over mitigating factors" and because "Haag's 46-year minimum term amounts to an unconstitutional de facto life sentence."[2] The opinion was written by Justice Helen Whitener and was joined in full by Chief Justice Steven Gonzalez and Justices Sheryl Gordon McCloud, Mary Yu, Susan Owens, and Raquel Montoya-Lewis.[3]

When Haag murdered Dillard in 1994, it was not yet unconstitutional for juveniles to be sentenced to mandatory life without parole—a holding the United States Supreme Court laid down in 2012 in *Miller v. Alabama*[4]—and Haag received a mandatory life sentence.[5] After *Miller*, the state of Washington enacted "*Miller*-fix" laws requiring juvenile offenders like Haag to be re-sentenced considering "mitigating factors that account for the diminished culpability of youth."[6] In 2018, Haag was resentenced to 46 years.[7]

During Haag's re-sentencing, the trial court heard victims' statements and uncontroverted evidence from Haag about his childhood and his efforts while incarcerated to improve himself.[8] It weighed

> a multiplicity of factors, which include a vile, cowardly, and particularly heinous multi-step strangulation and drowning of a defenseless, sixty-five pound little girl committed by a three hundred pound, seventeen-year-old young man that resulted in a conviction for aggravated murder in the first degree[,] . . . the then-youthful brain of Mr. Haag with diminished decision-making capacity, who simultaneously lived through some very difficult circumstances while still enjoying a supportive relationship and activities . . . [and that Haag] has exhibited a stellar track record in prison and has been assessed as a low risk for violently re-offending.[9]

Two years later, in *State v. Delbosque*, the state supreme court held that re-sentencing hearings must be "forward-looking,"

1 State v. Haag, 495 P.3d 241 (Wash. 2021).

2 *Id.* at 243.

3 *Id.* at 252.

4 567 U.S. 460 (2012).

5 *Haag*, 495 P.3d at 243.

6 Wash. Rev. Code Ann. §§ 10.95.030, 10.95.035 (West).

7 *Haag*, 495 P.3d at 243.

8 *Id.* at 243–44.

9 *Id.* at 244–45 (quoting the lower court's ruling).

focusing more on rehabilitation than on the nature of the crime.[10]

Based on *Delbosque*, the court held that Haag's re-sentencing court "clearly misapplied the law because it emphasized retribution over mitigation."[11] The court then said that a re-sentencing court "must place greater emphasis on mitigation factors than on retributive factors."[12] Retribution must "play[] a minor role."[13]

The court found that the re-sentencing court put too much emphasis on retribution for three reasons. First, the re-sentencing court said that "rehabilitation is not the sole measure of sentencing" and "under the retributive theory, severity of the punishment is calculated by the gravity of the wrong committed."[14] Second, it weighed the nature of the crime against the mitigating factors.[15] Third, the re-sentencing court heard evidence of Haag's rehabilitation and considered that he was 17 at the time of crime, but it "primarily focused on the youth of the victim, Rachel Dillard."[16] The re-sentencing court said that Dillard's hopes for the future "were obliterated when Miss Rachel was savagely slain by Mr. Haag."[17] The supreme court characterized this statement as "minimizing Haag's youth and making a savage of him."[18]

In sum, the supreme court found the re-sentencing court "founded its resentencing decision on retribution: on the fact that Haag had taken a young life, *not* on Haag's youth at the time of the crime or what he has done since his conviction."[19] Thus, the court vacated the sentence, reiterating that "retributive factors must count for less than mitigating factors."[20]

Going forward, the court explained, a trial court's discretion is constrained to "determin[ing] whether and to what extent a juvenile offender has been rehabilitated, whether youthfulness contributed to the crime, and whether he or she is likely to reoffend."[21] The court vacated the sentence for the additional and independent reason that a 46-year sentence "amounts to a de facto life sentence."[22] This, in the court's view, violated the Eighth Amendment under the U.S. Supreme Court's decisions in *Miller* and *Montgomery v. Louisiana*.[23] In *Montgomery*, the U.S. Supreme Court said, "*Miller* determined that sentencing a child to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption.'"[24] In a subsequent case, *Jones v. Mississippi*,[25] the Court held that the Eighth Amendment does not require a finding that a juvenile is "permanently incorrigible" before sentencing him to life without parole provided it considers his youth,[26] but the Washington Supreme Court did not address that case in reaching its conclusion on this issue.[27] Because the re-sentencing court had found that Haag was "not irretrievably depraved nor irreparably corrupt," the state supreme court held that the Eighth Amendment prohibited a life sentence without parole.[28]

Haag did not receive a sentence of life without parole, but the court reasoned that a 46-year minimum sentence was a "de facto" life sentence because it "results in his losing meaningful opportunities to reenter society and to have a meaningful life."[29] To determine whether a sentence leads to losing meaningful opportunities for a meaningful life, the court looked to whether technological developments would "make readjustment to life on the outside difficult."[30] The internet, which in 1995 "was a nascent thing," and cell phones, which were "for the few who had them, only phones," had "dramatically changed" the world outside of prison.[31] The court held that keeping Haag in prison for 46 years meant that he would "miss out on the developments of the world" and was thus a de facto life sentence.[32] It remanded the case and ordered the lower court to resentence Haag.[33] As of publication, he has not yet been resentenced.

Justice Charles Johnson, joined by Justice Barbara Madsen, concurred in the decision but said that it was unnecessary to decide whether the sentence amounted to a de facto life sentence.

Justice Debra Stephens concurred with the first conclusion—that the sentence should be vacated because of the re-sentencing court's failure to weigh rehabilitative factors more heavily than retributive factors—but dissented as to the second. In her view, the court's conclusion that a 46-year sentence was unconstitutional conflicted with *Jones v. Mississippi*.[34] Stephens argued that "*Jones* retreated from *Montgomery's* interpretation of *Miller*."[35] The majority decision, she said, "is premised

10 456 P.3d 806, 815 (2020).

11 *Haag*, 495 P.3d at 247.

12 *Id.* at 245.

13 *Id.* at 248.

14 *Id.* (quoting the lower court's order).

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.* at 249.

19 *Id.* (emphasis in original).

20 *Id.*

21 *Id.* at 250.

22 *Id.*

23 577 U.S. 190 (2016).

24 *Id.* at 724.

25 141 S. Ct. 1307 (2021).

26 *Id.* at 1321.

27 *See Haag*, 495 P.3d at 250–52.

28 *Id.* at 251.

29 *Id.* at 250.

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*

34 141 S. Ct. 1307.

35 *Haag*, 495 P.3d at 254 (Stephens, J., concurring in part, dissenting in part).

on *Montgomery's* now-rejected view that 'states are not free to sentence a child whose crime reflects transient immaturity to life without parole.'"[36] That view, in Justice Stephens's opinion, "is unsustainable in light of *Jones*."[37]

Stephens then argued that, regardless, the majority erred in concluding that a 46-year sentence was a de facto life sentence.[38] In reaching that conclusion, the majority noted that four other states had reached the same conclusion.[39] But none of those cases, Stephens observed, adopted the court's broad test of losing meaningful opportunities to have a meaningful life.[40] Stephens argued that the cases cited by the majority "stand only for the proposition that juvenile offenders cannot be sentenced to die in prison unless the sentencing court first considers whether that sentence is appropriate in light of the mitigating qualities of the offender's youth."[41] Thus, she dissented from the majority's conclusion that a 46-year sentence was a de facto life sentence that violated the Eighth Amendment.

36 *Id.* (quoting the majority opinion at 246).

37 *Id.*

38 *Id.* at 255 (majority opinion).

39 *Id.* at 250–51.

40 *Id.* at 256 (Stephens, J., concurring in part, dissenting in part).

41 *Id.*

WISCONSIN

Jefferson v. Dane County

By Andrew Cook

Published March 23, 2021

About the Author:

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Note from the Editor:

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

Background

On March 25, 2020, in response to the COVID-19 pandemic, Wisconsin Governor Tony Evers issued the "Safer at Home" order which, with certain exceptions, ordered residents to "stay at home at their place of residence."[1]

On April 6, 2020, Governor Evers issued another emergency order, this time suspending all in-person voting the day before the spring statewide elections.[2] The same day Gov. Evers issued his order suspending in-person voting, the Wisconsin Supreme Court issued an opinion enjoining Governor Evers' order, thereby allowing the election to move forward with in-person voting.[3]

On April 7, 2020, Wisconsin held its presidential primary election which coincided with the early days of the COVID-19 pandemic. In addition to the presidential primary, Wisconsin held a statewide race for the Wisconsin Supreme Court which pitted incumbent Justice Daniel Kelly against Jill Karofsky, who prevailed in the election.

Wisconsin is one of a number of states that requires voters to have a photo ID in order to obtain a ballot.[4] This includes providing a photo ID for obtaining an absentee ballot.[5]

After Gov. Evers issued the Safer at Home order in March, Dane County[6] Clerk Scott McDonnell issued a post on his personal Facebook page stating that Dane County would allow all voters to ignore the photo ID requirement for obtaining absentee ballots.[7] Clerk McDonnell's post provided in relevant part:

> I have informed Dane County Municipal Clerks that during this emergency and based on the Governors Stay[sic] at Home order I am declaring all Dane County voters may indicate as needed that they are indefinitely confined due to illness. This declaration will make it easier for Dane County voters to participate in this election by mail in these difficult times. I urge all voters who request a ballot

1 "Gov. Evers Emergency Order 12: Safer at Home," March 24, 2020, at https://evers.wi.gov/Documents/COVID19/EMO12-SaferAtHome.pdf.

2 "Gov. Evers Executive Order 74, Relating to suspending in-person voting on April 7, 2020, due to the COVID-19 Pandemic," April 6, 2020, at https://content.govdelivery.com/attachments/WIGOV/2020/04/06/file_attachments/1420231/EO074-SuspendingInPersonVotingAndSpecialSession.pdf.

3 *Wisconsin Legislature v. Evers*, No. 2020AP608-OA, April 6, 2020, at https://www.wicourts.gov/news/docs/2020AP608_2.pdf.

4 Wis. Stat. § 6.79(2)(a).

5 Wis. Stat. § 6.86(1)(ac).

6 Madison, the state capital and home of the University of Wisconsin-Madison, is located in Dane County, the second largest county in Wisconsin.

7 *Jefferson v. Dane County*, 951 N.W.2d 556, 558-59, 2020 WI 90 (2020).

and have trouble presenting a valid ID to indicate that they are indefinitely confined.

People are reluctant to check the box that says they are indefinitely confined but this is a pandemic. This feature in our law is here to help preserve everyone's right to vote.

Mr. McDonnell's Facebook message continued:

The process works like this:

- A voter visit's [sic] myvote.wi.gov to request a ballot.
- A voter can select a box that reads "I certify that I am indefinitely confined due to age[,] illness, infirmity or disability and request ballots be sent to me for every election until I am no longer confined or fail to return a ballot.["]
- The voter is then able to skip the step of uploading an ID in order to receive a ballot for the April 7 election.

Voters are confined due to the COVID-19 illness. When the Stay at Home order by the Governor is lifted, the voter can change their designation back by contacting their clerk or updating their information in myvote.wi.gov.

Voters who are able to provide a copy of their ID should do so and not indicate that they are indefinitely confined.

The Milwaukee County Clerk issued a nearly identical message on Facebook the next day. In response to these two statements, the Wisconsin Elections Commission (WEC) issued proposed guidance on when voters may declare themselves "indefinitely confined":

1. Designation of indefinitely confined status is for each individual voter to make based upon their current circumstance. It does not require permanent or total inability to travel outside of the residence. The designation is appropriate for electors who are indefinitely confined because of age, physical illness or infirmity or are disabled for an indefinite period.

2. Indefinitely confined status shall not be used by electors simply as a means to avoid the photo ID requirement without regard to whether they are indefinitely confined because of age, physical illness, infirmity or disability.[8]

On March 27, 2020, the Republican Party of Wisconsin and Mark Jefferson filed an original action with the Wisconsin Supreme Court seeking a declaration that: 1) the Dane County and Milwaukee County Clerks' interpretation of Wisconsin's election laws was erroneous, and 2) the governor's emergency order did not render all Wisconsinite's "indefinitely confined" so that they could obtain an absentee ballot without presenting a photo ID. The plaintiffs also sought a preliminary injunction seeking to have the Dane County Clerk remove his Facebook post.

The court granted the plaintiffs' request for a preliminary injunction and ordered the Dane County Clerk to refrain from posting advice inconsistent with the WEC guidance. The court then issued a decision on the merits on December 14, 2020.

Court Decision

In its decision,[9] the Wisconsin Supreme Court reversed the Dane County Clerk's interpretation that any person could obtain an absentee ballot without a photo ID as a result of the ongoing COVID-19 pandemic. The opinion was authored by Chief Justice Patience Roggensack, joined by Justices Annette Ziegler, Rebecca Bradley, and Brian Hagedorn. Justices Ann Walsh Bradley, Rebecca Dallet, and Jill Karofsky issued concurring and dissenting opinions.

The court began by citing the statutory provision, which provides in relevant part:

> An elector who is indefinitely confined because of age, physical illness or infirmity or is disabled for an indefinite period may by signing a statement to that effect require that an absentee ballot be sent to the elector automatically for every election. The application form and instructions shall be prescribed by the commission, and furnished upon request to any elector by each municipality. The envelope containing the absentee ballot shall be clearly marked as not forwardable. If any elector is no longer indefinitely confined, the elector shall so notify the municipal clerk.[10]

The court explained the statute provides two types of electors who can request an absentee ballot: 1) an elector who is indefinitely confined, or 2) an elector who is disabled for an indefinite period.

If an elector qualifies under either provision, the elector is not required to provide photo identification to obtain a ballot.[11] Instead, the elector may "submit with his or her absentee ballot a statement signed by the same individual who witnesses voting of the ballot which contains the name and address of the elector and verifies that the name and address are correct."[12]

The court explained that the main issue in the case is when an elector may obtain a ballot as indefinitely confined instead of the usual absentee ballot process which requires providing a photo ID.

The court held:

- Declaring oneself indefinitely confined or disabled for an indefinite period is an individual determination that only an individual elector can make; and
- An elector is indefinitely confined for only the reasons explicitly provided for in the statute, which includes the person's age, physical illness, or infirmity of another person.

8 *Id.* at 559.

9 *Id.*

10 Wis. Stat. § 6.86(2)(a).

11 Wis. Stat. § 6.87(4)(b)2.

12 *Id.*

In reaching its decision, the court noted that the statute requires each elector to make an individual assessment to determine whether he or she qualifies as indefinitely confined or disabled for an indefinite period.[13] Additionally, the court held that a county clerk may not "declare" that an elector is indefinitely confined due to a pandemic, as was declared by the Dane County Clerk.[14]

Analyzing the "indefinite confinement" statutory provision, the court held that the "presence of a communicable disease such as COVID-19 . . . does not entitle all electors in Wisconsin to obtain an absentee ballot" without having to provide a photo identification.[15]

Concurring/Dissenting Opinion

Justice Rebecca Dallet, joined by Justice Jill Karofsky, issued a concurring and dissenting opinion. The justices joined the court's holding that electors are not automatically confined or disabled solely because of the Emergency Order #12 or the mere presence of COVID-19. The dissenting justices said that had the court stopped there they would have joined the decision in its entirety.[16] Instead, Justice Dallet stated that the court's "speculation as to what conditions might render future voters indefinitely confined or disabled results in . . . an advisory opinion."[17] Furthermore, the dissent argued that the plaintiffs did "not allege that even one elector actually requested or obtained an absentee ballot based on McDonell's erroneous advice."[18] According to the dissent, "[w]ithout those facts, the majority opinion's interpretation of § 6.86(2) rests on hypothetical voters who are indefinitely confined for hypothetical reasons."[19]

13 *Jefferson*, 951 N.W.2d at 563.

14 *Id.*

15 *Id.*

16 *Id.* at 568.

17 *Id.*

18 *Id.*

19 *Id.*

WISCONSIN
State v. Roundtree

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Published April 14, 2021

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Note from the Editor:

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In January, the Wisconsin Supreme Court upheld the constitutionality of a state statute permanently banning felons from possessing firearms, even as applied to those who commit non-violent, public order offenses.[1] Roughly 18 years ago, Leevan Roundtree was convicted in Wisconsin state court on three felony counts of failing to pay child support for more than 120 days, was sentenced to probation, and subsequently paid his past-due child support.[2] Wisconsin is one of a minority of states that do not provide felons with a mechanism for having their civil rights—including gun rights—restored, except by gubernatorial pardon.[3] Roundtree therefore effectively had his right to keep and bear arms permanently revoked.[4]

In 2015, police executing a search warrant at Roundtree's home found a revolver and ammunition hidden under his bed. Roundtree admitted to purchasing the gun "from a kid on the street" but denied knowing that the gun had, in fact, been reported stolen in Texas. He ultimately pled guilty to unlawfully possessing a firearm as a convicted felon. Roundtree then filed for post-conviction relief, arguing that Wisconsin's felon-in-possession statute was unconstitutional as applied to him. The Wisconsin Circuit Court denied the motion for relief on the grounds that Roundtree waived his constitutional challenge by pleading guilty, and the Wisconsin Court of Appeals affirmed

1 State v. Roundtree, 952 N.W.2d 765 (Wisc. 2021). "Public order offenses" can take on a variety of definitions, normally [and in this specific case] referring to non-violent offenses that interfere with society's efficient operation or moral values. In Wisconsin, criminal offenses are lumped into one of four categories: violent, property, drug, and public order offenses. *See* Julie Grace, *Wisconsin DOC Classifies as Violent Many More Offenses Than Does The FBI*, Badger Institute (Sept. 20, 2020), https://www.badgerinstitute.org/News/2019-2020/Wisconsin-DOC-classifies-as-violent-many-more-offenses-than-does-the-FBI.htm.

2 *Id*. at 779 (Rebecca Grassl Bradley, J., dissenting).

3 Wis. Stat. § 941.29(5). To compare current state laws regarding the restoration of firearm rights, see Restoration of Rights Project, 50-State Comparison: Loss & Restoration of Civil/Firearms Rights, Table 2, 3 (updated Jan. 4, 2021), https://ccresourcecenter.org/state-restoration-profiles/chart-1-loss-and-restoration-of-civil-rights-and-firearms-privileges/.

4 The Restoration of Rights Project categorizes Wisconsin as having an "Infrequent/Uneven" pardoning frequency relative to other states. Restoration of Rights Project, 50-State Comparison: Pardon Policy & Practice, https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities-2/ (last accessed Mar. 29, 2021). This characterization appears accurate—former Governor Jim Doyle issued more than 100 pardons in the final three months of his term in 2010, but his successor did not issue a single pardon over the next eight years. *See* Scott Bauer, *Wisconsin Gov. Tony Evers Plans To Issue The State's First Pardons In Nine Years*, Milwaukee Journal Sentinel (updated Oct. 7, 2019 at 7:34 a.m. CT), https://www.jsonline.com/story/news/2019/10/06/gov-tony-evers-issue-wisconsins-first-pardons-nine-years/3891186002/.

on the grounds that Roundtree's argument failed on the merits, regardless of whether he waived the constitutional argument.[5]

In an opinion written by Justice Ann Bradley (joined by Chief Justice Patience Roggensack and Justices Annette Ziegler, Rebecca Dallet, and Jill Karofsky), the Wisconsin Supreme Court affirmed the Court of Appeals' decision. It applied intermediate scrutiny, finding such an approach to be consistent with *Heller*'s statement that felon dispossession laws are "presumptively lawful" and reasoning that no federal court of appeals has applied strict scrutiny to similar challenges.[6] The majority assumed that felon-in-possession statutes burden conduct falling within the scope of the Second Amendment's right but nevertheless concluded that Wisconsin's statute is substantially related to the government's important interest in addressing gun violence.[7]

In the majority's view, failure to pay child support is a serious offense that, while not involving physical violence, deprives one's children from "receiving basic necessities."[8] The state has a reasonable interest in keeping firearms out of the hands of "those who have shown a willingness not only to break the law, but to commit a crime serious enough that the legislature has denominated it a felony."[9] Moreover, the majority pointed to several studies that, in its view, support a conclusion that the past commission of non-violent felonies is related to the likelihood of future commission of violent crimes.[10]

Justice Dallet, joined by Justices Ann Bradley and Karofsky, wrote separately to express her opinion on the question—left unaddressed by the majority opinion—of whether Roundtree waived his as-applied constitutional challenge by pleading guilty.[11] In light of the United States Supreme Court's holding in *Class v. United States*, she concluded that he did not.[12]

Justice Rebecca Bradley dissented, arguing that the majority applied an inappropriate standard of review for a blanket ban on a fundamental individual right. *Heller*, *McDonald*, and relevant state cases made clear that the right to keep and bear arms is fundamental, and under the Wisconsin Supreme Court's own precedent, strict scrutiny must be applied to statutes that restrict a fundamental right.[13]

Additionally, she concluded that this blanket ban on a fundamental constitutional liberty for non-violent felons is inconsistent with the Second Amendment's original public meaning. The state may have some historically recognized authority to revoke Second Amendment rights based on an individual's dangerousness to society. But the Wisconsin statute predicates the loss of these rights on a felony conviction alone, while drawing "no distinction between an individual convicted of first-degree homicide and someone convicted of 'failing to comply with any record-keeping requirement for fish.'"[14]

Justice Brian Hagedorn also dissented, but for different reasons. Like Justice Bradley, he found that the historical record failed to demonstrate state authority to broadly prohibit firearm possession based merely on the commission of a felony. He reasoned, however, that the same historical record supported "some [state] authority to dispossess those who posed a danger of engaging in arms-related violence, and to do so in ways that were both at least somewhat over- and under-inclusive."[15] Intermediate scrutiny, therefore, is appropriate for analyzing felon dispossession laws.

Under intermediate scrutiny, the state failed to meet its burden of showing a substantial connection between dispossessing all felons—including those like Roundtree convicted of public order offenses—and the state's interest in remediating gun violence. In Justice Hagedorn's view, the majority completely misconstrued the two studies upon which it so heavily relied. One study failed to offer evidence establishing a relationship between past crime and a person's risk of committing gun-related violent crime in the future. The second study showed only a modest correlation that "falls far short of demonstrating why those convicted of . . . failure to pay child support should be dispossessed in the interest of preventing future gun-related violent crime."[16]

The Wisconsin Supreme Court has now joined a growing list of courts applying intermediate scrutiny to uphold lifetime bans on gun possession for non-violent felons.[17] Felon-in-possession cases will continue to present very real and pressing questions about the parameters of *Heller*'s "presumptively lawful" dicta.

5 *See* State v. Roundtree, No. 2018AP594–CR, unpublished slip op. (Wis. Ct. App. Apr. 4, 2019) (per curiam).

6 State v. Roundtree, 952 N.W.2d at 771.

7 *Id.* at 773.

8 *Id.*

9 *Id.* at 774.

10 *Id.* at 774–75.

11 *Id.* at 775 (Dallet, J., concurring).

12 *Id.*

13 *Id.* at 777–78 (referencing District of Columbia v. Heller, 554 U.S. 570, 581 (2008); Wisconsin Carry, Inc. v. City of Madison, 892 N.W.2d 233 (2017); Mayo v. Wisconsin Injured Patients & Families Comp. Fund, 914 N.W.2d 678 (2018)).

14 *Id.* at 779 (Bradley, J., dissenting).

15 *Id.* at 800 (Hagedorn, J., dissenting).

16 *Id.* at 804 (Hagedorn, J., dissenting).

17 *See, e.g.*, Folajtar v. Attorney General, 980 F.3d 897 (3d Cir. 2020); Kanter v. Barr, 919 F.3d 437, 448 (7th Cir. 2019); Binderup v. Attorney General, 836 F.3d 336 (3d Cir. 2016); Schrader v. Holder, 704 F.3d 980 (D.C. Cir. 2013). For an alternate view, see Amy Swearer, *Longstanding and Presumptively Lawful?* Heller*'s Dicta vs. History and Dicta*, Heritage Found. Legal Memorandum No. 238 (Nov. 5, 2018), https://www.heritage.org/sites/default/files/2018-11/LM-238.pdf.

WISCONSIN
State v. Halverson

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Note from the Editor:

Under the Wisconsin Constitution, a prisoner is not necessarily "in custody" for purposes of triggering *Miranda*[1] warnings. That was the Wisconsin Supreme Court's unanimous holding in *State v. Halverson*, decided January 2021.[2] But although unanimous, *Halverson* revealed significant disagreement over the Court's role in interpreting the state constitution. The decision portends future clashes on this important institutional question and corresponding opportunities for litigants seeking to press or oppose state constitutional claims.

In *Halverson*, the Wisconsin Supreme Court had the opportunity to clean up its *Miranda* jurisprudence, which an intervening decision of the United States Supreme Court had complicated.

Miranda famously held that, in order to protect the Fifth Amendment's privilege against self-incrimination, statements given by a defendant during a "custodial interrogation" by the state are inadmissible in criminal proceedings unless they were preceded by a series of warnings apprising the defendant of his rights.[3] This rule makes the question of whether a "custodial interrogation" has occurred a decisive one, and courts have labored to establish a workable test to answer that question in a multitude of contexts.

Thus, in the 1999 case of *State v. Armstrong*,[4] the Wisconsin Supreme Court was asked to clarify what qualified as "custody" in the jailhouse setting—by definition a place in which individuals are detained by the state for long periods. Reasoning in part that "[i]n general, a person is 'in custody' for purposes of *Miranda* when he or she is "deprived of his [or her] freedom of action in any significant way,"[5] the *Armstrong* Court unanimously issued the sweeping rule that "a person who is incarcerated is *per se* in custody for purposes of *Miranda*."[6]

But *Armstrong*'s bright line did not survive the United States Supreme Court's 2012 decision in *Howes v. Fields*,[7] where the Court made clear that *Miranda* did not require a per se rule for prisoners. "Custody" within the meaning of *Miranda*, the Court explained, "is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion."[8] And while "[d]etermining whether an individual's freedom of movement was curtailed" is "the first step in the analysis," it

1 Miranda v. Arizona, 384 U.S. 436 (1966).

2 State v. Halverson, 2021 WI 7, 395 Wis. 2d 385, 953 N.W.2d 847.

3 *Miranda*, 384 U.S. at 444.

4 State v. Armstrong, 223 Wis. 2d 331, 588 N.W.2d 606 (1999).

5 *Id.* at 353 (quoting *Miranda*, 384 U.S. at 444).

6 *Id.* at 355.

7 Howes v. Fields, 565 U.S. 499 (2012).

8 *Id.* at 508-09.

"identifies only a necessary and not a sufficient condition for *Miranda* custody."[9] Courts should "ask[] the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*."

The *Howes* Court went on to conclude that "imprisonment alone is not enough to create a custodial situation within the meaning of *Miranda*" for "at least" three reasons: (1) "questioning a person who is already serving a prison term does not generally involve the shock that very often accompanies arrest"; (2) "a prisoner, unlike a person who has not been sentenced to a term of incarceration, is unlikely to be lured into speaking by a longing for prompt release"; and (3) "a prisoner, unlike a person who has not been convicted and sentenced, knows that the law enforcement officers who question him probably lack the authority to affect the duration of his sentence."[10]

The essential rule of *Howes* is that "[w]hen a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation."[11] But while this answered the federal question in a way that effectively overruled *Armstrong*'s per se rule, left unresolved was whether the Wisconsin Constitution's nearly identically-worded analogue to the Fifth Amendment's self-incrimination privilege, Article I, § 8(1), provides independent support for such a rule.

Enter *State v. Halverson*, decided on January 29, 2021. The case arose when an inmate in a county jail, Brian Halverson, took a phone call from a law enforcement officer and made incriminating statements during the ensuing conversation (or interrogation).[12] In seeking to exclude the statements, Halverson could no longer rely on *Armstrong* and so instead argued the Wisconsin Supreme Court should "readopt the per se rule" under the Wisconsin Constitution.[13]

The Wisconsin Supreme Court unanimously declined to do so. Writing for the Court, Justice Brian Hagedorn acknowledged that "[f]ulfilling our duty to uphold the Wisconsin Constitution as written could yield conclusions affording greater protections than those provided by the federal Constitution," but he immediately added that "any argument based on the Wisconsin Constitution must actually be grounded in the Wisconsin Constitution," meaning "supported by its text or historical meaning."[14]

Halverson came to the Court armed with neither type of argument, instead simply relitigating the question *Howes* had resolved of whether incarceration was inherently custodial.[15] But the Court agreed with the reasoning in *Howes* that a blanket rule was inconsistent with what Justice Hagedorn dubbed the "anti-coercion purposes of *Miranda*" and observed that Halverson "offer[ed] no strong reasons to diverge from [the United States Supreme Court's] rationale."[16]

All that was left was to determine whether Halverson was in custody under the two-step test described in *Howes*. The Court had little trouble concluding that he was not.[17] Practitioners will want to note the Court's conclusion that "interrogation by phone call is unlikely to rise to the level of *Miranda* custody" given the suspect's ability to hang up.[18] And other factors like the short length of the interview, the fact that Halverson "spoke . . . alone and without physical restraints," and the interviewing officer's "calm" "tone" counseled against a finding of custody.[19] Finally, the Court explained that a warning to the suspect that he or she may leave the interview at any time (which in Halverson's case did not occur) is merely "relevant . . . not mandatory."[20]

The Court's opinion gave way to a relatively vigorous discussion between two battling concurrences—cumulatively joined by five of the Court's seven justices—regarding the proper approach to state constitutional interpretation.

The catalyst for the debate was a controversial 2005 opinion of the Court, *State v. Knapp*,[21] in which the Court had interpreted Article I, § 8(1) (in an unrelated context) to provide broader protections than the Fifth Amendment—precisely what Halverson sought—and had justified its reading on the need to "deter[]" what it called "particularly repugnant" "conduct" and to "preserv[e] . . . judicial integrity."[22]

Although Halverson had cited *Knapp* as an example of a case in which the Court had "expanded the scope of the exclusionary rule beyond its federal corollary," the *Halverson* Court summarily concluded in a footnote that "*Knapp* does not suggest anything about whether this court should adopt Halverson's proposed rule in this case."[23]

But Justice Rebecca Bradley, joined by Justice Annette Ziegler, went further and called for the Court to overrule what she characterized as an "unprecedented departure from the traditional tools employed by this court in interpreting the Wisconsin Constitution," a case in which the Court "breathed its policy preferences into [the state constitutional] provision."[24]

In response, Justice Rebecca Dallet, joined by justices Ann Walsh Bradley and Jill Karofsky, wrote in defense of *Knapp*, arguing that Justice Rebecca Bradley's concurrence "ignor[ed] [the Court's] robust tradition of independently interpreting the Wisconsin Constitution" and "abandon[ed] [the] court's long

9 *Id.* at 509 (quoting Maryland v. Shatzer, 559 U.S. 98, 112 (2010)).

10 *Id.* at 511-12.

11 *Id.* at 514.

12 *Halverson*, 395 Wis. 2d at ¶¶5-6.

13 *Id.* at ¶4.

14 *Id.* at ¶¶23-24 (quoting State v. Roberson, 2019 WI 102, ¶56, 389 Wis. 2d 190, 935 N.W.2d 813 (2019)).

15 *Id.* at ¶¶26-27.

16 *Id.* at ¶27.

17 *See id.* at ¶¶31-36

18 *Id.* at ¶31.

19 *Id.* at ¶32-36.

20 *Id.* at ¶33.

21 State v. Knapp, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899.

22 *Id.* at ¶¶75, 79.

23 *Halverson*, 395 Wis. 2d at ¶25 n.5.

24 *Id.* at ¶42 (Bradley, J., concurring).

history of upholding the Wisconsin Constitution's protection against overbearing law-enforcement practices."[25]

Although framed in terms of *Knapp*'s defensibility, the exchange between justices Rebecca Bradley and Rebecca Dallet is not solely about that case. *Knapp* is emblematic of a past era of the Court in which it was, in the words of Judge Diane Sykes, "quite willing to aggressively assert itself to implement the statewide public policies it deems to be most desirable" in a way "not susceptible of political correction as the legislature's would be."[26] That era ended when Justice Louis Butler, the author of *Knapp* and a key champion for a *Knapp*-style institutional approach, lost his seat to the much more jurisprudentially-conservative Justice Michael Gableman in 2008.[27]

But as the *Halverson* concurrences demonstrate, compositional changes have now made a resurgence of the mid-2000s Wisconsin Supreme Court realistic. Wisconsin will have to wait to see whether the Bradley or the Dallet methodology ultimately wins out.

25 *Id.* at ¶57 (Dallet, J., concurring).

26 Diane S. Sykes, *Reflections on the Wisconsin Supreme Court*, 89 Marq. L. Rev. 723, 737-38 (2006) (published address).

27 *See, e.g.*, Alan Ball, *The Butler-Gableman Divide: Wisconsin Supreme Court Elections Matter*, SCOWstats (March 20, 2018), http://www.scowstats.com/2018/03/20/the-butler-gableman-divide-wisconsin-supreme-court-elections-matter/ (statistical analysis).

WISCONSIN
Fabick v. Evers

By Andrew Cook

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About the Author:

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Note from the Editor:

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I. Background – Governor's Public Health Emergency Orders and Mask Mandate

On March 12, 2020, Wisconsin Governor Tony Evers issued Executive Order #72[1] which proclaimed a health emergency pursuant to the Wisconsin law[2] in response to the COVID-19 pandemic. On May 11, 2020, the executive order expired 60 days later pursuant to the statute[3] providing the governor the authority to act during a state of emergency.

On July 30, 2020, Gov. Evers issued another executive order,[4] again proclaiming "that a public health emergency" existed in Wisconsin due to the COVID-19 pandemic. On September 22, 2020, Gov. Evers issued another executive order[5] extending the public health emergency an additional 60 days based on the COVID-19 pandemic.[6] On September 22, 2020, Gov. Evers also issued Emergency Order #1[7] which mandated face coverings for all indoor and enclosed spaces, with certain exceptions.

In November 2020, Jeré Fabick filed a petition for original action with the Wisconsin Supreme Court challenging the validity of the two executive orders that were issued by Gov. Evers after the initial public health emergency order. Mr. Fabick argued that Gov. Evers exceeded his statutory authority by extending the public health emergencies beyond the 60-day statutory limit without approval to extend the state of emergency by the Wisconsin Legislature as required by the statute.

After the court accepted the case, Gov. Evers issued another executive order[8] extending the public health emergency and mask mandate. On February 4, 2021, the Wisconsin Legislature affirmatively revoked Executive Order #104[9] by adopting a joint resolution,[10] thereby ending the mask mandate. Later that

1 "Relating to a Proclamation Declaring a Health Emergency in Response to the COVID-10 Coronavirus," at https://evers.wi.gov/Documents/EO/EO072-DeclaringHealthEmergencyCOVID-19.pdf.

2 Wis. Stat. § 323.02(16).

3 Wis. Stat. § 323.10.

4 Executive Order #82, "Relating to Declaring a Public Health Emergency," at https://evers.wi.gov/Documents/COVID19/EO082-PHECOVIDSecondSpike.pdf.

5 Executive Order #90, "Relating to Declaring a Public Health Emergency," at https://evers.wi.gov/Documents/COVID19/EO090-DeclaringPublicHealthEmergency.pdf.

6 Executive Order #82, "Relating to Declaring a Public Health Emergency," at https://evers.wi.gov/Documents/COVID19/EO082-PHECOVIDSecondSpike.pdf.

7 "Relating to Requiring Face Coverings," at https://evers.wi.gov/Documents/COVID19/EmO01-SeptFaceCoverings.pdf.

8 "Relating to Declaring a State of Emergency and Public Health Emergency," at https://evers.wi.gov/Documents/EO/EO104-DeclaringPublicHealthEmergencyJan2021.pdf.

9 *Id.*

10 Enrolled Joint Resolution, relating to "Terminating the COVID-19 public

day, Gov. Evers issued Executive Order #105,[11] reinstating the public health emergency and again issuing an emergency order extending the mask mandate.

II. Wisconsin Supreme Court Decision

The Wisconsin Supreme Court granted the petition and heard oral arguments on November 16, 2020. On March 31, 2021, the court issued a 4-3 decision[12] ruling in favor of Mr. Fabick striking down the governor's multiple public health emergency orders and mask mandates.

A. Wisconsin Emergency Management Law

Under Wisconsin law, the governor has the authority to issue an executive order declaring a state of emergency. The statute provides in relevant part:

> The governor may issue an executive order declaring a state of emergency for the state or any portion of the state if he or she determines that an emergency resulting from a disaster or the imminent threat of a disaster exists. If the governor determines that a public health emergency exists, he or she may issue an executive order declaring a state of emergency related to public health for the state or any portion of the state and may designate the department of health services as the lead state agency to respond to that emergency…. A state of emergency shall not exceed 60 days, unless the state of emergency is extended by joint resolution of the legislature. A copy of the executive order shall be filed with the secretary of state. The executive order may be revoked at the discretion of either the governor by executive order or the legislature by joint resolution.[13] (Emphasis added)

B. Wisconsin Supreme Court Holds that Gov. Evers Exceeded His Statutory Authority by Issuing Multiple Executive Orders for the Same Emergency

The issue before the court was whether Gov. Evers exceeded his statutory authority when he proclaimed states of emergency related to COVID-19 after the initial state of emergency, also related to COVID-19, had existed for 60 days and was not extended by the legislature.

Interpreting the plain language of the statute, the Wisconsin Supreme Court held that Gov. Evers exceeded his authority by issuing multiple executive orders extending the original public health emergency beyond the 60-day limit without the legislature's approval.

According to the court, Gov. Evers relied on the same enabling condition, the COVID-19 pandemic, for the multiple executive orders that continued beyond the 60-day limit for the original emergency order.[14] The court explained that the statute provides the governor the authority to declare a state of emergency related to public health when the conditions for a public health emergency are satisfied. That occurred in March 2020 when Gov. Evers issued his first emergency order in response to the COVID-19 pandemic. The court further held that when relying on the same enabling condition, the governor is subject to the 60-day limit prescribed by the statute, unless the legislature extends the state of emergency by joint resolution. Here, not only did the Wisconsin Legislature not extend the state of emergency related to the COVID-19 pandemic, it adopted a joint resolution revoking the governor's subsequent executive orders declaring a state of emergency. The court declared that all executive orders issued by Gov. Evers after the original executive order declaring a state of emergency in response to COVID-19 were unlawful.[15]

The decision was authored by Justice Brian Hagedorn, and joined by Chief Justice Patience Roggensack, Justice Annette Ziegler, and Rebecca Grassl Bradley.

C. Dissent

The dissenting opinion shifts the focus of the 60-day limit in Wis. Stat. § 323.10 to the definition of "public health emergency" under Wis. Stat. § 323.02(16). That provision provides in relevant part:

> "Public health emergency" means the occurrence or imminent threat of an illness or health condition that meets all of the following criteria:
>
> (a) Is believed to be caused by bioterrorism or a novel or previously controlled or eradicated biological agent.
>
> (b) Poses a high probability of any of the following:
>
> 1. A large number of deaths or serious or long–term disabilities among humans.
>
> 2. A high probability of widespread exposure to a biological, chemical, or radiological agent that creates a significant risk of substantial future harm to a large number of people.

The dissent focuses on the term "occurrence" in the statute and states that the two subsequent executive orders "were in response to 'occurrences' that have already taken place."[16] Specifically, the dissent argues that the "new spike in [COVID-19] infections drove Order #83 and Order #90 was issued because of the significant increase in the spread of the virus occasioned by the beginning of the school year."[17] According to the dissent, an occurrence is a "something that takes place" or "something that happens unexpectedly and without design."[18] Applying the definition of "occurrence" to the executive orders, the dissent states that the orders were issued "in response to separate occurrences and are permissible under the plain language" of statutory definition of public health emergency.[19]

health emergency, including all emergency orders and actions taken pursuant to declaration of the public health emergency," at https://docs.legis.wisconsin.gov/2021/related/enrolled/sjr3.pdf.

11 "Relating to Declaring a State of Emergency and Public Health Emergency," at https://evers.wi.gov/Documents/EO/EO105-PHE.pdf. https://evers.wi.gov/Documents/EO/EO105-PHE.pdf.

12 *Fabick v. Evers*, 956 N.W.2d 856, 2021 WI 28 (2021).

13 Wis. Stat. § 323.10.

14 *Fabick*, 2021 WI at ¶40.

15 *Id.* at ¶43.

16 *Id.* at ¶113.

17 *Id.*

18 *Id.* at ¶115.

19 *Id.* at ¶118.

WISCONSIN

Zignego v. Wisconsin Elections Commission

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Drew Watkins is an associate with Holtzman Vogel Josefiak Torchinsky PLLC, providing counsel in the areas of campaign finance and election law, lobbying and ethics compliance, and tax-exempt organizations.

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Drew graduated from the University of Louisville with a B.S. in Justice Administration. He earned his Juris Doctor, magna cum laude, from the University of Kentucky College of Law and was a member of the Order of the Coif. During law school, he served as a senior staff editor on the Kentucky Law Journal and authored a published student note on the Justice Against Sponsors of Terrorism Act. He is a member of the Kentucky, D.C. and Virginia bars and the Federalist Society.

Note from the Editor:

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Wisconsin has passed statutory requirements designed to maintain the accuracy of its voter registration list and keep it up-to-date. These laws are exceedingly common among the states, and even required by federal law in some cases.[1] However, they have also been the source of significant litigation.

One mechanism Wisconsin uses to update its voter registration records is contacting voters when officials receive "reliable information" that a voter might have moved out of his or her municipality. Wisconsin law requires, in relevant part, that:

> Upon receipt of reliable information that a registered elector has changed his or her residence to a location outside of the municipality, *the municipal clerk or board of election commissioners* shall notify the elector by mailing a notice . . . . If the elector no longer resides in the municipality or fails to apply for continuation of registration within 30 days of the date the notice is mailed, *the clerk or board of election commissioners* shall change the elector's registration from eligible to ineligible status.[2]

To assist with maintaining the accuracy of the state's voter files, municipal clerks and boards of election commissioners in Wisconsin are seemingly required to take action when they receive reliable information that a registered voter has moved out of their municipality. However, in *State ex rel. Zignego v. Wisconsin Elections Commission (Zignego)*, the Wisconsin Supreme Court held that Wisconsin law does not impose a "positive and plain" duty on the Wisconsin Elections Commission (the Commission) when it receives similarly reliable information that a registered voter has moved.[3] Rather, the court determined that the Commission—the State body with broad responsibility to administer Wisconsin's election statutes and to design and maintain the official registration list—was distinct from the local boards of election commissioners referenced in Wisconsin's list maintenance statute.

In *Zignego*, the Commission received a "movers report" from the Electronic Registration Information Center, Inc. (ERIC)—a multi-state private consortium designed to improve the accuracy of voter rolls—which identifies registered voters who may have moved from the addresses associated with their voter registrations.[4] After receiving the report, the Commission conducted its own internal vetting and identified approximately 230,000 Wisconsin voters who may have moved from their

1 *Voter List Accuracy*, National Conference of State Legislatures (Mar. 20, 2020), https://www.ncsl.org/research/elections-and-campaigns/voter-list-accuracy.aspx.

2 Wis. Stat. Ann. § 6.50(3) (emphasis added).

3 State ex rel. Zignego v. Wis. Elections Comm'n, 2021 WI 32, ¶ 1.

4 *Id.* at ¶ 7.

registration addresses and sent a letter to each with instructions on how to affirm their address.[5] When the Commission took no further action to remove non-responsive voters from the voter registration system, a group of registered voters filed suit seeking to compel it to act.

The trial court issued an order instructing the Commission to remove non-responsive voters, which the Wisconsin Court of Appeals reversed. In a 5-2 decision, the Wisconsin Supreme Court affirmed and modified the Court of Appeals' decision.[6] Beginning with the premise that "the judicial branch ordinarily does not order the executive branch to do its job," the Court declined to order the Commission to remove voters from the state's voter list because it determined that the Commission had no "positive and plain" duty to do so under the facts at issue.[7]

The Wisconsin Supreme Court held that, under Wisconsin law, "the responsibility to change the registration of electors who may have moved out of their municipality is given to 'the municipal clerk or board of election commissioners.'"[8] The *Zignego* petitioners, requesting a writ of mandamus to require the Commission to act, proposed that the Commission is a "board of election commissioners" under the statute.[9] However, applying principals of statutory interpretation that instruct a court to look to the language of the statute as well as its statutory context and structure, the Wisconsin Supreme Court determined that this was "plainly incorrect."[10] As the court determined, Wisconsin's election statutes refer primarily to three actors: "(1) a 'municipal clerk'; (2) a 'board of election commissioners'; and (3) 'the commission.'"[11]

In describing these three actors and their different roles, the *Zignego* court explained that boards of election commissioners are established in Wisconsin's most populous cities and counties to carry out the duties otherwise performed by the municipal or county clerk. In fact, the Court described "that the phrase 'municipal clerk or board of election commissioners' appears in tandem all over [Wisconsin's] election statutes."[12]

After delineating the separate actors, the majority opinion highlights the different role each plays in Wisconsin election administration and maintenance of the state's voter registration list. In profiling their divergent roles, the *Zignego* court concluded that each of the three primary actors is given different responsibilities under the election code. Ultimately, the court concluded that, "according to the plain meaning supported by its statutory context, 'board of election commissioners' under [relevant Wisconsin law] does not include the Commission."[13] Given that the *Zignego* petitioners did not establish the Commission's positive and plain duty to maintain Wisconsin's voter list in this particular way, the court declined to impose the "extraordinary legal remedy" of mandamus.[14]

The court did not accept any of the *Zignego* petitioners' counterarguments. First, the petitioners asserted that the Wisconsin law requiring the chief election officer to enter into a membership agreement with ERIC and to comply with the terms of such agreement demanded a different result. However, the court concluded that the membership agreement with ERIC only required the Commission to initiate contact with voters whose records were deemed inaccurate.[15] Next, the *Zignego* petitioners claimed that, since the Commission had previously changed the registration of voters who did not respond to a similar notice sent in 2017 in conjunction with a prior report from ERIC, it must do so again in this case. Without deciding whether the Commission's past actions were lawful, the court determined that "[i]t is the statutory text, not agency practice, that determines what the law requires an agency to do."[16] Finally, the court rejected an argument that any reading of the relevant statute which did not require the Commission to change the registration status of voters when it received information that their address may have changed would violate federal law. Although federal law requires implementation of a centralized voter registration system, the court determined nothing within the law "precludes assigning local officials responsibility to make certain changes to the list."[17]

Writing in dissent, Justice Rebecca Bradley, joined by Justice Annette Ziegler, did not disagree with the court's answer to the statutory interpretation question.[18] Instead, the dissenting justices argued that the Commission had a broader duty to maintain the state's voter rolls. Implicit in that duty, according to the dissent, was the "obligation to change the status of ineligible voters on the statewide voter registration list."[19] Citing the Commission's past practice of marking voters ineligible in conjunction with previous reports from ERIC, the dissenting justices took the view that the Commission had historically demonstrated an understanding and embrace of

5 *Id.*

6 *Id.* at ¶ 44. After determining that the Court of Appeals' opinion expressed views on issues that were beyond what was necessary to resolve the case, the Wisconsin Supreme Court modified the Court of Appeals' opinion to exclude certain language. In particular, the Court of Appeals' opinion was modified by withdrawing language that decided the issue of whether the information the Commission received from ERIC was "reliable" and whether the Commission's past actions in removing voters upon learning information regarding a change in address were lawful. *See id.* at ¶ 44, n.19.

7 *Id.* at ¶¶ 3-4.

8 *Id.* at ¶ 4.

9 *Id.*

10 *Id.* at ¶¶ 4 and 12.

11 *Id.* at ¶ 14.

12 *Id.* at ¶ 17.

13 *Id.* at ¶ 37.

14 *Id.* at ¶¶ 38-39. The Court also reversed a contempt order issued by the trial court, determining that because the writ of mandamus was issued in error the contempt order had no proper basis. *Id.* at ¶ 43.

15 *Id.* at ¶ 31.

16 *Id.* at ¶ 32.

17 *Id.* at ¶ 35.

18 State ex rel. Zignego v. Wis. Elections Comm'n, 2021 WI 32, ¶ 46 (Bradley, J., dissenting).

19 *Id.*

its duty to maintain Wisconsin's voter rolls.[20] Emphasizing the Commission's duty to "maintain" the state's voter registration files, the dissent pressed that it was not sufficient for the Commission to merely create and insert data into the registration list, but that it must also work to keep the list "in a condition of good repair or efficiency."[21]

Rather than view the relevant statutory provision as one means for local officials to maintain the voter registration rolls, separate and apart from the Commission's overarching duty to do so, the dissent viewed these two duties as being inextricably intertwined. As Justice Bradley put it, if the Commission "receives reliable information from ERIC that a voter's address information is invalid . . . and in response [the Commission] does nothing, [the Commission] thereby fails to 'maintain' this list in any substantive regard."[22] The dissent discerned the Commission's duty to maintain accurate lists by referencing not only Wisconsin's election code, but also its agreement with ERIC, which required initiating contact with voters suspected of having out-of-date voter registration information "in order to *correct the inaccuracy* or . . . *inactivate* or *update* the voter's record."[23]

This case demonstrates the tensions inherent in states' efforts to devise a method for maintaining accurate voter files. While federal law imposes a floor to a state's attempts to keep up-to-date voter records, some discretion is left to each state in how to manage its voter rolls.[24] In Wisconsin, the state legislature assigned some role in that process to local election officials. But to what extent does such a delegation override or negate the state government's broad obligation to maintain accurate records? In this case, the court determined that the state statutory provision at issue spoke to a particular way for local officials to participate in Wisconsin's voter list management and did not impose any independent duty on state officials. However, even in a case like this, does the state's broad duty to maintain accurate voter rolls require it to at least ensure that local officials who have been delegated authority to participate in that process are carrying out their obligations? Litigation will continue to define the appropriate scope of a state's efforts to keep its voter records up-to-date, and states will need to adapt their attempts to maintain accurate voter rolls in response to court decisions.

20 *Id.* at ¶ 49.

21 *Id.* at ¶ 53 (citing Maintain, *The American Heritage Dictionary* (5th ed. 2011)).

22 *Id.* at ¶ 54.

23 *Id.* at ¶ 56 (emphasis in original).

24 *See, e.g.*, 52 U.S.C. §§ 20507(a)(4) and 21083(a)(4); *see also* Husted v. A. Phillip Randolph Inst., 138 S. Ct. 1833, 1839 (2018) (explaining that while the National Voter Registration Act "is clear about the need to send a 'return card' (or obtain written confirmation of a move) before pruning a registrant's name, no provision of federal law specifies the circumstances under which a return card may be sent. Accordingly, States take a variety of approaches.").

WISCONSIN

Tavern League of Wisconsin, Inc. v. Andrea Palm

By Corydon Fish

Published June 15, 2021

About the Author:

Cory Fish served as Wisconsin Manufacturers and Commerce's General Counsel & Director of Tax, Transportation and Legal Affairs from 2017-2021. In that role he advocated on his members' behalf before the administrative state, legislature, and judiciary to help resolve statutory, regulatory, and permitting concerns and generally ensure their interests were protected. Prior to joining WMC in 2017, Cory worked for in a series of roles for the State of Wisconsin.

Most recently he worked for State Senator Alberta Darling, Co-Chair of the powerful Joint Committee on Finance, serving as her Legal Counsel. He also advised Sen. Darling on budget and policy issues ranging from higher education and regulatory reform to natural resources and transportation.

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Two months ago, in the case *Tavern League v. Palm*, the Wisconsin Supreme Court reiterated its earlier ruling that the Wisconsin governor could not use executive orders to circumvent the checks and balances of constitutional governance provided by its rulemaking processes. In the first case on the topic, *Legislature v. Palm*, Governor Tony Evers and his Department of Health Services (DHS) Secretary Andrea Palm, through an executive order, shut down portions of Wisconsin's economy at the beginning of the COVID-19 pandemic.[1] The court determined the order actually constituted a rule, and that because it did not go through the appropriate procedures,[2] it was invalid. As Wisconsin experienced an increase in COVID-19 cases in the fall of 2020, Palm issued a substantively similar order, Emergency Order Three (EO 3), which restricted indoor public gatherings in Wisconsin to 25 percent of a premise's permitted capacity or ten people if no capacity was prescribed (with several sets of exemptions).[3] By taking this action, the court ruled Palm once again circumvented the rulemaking requirements the legislature placed on the authority it granted DHS (and all state agencies). In *Tavern League v. Palm*, in a split decision, the court reaffirmed its ruling in *Legislature v. Palm* and declared EO 3 unenforceable.

The Tavern League of Wisconsin, Inc., a trade association representing bars and restaurants, and their co-plaintiffs[4] (Plaintiffs) filed the lawsuit in Sawyer County Circuit Court against then-Secretary Palm and DHS (Defendants). Plaintiffs successfully sought a temporary restraining order enjoining EO 3. However, after a judicial substitution, the Plaintiffs' motion for a temporary injunction was denied, and the temporary restraining order was rescinded. At the same hearing the judge granted a motion to intervene by a group of businesses, public interest groups, and individuals[5] (Intervenors). The Intervenors appealed the ruling to Wisconsin's Third District Court of Appeals, which summarily reversed the circuit court, stating that under the state Supreme Court's prior *Legislature v. Palm* precedent, EO 3 was invalid and unenforceable and that because the Intervenors had an "apparent certainty" of success

1 *See* Wis. Legislature v. Palm, 2020 WI 42, 391 Wis. 3d 497, 942 N.W.2d 900.

2 Wis. Stat. Ch. 227 (all statutory citations are current unless stated otherwise).

3 Wis. Dep't of Health Services, Emergency Order #3 Limiting Public Gatherings (Oct. 6, 2020), https://evers.wi.gov/Documents/COVID19/EmO03-LimitingPublicGatherings.pdf.

4 The Sawyer County Tavern League and the Flambeau Forest Inn (a restaurant).

5 The Mix UP, Inc., (a restaurant), Pro-Life Wisconsin Education Task Force, Inc., Pro-Life Wisconsin, Inc., and two individuals Liz Sieben and Dan Miller.

on the merits they were entitled to a temporary injunction.[6] The Defendants appealed the decision to the Wisconsin Supreme Court.

The Wisconsin Supreme Court accepted review of the case and issued a decision on April 14th, 2021. Then-Chief Justice Patience Roggensack wrote the lead opinion and was joined by Justices Annette Ziegler and Rebecca Bradley. Justice Brian Hagedorn concurred with the ruling on stare decisis grounds, while Justice Ann Walsh Bradley dissented, joined by Justices Jill Karofsky and Rebecca Dallet.

The court addressed two issues on review: (1) whether the case was moot—EO 3 expired on November 6, 2020, prior to the court's decision—and (2) whether EO 3 was a rule subject to the rule promulgation process.[7] The court reviewed both issues de novo.[8]

The court found that, while the issue was moot, it met several exemptions to the mootness doctrine.[9] The court found that it could review the case primarily because the issue was likely to arise again.[10]

The court affirmed the court of appeals' ruling, holding that EO 3 "on its face" was a rule[11] and must comply with the rulemaking procedures in Wisconsin's Administrative Procedure Act.[12]

In its briefing, DHS attempted to distinguish EO 3 from the order at issue in *Legislature v. Palm*, which the Wisconsin Supreme Court had held was a rule. DHS argued the scope of the statute that EO 3 was issued under, Wis. Stat. § 252.02(3), was not discussed in *Legislature v. Palm* and also was so specific there was no need to interpret it and thus no rulemaking was required.[13] The lead opinion rejected these arguments, holding it does not matter what statute DHS issued EO 3 under—what matters is whether EO 3 met the definition of a rule.[14]

The court determined EO 3 met all five elements of a rule.[15] First, it was a general order. Second, it was of general application because the class was broad—any individual in Wisconsin who attended a public gathering and any entity open to the public as defined in the order—and individuals and entities could be added to the class if they moved into Wisconsin.[16] Third, EO 3 had the effect of law because it was enforceable by civil forfeiture.[17] Fourth, the order was issued by a state agency, the DHS.[18] Fifth, the order "both implemented and interpreted Wis. Stat. § 252.02(3)'s grant of authority" by interpreting the phrase "public gatherings" in the statute to mean "'limit' numerically" and carrying out the statute's authority to "forbid public gatherings."[19] The court concluded that because EO 3 met the definition of a rule but was not properly promulgated, it was invalid and unenforceable.[20]

Justice Brian Hagedorn filed a brief concurring opinion where he noted that while he objected to the legal analysis in *Legislature v. Palm*,[21] the doctrine of stare decisis applies to this case, where the same party—DHS—"does the very same thing again under the same circumstances."[22] Justice Hagedorn concluded his opinion by opening the possibility of reexamining the holding in *Legislature v. Palm* in the future, but he noted that none of the parties asked the court to do so here.[23]

Justice Ann Walsh Bradley, joined by Justices Karofsky and Dallet, dissented on two points. First, they argued that stare decisis did not apply because the court never interpreted Wis. Stat. § 252.02(3), and that even if *Legislature v. Palm* did interpret that statutory section, stare decisis should not apply because the *Legislature v. Palm* decision was unsound.[24] Second, they said the statutory language in Wis. Stat. § 252.02(3) is unambiguous, so no interpretation was required by the agency to effectuate the statutory grant of authority and therefore no

6 Tavern League, Inc., et al. v. Palm et al., 2021 WI 33, ¶ 12, 957 N.W.2d 261.

7 *Id.* at ¶ 13.

8 *Id.*

9 *Id.* at ¶¶ 15-16. Exceptions to the mootness doctrine include, "(1) the issues are of great public importance; (2) the constitutionality of a statute is involved; (3) the situation arises so often a definitive decision is essential to guide the trial courts; (4) the issue is likely to arise again and should be resolved by the court to avoid uncertainty; or (5) the issue is capable and likely of repetition and yet evades review." Portage Cnty. V. J.W.K., 2019 WI 54, ¶ 10, 386 Wis. 2d 672, 927 N.W.2d 509.

10 *Tavern League*, 2021 WI 33 at ¶ 16, n.4.

11 The definition of a rule has five elements. Wis. Stat. § 227.01(13). First, the action must be a general order, and second, of general application, which are both satisfied if "the class of people regulated . . . 'is described in general terms and new members can be added to the class.'" *Tavern League*, 2021 WI 33 at ¶ 20 (citing *Palm*, 2020 WI 42 at ¶ 22). Third, the action has to have the force of law, which is satisfied if it is enforced through a civil or criminal sanction. *Tavern League*, 2021 WI 33 at ¶ 21 (citing Cholvin v. DHFS, 2008 WI App 127, ¶ 26, 313 Wis. 2d 749, 758 N.W.2d 118). Fourth, the action is taken by an agency. *Tavern League*, 2021 WI 33 at ¶ 23. Fifth, the agency implements or interprets a statute when it takes the action, which is generally satisfied by an agency adopting its own understanding of a statute under its purview. *Tavern League*, 2021 WI 33 at ¶¶ 24-25. *See* Frankenthal v. Wis. Real Est. Brokers' Bd., 3 Wis. 2d 249, 253, 89 N.W.2d 825 (1958). Agencies must conform to the rulemaking process anytime an action meets the definition of a rule. *Tavern League*, 2021 WI 33 at ¶ 19, (citing *Palm*, 2020 WI 42 at ¶ 22, quoting Citizens for Sensible Zoning, Inc. v. DNR, 90 Wis. 2d 804, 814, 280 N.W.2d 702 (1979)).

12 *Tavern League*, 2021 WI 33 at ¶ 26. *See* Wis. Stat. Ch. 227.

13 *Tavern League*, 2021 WI 33 at ¶ 27. Wis. Stat. § 252.02(3) in whole reads, "[t]he department may close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics."

14 *Id.* at ¶ 28.

15 *See supra* note 11.

16 *Id.* at ¶¶ 30-31.

17 *Id.* at ¶ 32.

18 *Id.*

19 *Id.* at ¶ 33.

20 *Id.* at ¶ 34.

21 *Palm*, 2020 WI 42 at ¶¶ 165-263 (Hagedorn, J., dissenting).

22 *Tavern League*, 2021 WI 33 at ¶ 37 (Hagedorn, J., concurring).

23 *Id.* ¶ 38.

24 *Id.* at ¶¶ 39-41 (A.W. Bradley, J., dissenting) (citing Johnson Controls, Inc., v. Emp. Ins. of Wausau, 2003 WI 108, ¶ 99, 264 Wis. 3d 60, 665 N.W.2d 257).

rulemaking was necessary because Wis. Stat. § 227.10(1) only requires rulemaking if an agency adopts an interpretation of an ambiguous statute.[25]

The court's decision is the third time in less than a year the court has ruled against Governor Evers' administration for taking an action that the majority held should have been promulgated as a rule. With this ruling, the court continues to decide that the legislature has the right to oversee administrative agencies when those agencies use delegations of legislative authority. The case also reinforces past decisions by the court that agencies can only create law through rulemaking, a process heavily influenced by the legislature.

25 *Id.* at ¶¶ 75-77 (citing Lamar Cent. Outdoor, LLC v. Div. of Hearings & Appeals, 2019 WI 109, ¶ 24, 389 Wis. 2d 486, 936 N.W.2d 573).

WISCONSIN

Clean Wisconsin v. Wisconsin Department of Natural Resources

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Note from the Editor:

In a pair of related cases, the Wisconsin Supreme Court expanded Wisconsin administrative agencies' authority to create policy.[1] These cases expand the scope of agency authority by revitalizing the use of general grants of authority, which the Wisconsin Supreme Court had previously ruled had been eliminated through legislative action.[2] In doing so, the court weakened a restraint the Wisconsin legislature had placed on its delegations of legislative authority: the explicit authority requirement.

In December 2010, Governor-elect Scott Walker announced he would call a special session of the Wisconsin legislature upon his inauguration in January 2011 to address various topics including regulatory reform.[3] In this "Wisconsin is Open for Business Special Session," Governor Walker introduced 2011 January Special Session Assembly Bill 8, which became 2011 Wisconsin Act 21 (Act 21).[4] Prior to introduction, he released a white paper explaining the "problem" of "agency bureaucrats hav[ing] broad rulemaking authority" allowing them to draft administrative rules "based on . . . general duties provisions, not based on the more specific laws the legislature meant to govern targeted industries or activities."[5] The paper went on to outline the "solution":

> Legislation that states an agency may not create rules more restrictive than the regulatory standards or thresholds provided by the legislatures [sic]. Specifically stating that the department's broad statement of policies or general duties or powers provisions do not empower the department to create rules not explicitly authorized in the state statutes.[6]

This solution was codified as Act 21's explicit authority requirement[7] and its prohibitions on agencies using declarations

1 Clean Wis. et al. v. Wis. Dep't of Nat. Res. et al., 2021 WI 71, ¶ 25, 961 N.W.2d 346 (*Clean Wisconsin I*); Clean Wis. et al. v. Wis. Dep't of Nat. Res. et al., 2021 WI 72, ¶ 24, 961 N.W.2d 611 (*Clean Wisconsin II*).

2 *See* Wis. Legislature v. Palm, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900; Papa v. Wis. Dep't of Health Services, 2020 WI 66, 393 Wis. 2d 1, 949 N.W.2d 17; Tavern League, Inc., et al. v. Palm et al., 2021 WI 33, 957 N.W.2d 261.

3 Office of Governor Scott Walker, Special Session Part 2: Regulatory Reform (Dec. 21. 2010).

4 2011 Wis. Jan. Special Session Assembly Bill 8, https://docs.legis.wisconsin.gov/2011/proposals/jr1/ab8.

5 Office of Governor Scott Walker, Regulatory Reform Info Paper (Dec. 21, 2010).

6 *Id.*

7 Wis. Stat. § 227.10(2m). All citations to the Wisconsin statutes are current as of July 22, 2021, unless stated otherwise.

of legislative intent, general duties, or powers provisions to convey rulemaking authority.[8]

Both *Clean Wisconsin I* and *Clean Wisconsin II* stem from disputes over farmers seeking permits from the Wisconsin Department of Natural Resources (Department or DNR). In *Clean Wisconsin I*, a group of farmers attempted to have permits reissued to expand their dairies. A group of individuals and an environmental advocacy group sought to require the Department to include conditions on those permits that are not found in the text of the Wisconsin statutes, such as caps on the number of animals permitted and off-site monitoring wells.[9] In *Clean Wisconsin II*, farmers sought permits to operate high-capacity wells to support their agricultural operations. An environmental interest group and a lake association challenged these permits, arguing the Department needed to conduct an environmental review not specifically required in the Wisconsin statutes.[10] The contention underlying these disputes is how exact the legislature must be when delegating its lawmaking authority to administrative agencies.

In both cases, the court reviewed questions of agency authority and interpreted several statutory provisions in the process. The court reviews questions of agency authority de novo.[11] In such cases, the court directly reviews the agency's decision, not that of the lower reviewing courts.[12] In both cases, the administrative law judge and lower courts ruled against the permit seekers, but all the lower court decisions were issued before the Wisconsin Supreme Court interpreted Act 21's explicit authority requirement in 2020.

The focal point in both cases was the Wisconsin Administrative Procedures Act's explicit authority requirement.[13] The statute requires that "[n]o agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule . . ."[14] Both scholarship and state supreme court precedent had acknowledged[15] that this requirement eliminated the doctrine of express and implied authority.[16] These new cases brought back the superseded doctrine, reinterpreting "explicit" to mean "explicit but broad," thus allowing agencies to include requirements in permits that the statutes do not contain.[17] The court sided with the Department in both cases.

In *Clean Wisconsin I*, the court (Justice Jill Karofsky joined by Chief Justice Annette Ziegler and Justices Rebecca Dallet and Ann Walsh Bradley) found that the Department had the authority to impose a maximum animal unit limitation and off-site groundwater monitoring as conditions on approving the applicants' permits. The court found the Department had authority to cap the number of animals that could be on a property based on Wis. Stat. § 283.31(5), which requires that permits "specify maximum levels of discharges."[18] The court determined this language allowed the Department to limit the number of animals on a farm in a "practical way" to limit the amount of waste discharged.[19] The court also found the Department had the authority to implement off-site monitoring wells because they were necessary to enforce compliance with permittees' obligations under Wisconsin's Administrative Code and statutes. The Code requires permittees to apply manure and process wastewater[20] and to develop and submit a general plan.[21] The Department's permit condition statutes impose similar requirements.[22] Finding the Department had the explicit

8 Wis. Stat. § 227.11(2)(a)1-3.

9 *See* Wis. Stat. § 283.31(4); *Clean Wis.*, 2021 WI 71 at ¶¶ 3-13.

10 *See* Wis. Stat. §281.34(4); C*lean Wis.*, 2021 WI 72 at ¶¶ 2-7.

11 *Clean Wis.,* 2021 WI 71 at ¶¶ 14-15; *Clean Wis.,* 2021 72 at ¶¶ 9-10.

12 *Clean Wis.*, 2021 WI 71 at ¶¶ 14-15; *Clean Wis.*, 2021 WI 72 at ¶¶ 9-10.

13 Wis. Stat. § 227.10(2m).

14 *Id.*

15 Kirsten Koschnick, Note, *Making "Explicit Authority" Explicit: Deciphering Wis. Act 21's Prescriptions for Agency Rulemaking Authority*, 2019 Wis. L. Rev. 993, 1023 (2019) ("Ultimately, the Legislature passed Act 21 to unequivocally express that any agency authority must be traced to an explicit, enabling grant of such authority--implied or general powers would no longer be sufficient to confer rulemaking authority."); Wis. Legislature v. *Palm*, 2020 WI 42, ¶¶ 51-52, 391 Wis. 2d 497, 942 N.W.2d 900 ("The explicit authority requirement is, in effect, a legislatively-imposed canon of construction that requires us to narrowly construe imprecise delegations of power to administrative agencies.").

16 The Wisconsin Supreme Court has summarized the doctrine of express and implied authority this way:

> Wisconsin has adopted the 'elemental' approach to determining the validity of an administrative rule, comparing the elements of the rule to the elements of the enabling statute, such that the statute need not supply every detail of the rule. If the rule matches the elements contained in the statute, then the statute expressly authorizes the rule.

Wis. Citizens Concerned for Cranes and Doves v. Wis. Dep't of Nat. Res., 2004 WI 40, ¶ 14, 270 Wis. 2d 318, 677 N.W.2d 612 (internal citations omitted). For example, under the doctrine of express and implied authority, a pre-Act 21 court found that even though a Wisconsin statute specifically required an agency to require commercial sprinkler systems in apartments with 20 or more units, the agency could require sprinkler systems in buildings with four or more units because of a general grant of authority to require owners of public buildings to install fire suppression devices to protect the public welfare. Wis. Builders Ass'n v. Wis. Dep't of Com., 2009 WI App 20, ¶¶ 10, 13, 316 Wis. 2d 301, 762 N.W.2d 845. This case is among those that caused Governor Walker to introduce Act 21. Regulatory Reform Info Paper, *supra* note 5.

17 *Clean Wis.*, 2021 WI 71 at ¶ 25; *Clean Wis.*, 2021 WI 72 at ¶ 24 (While the majority brings back the word "express" and introduces the word "broad" into the interpretation of the explicit authority requirement, they also state that agencies have no implicit authority.)

18 *Clean Wis.*, 2021 WI 71 at ¶ 35; The whole text of Wis. Stat. § 283.31(5) reads, "[e]ach permit issued by the department under this section shall, in addition to those criteria provided in subs. (3) and (4), specify maximum levels of discharges. Maximum levels of discharges shall be developed from the permittee's reasonably foreseeable projection of maximum frequency or maximum level of discharge resulting from production increases or process modifications during the term of the permit."

19 *Clean Wis.*, 2021 WI 71 at ¶ 35.

20 Wis. Adm. Code NR § 243.14(2)(b)3.

21 Wis. Adm. Code NR §§ 243.14(1), (2)(b)3.

22 *Clean Wis.*, 2021 WI 71 at ¶¶ 38-39. (See Wis. Stat. § 283.31(3)(a) and (f),

authority to implement both of these conditions, the court upheld the ruling of the lower court.

Justice Patience Roggensack (joined by Justice Rebecca Bradley) dissented,[23] arguing that the majority's decision finding DNR has the authority to implement the conditions has "restored court deference to administrative agency assertions of power that the legislature explicitly limited in Act 21."[24] Justice Roggensack explained that the court had previously interpreted the statutes passed as part of Act 21 as a "legislatively-imposed canon of construction that requires [courts] to narrowly construe imprecise delegations of power to administrative agencies."[25] Looking at the legislative history of Act 21, she asserted it was intended to prohibit agencies from creating rules more restrictive than regulatory standards or thresholds provided by the legislature.[26] Further, Justice Roggensack showed that the legislature amended out the phrase "expressly" from the explicit authority requirement and replaced it with "explicitly."[27] She cited to statements made by former state Representative Tom Tiffany[28] during his floor speech explaining the amendment that "courts have interpreted expressly very broadly" and that using "explicitly" instead would be a stronger limitation on agency authority.[29] Concluding her opinion, Justice Roggensack stated the majority stepped "out of the judicial lane" to become "a maker of the law" by taking "apart what the legislature enacted in Act 21" and "reinstat[ing] control by agency regulation."[30]

In *Clean Wisconsin II*, the court (Justice Dallet, joined by Chief Justice Ziegler and Justices Karofsky and Ann Walsh Bradley) ruled that DNR has the authority to consider the environmental effects of the proposed high capacity wells not written in the statutes because the requirement of "explicit" authority does not mean the Department needs "specific" authority to do so.[31] The court went on to state the Department has explicit authority under Wis. Stat. §§ 281.11 and 281.12 to consider a proposed well's potential impact on the environment.[32] While intervenors (the Wisconsin Legislature and industry groups) argued that the Department does not have authority to conduct such a review because Wis. Stat. § 281.34(4) lists only three circumstances in which the Department can review environmental impacts of high capacity wells (none of which applied in this case), the court determined that Wis. Stat. § 281.12's statement that DNR "shall formulate plans and programs" to prevent water pollution was explicit authority to conduct the environmental review.[33] The court affirmed the lower court's judgement.

Justice Rebecca Bradley (joined by Justice Roggensack) dissented, arguing that through Act 21, "the legislature reclaimed a portion of its constitutionally-conferred powers previously delegated to agencies" in line with the principle that an "agency's powers, duties and scope of authority are fixed and circumscribed by the legislature and subject to legislative change."[34] Justice Bradley stated the majority opinion nullifies this legislative reclamation, explaining that "contrary to the majority's conclusions, there is no legal authority for DNR to conduct environmental impact reviews of any of the eight proposed high capacity wells, much less any 'explicit authority' as § 227.10(2m) commands."[35] Attacking the majority's findings of explicit authority in Wis. Stat. §§ 281.11 and 281.12, Bradley said agencies cannot "transform broad statements of legislative purpose or intent into a conferral of authority."[36] According to Bradley, the majority's decision transforms Wisconsin's administrative state into "Frankenstein's monster, a behemoth beyond legislative control unless the legislature kills it."[37]

Together, these decisions change much of what the legislature accomplished through the passage of Act 21. Agencies can rely on "explicit" and "broad" statutory authority[38] along with general statutory provisions[39] when making policy decisions. In a reversal from its positions in *Legislature v. Palm*, *Tavern League v. Palm*, and *Papa v. DHS*, the *Clean Wisconsin* court restricted the legislature's ability to police delegations of its lawmaking authority to administrative agencies.

Wis. Stat. § 283.31(4)). NR § 243.14(2)(b)3 states, "[m]anure or process wastewater may not cause the fecal contamination of water in a well."

23 Justice Brian Hagedorn did not participate in either case. Although Justice Hagedorn did not give a reason for his recusal, the most plausible reason is his previous role as Chief Legal Counsel to former Governor Scott Walker, who oversaw the permits in both cases while in office.

24 *Clean Wis.*, 2021 WI 71 at ¶ 49 (Roggensack, J., dissenting).

25 *Id.* at ¶ 70.

26 *Id.* at ¶ 64.

27 Wis. Stat. 227.10(2m).

28 Tom Tiffany is now a United States Congressman representing the Seventh District of Wisconsin.

29 *Clean Wis.* 2021 WI 71 at ¶ 68 (Roggensack, J., dissenting).

30 *Id.* at ¶ 81 (Roggensack, J., dissenting).

31 *Clean Wis.*, 2021 WI 72 at ¶¶ 21-22. Further, the Court said they were still under a duty to "liberally construe" statutes that expressly conferred agency authority. *Id.* at ¶ 24 citing Wis. Dep't of Justice v. DWD, 2015 WI 114, ¶ 30, 365 Wis. 2d 694, 875 N.W.2d 545 (Note this case was decided prior to binding precedent on Act 21's "explicit authority" requirement.).

32 *Clean Wis.*, 2021 WI 72 at ¶¶ 25-26. (Wis. Stat. § 281.11 and 281.12 contain a "statement of policy and purpose" and "general department powers and duties" for subchapter II of Wis. Stat. Ch. 281); *See* Lake Beulah Mgmt. Dist. et al. v. Wis. Dep't Nat. Res. et al., 2011 WI 54, ¶¶ 34, 39, 335 Wis. 2d 47, 799 N.W.2d 73.

33 *Clean Wis.*, 2021 WI 72 at ¶ 25.

34 *Id.* at ¶ 34 (R. Bradley, J., dissenting) (quoting Schmidt v. Dep't of Res. Dev., 39 Wis. 2d 46, 57, 158 N.W.2d 306 (1968)).

35 *Id.* at ¶¶ 35, 38.

36 *Id.* at ¶¶ 52.

37 *Id.* at ¶ 57.

38 *Clean Wis.*, 2021 WI 71 at ¶ 25; *Clean Wis.* 2021 WI 72 at ¶ 24.

39 *Clean Wis.*, 2021 WI 72 at ¶ 28.