State Court Docket Watch: 2020 Edition

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The Federalist Society

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State Court Docket Watch: 2020 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-seven 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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The Federalist Society takes seriously its responsibility as a non-partisan institution engaged in fostering a serious dialogue about legal issues in the public square. We occasionally produce white papers on timely and contentious issues in the legal or public policy world, in an effort to widen understanding of the facts and principles involved and to contribute to dialogue.

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

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Myers v. Yamato Kogyo Co.

By Nicholas Bronni

Published July 29, 2020

About the Author:

Nicholas Bronni was named the Solicitor General of Arkansas in July 2018. Before that he served for two years as Arkansas's Deputy Solicitor General, and prior to returning home to Arkansas, Mr. Bronni was a Senior Litigation Counsel with the Appellate Litigation Group at the United States Securities and Exchange Commission.

Note from the Editor:

When should courts defer to an agency's interpretation of a statute? At the federal level, the law is clear: When reviewing an agency's interpretation of a statute that it is charged with administering, courts apply the two-step test from *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*.[1] Under that test, "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[2] If the statute is silent or ambiguous, "the question for the court is whether the agency's answer is based on a permissible construction of the statute."[3] And where the agency's interpretation is reasonable, the court must defer to that interpretation.[4]

But at the state level, the rule isn't always clear. Some states reject *Chevron* outright. The Michigan Supreme Court, for example, has rejected *Chevron* deference on the grounds that it is both "very difficult to apply" and inconsistent with separation of powers principles.[5] Other courts, like the Maine Supreme Judicial Court, reject those concerns and apply "the same two-step analysis adopted by the United States Supreme Court in *Chevron*."[6] And still others apply something in between or more akin to the Supreme Court's approach in *Skidmore v. Swift & Co*.[7]

Arkansas courts have at various times applied all three different approaches. But a few months ago, in *Myers v. Yamato Kogyo Co.*, the Arkansas Supreme Court adopted a standard more akin to *Skidmore* than *Chevron*.[8] Indeed, though neither the majority nor the dissent mentioned *Skidmore*, *Chevron*, or any of the other various deference doctrines, the decision places Arkansas firmly among the states that consider an agency's interpretation of an ambiguous statute just "one of . . . many tools used to provide guidance."[9]

Myers concerned a workers' compensation decision. After Michael Myers was killed in an industrial accident in 2014, his employer, Arkansas Steel Associates, never contested his widow's workers' compensation benefits claim.[10] Myers's widow, however, was dissatisfied with the award she received, and she "filed a

1 467 U.S. 837 (1984).

2 *Id.* at 842-43.

3 *Id.* at 843.

4 *Id.* at 844-45.

5 *In re Complaint of Rovas Against SBC Michigan*, 754 N.W.2d 259, 271 (Mich. 2008).

6 *Cobb v. Bd. of Counseling Prof'ls Licensure*, 896 A.2d 271, 275 (Me. 2006).

7 323 U.S. 134 (1944). *See, e.g.*, *Nw. Youth Servs., Inc. v. Commonwealth Dep't of Pub. Welfare*, 66 A.3d 301 (Pa. 2013).

8 597 S.W.3d 613 (Ark. 2020).

9 *Id.* at 617.

10 *Id.* at 615.

wrongful death suit against . . . Arkansas Steel Associates' parent companies."[11] The trial court sent her case to the Arkansas Workers' Compensation Commission.[12]

Interpreting Arkansas law, the Workers' Compensation Commission held that the parent companies were shielded from civil liability as "principals and stockholders" of an employer subject to the exclusive remedy set forth in the Arkansas Workers' Compensation Act.[13] The Arkansas Court of Appeals subsequently affirmed that conclusion on the grounds that "while not binding on this court," an agency's interpretation of a statute is "highly persuasive" and is "not [to] be overturned unless it is clearly wrong."[14]

The Arkansas Supreme Court ultimately agreed with the Commission's interpretation of Arkansas law, but it rejected the court of appeals' deferential standard. Instead, the court began by "acknowledg[ing] confusion in prior cases regarding the standard of review for agency interpretations of a statute."[15] Indeed, the court conceded that its own cases had employed both more and less deferential standards.[16] And as a result, the Arkansas Supreme Court concluded that it needed to resolve that discrepancy.[17]

It then held that in "determin[ing] what a constitutional or statutory provision means," Arkansas courts should "not afford deference to [an agency's] interpretation."[18] Instead, "where ambiguity exists," the Arkansas Supreme Court explained, an agency's interpretation will be considered only to the extent it is persuasive.[19] In other words, Arkansas courts give *Skidmore*-like deference to agency interpretations, nothing more. And as other courts have done in adopting that same approach, the Arkansas Supreme Court explained that only that standard was consistent with basic separation of powers principles and the judiciary's "duty . . . to determine what a statute means."[20]

The dissent, moreover, did not dispute the majority's formulation of the relevant standard, its arguments about the separation of powers, or the proper role of the courts. Far from it, the lone dissent simply disagreed with the majority's—and by extension the Arkansas Workers' Compensation Commission's—interpretation of the relevant statute.[21] As a result, Arkansas can now be counted among those states that apply something akin to *Skidmore* deference when reviewing agency statutory interpretations.

11 *Id.*

12 *Id.*

13 *Id.* at 616.

14 *Myers v. Yamato Kogyo Co.*, 578 S.W.3d 296, 301 (Ark. Ct. App. 2019).

15 *Myers*, 597 S.W.3d at 616.

16 *See id*. at 616-17 (citing *Ark. Dep't of Hum. Servs. v. Pierce*, 435 S.W.3d 469 (Ark. 2014), and *Brookshire v. Adcock*, 307 S.W.3d 22 (Ark. 2009)).

17 *See Myers*, 597 S.W.3d at 616-17.

18 *Id.*; *accord id.* at 617.

19 *Id.*

20 *Id.*

21 *Id.* at 620-22 (Hart, J., dissenting).

ARIZONA

Brush & Nib Studio v. City of Phoenix

By Jonathan Scruggs

Published April 3, 2020

About the Author:

Jonathan Scruggs serves as senior counsel and director of the Center for Conscience Initiatives with Alliance Defending Freedom. In this role, Scruggs leads the team defending the constitutionally protected freedom of creative professionals to live out their faith in business and professional life without being subjected to government coercion, discrimination, or punishment.

Note from the Editor:

Alliance Defending Freedom represented Brush & Nib Studio and the studio's artists in their case against the City of Phoenix, with Mr. Scruggs serving as lead counsel throughout the litigation. Mr. Scruggs' views expressed here are his own and do not necessarily reflect the views of his clients.

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For the last decade, courts and commentators have penned many pages about anti-discrimination norms and religious liberty. Since the U.S. Supreme Court decided *Masterpiece Cakeshop v. Colorado Civil Rights Commission,*[1] lower courts have tried to balance these interests and begun to protect creative professionals from anti-discrimination laws that force them to speak messages against their conscience. The Arizona Supreme Court's decision in *Brush & Nib Studio v. City of Phoenix* exemplifies this trend.[2]

Brush & Nib involved two artists who operate a Phoenix art studio called Brush & Nib Studio.[3] Brush & Nib offers both pre-made artwork and custom commissioned artwork, such as paintings for home decor, hand-lettered signs, wedding vows, and wedding invitations.[4] And though Brush & Nib offers to sell its artwork to anyone, its artists do not create artwork conveying messages contrary to their religious beliefs—such as artwork promoting racism, demeaning others, or celebrating same-sex weddings.[5]

Phoenix has a law forbidding public accommodations from discriminating on the basis of sexual orientation.[6] The law penalizes violators up to $2500 and six months in jail for each day of non-compliance.[7]

Brush & Nib and its artists brought a pre-enforcement challenge to stop the law from forcing them to create custom artwork celebrating same-sex weddings.[8] Forcing them to do so, they argued, would compel them to speak, substantially burden their religion, and therefore violate both the Arizona Constitution's Free Speech Clause and Arizona's Free Exercise of Religion Act (FERA)[9]—the Arizona version of the Religious Freedom Restoration Act.

Phoenix countered that (1) the artists and their studio lacked standing; (2) its law regulated discriminatory business activity and only burdened speech incidentally; (3) its law did not compel Brush & Nib's speech because people would attribute that speech to Brush & Nib's clients; (4) its law merely required equal treatment and that its effect on the artists was too attenuated to substantially burden their religious beliefs about marriage; and

1 Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

2 Brush & Nib Studio, LC v. City of Phoenix, 448 P.3d 890 (Ariz. 2019).

3 *Id.* at 898.

4 *Id. See also* http://www.brushandnib.com; https://www.instagram.com/brushandnib (depicting some of these art pieces).

5 *Brush & Nib*, 448 P.3d at 897-98.

6 *Id.* at 898.

7 *Id.*

8 *Id.* at 899.

9 *Id.* at 899-900.

(5) applying its law to the studio served the compelling interest of stopping discrimination and helped prevent widespread discrimination.[10]

Rejecting these arguments, the Arizona Supreme Court ruled 4-3 that Phoenix would unconstitutionally compel speech and violate FERA by forcing Brush & Nib to create custom wedding invitations celebrating same-sex weddings.[11]

As for standing, the majority only analyzed Brush & Nib's wedding invitations because its other artwork did not sufficiently appear in the record. But the majority found a credible threat that Phoenix would prosecute the artists for declining to create same-sex wedding invitations, particularly because Phoenix conceded its law required this.[12]

As for compelled speech, the majority emphasized that public accommodations laws facially and typically regulate discriminatory business conduct. But these laws still compel speech when applied to "speech itself"—in this case when compelling artists to write words and paint paintings they disagree with. These artists did not forfeit their free speech rights by offering to create speech on commission.[13]

Nor did Brush & Nib's artwork speak only for their clients. The majority cited tattoo artists, parade organizers, and professional fundraisers as proof that speakers often work with others to create expression. Even when collaborating, artists still have an interest in choosing what they write, paint, or say.[14]

As for religious exercise, the majority found a substantial burden because the law's steep penalties forced the artists to do something *they considered* religiously objectionable. Citing *Burwell v. Hobby Lobby Stores, Inc.*,[15] the majority refused to dismiss this objection as too attenuated from the artists' fundamental religious beliefs. Doing that would force the court to question the reasonableness of their religious beliefs—something courts should not and cannot accurately do.[16]

And finally, the majority recognized Phoenix's interest in stopping discrimination but denied its relevance here. Because the studio objected to conveying *a message* celebrating same-sex marriage for anyone and served LGBT persons generally regardless of *their status*, the studio did not discriminate against anyone. So compelling the studio to speak did not further Phoenix's anti-discrimination interest.[17]

This point also negated any slippery-slope concerns. According to the majority, Phoenix can still use its laws to stop actual status-based discrimination. It just cannot use its laws in the rare situation when doing so would compel speech, like writing words or creating paintings. For the majority, this struck the right balance of respecting freedom while still allowing the government to stop status discrimination.[18]

In response to these conclusions, three dissenting opinions echoed arguments made by Phoenix. The first two dissents emphasized that Phoenix's law textually regulated discriminatory conduct, and that it did not require the artists to endorse any view but merely required them speak their clients' views, and therefore only burdened speech incidentally—a burden justified by the state's compelling interest in stopping status discrimination.[19]

These two dissents also denied any substantial burden on the Brush & Nib artists, saying the law did not affect "fundamental tenets" of their beliefs and that courts should inquire into the "nexus" between a religious belief and a particular practice to decide whether a substantial burden exists.[20]

And all three dissents raised line-drawing and slippery-slope concerns: that the majority opinion would open the door to discrimination of different sorts in the future, whether based on sexual orientation, race, or religion.[21]

The *Brush & Nib* decision will have far-reaching consequences inside and outside Arizona. In its 52-page decision, the Arizona Supreme Court tackled most of the arguments in this controversial area of law and provided a blueprint for balancing anti-discrimination norms and constitutional rights—protecting dissent and good-faith disagreement on one hand yet still giving officials the tools to stop status discrimination on the other. And because the majority relied almost entirely on federal caselaw, other courts will surely cite and grapple with the *Brush & Nib* analysis when similar questions pop up elsewhere.

10 *Id.* at 900, 905, 911-12, 916, 920-21, 923.

11 *Id.* at 926.

12 *Id.* at 901-02.

13 *Id.* at 914, 928-29.

14 *Id.* at 907-08, 910-11.

15 Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

16 *Brush & Nib*, 448 P.3d at 919-22.

17 *Id.* at 909-10, 914-15, 922-26.

18 *Id.* at 908, 916, 923-26.

19 *Id.* at 929-34, 937-38.

20 *Id.* at 934-35, 939-40.

21 *Id.* at 937-39, 941.

ARIZONA

State v. Arevalo

By Jacob Huebert

Published October 9, 2020

About the Author:

Jacob Huebert is a Senior Attorney at the Goldwater Institute. Before joining Goldwater, he served as Director of Litigation for the Liberty Justice Center in Chicago. There, he successfully litigated cases to protect economic liberty, free speech, and other constitutional rights, including the landmark Janus v. AFSCME case, in which the U.S. Supreme Court upheld government workers' First Amendment right to choose for themselves whether to pay money to a union.

Note from the Editor:

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People who want to challenge a state or federal law for violating their constitutional rights face an uphill battle, thanks in part to the "presumption of constitutionality"—a principle invented by judges under which legislation is presumed to be constitutional unless a party challenging it can prove otherwise. But a recent concurring opinion by Arizona Supreme Court Justice Clint Bolick argues that courts should discard that presumption because it unduly protects government power at the expense of individual rights.

The case, *State v. Arevalo*, presented a state constitutional challenge to a state law that enhanced the sentence for the crime of "threatening or intimidating" based on a defendant's membership in a criminal street gang.[1] The majority opinion invoked the "strong presumption in favor of a statute's constitutionality" under which "the challenging party bears the burden of proving its unconstitutionality," but nonetheless struck the law down for violating substantive due process under the Fourteenth Amendment and the Arizona Constitution.[2] The statute didn't require any connection between the underlying crime of threatening or intimidating and a defendant's gang membership—the crime could have nothing to do with the defendant's gang membership, but the enhancement would still apply—so the court concluded that the statute impermissibly punished membership in itself.[3]

The decision is not unique inasmuch as the court simply applied the U.S. Supreme Court's *Scales v. United States*, a 1961 case that struck down a statute criminalizing Communist Party membership,[4] and followed the example set by the Florida Supreme Court[5] and the Tennessee Court of Criminal Appeals[6] when they struck down similar sentence-enhancement statutes.[7]

But Justice Bolick's concurrence—joined by retired Justice John Pelander, sitting by designation—is noteworthy. Bolick agrees with the majority's reasoning but argues that the court should eliminate the presumption of constitutionality because it tips the scales of justice in the government's favor and "is antithetical to the most fundamental of ideals: that our constitutions are intended primarily not to shelter government power, but to protect individual liberty."[8]

1 *State v. Arevalo*, 470 P.3d 644 ¶ 1 (Ariz. 2020).

2 *Id.* at ¶¶ 9, 11, 20 (citing U.S. Const. amend. XIV, § 1; Ariz. Const. Art. 2 § 4).

3 *Id.* at ¶¶ 20, 27.

4 *Scales v. United States*, 367 U.S. 203, 224-25 (1961).

5 *State v. O.C.*, 748 So.2d 945, 950 (Fla. 1999).

6 *State v. Bonds*, 502 S.W.3d 118, 154-58 (Tenn. Crim. App. 2016).

7 *Arevalo*, 470 P.3d 644 at ¶¶ 11-14, 16-21.

8 *Id.* at ¶ 30 (Bolick, J., concurring).

Bolick rejects the idea that comity or respect for the other branches of government requires courts to presume that statutes are constitutional. Courts that apply the presumption might believe they are respecting the separation of powers, but the separation of powers only demands that judges not substitute their own *policy* judgments for those of the legislature; it doesn't require judges to defer to the legislature on the *legal* question of whether a statute is constitutional.[9] He further argues that deferring to legislators on constitutionality actually defeats the purpose of the separation of powers: the protection of individual rights.[10] It also ignores the judiciary's role in the separation of powers, which is to ensure that the political branches don't exceed their constitutional authority. In particular, they must ensure that legislation favored by the majority does not oppress the minority. If courts defer to the legislature, they won't fulfill that responsibility, and legislators will be the sole judges of their own laws' constitutionality—something James Madison warned against in Federalist No. 10.[11]

Bolick acknowledges that his view runs contrary to longstanding precedents of both his own court and the U.S. Supreme Court.[12] But he observes that scholars have increasingly questioned the presumption of constitutionality, citing the work of Randy E. Barnett, F. Andrew Hessick, and the late Washington Supreme Court justice Robert F. Utter.[13] And he notes that three members of the Texas Supreme Court, led by then-Justice Don Willett (now a judge of the U.S. Court of Appeals for the Fifth Circuit), recently questioned excessive judicial deference to the legislature.[14] Now Justice Bolick's opinion has drawn, and will draw, even more attention to this issue.[15]

9 *Id.* at ¶¶ 33-40 (Bolick, J., concurring).

10 *Id.* at ¶¶ 35-36 (Bolick, J., concurring).

11 *Id.* at ¶¶ 37-39 (Bolick, J., concurring) (citing, *inter alia*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 179 (1803); *The Federalist* No. 10 at 27 (Richard Beeman ed., 2012) (James Madison)).

12 *Id.* at ¶¶ 30-31, 46 (Bolick, J., concurring).

13 *Id.* at ¶ 43 (Bolick, J., concurring) (citing Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty (2004); F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 Notre Dame L. Rev. 1447 (2010); Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound L. Rev. 491, 507 (1984)).

14 *Id.* at ¶ 44 (Bolick, J., concurring) (citing *Patel v. Tex. Dep't of Licensing and Regulation*, 469 S.W.3d 69, 93 (Tex. 2015) (Willett, J., concurring)).

15 *See, e.g.,* George F. Will, *A Useful Litmus Test for the Next Supreme Court Justice*, Wash. Post, Sept. 25, 2020, https://www.washingtonpost.com/opinions/a-useful-litmus-test-for-the-next-supreme-court-justice/2020/09/24/1204782c-fe96-11ea-9ceb-061d646d9c67_story.html (citing Bolick's concurrence and proposing rejection of the presumption of constitutionality as a litmus test for Supreme Court nominees); Eugene Volokh, *Arizona Supreme Court Justice Clint Bolick, Writing Against the "Presumption of Constitutionality*, Reason, Sept. 1, 2020, https://reason.com/2020/09/01/arizona-supreme-court-justice-clint-bolick-writing-against-the-presumption-of-constitutionality/ (reproducing the concurrence).

CALIFORNIA

Frlekin v. Apple Inc.

By Jeremy B. Rosen

Published October 9, 2020

About the Author:

Jeremy Rosen is a partner at Horvitz & Levy LLP, which he joined in 2001. He is nationally renowned for his proficiency in numerous issues arising under the First Amendment and California's anti-SLAPP law. Using that knowledge, Jeremy has helped a wide variety of clients – including churches, private businesses, and individuals – defeat lawsuits that seek to impose liability on clients for exercising their rights of petition, free speech, and free exercise of religion. He has also handled hundreds of appeals in numerous appellate courts, including the Ninth Circuit Court of Appeals, the California Supreme Court, and California's intermediate appellate courts. In addition to First Amendment and anti-SLAPP cases, his cases have involved numerous important issues regarding anti-trust, class actions, wage and hour law, employment law, breach of contract, California's Unfair Competition Law, CEQA, the enforceability of arbitration clauses, hospital peer review, the scope of public employee whistleblower protection, and the application of the primary assumption of risk doctrine.

He is a California State Bar Certified Appellate Specialist and a member of the California Academy of Appellate Lawyers.

Note from the Editor:

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

Shoplifting and theft costs U.S. retailers $48.9 billion each year, and 30 percent of all retail theft is committed by employees.[1] These sizable costs sap revenues for businesses, raise prices for consumers, and decrease wages and available jobs for workers. In response, many retailers require exit searches or bag checks of employees when they leave work. In *Frlekin v. Apple Inc.*, the California Supreme Court resolved whether California law requires employers to compensate employees for time spent waiting for, and undergoing, such exit searches.[2]

Apple required store employees to undergo theft-prevention searches of their bags before leaving work.[3] Employees also had to show that any personal Apple technology devices, including iPhones, in their possession belonged to them.[4] These exit searches happened after clocking out and usually took five to twenty minutes (though some employees reported that, on the busiest days, it took up to 45 minutes to find an available supervisor and undergo a search).[5]

A class of retail employees sued Apple in federal court, alleging that Apple had violated a California law—Industrial Welfare Commission Wage Order 7[6]—requiring employers to compensate employees for all "hours worked."[7] The Ninth Circuit requested the California Supreme Court's guidance on the state law issue of whether exit searches were compensable under Wage Order 7 as "hours worked."[8]

A unanimous California Supreme Court held that an employee's time spent on the employer's premises waiting for, and undergoing, mandatory exit searches of bags, packages, or personal technology—even those items brought to work purely for personal convenience—is compensable.[9]

The court's analysis centered on interpreting Wage Order 7, which defines "hours worked" to include "the time during which an employee is *subject to the control* of an employer."[10] Applying a "strictly textual analysis," the court determined that Apple controlled its employees during exit searches in several ways:

1 Nat. Retail Fed'n, 2017 National Retail Security Survey (2017), https://cdn.nrf.com/sites/default/files/2018-10/NRSS-Industry-Research-Survey-2017.pdf.

2 *Frlekin v. Apple Inc.*, 8 Cal. 5th 1038 (2020), *reh'g denied* (May 13, 2020).

3 *Id.* at 1043.

4 *Id.*

5 *Id.* at 1044.

6 Cal. Code Regs. tit. 8, § 11070(2)(G).

7 *Frlekin*, 8 Cal. 5th at 1042, 1044.

8 *Id.* at 1045 (citing *Frlekin v. Apple, Inc.*, 870 F.3d 867, 869 (9th Cir. 2017)).

9 *Id.* at 1042.

10 *Id.* at 1046-47 (emphasis added).

enforcing compliance with the policy under threat of discipline; confining employees to the premises until completion of the search; and compelling performance of multiple tasks, such as locating a manager, unzipping and opening bags, and removing Apple devices for inspection.[11]

The court rejected Apple's argument that employees were not subject to Apple's control since they were not *required* to bring a bag, package, or Apple device with them to work. Neither the text nor history of Wage Order 7 suggests that only mandatory activities are compensable.[12] Rather, the law requires compensation for "employer-controlled conduct," which is determined by several factors including "the location of the activity, the degree of the employer's control, whether the activity primarily benefits the employee or employer, and whether the activity is enforced through disciplinary measures."[13] According to the court, each factor favored compensating the employees in this case.[14]

What's more, the court reasoned that the exit searches were required "as a practical matter."[15] In ordinary life, most people carry valuables and personal items in a bag, purse, or satchel. Likewise, having a cell phone is one of the "practical necessities of modern life."[16] Thus, the court explained that, though bringing such items to work was "not 'required' in a strict, formal sense, many employees may feel that they have little true choice when it comes to the search policy, especially given that the policy applies day in and day out."[17]

In the end, the court held that since employees were "subject to Apple's control while awaiting, and during, Apple's exit searches," Wage Order 7 required Apple to compensate those employees for their time.[18]

Importantly, the court declined to limit *Frlekin* to prospective application. According to the court, the decision did not upset settled law, and neither fairness nor public policy concerns displaced the traditional rule that judicial opinions apply retroactively.[19] This retroactivity could expose many retailers in California to significant lawsuits and liability for using similar anti-theft practices in the past.

Applying the California Supreme Court's new guidance, the Ninth Circuit held that summary judgment must be granted to the plaintiffs who had indisputably not received wages for the time spent waiting for and during the exit searches.[20] The Ninth Circuit then remanded the case back to the federal district court to determine what remedy to afford to each individual in the class.[21]

Frlekin is especially noteworthy because it makes California the outlier relative to both federal law and the laws of several other states. The United States Supreme Court has held that time spent undergoing similar security screenings was not compensable under the Fair Labor Standards Act.[22] And it appears most other states to consider the same question have nearly identical rules.[23]

11 *Id.* at 1047.

12 *Id.* at 1048-49.

13 *Id.* at 1056.

14 *Id.*

15 *Id.* at 1054.

16 *Id.* at 1055 (citation omitted).

17 *Id.* at 1054.

18 *Id.* at 1056-57.

19 *Id.* at 1057.

20 *Frlekin v. Apple, Inc.*, No. 15-17382, 2020 WL 5225699, at *4 (9th Cir. Sept. 2, 2020).

21 *Id.*

22 *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 515 (2014).

23 *See In re Amazon.com, Inc., Fulfillment Center Fair Labor Standards Act (FLSA) and Wage and Hour Litigation*, 261 F. Supp. 3d 789, 793, 796 (W.D. Ky. 2017) (Nevada and Arizona law); *UPS Supply Chain Solutions, Inc. v. Hughes*, No. 2014-CA-001496-ME, 2018 WL 1980775, at *7 (Ky. Ct. App., Apr. 27, 2018) (Kentucky law); *Cinadr v. KBR, Inc.*, No. 3:11-cv-00010, 2013 WL 12097950, at *7 (S.D. Iowa, Feb. 15, 2013) (Iowa law); *Sleiman v. DHL Express*, No. 09-0414, 2009 WL 1152187, at *6 (E.D. Pa., Apr. 27, 2009) (Pennsylvania law).

COLORADO

People v. R.D.

By Prof. Anthony (Tom) Caso

Published August 6, 2020

About the Author:

Professor Anthony (Tom) Caso is a Clinical Professor of Law at the Dale E. Fowler School of Law, Chapman University.

Professor Caso joined the Chapman faculty in 2008 as a Visiting Associate Clinical Professor and Director of the Constitutional Jurisprudence Clinic. Prior to joining the faculty Professor Caso held a variety of positions at Pacific Legal Foundation, including service as its Senior Vice President and Chief Counsel. Professor Caso's litigation experience includes successful cases at every level of the state and federal court system, including the California Supreme Court and the United States Supreme Court. Professor Caso has taught as an Adjunct Professor of State Constitutional Law at McGeorge School of Law and an adjunct professor at the University of San Francisco, College of Professional Studies. In addition to directing the Constitutional Jurisprudence Clinic, Professor Caso teaches Administrative Law.

Note from the Editor:

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The U.S. Supreme Court has long acknowledged that "true threats" are not protected speech under the First Amendment.[1] But the question of what constitutes a true threat, especially in the age of social media, has sparked a split of judicial opinion.[2] First Amendment scholars expected the Supreme Court to resolve this question in the *Elonis* case. However, the Court decided that it was "not necessary to consider any First Amendment issues."[3]

The Colorado Supreme Court has tried to fill that void with its decision in *People v. R.D.*[4] The case involved a Twitter exchange between two teens who did not know each other's names or even where each other lived or went to school.

The conversation featured such memorable phrases as "kill you" and "body bag" and one Tweet featured a picture of gun. The trial court reasoned that the picture of the gun was similar to showing a real gun in a face-to-face confrontation and ruled that the exchange was not protected by the First Amendment.[5] (This led to an interesting, but slightly off-topic discussion of how gun emojis might appear to be real guns on some operating systems and water pistols on others.)[6]

The First Amendment does not protect true threats solely because of the possibility that real violence will occur. The doctrine also recognizes the social interest in protecting the targets of the threat from intimidation and fear.[7] Thus, the Supreme Court has ruled that it is irrelevant that the speaker did not intend to carry out the threat.[8] Still, it must be a real threat and not simply "political hyperbole."[9] The question left unanswered by *Elonis* is whether the speaker must intend to cause fear in the recipient.

The Colorado Supreme Court ruled that the objective tests used in the past were not sufficient to distinguish between constitutionally protected speech and a true threat.[10] Instead, the court articulated five "contextual factors" that must be considered by the trier of fact: 1) "the statement's role in the broader exchange"; 2) the "medium" through which the statement was

1 *Elonis v. United States*, 135 S. Ct. 2001, 2024 (2015) (Thomas, J., dissenting) ("'From 1791 to the present, . . . our society . . . has permitted restrictions upon the content of speech in a few limited areas,' true threats being one of them.) (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 382-83 (1992)).

2 *Elonis*, 135 S. Ct. at 2018 (Thomas, J., dissenting).

3 *Id.* at 2012.

4 *People v. R.D.,* 464 P.3d 717 (2020).

5 *Id.* at 724.

6 *Id.* at 730.

7 *Virginia v. Black*, 538 U.S. 343, 360 (2003).

8 *Id.*

9 *Watts v. United States*, 394 U.S. 705, 708 (1969).

10 *R.D.*, 464 P.3d at 731.

communicated; 3) whether the statement was anonymous and whether it was private or public; 4) any relationship between speaker and recipient; and 5) the subjective reaction of the "intended or foreseeable recipient(s)."[11]

The court noted that these factors were not an exhaustive list but are intended as tools to help the fact finder put the statements into context. The court further stated that trial court had discretion on how to weigh the various factors and even suggested that it might be necessary to resort to experts "to help illuminate coded meanings, explain community norms and conventions, or bridge other contextual gaps."[12]

The true test of appellate decisions such as this is whether they give the trial court sufficient guidance on how to judge a particular case. In Colorado, the trial court's balancing of the five factors is not determinative. Whether a statement constitutes a true threat is "a matter subject to independent review" on appeal.[13]

Social media continues to evolve, as do social norms for how we communicate with each other. Indeed, as the Twitter conversation in this case and our own experiences demonstrate, social media seems to bring out the worst in people and coarsen the public dialogue—even as it makes that dialogue easier.[14] As social media makes it easier to communicate and the coarseness of modern culture encourages hyperbolic statements, courts will need to carefully consider the context and mode of communication to distinguish between protected speech and a true threat. The Colorado Supreme Court has started the conversation on how courts should make that distinction.

11 *Id.*

12 *Id.* at 734.

13 *Id.*

14 Glenn Harlan Reynolds, *I deleted my Twitter account. It's a breeding ground for thoughtlessness and contempt.* USA Today, Dec. 3, 2018, https://www.usatoday.com/story/opinion/2018/12/03/twitter-facebook-social-media-bias-political-poison-blogosphere-instapundit-column/2183648002/.

FLORIDA

Thompson v. DeSantis

By Chloe C. Leedom

Published November 3, 2020

About the Authors:

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Note from the Editor:

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On September 11, 2020, the Supreme Court of Florida unanimously granted Florida State Representative Geraldine Thompson's amended petition for a writ of mandamus ordering Florida Governor Ron DeSantis to appoint an eligible nominee to fill the vacancy left on Florida's Supreme Court by Justice Robert Luck in November 2019.[1] After considering the governor's response to an order to show cause for his delayed appointment,[2] the court ordered Governor DeSantis to fully comply by appointing an eligible justice to the court no later than September 14, 2020.[3]

Governor DeSantis had announced on May 26, 2020, that he would choose Judge Renatha Francis to fill the seat—one of seven people preapproved by the Judicial Nominating Commission ("JNC").[4] She currently serves on the Fifteenth Judicial Circuit in Palm Beach County, Florida.[5]

Judge Francis has been a member of the Florida Bar since September 24, 2010. The Florida Constitution requires ten years of Florida Bar membership before a jurist is eligible to serve on the state supreme court.[6] When Governor DeSantis announced his choice on May 26, Judge Francis was four months shy of the ten-year requirement.[7] Representative Thompson sought relief against Supreme Court JNC Chair Daniel Nordby and Governor DeSantis in their official capacities.[8] The factual basis for the petition was that, on the date of her appointment, Judge Francis had not been a member of the Florida Bar for the preceding ten years.[9]

The court held that the bar eligibility requirement "attaches at the time of appointment," instead of when the appointee

1 Thompson v. DeSantis (*Thompson I*), No. SC20-985, slip op at 1 (Fla. Aug. 27, 2020), (*Thompson II*) No. SC20-985, slip op. at 1 (Fla. Sept. 8, 2020) *reh'g denied*, (*Thompson III*) SC20-985, slip op (Fla. Sept. 11, 2020) *mandamus granted*.

2 *Id.* at 2.

3 *Id.* at 2, 3.

4 Brief for Respondents at 1, No. SC20-985, (Fla. Aug. 3, 2020). Florida precedent requires the governor to choose from a list of nominees selected by the commission. *See* Pleus v. Crist, 14 So. 3d 941 (Fla. 2009).

5 *Id.*

6 Fla. Const. art. V, § 8.

7 Anthony Man & Gray Rohrer, *Renatha Francis Withdraws, Hours After Supreme Court Invalidates Her Appointment and Orders DeSantis to Pick a New Justice*, Sun Sentinel (Sept. 11, 2020, 3:00 PM), http://www.sun-sentinel.com/news/politics/fl-ne-renatha-francis-supreme-court-withdraw-20200911-pl7rlnqxofbh5ggomvf2g2sbte-story.html.

8 *Thompson I*, No. SC20-985, slip op. at 2 (Fla. Aug. 27, 2020).

9 *Id.*

assumes the duties of the office.[10] Thus, the governor argued that what happened on May 26 was merely an "announcement" and that the petitioner was calculatingly adhering to formalism.[11] The court was not convinced that the May 26 press conference was merely an announcement and instead held that it was an appointment, noting that the governor had asserted, in response to the initial petition, that "Governor DeSantis completed his legal duty by appointing Judge Francis . . . to the Florida Supreme Court on May 26, 2020."[12] The court also criticized the governor because the Florida Constitution's sixty-day deadline to fill the vacancy expired months prior to when the court stepped in.[13] Moreover, the court acknowledged its penchant for formalism and responded with a quotation from the late Justice Antonin Scalia, who said that "formalism . . . is what makes a government a government of laws and not of men."[14]

On September 14, 2020, in compliance with the order, Governor DeSantis named Judge Jamie Grosshans to the Florida Supreme Court.[15] Judge Grosshans was serving on Florida's Fifth District Court of Appeal, where she was appointed in 2018, and she was previously a judge on the Ninth Judicial Circuit in Orange County, Florida.[16]

10 Governor's Response to the Court's Order to Show Cause Why Petitioner's Amended Petition Should not be Granted, No. SC20-985, at 10 (Fla. Sept. 9, 2020).

11 Governor's Response in Opposition to Motion on Rehearing, No. SC20-985, at 12 (Sept. 4. 2020).

12 *Thompson I*, No. SC20-985, slip op. at 1 (Fla. Aug. 27, 2020); *Id.* at 2 n. 1.

13 *Id.* at 2.

14 *Thompson I*, No. SC20-985, slip op. at 2 (Fla. Aug. 27, 2020) (quoting Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 25 (1997).

15 Florida Supreme Court, http://www.floridasupremecourt.org/Justices/Justice-Jamie-R.-Grosshans (last visited Oct. 18, 2020).

16 *Id.*

GEORGIA

Jackson v. Raffensperger

By Anastasia P. Boden

Published July 7, 2020

About the Author:

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

Note from the Editor:

This article was updated on February 9, 2021 to clarify the nature of the Court's decision with respect to whether CLCs and IBCLCs are similarly situated.

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A Georgia trial court recently held that the state constitution "does not recognize a right to work in one's chosen profession."[1] In *Jackson v. Raffensperger*, the Georgia Supreme Court reversed that decision and reaffirmed the state constitution's role in protecting people's ability to pursue a livelihood without unreasonable state interference.[2]

The plaintiffs in the case, Mary Jackson and her non-profit organization, Reaching Our Sisters Everywhere, Inc. (ROSE), challenged the constitutionality of the Georgia Lactation Consultant Practice Act. Lactation care providers, or "LCs," provide breastfeeding support in clinical settings and at home, and for decades they were able to work in Georgia free of a licensure requirement. But in 2016, the legislature passed a law that not only mandated licensure, but also limited eligibility to individuals who are privately credentialed as International Board Certified Lactation Consultants (IBCLCs).[3] The law thus excluded consultants who were certified by other prominent organizations, including Certified Lactation Counselors (CLCs). Mary Jackson, who is certified as a CLC, alleged in her lawsuit that the law deprived her of due process and equal protection under the state constitution because it unfairly prohibited her from working as a lactation consultant even though she and other members of ROSE were just as competent as IBCLCs to provide lactation care.

Though the statute banned CLCs from getting a license, it contained a multitude of exceptions for other professionals, including, "[p]ersons licensed to practice the professions of dentistry, medicine, osteopathy, chiropractic, nursing, physician assistant, or dietetics;" "doulas and perinatal and childbirth educators;" "students, interns, or persons preparing for the practice of lactation care and services" (with supervision); certain federal, state, county, and local employees; and anyone who does it for free.[4]

The trial court ruled that the plaintiffs failed to state a legal claim under the state constitution's due process clause because the Georgia Constitution doesn't recognize a right to work in one's chosen profession. It further ruled that that they failed to state a claim that the Act violates the equal protection clause because CLCs and IBCLCs are not similarly situated.[5]

In a relatively short opinion, the Georgia Supreme Court reversed and remanded, citing a long line of cases establishing that the state constitution does, in fact, protect "the right to pursue an occupation of one's choosing free from unreasonable government

1 *Jackson v. Raffensperger*, 2020 WL 2516517, at *1

2 *Id.* at *3.

3 *Id.* at *2-3.

4 *Id.* at *3. While permitted to practice lactation care, many of these groups were prohibited from holding themselves out as licensed lactation consultants.

5 *Id.* at *1.

interference."[6] It ruled that the lower court's decision was based on an erroneous interpretation of a prior case which merely stood "for the unremarkable proposition that an individual's due process right to practice a . . . profession is subject to reasonable regulation by the State."[7] That case did not, however, mean that there was no right to practice a profession at all. It therefore remanded so that the due process claim could proceed to the merits.

The court also ruled that the plaintiffs had adequately alleged that CLCs and IBCLCs were similarly situated for purposes of an equal protection challenge.[8] The complaint alleged that the two perform similar work and that both groups were equally competent to do that work. (That allegation was bolstered by the fact that the legislature had previously rejected a nearly identical bill after the Georgia Occupational Regulation Review Council determined that CLCs and IBCLCs were equally qualified. The legislature went on to pass a later iteration of the bill despite objections.[9]) The Court ruled that, accepting these facts as true, the groups were similarly situated for purposes of an equal protection challenge regardless of the fact that the prerequisites for obtaining the two credentials differed.

On remand, the plaintiffs will now have the chance to make their case on the merits.

6 *Id.* at *3.

7 *Id.* at *4.

8 *Id.* at *5.

9 *Id.* at *2.

HAWAII

In Re Individuals in Custody of the State of Hawai'i

By Jeremiah Mosteller

Published December 16, 2020

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.

Note from the Editor:

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As COVID-19 spread across our country, many jurisdictions struggled with how to protect those in our prisons and jails. Many jurisdictions responded by, among other things, seeking to reduce the number of people entering the system while also finding ways to safely release more individuals into the community.[1] Nevertheless, there has been litigation arguing that these efforts have not been extensive enough, and judges have weighed in about how we should protect those who are medically vulnerable or at high risk of contracting COVID-19 in our prisons and jails.[2]

One petition, filed by the Hawaii Office of the Public Defender, asked the state's supreme court to order additional action by the Hawaii Department of Public Safety and the

1 *See e.g.* Dave Minsky, *Sheriff has booked, released nearly half of those arrested since coronavirus emergency order*, Santa Maria Times (Oct. 28, 2020), https://santamariatimes.com/news/local/crime-and-courts/sheriff-has-booked-released-nearly-half-of-those-arrested-since-coronavirus-emergency-order/article_5ddbc4f5-f2b9-5abe-ba0c-45f6ed7c1760.html; *646 more Kentucky inmates released from prison to prevent COVID-19 spread*, WLKY (Aug. 25, 2020), https://www.wlky.com/article/646-more-kentucky-inmates-released-from-prison-to-prevent-covid-19-spread/33798804#; Jordan Rubin, *Will Pandemic Be 'Tipping Point' For Justice Reform?*, The Crime Report (June 4, 2020), https://thecrimereport.org/2020/06/04/will-pandemic-be-tipping-point-for-justice-reform/; Xerxes Wilson, *Why Delaware Arrests Have Plummeted During the Pandemic*, U.S. News and World Report (May 2, 2020), https://www.usnews.com/news/best-states/delaware/articles/2020-05-02/why-delaware-arrests-have-plummeted-during-the-pandemic; James Mayse, *Arrests have declined dramatically due to effort to reduce COVID-19 exposure*, Messenger-Inquirer (Apr. 17, 2020), https://www.messenger-inquirer.com/news/arrests-have-declined-dramatically-due-to-effort-to-reduce-covid-19-exposure/article_1ea3b65e-febb-52bd-a47a-a60d5565261e.html; Kenneth Lipp, *Jail inmate roster halved*, News Times (Apr. 16, 2020), https://newportnewstimes.com/article/jail-inmate-roster-halved; Heather Walker, *Coronavirus prompts prisons to parole inmates more quickly*, WOOD TV (Apr. 14, 2020), https://www.woodtv.com/health/coronavirus/coronavirus-prompts-prisons-to-parole-some-early/; James Baron, *Some non-violent inmates released from area jails amidst coronavirus pandemic*, The Free Lance-Star (Mar. 28, 2020), https://fredericksburg.com/news/crime_courts/some-non-violent-inmates-released-from-area-jails-amidst-coronavirus/article_53423ed4-81da-5d13-9353-f66ec0377b65.html; Memorandum from Attorney General William Barr to Director of Bureau of Prisons (Mar. 26, 2020), *available at* https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf; Jody Godoy & Stewart Bishop, *Federal Prisons Can Send More Inmates Home. Will They?*, Law 360 (Mar. 26, 2020), https://www.law360.com/articles/1257468; Kerri O'Brien, *Area jails releasing inmates to prevent COVID-19 outbreak behind bars*, ABC 8 News (Marc. 23, 2020), https://www.wric.com/news/virginia-news/area-jails-releasing-inmates-to-prevent-covid-19-outbreak-behind-bars/.

2 *See, e.g.*, United States v. Zukerman, No. 16 Cr. 194 (AT) (S.D.N.Y. Apr. 3, 2020); United States v. Ramos, 450 F. Supp. 3d 63 (D. Mass. Mar. 26, 2020); Burton Bentley II, *The Growing Litigation Battle Over COVID-19 in the Nation's Prisons and Jails*, Law.com (Aug. 25, 2020), https://www.law.com/2020/08/25/the-growing-litigation-battle-over-covid-19-in-the-nations-prisons-and-jails/?slreturn=20201018081011; Matthew Santoni, *Inmates Say Pittsburgh Jail Not Following COVID-19 Guidance*, Law360 (Apr. 9, 2020), https://www.law360.com/articles/1261781/inmates-say-pittsburgh-jail-not-following-covid-19-guidance; ACLU Sues Oakdale Federal Prison For Release Of Those Most At Risk From Covid-19,

Hawaii Paroling Authority in response to the risk of COVID-19.[3] This petition sought expedited release for those incarcerated for any nonviolent offense without individualized hearings, a temporary suspension of cash bail, and the release through parole of individuals who are over age 65, pregnant, or detained for a technical violation of parole.[4] The Department of Public Safety, Paroling Authority, and four county prosecutors all filed answers stating significant objections to those requests and suggesting alternative courses of action.[5]

Supreme Court Order

The Hawaii Supreme Court ordered a variety of temporary policy changes across the Aloha State's justice system, reasoning that the court must balance the interests of public health and public safety. These changes applied to any individual who was not charged with or convicted of a list of offenses including homicide, assault, kidnapping, sexual offenses, child abuse, burglary, and violating a quarantine requirement.[6]

The changes included:

1. Suspending intermittent jail sentences and discouraging courts from imposing new intermittent jail sentences.
2. Releasing anyone arrested or detained solely for misdemeanor offenses.
3. Barring all courts from imposing bail for misdemeanor offenses.
4. Discouraging courts from imposing bail for defendants charged with a felony not on the exclusion list and encouraging the release of such defendants to home confinement or electronic monitoring.
5. Discouraging the detention of persons who violate their probation terms unless they pose "a significant risk to public health or safety."
6. Clarifying that individuals incarcerated in state prisons who test positive for COVID-19 can be released without taking another test if they meet CDC contagion guidelines.

These actions are not unusual by the standard of temporary policy changes adopted by many courts, prosecutors, law enforcement agencies, and corrections departments in response to COVID-19.

The Hawaii Supreme Court issued a second order a few days after the first, rejecting a motion from the Office of the Public Defender to preemptively issue an order to compel compliance. The court found that this motion was not "sufficiently supported" and "not within the scope of the relief previously ordered."[7] These two orders superseded a variety of other orders issued by the Hawaii Supreme Court during the preceding weeks.[8]

Concurring Opinion

Justice Sabrina McKenna's concurring opinion raises concerns about the inclusion of "violation of interstate or intrastate travel quarantine requirements" in the list of excluded crimes.[9] She notes that the majority's order allows the incarceration of those who violate quarantine procedures.[10] But unlike the other crimes in the exclusion list, violations of quarantine requirements are not the violation of a criminal statute. Rather, they are violations of executive orders authorized by Hawaii's emergency management statutes.[11]

These statutes delegate extensive powers to the governor when the state is facing "disasters or emergencies of unprecedented size and destructiveness."[12] They provide the governor with the sole power to declare the existence of an emergency and then adopt rules that "have the force and effect of law," including a quarantine requirement for people exposed to an infectious disease.[13] These statutes allow criminal sanctions for violations of

ACLU (Apr. 6, 2020), https://www.aclu.org/press-releases/aclu-sues-oakdale-federal-prison-release-those-most-risk-covid-19.

3 Petition for Extraordinary Writ Pursuant to H.R.S. §§ 602-4, 602-5(5), and 602-5(6) and/or For Writ of Mandamus, *In the Matter of Individuals in Custody of the State of Hawai'i*, No. SCPW-20-0000509 (Haw. Aug. 12, 2020) [Hereinafter "Petition"]; *See also* John Burnett, *Surge in COVID-19 cases spurs petition from Office of Public Defender seeking the release of some inmates,* Hawaii Tribune-Herald (Aug. 14, 2020), https://www.hawaiitribune-herald.com/2020/08/14/hawaii-news/surge-in-covid-19-cases-spurs-petition-from-office-of-public-defender-seeking-the-release-of-some-inmates/.

4 Petition *supra* note 3 at 14-16.

5 Order Re: Petty Misdemeanor, Misdemeanor, and Felony Defendants, 2 (Haw. Aug. 27, 2020), *available at* https://www.courts.state.hi.us/wp-content/uploads/2020/08/SCPW-20-0000509ord6.pdf.

6 *Id* at 3-5.

7 Order Denying Petitioner's Motion to Compel Compliance with this Court's Orders, 2 (Haw. Sep. 1, 2020), *available at* https://www.courts.state.hi.us/wp-content/uploads/2020/09/SCPW-20-0000509ord7.pdf.

8 Order Granting in Part and Denying in Part Motion for Clarification and/or Reconsideration (Haw. Aug 26, 2020), *available at* https://www.courts.state.hi.us/wp-content/uploads/2020/08/SCPW-20-0000509recong.pdf; Order Re: Petty Misdemeanor, Misdemeanor, and Felony Defendants at the Maui Community Correctional Center, the Hawai'i Community Correctional Center, and the Kaua'i Community Correctional Center (Haw. Aug. 24, 2020), *available at* https://www.courts.state.hi.us/wp-content/uploads/2020/08/SCPW-20-0000509ord5.pdf; Interim Order for *In the Matter of Individuals in Custody of the State of Hawaii* (Haw. Aug. 19, 2020), *available at* https://www.courts.state.hi.us/wp-content/uploads/2020/08/SCPW-20-0000509ord4.pdf; Amended Order Re: Felony Defendants (Haw. Aug. 18, 2020), *available at* https://www.courts.state.hi.us/wp-content/uploads/2020/08/SCPW-20-0000509amord3.pdf; Amended Order Re: Petty Misdemeanor and Misdemeanor Defendants (Haw. Aug. 17, 2020), *available at* https://www.courts.state.hi.us/wp-content/uploads/2020/08/SCPW-20-0000509amord.pdf; Interim Order for *In the Matter of Individuals in Custody of the State of Hawaii* (Haw. Aug. 14, 2020), *available at* https://www.courts.state.hi.us/wp-content/uploads/2020/08/SCPW-20-0000509ord1.pdf; Order for *In the Matter of Individuals in Custody of the State of Hawaii* (Haw. Aug. 13, 2020), *available at* https://www.courts.state.hi.us/wp-content/uploads/2020/08/SCPW-20-0000509ord.pdf.

9 Order Re: Petty Misdemeanor, Misdemeanor, and Felony Defendants (Haw. Aug. 27, 2020) (McKenna, J., concurring and dissenting), *available at* https://www.courts.state.hi.us/wp-content/uploads/2020/08/SCPW-20-0000509condop1.pdf.

10 *Id.*

11 Haw. Rev. Stat. § 127A-1-32 (2020).

12 Haw. Rev. Stat. § 127A-1; 127A-12; 127A-13; 127A-14; 127A-15; 127A-25 (2020).

13 Haw. Rev. Stat. § 127A-13; 127A-14; 127A-25 (2020).

quarantine requirements, but they neither include nor require a mens rea standard, and they only provide minimal requirements for how the public should be informed of these new rules.[14] This could present serious overcriminalization and due process problems because under the order, a person could be incarcerated without any actual knowledge of the state's current quarantine requirements.

Commentators across the political spectrum have expressed concern that government responses to COVID-19 might rely too much on the heavy hand of criminal sanctions, exacerbating preexisting overcriminalization problems.[15] Local law enforcement has already used the Hawaii Supreme Court order to jail at least one person.[16]

14 Haw. Rev. Stat. § 127A-15 (2020).

15 Timothy Head, *How the coronavirus is revealing America's over criminalization problem*, The Hill (June 1, 2020), https://thehill.com/opinion/criminal-justice/500502-how-the-coronavirus-is-revealing-americas-over-criminalization; National Association of Criminal Defense Lawyers, *NACDL Supplemental Statement of Principles and Further Call to Action Concerning COVID-19 and America's Criminal Justice System* (May 11, 2020), https://www.nacdl.org/newsrelease/COVID19Criminalization; Betsey Pearl, et al., *The Enforcement of COVID-19 Stay-at-Home Orders*, Center for American Progress (Apr. 2, 2020), https://www.americanprogress.org/issues/criminal-justice/news/2020/04/02/482558/enforcement-covid-19-stay-home-orders/.

16 Katie Dowd, *San Francisco woman jailed for allegedly violating Hawaii COVID-19 rules*, SFGate (Nov. 18, 2020), https://www.sfgate.com/hawaii/article/maui-coronavirus-travel-rules-violation-arrest-15736193.php.

ILLINOIS

Berry v. City of Chicago

By Christopher Appel

Published November 3, 2020

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Christopher Appel is Of Counsel at Shook Hardy & Bacon LLP. Chris' public policy work focuses on tort law and civil justice system reform. His work is generally divided among legislative efforts, appellate litigation, and liability counseling. Chris has drafted model legislation to be introduced on the state and federal level, testified on numerous legislative initiatives, and authored amicus briefs to state supreme courts and federal appellate courts, including the U.S. Supreme Court. He also serves as an adviser to various business groups and trade associations interested in tort liability issues and civil justice system reform.

Note from the Editor:

In *Berry v. City of Chicago*,[1] the Illinois Supreme Court held that plaintiffs alleging an increased risk of injury as a result of a defendant's negligence cannot recover medical monitoring damages in the absence of a present physical injury. The court's decision to reject a recovery based on the mere possibility of future harm adhered to the traditional tort law requirement that a claimant must demonstrate an existing injury.

Berry involved a proposed class action against the City of Chicago on behalf of all city residents who resided in an area where the city had replaced water mains or meters between 2008 and the present.[2] The named plaintiffs asserted that the city negligently performed construction work to modernize and replace hundreds of miles of water lines made of lead, and negligently failed to warn residents about the risks of lead exposure related to such work. The action sought the establishment of "a trust fund . . . to pay for the medical monitoring" of all class members to diagnose potential incidences of lead poisoning.[3]

The trial court dismissed the plaintiffs' complaint for failure to state a valid cause of action, but a mid-level appellate court reversed the decision.[4] The city appealed to the Illinois Supreme Court, which granted review and reversed the mid-level appellate court.

The state high court explained that the "plaintiffs' allegation that they require 'diagnostic medical testing' is simply another way of saying they have been subjected to an increased risk of harm."[5] The court determined that Illinois common law makes clear that "in a negligence action, an increased risk of harm is not an injury."[6] Accordingly, the court concluded that a "plaintiff who suffers bodily harm caused by a negligent defendant may recover for an increased risk of future harm as an element of damages, but the plaintiff may not recover solely for the defendant's creation of an increased risk of harm."[7]

In rejecting the availability of a medical monitoring remedy without a physical injury, the Illinois Supreme Court aligned itself with the approach followed in many other states.[8] The court

1 No. 124999, 2020 IL 124999 (Ill. Sept. 24, 2020).

2 *See id.* at *1.

3 *Id.* at *3 (quoting complaint).

4 *Id.* at *1.

5 *Id.* at *7.

6 *Id.* (citing Restatement (Third) of Torts, Liability for Physical & Emotional Harm § 4, cmt. c (2010)).

7 *Id.*

8 States are divided on whether a claimant can recover medical monitoring damages in the absence of a present physical injury. Of the states in which a state appellate court has decided the issue as a matter of common law, a slim majority have rejected such claims. In most states, however, neither a state appellate court nor the legislative branch has decided

recognized that "there are practical reasons for requiring a showing of actual or realized harm before permitting recovery in tort."[9] "Among other things," the court explained, a present physical injury requirement "establishes a workable standard for judges and juries who must determine liability, protects court dockets from becoming clogged with comparatively unimportant or trivial claims, and reduces the threat of unlimited and unpredictable liability."[10] The U.S. Supreme Court and other state high courts have similarly expressed these policy rationales in rejecting medical monitoring claims by the unimpaired.[11]

the availability of medical monitoring absent a present physical injury. *See* Mark A. Behrens & Christopher E. Appel, *American Law Institute Proposes Controversial Medical Monitoring Rule in Final Part of Torts Restatement*, IADC Defense Counsel Journal, Nov. 2020, *available at* https://www.iadclaw.org/defensecounseljournal/american-law-institute-proposes-controversial-medical-monitoring-rule-in-final-part-of-torts-reinstatement/ (discussing courts' treatment of medical monitoring claims by plaintiffs without a present physical injury and including a 50-state case law survey).

9 *Berry*, 2020 IL 124999, at *7.

10 *Id.*

11 *See id.* (citing *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997), and *Caronia v. Philip Morris USA, Inc.*, 5 N.E.3d 11 (N.Y. 2013)); *see generally* Victor E. Schwartz et al., *Medical Monitoring – Should Tort Law Say Yes?*, 34 Wake Forest L. Rev. 1057 (1999).

INDIANA

Indiana Department of Natural Resources v. Kevin Prosser

By Prof. Aaron Nielson

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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.

If you are like most people, when you hear the words "administrative law," you think about big buildings in Washington D.C. where everyone wears suits and speaks in acronyms. Your mind probably does not turn a property owner seeking to install 117 feet of concrete seawall on Lake Manitou in Rochester, Indiana.[1] Yet administrative law is everywhere, including on the shore of Lake Manitou.

On February 24, 2020, the Indiana Supreme Court denied review in *Indiana Department of Natural Resources v. Prosser*, a case about concrete seawall.[2] The legal issue in *Prosser* is a familiar one in administrative law: What does "substantial evidence" review require?

In 2015, Kevin Prosser needed a permit under state law to install a concrete seawall on his property.[3] After the permit was denied, Mr. Prosser sought review from an administrative law judge ("ALJ").[4] The ALJ concluded that because Mr. Prosser's property is not "developed," it is subject to special requirements, including that a seawall must be built with bioengineered materials.[5] Mr. Prosser argued, however, that the area *is* developed.[6] Both sides agreed that the relevant area had been excavated in 1947.[7] The question was whether that excavation "result[ed] in an increase in the total length of shoreline around the lake."[8] According to Mr. Prosser, the shoreline was extended, and he had two eyewitnesses (who were children at the time) to prove it.[9] Aerial photos also arguably supported that position.[10] The State, however, offered evidence of its own that cast doubt on Mr. Prosser's position.[11] The ALJ concluded that there was "insufficient" evidence that "the

1 *See* Ind. Dep't of Nat. Resources v. Prosser, 132 N.E.3d 397 (Ind. App.), *trans. denied* 139 N.E.3d 702 (Ind.

App. 2019).

2 *See Prosser*, 139 N.E.3d at 702.

3 *See Prosser*, 132 N.E.3d at 398; *see also* Olivia Covington, *Slaughter Invites Challenges to Reviews of Agency Adjudications*,

The Indiana Lawyer, https://www.theindianalawyer.com/articles/slaughter-invites-challenges-to-reviews-of-agency-adjudications.

4 *Prosser*, 132 N.E.3d at 398.

5 *See id.* at 399-400.

6 *See* Brief of Appellee at 13, *Prosser*, 132 N.E.3d 397 (No. 18A-MI-02644).

7 *Id.* at 16.

8 Appellant's Response to Appellee's Petition to Transfer at 7, *Prosser*, 132 N.E.3d 397 (No. 18A-MI-2644).

9 *See Prosser*, 132 N.E.3d at 399.

10 *Id.*

11 *Id.*

shoreline of Lake Manitou was increased . . . by dredging or other means" and that the eyewitness testimony was not dispositive.[12]

Mr. Prosser sought judicial review—at first, successfully.[13] He appealed the ALJ's ruling to the trial court, which concluded that the State's evidence was insufficient to overcome the eyewitness testimony.[14] The appellate court, however, disagreed.[15] The court reasoned that it was "bound by the agency's findings of fact if those findings are supported by substantial evidence," which standard, under both Indiana and federal precedent, is "more than a scintilla, but something less than a preponderance of the evidence."[16] Applying that deferential standard, the court sided with the State.[17] After all, as the court explained, "it was ALJ's job to evaluate the testimony of witnesses and other evidence for credibility and weight, and the ALJ's evaluation of their evidence strikes us as neither arbitrary nor capricious."[18] The Indiana Supreme Court denied review.[19]

Prosser is especially noteworthy because of a concurrence by Justice Geoffrey Slaughter. Although Slaughter agreed with his colleagues not to hear *Prosser*, he wrote separately to express concern about substantial evidence review itself.[20] Slaughter observed that "what qualifies as 'substantial' evidence is not substantial at all."[21] Rather, "if there is sufficient evidence in the record, a reviewing court must defer to an agency's factfinding," with no de novo review by a jury or judge.[22] Slaughter also expressed discomfort with deference more generally and explained that in a future case he is "open to entertaining legal challenges to this system."[23] Presumably litigants in Indiana will now begin formulating arguments in response to Slaughter's call. What those arguments will be remains to be seen. But it is safe to say that administrative law creates difficult questions. Coming up with the right answers will be even more difficult.[24] But it is important to ask questions—and Indiana isn't a bad place to start.

12 *Id.* at 400.

13 *Id.*

14 *Id.*

15 *Id.* at 402.

16 *Id.* at 401; *see also, e.g.*, Fla. Gas Transmission Co. v. FERC, 604 F.3d 636, 645 (D.C. Cir. 2010).

17 *See Prosser*, 132 N.E.3d at 399, 402.

18 *Id.*

19 *Prosser*, 139 N.E.3d at 702.

20 *Id.* (Slaughter, J., concurring).

21 *Id.*

22 *Id.*

23 *Id.*

24 *See, e.g.*, Aaron L. Nielson, *Confessions of an "Anti-Administrativist"*, 131 Harv. L. Rev. F. 1, 12 (2017 ("Because administrative law is complex, there are many ideas, some better and some worse—and all needing further thinking.").

IOWA

League of United Latin American Citizens of Iowa v. Pate

By Drew Watkins

Published December 17, 2020

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Note from the Editor:

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In *League of United Latin American Citizens of Iowa v. Pate (LULAC v. Pate)*, the Iowa Supreme Court denied a request to block enforcement of a portion of Iowa's absentee balloting law which requires county auditors to contact voters who submit defective absentee ballot applications in order to correct the errors.[1]

In June 2020, during the COVID-19 pandemic, the Iowa legislature passed, and the Governor signed into law, House File 2643 (HF 2643), which amended certain provisions of Iowa's election law.[2] In particular, two sections of HF 2643, sections 123 and 124, altered Iowa Code section 53.2(4) to require that certain identifiable information must be provided by "a registered voter" in order to request an absentee ballot, and that county auditors must contact applicants within twenty-four hours to obtain or correct any deficient required information in an application.[3] Importantly, this law replaced a prior version that permitted county auditors to use "the best means available" to obtain missing information.[4]

Shortly after HF 2643 was enacted, plaintiffs—the League of United Latin American Citizens of Iowa and Majority Forward—brought suit seeking to block enforcement of the provision of HF 2643 that required county auditors to contact voters to cure flawed absentee ballot applications.[5] Alleging that Iowa's law created an unconstitutional, severe burden on the right to vote, plaintiffs sought to allow county auditors to correct errors and omissions in applications *sua sponte*, without additional voter contact.[6] The district court denied plaintiffs' request for a temporary injunction.[7]

In affirming the district court's decision, the Iowa Supreme Court relied on its decision in *Democratic Senatorial Campaign Committee v. Pate (DSCC v. Pate)*,[8] which upheld the requirement that the applicant provide his or her identifiable information, rather than having such information prefilled on forms mailed by county auditors. The Iowa Supreme Court determined that

1 *League of United Latin Am. Citizens v. Pate (LULAC v. Pate)*, No. 20-1249, 2020 Iowa Sup. LEXIS 89, at *3-4 (Oct. 21, 2020) (*per curiam*).

2 *Id.* at *4.

3 *Id.* at *4-5; *see also* Iowa Code § 53.2(4)(a) and (b).

4 *LULAC v. Pate*, 2020 Iowa Sup. LEXIS 89, at *5.

5 *Id.* at *5-6.

6 *Id.* at *2.

7 *Id.* at *6-7.

8 *Democratic Senatorial Campaign Comm. v. Iowa Sec'y of State (DSCC v. Pate)*, No. 20-1281, 2020 Iowa Sup. LEXIS 88 (Oct. 14, 2020) (*per curiam*).

the "purpose of both requirements is to protect the integrity and security of the absentee ballot system."[9]

Focusing on whether plaintiffs had demonstrated a likelihood of success on the merits to justify a temporary injunction, the Iowa Supreme Court applied the familiar *Anderson-Burdick* framework for evaluating statutes impacting state electoral processes.[10] Under this framework, when evaluating a state's regulation of the voting process, the "rigorousness" of a court's review "depends upon the extent to which a challenged regulation burdens" constitutional rights.[11] If a restriction is "severe" the regulation must survive strict scrutiny—that is, "the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'"[12] However, if a regulation imposes "only 'reasonable, nondiscriminatory restrictions … the State's important regulatory interests are generally sufficient to justify' the restrictions."[13]

Applying the *Anderson-Burdick* framework, the Iowa Supreme Court determined the burden imposed by the Iowa statute on voters' constitutional right to vote was not severe. In so doing, the Iowa Supreme Court determined that the challenged provisions in *DSCC v. Pate* and *LULAC v. Pate*, were "two sides of the same coin," both intended to ensure that the voter completes the absentee ballot application "as a means of assuring the application *comes from the voter*."[14] In effect, the Iowa Supreme Court determined, plaintiffs were attempting to relieve the responsibility on voters to complete the application (which the court found to be a nonsevere burden in *DSCC v. Pate*) by allowing the county auditor to correct any errors or omissions.[15] Instead, the law provided "the applicant a second chance to fill out the application correctly."[16]

Weighing the nonsevere burden imposed by Iowa's statute against Iowa's interest in ensuring its elections are free from fraud, the court noted that under Iowa election law, "anyone can turn in an absentee ballot request on behalf of another person."[17] Accordingly, incorrect and omitted information on an application "raise potential concerns about whether the person completing the form is in fact the registered voter."[18] As such, "[t]he auditor's direct communication with the voter furthers the integrity of absentee voting by helping to 'ensure that the person submitting the request is the actual voter.'"[19]

Although the court recognized that HF 2643 was not passed in response to evidence of actual fraud, the court reasoned that the "legislature need not ignore potential threats, and 'should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively.'"[20] Moreover, the absence of actual fraud had "little significance" given the minimal burden imposed by the law.[21] As the court explained, the Iowa Supreme Court has long recognized the prevention of fraud to be a legitimate interest in regulating absentee ballot requests.[22]

In addition, the court took a dim view of the record established by plaintiffs in support of their case. First, the Iowa Supreme Court found that the plaintiffs had presented no evidence of anyone actually being stopped from voting as a result of the challenged statute.[23] Additionally, in response to plaintiffs' hypothetical concern that voters could be confused about the status of their ballot request, the court pointed out that the Secretary of State allows voters to track their request online.[24] Also, pointing to public data that showed only a small percentage of absentee ballot requests had yet to be fulfilled, and that over 90% of unprocessed requests originated from two counties which had to recall unlawfully prepopulated ballot request forms, the Iowa Supreme Court questioned the magnitude of plaintiffs' concerns.[25] In particular, the court noted that the data called into question plaintiffs' expert witness who had predicted a "tsunami" of requests leading up to the request deadline when, in fact, "the actual data show[ed] daily *decreases* [sic] in ballot requests … [and] yet-to-be-mailed ballots."[26]

Finally, the court summarily rejected plaintiffs' claims that the statute violated the Iowa Constitution's equal protection clause and procedural due process protections. The court found that plaintiffs offered no evidence to support an equal protection claim and, in any event, it held that variations among county auditors' in their cure practices did not, without more, establish an equal protection violation.[27] Additionally, in rejecting the procedural due process claim, the court noted that it largely overlapped with the court's holding "as it relates to the permissible balance between election security and access to voting."[28] The court also highlighted additional safeguards in place to protect the right to vote including that the Secretary of State mailed an absentee ballot application to every registered voter, that the ballot request forms contained clear instruction, that county auditors were compelled to contact voters to cure insufficient applications, and that Iowa

9 *LULAC v. Pate*, 2020 Iowa Sup. LEXIS 89, at *3.

10 *Id.* at *9.

11 *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

12 *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

13 *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

14 LULAC v. Pate, 2020 Iowa Sup. LEXIS 89, at *10 (emphasis in original).

15 *Id.*

16 *Id.*

17 *Id.* at *11 (citing Iowa Code § 53.17(1)(a)).

18 *Id.*

19 *Id.* at *12 (quoting *DSCC v. Pate*, 2020 Iowa Sup. LEXIS 88, at *8).

20 *Id.* at *12-13 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986)).

21 *Id.* at *12.

22 *Id.* at *13 (citing *Luse v. Wray*, 254 N.W.2d 324, 329-30 (Iowa 1977) (*en banc*)).

23 *Id.* at *16.

24 *Id.* at *17.

25 *Id.* at *18-19.

26 *Id.* at *19-20.

27 *Id.* at *23-24.

28 *Id.* at *24.

had extensive early absentee and in-person voting periods in addition to election day voting.[29]

Writing in dissent, Justice Oxley distinguished between what she termed the "front-end process of filling out the form correctly," and the "back-end process of timely correcting the errors … and getting an absentee ballot back to the voter in time to use it."[30] In the dissent's view, "[t]he front-end and back-end provisions impose significantly different burdens on Iowa voters' ability to actually receive an absentee ballot," and this difference "tips the scale differently in this case than it did in *DSCC v. Pate*."[31] Applying a higher standard in light of a perceived higher burden on the right to vote, the dissent weighed "the evidence in the record" suggesting a likelihood that thousands of Iowa voters will not receive an absentee ballot in time, against the state's "mere incantation of 'integrity of the election system' and 'voter fraud'" to conclude that plaintiffs have shown a likelihood of success on the merits and are entitled to a temporary injunction.[32] In response, the majority countered that the dissent: (i) confused "the burden on the *voter* with the potential burden on *county auditor*;" (ii) mistook the "facts on the ground with the predictions of a party's retained expert;" and (iii) overstated the distinction between "front-end" and "back-end" processes which are "really one verification method."[33]

In *LULAC v. Pate*, the majority reaffirmed the state legislature's prerogative to enact nonsevere burdens on the voting process in an effort to combat fraud in elections. The court even floated the notion that protecting "public confidence in the electoral process" may suffice to impose "minimally burdensome regulations" on the right to vote.[34] In the aftermath of the 2020 election cycle, and considering that absentee and early voting will likely sustain increased use in future elections, state legislatures will be looking at ways to ensure the integrity of their elections. It is likely that many of the changes state legislatures make to their voting process will be challenged, and the bounds of a state's regulation of its elections may be tested.

29 *Id.* at *25.

30 *Id.* at *27 (Oxley, J., dissenting).

31 *Id.* at *28-29.

32 *Id.* at *29.

33 *Id.* at *20-22.

34 *Id.* at *14 (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008)).

KANSAS

Kelly v. Legislative Coordinating Council

By Brad Schlozman

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Note from the Editor:

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Since the November 2018 election of Democrat Laura Kelly as governor of Kansas, the state's Republican-controlled legislature has found itself in an increasing number of battles with the leader of the executive branch. One of the most recent controversies—a high-stakes separation of powers dispute in April over the legislature's authority to claw back gubernatorial executive orders issued in connection with the COVID-19 pandemic—culminated in a short-lived win for the governor before the Kansas Supreme Court.[1] Ruling solely on statutory grounds, the court held that a legislative snafu effectively deprived the legislature of the ability to abrogate pandemic-related executive orders.

Background

The Kansas Emergency Management Act ("KEMA") grants the governor a statutory power to declare a state of "disaster emergency" for virtually any reason.[2] At the time this case arose, the governor enjoyed nearly unfettered discretion during such emergencies to issue executive orders and perform such other duties "as are necessary to promote and secure the safety and protection of the civilian population."[3] But as a check on gubernatorial power, the statute greatly restricted the duration of disaster emergencies. In particular, the governor's declaration automatically expired after 15 days unless ratified by a concurrent resolution of the legislature.[4]

After Governor Kelly declared a disaster emergency related to COVID-19 on March 12, 2020, the legislature hurriedly passed a concurrent resolution extending the disaster emergency until May 1.[5] The resolution included a provision allowing the Legislative Coordinating Council ("LCC")—a statutorily-created body comprised of leaders from the state's House of Representatives and Senate that is authorized to act on behalf of Kansas' part-time legislature during periods of recess[6]—to terminate the state of disaster emergency or revoke any executive order as it saw fit.[7]

In their haste to leave the capital, legislators did not subject the concurrent resolution's text to the typical rigorous review by the Revisor of Statutes. As a result, the concurrent resolution inadvertently stated that the LCC had no power to modify or

1 *Kelly v. Legislative Coordinating Council*, 460 P.3d 832 (Kan. 2020).

2 Kan. Stat. Ann. § 48-924(b).

3 *Id.* § 48-925(c)(11).

4 *Id.* § 48-924(b)(3). The KEMA also allowed a disaster emergency to be extended by an affirmative vote of the State Finance Council. *Id.* § 48-924(b)(4). But the State Finance Council never took any action in the case.

5 H.R. Con. Res. 5025 (Mar. 20, 2020).

6 Kan. Stat. Ann. § 46-1201 *et seq.*

7 H.R. Con. Res. 5025 § 2(A), (D).

revoke any gubernatorial action in connection with the disaster emergency unless the State Finance Council had first extended the emergency.[8] (The State Finance Council is a separate, statutorily-created body comprised of the governor and key legislative leaders. Its myriad responsibilities include approving regulations issued by the state's department of administration and appropriating funds for unanticipated and unbudgeted needs.)[9]

In the weeks following the issuance of the concurrent resolution, all parties recognized the scrivener's error, but the governor opted to work with the LCC in crafting her executive orders rather than invite a confrontation that could ultimately limit her authority during the pandemic. The détente proved only temporary.

On April 7, just five days before Easter, the governor issued Executive Order 20-18, which removed "religious gatherings" and funerals from the list of activities exempted from her prior directive prohibiting mass gatherings.[10] Violations were a criminal misdemeanor under state law, punishable by up to one year in jail and a $2,500 fine.[11] The LCC majority, noting that the governor had deliberately targeted churches while still allowing bars, restaurants, libraries, and shopping malls to operate with proper social distancing, promptly voted to invalidate the executive order the next day.[12]

The governor responded by filing an original action (a petition for a writ of *quo warranto*) against the LCC and both bodies of the legislature in the state supreme court. Predicating her claim solely on constitutional grounds, she argued that the legislature could not empower the LCC to overturn an executive order. She insisted that the only way the legislature could abrogate her order was by satisfying traditional bicameral adoption and presentment requirements.[13]

Although confronted with legislative text that unequivocally did not support its actions, the LCC claimed that the drafting errors did not reflect the legislature's intent and that the text as written was illogical. The LCC pointed out in oral argument that, under the literal text of the resolution, the State Finance Council could not possibly extend the disaster emergency in this case because the maximum 30-day extension the State Finance Council could impose would expire well before the extension granted by the legislature's concurrent resolution. The LCC further suggested that the governor had unclean hands because she had expressly agreed to the LCC's claw-back authority (in return for the elimination of additional restrictions on her power).[14] Finally, the LCC maintained that its enabling statute conferred upon it the authority to act on behalf of the legislature as a whole during a recess, thereby rendering its actions valid in this dispute and fully consistent with legislative intent.[15]

The Court's Opinion

In a brief per curiam opinion, the Kansas Supreme Court declined to address the governor's constitutional arguments. Instead, it ruled exclusively on statutory grounds, holding that the text of the legislature's concurrent resolution simply did not permit the LCC to modify or strike any executive order issued pursuant to the KEMA unless and until the State Finance Council had previously extended the disaster emergency.[16] Given the lack of any action by the State Finance Council, the LCC's conduct was void from the outset. No equitable principle, the court reasoned, could be used to alter the resolution's clear text.[17] As for the power of the LCC to act in the legislature's absence, the court concluded that the more specific language of the KEMA controlled over the LCC's enabling statute.[18]

In a concurring opinion, Justice Dan Biles said that, even if the concurrent resolution had been worded as the legislature intended, the LCC's actions still would have been invalid because the text of the KEMA did not endow the legislature with any authority to allow the LCC to invalidate gubernatorial executive orders.[19] Citing *INS v. Chadha*,[20] he opined that the legislature could not nullify an otherwise valid executive order via a concurrent resolution.[21]

In another concurring opinion, Justice Caleb Stegall reasoned that the LCC's delegation of authority argument was colorable "in light of the vexing separation of powers problems created when one branch of government delegates its powers to another branch."[22] Here, he reasoned, "[a]bsent a liberal interpretation of the Legislature's ability to continually oversee the Governor's exercise of delegated Legislative authority, the structure of KEMA itself risks violating the constitutional demand of separate powers."[23]

Justice Stegall further agreed that the concurrent resolution's requirement of State Finance Council action as a prerequisite to LCC invalidation was a legal impossibility and produced absurd results.[24] But, he added, while this ambiguity arguably

8 *Id.* §§ 1-2.

9 Kan. Stat. Ann. § 75-3708 *et seq.*

10 In Executive Order 20-14, the governor had imposed restrictions on mass gatherings, but included an array of exemptions. Executive Order 20-18, which superseded Executive Order 20-14, incorporated nearly all of the same exemptions except those for funerals and religious gatherings.

11 Kan. Stat. Ann. § 48-939.

12 *See* Jonathan Shorman, Renee Leiker, and Michael Stavola, *War over Easter: Kansas lawmakers revoke Gov. Kelly's order limiting church gatherings*, K.C. Star, Apr. 8, 2020, *available at* https://www.kansascity.com/news/politics-government/article241861126.html.

13 *See* Pet'r Pet. 6-7; Mem. Supp. Pet. 7-13.

14 *See* Resp't Resp. 14-15.

15 *See id.* at 5-9.

16 *Legislative Coordinating Council*, 460 P.3d at 838-39.

17 *Id.* at 839.

18 *Id.*

19 *Id.* at 840.

20 462 U.S. 919 (1983).

21 *Legislative Coordinating Council*, 460 P.3d at 840-41.

22 *Id.* at 841.

23 *Id.*

24 *Id.* at 842.

might sanction the court looking behind the text to legislative intent, particularly in the urgency of a pandemic, the concurrent resolution could just as easily be rewritten to allow the State Finance Council to extend the disaster emergency beyond the deadline imposed by the legislature.[25] As a result, he determined the most prudent course of action would be to:

> hold fast to the tried and true bedrock of legal interpretation and analysis—the words on the page. This commitment both constrains judicial action in circumstances where judges are ill-suited to make rules on the fly and gives the policy-making branches of government the greatest leeway to fix problems of their own making.[26]

Finally, Justice Stegall noted that the court was affirmatively not reaching the potentially significant religious liberty dimensions of the governor's actions.[27] Those concerns were later the subject of federal court litigation that resulted in the issuance of an injunction against enforcement of the governor's order.[28]

The Aftermath

Less than two months after the court issued its opinion, the legislature amended the KEMA to strip the governor of much of the considerable powers she had previously possessed during a disaster emergency. The new legislation, which the governor signed into law on June 8, extended the state of disaster emergency through September 15.[29] But it prohibits the governor from proclaiming any new COVID-19-related disaster emergency during 2020 unless the State Finance Council validates her declaration by an affirmative vote of at least six of the eight members.[30] The legislation also prevents her from directing the cessation of activities of any business for more than 15 days,[31] altering any election laws or procedures due to the pandemic,[32] or closing schools absent a majority vote by the state board of education[33] (which she failed to attain when she subsequently tried to do so).[34] The bill further authorizes each board of county commissioners to adopt public health provisions that are less restrictive than those imposed by the governor.[35] And it eliminates the criminal penalties for violations of executive orders and treats infringements as mere civil offenses.[36] In sum, the governor's victory in the Kansas Supreme Court turned out to be brief.

25 *Id.*

26 *Id.* at 843.

27 *Id.* at 843-44.

28 *First Baptist Church v. Kelly*, 2020 WL 1910021 (D. Kan. Apr. 18, 2020).

29 H.B. 2016, § 5(a).

30 *Id.* § 5(b).

31 *Id.* § 6. Extensions of business closures are permitted only with a supermajority vote of the State Finance Council, which is controlled by Republican leaders in the legislature.

32 *Id.* § 33 (codified at Kan. Stat. Ann. § 48-925(f)).

33 *Id.* § 7.

34 *See* Jonathan Shorman and Dion Lefler, *Kansas Board of Education rejects Kelly order delaying schools opening to stem virus*, Wichita Eagle, July 22, 2020, *available at* https://www.kansas.com/news/politics-government/article244401862.html.

35 H.B. 2016, § 33 (codified at Kan. Stat. Ann. § 48-925(h)).

36 *Id.* § 36.

KANSAS

State v. Harris

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Note from the Editor:

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When does uncertainty regarding enforcement standards constitute an impermissible delegation of legislative authority such that a criminal law should be declared unconstitutionally vague? The Kansas Supreme Court addressed this important question in answering whether a small pocketknife meets the statutory definition of a prohibited knife in *State v. Harris*.[1]

Kansas law makes it a crime for a convicted felon to possess a "knife." K.S.A. 2019 Supp. 21-6304 defines a knife as "a dagger, dirk, switchblade, stiletto, straight-edged razor or any other dangerous or deadly cutting instrument of like character." In *State v. Harris*, the Kansas Supreme Court considered whether the statute's catch-all clause—"or any other dangerous or deadly cutting instrument of like character"—was impermissibly and unconstitutionally vague. The Kansas high court's July 2020 decision held that it is.

Christopher Harris, a convicted felon, brandished a pocketknife with a 3½ inch serrated blade during an altercation in Wichita. Kansas charged him with aggravated assault, criminal use of a weapon, and criminal possession of a weapon by a felon. At trial, Harris was acquitted of the first two charges, but the jury convicted him of the third.

Harris appealed on two grounds: first, that the law's definition of a knife was unconstitutionally vague both facially and as applied to his case; and second, that the trial court erred in preventing Harris from introducing evidence that his parole officer told him that he could legally possess his serrated pocketknife. The appellate court rejected Harris's constitutional challenge, holding that the statute was not "so vague that it [did not warn] people of ordinary intelligence of the prohibited conduct or that the statute is susceptible to arbitrary and discriminatory enforcement."[2] The appellate court, however, reversed Harris's conviction and remanded the case for a new trial after finding "a reasonable probability that the outcome of the trial would have been different had the court allowed Harris to introduce the parole officer's testimony and the [Kansas Department of Corrections'] Handbook to the jury."[3] Harris and Kansas appealed their respective appellate losses to the Kansas Supreme Court.

The Kansas Supreme Court's majority ruled that the Kansas statute was unconstitutionally vague on its face, and therefore the majority declined to address the evidentiary question presented by the state.[4] Two justices joined Justice Daniel Biles in dissent.

Justice Caleb Stegall, writing for the *Harris* majority, observed that vagueness challenges raise two concerns: due process

1 State v. Harris, No. 116,515 (Kan. July 17, 2020).

2 *Id.* slip op. at 4 (Kan. App. 2018) (unpublished opinion).

3 *Id.* at 8.

4 *Id*. at 6 ("Because we resolve this case in Harris' favor on constitutional grounds, we need not reach the evidentiary issue raised by the State's petition for review.").

and separation of powers. Due process challenges ask whether "the statute fairly put people on notice as to the conduct proscribed? Are the words used common and understandable enough to allow persons of ordinary intelligence to easily grasp their meaning?"[5] The separation of powers concerns arise when the legislature "fails to 'provide explicit standards' for enforcement" such that the law "'threaten[s] to transfer legislative power to' police, prosecutors, judges, and juries, which leaves 'them the job of shaping a vague statute's contours through their enforcement decisions.'"[6] The majority focused on the second concern, and held that the statute's "or any other dangerous or deadly cutting instrument of like character" clause violated this separation of powers doctrine and presented a "textbook example" of the arbitrary guesswork induced by vague laws because:

> . . . [Kansas] enforcement officials must ask, what exactly is a dangerous cutting instrument of like character? We are unable to discern a sufficiently objective standard of enforcement in this language. Instead, we are left with the subjective judgment of the enforcement agencies and actors. A pair of scissors? Maybe. A safety razor blade? Perhaps. A box cutter? Probably, but would that decision be driven by an objective rule or a historically contingent fear of box cutters?[7]

The dissent objected to such hypotheticals, but the majority countered that the "crucial question" was whether the law "invite[s] 'varying and . . . unpredictable' enforcement decisions 'on an ad hoc and subjective basis,'" and that the state's own inconsistent interpretations answered that question in Harris's favor.[8] The majority noted that the state's prosecutors believed that the statute was enforceable against Harris's possession of the pocketknife, while the Department of Corrections through its Handbook and parole officer believed it was not. Thus, the majority concluded, "the circumstances present us with an unmistakable instance of arbitrary enforcement of an inherently subjective standard."[9]

Justice Biles disagreed that the statute was unconstitutionally vague either facially or as applied to Harris. He argued in dissent that the majority was wrong to frame the challenge only as a facial one, and that "the statutory language does not insert subjective judgment unmoored from the statute's specifics. Harris' knife . . . falls well within this statute's foreseeable bounds."[10] The majority's approach, according to Justice Biles, "goes too far" by transforming "the appropriate degree of specificity . . . from a requirement for commonsense adequate protections against arbitrary and discriminatory enforcement to an unbearably exacting requirement that all statutes making specific conduct criminal must be wholly expressed by the Legislature."[11] Such an exacting standard, argued Justice Biles, plows new legal ground for Kansas.[12]

The dissent, however, would have reversed Harris's conviction and afforded him a new trial in which to present his "mistake-of-law defense" with the previously excluded evidence that his parole officer and the Department of Corrections Handbook had advised Harris that he could legally possess a pocketknife with a blade shorter than 4 inches.[13]

The *Harris* decision opens the door for challenges to other statutes that might lack explicit standards for enforcement under principles of non-delegation and void for vagueness.

5 *Id.* at 8.

6 *Id.* (quoting *Sessions v. Dimaya*, 138 S. Ct. 1204, 1228 (2018) (Gorsuch, J., concurring)).

7 *Id.* at 11.

8 *Id.* (citations omitted).

9 *Id.* at 12.

10 *Id.* at 19 (Biles, J., dissenting).

11 *Id.* at 23 (Biles, J., dissenting).

12 *Id.* at 22 (Biles, J., dissenting).

13 *Id.* at 13 (Biles, J., dissenting).

LOUISIANA
Normand v. Walmart.com

By Adam A. Millsap, Ph.D. & Lee A. Steven

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Note from the Editor:

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Walmart.com is an e-commerce platform operated by Walmart, Inc. In addition to products offered for sale directly from Walmart, the site allows third-parties to sell products using the Walmart.com digital infrastructure. Pursuant to contract, third-party retailers are "the sellers of record."[1] Walmart.com's service includes connecting customers to retailers, providing a checkout system, processing payments, and protecting against fraud.[2] Although retailers may authorize Walmart.com to collect sales taxes on items sold, they are not required to do so and remain responsible for any tax liabilities, including sales taxes, related to their sales on Walmart.com.[3]

In *Normand v. Walmart.com*, the Louisiana Supreme Court overturned lower court decisions that found Walmart.com liable for the payment of sales tax on items sold on its online marketplace by third-party retailers.[4] The case was brought on behalf of the tax collector for Jefferson Parish for unpaid sales taxes from 2009 to 2015. Although Walmart.com paid the sales tax due on the sale of its own items, it had not paid or reported sales tax due from online sales made by third party retailers.

The case turned on the interpretation of the word "Dealer" under La. R.S. 47:301(4)(l).[5] Under that statute, a dealer is defined broadly to include retail sellers, manufacturers and producers, lessors and lessees, service providers, recipients of services, and certain persons who make deliveries. The definition also encompasses out-of-state sellers who operate in Louisiana. The statute imposes on the dealer the responsibility for collecting and paying sales tax. Notwithstanding the broad definition, the court held that the statute does not apply to the facilitator of a sale between two parties, such as an online marketplace. Walmart.com was therefore not liable for the taxes at issue.

Specifically, the court noted that pursuant to its contract with third-party retailers, "Wal-Mart.com never had title or possession of the property being sold by third party retailers and did not transfer title or possession of the property to purchasers."[6] It therefore concluded that "an online marketplace is not a party to the underlying sales transaction between the third party retailers

1 Normand v. Wal-Mart.com USA, LLC, No. 2019-C-00263, slip op. at 27 (La. Jan. 29, 2020).

2 *Id.* at 4.

3 *Id.* at 27.

4 The decision was issued on January 29, 2020. On April 9, 2020, the Louisiana Supreme Court denied an application for rehearing.

5 The case also involved a detailed issue of procedural law relating to tax collection, discussed at length by both the majority and a dissent.

6 Normand v. Wal-Mart.com USA, LLC, No. 2019-C-00263, slip. op. at 17 (La. Jan. 29, 2020).

and their customers, but rather a facilitator of the sale."[7] The court also reviewed related statues and regulations to explain that:

> it is the seller of merchandise, the performer of taxable services, and the rentor or lessor of property as parties to the underlying transactions that are liable for collection of the tax. The statutory and regulatory scheme does not contemplate the existence of more than one dealer that would be obligated to collect sales tax from a purchaser. An online marketplace in its role as a facilitator for sales of third party retailers does not fall in these groups.[8]

The court also discussed the special statutory provisions relating to auctioneers, who are responsible under Louisiana law for the collection and payment of sales taxes. The court acknowledged that, like an online marketplace, auctioneers are facilitators between the seller and purchaser. Because of the unique nature of that relationship, specific legislation was required to obligate auctioneers to collect and pay sales taxes. No such legislation exists for online marketplaces, and absent that legislation:

> double taxation could result if both online marketplaces and third party retailers are obligated to collect sales tax on the same transaction. It is not in the province of the judiciary to create an exception (in the context of a retail sale) to the seller's obligation to collect sales tax for a marketplace facilitator, similar to that legislatively enacted for auctioneers.[9]

Finally, the court looked to the contract between Walmart.com and third-party retailers to find that, "Wal Mart.com did not contractually assume the obligation of the third party retailers, as dealers, to collect and remit sales tax."[10] Therefore, the third-party retailers remained liable for the payment of sales tax.

The decision of the majority earned a dissent from the court's chief justice, who argued that Walmart.com should be considered a dealer within the meaning of the statute. The dissent argued that the definition of dealer in the statute was sufficiently broad to encompass an online marketplace such as Walmart.com. It focused on the fact that Walmart.com controlled all aspects of the online sales experience, including the collection of any payments. "Wal-Mart.com processes all payments and collects all proceeds from the sales, thereby retaining exclusive actual control over the collection of sales taxes from customers for all online market sales transactions, yet refuses to collect those taxes unless expressly requested to do so by the third party seller."[11] Finding Wal-Mart.com to be a dealer would "eliminate[] this problem and increase[] compliance with sales/use tax collection and remittance, allowing these tax proceeds to benefit the citizens of Jefferson Parish as intended."[12]

In the wake of the Supreme Court's decision in *South Dakota v. Wayfair*, which found that states may impose sales tax on purchases made from out-of-state sellers without a physical presence in the state, this case raises the broader question of whether and to what extent an online marketplace that facilitates third-party transactions should be responsible for the collection of sales tax on those transactions. State legislatures that want to increase the collection of sales tax revenues may start amending their statutes to place the obligation to collect and pay the sales tax directly on online marketplaces.

7 *Id.*

8 *Id.* at 23.

9 *Id.* at 26.

10 *Id.* at 28.

11 *Id.* at 3 (Johnson, C.J., dissenting).

12 *Id.* at 4.

LOUISIANA

The Effect of *Ramos v. Louisiana*

By GianCarlo Canaparo

Published July 14, 2020

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In April of this year, the Supreme Court decided *Ramos v. Louisiana*, holding that the Sixth Amendment's[1] requirement of jury unanimity in criminal convictions was incorporated against the states.[2]

At the time of Evangelisto Ramos's conviction, Louisiana permitted non-unanimous convictions based on 10-to-2 or 11-to-1 jury votes. In the time between his conviction and his appeal, Louisiana changed its law to require unanimous convictions.[3]

In opposing Ramos's claim, Louisiana argued, among other things, that requiring unanimous jury verdicts would cause chaos for its criminal justice system.[4] For one thing, anyone convicted by a non-unanimous jury whose appeal had not yet become final would have to be retried. And for another, defendants whose non-unanimous convictions had become final would challenge them on collateral review.[5]

The Court rejected these two arguments. As to the first, it acknowledged that the decision would "surely impose a cost" but said that cost did not outweigh the constitutional harm that permitting non-unanimous verdicts imposes on defendants.[6] As to the second, the Court noted that the test for whether a new rule of criminal procedure applies retroactively is so stringent that it has never been met.[7]

As Louisiana predicted, defendants convicted by non-unanimous juries are now challenging their convictions. At least for now, however, that burden seems much lighter than Louisiana expected. Orders granting writs for review in light of *Ramos* began appearing on the Louisiana Supreme Court's docket a month after the Supreme Court decided that case.[8] The first day such orders appeared, there were more than thirty, but since then, if any appear among the court's list of orders, there are at most a handful.

The Louisiana Supreme Court has quickly adapted to handle these cases. In cases where a defendant was convicted by non-unanimous verdict and his or her appeal was not yet final, the Louisiana Supreme Court issues a unanimous, form, per curiam order remanding the case "for further proceedings and to

1 U.S. Const. amend. VI; *see also* Thompson v. Utah, 170 U. S. 343, 351 (1898) (holding that the Sixth Amendment's guarantee of a jury trial included the historical requirement of unanimity); Patton v. United States, 281 U.S. 276, 288 (1930) (same).

2 140 S. Ct. 1390 (2020)

3 *Id.* at 1407.

4 *Id.* at 1406.

5 *Id.* at 1407.

6 *Id.* at 1406.

7 *Id.* at 1407.

8 *See Court Actions/May 27, 28, and June 3, 2020*, Louisiana Supreme Court, https://www.lasc.org/Actions?p=2020-020 (last visited, July 10, 2020).

conduct a new error patent review in light of *Ramos*."[9] The order also provides that even if the defendant abandoned or failed to preserve his or her objection to the non-unanimous verdict, the lower court should still consider the issue.[10]

In at least one case, the record did not indicate whether the verdict was unanimous because "the district court ceased polling the jury after the first ten jurors."[11] In that case, the Louisiana Supreme Court ordered the lower court to "ascertain whether the verdict was unanimous."[12] Chief Justice Bernette Johnson dissented, arguing that the jurors' memories will be "tainted" by all the publicity that has surrounded the jury unanimity issue in the four years since the defendant's conviction, and so it would be better to simply remand for a new trial.[13]

So far, it does not appear that any challenges to final non-unanimous convictions have made it to the Louisiana Supreme Court on collateral review. It is clear, however, that the court is expecting those challenges in the future. Its form per curiam order includes the line, "Nothing herein should be construed as a determination as to whether that ruling will apply retroactively on state collateral review to those convictions and sentences that were final when *Ramos* was decided."[14]

Although *Ramos* has not imposed a significant burden on the Louisiana courts yet, the number of potential collateral review challenges likely far outstrips the number of non-final non-unanimous convictions subject to immediate retrial. After all, Louisiana has permitted non-unanimous verdicts since 1898.[15] The true burden of *Ramos*, therefore, remains to be seen.

It is also nearly certain that at some point in the future the Supreme Court will be asked to decide whether the *Ramos* rule applies retroactively. If it holds that it does—which would be a first[16]—then Louisiana's courts, and the courts of any other states that have permitted non-unanimous verdicts, will most likely be deluged by collateral challenges.

9 *See, e.g.*, State v. Kendell Shanner Cagler, No. 2018-KO-01988 (June 3, 2020), *available at* https://www.lasc.org/Opinions/2020/18-1988.KO.PC.pdf.

10 *Id.*

11 State v. Dermaine Norman, No. 2020-K-0109 (July 2, 2020), *available at* https://www.lasc.org/Opinions/2020/20-0109.K.PC.pdf.

12 *Id.*

13 *Id.*, *dissent available at* https://www.lasc.org/Opinions/2020/20-0109.K.bjj.dis.pdf.

14 *See, e.g.*, Kendell Shanner Cagler, No. 2018-KO-01988.

15 *Ramos*, 140 S. Ct. at 1393.

16 *Id.* at 1407

MASSACHUSETTS
Foster v. Commissioner of Correction

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Correctional facilities across the United States house and employ large numbers of people. Keeping these people safe during the COVID-19 pandemic has been a tremendous challenge. In April 2020, several incarcerated inmates and individuals civilly committed for substance abuse treatment filed a class action lawsuit in a Massachusetts court that alleged their conditions of confinement posed an unreasonable risk of COVID-19 exposure.[1] They claimed that the failure to reduce the number of confined individuals to allow for greater social distancing amounted to cruel and unusual punishment and violated their substantive due process rights.[2]

In *Foster v. Commissioner of Correction* ("*Foster I*"), the Supreme Judicial Court of Massachusetts addressed the plaintiffs' motion for a preliminary injunction that sought to require the Department of Correction ("DOC") to take immediate steps to reduce the number of detained individuals while the suit proceeded to trial. To prevail, the plaintiffs would have to show a likelihood of success on the merits of their underlying claims.

The court first examined class certification and narrowed the plaintiffs into two smaller subgroups: (1) medically vulnerable inmates, and (2) individuals civilly committed for substance abuse treatment.[3] The court then addressed the constitutional claims of the two subclasses separately because only individuals being "punished" can assert claims of cruel and unusual punishment under the Eighth Amendment. Because the civilly committed individuals were not being punished, their claims were limited to substantive due process violations.[4]

Eighth Amendment Claims

The medically vulnerable inmate plaintiffs argued that their conditions of confinement and the failure to expedite the release of inmates violated their constitutional rights.[5] To succeed on this claim, the plaintiffs were required to satisfy a two-part test. The first element required an objective showing that their living conditions "pose a 'substantial risk of serious harm.'"[6] The second element was subjective, requiring a showing that "prison officials acted or failed to act with deliberate indifference."[7] The court found that the plaintiffs met the first element, but failed the second element.

Almost immediately after the governor declared a state of emergency in Massachusetts, the DOC implemented policies that

1 *Foster v. Comm'r of Correction*, 146 N.E.3d 372, 378 (Mass. 2020).

2 *Id.*

3 *Id.* at 388.

4 *Id.* at 390.

5 *Id.*

6 *Id.* at 391 (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)).

7 *Id.* at 390-91.

included social distancing in all of its facilities, the elimination of almost all group programming and recreation time, increased sanitation, distribution of cleaning supplies and masks to all inmates and staff, lockdowns prohibiting access into the facilities by visitors, a mandatory two week quarantine for all new inmates, daily health screening for all staff, and widespread testing for all staff and inmates.[8]

The court acknowledged that despite these policies, it may not be feasible to maintain sufficient physical distancing in all instances, and thus the increased risk of contracting COVID-19 while incarcerated poses an objectively substantial health risk.[9] However, because prison officials took significant steps to reduce exposure to and protect inmates from the spread of COVID-19, it was unlikely the plaintiffs would be able to establish that the DOC acted with subjective "deliberate indifference."[10]

Substantive Due Process Claims

In Massachusetts, individuals can be civilly committed to a secure facility for substance abuse treatment if they pose a danger to themselves or others.[11] The purpose of inpatient substance abuse treatment is "to promote the health and safety of the individual committed[.]"[12] The second subclass of plaintiffs argued that civilly committing them during a pandemic violates their substantive due process rights under the federal and state constitutions.

For such a claim to pass muster under the federal Constitution, a "reasonable relation" must exist between the "'conditions and duration of confinement'" and "'the purpose for which persons are committed.'"[13] Under this lenient standard, the government must simply show that confining an individual for treatment is reasonably related to the public safety needs of the state.[14] The state constitution, however, mandates a strict level of judicial review. The statute must be "'narrowly tailored to further a legitimate and compelling governmental interest and [be] the least restrictive means available to vindicate that interest.'"[15]

The court found that the need for substance abuse treatment has not diminished during the pandemic. It then concluded that on the record before it, the civil commitment statute satisfied both levels of scrutiny and that the plaintiffs did not show a likelihood of success on the merits of their substantive due process claims.

However, the court went on to use its supervisory authority to prohibit lower court judges from civilly committing individuals during the state of emergency absent a written or oral finding on the record that the danger of an individual's substance abuse disorder outweighs the risk of COVID-19 exposure and transmission. Committed individuals were given the ability to seek reconsideration of their commitment orders under this mandate.[16] The court denied the motion for preliminary injunction and transferred the case to the Superior Court for a final adjudication on the merits. Chief Justice Ralph D. Gants wrote a concurring opinion, joined by two other justices, to emphasize that the DOC is doing its best to manage the COVID-19 crisis under the circumstances. Justice Gants wrote separately to highlight three points. First, he said more can be done to reduce the prison population, such as releasing inmates on home confinement, increasing parole release, and providing more opportunities for inmates to earn good time credit.[17] Second, he emphasized the need to plan beyond the current lockdown policies that, if left unaltered, could become Eighth Amendment violations if continued long term.[18] Finally, he urged the DOC to prepare for a "second wave."[19]

The same day it decided *Foster I*, the court also decided two motions to dismiss filed by the governor and the chair of the parole board in *Foster v. Commissioner of Correction* (*Foster II*).[20] The plaintiffs alleged that both "fail[ed] to implement an effective mechanism to reduce the incarcerated population to a safe level. . ."[21]

In regard to the governor, the plaintiffs claimed he was liable because he refused to utilize his executive authority to pardon and grant clemency, and they sought to compel him to use that plenary emergency power to order a reduction in the prison population. The court proclaimed that it "should tread lightly in telling any Governor when or how to exercise his or her powers."[22] The court then found that the "failure to act" claims against the governor were not actionable and granted his motion to dismiss.

In regard to the parole board, the plaintiffs argued that the board made little effort to increase the use of medical parole or to modify the criteria for release to better streamline the parole process in light of the virus. The court concluded that the plaintiffs alleged facts that were sufficient to state a claim if proven and denied the parole board's motion.[23]

8 *Id.* at 394.

9 *Id.* at 391-92.

10 *Id.* at 395-96.

11 *Id.* at 397-98; Mass. Gen. Laws ch. 123, § 35.

12 *Foster*, 146 N.E.3d at 398.

13 *Id.* at 397 (quoting *Seling v. Young*, 531 U.S. 250, 265 (2001)).

14 *Id.* at 398.

15 *Id.* (quoting *Commonwealth v. Weston W.*, 455 Mass. 24, 35, 913 N.E.3d 832 (2009)).

16 *Id.* at 401.

17 *Id.* at 404 (Gants, J., concurring).

18 *Id.* at 407-08.

19 *Id.* at 408.

20 *Foster v. Comm'r of Correction*, 146 N.E.3d 408 (Mass. 2020).

21 *Id.* at 410.

22 *Id.* at 412.

23 *Id.* at 414.

MICHIGAN
Rafaeli, LLC v. Oakland County

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Published September 11, 2020

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When Rafaeli, LLC underpaid its property tax bill by $8.40, the county auctioned off the property for $24,500 and kept the surplus proceeds. The process was proper under Michigan's General Property Tax Act, and the lower courts held that the application of the statute was valid under Michigan's Constitution. But the Michigan Supreme Court unanimously reversed, holding that the county violated the Michigan Constitution's Takings Clause when it failed to return the difference between the sale proceeds and the taxes, fees, and interest Rafaeli owed.[1]

The two lower courts considered it a simple case. In their view, the property was not "taken" from the plaintiffs,[2] but they instead "forfeited" it to the government by failing to timely redeem it, and therefore the plaintiffs lost all property interests.[3] The Michigan Court of Appeals likened the case to *Bennis v. Michigan*, where a court ordered the forfeiture of a nuisance-causing car.[4] The U.S. Supreme Court held that, under the U.S. Constitution, the forfeiture proceeding provided due process to the car's owners, so "the property in the automobile was transferred by virtue of that proceeding from [the owners] to the State."[5] In light of that transference, the Court reasoned that the government was not "required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain."[6]

Justice Brian Zahra, writing for the Michigan Supreme Court, distinguished the civil asset forfeiture in *Bennis* from Rafaeli's tax foreclosure, but he recognized that even if *Bennis* "had directly addressed the issue presented here," it would still not control the Court's interpretation of the Michigan Constitution's Takings Clause.[7] Michigan's Constitution expressly retained the common law as it was in 1963, so long as it was "not repugnant to" that Constitution.[8] So the court began by explaining—from the Magna Carta onward—the common law roots of "a property owner's right to collect the surplus proceeds that result from a tax-foreclosure sale," and it recognized that the ratifiers of Michigan's Constitution "would have commonly understood this

1 *See Rafaeli, LLC v. Oakland Cty.*, — N.W.2d —, No. 156849, 2020 WL 4037642 (Mich., July 17, 2020).

2 The other plaintiff was another LLC that went through a similar ordeal: it owed $6,000 and failed to receive notice, so when it did not pay, its property was auctioned for $82,000, and the county kept the surplus proceeds.

3 *Rafaeli, LLC v. Oakland Cty.*, 2015 WL 13859576, at *2 (Mich. Cir. Ct.).

4 *Rafaeli, LLC v. Oakland Cty.*, No. 330696, 2017 WL 4803570, at *4 (Mich. Ct. App. Oct. 24, 2017).

5 *Bennis v. Michigan*, 516 U.S. 442, 452 (1996).

6 *Id.*

7 *Rafaeli*, 2020 WL 4037642 at *15 n.73.

8 Mich. Const. (1963) art. 3, § 7.

common-law property right to be protected under Michigan's Takings Clause at the time of the ratification[.]"[9] And a decision by the Michigan Supreme Court thirteen years after ratification confirmed the continued existence of that common law right.[10] The court then reasoned that "[w]hile the Legislature is typically free to abrogate the common law, it is powerless to override a right protected by Michigan's Takings Clause."[11]

Having concluded that the county committed a taking, the court went on to determine what the plaintiffs were owed. The plaintiffs argued that "just compensation" required that they be "awarded the fair market value of their properties so as to be put in as good of [a] position had their properties not been taken at all."[12] The court rejected that position because the property taken was not plaintiffs' real property, but the surplus proceeds from the sale. And if plaintiffs received more than the surplus, they would be benefitting from their own tax delinquency.[13]

Justice David Viviano concurred with the result but disagreed with much of the court's reasoning.[14] In his view, the court improperly looked to the ratifiers' expected application of the Takings Clause, rather than interpreting how the term "property" was publicly understood when the Michigan Constitution was ratified in 1963. Under that original public meaning approach, even if there was a common law property right to surplus proceeds in 1963, the Takings Clause would not prevent the legislature from modifying that property right in the future. Justice Viviano also contended that the relevant property right was not "the right to surplus proceeds," but rather plaintiffs' "equity in the property," arising from the common law's longstanding "equity of redemption."[15] Although in this case the equity and the surplus were equal, that might not always be so.[16]

Michigan is one of only five states whose statutes allow the government to retain the surplus proceeds of a sale, even when it is far above the amount of taxes, fees, and interest owed.[17] Although these windfalls seem to be the exception, rather than the rule, Michigan's statute has drawn judicial ire more than once.[18] The *Rafaeli* decision affirms the longstanding view of property rights as a "bundle of sticks," i.e., "a collection of individual rights which, in certain combinations, constitute property."[19] The holding means that at least one of those sticks—the right to surplus proceeds—survives even though the owner loses the physical property itself to tax foreclosure. The decision is an example of how state courts and litigants can look to state Constitutions for solutions, rather than focusing exclusively on the text and precedents of the U.S. Constitution.

9 *Rafaeli*, 2020 WL 4037642, at *19.

10 *See id.* at *20 (citing *Dean v. Mich. Dep't of Nat. Res.*, 247 N.W.2d 876 (Mich. 1976)).

11 *Id.*

12 *Id.* at *24.

13 *Id.*

14 *Id.* at *25 (Viviano, J., concurring).

15 *Id.* at *35–36.

16 *Id.* at *25, 39.

17 The four other states with similar regimes are North Dakota (N.D. Cent. Code § 57-28-20.1), Massachusetts (Mass. Gen. Laws ch. 60, § 43), Minnesota (Minn. Stat. § 280-29), and Montana (Mont. Code §§ 7-6-4414(2), 15-17-322).

18 *See, e.g.*, *Freed v. Thomas*, No. 17-cv-13519, 2018 WL 5831013, at *2 (E.D. Mich. Nov. 7, 2018) (describing Michigan's law as "unconscionable"); *Wayside Church v. Van Buren Cty.*, 847 F.3d 812, 823 (6th Cir. 2017) ("In some legal precincts that sort of behavior is called theft. But under the Michigan General Property Tax Act, apparently, that behavior is called tax collection.") (Kethledge, J., dissenting).

19 *Rafaeli*, 2020 WL 4037642, at *19 n.101.

MICHIGAN

Midwest Institute of Health, PLLC v. Governor of Michigan

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In the wake of Michigan's first positive tests for the coronavirus, Governor Gretchen Whitmer declared a state of emergency pursuant to two state laws: the Emergency Powers of the Governor Act of 1945 (the EPGA)[1] and the Emergency Management Act of 1976 (the EMA).[2] In the weeks and months that followed, Governor Whitmer exercised her special emergency powers by issuing a number of executive orders imposing, among other things:

- a requirement that all residents stay home, with limited exceptions;
- a requirement that all residents wear face coverings in indoor public spaces and when outdoors if unable to consistently maintain a distance of six feet or more from individuals who are not members of their household,
- a requirement that children wear face coverings while playing sports;
- a requirement that businesses comply with numerous workplace safeguards;
- a prohibition on the operation of dozens of industries; and
- a prohibition on nonessential travel and in-person work not necessary to sustain or protect life.

One such order prohibited healthcare providers from performing "non-essential" surgeries, which led three healthcare providers and a man who wished to have knee surgery to file suit in federal court against the governor, the attorney general, and the director of the Michigan Department of Health and Human Services. The plaintiffs' case rested, in part, on the claim that the EPGA violates provisions in the Michigan Constitution concerning the separation and delegation of powers.[3] The federal district court recognized that resolving plaintiffs' claims would require the court to "interpret Michigan statutes that have never before been interpreted by the Michigan Courts" and therefore

1 Mich. Comp. Laws 10.31 *et seq.*

2 Mich. Comp. Laws 30.401 *et seq.*

3 *See* Mich. Const. 1963, art. 3, § 2 ("The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."); Mich. Const. 1963, art. 4, § 1 ("[T]he legislative power of the State of Michigan is vested in a senate and a house of representatives."). The complaint and the federal district court referred to these provisions as the "Separation of Powers and Non-Delegation Clauses." Compl. at 25–26, *Midwest Inst. of Health, PLLC v. Governor of Mich.*, No. 1:20-cv-414 (W.D. Mich. May 12, 2020); *Midwest Inst. of Health, PLLC v. Governor of Mich.*, No. 1:20-cv-414, slip op. at 1 (W.D. Mich. June 16, 2020).

certified two questions to the Michigan Supreme Court.[4] The questions addressed whether Governor Whitmer had the statutory authority to issue or renew executive orders beyond a certain date, and whether the EPGA or the EMA violated the Michigan Constitution as alleged by plaintiffs. The Michigan Supreme Court unanimously agreed to certify both questions, but the justices varied in how to answer those questions.[5]

Writing for the majority, Justice Stephen J. Markman first addressed the EMA. Unlike the EPGA, the EMA imposes a time limit on the governor's emergency powers. Once the governor declares the state of emergency, it continues "until the governor finds that the threat or danger has passed, the emergency has been dealt with to the extent that emergency conditions no longer exist, or until the declared state of emergency has been in effect for 28 days."[6] If the state of emergency is to continue after that, both houses of the state legislature must approve a request from the governor that specifies the number of additional days.[7] Governor Whitmer initially declared the state of emergency on March 10, 2020, and the Michigan legislature approved an extension until April 30, 2020, but declined to extend it further. All members of the court agreed with Justice Markman that, after that date, the governor lacked authority under the EMA to issue executive orders relating to the coronavirus pandemic.[8] The court unanimously rejected the governor's argument that she could "*redeclare* the same state of emergency" to avoid the time limit and rejected the argument that the time limit imposed a legislative veto.[9] Rather, the EMA's provisions "impose nothing more than a durational limitation on the governor's authority."[10]

Justice Markman next addressed plaintiffs' challenges to the EPGA, concluding at that outset that, contrary to the plaintiffs' arguments, the EPGA applied to the coronavirus pandemic. Six of the court's seven members rejected the contentions that an "emergency" under the act must be short-lived, or must be constrained to a local area, or that only certain types of emergencies qualified.[11] The EPGA enables the governor to "proclaim a state of emergency and designate the area involved" and refers to circumstances "when public safety is imperiled."[12] Justice Markman relied on a dictionary definition to conclude that the "area involved" may "comprise the entire state, or it may comprise some more localized geographical part of the state."[13] He took the same approach to interpreting "emergency." Likening an epidemic to a fire that continues to burn, the justice wrote, "an emergency is an emergency for as long as it persists as an emergency."[14]

Justice Markman further noted that prior cases, though not addressing the EPGA specifically, had treated epidemics as implicating "public safety" and not merely "public health."[15] "The people of this state, as well as their public officials, deserve to be able to read and to comprehend their own laws," wrote Justice Markman, and "we are not prepared to rewrite the EPGA or to construe it in an overly narrow or strained manner to avoid rendering it unconstitutional."[16]

These conclusions led the majority to address the facial constitutionality of the EPGA. The Michigan Constitution includes an express provision regarding the separation of powers:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.[17]

The majority looked to both its own precedent and that of the U.S. Supreme Court to assess the contours of the nondelegation doctrine—i.e., "the settled maxim[] in constitutional law . . . that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority."[18] Citing precedent holding that Michigan's nondelegation caselaw is similar to that developed in federal courts, Justice Markman explained that the legislative act in question must lay down "an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform[.]"[19] Ultimately, the majority concluded that the EPGA does not provide an intelligible principle because it requires only that the governor's directives be "reasonable" and "necessary."[20] Consequently, the majority held the EPGA was facially unconstitutional.

4 *Midwest Inst. of Health, PLLC v. Governor of Mich.*, No. 1:20-cv-414 (W.D. Mich. June 16, 2020); *see also* Mich. Ct. R. 7.308(A)(2)(a) ("When a federal court, another state's appellate court, or a tribal court considers a question that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent, the court may on its own initiative or that of an interested party certify the question to the Court.").

5 *In re Certified Questions (Midwest Inst. of Health, PLLC v. Governor of Mich.)*, No. 161492, 2020 WL 5877599, at *4 (Mich. Oct. 2, 2020), *available at* https://courts.michigan.gov/Courts/MichiganSupremeCourt/Clerks/Recent%20Opinions/20-21%20Term%20Opinions/In%20re%20Certified%20Questions-OP.pdf.

6 Mich. Comp. Laws § 30.403(4).

7 *Id.*

8 *In re Certified Question*, 2020 WL 5877599, at *24 n.25.

9 *Id.* at *7.

10 *Id.*

11 Justice David Viviano would have held that the EPGA does not apply to public health emergencies such as pandemics. *Id.* at *36 (Viviano, J., concurring in part and dissenting in part).

12 Mich. Comp. Laws § 10.31(2).

13 *In re Certified Question*, 2020 WL 5877599, at *9.

14 *Id.*

15 *Id.* at *11 (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 37 (1905) and *People ex rel. Hill v. Lansing Bd. of Ed.*, 224 Mich. 388, 391, 195 N.W. 95 (1923).

16 *Id.* at *11–12.

17 Mich. Const. 1963, art 3, § 2.

18 *In re Certified Question*, 2020 WL 5877599, at *12 (quoting Cooley, Constitutional Limitations 116–17 (1886)).

19 *Id.* at *13 (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)).

20 *Id.* at *18.

Justice David Viviano agreed with the majority that the EPGA violated the nondelegation doctrine, but he contended that reaching the question was unnecessary. In his view, "public health" and "public safety" are distinct terms of art.[21] Relying on the history and laws that followed the 1918 influenza epidemic, Justice Viviano concluded public health crises are the province of health codes and the legislature did not intend to regulate them with the EPGA.[22]

Chief Justice Bridget McCormack, joined by Justices Richard Bernstein and Megan Cavanagh, took the opposite position. They agreed with the majority that the EPGA *does* apply to pandemics, but they *disagreed* that it violated the nondelegation doctrine. Like Justice Markman, Chief Justice McCormack also turned to both state and federal precedent, but she concluded that only a delegation that provided "*no* standards to guide the decisionmaker's discretion" would constitute an impermissible delegation.[23] The Chief Justice believed that the "particular standards in the EPGA are as reasonably precise as the statute's subject matter permits," and thus constitutionally permissible.

Finally, although Justice Bernstein joined Chief Justice McCormack's opinion in full, he wrote separately to explain why. In his view, concluding that the EPGA did not violate the separation of powers was "inherently troubling" but consistent with state and federal precedent that has let the nondelegation doctrine lay dormant since the New Deal era.[24] Justice Bernstein explained that he "would leave to the Supreme Court of the United States to decide whether it is now time to revisit the nondelegation doctrine."[25]

Ultimately, the justices were unanimous that the coronavirus pandemic is an exceptional situation posing exceptional risks. Although the majority held that the EPGA unlawfully delegates legislative power to the executive branch, the court emphasized that its ruling was not the final word on dealing with the health crisis. So long as the proper constitutional roles of each branch of government are respected, there remain "many avenues for the Governor and Legislature to work together to address this challenge and we hope that this will take place."[26]

21 *Id.* at *27 (Viviano, J., concurring in part and dissenting in part).

22 *Id.* at *29 (Viviano, J., concurring in part and dissenting in part).

23 *Id.* at *42 (McCormack, C.J., concurring in part and dissenting in part).

24 *Id.* at *46 (Bernstein, J., concurring in part and dissenting in part).

25 *Id.* (citing *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring in the judgment) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment.")).

26 *Id.* at *3 n.1 (citing *Gundy*, 139 S. Ct. at 2145 (Gorsuch, J., dissenting)).

MISSISSIPPI

HWCC-Tunica, Inc. v. Mississippi Dep't of Revenue

By Daniel Ortner

Published August 28, 2020

About the Author:

Daniel M. Ortner joined Pacific Legal Foundation in the fall of 2018 as an attorney, focusing on the First Amendment, property rights, economic liberty, and curtailing the overreach of the administrative state.

Note from the Editor:

Most discussions of judicial deference to administrative agencies center on federal doctrines like those established in the *Chevron* and *Auer* cases. But there have been a lot of recent developments regarding deference and the separation of powers at the state level. Over the past several years, seven state supreme courts have rejected deference to the statutory or regulatory interpretations of state agencies.[1] These state courts have suggested that such deference is incompatible with the duty of the judiciary to "say what the law is."[2] But until recently, none of the state courts that rejected deference had been asked to determine whether a law expressly *requiring* that the judiciary defer to an agency's interpretation was unlawful.

In *HWCC-Tunica, Inc. v. Mississippi Dep't of Revenue*[3], the Mississippi Supreme Court addressed that question head-on and determined that a statute requiring the judiciary to defer to the Department of Revenue's statutory interpretations was incompatible with the Mississippi Constitution.[4]

In *HWCC-Tunica*, two Mississippi casinos had developed rewards programs which allowed members to gain entries in a randomized prize drawing through frequently patronizing the casino. The casinos deducted the cost of the prizes from their gross revenues when calculating state income taxes, under an exemption for payouts made as a "result of a legitimate wager."[5] The Department concluded that this deduction was improper under a Department regulation providing a specific list of things that would qualify as a "legitimate wager."[6] The trial court deferred to the Department's regulation and ruled in its favor. The casinos appealed, arguing that deference was incompatible with the Mississippi Constitution and with the Mississippi

1 *In re Complaint of Rovas Against SBC Michigan*, 482 Mich. 90, 111, 754 N.W.2d 259, 272 (2008); *Bowen v. State, Dep't of Transp.*, 2011 WY 1, ¶ 7, 245 P.3d 827, 829 (Wyo. 2011); *Douglas v. Ad Astra Info. Sys., L.L.C.*, 296 Kan. 552, 559, 293 P.3d 723, 728 (2013); *Hughes Gen. Contractors, Inc. v. Utah Labor Comm'n*, 2014 UT 3, ¶ 25, 322 P.3d 712, 717; *Ellis-Hall Consultants v. Pub. Serv. Comm'n*, 2016 UT 34, ¶ 31, 379 P.3d 1270, 1275; *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 42, 382 Wis. 2d 496, 535, 914 N.W.2d 21, 40; *King v. Mississippi Military Dep't*, 245 So. 3d 404, 407 (Miss. 2018). *Myers v. Yamato Kogyo Co., Ltd.*, 220 Ark. 135 (2020).

2 *Marbury v. Madison*, 5 U.S. 137, 178 (1803).

3 296 So. 3d 668 (Miss. 2020)

4 *Id.* ¶ 19. The statute, Miss. Code Ann. § 27-77-7(5), reads, "[a]t trial of any action brought under this section, the chancery court shall give no deference to the decision of the Board of Tax Appeals, the Board of Review or the Department of Revenue, but shall give deference to the department's interpretation and application of the statutes as reflected in duly enacted regulations and other officially adopted publications."

5 *Id.* ¶ 42 (quoting Mississippi Code Section 75-76-193).

6 *Id.* ¶ 39.

Supreme Court's decision in *King v. Mississippi Military Dep't*,[7] in which the court had abandoned deference to agency statutory interpretations.

After dispensing with some preliminary arguments concerning argument preservation, the court concluded that the law requiring deference to the Department was incompatible with the Mississippi Constitution because "when deference is given to an agency interpretation, [the courts] share the exercise of the power of statutory interpretation with another branch in violation of Article I, Section 2" of the state constitution.[8] The court concluded that this principle "is applicable to any case in which an agency interprets a statute" because "[i]nterpreting statutes is reserved exclusively for courts."[9]

Because the trial court had deferred to the Department's regulation rather than conduct its own independent analysis of the key statutory terms, the court found that it had erred by failing to conduct a *de novo* review."[10]

Nevertheless, the court ultimately ruled in favor of the Department after conducting its own statutory analysis. Because state law described random drawings as "promotional activity" rather than a "gambling game," the court concluded that the casinos could not deduct the cost of prizes as a loss.[11] The court therefore affirmed the decision granting summary judgment to the Department.

Even though the Department ultimately prevailed, *HWCC-Tunica* is a significant decision. It makes Mississippi the first state, to my knowledge, to invalidate a legislature's express effort to require judicial deference to an agency interpretation. As such, this decision can be read as a declaration of judicial independence, not only from executive agencies, but also from the legislative branch.[12] According to the Mississippi Supreme Court, neither the legislature nor the executive can interfere with the judiciary's exercise of its duty to "say what the law is." And although Mississippi is the first, it is unlikely to be the last to reach that conclusion.

7 245 So. 3d 404, 408 (Miss. 2018)

8 *Id.* ¶ 33 (quoting *King*, 245 So. 3 at 408). Article I, Section 2 states that "[n]o person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others."

9 *Id.* ¶ 34.

10 *Id.* ¶40.

11 *Id.* ¶ 47.

12 *Id.* ¶¶ 34-36.

NEW JERSEY

State of New Jersey v. Robert Andrews

By Billy Easley, II

Published November 18, 2020

About the Author:

Billy Easley is Americans for Prosperity's Senior Policy Analyst for technology and innovation. In this role, he reviews state and federal policy on digital free speech, privacy, government surveillance, autonomous vehicles and related policies. Previously he served as a legislative specialist for the United States Sentencing Commission where he authored a paper on the relationship between age and recidivism among federal prisoners. Billy started his career working for the Senate Homeland Security and Governmental Affairs Committee and as Senator Rand Paul's legal counsel for technology and criminal justice policy.

Note from the Editor:

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Can law enforcement compel you to unlock your smartphone to access your texts, phone logs, and other private materials? State and federal courts are all over the place when it comes to this question.[1] In *State of New Jersey v. Robert Andrews*, New Jersey joined Massachusetts[2] in explicitly allowing police officers to compel defendants to enter their phone passcodes. Law enforcement in both states have a new rule: *if* police can 1) establish that they know a defendant owns the phone, 2) show that the defendant has the passcode, and 3) state with specificity what data is on the phone that's relevant to the case, *then* they can compel an individual to unlock their phone.[3] The United States Court of Appeals for the Third Circuit adopted a similar rule.[4] The Indiana[5] and Pennsylvania[6] state supreme courts have rejected such a rule, for now. The Florida District Courts of Appeals have adopted competing rules.[7] Courts are struggling to answer this question consistently as they consider such difficult questions as how to apply old doctrine to new technology and how to preserve individual privacy. The Supreme Court of New Jersey's recent decision demonstrates the difficulty in resolving these issues.

In *State of New Jersey v. Robert Andrews*, the Supreme Court of New Jersey held that the compelled production of an individual's phone passcode is testimonial evidence under the Fifth Amendment. But the court also determined that the government can require a defendant to produce their passcodes under the Supreme Court's foregone conclusion exception.

The defendant, Robert Andrews, was indicted for official misconduct, hindering, and obstruction related to a drug dealing investigation. The state already had testimony, phone records, and text messages suggesting that the defendant had been in contact with another individual involved in the scheme. The state secured a warrant that granted access to specific apps on the defendant's iPhone, including the default Phone application and its messaging counterpart. However, the state could not access the phone's contents due to Apple's security protocols. When the trial court granted the state's motion to compel the defendant to provide his phone's passcode, the defendant refused and claimed that disclosure violated his Fifth Amendment right against self-incrimination, New Jersey's analogous statutory right, and New Jersey common law's broader privacy principles.

1 *See Eunjoo Seo v. State*, 148 N.E.3d 952, 968 (Ind. 2020).

2 *Com. v. Gelfgatt*, 468 Mass. 512, 518, 11 N.E.3d 605, 611 (2014).

3 *Id.*

4 *United States v. Apple MacPro Computer*, 851 F.3d 238, 248 (3d Cir. 2017).

5 *Eunjoo Seo v. State*, 148 N.E.3d 952, 962 (Ind. 2020).

6 *Com. v. Davis*, 220 A.3d 534, 550 (Pa. 2019).

7 *See State v. Stahl*, 206 So. 3d 124, 136 (Fla. Dist. Ct. App. 2016); *G.A.Q.L. v. State*, 257 So. 3d 1058 (Fla. Dist. Ct. App. 2018).

The court rejected the state's argument that phone passcodes are mere numbers and recognized that they have testimonial value. However, testimonial evidence can be exempted from Fifth Amendment protection under the foregone conclusion doctrine if the existence, possession, and authentication of the testimony are already known to the government. Since the state already demonstrated at trial that the phone's passcode exists, that the defendant owned and operated the smartphone associated with it, and the passcode itself simply authenticates this previously known knowledge, the court found that the foregone conclusion exception applies.[8]

Justice Jaynee LaVecchia dissented, focusing on two points. First, she argued that the majority's particular application of the doctrine violates the fundamental privacy principles found within the U.S. Constitution and the state's common law. The dissent preferred a broader conception of privacy than the one the majority adopted. As Justice LaVecchia put it, "the precept that one's inner thoughts cannot be compelled to be disclosed because they are protected by the Fifth Amendment privilege against self-incrimination is still an accepted United States Supreme Court principle."[9]

Secondly, the dissent believed it was unwise to expand the foregone conclusion doctrine to digital technologies. "The exception originated in the setting of the government ferreting out already existing, physical documents held by another person," Justice LaVecchia wrote.[10] "It requires expansion to be used here. Its lineage does not merit its use in the present context of overriding the privilege to keep one's thoughts and recollections to one's self and not turn that over to the government for use in easing its investigatory efforts."[11] Unlike the majority, the dissent saw a sharp distinction between compelling individuals to share specific bank account information—the type of physical documentation commonly seen in the Supreme Court's limited foregone conclusion jurisprudence—and compelling them to open up access to their smartphones. LaVecchia urged the majority to wait for the U.S. Supreme Court to determine whether the foregone conclusion doctrine should be expanded.

The Supreme Court will eventually have to resolve both these questions—whether phone passcodes are testimonial evidence and whether the foregone conclusion doctrine applies to them. And a firm rule may not be enough. The Court will also need to provide a proper framework to guide lower courts in analyzing compelled production cases. For instance, in *G.A.Q.L. v. State*, the Florida District Court of Appeals "reasoned that the evidence sought in a password production case . . . is not the password itself; rather it is the actual files or evidence on the locked phone."[12] It therefore denied the defendant Fifth Amendment protection. Both the New Jersey Supreme Court and the Third Circuit disagreed with that approach. Instead, they "view the compelled act of production in this case to be that of producing the passcode."[13] This distinction not only impacts the self-incrimination analysis but also related privacy questions.

It is highly likely that the Supreme Court will be asked to resolve these questions in the next few years. Until then, expect more splintering and confusion in the lower courts on these essential questions regarding privacy, self-incrimination, and modern technology.

8 *State v. Andrews*, 243 N.J. 447, 480, 234 A.3d 1254, 1274 (2020).

9 *State v. Andrews*, 243 N.J. 447, 489, 234 A.3d 1254, 1280 (2020).

10 *State v. Andrews*, 243 N.J. 447, 502, 234 A.3d 1254, 1288 (2020).

11 *Id.*

12 *G.A.Q.L. v. State*, 257 So. 3d 1058, 1064 (Fla. Dist. Ct. App. 2018).

13 *State v. Andrews*, 243 N.J. 447, 480, 234 A.3d 1254, 1274 (2020).

OHIO

State v. Nettles

By Zachery Keller

Published August 27, 2020

About the Author:

Zachery Keller joined the Ohio Attorney General's Office in 2013 and is the current Deputy Solicitor General. He started in the Constitutional Offices Section, a division that represents Ohio's elected officials. In 2019, Zachery became a Deputy Solicitor General. In this role, he represents the State of Ohio—along with its agencies and officials—in appeals before the Ohio Supreme Court, the United States Supreme Court, and the Sixth Circuit Court of Appeals. Before working for the Ohio Attorney General's Office, Zachery clerked for District Judge Edmund A. Sargus and Magistrate Judge Elizabeth P. Deavers in the U.S. District Court for the Southern District of Ohio. He received his J.D. from the Ohio State University Moritz College of Law in 2010.

Note from the Editor:

Any opinions expressed in Zachery's posts represent his own views, which do not necessarily reflect the views of the Ohio Attorney General's Office. 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.

The Ohio Supreme Court's decision in *State v. Nettles*[1] concerns what happens when decades-old laws meet modern-day technology. More precisely, the court addressed the question of *where* police "intercept" a cellular call under Ohio's wiretap statutes. *Nettles* held that an interception occurs in at least two places: *both* at the location of the targeted call (where the target speaks) *and* at the listening post (where the police listen in).[2]

The *Nettles* decision was fifty years in the making. In the late 1960s, the United States Supreme Court held that warrantless electronic surveillance of a telephone booth violated the Fourth Amendment.[3] The next year, Congress enacted the Omnibus Crime Control and Safe Streets Act, which established warrant procedures governing interceptions of wire communications. States followed suit. Ohio, for example, enacted wiretap statutes in the 1980s.

Ohio's statutes direct law enforcement to apply for a wiretap warrant in "the county in which the interception is to take place."[4] The statutes do not spell out exactly where an interception occurs. But they do define "intercept" to mean "the aural or other acquisition of" communications.[5] And they also define some related terms, like "aural transfer," which is a "transfer containing the human voice at a point between and including the point of origin and the point of reception."[6]

Enter Keith Nettles, a drug dealer who was smuggling cocaine from Michigan into northern Ohio. Federal agents caught wind of this activity. As a result, an agent applied for a wiretap warrant targeting Nettles's cell phone. The agent applied for that warrant in the county where Nettles lived and committed his crimes. But, in carrying out the wiretap, agents chose to use a listening post in a *different*, nearby county from which they monitored Nettles's calls.

Armed with evidence from the wiretap, the state charged Nettles with multiple counts of drug trafficking. Both at trial and on appeal, Nettles argued for suppression of the wiretap evidence. His theory was that an interception occurs solely in the county of the listening post, where police first hear the intercepted communications. So, under his view, the wiretap warrant came from the wrong county.

In a tidy six-page opinion, the Ohio Supreme Court unanimously rejected Nettles's listening-post-only theory. It stressed that Ohio's wiretap statutes broadly define "intercept" to

1 __ Ohio St. 3d __, 2020-Ohio-768.

2 *Id.* at ¶ 11.

3 *Katz v. United States*, 389 U.S. 347 (1967).

4 Ohio Rev. Code § 2933.53(A).

5 Ohio Rev. Code § 2933.51(C).

6 Ohio Rev. Code § 2933.51(T).

mean both the "aural" and "other acquisition" of communications.[7] The court then considered that language in light of current technology. It explained that, under modern surveillance practices, "the government, with the aid of phone companies, captures and redirects a phone call the moment a speaker speaks" into the phone.[8] It follows that, given Ohio's broad definition of "intercept," an interception occurs both "at the place where a speaker uses the phone (other acquisition)" and where "the government overhears the call at the listening post (aural acquisition)."[9] Thus, the court grounded its decision in Ohio's statutory text. But it did mention, for added support, that its interpretation of Ohio law was consistent with federal and state cases interpreting similar laws in other jurisdictions.[10]

Taking a broader view, *Nettles* yields at least two takeaways. First, the decision has important real-world implications for law enforcement in Ohio. It allows police flexibility in deciding where to apply for a warrant, so they may go to the location they think best fits the investigation. For example, they might apply where the officers who need to present supporting evidence are located. Nettles's interpretation, on the other hand, would have meant that law enforcement would have been unable to obtain a warrant in Nettles's home county—the county that had the strongest connection to his crimes.

Second, *Nettles* falls in a long line of cases where older text runs into newer technology. This often happens in the Fourth Amendment context, where courts must decide what constitutes a "search" or a "seizure" after two-hundred years of technological advances.[11] In *Nettles*, pinning down the location of an interception might have been "relatively easy . . . back in the days of wiretaps and landlines, but the advent of cell phones . . . made things a bit more difficult."[12] Difficult, however, does not mean impossible: as *Nettles* aptly shows, the text can still lead to an answer, even if the question involves technology the text's drafters were not thinking of.

7 *Nettles*, 2020-Ohio-768, ¶¶ 9–11.

8 *Id.* at ¶ 11.

9 *Id.*

10 *Id.* at ¶¶ 15–16 (compiling non-Ohio cases).

11 *E.g.*, *Kyllo v. United States*, 533 U.S. 27 (2001).

12 2020-Ohio-768, ¶ 1.

OKLAHOMA

Institute For Responsible Alcohol Policy v. Oklahoma ex rel. Alcohol Beverage Laws Enforcement Comm.

By Jarrett Dieterle

Published June 16, 2020

About the Author:

C. Jarrett Dieterle is Director of Commercial Freedom and Senior Fellow at R Street Institute. Jarrett researches and writes on regulatory affairs, alcohol policy, occupational licensing and other commercial freedom issues. He also oversees the Institute's postal, labor and disintermediation policy programs.

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.

In January 2020, the Oklahoma Supreme Court upheld a challenge under the Oklahoma Constitution to a state law concerning so-called "forced sale clauses"[1] under the state's system of regulation for alcoholic beverages.[2] The story traces back to 2016, when the Oklahoma Legislature passed a joint resolution to place State Question 792 on the November ballot that year. The ballot question was approved by a majority of voters, and it took effect in October 2018.

State Question 792 sought to replace and update Article 28 of the Oklahoma Constitution—involving the control and regulation of alcoholic beverages—with a new section titled Article 28A. One of the main goals of the proposed change was to repeal Oklahoma's so-called "weak beer" law, which restricted the ability of grocery and convenience stores in the state to sell beer over 3.2 percent ABV.[3]

The ballot question also addressed other features of the state's alcohol regulation system, including proposing a new provision in Article 28A of the Oklahoma Constitution that specified that a manufacturer of alcohol "*may* sell" its brand of beverages to a licensed wholesaler in the state.[4] This contrasted with the old Article 28 of the Oklahoma Constitution, which included a "forced sale clause" stating that a manufacturer "*shall* be required to sell" its brand to any wholesaler who desired to purchase it.[5]

Shortly after the ballot question was approved, the state legislature passed SB 608, a law which re-instituted a new type of forced sale clause specifying that any wine or spirit product that constituted a "top brand" (defined as any brand in the top 25 of sales) "*shall* be offered by the manufacturer for sale" to every licensed wholesaler in the state.[6]

SB 608 was promptly challenged by various companies and organizations, including numerous alcohol manufacturers, wholesalers, and retailers (collectively, appellees), who argued that it directly contradicted the recently enacted language in Article 28A stating that alcohol producers had discretion (i.e., "*may* sell") when it came to selling to wholesalers. The law was defended by

1 In this context, a forced sale clause means a requirement in a commercial transaction that one party (here, an alcohol producer) sell their products to another party (such as an alcohol wholesaler).

2 Institute For Responsible Alcohol Policy v. Oklahoma ex rel. Alcohol Beverage Laws Enforcement Comm., Case Number 118209, (Okla. Jan. 22, 2020), *available at* https://law.justia.com/cases/oklahoma/supreme-court/2020/118209.html.

3 *Id.* ¶4.

4 [Citation] (emphasis added).

5 *Id.* ¶13.

6 *Id.* ¶6.

Oklahoma's Alcoholic Beverage Laws Enforcement Commission as well as several other alcohol wholesalers in the state (appellants), who argued that Article 28A and SB 608 were not in direct conflict and that SB 608 was a proper use of legislative authority under the anti-competitive provisions of the Oklahoma Constitution.[7]

The district court held that the forced sale clause of SB 608 *was* in direct conflict with the language in Article 28A of the Oklahoma Constitution. Appellants appealed, and the Oklahoma Supreme Court agreed to hear the appeal.[8] The Oklahoma Supreme Court upheld the district court's opinion, agreeing that SB 608 was unconstitutional under Article 28A of the state constitution.[9]

The majority opinion started by noting that when a statute is challenged under the state constitution, the court "looks first to [the constitution's] language, which if unambiguous, binds the Court."[10] A statute should be upheld "unless it is 'clearly, palpably and plainly' inconsistent with the Constitution."[11]

Because the "clear and ordinary language" of Article 28A of the Oklahoma Constitution states that alcohol manufacturers "may sell such brands" to alcohol wholesalers, and because the word "may" denotes that "an action is permissive or discretional, and not mandatory," any statute that contradicts that language runs afoul of the constitution. Therefore, SB 608's forced sale clause, which states that manufacturers of the top 25 brands "shall" sell those products to all wholesalers, is unconstitutional.[12]

The court also addressed the appellants' additional argument that SB 608 was a proper use of legislative authority under the anti-competitive provisions of the Oklahoma Constitution—namely, Article V, Sections 44 and 51, which bar unlawful monopolies or trusts and prohibit any laws that grant corporations exclusive rights or privileges. The court held that if a statute like SB 608 violates one part of the Oklahoma Constitution (such as Article 28A) it cannot be saved by other provisions elsewhere in the constitution.[13] Regardless, the majority held that Article 28A was not in conflict with the anti-competitive provisions of the Oklahoma Constitution since prior court cases had declined to find antitrust violations for situations in which an alcohol producer granted a single wholesaler the exclusive rights to distribute its product.[14]

The majority decision sparked two dissents. First, Justice Kauger argued that the majority incorrectly found an irreconcilable conflict between SB 608 and Article 28A. Justice Kauger argued the text of Article 28A was ambiguous given that it also specified that producers must sell their products to wholesalers "without discrimination," and only selling to one wholesaler at the exclusion of others could be construed as a type of discrimination.[15]

Justice Kauger urged a consideration of the "intention of the framers" of Article 28A, which should govern over "technical rules" regarding statutory construction. When considering the entirety of State Question 792, which implemented Article 28A—including analyzing the Final Ballot Title and the "gist" of the ballot question as they appeared on the electoral ballot—Justice Kauger concluded that the state legislature was primarily concerned with three things: preventing the formation of monopolies, preventing discrimination and retaining legislative authority to regulate the sale of alcoholic beverages. Therefore, when "the resolution, the title, and the gist, are read collectively, it is apparent the voters were voting on these same three things, [whereas] voters were not notified about whether [the ballot question would] allow a manufacturer to sell to only one wholesaler."[16]

Under Justice Kauger's analysis, SB 608 was a valid use of legislative authority. The primary goal of SB 608 was to prevent wholesaler monopolies from arising if all wholesalers were not allowed to sell the top 25 brands in the marketplace.[17]

A second dissent, authored by Justice Barnes, argued that the Oklahoma Constitution must be construed "as a consistent whole," thus the Court must "attempt to harmonize" Article 28A with the anti-competitive provisions of the constitution. Given the broad powers the legislature is recognized to have over alcoholic beverage regulation, in conjunction with the broad anti-competitive and anti-monopoly powers granted to the legislature under the constitution, exercises of legislative power like SB 608 are "not plainly and clearly prohibited." Therefore, the dissent argued, any doubt should be resolved in favor of the legislature's actions, which means SB 608 should be upheld.[18]

While it's hard to know if the Oklahoma Supreme Court's decision will be the concluding chapter in the state's long saga concerning State Question 792, it definitively concludes that legislation forcing alcohol producers to sell their products to wholesalers violates the state constitution.

7 *Id.* ¶8.

8 *Id.* ¶9.

9 *Id.* ¶22.

10 *Id.* ¶12.

11 *Id.*

12 *Id.* ¶14-¶17.

13 *Id.* ¶18.

14 *Id.* ¶20.

15 *Id.*, ¶2 (Kauger, J., dissenting).

16 *Id.* ¶11-12. (Kauger, J., dissenting).

17 *Id.* ¶15-17.

18 *Id.* ¶4, ¶15-16 (Barnes, J., dissenting).

OREGON

Elkhorn Baptist Church v. Brown

By GianCarlo Canaparo

Published August 3, 2020

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 and writes on criminal justice reform, immigration, the role of the courts, and various constitutional issues.

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.

On June 12, 2020, the Oregon Supreme Court struck down a preliminary injunction that had been granted by a lower court to Elkhorn Baptist Church, which had challenged Governor Kate Brown's COVID-19 executive orders.[1]

Like many governors, Brown implemented a series of emergency executive orders to respond to the public health crisis posed by COVID-19. The most recent orders were issued in mid-March, and they put a 25-person cap on gatherings, including religious services, and required attendees to obey various "social distancing" requirements.[2]

Plaintiffs, a number of churches and individuals, sued and sought to enjoin the governor from enforcing the orders.[3] Curiously, unlike the plaintiffs in two similar challenges that were recently rejected by the United States Supreme Court,[4] the plaintiffs here did not claim that the orders violated their religious liberties.[5] Instead, they argued that the orders had expired in late April pursuant to a statutory deadline, or in the alternative, a state constitutional deadline.[6]

The court rejected these arguments concluding that the plaintiffs' claims failed as a matter of law because the deadlines were inapplicable.

In reaching that conclusion, the court first worked its way through the complicated interplay of two chapters of the Oregon code.

The first is chapter 433, which permits the governor to "declare a state of public health emergency" and grants her the power to, among other things, limit "entry into, exit from, movement within, and the occupancy of premises in any public area subject to or threatened by a public health emergency."[7] This public health emergency and its conferred powers expire after, at most, 28 days.[8] It was this power that the governor wielded when she limited gatherings to 25 people.[9] Accordingly, the plaintiffs argued that the orders expired no later than the end of April and were no longer enforceable.

1 Elkhorn Baptist Church v. Brown, 466 P.3d 30 (OR 2020).

2 *Id*. at 37.

3 *Id*. at 39.

4 S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (rejecting an emergency First Amendment challenge to California's COVID-19 orders); Calvary Chapel Dayton Valley v. Sisolak, No. 19A1070, 591 U.S.__ (2020) (rejecting an emergency First Amendment challenge to Nevada's COVID-19 orders).

5 *Elkhorn*, 466 P.3d at 51.

6 *Id*. at 39.

7 Or. Rev. Stat. § 433.441, et seq.

8 *Id*.

9 *Elkhorn*, 466 P.3d at 45–46.

Although the governor wielded powers set forth in ORS 433.441, she did not invoke that statute when she declared an emergency. Rather, she declared an emergency pursuant to chapter 401, which permits the governor to "declare a state of emergency"[10] and grants her police powers[11] and other powers not relevant to the dispute.[12] This state of emergency and its conferred powers do not expire until the governor or the legislature says so.[13] In other words, the governor declared an emergency pursuant to a statute with no deadline, but wielded powers pursuant to another statute with a 28-day deadline.[14]

The court sided with the governor in holding that because the emergency declaration was made pursuant to chapter 401, there was no deadline. First, it concluded that chapter 433 permits the governor to do wield its powers even if the emergency declaration is made under chapter 401.[15] Section 433.441(4) provides that if the governor declares a state of emergency pursuant to chapter 401, "the Governor may implement any action authorized by ORS 433.441. . ."[16] Second, to the extent that chapter 433 and 401 were in conflict, the court concluded that chapter 401 rendered 433 inoperative.[17] Lastly, the court picked through the legislative history of chapter 433 and concluded, based on the testimony of legislative witnesses, that the legislature intended for chapter 433 to be "a step short of declaring a state of emergency under chapter 401."[18]

Alternatively, the plaintiffs also argued that the governor's orders were subject to a 30-day deadline under Article X-A of the Oregon Constitution.[19] Article X-A permits the governor to declare a "catastrophic disaster" and grants the governor extraordinary powers—beyond those of chapter 401 or 433—which expire after 30 days.[20] The court held that Article X-A's deadline did not apply because the governor did not invoke Article X-A and did not have to because Article X-A is discretionary.[21]

Justice Christopher Garrett, joined by Justice Thomas Balmer, concurred in the opinion but wrote separately to say that the majority opinion went further than necessary.[22] They would not have said, as the majority did, that the plaintiffs cannot prevail; "it is enough to say that their arguments to this point fall short of what is required for preliminary relief."[23]

The ultimate effect of *Elkhorn* is to turn chapter 433's 28-day deadline into a dead letter, meaning that a governor can give herself all the powers of chapter 433 while avoiding that chapter's deadline.

10 Or. Rev. Stat. § 401.165.

11 *Id.* § 401.168.

12 *Id.* § 401.175.

13 *Id.* § 401.192.

14 The court did not address whether the powers she wielded to limit the size of gatherings qualified as a "police power" for the purposes of chapter 401.

15 *Elkhorn*, 466 P.3d at 44.

16 Or. Rev. Stat. § 433.441(4).

17 *Elkhorn*, 466 P.3d at 44.

18 *Id.* at 46.

19 *Id.* at 49.

20 Or. Const. art. X.

21 *Elkhorn*, 466 P.3d at 50.

22 *Id.* at 52 (Garrett, J., concurring).

23 *Id.* at 53.

PENNSYLVANIA

Ladd v. Real Estate Commission

By Anastasia P. Boden

Published July 7, 2020

About the Author:

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

Note from the Editor:

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In *Ladd v. Real Estate Commission*,[1] the plaintiff Sarah Ladd was an entrepreneur who used ingenuity and the burgeoning short term rental industry to her advantage. She built a business handling marketing and other logistics for short term rentals, including responding to inquiries, coordinating bookings, managing billing, and ensuring that the properties were cleaned between uses. The homeowners were separately responsible for entering into contracts with the renters and making sure that the relevant fees and taxes were paid and regulations followed. The Commonwealth of Pennsylvania, however, defined Ladd's business as a "real estate brokerage" and required her to secure a license. Completing the licensure requirements would have forced her to complete years of training, pass two exams, work as an apprentice, and obtain a physical office. In total, Ladd would have had to complete 165 hours of coursework geared toward large scale real estate transactions and forego income for three years while she pursued licensure.

Rather than pursuing a license, Ladd sought a judicial declaration that the real estate licensing law deprived her of her right to pursue her chosen occupation under the state constitution. The government moved to dismiss based on ripeness, failure to exhaust, and failure to state a claim. It also sought to dismiss one of the plaintiffs—a former client of Ladd's who argued that she was injured because she was no longer able to use Ladd to book clients for her short term rental.

The trial court dismissed. It first rejected the government's ripeness and exhaustion claims, finding that Ladd was suffering a sufficiently direct and immediate harm to warrant pre-enforcement review.[2] Because she was forced to suffer the costs of complying or possible sanctions for non-compliance, Ladd could seek a judgment in court rather than pursuing administrative remedies.

The court then dismissed the case on the basis that Ladd could not possibly prove her claim. It reasoned that it's rational to have prerequisites for a career, and those prerequisites do not become any less rational merely because a person practices "in a limited fashion."[3] The government had warned that Ladd's reasoning would permit people to "practice medicine without attending medical school" so long as they do not "perform major surgery," or allow architects to "design small houses," or enable pharmacists to work unlicensed so long as they "only work weekends and do not prescribe narcotics."[4] The lower court agreed, ruling that to hold otherwise would "effectively upend

1 Ladd v. Real Estate Commission, 2020 WL 2532285, at *1 (Pa. 2020).

2 Ladd v. Real Estate Commission of Commonwealth, 187 A.3d 1070, 1076 (Pa.Cmwlth. 2018).

3 *Id.* at 1078.

4 2020 WL 2532285 at *8.

the legitimacy of any requirement by the Commonwealth for a professional license."[5]

The Pennsylvania Supreme Court reversed. Citing its earlier opinion in *Gambone v. Commonwealth of Pennsylvania*,[6] the Court affirmed that even under the rational basis standard, any exercise of the police power should not be "unreasonable, unduly oppressive, or patently beyond the necessities of the case."[7] Moreover, laws must bear a "real and substantial relation" to a legitimate policy objective and the government's stated justification must be supported by the record.[8] Given that standard, Ladd had made a colorable claim that the real estate licensure requirement, as applied to her, violated due process.

For instance, Ladd alleged that forcing her to engage in an apprenticeship, complete coursework and exams, and arrange physical office space in order to continue her business did not bear a "real and substantial" relationship to protecting the buyers and sellers of homes because Ladd did not buy or sell property, facilitate leases, or handle large sums of money.[9] "Taking courses on how to perform those functions" was therefore "irrelevant to her competent performance of a wholly different service," which entailed managing rentals "that last only a few days and cost only a few hundred dollars."[10] In other words, Ladd had not just alleged that she sought to practice "limited" brokerage services, but instead that she sought to practice what was essentially an entirely different profession altogether.[11] Moreover, the law's exemptions for other related professions and blanket prohibition on "[u]nfair methods of competition and unfair or deceptive acts" meant that there were less restrictive ways to protect the public than licensure of Ladd's services.[12]

In dissent, Justice David Wecht disagreed with the "deeply flawed 'heightened rational basis' test'" established in *Gambone*.[13] Justice Wecht viewed that test as permitting courts, "under the facade of substantive due process—to second-guess the wisdom, need, or appropriateness of otherwise valid legislation," and to effectively act as legislators themselves. Referencing the United States Supreme Court's infamous decision in *Lochner v. New York*,[14] Justice Wecht argued that decisions protecting economic liberty, like the right to freedom of contract or the right to earn a living, merely lock in judges' policy preferences.[15] *Gambone*, Justice Wecht said, embodies *Lochner* even though the Supreme Court itself has abandoned that test.[16] Indeed, in his view *Gambone* goes beyond *Lochner*, because rather than purporting to protect unenumerated rights, it explicitly allows courts to declare laws unconstitutional based on whether they are "reasonable."[17] In Justice Wecht's view, "the only constitutionally relevant question is whether the RELRA's broker licensing requirements are rationally related to a legitimate government interest."[18] In response to that question, the justice answered, "I have little doubt that they are."[19]

Even arguing on the majority's terms, Justice Wecht found the majority's opinion problematic because it would create a constitutional right to "a custom-made licensing statute" that would mean that "requirements for dentists are unconstitutional as applied to practitioners who only intend to extract teeth."[20] To this, the majority responded that the relevant fact was not merely that Ladd's services were limited, but that they were so limited so as to constitute an entirely different profession. It analogized to the distinction between a dental hygienist and dentist, rather than between a dentist and a part-time dentist.[21]

In a much shorter dissent, Justice Sallie Updyke Mundy briefly noted that she too believed that the real estate law was rational regardless of whether Ladd limited the scope of her business.[22]

On remand, Ladd will now have the opportunity to proceed to discovery and to make her argument on the merits that the law goes too far.

5 *Id.*

6 Gambone v. Commonwealth of Pennsylvania, 375 Pa. 547 (Pa. 1954).

7 *Id.*

8 *Ladd,* 2020 WL 2532285 at *6.

9 *Id.* at *7.

10 *Id.*

11 *Id.* at *12.

12 *Id.* at *15.

13 *Id.*

14 198 U.S. 45 (1905).

15 *Id.* at *16.

16 *Id.* at *17.

17 *Id.* at *18.

18 *Id.* at *20.

19 *Id.*

20 *Id.*

21 *Id.* at *14 n.19.

22 *Id.* at *21.

PENNSYLVANIA

Pennsylvania Democratic Party v. Boockvar

By J. Christian Adams & Kaylan L. Phillips

Published November 5, 2020

About the Authors:

J. Christian Adams serves as President and General Counsel of the Public Interest Legal Foundation. He is also the founder of the Election Law Center, PLLC. He served from 2005 to 2010 in the Voting Section at the United States Department of Justice. He is the author of the New York Times bestseller Injustice: Exposing the Racial Agenda of the Obama Justice Department which examines the Department's election and voting rights record. He litigates election law cases throughout the United States and brought the first private party litigation resulting in the cleanup of corrupted voter rolls under the National Voter Registration Act of 1993.

Kaylan L. Phillips joined Public Interest Legal Foundation in 2012 and serves as Litigation Counsel. She has litigated election law and constitutional law cases across the nation, from Washington state to Maine. Kaylan has extensive experience at every level of litigation in state and federal court, including the Supreme Court. She also has experience representing clients before federal and state administrative agencies.

Note from the Editor:

At the time this article was published on November 5, 2020, a petition for full review of this case is currently pending at the U.S. Supreme Court. On September 22, 2020, Republican state officials filed an application for stay, but the state supreme court denied it on September 24. Four days later, two applications for stay were filed at the U.S. Supreme Court; the first came from Joseph Scarnati III and Jake Corman, president pro tempore and majority leader of the Pennsylvania Senate, and the second came from the Pennsylvania Republican Party. On October 19, the U.S. Supreme Court denied these applications 4-4 and let stand the state supreme court's ruling. On October 24, a petition for certiorari was filed by the Republican Party of Pennsylvania at the U.S. Supreme Court, followed by an October 28 denial of motion to expedite consideration for certiorari issued by the Supreme Court. For more details, please visit https://www.scotusblog.com/election-litigation/pennsylvania-democratic-party-v-boockvar/.

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Pennsylvania, like most states in 2020, has seen contested election litigation. In *Pennsylvania Democratic Party v. Boockvar*, the state supreme court determined that the county board of elections may accept mail-in ballots outside of their offices, including in unmanned drop-boxes; and that the deadline for mail-in and absentee ballots is extended by three days, even for ballots lacking a postmark.[1]

The case centered around Pennsylvania's Act 77 of 2019, which authorized no-excuse mail-in voting for the first time in the Commonwealth.[2] The bill was signed into law in late October 2019,[3] before COVID-19 was a household name and a part of the debate about how elections should be conducted. Section 1301-D of Act 77 allows any Pennsylvania registrant who is not qualified to cast an absentee ballot under Pennsylvania law to be a "qualified mail-in elector." Under this new law, a registrant must submit an Application for Mail-In Ballot.[4] The registrant's county board of elections then processes the application and, if approved, mails the registrant a ballot. Included with the ballot are two envelopes so that the ballot may be placed in one envelope with only the words "Official Mail-In Ballot" on the front which is then placed in a larger envelope to be signed by the registrant attesting that he is qualified to vote by mail and has not already voted in the election.

It was unusual for the state's high court to take this case so close to the election because of a long established principle that the rules of elections should not change too close to elections, but it did so due to the ongoing COVID-19 crisis. The petition for review was initially filed in an intermediate appellate court by the Pennsylvania Democratic Party, Democratic officials, and Democratic candidates in mid-July.[5] The petition sought relief against Secretary of the Commonwealth Kathy Boockvar and county election boards.[6] Multiple entities sought to intervene in the matter, including Trump for President, Inc. and the Pennsylvania GOP, as well as several groups such as Common Cause of Pennsylvania and the League of Women Voters of Pennsylvania.[7]

1 *Pa. Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 Pa. LEXIS 4872, at *88-90 (Sep. 17, 2020).

2 25 P.S. §§ 3150.11-3150.17.

3 Press Release, Governor Tom Wolf, Governor Wolf Signs Historic Election Reform Bill Including New Mail-in Voting (Oct. 31, 2019), *available at* https://www.governor.pa.gov/newsroom/governor-wolf-signs-election-reform-bill-including-new-mail-in-voting/.

4 Pennsylvania Application for Mail-In Ballot, https://www.votespa.com/Register-to-Vote/Documents/PADOS_mailInapplication.pdf.

5 *Boockvar*, No. 133 MM 2020, at *1-2.

6 *Id.* at *2.

7 *Id.* at *6-7.

In August, Secretary Boockvar asked the Pennsylvania Supreme Court to exercise "extraordinary jurisdiction" over the claims.[8] The Democratic Party did not object, and the Pennsylvania Supreme Court granted the request on September 1, 2020.[9] The Supreme Court also allowed the Pennsylvania GOP to intervene along with members of the Pennsylvania Senate and House of Representatives but denied the motions to intervene of other entities.[10]

The plaintiffs wanted two significant changes. First, the Democratic Party sought a declaration that county boards of election can utilize as many ballot "drop boxes" as they wish. Pennsylvania law states that mail-in ballots should be sent "by mail, postage prepaid, except where franked, or deliver[ed] [] in person to said county board of election."[11] The Democratic Party and the Secretary advocated that this language must allow drop boxes in places designated by the county board.[12] The Pennsylvania GOP, however, argued that the General Assembly intended the ballots to be delivered to the office of the county board.[13]

The court found that the competing interpretations of state law were reasonable but sided with the Democratic Party and Secretary because their position "favors the fundamental right to vote and enfranchises, rather than disenfranchises, the electorate."[14]

Second, the Democratic Party sought to extend Pennsylvania's deadline for the receipt of ballots by seven days. Pennsylvania statute requires that ballots be received by 8:00 pm on Election Day.[15] The Secretary reversed her previous position against any extension and consented to a 3-day extension for the receipt of ballots.[16] The court determined that the present circumstances qualify as a "natural disaster" and that "[i]t is beyond cavil" that there will be an extraordinary number of Pennsylvanians seeking to vote by mail.[17] Additionally, the court expressed concern over the United States Postal Service's handling of the anticipated high volume of ballots.[18] For these reasons, the court found that it "can and should act to extend the received-by deadline for mail-in ballots to prevent the disenfranchisement of voters."[19]

The Democratic Party also sought a declaration that Pennsylvania's requirement that poll watchers be appointed only to locations within the county in which they reside is constitutional.[20] The Secretary agreed with the Democratic Party. The court determined that the "requirement does not burden one's constitutional voting rights" and that the legislature's choice to require that poll watchers serve where they reside is reasonable in light of how Pennsylvania runs its elections.[21] Therefore, the court granted the requested relief.[22]

The Democratic Party also requested a mandate that county boards contact voters who submitted faulty ballots to allow an opportunity to cure as well as a declaration that ballots lacking a secrecy envelope must still be counted. As to the former, the court decided that such policy changes are best left up to the legislature.[23] As to the latter, the court determined that the secrecy envelope requirement is mandatory.[24]

Justice David Wecht joined the majority's opinion in full and wrote a concurring opinion emphasizing that "the convergence of a once-in-a-century pandemic and unprecedented operational delays in United States Postal Service delivery capacity threatens to undermine the integrity of our general election, this *force majeure* necessitates relief."[25]

Justice Thomas Saylor dissented as to the majority's allowance of drop boxes and the 3-day extension for receipt of mail-in ballots. Justice Saylor expressed concern over the fact that "although the majority decision appears to be designed to accommodate only ballots actually mailed on Election Day or before, the majority does not so much as require a postmark. Particularly in combination with the allowance of drop boxes, this substantially increases the likelihood of confusion, as well as the possibility that votes will be cast after 8:00 p.m. on Election Day."[26]

Justice Christine Donohue also wrote separately to state that while current circumstances support extending the deadline for receipt of mail-in ballots, such a decision should have been presented along with a sufficient showing of the existence of a constitutional injury. Justice Donohue constructed a chart of the election deadlines along with the USPS expectation of delivery for mail and concluded that "the deadline for requesting a ballot should be moved to Friday, October 23, 2020. . . .The legislative choice of Election Day at 8:00 p.m. should remain intact."[27]

8 *See* 42 Pa.C.S. § 726.

9 *Boockvar*, No. 133 MM 2020, at *6.

10 *Id.* at *6-7.

11 25 P.S. § 3150.16(a).

12 *Boockvar*, No. 133 MM 2020, at *12-13.

13 *Id.* at *16.

14 *Id.* at *23.

15 *See* 25 P.S. §§ 3146.6(c), 3150.16(c).

16 *Boockvar*, No. 133 MM 2020, at *32-35.

17 *Id.* at *47.

18 *Id.* at *47-48.

19 *Id.* at *48.

20 *Id.* at *74-77.

21 *Id.* at *87.

22 *Id.* at *88.

23 *Id.* at *56-57.

24 *Id.* at *73-74.

25 *Id.* at *94.

26 *Id.* at *103.

27 *Id.* at *112.

SOUTH CAROLINA

Bailey v. South Carolina State Election Commission

By Jason Torchinsky & Drew Watkins

Published July 31, 2020

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Note from the Editor:

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In *Bailey v. South Carolina State Election Commission*, the Supreme Court of South Carolina, accepting original jurisdiction, dismissed an action that sought to expand South Carolina's absentee ballot provisions in light of the ongoing COVID-19 pandemic.[1]

The plaintiffs in *Bailey* were candidates in the South Carolina Democratic primary, the South Carolina Democratic Party, and the Democratic Congressional Campaign Committee (DCCC). They argued that the state's absentee balloting laws, which permit absentee voting by "physically disabled persons," encompass those practicing social distancing to avoid contracting or spreading COVID-19.[2] Such voters, plaintiffs argued, could not vote in person in the state's June primary or November general elections "because of . . . illness" and were therefore "physically disabled persons" under South Carolina's absentee balloting laws.[3] Carrying this argument to its ultimate conclusion, plaintiffs maintained that this construction would permit all registered voters to vote by absentee ballot for the duration of the COVID-19 pandemic.[4] Although all five justices of the state's Supreme Court agreed that the claim should be dismissed, there was a split in reasoning.

The majority held that this case presented a nonjusticiable political question, and that it was not appropriate for the court to weigh in. As the court noted, on the same day it heard oral argument in *Bailey*, the South Carolina legislature met and approved temporary changes to the election law to allow all qualified electors to vote absentee if their place of residence or polling place was located within an area subject to a state of emergency declared by the governor and it was within 46 days of an election.[5] The next day, this legislation was signed into law. Because at the time there existed a declared state of emergency in South Carolina, and it was within 46 days of the June primary election, the Court recognized that the legislature had mooted the plaintiffs' case with respect to the June election.[6] However, the new legislation expired on July 1, 2020, leaving the issue potent for the November general election.

Nonetheless, the majority considered the legislature's action in changing the law as "a clear indication the absentee voting statutes did not already permit" any voter practicing social distancing to vote absentee.[7] Furthermore, the court said, by providing an expiration date in the new law, the legislature was

1 Bailey v. S.C. State Election Comm'n, No. 27975 (May 27, 2020), *available at* https://www.sccourts.org/opinions/HTMLFiles/SC/27975.pdf.

2 *Id.* (slip op. at 4).

3 *Id.*; S.C. Code Ann. §§ 7-15-310(4) and 7-15-320(B)(1).

4 *Bailey*, No. 27975 (slip op. at 4).

5 *Id.*

6 *Id.* (slip op. at 5); S.C. Exec. Order No. 2020-35 at 9 (May 12, 2020).

7 *Bailey*, No. 27975 (slip op. at 5).

reenacting the old law as of July 1.[8] As a result of this "legislative determination" of the plaintiffs' challenge, the majority considered itself constrained by a construction of South Carolina's absentee voting law "not based on its plain language or the canons of construction, but based on the Legislature's political act of reenacting the subsection after temporarily changing the law."[9] The legislature's answer to the plaintiffs' challenge "with absolute clarity" rendered the question—in the view of the majority—a "political question." Accordingly, the court felt bound by separation of powers principles to abstain from reaching a different conclusion. "[W]hen the Legislature considers the very same question—knowing it is doing so at the very same time the Court considers the question—and answers the question with clarity, we cannot give a different answer through the judicial act of statutory interpretation."[10]

The majority clarified, however, that the plaintiffs were not without potential relief—it just would not come from the court. The South Carolina legislature, by joint resolution, set September 15, 2020, to resume legislative session and consider, among other items, "legislation concerning COVID-19."[11] At that time, it will be left to the legislature to "consider this political question." After all, as the majority explained, it is "the Legislature which bears the constitutional obligation to ensure that elections are carried out in such a manner as to allow all citizens the right to vote."[12] Accordingly, the legislature may still make a change in South Carolina's absentee voting law for the November general election, but the court will not.

Although the dissent agreed with the decision to dismiss plaintiffs' case, it would not have done so with the same finality as the majority.[13] Relying on the familiar doctrine from *Marbury v. Madison* that "it is emphatically the province and duty of the judicial department to say what the law is," the dissent would have viewed the question as one of pure statutory interpretation, not a political question.[14] The dissent rejected the notion that "the action or inaction of the General Assembly . . . determine[s] whether a question is political, and therefore, nonjusticiable."[15] Instead, it would have considered the "plain and ordinary meaning of 'physically disabled persons,' as defined" under South Carolina law.[16] Nonetheless, the dissent would have still dismissed the complaint "on the ground that the matter involving the general election is not yet ripe for judicial consideration, which would not foreclose a future suit."[17]

As more cases arise and the November election approaches, the volume of state and federal litigation is expected to increase. The role of state courts in these political question and separation of powers cases will likely be tested in a number of state courts in the coming months.

8 *Id.*

9 *Id.* (slip op. at 5-6).

10 *Id.* (slip op. at 6).

11 *Id.*

12 *Id.*

13 *Id.* (slip op. at 8) (Hearn, J., concurring in part, dissenting in part).

14 *Id.* (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)).

15 *Id.* (slip op. at 10).

16 *Id.*

17 *Id.* (slip op. at 11).

SOUTH CAROLINA

Adams v. McMaster

By Stafford (Mac) J. McQuillin, III

Published December 16, 2020

About the Author:

A versatile litigation and appellate attorney with deep ties to his native Charleston, South Carolina, Mac McQuillin blends an established government and business litigation practice with an emerging practice as a certified South Carolina Mediator. In addition to his law practice, Mac was elected in 2014 to serve on the Berkeley County School District Board (the fourth largest school district in South Carolina) and currently serves as the school board's Vice Chairman and Chairman of the Facilities and Capital Planning Committee.

Note from the Editor:

Background

In early March, South Carolina's Governor, Henry McMaster, issued a State of Emergency following the President's national emergency declaration due to the public health risks posed by the coronavirus. By the end of March, the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), which appropriated $30.75 billion to the Education Stabilization Fund, was passed by Congress and signed by the President.[1] One of the provisions in the Act ordered the Secretary of Education to allocate money to the Governor's Emergency Education Relief ("GEER") Fund.[2] The Governor applied for a GEER Fund grant, and South Carolina was awarded $48,467,924 from the Department of Education.[3] The Governor later announced the creation of the Safe Access to Flexible Education ("SAFE") Grants Program, which used $32,000,000 of the CARES award "to provide one-time, need-based grants of up to $6,500 per student to cover the cost of tuition for eligible students to attend participating private or independent schools in South Carolina for the 2020-2021 academic year."[4] Following the initiation of the program, public educators challenged the program as violating Article XI, Section 4 of the South Carolina Constitution, which prohibits public funding of private schools.[5] In early October of this year, the South Carolina Supreme Court issued an opinion addressing these claims in *Adams v. McMaster*.

Standing

The first issue considered by the court was whether petitioners—a group of public school teachers—had standing to sue. The Governor moved to dismiss the petitioners' claims because they lacked standing. Specifically, the Governor asserted that petitioners failed to identify a statute that would give them standing, and he argued they lacked constitutional standing because they could not demonstrate an injury-in-fact. Petitioners claimed they had standing under the public importance exception, which does not require a showing of a concrete or particularized injury. The court found that petitioners established public importance standing because of the nature of the case. The court reasoned, "[t]he COVID-19 pandemic that has plagued our State in recent months has posed unprecedented challenges in every area of life and severely disrupted essential governmental operations."[6]

1 Pub. L. No. 116-136, 134 Stat. 281 (2020).

2 *See id.* at 564.

3 *Adams v. McMaster*, No. 2020-001069, 2020 WL 5939936, at 2 (S.C. 2020).

4 *Id.*

5 S.C. Const. art. XI, § 4.

6 *Adams*, 2020 WL 5939936, at 3.

Constitutionality under Article XI, Section 4

The next issue before the court was whether the Governor's use of GEER funds for the SAFE Grants Program violated Article XI, Section 4 of the South Carolina Constitution because it allocated public funds to the direct benefit of private schools. Pursuant to Article XI, Section 4, "[n]o money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution."[7]

A. Public Funds

The court first looked to whether the GEER Funds constituted "public funds" within the meaning of the constitutional provision. Petitioners argued that since the state code required the money to be deposited in the state treasury, this indicated that the GEER Funds were "public funds."[8] Additionally, petitioners argued the funds were not passively flowing through the state, but that the state—through the Governor—was actively using the funds for the purpose of funding the SAFE program.[9] The court agreed with this rationale and found that "when the GEER funds are received in the State Treasury and distributed through it, the funds are converted into 'public funds' within the meaning of Article XI, Section 4."[10]

B. Direct Benefit

The most controversial component of the constitutional issue before the court was whether the GEER Funds issued to benefit students who chose to attend private schools directly benefitted the private institution. Petitioners claimed the Governor's allocation of the GEER funds to create grants for students to attend private schools violated the Constitution's prohibition on using public funds for the "direct benefit" of a "private educational institution."[11] The Governor claimed the SAFE Grants Program did not benefit participating private schools but instead, provided a direct benefit to the student recipient and his or her family. The Governor argued that Article XI, Section 4 did not prohibit this sort of benefit and that it was, in fact, amended in 1972 specifically to remove a prohibition on indirect financial aid.[12] The Governor's position was reiterated in several amicus briefs, including those submitted by the American Center for Law and Justice (ACLJ) and the Institute for Justice, which emphasized that the students were the ones who directly benefitted from the funds, not the schools.[13] The court rejected the Governor's argument based on the fact that the SAFE grants were not transferred directly to the student, but instead were transferred from the state treasury to the selected school. Further, it explained that the direct payment to private schools was contrary to the framers' intention not to grant public funds "outrightly" to such institutions.[14]

Lastly, the Governor claimed the CARES Act granted him absolute discretion in using the GEER funds such that the federal law preempts the state constitutional provision under the Supremacy Clause. In its amicus brief, the ACLJ supported this position and argued that "[the Governor's] actions were precisely within the intent of Congress in passing the CARES Act."[15] The language establishing the GEER Fund provides that the funds may be available to an "education related entity within the State that the Governor deems essential for carrying out emergency educational services to students."[16] The Governor claimed this language illustrated the intent of Congress to grant him broad discretion in distributing the funds.[17]

However, the court held that "there is no clear congressional intent in the education provisions of the CARES Act to allow the Governor to allocate the GEER funds in his discretion in contravention of our State Constitution."[18] "If that were the case, Congress certainly understood how to make such intention clear . . . ."[19] Accordingly, the court found the Governor's SAFE Grants Program to be in violation of Article XI, Section 4 of the state's constitution.[20]

Conclusion

The Governor's use of GEER funds for the SAFE Grants Program was ultimately deemed to be in violation of the South Carolina constitution. The South Carolina Supreme Court found that despite giving students the ability to choose which private school they wished to attend, the schools were being directly benefited because the funds were transferred from the state treasury directly to the private institution. Finally, the court held that Congress did not intend to allow Governor McMaster to distribute GEER funds at his discretion in contravention of the state constitution.

7 S.C. Const. art. XI, § 4.

8 *Adams*, 2020 WL 5939936, at 3.

9 *Id.*

10 *Id*. at 4.

11 *Id.*

12 *Adams*, 2020 WL 5939936, at 4.

13 *See* Brief for the American Center for Law & Justice as Amicus Curiae, at 1, *Adams v. McMaster*, 2020 WL 5939936 (S.C. 2020); Brief for the Institute for Justice as Amicus Curiae, at 6, *Adams v. McMaster*, 2020 WL 5939936 (S.C. 2020).

14 *Adams*, 2020 WL 5939936, at 5.

15 Brief for the ACLJ as Amicus Curiae, *supra* note 13, at 3, *Adams v. McMaster*, 2020 WL 5939936 (S.C. 2020).

16 Pub. L. No. 116-136, 134 Stat. 281 (2020).

17 *Adams*, 2020 WL 5939936, at 5.

18 *Id.*

19 *Id.*

20 *Id.*

TENNESSEE
Fisher v. Hagett and *Lay v. Goins*

By Jason Torchinsky & Dennis W. Polio

Published September 18, 2020

About the Author:

Jason Torchinsky is a partner at Holtzman Vogel Josefiak PLLC, specializing in campaign finance, election law, lobbying disclosure and issue advocacy groups. Politico recently named him one of the "50 Politicos to Watch," and in 2007, Campaigns and Elections Magazine named him a "Rising Star of Politics."

Dennis Polio is an associate with the law firm Holtzman Vogel Josefiak Torchinsky PLLC. Dennis's practice focuses on First Amendment, redistricting, and election-related litigation and appeals as well as lobbying, ethics, and tax-exempt organizations' compliance. Dennis regularly co-authors amicus briefs and appellate briefs in the Supreme Court of the United States, the various federal courts of appeals, and state supreme courts. Dennis has also authored and co-authored several articles in academic journals and with the Congressional Research Service in the Library of Congress.

Note from the Editor:

The Authors, Jason B. Torchinsky and Dennis W. Polio, authored an amicus brief in *Lay v. Goins*. 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.

In *Fisher v. Hagett* and *Lay v. Goins*, a majority of the Supreme Court of Tennessee vacated an injunction which had temporarily forced the State of Tennessee to provide any eligible Tennessee voter, who applied to vote by mail in order to avoid transmission or contraction of COVID-19, an absentee ballot in that state's August 2020 and December 2020 elections.[1]

Tennessee, like many other states, requires that registered voters must "qualify" to vote by absentee ballot. Qualified absentee voters in Tennessee include persons that are over 60 who are hospitalized, ill, or disabled; individuals younger than 60 who are unable to appear at their polling place on election day because of being hospitalized, ill, or physically disabled; or persons who are caretakers of a hospitalized, ill, or disabled person.[2]

The plaintiffs in both cases, which were heard together and decided in a single opinion, included registered Tennessee voters who wished to vote by mail in the August 2020 and November 2020 elections due to the COVID-19 pandemic, but who did not satisfy Tennessee's eligibility requirements for doing so.[3]

On June 4, 2020, the trial court, the Chancery Court for Davidson County, Tennessee, issued its "Memorandum and Order Granting Temporary Injunction to Allow Any Tennessee Registered Voter to Apply for a Ballot to Vote by Mail Due to COVID-19."[4] The trial court applied the *Anderson-Burdick* framework the U.S. Supreme Court has developed for election law challenges and held that, during the unique circumstances of the pandemic, the state's interpretation of the eligibility criteria constituted an unreasonable and discriminatory burden on the fundamental right to vote guaranteed by the Tennessee Constitution, and that plaintiffs were therefore entitled to a temporary injunction.[5] The temporary injunction directed the state to (1) provide any eligible voter, who applies to vote by mail in order to avoid transmission or contraction of COVID-19, an absentee ballot for the August 2020 and November 2020 elections during the pendency of pandemic circumstances; and (2) construe the eligibility criteria to include any qualified voter who "determines it is impossible or unreasonable to vote in-person at a polling place due to the COVID-19."[6] The state filed an interlocutory appeal, and the Supreme Court of Tennessee assumed jurisdiction over it.[7]

1 *Fisher v. Hargett*, 2020 Tenn. LEXIS 283, *3-*4 (Tenn. Aug. 5, 2020).

2 *Id.* at *9.

3 *Id.* at *10-*12, *15-*16. The individual plaintiffs were joined by an organization that stated that it was devoted to increasing voter registration and turnout. *Id.*

4 *Id.* at *19.

5 *Id.* at *20.

6 *Id.* at *20-*21.

7 *Id.* at *22-*23.

On appeal, the state challenged the trial court's holding that the Tennessee Constitution required the state to allow all Tennessee voters to vote by mail in the August and November elections.[8]

A majority of the Supreme Court of Tennessee distinguished two distinct categories of plaintiffs and voters: (1) persons with special vulnerability to COVID-19 and their caretakers; and (2) persons who are not especially vulnerable to COVID-19 or who do not act as caretakers to those who are.[9] The state conceded that persons in the first category are eligible to vote absentee by mail under the eligibility criteria.[10] The court instructed the state to provide appropriate guidance to registered voters with respect to the eligibility requirements to vote by absentee ballot in advance of the November 2020 election, and it held that with respect to plaintiffs and persons with special vulnerability to COVID-19 or who are their caretakers, injunctive relief was not necessary because they already met the eligibility criteria for absentee voting.[11]

With regard to plaintiffs and other registered voters who are not especially vulnerable to COVID-19 or caretakers for those who are, the state continued to contend that the Tennessee Constitution did not require it to provide a vote-by-mail mechanism for the elections.[12] The majority of the court first found that the plaintiffs had standing to bring their claims because they asserted a sufficient infringement and alleged sufficient facts regarding injury.[13] Next, the majority assumed without deciding that the flexible *Anderson-Burdick* framework applied to the merits of plaintiffs' claims.[14]

The state argued that only rational basis review should apply to the challenged provisions under *Anderson-Burdick* because voting by absentee ballot is a "privilege" rather than a fundamental right under the Tennessee Constitution. The state relied on cases such as *McDonald v. Bd. of Election Comm'rs of Chicago*,[15] where the U.S. Supreme Court held that challenges to absentee ballot regulations do not implicate the right to vote but rather a claimed right to receive absentee ballots.[16] The Supreme Court of Tennessee rejected this characterization because:

> Characterizing absentee voting by mail as a "privilege" begs the question of whether, under some circumstances, limitations on this lawful method of voting can amount to a burden on the right to vote itself. The answer to that question must be yes. If it were not, even when the right to vote is unavailable through any other means, deprivation of absentee voting by mail would nevertheless be deemed not to burden the fundamental right to vote itself.[17]

However, the majority found that in-person voting was not foreclosed to the plaintiffs and that they were not excluded from voting because (1) the risk of COVID-19 to the category of plaintiffs in the case at issue "is significantly less than the risk to voters with special vulnerability to COVID-19" or their caretakers, (2) the state is actively responding to the pandemic, and (3) Tennessee's current absentee ballot access laws accommodate vulnerable populations.[18] Accordingly, the court held that the burden on plaintiffs' right to vote was moderate, rather than severe, under the *Anderson-Burdick* balancing test.[19]

The majority opinion balanced the moderate burden on plaintiffs' voting rights against the state's interests in maintaining the eligibility criteria: ensuring the efficacy and integrity of the election process, preventing fraud, keeping costs down, and maintaining feasible elections.[20] Unlike the trial court, the majority found these interests to be sufficient to justify the moderate burden the eligibility criteria place on the right to vote. It held that the state may act prophylactically to prevent fraud, regardless of whether there is evidence of fraud on the record, and that the Constitution's delegation to the legislature of the power to regulate elections, "which certainly includes within its scope the interest in fiscal responsibility and efficient conduct of the elections" constrained the court from judging the merits of the state's policy choices.[21] Accordingly, the court vacated the trial court's injunction, but it left in place for voters who already requested and submitted an absentee ballot by mail for the August 2020 election, pursuant to the trial court's temporary injunction, due to the proximity to that election.[22]

Justice Sharon G. Lee of the Supreme Court of Tennessee issued a separate opinion concurring in part and dissenting in part. She concurred in the majority decision's allowance of individuals to vote by absentee ballot if they, in their discretion, determine that they have underlying health conditions that make them more susceptible to contracting COVID-19 or if they are vulnerable to greater health risks should they contract COVID-19, or if they care for someone with such a condition.[23] She also agreed with much of the rest of the opinion, including the deference given to the Legislature in creating election policy, the application of *Anderson-Burdick*, and the moderate burden the eligibility criteria place on the right to vote of those plaintiffs who do not have (or care for someone with) an underlying condition.[24] However, Justice Lee dissented in the rest of the majority opinion because she believed that it did not go far enough—she stated that the

8 *Id.* at *23-*24.

9 *Id.* at *25.

10 *Id.* at *24-*25.

11 *Id.*

12 *Id.* at *25.

13 *Id.* at *31.

14 *Id.* at *39-*40.

15 394 U.S. 802 (1969).

16 *Fisher v. Hargett*, 2020 Tenn. LEXIS at *40-*43.

17 *Id.* at *43.

18 *Id.* at *46.

19 *Id.* at *47.

20 *Id.* at *47-*48.

21 *Id.* at *48-*51.

22 *Id.* at *51-*52.

23 *Id.* at *53-*54 (Lee, J., concurring and dissenting in part).

24 *Id.*

decision should allow all qualified voters in Tennessee to vote by absentee ballot during the pendency of the COVID-19 pandemic.[25]

This case is one of many challenges to election laws that have been and continue to be fought in state court in light of COVID-19. Such litigation—in both state and federal court—is expected to increase exponentially as the November 2020 election approaches. The role of state courts in resolving these kinds of questions concerning separation of powers and last-minute election law changes will certainly be tested in numerous other state courts in the coming months.

25 *Id.*

TENNESSEE

McClay v. Airport Management Services, LLC

By Mark A. Behrens

Published November 3, 2020

About the Author:

Mark A. Behrens co-chairs Shook, Hardy & Bacon L.L.P.'s Washington, D.C.-based Public Policy Group and is a member of the Federalist Society's Litigation Practice Group Executive Committee. He is active in civil justice issues on behalf of business and civil justice organizations, defendants in litigation, and insurers.

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.

In *McClay v. Airport Management Services, LLC*,[1] the Tennessee Supreme Court upheld the state's $750,000 cap on noneconomic damages in personal injury cases ($1 million for "catastrophic loss or injury").[2] The court, answering certified questions from the United States District Court for the Middle District of Tennessee, concluded that the cap satisfies the Tennessee Constitution's right to a trial by jury, separation of powers, and equal protection provisions.

Plaintiff Jodi McClay, a California resident, brought suit against the defendant, an operator of a retail store at the Nashville International Airport, after a wooden panel in the store fell and struck her foot. Following a trial, the jury returned a verdict for the plaintiff and awarded $444,500 for future medical expenses and $930,000 for noneconomic damages.[3]

The Tennessee Supreme Court, in an opinion written by Chief Justice Jeffrey Bivins, first addressed the legislature's authority to weigh competing public and private interests and to legislatively alter the common law. The court noted that the legislature had altered common law causes of action and available remedies on numerous occasions, citing several examples. The court said that "one could view the statutory cap on noneconomic damages as a limitation on the available remedy for certain causes of action, or as an abrogation of causes of action for claims exceeding the statutory limit."[4] "Under either view," the court added, "the General Assembly was within its legislative authority to alter the common law by enacting the statutory cap on noneconomic damages."[5]

The court concluded that the cap does not violate the Tennessee Constitution's right to a trial by jury. The court said that the right to jury trial is satisfied "when an unbiased and impartial jury makes a factual determination regarding the amount of noneconomic damages, if any, sustained by the plaintiff."[6] Once the jury satisfies that role, the trial judge "then applies, as a matter of law determined by the legislature, the statutory cap on noneconomic damages in entering the final judgment."[7] The right to a jury trial "does not entitle a plaintiff to any particular cause of action or any particular remedy."[8] The court found "persuasive the reasoning from many [other state supreme courts]

1 596 S.W.3d 686 (Tenn. 2020).

2 Tenn. Code Ann. § 29-39-102.

3 *McClay*, 596 S.W.3d at 688.

4 *Id.* at 691.

5 *Id.*

6 *Id.* at 693.

7 *Id.* at 692.

8 *Id.* at 691.

that similarly concluded that statutory caps on damages do not violate a plaintiff's right trial by jury."[9]

In a significant footnote, the court repudiated a 2019 decision by the federal Sixth Circuit Court of Appeals predicting that the Tennessee Supreme Court would find the state's *punitive* damages cap to violate the right to jury trial, and therefore holding that the cap violated the state's constitution.[10] The court found the Sixth Circuit's reasoning "unpersuasive" and criticized the Sixth Circuit's failure to certify that question of state law, while noting that the punitive damages cap was not at issue in *McClay*.[11]

Next, the Tennessee Supreme Court held that the statutory cap does not violate the separation of powers doctrine. The court explained that the cap is a substantive change in the law that "does not interfere with the judicial power of the courts to interpret and apply law."[12]

Lastly, the court rejected plaintiff's assertion that the statutory cap violates equal protection by discriminating against women.[13] The court said that Equal Protection Clause of the United States and Tennessee Constitutions "does not provide for disparate impact claims."[14] To prove a constitutional violation, the plaintiff would have to show that the statutory cap was enacted with "discriminatory purpose."[15] The court said there was "no allegation or evidence that the General Assembly acted with the purpose of discriminating against women in enacting the statutory cap on noneconomic damages."[16] And, while the court did not examine the veracity of plaintiff's disparate impact allegations because "a disparate impact, without evidence of discriminatory purpose, is not cognizable,"[17] the court noted the plaintiff did "little more than reference a 2004 law journal article regarding tort reform" and "provided no evidence that Tennessee's statutory cap on noneconomic damages has a disparate impact."[18]

Two justices wrote dissenting opinions arguing that they would hold that the statutory cap violates the right to a trial by jury. Justice Cornelia Clark claimed that the cap "usurps and replaces the jury's constitutionally protected function of determining damages with an arbitrary ceiling,"[19] adopting the reasoning of the minority of high courts that have "struck down statutory damages caps as unconstitutional under constitutional provisions that use the term 'inviolate' to describe the jury trial right."[20] Justice Clark's dissent interprets Tennessee's constitutional right to a jury trial as "divest[ing] the General Assembly of *all* authority to modify the common law right of trial by jury."[21]

Putting "[l]egal analysis aside,"[22] Justice Lee's dissent criticized the General Assembly for enacting a statute with which she disagrees based on policy. A concurring opinion said her dissent "cites statistics suitable for a legislative committee hearing and describes in vivid detail the injuries" to a plaintiff in an unrelated case "as an example of how the legislature's policy choice will be unfair to . . . seriously injured claimants."[23] Justice Lee's dissent also cites holdings by the minority of courts in other states that have struck down statutory damages caps. The dissent concludes that the majority's decision to uphold the statutory noneconomic damages cap "tells the citizens of Tennessee that their right to trial by jury and their right to be fairly compensated for noneconomic damages are trumped by the desire to limit the financial exposure of big corporations and insurance companies in civil negligence lawsuits."[24]

Justice Holly Kirby filed a concurring opinion joining "fully" in the majority's conclusion that Tennessee's statutory noneconomic damages cap is constitutional.[25] The concurring opinion provides an insightful history of the right to jury trial at the time of British rule and in post-revolutionary America. The opinion explains that the right to jury trial was originally about "establishing the role of juries vis-à-vis judges."[26] The right served as "a 'restraint on judicial power'"[27] and "is not implicated by the legislature's alteration of the remedies available to litigants."[28]

Justice Kirby also criticized Justice Lee's dissent for first strongly advocating for the statutory damages cap to be struck down, then describing "at length why the dissent disagrees with

9 *Id.* at 692 (citing Murphy v. Edmonds, 601 A.2d 102 (Md. 1992); Kirkland v. Blaine County Med. Ctr., 4 P.3d 1115 (Idaho 2000); Arbino v. Johnson & Johnson, 880 N.E.2d 420 (Ohio 2007); Evans ex rel. Kutch v. State, 56 P.3d 1046 (Alaska 2002); Gourley ex rel. Gourley v. Nebraska Methodist Health Sys., Inc., 663 N.W.2d 43 (Neb. 2003); Tam v. Eighth Jud. Dist. Court, 358 P.3d 234 (Nev. 2015); Judd ex rel. Montgomery v. Drezga, 103 P.3d 135 (Utah 2004); Wright v. Colleton County Sch. Dist., 391 S.E.2d 564 (S.C. 1990); Phillips v. Mirac, Inc., 685 N.W.2d 174 (Mich. 2004)).

10 *Id.* at 693 n.6 (citing Lindenberg v. Jackson Nat'l Life Ins., 912 F.3d 348 (6th Cir. 2019), *reh'g en banc denied*, 919 F.3d 992 (6th Cir. 2019), *cert. denied sub nom*. Tennessee v. Lindenberg, 140 S. Ct. 635 (2019)).

11 *Id.*

12 *Id.* at 695.

13 *Id.* at 696.

14 *Id.* at 695.

15 *Id.* at 696.

16 *Id.*

17 *Id.*

18 *Id.* at n.7.

19 *Id.* at 698 (Clark, J, dissenting).

20 *Id.* at 698 & n.3 (citing Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156 (Ala. 1991); Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218 (Ga. 2010); Hilburn v. Enerpipe. Ltd., 442 P.3d 509 (Kan. 2019); Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633 (Mo. 2012); Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989), amended by 780 P.2d 260 (Wash. 1989)).

21 *Id.* at 699 (Clark, J, dissenting) (emphasis in original).

22 *Id.* at 705 (Lee, J, dissenting).

23 *Id.* at 711-712 (Kirby, J., concurring).

24 *Id.* at 709 (Lee, J, dissenting).

25 *Id.* at 709 (Kirby, J., concurring).

26 *Id.* at 711 (Kirby, J., concurring).

27 *Id.* at 710 (Kirby, J., concurring) (quoting Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 Hastings L.J. 579, 600 (1993)).

28 *Id.* at 711 (Kirby, J., concurring).

the legislature's policy decision to enact it in the first place."[29] This sequence, Justice Kirby said, "could give a misimpression that the two points are linked."[30]

Justice Kirby said that courts must not "inquire into the motives of the General Assembly" or review a "statute's wisdom, expediency, reasonableness, or desirability."[31] "These are matters entrusted to the electorate," he said, "not the courts."[32] "Admittedly, this can sometimes be a hard principle to maintain," Justice Kirby concluded, "[b]ut maintain it we must."[33]

29 *Id.* at 712 (Kirby, J., concurring).

30 *Id.* (Kirby, J., concurring)

31 *Id.* (Kirby, J., concurring) (citation omitted).

32 *Id.* (Kirby, J., concurring) (citation omitted).

33 *Id.* (Kirby, J., concurring).

TEXAS
In re Salon a la Mode

By Ken Paxton

Published June 4, 2020

About the Author:

Ken Paxton is the 51st Attorney General of Texas. He was elected on November 4, 2014, and sworn into office on January 5, 2015.

As the state's top law enforcement officer, Attorney General Paxton leads more than 4,000 employees in 38 divisions and 117 offices around Texas. That includes nearly 750 attorneys, who handle more than 30,000 cases annually – enforcing child support orders, protecting Texans against consumer fraud, enforcing open government laws, providing legal advice to state officials, and representing the state of Texas in court, among other things.

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.

In response to the global pandemic caused by COVID-19, local authorities in Texas, like local authorities across the country, issued a variety of orders with the goal of flattening the curve. Many of those orders prevented "non-essential" businesses from operating and limited the ability of individuals to travel freely. In late April, a group of small businesses in Texas, along with two individuals, filed an original mandamus petition in the Texas Supreme Court, arguing that a number of those local orders violated Texas statutory law and the Texas Constitution.

The Texas Supreme Court denied the mandamus petition without an opinion.[1] Justice Blacklock wrote a concurring opinion that was joined by three other Justices to make three points: (1) courts must enforce the Constitution during a pandemic, (2) governments must demonstrate that restrictions on liberties are necessary, and (3) the judicial process must consider all relevant facts.

As to the first point, the concurrence began with the court's declaration from a prior case that "[t]he Constitution is not suspended when the government declares a state of disaster."[2] While expressing hope that many of these conflicts could be decided in the public square rather than a courtroom, the concurrence acknowledged that courts must not uncritically defer to the other branches of government or shrink from their duty to interpret and apply the Constitution.[3] Commending the "sovereign people" for enduring the suspension of their civil liberties, the concurrence reminded them that duly elected officials were making difficult decisions in difficult circumstances.[4] But the concurrence went on to encourage the people, the courts, and all branches of government to insist that government action comply with the Constitution, as tolerating unconstitutional orders out of expediency or fear risks "abandon[ing] the Constitution at the moment we need it most."[5]

The concurrence did not purport to choose a legal standard for judging the constitutionality of government actions taken during a pandemic. But it indicated that the burden would be on the government to justify any restrictions on liberties, positing strict scrutiny or another "rigorous form of review."[6] The concurrence reasoned that governments should welcome the opportunity to demonstrate that restrictions on liberties are

1 In re Salon a la Mode, No. 20-0340, 2020 WL 2125844, at *1 (Tex. May 5, 2020).

2 *Id.* (Blacklock, J., concurring) (quoting In re Abbott, No. 20-0291, 2020 WL 1943226, at *1 (Tex. Apr. 23, 2020)).

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

"absolutely necessary to combat a threat of overwhelming severity" and that no less restrictive measures would suffice.[7]

Finally, the concurrence's analysis suggested that a thorough discussion of the facts is a necessary part of this "rigorous" review. Indeed, the lack of a factual record was one of the reasons cited by the concurrence for denying mandamus.[8] The concurrence noted the change in circumstances from the pandemic's early stages, when the people did not know enough facts to second-guess lockdowns and other local orders, to the present, when they have more information about the threat posed by COVID-19 and specific ways to respond to it.[9] The concurrence hypothesized that the additional knowledge may alter the balance between local orders and civil liberties.[10]

Ultimately, the concurrence concluded that, because the Constitution still limits government action during a pandemic, the court must also comply with the limits on its authority.[11] Because the court's jurisdiction was doubtful and it lacked a factual record, denial of the mandamus petition was appropriate.[12] Instead, the case should have been brought in district court.[13]

7 *Id.*

8 *Id.* at *2.

9 *Id.* at *1.

10 *Id.*

11 *Id.* at *2.

12 *Id.*

13 *Id.*

TEXAS

In re State of Texas

By Cory Liu

Published September 25, 2020

About the Author:

Cory Liu is a partner at the Ashcroft Law Firm. He previously served as assistant general counsel to Texas Governor Greg Abbott. Mr. Liu clerked for Judge Andrew Oldham on the U.S. Court of Appeals for the Fifth Circuit and Judge Danny Boggs on the U.S. Court of Appeals for the Sixth Circuit. He was Editor-in-Chief of the Harvard Journal of Law & Public Policy and is a graduate of Harvard Law School and the University of Chicago.

Note from the Editor:

In *In re State of Texas*, the Texas Supreme Court held that a voter's lack of COVID-19 immunity, without more, does not qualify as a "disability" for an application to vote by mail under Texas Election Code § 82.002.

In Texas, voters are generally required to vote in person. Voting by mail is permitted in only five specific circumstances: (1) absence from the county of residence;[1] (2) disability;[2] (3) old age;[3] (4) confinement in jail;[4] and (5) participation in an address confidentiality program.[5]

On March 7, 2020, the Texas Democratic Party, its Chairman, and two voters filed a lawsuit in the Travis County District Court against the Travis County Clerk seeking a declaration that "any voter who believes social distancing is necessary to hinder the spread of the [COVID-19] virus" has a "disability" that authorizes voting by mail under Texas Election Code § 82.002.[6] The State of Texas and several advocacy groups intervened in the lawsuit.[7]

On April 17, the district court issued a temporary injunction declaring that any voter without COVID-19 immunity is entitled to vote by mail under Texas Election Code § 82.002.[8] After the court of appeals allowed the district court to enforce its injunction, the State of Texas filed a petition for a writ of mandamus in the Texas Supreme Court. The petition asked the court to compel officials in various counties to reject requests for mail-in ballots based solely on the claim that a generalized risk of contracting COVID-19 was a "disability" under Texas Election Code § 82.002.

Just two weeks after the petition was filed, Chief Justice Hecht delivered an opinion for the majority of the court. Justices Green, Guzman, Lehrmann, Devine, Blacklock, and Busby joined the opinion. The court began with the text of Texas Election Code § 82.002, which states that a voter is entitled to vote on the basis of "disability" if "the voter has a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health." A voter who is concerned about the *risk* of a COVID-19 infection while voting obviously does not have "a sickness." Therefore, the court focused its analysis

1 Tex. Elec. Code § 82.001.

2 *Id.* § 82.002.

3 *Id.* § 82.003.

4 *Id.* § 82.004.

5 *Id.* § 82.007.

6 *In re State of Texas*, No. 20-0394, slip op. at 4 (Tex. May 27, 2020).

7 *Id.* at 5.

8 *Id.*

on the question of whether a lack of COVID-19 immunity is a "physical condition."

The court interpreted the word "condition" to mean to an "abnormality," such as a heart condition.[9] That interpretation is in accord with the Texas Legislature's use of the word "disability" in Texas Election Code § 82.002, which the court interpreted as referring to an "incapacity." Voters who lack COVID-19 immunity have neither a physical abnormality nor an incapacity.[10] Therefore, the majority held that a voter is not entitled to vote by mail under Texas Election Code § 82.002 based purely on a lack of COVID-19 immunity.

Having clarified the law, the court declined to issue a writ of mandamus. Mandamus is a discretionary remedy, and the court sought to give county officials an opportunity to "follow the guidance" that it had just provided in its opinion.

Justice Boyd and Justice Bland both concurred in the judgment only. Each wrote separate opinions.

Justice Boyd argued that "physical condition" should be construed more broadly as "a bodily state of being that limits, restricts, or reduces a person's abilities."[11] He believed that a lack of COVID-19 immunity could, in some instances, allow a person to vote by mail, depending on "innumerable factors, including the nature of the person's sickness or physical condition, the person's health history, the nature and level of the risk that in-person voting would pose in light of the particular sickness or physical condition, the adequacy of safety and sanitation measures implemented at and near the polling station to reduce that risk, and the level of caution the voter exercises."[12] Justice Boyd argued for a case-by-case approach that turns on whether the facts of a particular voter's situation demonstrate that in-person voting poses a "likelihood" of "injuring the voter's health" under Texas Election Code § 82.002.[13]

Justice Bland would have construed "physical condition" even more broadly as referring to a person's "state of health or physical fitness."[14] Like Justice Boyd, she too argued for a case-by-case approach based on each voter's particular situation, focusing on the "likelihood" of injury.[15] Justice Bland went out of her way to emphasize that county officials did "not have any authority to police" voters' personal determinations about whether Texas Election Code § 82.002 applied to them.[16] She explained that the "Legislature left it to the voter" to determine the law's applicability, and she cautioned the State of Texas that "the possibility of fraud does not allow for the disenfranchisement of eligible voters."[17]

Three months after the Texas Supreme Court's decision in *In re State of Texas*, the Harris County District Clerk announced his intention to send more than 2 million unsolicited applications for mail-in ballots to all registered voters. The State of Texas is now back at the state high court with a petition for a writ of mandamus (Case No. 20-0715). On September 15, the court ordered the Harris County District Clerk "not to send or cause to be sent any unsolicited mail-in ballot applications pending disposition of the State's appeal to the Court of Appeals and any proceedings in this Court, and until further order of this court." The State's mandamus petition was still pending at the time this article was published.

9 *Id.* at 20.

10 *Id.* at 21.

11 *In re State of Texas*, No. 20-0394, Opinion of Justice Boyd at 5 (Tex. May 27, 2020).

12 *Id.* at 7.

13 *Id.* at 7–8.

14 *In re State of Texas*, No. 20-0394, Opinion of Justice Bland at 4 (Tex. May 27, 2020).

15 *Id.* at 6–8.

16 *Id.* at 9.

17 *Id.* at 9.

TEXAS

Texas v. Hollins

By Cory Liu

Published December 17, 2020

About the Author:

Cory Liu is a partner at the Ashcroft Law Firm. He previously served as assistant general counsel to Texas Governor Greg Abbott. Mr. Liu clerked for Judge Andrew Oldham on the U.S. Court of Appeals for the Fifth Circuit and Judge Danny Boggs on the U.S. Court of Appeals for the Sixth Circuit. He was Editor-in-Chief of the Harvard Journal of Law & Public Policy and is a graduate of Harvard Law School and the University of Chicago.

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.

In *Texas v. Hollins*, the Supreme Court of Texas unanimously enjoined the Harris County Clerk from mailing unsolicited applications for mail-in ballots to every registered voter in the county, regardless of whether the voter was legally eligible to vote by mail.

Texas has more than 16 million registered voters, roughly 2.4 million of whom reside in Harris County.[1] Under Texas law, there are five categories of voters who are eligible to vote by mail: (1) those who expect to be absent from the county during the voting period;[2] (2) those with a disability;[3] (3) those who will be 65 or older on election day;[4] (4) those confined to jail at the time their application is submitted;[5] and (5) crime victims whose addresses are confidential by law.[6]

On August 25, 2020, the official Twitter account of the Harris County Clerk's Office wrote: "Update: our office will be mailing every registered voter an application to vote by mail." Two days later, the Texas Secretary of State's Director of Elections, Keith Ingram, sent a letter to the Harris County Clerk demanding that he "immediately halt" this plan.[7] The letter asserted that the plan was contrary to the Secretary of State's guidance, would confuse voters about their eligibility to vote by mail, and could clog up the vote-by-mail infrastructure with millions of applications from persons who are not legally eligible to vote by mail.[8] The letter gave the Harris County Clerk until noon on August 31 to announce the retraction of his plan.[9] The Clerk informed Ingram that he would not comply, so the State of Texas went to court.[10]

The question presented to the Supreme Court was whether the district court abused its discretion by denying the State a temporary injunction.[11] In a unanimous *per curiam* opinion, the Supreme Court held that the State was entitled to a temporary injunction.

1 *Texas v. Hollins*, No. 20-0729, slip. op. at 3 (Tex. Oct. 7, 2020) (per curiam).

2 Tex. Elec. Code § 82.001.

3 *Id.* § 82.002.

4 *Id.* § 82.003.

5 *Id.* § 82.004.

6 *Id.* § 82.007.

7 *Texas v. Hollins*, No. 20-0729, slip. op. at 4 (Tex. Oct. 7, 2020) (per curiam).

8 *Id.*

9 *Id.* at 4–5.

10 *Id.* at 5.

11 *Id.* at 6.

To obtain a temporary injunction, the State had to establish: "(1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim."[12] The Harris County Clerk did not dispute that the State had a cause of action, so the court's analysis focused on the second and third factors.[13]

The court's analysis began with a discussion of background principles for interpreting the scope of the Harris County Clerk's powers. In Texas, political subdivisions such as counties, municipalities, and school districts are creations of the State and may exercise only powers granted to them by state law.[14] As the court explained nearly a century ago in *Foster v. City of Waco*, a political subdivision has only three categories of powers: (1) those that are granted to it in "express words"; (2) those that are "necessarily or fairly implied in" an express grant of power; and (3) those that are "indispensable" to the accomplishment of its objectives.[15] Subsequent caselaw has "clarified" that powers "necessarily or fairly implied" must also be "indispensable."[16] *Foster* also articulated a canon of interpretation requiring ambiguities about a political subdivision's powers to be resolved against the political subdivision: "Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the [political subdivision], and the power is denied."[17]

Turning to the question of whether the State had a right to relief, the court observed: "The Election Code does not expressly authorize [the Harris County Clerk] Hollins' proposed mass mailing, and he does not argue to the contrary. Thus the question is whether the authority is implied."[18] The Harris County Clerk argued that his duties to "conduct the early voting in each election,"[19] to manage polling locations,[20] and to "make printed forms . . . readily and timely available,[21] authorized his plan to mail unsolicited applications to vote by mail to all voters.

The court rejected these arguments for several reasons. First, the Harris County Clerk's plan was not "necessary" and "indispensable" to the carrying out of these duties, as evidenced by every other Texas county's decision to abide by the usual practice of mailing applications to only those who request them.[22] Second, numerous provisions of the Election Code contemplate that applications to vote by mail are to be requested by voters.[23] Third, the Election Code requires the Secretary of State to ensure uniformity throughout the State in the implementation of the election laws.[24] Finally, the Election Code demonstrates a general "expectation that most Texans will vote in person," with voting by mail being "the exception, rather than the rule," as evidenced by the strict legal requirements for applying to vote by mail.[25] For these reasons, the court concluded that the Harris County Clerk's plan was unlawful and that the State had established a probable right to relief.

The court went on to conclude that in a lawsuit by the State to enjoin an unlawful action by a political subdivision, "a showing of likelihood of success on the merits is sufficient to satisfy the irreparable-injury requirement for a temporary injunction."[26] Because the State satisfied all the requirements for a temporary injunction, the court reversed the court of appeals and directed the entry of a temporary injunction prohibiting the Harris County Clerk from mailing unsolicited applications to vote by mail.[27]

12 *Id.* (quoting *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002)).

13 *Id.*

14 *Id.* at 6–7.

15 *Id.* at 7. (quoting *Foster v. City of Waco*, 255 S.W. 1104, 1105–06 (Tex. 1923)).

16 *Id.* (citing *Tri-City Fresh Water Supply Dist. No. 2 of Harris Cty. v. Mann*, 142 S.W.2d 945, 947 (Tex. 1940)).

17 *Foster*, 255 S.W. at 1106.

18 *Texas v. Hollins*, No. 20-0729, slip. op. at 8 (Tex. Oct. 7, 2020) (per curiam).

19 Tex. Elec. Code § 83.001(a).

20 *Id.* § 83.001(c) (giving the clerk the same duties as a presiding election judge, which are set forth in § 32.071, for early voting).

21 *Id.* § 1.010(a).

22 *Texas v. Hollins*, No. 20-0729, slip. op. at 8–9, 13 (Tex. Oct. 7, 2020) (per curiam).

23 *Id.* at 9–11 (citing Tex. Elec. Code §§ 1.010(b)–(c), 84.012, 84.013).

24 *Id.* at 11.

25 *Id.* at 11–12.

26 *Id.* at 14.

27 *Id.*

UTAH
Mitchell v. Roberts

By Samantha Harris

Published July 20, 2020

About the Author:

Samantha Harris is a Senior Fellow at the Foundation for Individual Rights in Education (FIRE) and is of counsel to the firm of Mudrick & Zucker, where she concentrates her practice in the areas of campus discipline, Title IX, and free speech. For more than 15 years, she has advised students, faculty, administrators, and attorneys on issues of free speech and due process on campus.

Note from the Editor:

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Mitchell v. Roberts came before the Utah Supreme Court on certification from the U.S. District Court for the District of Utah.[1] The plaintiff, Terry Mitchell, brought claims against the defendant, Richard Roberts, based on allegations that he had sexually abused her when she was a teenager in 1981. Although the statute of limitations had already run on Mitchell's claim, a 2016 law passed by the Utah legislature revived time-barred sex abuse claims if brought within 35 years of a victim's 18th birthday or within 3 years of the law's effective date, whichever was later.[2] Mitchell filed her claim within 3 years of the statute's effective date.[3]

Roberts challenged the Utah legislature's authority to enact a statute reviving time-barred claims. As an initial matter, the court noted that it agreed with the legislature's policy judgment in wishing to revive time-barred child sex abuse claims.[4] However, the court held:

> The original meaning of the constitution binds us as a matter of the rule of law. Its restraint on our power cannot depend on whether we agree with its current application on policy grounds. Such a commitment to originalism would be no commitment at all. It would be a smokescreen for the outcomes that we prefer.[5]

To analyze the constitutional question raised by Roberts, the court examined both its own precedent as well as historical evidence of the original understanding of due process and legislative power.

First, the court held that its precedents had long been clear that "the legislature lacks the power to revive a plaintiff's claim in a manner that vitiates a 'vested' right of a defendant," and that this limitation has long been extended to "the right to retain a statute of limitations defense after a plaintiff's claim has expired under existing law."[6] The court cited to a long line of its decisions holding that the legislature cannot retroactively deprive an individual of a vested right, including the right to rely on a ripened statute of limitations defense.[7] Some of these cases, while acknowledging the vested right limitation, also relied on the fact that the legislature had not made a clear statement that a revised statute of limitations should apply retroactively. However, the court confronted this issue directly in *State v. Apotex Corp.*, and

1 Certification of Issue to State Supreme Court, Mitchell v. Roberts, No. 2:16-cv-00843 (D. Utah June 1, 2017), ECF No. 37.

2 Utah Code Ann. § 78B-2-308(7) (LexisNexis 2020).

3 Mitchell v. Roberts, 2020 UT 34, ¶ 2.

4 *Id.* at ¶¶ 6-7.

5 *Id.* at ¶ 8.

6 *Id.* at ¶ 11.

7 *Id.* at ¶¶ 12-17.

held that even when the legislature explicitly made a statute of limitations change retroactive, "the defense of an expired statute of limitations is a vested right . . . which cannot be taken away by legislation."[8]

The plaintiff, Mitchell, argued that *Apotex* was an outlier and that the weight of the court's precedent suggested that the vested-right limitation applied only when the legislature had not — as it had in this case — made clear its intent that a statute should apply retroactively.[9] While acknowledging some ambiguity in its earlier decisions about the relationship between the "clear statement rule" and the "vested-rights limitation," the court disagreed with Mitchell, holding both that "the vested rights limitation on legislative power can be traced through our decisions for more than a century" and that "these statements of a hard-and-fast constitutional rule limiting the legislature's power is consistent with the original understanding of our state constitution."[10]

Specifically, the court found that the vested-rights limitation is consistent with the framers' understanding of the due-process clause of the Utah Constitution.[11] That clause, the court noted, was originally understood as a "principle for enforcement" of the separation of powers in a system in which "the executive has the power to enforce law (not to make it), the judiciary has the power to adjudicate cases under existing law in accordance with established procedures, and the legislature has the power to enact general laws to govern behavior going forward."[12] Thus, at the time of the Constitution's framing, the due-process clause was understood to prohibit the legislature from encroaching on the power of the judiciary, including by "retrospectively divest[ing] a person of vested rights that had been lawfully acquired under the rules in place at the time."[13]

The court also reviewed records of the state's constitutional convention, which revealed discussions of "the concept of 'vested rights' in the context of the legislative power to enact retroactive laws" — discussions that further bolstered the court's view that the framers' conception of due process was linked to the separation of powers.[14]

The court then examined whether the historical documents supported the claim that a ripened statute of limitations defense, specifically, constitutes a vested right. The court noted that the year before the Utah Constitution was drafted, the court's predecessor "defined a vested right as 'title, legal and equitable, to the present and future enjoyment of property, or to the present enjoyment

8 State v. Apotex Corp., 282 P.3d 66, 81 (Utah 2012).

9 *Mitchell*, 2020 UT at ¶ 19.

10 *Id.* at ¶¶ 20, 25-26.

11 *Id.* at ¶ 30.

12 *Id.* at ¶ 31.

13 *Id.* at ¶ 34 (quoting Nathan S. Chapman & Michael McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1782 (2012)).

14 *Id.* at ¶ 36.

WISCONSIN

Wisconsin Legislature v. Palm

By Rick M. Esenberg

Published August 6, 2020

About the Author:

Rick Esenberg is the founder and current President and General Counsel of the Wisconsin Institute for Law & Liberty, a rapidly expanding law and policy organization headquartered in Milwaukee. Under Rick's leadership, WILL has grown into one of the more active state-based think tanks and litigation centers in the country. Rick is a frequent litigator in state and federal courts and nationally recognized scholar and commentator on constitutional law, particularly the First Amendment's guarantees of freedom of speech and religion. He is one of the leading experts on the Wisconsin Constitution and a frequent advocate before the Wisconsin Supreme Court. Rick's work seeks to advance the rule of law and individual liberty, formed by a robust civil society that forms individual and community character, preserving the wisdom of the past and an openness to the future.

Note from the Editor:

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In May, Wisconsin became the only state to emerge from a gubernatorial "stay-at-home" order by judicial decision. The decision was not based on a claim of individual liberty or, for that matter, any constitutional claim at all. Rather, it focused on statutory limits on the power of government, serving as a reminder that liberty can be served by legal limitations on the state's general authority as well as the protection of specified freedoms.

In *Wisconsin Legislature v. Palm*,[1] the Wisconsin Supreme Court held that the state's "Safer at Home" order was invalid because it had not been adopted through administrative rule-making.[1] It also held that a state law permitting the state's Department of Health Services (DHS) to, among other things, take "all emergency measures necessary to control communicable diseases"[2] did not empower DHS to order Wisconsin citizens to stay at home, forbid "non-essential" travel, or close "non-essential" businesses.

Palm grew out of an effort by Wisconsin Governor Tony Evers to extend a shutdown order imposed under a public health emergency that had been declared in early March. That emergency—which grants the governor the power to issue "orders" deemed "necessary for the security of persons and property"—had been one of the bases upon which he had issued a so-called "Safer at Home" order on March 23. That order resembled the more aggressive shutdowns ordered in March, closing businesses and schools, forbidding public gatherings, and ordering Wisconsinites to stay in their homes save for approved purposes. Gov. Evers' initial order was set to expire on April 24 and, as its expiration approached, he wished to extend it. But under Wisconsin law, a gubernatorial emergency—and the extraordinary powers that such a declaration confers—is limited in duration.[3] A declared emergency can be rescinded by a joint resolution of the legislature and, in all events, expires after sixty days if not extended by such a joint resolution. As the expiration of the "Safer at Home" order approached, so did the expiration of the public health emergency.

The governor, a Democrat, had a choice to make. He could either agree on the terms of an extension with the Republican legislature or find a workaround. He thought he had discovered the latter in Wisconsin Statute § 252.02, which confers broad authority on DHS to "promulgate and enforce rules or issue orders to prevent the introduction of communicable diseases into the state, for the control and suppression of such diseases, for the quarantine and disinfection of persons, localities and things infected or suspected of being infected"[4] by such disease and for the sanitary care of certain public institutions. The statute also empowers DHS to "close schools and forbid public gatherings

1 2020 WI 42.

2 Wis. Stat. § 252.02(6).

3 Wis. Stat. § 323 et seq.

4 Wis. Stat. § 252.02(4).

in schools, churches, and other places to control outbreaks and epidemics,"[5] and it grants to DHS a broad authority to take "all emergency measures necessary to control communicable diseases."[6] Relying on Chapter 252, the governor instructed Acting DHS Secretary Andrea Palm to issue an order extending the "Safer at Home" order known as Executive Order 28 and also an order establishing the "Badger Bounce Back Plan," which would set the terms under which the shutdown would be lifted. Evers and Palm argued that Chapter 252 was not dependent on the declaration of an emergency, was unlimited in duration, and was not subject to legislative oversight apart from the passage of law subject to gubernatorial veto.

But Wisconsin law also requires that agencies "*shall* promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute."[7] A rule must be made through processes specified in the state's Administrative Procedure Act, involving, among other things, public notice, comment, and review by a joint committee of the legislature. Executive Order 28 was not promulgated as a rule, and so the legislature filed suit, arguing that the order was invalid because it had not been promulgated as a rule, exceeded statutory authorization, and was arbitrary and capricious.

The case moved quickly. It was filed on April 21, fully briefed by the parties and fourteen amici by April 29, and argued on May 5. On May 13, by a 4-3 vote, the court agreed that the stay-at-home order was a "general order of general application" and therefore a rule within the meaning of Wisconsin law. Because it had not been promulgated as a rule, it was invalid. The majority rejected the argument that the order was not of "general application" because it was limited to the circumstances of the coronavirus pandemic. It held that the factual circumstances leading to imposition of a rule are irrelevant, noting that, under Wisconsin law, a rule is of general application when the class of people regulated "is described in general terms and new members can be added to the class . . . ."[8] The court also noted that the challenged order regulated all persons in Wisconsin at the time it was issued and all who will come into Wisconsin in the future, and that the power claimed, even if aimed at a particular circumstance, was unlimited in duration. The court concluded that because rulemaking procedures weren't followed, the order was invalid.

In reaching this conclusion, the court noted that violations of the stay-at-home order were punishable as a crime and that, under Wisconsin law, violation of an agency directive cannot be subject to criminal penalties unless the directive is defined by rule. Although the legislature did not claim that the order was unconstitutional, the majority emphasized the canon of constitutional doubt, noting that a legislative delegation that authorized an executive officer to take any step for any amount of time without the procedural protections provided by rule-making processes would raise serious constitutional concerns.

As noted above, the court went on to suggest that, notwithstanding the broad language of Chapter 252, the order to stay home, the prohibition of "non-essential" travel, and the identification and shuttering of "non-essential" businesses exceeded the agency's authority. Noting Wisconsin law requiring that the authority to promulgate a rule must be explicit, the court concluded that the challenged order went too far, although it did not specify just how far a properly promulgated rule might go.

Justices Rebecca Grassl Bradley and Daniel Kelly concurred, placing greater emphasis on the separation of powers problems that would be raised by a broad interpretation of the statute. Noting that "fear never overrides the Constitution," each would have held that a law broad enough to give a single executive officer the power to indefinitely place the state on lockdown would violate the state consitution's separation of powers.[9]

Three justices dissented. Justice Brian Hagedorn declined to consider "constitutional doubt" as relevant to the construction of the statute, noting that the legislature (as opposed to amici) had not challenged the consitutionality of the § 252.02 and, in fact, would lack standing to do so.[10] Writing separately, Justice Rebecca Dallet rejected what she saw as an attempt to resurrect the "non-delegation" doctrine; she emphasized that broad delegations of legislative authority should be upheld whenever the law, "including its purpose, factual background, and context," operated to somehow "bind the agency's authority."[11] For each of the dissenters, EO 28 was not of "general application" because it was limited to the cirumstances of the coronavirus. Although it could be extended and, as the majority noted, was effectively extended by the "Badger Bounceback Order" providing that it would not be lifted unless and until certain prerequisties were met, Justice Hagedorn noted that the EO had a putative expiration date and was issued in response to a particular crisis.[12] Because it was the expiring time limits imposed by § 323.10 that occasioned theneed for reliance on § 252.02, the dissents apparently contemplated that an order could be indefinite in duration and unlimited in scope but not of general application because it was issued in response to a specific outbreak that could be presumed to be of some fixed, but unknown, duration.[13] The majority rejected that view, maintaining that the specific reason for the issuance of an order otherwise indefinite in duration and general in its applicability did not obviate the need for rulemaking.[14]

Even though the legislature had asked it to do so, the court declined to delay the effective date of its order to allow DHS to promulgate a rule. Oddly, four justices "would have" granted a stay—the three dissenters and the author of the majority opinion, Chief Justice Patience Roggensack. The Chief Justice wrote

5 Wis. Stat. § 252.02(3).

6 Wis. Stat. § 252.02(6).

7 Wis. Stat. §227.10(1).

8 Citizens for Sensible Zoning, Inc. v. DNR, 90 Wis. 2d 804, 280 N.W.2d 702 (1979).

9 *Palm*, 2020 WI at ¶85.

10 *Id.* at ¶ 167, 169.

11 *Id.* at ¶ 145 n. 11.

12 *Id.* at ¶ 232.

13 *Id.*

14 *Id.* at ¶ 27.

separately to say that she "would have" stayed the effective date of the invalidation of EO 28 for one week.[15] But since there were not four actual votes to stay the decision, EO 28 was immediately invalidated.

Although a rulemaking process was initiated shortly after the decision, it was promptly abandoned, with the governor contending that he and the legislature were unlikely to reach agreement. Thus, Wisconsin has been without a statewide order imposing a "stay-at-home" obligation since May 13. The *Palm* dissenters forecast dire consequences for the state,[16] and the governor excoriated the majority for turning the state into the "wildwest."[17] A recently published study by the National Bureau of Economic Research found "no evidence" that the sudden lifting of Wisconsin's order "impacted social distancing, COVID-19 cases, or COVID-19-related mortality" during the 14 days that followed.[18]In the past month, Wisconsin has experienced an increase in cases although the death rate and hospitalization rates have yet to follow in a commensurate fashion.[19] But connecting even that to the *Palm* decision would seem to be a heavy lift.

15 *Id.* at ¶ 65.

16 *Id*. at ¶¶ 129-130, 192.

17 Meagan Flynn, *After Wisconsin court ruling, crowds liberated and thirsty descend on bars. 'We're the Wild West,' Gov. Tony Evers says*, Washington Post, May 14, 2020, https://www.washingtonpost.com/nation/2020/05/14/wisconsin-bars-reopen-evers/ (last visited July 20, 2020).

18 Dhaval M. Dave, et al., *Did the Wisconsin Supreme Court Restart a COVID-19 Epidemic? Evidence from a Natural Experiment*, NBER Working Paper No. 27322 (June 2020), https://www.nber.org/papers/w27322 (last visited July 20, 2020).

19 *COVID-19: Wisconsin Summary Data*, Wisc. Dep't of Health Servs., https://www.dhs.wisconsin.gov/covid-19/data.htm (last visited July 20, 2020).

WISCONSIN

Hawkins v. Wisconsin Elections Commission

By Andrew C. Cook

Published November 5, 2020

About the Author:

Former Deputy Attorney General of Wisconsin Andrew Cook has vast experience in the areas of government investigations, administrative law, appellate litigation and public policy. Currently Of Counsel, Andy splits his time between Orrick, Herrington & Sutcliffe's Washington, D.C., and Seattle offices.

Background

Wisconsin was one of the few swing states in 2016 and was considered a key battleground state again in 2020. In 2016, President Donald Trump carried Wisconsin by 22,748 votes. With such a razor-thin margin separating the top two presidential candidates, in 2020 the major parties were concerned about which candidates would qualify to appear on the general election ballot. Green Party candidate Jill Stein received 31,006 votes in Wisconsin in 2016.

On August 7, 2020, Allen Arnsten filed a complaint with the Wisconsin Elections Commission (Commission) challenging numerous signatures submitted by the Green Party presidential and vice presidential candidates. Specifically, the challenger alleged that the Green Party nominee for vice president, Angela Walker, listed an incorrect home address on her nomination forms that included 1,834 signatures filed with the Commission. Wisconsin law requires 2,000 valid signatures for nominees for president and vice president to be certified and placed on the ballot. The Green Party candidates filed a total of 3,966 signatures.

The Commission, a six-member board that includes three Democratic and three Republican commissioners, deadlocked 3-3 on whether the signatures were invalid, with the Democrats voting to strike the signatures and the Republicans approving the signatures.[1] The Republican commissioners noted during the hearing that Ms. Walker voluntarily notified the Commission of her recent move and that she sought guidance from the Commission on how to proceed. The Commission staff responded to Ms. Walker as follows:

> If Ms. Walker has previously filed a declaration of candidacy [] with the Wisconsin Elections Commission, it can be amended to reflect the address change. Technically speaking, however, federal candidates are not required to list an address of their declaration of candidacy. So, if Ms. Walker chooses to list her address on her declaration of candidacy, she can include the most current one.[2]

On August 20, the Commission ultimately voted on a motion that 1) certified 1,789 signatures for the Green Party candidates and 2) stated that the Commission was deadlocked on the remaining 1,834 signatures that included Ms. Walker's previous address. Based on this motion, the Commission staff notified the Green Party candidates that they were not certified and ordered that ballots be printed without the Green Party candidates appearing on the 2020 general election ballot.[3]

1 *Hawkins v. Wisconsin Elections Commission, et al.*, 2020 WI 75 (Sept. 14, 2020).

2 *Hawkins*, 2020 WI at ¶ 37.

3 *Id.* at ¶ 2.

On September 3, 2020, two days after the Commission voted to confirm the presidential and vice presidential candidates that would appear on the ballot, the Green Party candidates filed a petition for leave to commence an original action[4] with the Wisconsin Supreme Court seeking to overturn the Commission's actions.

Wisconsin Supreme Court Decision

In a 4-3 order issued on September 14, 2020, the Wisconsin Supreme Court upheld the Commission's decision to exclude the Green Party candidates from appearing on the ballot. The per curiam majority opinion was not signed by any of the justices, but since Chief Justice Patience Roggensack and Justices Annette Ziegler and Rebecca Bradley wrote dissenting opinions, it is clear that Justices Ann Walsh Bradley, Rebecca Dallet, Jill Karofsky, and Brian Hagedorn were in the majority.

The majority's decision to "exercise [its] discretion to deny the petition for leave to commence an original action" turned on its determination that the Green Party waited too long to file its lawsuit.[5] According to the majority, "[a]lthough we do not render any decision on whether the respondents have proven that the doctrine of laches applies," the Green Party candidates "delayed in seeking relief in a situation with very short deadlines," and therefore it was "too late to grant petitioners any form of relief that would be feasible and that would not cause confusion and undue damage to Wisconsin electors."[6] The majority's order did not address whether the challenged signatures were lawful or whether the Commission properly excluded the Green Party candidates.

Dissenting Opinions

In dissenting opinions, Chief Justice Roggensack and Justices Ziegler and Rebecca Bradley rebuked the majority's decision. Chief Justice Roggensack opined that the "people of Wisconsin have the right to know the acts of the Commission that took the right of ballot access away from candidates of a small independent party" which "followed all the requirements of Wisconsin law necessary for ballot access."[7]

Justice Ziegler in her dissenting opinion criticized the Commission for failing to follow Wisconsin law and procedures. According to Justice Ziegler, under Wisconsin law, when a motion of the Commission deadlocks 3-3, the motion fails and no action should be taken.[8] On multiple votes, the three Democratic commissioners voted to exclude 1,824 signatures submitted by the Green Party candidates, while the three Republican commissioners voted to approve the signatures. Therefore, the 1,824 signatures should have been approved, as the Commission had no authority to remove the signatures absent "an affirmative vote of at least two-thirds of the members."[9] Had the 1,824 signatures been included, Justice Ziegler continued, the Green Party candidates would have easily met the 2,000 signature threshold and been placed on the ballot. And "[n]ot only did the Green Party candidates have a right to appear on the ballot, but the Commission had a statutory obligation to place them on the ballot, which the Commission violated."[10] The dissent further argued that the "Commission did not just fail the Green Party candidates . . . it failed the people of Wisconsin."[11]

Finally, Justice Ziegler's dissent took aim at the majority's "too late" analysis, noting that the majority did not apply a legal analysis of the laches doctrine, which was argued as a defense by the Commission. According to the dissent, the reason the majority did not address laches is that the Commission would have been unable to meet the three elements of the defense needed to bar a claim under Wisconsin law: 1) a party unreasonably delays in bringing a claim; 2) a second party lacks knowledge that the first party would raise that claim; and 3) the second party is prejudiced by the delay.[12] Justice Ziegler's opinion explained that, as to the first element, the Green Party filed a lawsuit with the Wisconsin Supreme Court two days after the Commission denied the presidential candidates access to the ballot.[13] As to the second element regarding the Commission's knowledge of a potential lawsuit, the Green Party specifically announced it planned to file a lawsuit at the Commission hearing.[14] Additionally, during the public hearing, the three Republican commissioners explained they crafted the final motion in order to narrow the issues for a court when the Green Party files its lawsuit.[15] Finally, there was plenty of time to print and issue the ballots with the Green Party candidates well in advance of the election.[16]

In a third dissenting opinion, Justice Rebecca Bradley stated that in "dodging its responsibility to uphold the rule of law, the majority ratifies a grave threat to our republic, suppresses the votes of Wisconsin citizens, irreparably impairs the integrity of Wisconsin's elections, and undermines the confidence of American citizens in the outcome of a presidential election."[17]

4 Emergency Petition, Hawkins v. Wisconsin Elections Commission, et al., 393 Wis.2d 629 (2020), *available at* https://howiehawkins.us/wp-content/uploads/2020/09/Petition-1.pdf.

5 *Hawkins*, 2020 WI at ¶ 5.

6 *Id.*

7 *Id.* at ¶ 14.

8 Wis. Stat. § 5.05(1e) ("Any action by the commission … requires the affirmative vote of at least two-thirds of the members.").

9 *Hawkins*, 2020 WI at ¶ 40.

10 *Id.* ¶ 48.

11 *Id.*

12 *Id.* at ¶ 55.

13 *Id.* at ¶ 58.

14 *Id.* at ¶ 65.

15 *Id.* at ¶ 41.

16 *Id.* at ¶ 34 ("Both state and federal law allow for corrections to be made and dates to be adjusted when ballots are improper or the law is not followed . . . . The record before the court demonstrates that the errors can be corrected, yet our court stands silent.").

17 *Id.* at ¶ 86.

WISCONSIN

Service Employees International Union, Local 1 v. Vos

By Andrew C. Cook & Corydon James Fish

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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 also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

I. Introduction

In 2018, Wisconsin Governor Scott Walker and Attorney General Brad Schimel were unseated in the midterm elections by their Democratic opponents, while the Republicans in the legislature maintained full control of both the assembly and senate. A month after the 2018 gubernatorial and attorney general elections, the Republican-controlled legislature enacted three bills during an extraordinary session limiting the powers of incoming Democratic Governor Tony Evers and Attorney General Josh Kaul. The bills were signed into law by outgoing Governor Scott Walker just weeks before he left office.

The bills became 2017 Wisconsin Acts 368, 369, and 370. The new laws made numerous changes to Wisconsin's Administrative Procedure Act[1] as well as laws governing interactions among the legislature, governor, and attorney general.

In response, several labor unions, political interest groups, and individual taxpayers (including the state senate assistant minority leader) filed a series of lawsuits in state and federal courts arguing the laws facially violated the Wisconsin Constitution's separation of powers. On July 9, 2020, the Wisconsin Supreme Court issued its long-awaited decision. Instead of issuing one decision, the court issued two: the first upholding the majority of the laws limiting the powers of the governor and attorney general, and a second which struck down a portion of the laws that regulating state agency guidance documents.[2]

Justice Brian Hagedorn wrote the majority opinion on all issues except for the Act 369 provisions concerning guidance documents. Justice Hagedorn's opinion was joined by Chief Justice Patience D. Roggensack, and Justices Annette Ziegler, Rebecca Bradley, and Daniel Kelly.[3] Justice Kelly wrote the majority opinion regarding the guidance document provisions. His opinion was joined by Justices R. Bradley, Ann Walsh Bradley, and Rebecca Dallet. Chief Justice Roggensack authored a separate opinion criticizing the court's decision on the guidance documents issue. Justice Hagedorn, joined by Justice Ziegler also filed a dissenting opinion. Justice Kelly wrote an entire section in his majority decision addressing the significant criticisms contained in the dissenting opinions. Given the breadth of the new laws and the court's decision, this article focuses on those portions of the decision that dealt with the most noteworthy statutes.

1 Ch. 227, Wis. Stats.

2 *Service Employees Int'l Union (SEIU) v. Vos*, 2020 WI 67 (2020).

3 Justice Kelly was subsequently defeated in his election and replaced on the bench by Justice Jill Karofsky.

II. Summary of Extraordinary Session Laws Limiting the Governor and Attorney General Powers

The 2018 extraordinary session laws were meant to provide the legislature more oversight authority of the governor and attorney general. Below is a summary of the main provisions of the laws that were challenged in court:

- Suspension of Administrative Rules – Prior to the passage of Act 369, the Joint Committee for Review of Administrative Rules (JCRAR) could suspend an administrative rule for up to a single legislative session. The legislature could then pass a bill to make the suspension permanent. If the legislation was not enacted, then the rule would come back into effect and JCRAR could not suspend it again. Act 369 changed this procedure to allow JCRAR to suspend a rule multiple times prior to legislation being passed.[4] This in effect gave JCRAR the authority to indefinitely strike down a proposed administrative rule rather than requiring the full legislature to vote to strike down the rule.
- Agency Deference – Act 369 codified the Wisconsin Supreme Court's ruling in *Tetra Tech EC Inc. v. Wisconsin Department of Revenue*, which held that Wisconsin courts must not accord any deference to a state agency's interpretation of law.[5]
- Guidance Documents – Wisconsin administrative agencies routinely provide plain language explanations of statutes and administrative rules. However, some assert that guidance documents might contain standards or requirements that are found nowhere in statute or rule, essentially creating new law. In Act 369, the legislature defined a "guidance document"[6] and created a series of protections against agency attempts to use guidance documents to avoid rulemaking. These protections include requirements that agencies cite to statutory and regulatory authorities discussed in the document, make these documents publicly available, allow public comment periods, and permit private parties to petition an agency to promulgate a rule instead of issuing a guidance document.[7]
- Legislative Intervention – Act 369 gave the legislature, through the Joint Committee on Legislative Organization, authority to intervene in any lawsuit challenging the validity of a state statute.[8]
- Attorney General's Settlement Authority – Prior to Act 369, the attorney general had the authority to compromise or discontinue any civil action on behalf of the state of Wisconsin, provided the governor approved the action. Act 369 provided the legislature with oversight over both of these functions, requiring legislative, instead of gubernatorial, approval to compromise or discontinue a civil action. Specifically, in order to compromise or discontinue a case, the attorney general must now submit a proposed plan to the Joint Finance Committee for its approval.[9]

Further, the attorney general cannot submit a settlement agreement for approval to the Joint Finance Committee in which the unconstitutionality or invalidity of a state statute is conceded without the approval of the Joint Committee on Legislative Organization.[10]

III. The Court's Decision – Separation of Powers

The plaintiffs facially challenged[11] the constitutionality of the provisions described above in Acts 369 and 370. They alleged the statutes violated the separation of powers doctrine.

In its opinion, the court explained that when the Wisconsin Constitution was adopted in 1848, government power was divided among three separate branches, each "vested" with a specific core government power.[12] The court noted that "[w]hile separation of powers is easy to understand in theory, it carries with it not-insignificant complications."[13] The court further explained the Wisconsin Constitution "sometimes takes portions of one kind of power and gives it to another branch."[14] As a result, determining "where the functions of one branch end and those of another begin" is not always clear.[15]

According to the court, a "separation of powers analysis begins by determining if the power in question is core or shared," with core powers being those powers that are "conferred to a single branch by the constitution."[16] If a power is "core," "no other branch may take it up and use it as its own."[17] Shared powers, on the other hand, are those that "lie at the intersections of these exclusive constitutional powers."[18] The three branches of government "may exercise power within the borderlands but no

4 Wis. Stat. § 227.26(2)(im).

5 Wis. Stat. § 227.10(2)(g) (codifying *Tetra Tech EC Inc. v. Wisconsin Dep't of Revenue*, [citation]).

6 Wis. Stat. § 227.01(3m).

7 Wis. Stat. § 227.112.

8 Wis. Stat. § 165.25(1m).

9 Wis. Stat. §§ 165.08(1); 165.25(6)(a)1.

10 Wis. Stat. §§ 165.08(1); 165.25(6)(a)1.

11 A facial challenge is when a party seeks to strike down a law in its entirety as compared to an as-applied challenge which seeks to strike down a law "as applied to a given party or set of circumstances." *SEIU*, 2020 WI at ¶ 4. The threshold for striking down a law in its entirety is high, as a party must show that "every single application of a challenged provision is unconstitutional." *Id.*

12 *Id.* at ¶ 31. *See* Wis. Const. art. IV, § 1 ("The legislative power shall be vested in a senate and assembly."); *id.* art. V, § 1 ("The executive power shall be vested in a governor."); *id.* art. VII, § 2 ("The judicial power of this state shall be vested in a unified court system.").

13 *SEIU*, 2020 WI at ¶ 32.

14 *Id.* at ¶ 32.

15 *Id.* at ¶ 34.

16 *Id.* at ¶ 35.

17 *Id.*

18 *Id.*

branch may unduly burden or substantially interfere with another branch."[19] Using this legal framework, the court addressed the various laws passed by the legislature to determine whether they "unduly burdened" or "substantially interfered" with the core powers of executive branch, and thus violated the separation of powers doctrine.

A. Decision Upholding Laws Limiting Governor and Attorney General Powers

1. Legislative Involvement in Litigation

The court addressed the legislature's authority to involve itself in litigation through both intervention and approval authority over the settling or discontinuing of cases involving either revenues deposited in the treasury or the validity of a statute. The court noted that while the attorney general is an executive officer, and the Wisconsin Department of Justice is an agency created by the legislature residing in the executive branch, the Wisconsin Constitution gives the legislature the authority to proscribe the powers of the attorney general.[20]

The court discussed the history of the legislature carrying out certain powers alongside the attorney general, namely engaging in litigation.[21] The legislature did so in its first ever legislative session in 1848, giving the attorney general the power to represent the state in cases where the state is a party or may have an interest when required by the governor or either house of the legislature.[22] According to the court, the attorney general's ability to engage in litigation is not always a core executive function because of the legislature's institutional interest in various types of cases, especially those involving revenue and statutes passed by the legislature.[23] The court determined that these interests were sufficient to defeat the facial challenges regarding legislative intervention and the ability to review settlements and discontinuances of certain cases.

2. Suspension of Administrative Rules

The legislature delegates a portion of its legislative power to administrative agencies by allowing them to make rules. These delegations are subject to procedural constraints contained in Wisconsin's Administrative Procedure Act. One such constraint is JCRAR's authority to temporarily suspend a rule a single time, which was created in 1985 and subsequently upheld by the state supreme court in *Martinez v. DIHLR*.[24]

In upholding the constitutionality of the law empowering JCRAR to suspend a rule multiple times, the court explained that no party raised constitutional concerns with the holding or underlying principles in *Martinez*, which held that one three-month suspension was constitutionally permissible because of the safeguards put in place and the need for bicameralism and presentment to permanently suspend a rule. Here, the court held that if one three-month suspension is permissible, then surely a second suspension is permissible as well because, like in *Martinez*, the suspension would be temporary.[25]

3. Agency Deference

The court disposed of the plaintiffs' challenge to the constitutionality of Act 369's codification of the court's holding in *Tetra Tech* in a few short sentences noting, "[g]iven our own decision that courts should not defer to the legal conclusions of an agency, a statute instructing agencies not to ask for such deference is facially constitutional."[26]

B. Decision Striking Down Agency Guidance Document Provisions

Justice Kelly, joined by Justices R. Bradley, A. Bradley, and Dallet, wrote the majority opinion striking down most of Act 369's guidance document provisions as a facially unconstitutional infringement on core executive branch powers.[27] According to the court, the executive branch's authority to execute the law "encompasses determining what the law requires as well as applying it."[28] The majority went on to find that guidance documents are not the law and do not have the force or effect of law and that therefore the executive branch has authority to issue guidance documents.

After determining that the creation of guidance documents is an executive power, the court next considered whether creation of guidance documents is a "core" executive power or a power "shared" with the legislature. The court determined it is a core executive power because (1) it is created by executive branch employees with executive branch authority, (2) it requires no legislative authority or personnel involvement, and (3) it does not affect what the law is, create policy or standards, or bind anyone or anything.[29] In other words, a guidance document is simply the executive saying what the law requires prior to executing it.[30]

Chief Justice Roggensack and Justices Hagedorn and Ziegler, in two different dissenting opinions, disagreed that the creation of guidance documents is a core executive power and that they do not, in practice, have the force of law. Chief Justice Roggensack's dissent argued that while the execution of laws is a core executive power, the power to *interpret* laws is not, but is instead shared across all three branches of government. Interpretations of law, outside of court proceedings, are a shared constitutional function.[31] The Chief Justice further stated that guidance documents historically have been used by administrative

19 *Id.*

20 *Id.* at ¶¶ 57-62.

21 *Id.* at ¶ 63.

22 *Id.* at ¶ 65.

23 *Id.* at ¶¶ 67-71.

24 *Martinez v. DIHLR*, 165 Wis. 2d 687, 699-700, 478 N.W.2d 582 (Wis. 1992).

25 *SEIU*, 2020 WI at ¶ 82.

26 *Id.* at ¶ 84.

27 *Id.* at ¶ 88 (The court did not strike down the provisions that defined guidance documents and judicial review of guidance documents. Wis. Stat. §§ 227.01(3m), 227.40.).

28 *Id.* at ¶ 99.

29 *Id.* at ¶ 105.

30 *Id.* at ¶¶ 96-97.

31 *Id.* at ¶ 139 (citing *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶¶ 140-41, 382 Wis. 2d 496, 914 N.W.2d 21 (Ziegler, J., concurring)).

agencies to circumvent rulemaking.[32] She explained that administrative agencies use guidance documents to avoid the procedural guardrails the legislature put on their delegations of legislative power.[33] Additionally, the Chief Justice argued that the legislature has a legitimate interest in providing these safeguards and that "Justice Kelly should not be so quick to dismiss the history that led to the enactment of [Act 369]."[34]

Justice Hagedorn, joined by Justice Zeigler, agreed with the Chief Justice that the creation of guidance documents is a shared power. Justice Hagedorn further argued that the legislature has long regulated the creation of certain executive branch communications on the law and that regulating the manner in which guidance documents are created does not regulate how the executive branch interprets the law but how that interpretation is documented.[35] According to Justice Hagedorn:

> The majority's abstract approach misses what's actually going on here. The legislature is not invading the executive's ability to read the law or think about the law when it regulates how agencies officially communicate to the public about what the law is and where in the statutes the law may be found.[36]

Rather than protect the separation of powers, Justice Hagedorn argued, the majority's opinion undermines it "by removing power the people gave to the legislature through their constitution."[37]

IV. Conclusion

In *SEIU*, the Wisconsin Supreme Court continued its trend of upholding laws increasing legislative oversight of administrative agencies and legislative interaction with the executive branch. The court found that the legislature has a legitimate role in conducting and settling litigation that affects its institutional interests, the authority to temporarily suspend administrative rules, and the warrant to forbid judicial deference to agency interpretations. Even in striking down the legislature's attempt to exert control over the publication of guidance documents, the court held that guidance documents do not have "the force or effect of law," further reinforcing past decisions that agencies can only create law through rulemaking, a process heavily influenced by the legislature. While several minor contested provisions of the laws were not addressed by the court and remanded to the circuit court, this decision effectively ends the "extraordinary session" litigation that has been before Wisconsin courts for the past two and a half years.

32 *Id.* at ¶¶ 142-43 (citing Andrew C. Cook, *Extraordinary Session Laws: New Limits on Governor and Attorney General*, 92 Wis. Law. 26, 27 (2019)).

33 *Id.* at ¶¶ 144-47.

34 *Id.* at ¶ 145.

35 *Id.* at ¶¶ 201-06.

36 *Id.* at ¶ 204.

37 *Id.* at ¶ 212.

WEST VIRGINIA
Morrisey v. West Virginia AFL-CIO
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Note from the Editor:

Mr. Lin represented the U.S. Chamber of Commerce as amicus curiae in the case, and at the preliminary injunction stage was the WV Solicitor and counsel for the State. Mr. Lin's views expressed here are his own and do not necessarily reflect the view of his clients. 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.

Just over four years after its enactment, West Virginia's Right to Work law (the Act) has been definitively upheld by the State's highest court. In February 2016, the West Virginia Legislature passed the Act, overrode the Governor's veto, and made West Virginia the 26th state to enact right-to-work legislation. Among other things, the law bans collective bargaining agreements that require non-union employees to pay any dues or fees as a condition of employment. Labor unions challenged the law as violating the West Virginia Constitution. On April 21, 2020, the West Virginia Supreme Court of Appeals conclusively rejected these arguments, overturned the trial court for the second time, and remanded the case for judgment to be entered for the State.[1]

The State's highest (and sole) appellate court had previously found the unions' constitutional arguments likely to fail. In September 2017, the Supreme Court of Appeals reversed a preliminary injunction of the Act. The high court concluded that the unions "had failed to establish, beyond a reasonable doubt, *any* likelihood of success on the merits as to any of the three theories they argued in support of a finding that the Act is unconstitutional."[2] But on remand, the trial court proceeded to enter a permanent injunction, despite "the absence of any additional evidence or arguments," leading to the second appeal.[3]

Joined by four of the five justices, the majority opinion in the latest appeal held that "the Act does not violate constitutional rights of association, property, or liberty."[4] In so doing, the majority noted that states are "expressly authorized" by the National Labor Relations Act to enact right-to-work laws, that seventeen have laws "like" West Virginia's, and that no appellate court anywhere has found a right-to-work law unconstitutional.[5] The majority also stressed that the trial court "clearly erred in its application of" the high court's previous reversal of the preliminary injunction.[6]

As to associational rights, the majority looked to two decisions of the U.S. Supreme Court, after concluding that the West Virginia Constitution provides no greater protection "in the context of the instant matter" than the U.S. Constitution.[7] *First*, the majority held the unions' position foreclosed by the U.S. Supreme Court's seventy-year-old decision in *Lincoln Federal*

1 *Morrisey v. West Virginia AFL-CIO*, No. 19-0298, 2020 WL 1982284 (W. Va. Apr. 21, 2020), *available at* http://www.courtswv.gov/supreme-court/docs/spring2020/19-0298b.pdf.

2 *Id.* at 18.

3 *Id.* at 1.

4 *Id.* at 2.

5 *Id.* at 33-34.

6 *Id.* at 64.

7 *Id.* at 26.

Labor Union v. Northwestern Iron & Metal Co.,[8] which "rejected the argument that the government infringed upon the rights of the labor organizations by refusing to compel union membership as a condition of employment."[9] *Second*, the majority also found support in *Janus v. American Federation of State, County & Municipal Employees*,[10] in which the U.S. Supreme Court recently "highlighted the importance of protecting the rights of workers to be free from financially supporting labor organizations whose views they do not share."[11] The majority acknowledged that *Janus* concerned public-sector unions, but explained that "[w]orkers in the private sector have no less of a right than public sector employees to be free from forced association with a labor organization."[12]

As to property rights, the majority rejected on several grounds the unions' argument that, by depriving unions of non-member fees, the Act effectuates an uncompensated taking because unions must still provide services to non-member employees. For one, the majority explained that the obligation on unions to represent all employees is imposed by federal law, not by the Act. Moreover, unions "actually do receive compensation for their duty to represent all employees in a bargaining unit."[13] As explained in *Janus*, unions receive "exclusive" bargaining status in exchange for that duty, giving them "a privileged place in negotiations over wages, benefits, and working conditions"—a "tremendous increase" in power.[14]

As to liberty rights, the majority was brief. The trial court found the Act arbitrary and violated substantive due process because it requires unions "to provide expensive services *for nothing*."[15] The majority reiterated that "[t]he obligation to provide services to nonmembers is imposed on labor organizations by federal law, not the Act, and they are compensated for those services."[16]

Two justices wrote separately. Justice Hutchison joined the majority in full, but concurred in a short opinion to stress his duties as a justice. After extolling the virtues of unions, Justice Hutchison explained that he "do[es] not approach this question as a legislator or as a private citizen," but as a justice.[17] As such, he must respect that "[w]ith almost clarion unity, courts repeatedly hold that legislatures may give rights to unions and can just as quickly take those rights away with constitutional impunity."[18]

Justice Workman "reluctantly" concurred in the judgment only.[19] She thought the trial court's "carefully crafted decision" was "absolutely correct in its associational rights and takings analyses . . . at the time it was written, in a pre-*Janus* world."[20] And even though *Janus* was "wrongly decided" by the U.S. Supreme Court, it now "compel[s]" the majority's outcome.[21] Justice Workman criticized the majority for giving short shrift to whether the West Virginia Constitution provides more protection to unions than the U.S. Constitution as interpreted in *Janus*, but she ultimately could not "say with certainty" that the West Virginia Constitution should be so construed, as striking down a right-to-work law would make West Virginia an "outlier" on a "long, lonely limb."[22] Justice Workman also disagreed that the Act "was enacted for a beneficial purpose."[23] In her view, the law reflects "a mad rush in state legislatures, including our own, to choke off the lifeblood of labor unions" and "was intended to sound the death knell for both public and private workers' unions in West Virginia."[24]

8 335 U.S. 525 (1949).

9 *Morrisey*, No. 19-0298, at 38.

10 138 S. Ct. 2448 (2018).

11 *Morrisey*, No. 19-0298, at 45.

12 *Id.*

13 *Id.* at 53.

14 *Id.* at 53-54 (internal quotations omitted).

15 *Id.* at 61 (internal quotations omitted).

16 *Id.* at 64.

17 *Id.* at 5 (Hutchison, J., concurring), *available* at http://www.courtswv.gov/supreme-court/docs/spring2020/19-0298c-hutchison.pdf.

18 *Id.*

19 *Id.* at 1 (Workman, J., concurring and dissenting), *available at* http://www.courtswv.gov/supreme-court/docs/spring2020/19-0298cd-workman.pdf.

20 *Id.* at 2.

21 *Id.* at 1-2.

22 *Id.* at 17.

23 *Id.* at 6.

24 *Id.* at 4, 10.