STATE COURT
Docket Watch®

New York and Maine High Courts Review State Financing of Schools

by Amber Taylor

In the last year, the highest courts in New York and Maine issued important rulings in school finance cases. The New York court refused to require the state to spend $5.63 billion in additional operating funds for New York City public schools, but upheld the state's proposed $1.93 billion increase — itself required by an earlier state supreme court decision. The Maine court upheld a statute that excluded sectarian high schools from eligibility for public funding in districts where there was no public high school.

New York

In *Campaign For Fiscal Equity Inc. v. New York* (*CFE III*), the New York Court of Appeals, with Judge Pigott writing for the majority, "declare[d] that the constitutionally required funding for the New York City School District includes additional operating funds in the amount of $ 1.93 billion."[1] The court thus rejected the plaintiff's contention that that amount was not a reasonable estimate of the amount required to fulfill New York's constitutional guarantee of a sound basic education for children.

The New York state constitution requires the legislature to "provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."[2] The New York state courts have interpreted this as a guarantee of a "sound basic education."[3] The Campaign For Fiscal Equity (CFE) filed suit, arguing that the New York City public schools had not fulfilled this guarantee and that school financing was to blame. In *CFE I*, the court of appeals preserved their claims from a motion to dismiss[4] and in *CFE II* held that they had established a causal link between the existing school finance system and the failure of the city's public schools to prepare children "to function productively as civic participants."[5]

The court in *CFE II* directed the state to reform the school finance system and to ensure accountability by July 30, 2004.[6] To conform to this mandate, the Governor created the Zarb Commission, which assessed districts' educational performance and spending to determine the location and size of "spending gaps." The Commission calculated that the spending gap for the city's public schools' operating budget was $1.93 billion.[7] Although the Governor and

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West Virginia Supreme Court of Appeals Finds Significant Economic Presence Test Better Indicator for Nexus than Physical Presence Requirement

by Dean A. Heyl

Nexus has been a vexing issue for the business community and state revenue departments for years. This spring, two petitions for certiorari were filed before the United States Supreme Court asking for a decision on whether the imposition of franchise and corporate income taxes by a state violates the Commerce Clause when a company has no physical presence in that state.[1] In June, the Supreme Court declined to hear the cases.

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JULY 2007

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FROM THE EDITOR

In an effort to increase dialogue about state court jurisprudence, The Federalist Society presents *State Court Docket Watch*. This newsletter is one component of the State Courts Project, presenting original research on state court jurisprudence and illustrating new trends and ground-breaking decisions in the state courts. These articles are meant to focus debate on the role of state courts in developing the common law, interpreting state constitutions and statutes, and scrutinizing legislative and executive action. We hope this resource will increase the legal community's interest in tracking state jurisprudential trends.

Additionally, readers are strongly encouraged to write us about noteworthy cases in their states which ought to be covered in future issues. Please send news and responses to past issues to Debbie O'Malley, at domalley@fed-soc.org.

CASE IN FOCUS

Washington Supreme Court Upholds Talk Show Hosts' Right to Free Speech

by Andy Cook

In *San Juan County, et al v. No New Gas Tax*, the Washington Supreme Court upheld the right of two Seattle radio talk-show hosts to comment about campaign issues on the air.[1] In its unanimous 9-0 decision, the supreme court ruled that KVI radio hosts John Carlson and Kirby Wilbur's on-air support for an anti-gas tax initiative did not run afoul of campaign finance laws.

Facts Leading to Lawsuit

In 2005, the Washington Legislature enacted a controversial 9.5-cents-a-gallon gas tax. Wilbur and Carlson, two popular conservative talk-show hosts, opposed the new tax on their radio programs. The hosts also actively supported Initiative 912 (I-912), the ballot measure brought by opponents of the gas tax to repeal the law.

Carlson and Wilbur spent considerable time during their morning and evening radio shows encouraging listeners to contribute to the campaign. They also urged their listeners to sign and circulate the initiative, so that it qualified for the fall ballot. Although supporters of the initiative garnered enough signatures to qualify it for the fall election, I-912 was eventually defeated by the voters.

During the beginning stages of the initiative process, the cities of Seattle, Kent, Auburn, and San Juan Island County filed a complaint against the No New Gas Tax (NNGT) campaign. The local governments alleged that the NNGT campaign violated public disclosure provisions under Washington's Fair Campaign Practices Act (FCPA).[2] Specifically, the municipalities alleged that the NNGT campaign failed to report in-kind contributions from Fisher Communications, the corporation that owns the radio station.

According to the local governments, the NNGT campaign received free advertising from Carlson and Wilbur's radio shows. Therefore, the municipalities sought an injunction to prevent the campaign from receiving further in-kind contributions until it reported the contributions to the Public Disclosure Commission — the state commission overseeing elections.

Trial Court Decision

The Thurston County Superior Court (trial court) granted the municipalities' preliminary injunction. The trial court ruled that the NNGT campaign received contributions of free air time for political advertising in support of I-912.[3] The trial court further ruled that Fisher Communications was required to disclose the value of Carlson's and Wilbur's on-air contributions to the Public Disclosure Commission.[4]

The NNGT campaign appealed the ruling and filed an emergency stay, arguing that the injunction would limit the radio hosts' ability to speak about the initiative. According to Fisher Communications' vice-president, since Washington law limits in-kind contributions to $5,000 three weeks prior to the election, the practical

effect of the ruling was that the hosts would no longer be able to speak about the initiative on the air.[5] The radio feared that allowing the hosts to continue speaking about the I-912 campaign would subject the radio station to prosecution for violating campaign finance laws.[6]

The NNGT campaign proceeded to file fourteen counterclaims against the prosecutors, alleging violations of the campaign officials' civil rights. The trial court dismissed the counterclaims.

In its ruling, the trial court found that Carlson and Wilbur were principals of the NNGT campaign; that the hosts intentionally promoted the campaign on the air; and that the on-air discussion of I-912 had value to the NNGT campaign similar to advertising that could be purchased off the air.[7] According to the trial court, forcing the radio show hosts to report the value of their discussions would not "in any way" restrict their on-air speech.[8]

Unanimous Supreme Court Reversal

In a unanimous decision, the Washington Supreme Court reversed the trial court. The Court ruled that Wilbur's and Carlson's on-air discussion of I-912 was protected speech under the FCPA.

The Supreme Court began by analyzing Washington's FCPA. Specifically, the court looked to the statute to determine what constituted a "contribution" and determined that the hosts' on-air speech fell within the statute's media exemption.

The FCPA exempts from the definition of "contribution" any "news item, feature, commentary, or editorial in a regularly scheduled news medium… by a person whose business is that news medium, and that is not controlled by a candidate or a political committee."[9]

The prosecutors argued that media exemption did not apply because the radio broadcasts were "controlled" by a political committee due to the radio hosts' role as "principals" of the NNGT campaign. The court rejected this argument.

According to the justices, the applicability of the media exemption did not turn on the radio hosts' relationship with the campaign. Instead, the question was whether the news medium — in this case, the radio station — was controlled by a political committee, not whether a political committee authored the content of the particular communication. The court further noted that "[a]s with the federal exemption, 'control' does not change from hour to hour, depending on who may be hosting a particular radio program."[10]

Thus, according to the Washington Supreme Court, the hosts' on-air support for the initiative easily fell within the exemption, regardless of whether Carlson or Wilbur "acted at the behest of NNGT or solicited votes and financial support for the initiative campaign."[11]

Because the Washington Supreme Court ruled in favor of the NNGT campaign based on the statute, the court refused to address whether disclosure requirements of the FCPA were unconstitutional as applied to the NNGT.[12]

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South Carolina Supreme Court Creates New Duty of Medical Care Providers to Non-Patients

Last year, in *Hardee v. Bio-Medical Applications of S.C., Inc.*, the Supreme Court of South Carolina took the unusual step of hearing an appeal directly from the trial court.[1] The trial court in the case had granted summary judgment to the defendant medical center, concluding that South Carolina law did not recognize any legal duty by medical providers to unknown third parties.

The facts of the case involved a two car automobile accident caused when one of the drivers experienced insulin shock and lost control of the vehicle. That driver, Danny Tompkins, was a Type 1 insulin dependent diabetic. Just prior to the accident, he was treated by Bio-Medical Applications of South Carolina, Inc. d/b/a Conway Dialysis Center ("Conway Dialysis Center"). For some time, Tompkins made several trips each week to the Conway Dialysis Center to undergo hemodialysis treatment. Hemodialysis treatment involves removal of the patient's blood in order to run it through a dialysis machine before returning it to the patient's body.

The court record reveals that Tompkins was familiar with his treatment and on occasion was driven to the Conway Dialysis Center by someone else. On this occasion, however, he drove himself for treatment. He was released to go home from the Center shortly after completion. Tompkins was killed in the accident.

Following the accident, the driver and passenger in the other car involved in the accident filed suit against the Conway Dialysis Center, alleging negligence in releasing Tompkins to drive home without proper

warning of the risks of possible low blood sugar or insulin shock following hemodialysis. Also alleged was a failure on the part of the Center to perform proper post-treatment tests or monitoring of Tompkins prior to his release.

The trial court granted summary judgment to Conway Dialysis Center based on existing South Carolina law, which did not impose a duty to unknown third parties on medical providers. In other words, generally under South Carolina law at the time of the accident a doctor or medical provider was only subject to suit for wrongful or deficient medical treatment by the actual patient. The trial court determined that, since the plaintiffs had no relationship with the Conway Dialysis Center, no duty was owed to them by that medical provider in connection with the treatment rendered Tompkins. The plaintiffs appealed that decision.

Extension of the duty owed by medical providers to those other than the patients receiving treatment has been recognized in some other jurisdictions; although those were factually dissimilar situations. An exception to the general principle that a medical provider only owes a duty to its *patient* does exist in the context of contagious and communicable diseases.[2] These decisions, however, are based in large part on the proximity between the patient and the third party to whom the expanded duty was said to be owed. In addition to the historical recognition that a physician's relationship is often with both the patient and the patient's family, it was explained that a "well-established predicate for extending a physician's duty of care to third parties is when the service performed on behalf of the patient necessarily implicates protection of household members or other identified persons foreseeably at risk because of a relationship with the patient, whom the doctor knows or should know may suffer harm by relying on prudent performance of that medical service."[3]

A similar rationale has been applied in other states to determine that the same duty extends to a patient's family member, even where the disease is not technically communicable but is known to appear in clusters — impacting family members of those infected who often also have contracted the disease.[4] The South Carolina Supreme Court's opinion goes much further, however.

Acknowledging that it was, indeed, recognizing a

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Missouri High Court Finds Constitutional Right To Collective Bargaining for Public Sector Employees

by Jonathan Bunch

In 2002, the Independence, Missouri school board adopted new terms of employment for the employees of the school district. In so doing, the board also rescinded terms of employment previously established through agreement or understanding between the school district and its employees. The school district adopted the new terms without bargaining collectively with several employee associations representing teachers, custodians, and transportations employees who had been affected by the change.

In response to the school district's actions, these employee associations, including the National Education Association, sued the school district for refusing to bargain with them over salaries and working conditions. The employee associations also challenged the school district's decision to unilaterally rescind established terms of employment.

Both sides agreed that the school district's actions constituted a refusal to bargain collectively. The employee associations maintained that the refusal to bargain collectively was a violation of the Missouri Constitution, while the school district maintained that it was not obligated to bargain with the employee associations because the Missouri Constitution did not grant public-sector employees the right to bargain collectively.

A Missouri trial court agreed with the school district. The court concluded that, Missouri law permitted the school district to refuse to bargain collectively with their employees, and that the school district could unilaterally rescind the existing employment agreements. The case reached the Supreme Court of Missouri, where the trial court was reversed on both counts.[1]

I. The Supreme Court's Decision

Though the high court unanimously held that school districts cannot unilaterally rescind existing employment agreements, only five of the seven judges on the court agreed that the Missouri Constitution gives public-sector employees a right to bargain collectively.

The employees based their claim to a constitutional right to bargain collectively on their interpretation of Article I, Section 29 of the Missouri Constitution, which

states: "employees shall have the right to bargain collectively."[2] The school district disagreed with this interpretation of Section 29, and instead pointed to *Springfield v. Clouse*,[3] the first case to interpret Section 29. Just two years after Section 29 was adopted by Missouri voters, the Missouri Supreme Court held in *Clouse* that the right to bargain collectively that was expressed in Section 29 had no application in the public sector and that public-sector employees had been deliberately excluded from Section 29's reach.[4]

The school district also highlighted the fact that since *Clouse* the Supreme Court of Missouri has had multiple opportunities to re-examine that case as well as Section 29, and has repeatedly affirmed Section 29's exclusive application to private-sector employees. According to the school district, the passage of time and the public's expression of its will to distinguish between public and private sector employees for purposes of collective bargaining presented compelling reasons for rejecting the employees claim on the basis of *stare decisis*.

According to the employees, the school district's claim that Section 29 does not extend to public-sector employees is erroneous because the terms of Section 29 do not distinguish between employees in the public and private sectors. They further argued that *Clouse* and its progeny should be overruled to the extent those cases make that distinction.

A majority of the Missouri Supreme Court agreed and overruled *Clouse*. Justice Michael Wolff, writing for the majority, stated that *Clouse* had rested its disparate treatment of public and private sector employees on the "now largely defunct nondelegation doctrine, which holds that it is unconstitutional for the legislature to delegate its rule-making authority to another body." And, according to the majority, because "the nondelegation doctrine has been largely abandoned in Missouri," *Clouse*'s holding that Section 29 only applies to the private sector should be overruled.

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New York Court of Appeals Rules on Contraception Case

by Gerard Bradley

Seeking to advance women's health and their overall treatment on terms equal to men, the New York Legislature in 2002 enacted the Women's Health and Wellness Act (WHWA). WHWA's most controversial provision amended the state's insurance laws: requiring that any employer health plan "which provides coverage for prescription drugs shall include coverage for the cost of contraceptive drugs or devices."

Plaintiffs in *Catholic Charities of Diocese of Albany v. Serio* were ten "faith-based social service organizations," eight of which were affiliated in some way with the Roman Catholic Church and two affiliated with the Baptist Bible Fellowship. All had purchased health insurance for their employees and these plans included prescription drugs. The problem, as the New York Court of Appeals described it, was that "[p]laintiffs believe contraception to be sinful, and assert that the challenged provisions of the WHWA compel them to violate their religious tenets by financing conduct that they condemn."

"At the heart of this case", the court wrote, is WHWA's exemption for "religious employers." An employer may request an insurance contract "without coverage for... contraceptive methods that are contrary to the religious employer's religious tenets." Wherever such a request is granted, the insurance carrier must "offer coverage for contraception to individual employees, who may purchase it at their own expense 'at the prevailing small group community rate.'"

WHWA stipulated a four-part test for this exemption. The criteria were carefully crafted to exclude all educational, health, and social service agencies, even those operated by the church itself. In order to qualify, an organization would have to have as its purpose the "inculcation of religious values." It would also have to employ as well as *serve* "primarily" members of the sponsoring organization's faith. In effect, the only "religious employers" who qualify for this exemption would be religious congregations themselves — churches, synagogues and the like. The stated reason for the narrow exclusion was the following: in the legislators' judgment, too many female employees would otherwise be left outside the must-carry provision of WHWA.

Plaintiffs in *Serio* asserted that the exemption was unconstitutionally narrow. They did not challenge the law facially, but instead said it was unenforceable as applied to *them*. The stated reason for their concern was simple: legally, they retained the option of foregoing prescription drug insurance altogether; morally, however, they judged that option to be inconsistent with their duty to provide a just wage. The court did not question the sincerity of this claim, or of the plaintiffs' conviction that contraception is

wrong, or the centrality of these beliefs to their faiths.

The court of appeals nonetheless upheld the law against federal and state Free Exercise challenges, and also against federal Establishment Clause attack. There were no dissents or concurrences; one judge did not participate. The result in *Serio* is the same as that reached by the California Supreme Court upholding a nearly identical statute.[1] The U.S. Supreme Court denied review of that case.[2]

The New York court decided both federal challenges speedily, on the basis of U.S. Supreme Court precedent. In these parts of its opinion the court of appeals gave almost no credence to the plaintiffs' arguments and, in fact, made new law on the state Free Exercise claim. It is this part of the opinion which is likely to be critically engaged by commentators and other courts alike.

On the Establishment Clause: The plaintiffs asserted that the exemption provision was an invalid discrimination between (as the Court of Appeals phrased it)) "religious organizations that are exempt from the contraception requirements and those that are not." As the court recognized, the "clearest command" of the Establishment Clause is that "one religious denomination cannot be officially preferred over another" (citing the Supreme Court's holding in *Larson v. Valente,* 456 U.S. 228 (1982)).

The New York court rejected the discrimination analogy, saying that the plaintiffs' claim was "without merit." The court dismissed any possibility that WHWA was aimed at Catholics or Baptists. The law instead drew a distinction based upon the "nature of [the denominations'] activities." The court further observed that the plaintiffs' theory of *Larson* "would call into question" any attempt to define an exemption for religious organizations from a generally applicable law.

Whether or not the court of appeals arrived at the right answer, the question is more difficult than it allowed. The New York legislature wanted to have some exemptions, but not too many: "[t]he Legislature decided that to grant the broad exemption that plaintiffs seek would leave too many women outside the statute." This desire was the wellspring of the precise exemption it recognized. The statutory definition did not spring, in other words, from some conventional definition or internal logic of churches or religion.

Nor was the statutory definition explainable according to the problem which the exemption provision addressed. The plaintiffs' convictions do not vary with the size or diversity of their clientele. A Catholic hospital is a Catholic hospital independent of who occupies its beds. The need for the exemption, and thus the *reason* for having any exemptions at all apply all the same to churches, hospitals and social service agencies. It was, then, a wholly *extrinsic* factor — the "wellspring" desire to limit the number of women employees affected — which produced the exemption in WHWA.

Even so, the "clearest command" of the Establishment Clause would prohibit achieving the desired goal by discriminatory or arbitrary means. The legislature could not say that only "small" churches or churches outside New York City or every third church in the state directory qualified for the exemption, *because* that would yield the right number of exemptions. The "clearest command" of the Establishment Clause could actually present the legislature with a hard choice, that between a non-discriminatory definition which yielded too many exemptions, and no exemption at all.

On the federal Free Exercise Clause: The New York court applied the U.S. Supreme Court's controlling precedent of *Oregon v. Smith*.[3] *Smith* was a watershed case. In it the Supreme Court held 5-4 that the Free Exercise Clause did *not* authorize the judiciary to craft exemptions from "neutral" legal regulations for religious conscientious objectors. The New York court quoted *Smith*: "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[4]

It is important to note that *Smith* had entirely to do with *courts'* power under the federal Constitution. Nothing in *Smith* or in any case since casts doubt upon courts' authority to enforce exemptions from general laws, such as the exemption put into WHWA by the New York legislature. Much less has any Free Exercise case since *Smith* cast doubt upon legislators' authority to craft exemptions.

The doubt about exemptions stems instead from confusion in Establishment Clause jurisprudence. The uncertainty has nothing to do with the sect-neutrality requirement of *Larson.* It is long been universally agreed that *no* law — even one setting out an exemption — may intentionally discriminate among religions. The real problem owes to a more secularized interpretation of the Establishment Clause, a reading supported by holdings of the U.S. Supreme Court to the effect that no law may "endorse" religion or favor it in any way when compared to non-religion.

This extraordinary sort of "neutrality" would imperil any exemption limited to those who are "religious," no mater how generously that class was defined. Fortunately, this peril was laid to rest by the Supreme Court in the 2005

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California Supreme Court to Consider Partisan Government Campaigning

The California Supreme Court currently has before it a case involving the question of whether the government may become its own partisan in elections: *Vargas v. City of Salinas* (S140911). But to understand what is at stake in *Vargas*, one must first have the backdrop of *Stanson v. Mott*, 17 Cal.3d 206 (1976) — the opinion referenced in the state supreme court's own website as concerning the "proper standard for determining when a city has unlawfully expended public funds on improper partisan campaigning." For the past 30 years, *Stanson* has governed the degree to which government agencies may involve themselves in election campaigning under California law. Under the *Stanson* standard, the line between acceptable "informational" material and impermissible "promotional" material is based on a case-by-case analysis, in which the court must give "careful consideration" to "such factors as the style, tenor and timing of the publication," with no "hard and fast rule" to "govern every case."[1]

In *Stanson*, the election involved a large statewide bond issue to fund acquisition of park and recreational land. The government's involvement was the expenditure of $5,000 by the state department of parks and recreation allegedly "to promote" passage of the issue.[2] The expenditure included money for promotional materials written by both the department and an outside organization favoring the bond issue, as well as money spent funding speaking engagements and travel expenses, and the devotion of a three-person staff working specifically on the issue.[3] A taxpayer filed suit one day before the election, seeking to require the director to repay the funds to the state treasury. (The bond issue passed anyway.) The state trial court dismissed the case on demurrer, and the state high court reversed the judgment of dismissal, concluding that the director could be sued for such an expenditure if he failed to exercise due care in permitting the expenditure.

The *Stanson* decision began with the premise that "a public agency may not expend public funds to promote a partisan position in an election campaign" unless there is "clear and explicit legislative authorization."[4] After disposing of a collateral estoppel defense based on a previous opinion of the state intermediate appellate court,[5] the state supreme court established that there was no legislative authorization "to promote the passage" of the bond issue, and in particular no such authorization to be found in the act authorizing the vote.[6] Significantly, the *Stanson* court's argument was the need for "clear and unmistakable" language supporting promotional expenditures.[7]

But there was another theme sounded by the court: fairness. In a passage citing, *inter alia*, *Federalist* No. 52, the court declared that the government should not "'take sides' in election contests or bestow an unfair advantage on one of several competing factions."[8] That point also surfaced in citation to other cases emphasizing "the importance of governmental impartiality in electoral matters."[9]

The *Stanson* opinion was not without its qualifiers, though. First the task of distinguishing between legislatively authorized lobbying efforts and using public funds in election campaigns.[10] The court's point was that the "legislative process" contemplates that "all interested parties" would be heard from, so public agency lobbying "within the limits authorized by statute" does not undermine or distort the process.[11] The second qualification would have its ramifications later, in the now pending *Vargas* decision: How does a court tell the difference between "unauthorized campaign expenditures and authorized informational activities" — a line that the court acknowledged was "not so clear."[12] The *Stanson* court enunciated a nuanced rule to solve that problem: A court must consider the "style, tenor and timing of the publication;" that is, "no hard and fast rule governs every case."[13] In the case before it, however, there was no need to explore those nuances because of the case's procedural posture. Coming to the high court on demurrer, the court was obligated to accept at face value the plaintiff's allegation that the department had disseminated publications that were "'promotional.'"[14]

The *Stanson* court's resolution obviated the need to consider a more extreme hypothetical: Suppose there *had* been explicit legislative authorization for "promotional" materials to influence an election? While the court noted that it did not need to resolve this question, it did send some rhetorical signals that it was fundamentally mistrustful of the idea.[15] The no-need-to-resolve point was made just after several paragraphs stressing the "uniform judicial reluctance" to allow public funds to be used for the government to essentially "'take sides,'" a prospect that posed the danger of office holders using official power to "perpetuate themselves or their allies."[16] Such a prospect raised, at the very least, a "serious constitutional question."[17]

Stanson was a unanimous opinion written by Justice

Tobriner. Let us now segue to the *Vargas* case, 30 years later, as it was written in late 2005 by a panel from the state's intermediate appellate court from California's Sixth Appellate District (which generally takes cases from trial courts in the San Jose area).[18] In both rhetoric and substance, the intermediate appellate court took a distinctly different approach than the California Supreme Court had in *Stanson*.

Vargas involved a city ballot measure that would have repealed the city's utilities user tax, which represented about 13 percent of the city's general fund budget. City staffers identified "service cuts, some in dire terms" that would be implemented if the measure passed. Their warnings were posted on the city's website. Moreover, the "city informed the electorate of its analysis" through a periodic newsletter to residents, and also by means of a leaflet.[19] Proponents of the measure sued the city for using city funds to oppose the measure; funds claimed to be in excess of $250,000. The city responded with what has become known as an "anti-SLAPP" motion (acronym for strategic lawsuit against public participation), which is supposed to allow defendants sued for exercising free speech rights to end a lawsuit early.

Procedurally, an anti-SLAPP motion is a kind of "quickie" summary judgment motion: It can be brought early in litigation, and can be heard without discovery and without the long response period for summary judgment motions that now is part of California procedural law. However, only certain kinds of lawsuits are susceptible to such an early attack: They must arise from an act in furtherance of free speech or right of petition.[20] Hence, California law now treats such motions as a two-prong process, the first of which is whether the motion qualifies for anti-SLAPP treatment. The second is whether it is meritorious (i.e., that the defendant has enough to win using a summary judgment standard).[21] The trial court granted the motion against the proponents of the tax-relief measure, and the case then went to a panel of the Sixth Appellate District. (In California, parties have an entitlement to appeal from any final judgment against them.[22])

The first prong is particularly interesting as it related to the Sixth District panel's decision to uphold the dismissal. It was, after all, the city itself, acting largely at the instigation of staff who themselves would certainly be affected by the ballot measure, that was wrapping itself in the mantle of free speech.[23] While the *Stanson* opinion had approached the idea of government campaigning cautiously, the *Vargas* intermediate court embraced the notion that the city had a free speech right to campaign — arguing that the right to "speak on political matters'" is the "quintessential subject of our constitutional protections of the right of free speech,'" core values, robust debate, etc.[24] The court essentially avoided the problem of whether the city's "right" to free speech somehow conflicted with the "serious" constitutional issues identified by the *Stanson* court by not considering the problem in the context of the first prong.[25] That gambit allowed the intermediate court to rely on cases that asserted that the "legality" of the speech is irrelevant to the first prong and it was enough that the city had made a "prima facie showing" that the claim against it arose from the "constitutionally protected speech" of the city.[26]

Avoiding the "serious" constitutional issue of the fairness of the city's taking sides enabled the court to more easily dispose of the second (merits) prong. Having held that the city was being sued for the exercise of its free speech rights (totally apart from any considerations raised by *Stanson*), the court then said that the burden had shifted to the plaintiffs to defeat the anti-SLAPP motion.[27] In this passage, the *Vargas* intermediate court did not deal with the rule, which it had cited earlier in explaining the standard of review in anti-SLAPP motions, that the merits prong of an anti-SLAPP motion is akin to a summary judgment motion.[28] In California — probably universally — the initial burden on summary judgment motions always rests with the moving party.[29]

After this shift of burden, it remained for the *Vargas* intermediate court to distinguish *Stanson*. The court did address the "take sides" language from *Stanson*.[30] The distinction was found in a post-*Stanson* addition to the California Government Code that expressly precludes the expenditure of any funds to support or oppose a ballot or measure or candidate, and then defines "expenditure" in terms of communications that "expressly advocate" a ballot position or candidate.[31] While the *Stanson* court had recognized that the line between information and promotion could be difficult to draw—hence its emphasis on tone, style and timing — that provision of the Government Code allowed the *Vargas* intermediate court to draw a bright line: The plaintiffs had to show "express advocacy."[32]

The court, however, still had to wrestle with the following problematic questions: Dire predictions of disaster if a measure passes are *not* express advocacy against the measure? A summary judgment standard to be applied *against* the moving party? In order to address these questions, the *Vargas* intermediate court employed an ipse dixit, acting as its own fact finder about the city's materials: "[I]n our view, the city's communications present a balanced picture of the consequences of the measure. To be sure, they contain a heavy emphasis on

the conclusions of the city staff. But those conclusions are supported by detailed economic analysis, presented for the most part in a straightforward fashion. Furthermore, the city made the views of the repeal proponents available as well," noting that the pro-repeal "views were reflected on the city's website, in the minutes of the city council meeting held in August at which the proponents presented their positions" and their "plans" were also discussed and analyzed" in a city report.[33] With this determination that dire predictions in the wake of the elimination of a city tax constituted a balanced picture of the consequences of the measure, the way was open to affirm the anti-SLAPP dismissal.

Judging from the California Supreme Court's press release announcing it would hear the case, the shift from a standard requiring a court to look at "tone, style and timing" in *Stanson* to the lower court's "express advocacy" standard in *Vargas*, based on a negative implication of a definition of expenditure in a statute, is what caught the attention of the high court.

Endnotes

1 17 Cal.3d at 222.

2 *Id*. at 210-211.

3 *Id.*

4 *Id*. at 210.

5 *Id*. at 211-213.

6 *Id*. at 214-215.

7 *Id*. at 216.

8 *Id.* at 217.

9 *Id*. at 219.

10 *See generally id*. at 218-220.

11 *Id*. at 218.

12 *Id*. at 222.

13 *Id.*

14 *Id.*

15 *Id*. at 219-220.

16 See *id*. at 217-219.

17 *Id*. at 219.

18 38 Cal.Rptr.3d 506. In California, published opinions of the intermediate appellate courts in which review is granted by the California Supreme Court are not included in the hard bound "official reporter" now known as "Cal.App.4th," but may still be accessed in the unofficial California Reporter 3d. Such decisions lose all precedential value, and may not be cited or relied on by any party or court in litigation. They are, however, fair game for academic analysis.

19 37 Cal.Rptr.3d at 510-511.

20 Cal. Code Civ. Pro., § 425.16(b)(1).

21 *See, e.g.,* Varian Medical Systems, Inc. v. Delfino, 35 Cal.4th 180 (2005).

22 *See* Cal. Code Civ. Pro., § 904.1(a)(1).

23 *See* 37 Cal.Rptr.3d at 510-511 (noting significant staff involvement in city's involvement in election).

24 37 Cal.Rptr.3d at 519.

25 The *Vargas* intermediate court articulated plaintiffs' argument that the government "'does not enjoy the same First Amendment freedom as citizens,'" 37 Cal.Rptr.3d at 517, quickly adding that the case did not "require" the court to "test the validity or boundaries of that argument," but then spoke about the "duty" of government "to speak on matters that concern the discharge of its responsibilities toward its citizens." *Id*.

26 37 Cal.Rptr.3d at 520.

27 *Id*.

28 *Id*. at 515.

29 *See* Aguilar v. Atlantic Richfield Co., 25 Cal.4th at 845 ("From commencement to conclusion, the moving party bears the burden of persuasion that there is no genuine issue of material fact….").

30 37 Cal.Rptr.3d at 523-524.

31 Cal. Gov. Code, § 54964, enacted in 2000.

32 37 Cal.Rptr.3d at 522.

33 *Id*. at 526.

Justice Jim Johnson's Concurrence

In a strongly written concurring opinion, Justice Jim Johnson—joined by Justice Richard Sanders—rebuked the local governments for bringing the lawsuit. In his opening sentence, Justice Johnson stated that "[t]oday we are confronted with an example of abusive prosecution by several local governments."[13]

In addition, Justices Johnson and Sanders opined that the municipalities brought the lawsuit for the purpose of "restricting or silencing political opponents."[14]

The concurring justices further argued that the local governments expected millions of dollars from the gas tax, and that the law firm they hired stood to potentially benefit financially from its role as a bond counsel to the state of Washington.[15]

The justices also explained that the injunction granted by the trial court was a "chilling of speech" because of the substantial risk that the radio hosts' continued commentary would lead to excessive financial sanctions and potential prosecution.

The justices ended their concurring opinion by admonishing the prosecutors for bringing the lawsuit. According to Justices Johnson and Sanders, the lawsuit appeared as a calculated way to "muzzle media support of the NNGT initiative" and "was offensive to the notion of free and open debate."[16] Thus, according to the justices, the NNGT campaign should be awarded attorneys' fees on remand.

Conclusion

The Washington Supreme Court's decision appears to be significant not only for Washington, but for other states with similar laws. (Many states have campaign finance laws similar to Washington's, which are patterned after federal law).

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Endnotes

1 --- P.3d ---, 2007 WL 1218207.

2 Revised Code of Washington (RCW) chapter 42.17.

3 *No New Gas Tax*, 2007 WL 1218207 *3.

4 *Id.*

5 *Id.*

6 *Id.*

7 2007 WL 1218207 *4.

8 *Id.*

9 RCW 42.17.020(14)(a)(iv).

10 2007 WL 1218207 *7

11 *Id.* at *10.

12 *Id.*

13 *Id.* at *11.

14 *Id.*

15 *Id.*

16 *Id.* at *15.

new duty, the Supreme Court of South Carolina reversed the trial court's decision. The court explained its position as follows:

> *We believe South Carolina tort law ought to recognize such a duty.* Generally, a medical provider has a duty to warn of the dangers associated with medical treatment. Thus, a medical provider who provides treatment which it knows may have detrimental effects on a patient's capacities and abilities owes a duty to prevent harm to patients *and to reasonably foreseeable third parties* by warning the patient of the attendant risks and effects before administering the treatment.[5]

This case represents the first time the Supreme Court of South Carolina addressed this issue directly. Though the court previously recognized some limited situations in which a physician-patient relationship may not be required to give rise to a legal action against the medical provider, these exceptions never applied to third parties wholly unknown to the medical provider.

In fact, nearly twenty years ago, Judge Bell, a former South Carolina Court of Appeals judge, explained this issue clearly in the case of *Sharpe v. S.C. Dept. of Mental Health*:

> [T]he duty to observe appropriate standards of medical care was a duty owed to [the patient], not a duty owed to Sharpe [a third party]. Sharpe was a stranger to the treatment process. Sharpe had no relationship with the Department [medical care provider or facility] from which a duty to him could arise. His position was no different from that of any member of the general public as far as the Department was concerned. He also had no relationship with [the patient]....
>
> In these circumstances, even if the Department failed to observe due care in treating [the patient], there was no liability to Sharpe....
>
> The plaintiff must sue in his own right for a breach of duty personal to him, and not as the vicarious beneficiary of a breach of duty to another....
>
> Sharpe's theory would overthrow settled doctrine in favor of a rule that one rendering medical services owes a duty of care not only to the patient he treats, but to the whole world. It would make doctors and hospitals liable to the Frank Smiths who happen casually on the scene as well as the Bobby Sharpes who live next door. It would create no end of liability for negligence. Such a rule would be as unwise as it is unprecedented.[6]

The present case of *Hardee* is a sharp departure from *Sharpe*. Recognizing the novelty of its decision in *Hardee*, the Supreme Court of South Carolina — in its unanimous decision to create this new duty — stated the following:

> This is a very narrow holding that carves out an exception to the general rule that medical providers do not owe a duty to third party non-patients. Importantly, this duty owed to third parties is identical to the duty owed to the patient, i.e., a medical provider must warn a patient of the attendant risks and effects of any treatment. Thus, our holding does not hamper the doctor-patient relationship.[7]

The *Hardee* court went on to explain that its decision did not decide the ultimate issue whether the Conway Dialysis Center actually had the duty in this case — i.e., whether the plaintiffs were reasonably foreseeable third parties or whether the facts supported the allegation the Center failed properly to warn Tompkins: "We note, however, that we do not make the determination that Respondent owed Appellants this duty of care. The trial court granted summary judgment holding that under no factual circumstances could a duty exist. We hold that, under some circumstances, a duty can exist."[8]

Critics of the court have noted, however, that the new duty recognized in *Hardee* was imposed on the Conway Dialysis Center despite its creation *after* the conduct giving rise to the action—arguably creating a troubling precedent for medical care providers in South Carolina.

Endnotes

1 370 S.C. 511, 636 S.E.2d 629 (2006).

2 *See, e.g.,* Tenuto v. Lederle Labs., 687 N.E.2d 1300 (N.Y. Ct. App. 1997); Troxel v.A.I. Dupont Inst., 675 A.2d 314 (Pa. 1996); DiMarco v. Lynch Homes-Chester County, Inc., 559 A.2d 530 (1989).

3 *See Tenuto*, 687 N.E.2d at 613 (extending duty of pediatrician beyond immediate patient to the parents of the patient in connection with the risks of parental contact polio from oral vaccination of child).

4 *See* Bradshaw v. Daniel, 854 S.W.2d 865 (Tenn. 1993) (extending duty to provide proper advice on symptoms related to Rocky Mountain Spotted Fever to wife following her husband's death from the disease).

5 *Hardee*, 370 S.C. 511, 516, 636 S.E.2d 629, 631-32 (2006) (emphasis added).

6 Sharpe v. S.C. Dept. of Mental Health, 292 S.C. 11, 17-18, 354 S.E.2d 778, 782 (Ct. App. 1987) (Bell, J., concurring).

7 *Hardee*, 370 S.C. at 516, 636 S.E.2d at 632.

8 *See Hardee*, 370 S.C. at 516 n.2, 636 S.E.2d at 631 n.2

West Virginia Court Finds Better Nexus

This article examines the case of *Tax Commissioner of the State of West Virginia v. MBNA America Bank, N.A.*[2] In *Lanco, Inc. v. Director, Division of Taxation*,[3] the New Jersey Supreme Court upheld the determination of Appellate Division of New Jersey Superior Courts that "the Director constitutionally may apply the Corporation Business Tax notwithstanding a taxpayer's lack of a physical presence in New Jersey."[4] In the *MBNA* case, the West Virginia Supreme Court of Appeals (West Virginia Supreme Court) similarly held that although MBNA did not have a physical presence in West Virginia the state could impose its business franchise and corporation net income taxes on MBNA's activity within the state.[5]

This was far from a unanimous decision, however; with a very spirited dissent by Justice Benjamin, who stated his fear of courts engaging "in some form of legislative activism for which the only support is political, not legal."[6]

Background

MBNA, a company that primarily engaged in issuing and servicing VISA and MasterCard credit cards, appealed the imposition of West Virginia's business and franchise tax and corporation net income tax for the tax years of 1998 and 1999 based on facts that MBNA's principal place of business and commercial domicile was in Wilmington, Delaware during the years in question and that it had no real or tangible property and no employees located in West Virginia. The Chief Administrative Law Judge (ALJ) with the Office of Tax Appeals ruled in favor of MBNA reasoning that:

> [U]nder the Commerce Clause, a state may not subject an activity to a tax unless that activity has a 'substantial nexus' with the taxing state, and a mere economic exploitation of the market is not sufficient. Because it was agreed that MBNA does not have a physical presence in West Virginia, the ALJ concluded that the State's business franchise and corporation net income taxes could not be imposed on MBNA's activity within the State.[7]

The Tax Commissioner appealed the ALJ's decision to the Circuit Court of Kanawha County, and the court found that physical presence is not necessary to show a substantial nexus for purposes of state taxation of foreign corporations. The court went on to find that MBNA's significant business in West Virginia was sufficient to meet the substantial nexus standard and therefore the imposition of the State's business franchise and corporate net income taxes on MBNA did not violate the Commerce Clause.

MBNA appealed the circuit court's order to the West Virginia Supreme Court. In determining whether the Commerce Clause was violated by imposing the state's business franchise and income taxes on MBNA, the West Virginia Supreme Court examined the nexus standards established in the U.S. Supreme Court decision *Quill Corp. v. North Dakota*[8] and 15 U.S.C. § 381(a), more commonly known as P.L. 86-272.

In the *Quill* decision, the Court held that "a vendor whose only connection with customers in a taxing state is by common carrier or the United States mail is free from state-imposed duties to collect sales and use taxes, because such a vendor lacks the substantial nexus with the taxing state required by the commerce clause." While 15 U.S.C. § 381(a)/P.L. 86-272 provides that:

> No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:
>
> (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

The West Virginia Supreme Court also took note of congressional bills such as H.R. 1956, 109th Congress (April 28, 2005), "which would amend 15 U.S.C. § 381 to apply to, in addition to tangible property, all other forms of property, services, and other transactions fulfilled from a point outside the State."[9]

The court concluded, however, that "*Quill's* physical-presence requirement for showing a substantial Commerce Clause nexus applies only to use and sales taxes and not to business franchise and corporation net income taxes."[10] It rejected MBNA's arguments that a physical presence was required to establish nexus for the imposition of the state's business franchise and net income tax.

When presented with the case of *J.C. Penney Nat'l Bank v. Johnson,* in which a Tennessee Court applied the physical presence test to Tennessee's attempted imposition of income taxes on an out-of-state credit card company, the West Virginia Supreme Court acknowledged *J.C. Penney* was factually on point and addressed the same issue as the one before it.[11] However, the court rejected

the reasoning in *J.C. Penney* and declined to apply it to the *MBNA* case.[12]

Instead, the court stated it had "no trouble" concluding that MBNA's systematic and continuous business activity in this state produced receipts attributable to its West Virginia customers, sufficient enough to create substantial nexus.[13]

Prior to this conclusion, the court discussed "the great challenge in applying the Commerce Clause to the ever-evolving practices of the marketplace." Advances in technology were mentioned liberally; including references to a world that now has iPods.[14] The court went on to state:

> This recognition of the staggering evolution in commerce from the Framers' time up through today suggests to this Court that in applying the Commerce Clause we must eschew rigid and mechanical legal formulas in favor of a fresh application of Commerce Clause principles tempered with healthy doses of fairness and common sense. This is what we have attempted to do herein.[15]

The court then concluded that "West Virginia's imposition of its business franchise and corporation net income taxes on MBNA for the tax years 1998 and 1999, did not violate the Commerce Clause."[16]

Dissent

In the lone dissenting opinion, Justice Benjamin decried the majority's opinion in no uncertain terms:

> The majority, in its opinion, boldly goes where no court has gone before. In doing so, the majority relies not on bedrock constitutional principles or on established legal precedent, but rather on legal commentaries with thinly veiled state-favoring taxing agendas, a strained and inaccurate reading of the United States Supreme Court's decision in *Quill* [citation omitted] and a unilateral restatement of the important policy considerations which led to the inclusion of the Commerce Clause within the United States Constitution because, according to the majority opinion, the framers could not possibly have foreseen the future. The majority opinion gives legal sanction to a state taxing scheme which impermissibly burdens the interstate commerce of the nation.[17]

Justice Benjamin continued:

> There is no precedential support whatsoever for the conclusions reached by the majority decision. None. None at the state level. None at the federal level. Ignoring that our consideration here should be the effect of the tax in question on interstate commerce, rather than the type of tax it is, none of the rhetoric raised by the majority opinion explains why a state's imposition of a tax on an out-of-state corporation with no presence, tangible or intangible, on income realized from an out-of-state account does not adversely affect the nation's interstate commerce, an analysis identified by the United States Supreme Court as the cornerstone of constitutional jurisprudence [citation omitted].[18]

In his dissenting opinion, Justice Benjamin questioned the real purpose behind the case ("One might well argue that the State of West Virginia, under the facts of this case, is attempting to engage in extraterritorial taxation."[19]) and concluded that the majority analyzed various taxes in an inconsistent manner ("The majority opinion attempts mightily to distinguish between forms of taxes, such as sales and use taxes on the one hand, and income and franchise taxes on the other hand, in attempting to defend its disregard for the substantial nexus standards required in *Quill*."[20]).

Perhaps, however, Justice Benjamin's most searing criticism of the majority's opinion was his commentary on judicial activism and the court:

> I must admit to some disdain for the rather elite nature of "foreseeability of the framers" arguments. Frequently, such invocations serve no purpose other than an attempt to excuse legislating from the bench. Other times, such invocations simply serve as the argument of last resort by courts searching for a legal basis to justify result-based decision-making. Caution should by necessity be the watchword when any court seeks to expand the power of the State on the basis of the "foreseeability of the framers" argument.[21]

The Supreme Court declining to hear the *MBNA* and *Lanco* cases will likely result in renewed efforts by the business community to enact federal legislation similar to the aforementioned H.R. 1956 (Business Activity Tax Simplification Act of 2005). Without such a law, there will be a continued lack of uniformity in the application of tax nexus standards by individual states.

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Endnotes

1 MBNA America Bank, N.A. v. Tax Commissioner of the State of West Virginia (March 8, 2007) and Lanco, Inc. v. Director of Taxation, (March 9, 2007).

2 640 S.E.2d 226 (2006) (cert. denied).

3 908 A.2d (2006) (cert denied).

4 *Id.*

5 640 S.E.2d 226.

6 *Id.* at 239.

7 *Id.* at 228.

8 504 U.S. 298 (1992).

9 H.R. 1956's official title was the Business Activity Tax Simplification Act of 2005. In addition to including intangible property, H.R. 1956 would have also prohibited state taxation of an out-of-state entity unless such entity had a physical presence in the taxing state. Specifically, Sec. 3 (Jurisdictional Standard for State and Local Net Income Taxes and Other Business Activity Taxes) stated:

> (a) In General- No taxing authority of a State shall have power to impose, assess, or collect a net income tax or other business activity tax on any person relating to such person's activities in interstate commerce unless such person has a physical presence in the State during the taxable period with respect to which the tax is imposed.

10 640 S.E.2d 226 at 232.

11 19 S.W.3d 831 (Tenn. Ct.App. 1999).

12 *Id.* at 235.

13 *Id.* at 236.

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id* at 237.

18 *Id.* at 237.

19 *Id.* at 238.

20 *Id.* at 239.

21 *Id.* at 241.

the legislature endorsed this figure and the process used to determine it, a panel of referees appointed by the supreme court decided that CFE's methodology, which yielded a spending gap of $5.63 billion, was better.

In *CFE III*, the court of appeals affirmed the reasonableness of a $1.93 billion increase in operations spending and vacated the portion of the lower court's directive calling for capital improvements for the school system. (Legislation exceeding the supreme court's mandate for capital improvements was passed in the interim.) The majority justified its opinion by emphasizing the importance of judicial deference to the political branches. The judiciary, it observed, has limited access to social and economic facts and therefore must balance the defense of constitutional rights with micromanagement of fiscal matters and interference with the balance of power between the branches of government.[8] Despite the interventionist character of *CTE I* and *CTE II*, it held the supreme court should have assessed whether the Commission's proposals were "reasonable" or "rationally defensible," not established its own panel to create new substantive solutions.[9]

Judge Rosenblatt concurred that the supreme court should have deferred to the other branches because "the State budget plan had already calculated the amount in a way that, as a matter of law, was not arbitrary or irrational."[10] He asserted, however, that although the state's calculations might be reasonable they did not necessarily yield the "proper" amount to provide the city's public schools.[11] This inclination to allow for the judiciary to weigh in on the correctness, not mere legality, of state policy, undercut the majority's emphasis on deference.

Chief Judge Kaye concurred in part and dissented in part; Judge Ciparik joined her opinion. The dissent argued that the majority erred by deferring too much to the executive and legislative branches, and that the Commission's calculations were irrational. She contended that when the legislative and executive branches do not act together, as in this circumstance where no appropriations bill had been enacted, the determinations of these branches did not merit special weight.[12] Additionally, Chief Judge Kaye critiqued the weighting of variables used in the Commission's calculations. She concurred with the majority's assessment with respect to capital improvements or accountability procedures.[13]

Maine

While the New York Court of Appeals attempted to define appropriate judicial deference to the political branches, Maine's highest court struggled with how to

balance the contradictory demands of the Establishment and Free Exercise Clauses. In *Anderson v. Town of Durham*, the Maine Supreme Judicial Court ruled that the state's tuition payment statute, which prohibits town school districts that do not operate a public high school from providing public funds for students to attend private sectarian schools, is constitutional.[14] The court held that the statute did not "infringe upon the fundamental right to free exercise of religion in a constitutionally significant manner" and did not violate the Fourteenth Amendment's guarantee of equal protection.[15]

The plaintiffs, parents who sent their children to religious high schools ineligible for public funding, sued the defendant towns for a declaratory judgment that the tuition payment statute violates the Establishment, Free Exercise, and Equal Protection Clauses of the First and Fourteenth Amendments; an injunction forbidding the towns from enforcing the tuition payment statute; and reimbursement for tuition paid to the religious schools, attorney fees, and costs. The parents also sought to hold the towns liable under § 1983 on the ground that the towns had deprived plaintiffs of their constitutional rights under color of state law.[16]

Maine law permits school districts to build their own high schools or to contract with another school district or a private school that meets the state's school approval criteria.[17] If the district does not build its own school,[18] it pays the contract high school a set amount, based on the anticipated cost of public high school tuition.[19] Before 1981, sectarian private schools were eligible for approval, but the statute was changed to exclude them in response to concern that this use of public funds violated the Establishment Clause.[20]

Maine's highest court[21] and the First Circuit[22] had previously upheld the tuition payment statute against federal constitutional challenges. In 2002, however, the U.S. Supreme Court held in *Zelman v. Simmons-Harris* that using publicly-funded school vouchers to pay tuition at sectarian schools did not violate the Establishment Clause.[23] This, plaintiffs argued, meant that the state could not discriminate against religious schools by excluding them from Maine's tuition payment program. Maine Supreme Judicial Court Justice Alexander, writing for a majority, nonetheless affirmed that Maine's program was constitutional.

The majority based its approval of the statute on the concept of "play between the joints" of the Establishment and Free Exercise Clauses discussed in *Locke v. Davey*.[24] That case held that Washington State's exclusion of students pursuing theology degrees from eligibility for a state scholarship did not violate the Free Exercise Clause. Like the Washington program in *Locke*, Justice Alexander stated, the Maine tuition payment statute did not violate the Free Exercise Clause because the plaintiffs were not being punished for conduct required by their religious beliefs, required to perform an act proscribed by their religion, or pressured to modify their beliefs.[25] The majority also contended that, although *Zelman*'s holding meant that Maine "could hypothetically extend tuition funding to sectarian schools without violating the Establishment Clause," the state was not thereby required to do so; like Washington, Maine *could* choose not to fund religious education.[26]

Since the majority found that the statute did not violate plaintiffs' rights under the Establishment or Free Exercise Clauses, it declined to apply strict scrutiny to the statute in assessing plaintiffs' Equal Protection claim.[27] The majority rejected the idea that the statute must be considered only in light of the known rationale for its passage. Despite evidence that the legislature enacted the tuition payment statute in response to a state attorney general's report on the effect of the U.S. Supreme Court's Establishment Clause decisions in the 1970s and early 1980s,[28] the majority declared that it was not "bound by the justification proffered by the State in support of the statute... or offered in support of the legislation in 1981 [because the new] justifications for the statute asserted by the State [were] not inconsistent with or contradictory to prior stated goals."[29] The majority noted in particular that the payment mechanism, which differed from the vouchers at issue in *Zelman*, involved a direct payment from the public fisc to a sectarian school, and that acceptance of the payment made the sectarian schools subject to state regulation.[30] Avoiding the potential for state entanglement with religion posed by these circumstances, it held, constituted a rational basis for upholding the tuition payment statute.[31]

Two justices concurred that the statute did not violate the First or Fourteenth Amendments but asserted that the court should have addressed plaintiffs' contention that the school districts could be found liable for failing to disobey the tuition payment statute. They did not express an opinion as to the merit of this contention, but argued that the strong potential for recurrence and the great public interest involved should exempt it from the mootness doctrine.

Justice Clifford dissented, asserting that the majority had read *Locke* too broadly, erred as to the resolution of the plaintiffs' First Amendment claim, and therefore applied the wrong test to the Fourteenth Amendment claim.[32] The tuition payment statute, he said, was not neutral toward religion; it excluded some schools from the program on the basis of religion through "discriminatory language."[33] And though the post-secondary theological

education in *Locke* was "an essentially religious endeavor," the education provided by sectarian schools in Maine that complied with state approval requirements was not, he contended.[34] He argued that the lack of correspondence between the two programs meant that *Locke* did not apply.[35]

Justice Clifford's dissent also contrasted the history of opposition to state support for the ministry in Washington State with the pre-1980 Maine law permitting the use of public funds to pay tuition at sectarian high schools. Because he would have found that the statute violated plaintiffs' right to free exercise, Justice Clifford would have applied strict scrutiny to the state's rationale for the law. And because the actual rationale was based on a jurisprudence that has since been overturned or reconstructed, it would have failed. However, he also argued that the law should have failed the majority's application of the rational basis test for the same reason. Finally, Justice Clifford stated that the court should have rejected the school district's "new, after-the-fact reasons to justify the [statute's] discriminatory language."[36]

Unlike the New York Court of Appeals's decision in *CTE III*, the Maine Supreme Judicial Court's decision in *Anderson* does not preclude further litigation, as only the U.S. Supreme Court can definitively outline how much "play between the joints" of the Religion Clauses there should be and at what point avoidance of establishment shades into interference with free exercise.

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Endnotes

1 8 N.Y.3d 14, 27 (2006) (*CFE III*).

2 N.Y. Const. art XI §1.

3 Bd. of Educ., Levittown Union Free Sch. Dist. v Nyquist, 57 N.Y.2d 27 (1982).

4 Campaign for Fiscal Equity v. State of New York, 86 N.Y.2d 307 (1995) (*CFE I*).

5 Campaign for Fiscal Equity v. State of New York, 100 N.Y.2d 893, 908 (2003) (*CFE II*).

6 *Id.* at 932.

7 *CFE III*, 8 N.Y.3d at 24.

8 *Id.* at 28.

9 *Id.* at 29-31.

10 *Id.* at 33.

11 *Id.*

12 *Id.* at 34-35.

13 *Id.* at 38-42.

14 895 A.2d 944 (Me. 2006), 2006 Me. 39, 2006 Me. LEXIS 39.

15 *Id.* at 39.

16 *Id.* at 12-13.

17 20-A M.R.S. §§ 2901, 2902 (2005). Approved private schools must either be accredited by the New England Association of Colleges and Secondary Schools or comply with state requirements for basic instruction, curriculum, teacher certification, length of the school day, and student-teacher ratios. They must also be incorporated under the laws of Maine or the United States, release student records to another school upon request, comply with auditing requirements pursuant to § 2952 and 2953, and follow any regulations established by the commissioner under 20-A M.R.S. § 2954. Approved private schools with enrollment of at least 60 percent publicly-funded students must participate in state academic assessments. 20-A M.R.S. § 2951 (2005).

18 20-A M.R.S. § 2701 (2005).

19 20-A M.R.S. §§ 5805, 5806, 5808 (2005).

20 20-A M.R.S. § 2951(2) (2005).

21 Bagley v. Raymond Sch. Dep't, 728 A.2d 127, (Me. 1999).

22 Strout v. Albanese, 178 F.3d 57, 66 (1st Cir. 1999); Eulitt v. Me. Dep't of Educ., 386 F.3d 344 (1st Cir. 2004).

23 536 U.S. 639 (2002).

24 540 U.S. 712, 718 (2004).

25 *Id.*

26 *Anderson*, 2006 Me. LEXIS at 39.

27 *Id.* at 40-41.

28 Specifically, the majority cited *Aguilar v. Felton*, 473 U.S. 402 (1985) (holding that the Establishment Clause prohibited sending public school teachers into private, religious schools to provide remedial education to disadvantaged children); Wolman v. Walter, 433 U.S. 229 (1977) (holding that provision of instructional materials and transportation services to religious schools is not permitted; therapeutic services could be provided to religious school students off-site; funding for secular textbooks, testing, and diagnostic services upheld); Meek v. Pittenger, 421 U.S. 349 (1975) (striking down in part a Pennsylvania law that provided loans of educational materials to religious schools); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (invalidating New York tax laws that provided direct money grants to qualifying non-public schools for maintenance and repair of facilities and equipment); Lemon v. Kurtzman, 403 U.S. 602 (1971) (invalidating programs that provided salary supplements to teachers of secular subjects in religious schools).

29 *Id.*

30 *Id.* at 44.

31 *Id.*

32 *Id.* at 52.

33 *Id.* at 55.

34 *See supra* note19.

35 *Id.* at 53.

36 *Id.* at 57.

II. Dissent and Critics of the Decision

Critics of the Missouri Supreme Court have argued that in reaching its decision to reverse *Clouse* and extend the right to bargain collectively to all employees, regardless of sector, the court ignored the historical context surrounding Section 29's passage and focused almost exclusively on *Clouse*'s analysis of the non-delegation doctrine as it could be applied to collective bargaining.

Judge Ray Price, joined in his dissent by Judge Stephen N. Limbaugh, Jr., took exception to the majority's reasoning and argued that, even though the text of Section 29 does not distinguish between the public and private sectors, "the section must be read in historical context with the understanding of collective bargaining in relation to public employees that existed at the time of its adoption in 1945."[5] In other words, it was more important for the court to understand the terms "collective bargaining" as understood during the historical context surrounding the passage of Section 29 than it was to understand legal theories used by the court in *Clouse* to support its early interpretation of the section.

The dissent further argued that, by putting the amendment into its proper historical context, one finds that, at the time of the amendment's enactment by the people of Missouri, "the term 'collective bargaining' simply had no relation, by definition, to public employment."[6]

In support of this argument, Judge Price relied on statements made by President Franklin D. Roosevelt, as well as R.T. Wood, the sponsor of Section 29 and president of the State Federation of Labor. In a letter read at the constitutional convention, President Roosevelt stated:

> All Government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employee organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employees alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters. All Government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employee organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employees alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters.[7]

And the sponsor of Section 29, Mr. Wood, expressed similar sentiments at the convention, by stating, "I don't believe there is anyone in the organization that would insist upon having a collective bargaining agreement with a municipality setting forth wages, hours, and working conditions."[8]

The dissenting judges highlighted the fact that "[t]he decision in *Clouse*, that public employees do not enjoy the right to collective bargaining under the constitution, was handed down only two years following the convention. There is no doubt the Court then knew the intent of the framers and the mood of the 1945 electorate better than the Court does now."[9]

While the majority dealt with the doctrine of *stare decisis* by arguing that the passage of time justified a change in the law, Judge Limbaugh noted during oral argument that the fact that a single interpretation of Section 29 has existed for more than half a century "strongly dictates against overruling our longstanding precedent, especially because [*Clouse*] was not wrongly decided."[10] Indeed, Missourians have been debating that holding and the meaning of Section 29 from the days of the convention until now, yet the interpretation of Section 29 expressed in *Clouse* has been the unchanged law of Missouri for sixty years. As late as 2002 the people of Missouri declined to pass a constitutional amendment that would have given public employees the right to bargain collectively.[11]

Critics of the Court have stated that the most troubling aspect of the majority's ruling, however, is the lack of specificity with which it defines the new constitutional right of public-sector employees to bargain collectively. The majority did not define what it meant by "collective bargaining," nor did it describe how the new right differed, if at all, from Missouri's existing labor laws, which give public-sector employees the right to "meet and confer" with employers. Because of this lack of clarity, Judge Price stated: "It seems less harm would result from leaving this longstanding procedure in place than from giving public employees a new constitutional right to 'collective bargaining' that the majority does not

define, describes in terms similar to 'meet and confer,' and the application of which no one can predict."[12]

After the decision was released, Missouri Governor Matt Blunt chided the court and noted the practical effect the ruling would have: "This reckless decision could force cities and school districts to raise taxes and subject Missourians to the threat of strikes by critical public sector employees."[13] Similarly, St. Louis attorney and former general counsel of the National Labor Relations Board Jerry M. Hunter was cited by the *St. Louis Post Dispatch* as describing the ruling as a departure from the intended meaning of Section 29 and "one of the biggest labor decisions in recent memory in the state of Missouri."[14] It is estimated that Missouri has nearly 400,000 public-sector employees who could be affected by the supreme court's decision, and this fact alone is sure to spark intense debate about the role of collective bargaining in the state.

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Endnotes

1 Independence-National Education Association v. Independence School District, SC87980, __ S.W.3d __ (Mo. Banc 2007). The case was taken by the supreme court directly from the trial court without decision by the Missouri Court of Appeals.

2 Mo. Const., art. I., sec. 29.

3 206 S.W.2d 539, 542 (Mo. banc 1947).

4 *Id.*

5 Independence-National Education Association, SC87980, __ S.W.3d at ___ (Price, J., dissenting).

6 *Id.*

7 *Clause*, 206 S.W.2d 539, 542-43 (Mo. banc 1947).

8 *Id.*

9 *Supra* note 5.

10 Citing oral argument.

11 Missouri Secretary of State, Elections, 2002 Initiative Petitions, *available at* http://www.sos.mo.gov/elections/2002petitions/ip

200201.asp> (last viewed 6/13/07).

12 *Supra* note 5.

13 Governor Matt Blunt, "Gov. Matt Blunt Statement on Supreme Court Ruling," Press Release 5/29/07, *available at* http://gov.missouri.gov/press/Statement052907.htm (last viewed 6/13/07).

14 Paul Hampel, *Missouri Government Workers Win Right to Bargain*, St. Louis Post-Dispatch, 5/30/2007, *available at* http://www.stltoday.com/stltoday/emaf.nsf/Popup?ReadForm&db=stltoday%5Cnews%5Cstories.nsf&docid=495314B15F35DAED862572EB001343B0 (last viewed 6/13/07).

case of *Cutter v. Wilkinson*.[5] There the Court affirmed that even where Free Exercise did not require an exemption, the Establishment Clause permitted accommodations which do not "come packaged with benefits to secular entities."[6]

On the state Free Exercise Claim: New York's Constitution provides that the "free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind."[7] The court of appeals declined to follow the "inflexible rule" of *Smith* in its interpretation of the state clause. The court articulated a rule more protective of believers than *Smith,* but less protective than that of some states (and, for that matter, of some federal legislation). This latter rule would invalidate any burden save where it was necessary to a compelling state interest. The *Serio* court rejected it: "such a rule of constitutional law would give too little respect to legislative prerogatives, and would create too great an obstacle to efficient government." A more forgiving and flexible rule was needed.

The court of appeals adopted a "balancing" test, with a "deference" kicker:

> "[W]e have held....that we must consider the interest advanced by the legislation that imposes the burden, and that the respective interests must be balanced to determine whether the incidental burdening is justified.... We now hold that substantial deference is due to the Legislature, and that the party claiming an exemption bears the burden of showing that the challenged legislation, as applied to that party, is an unreasonable interference with religious freedom" (internal quotation marks and citation omitted).

The court of appeals had no difficulty finding that the plaintiffs' interest in their moral integrity was outweighed by the state's "substantial" interest in fostering equality between the sexes and in providing better health care for women.

The court hastened to make clear that its deferential standard and easy application of it to the case at hand did not signal that its review was toothless. The court asserted that several hypothetical scenarios—including one in which a priest is made to testify about confessional confidences—were "well beyond the bounds of constitutional acceptability."

Critics of *Serio* argue that the real challenge, however, is not to hypothesize conclusions, but instead show that the conclusions result from the *impartial* application of *norms* grounded in *reasons.* In other words, the challenge is to show that more than judicial predilections are at work.

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Endnotes

1 *See* Catholic Charities of Sacramento, Inc., v. Superior Court, 32 Cal. 4th 527, 85 P. 3d 67 (2004).

2 *See* 543 U.S. 816 (2204).

3 494 U.S. 872 (1990).

4 *Id.* at 879 (internal quotation marks omitted).

5 544 U.S. 709 (2005).

6 544 U.S. at 724 (quoting *Corporation of Presiding Bishop v. Amos,* 483 U.S. 327, 338 (1987)..

7 N.Y. Const. Art. I, sect. 3.

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