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Absolute Immunity: No Immunity Where District Attorneys Act in Investigatory Capacity

Rieves v. Town of Smyrna, nos. 19-5319/5320/5347 (6th Cir. May 15, 2020).

Where the District Attorney's office actively directed law enforcement's investigation into a group of Tennessee CBD retailers, resulting in 17 arrests and lock down of the stores, the DA defendants were not acting as advocates and could not avail themselves of absolute immunity; nor was qualified immunity available for defendants who acted without probable cause in violating clearly established Fourth Amendment rights.

In February 2018, law enforcement officials in Rutherford County, Tennessee (County) executed "Operation Candy Crush," raiding various stores selling legal cannabidiol (CBD) products and arresting 17 store owners.

During the year preceding the raid, Rutherford County Sheriff's Office (RCSO) had been investigating the sale of CBD products in the County, based initially on promotions for "100% legal CBD products" on a store's Facebook pages. RCSO purchased the products and submitted them to the Tennessee Bureau of Investigation (TBI) for lab testing, which confirmed the presence of CBD.

RCSO officers met with Assistant District Attorney John Zimmerman (Zimmerman) to seek "advice" and "prosecutorial direction on the case," expressing concern that the lab report stated CBD was a "Schedule VI" substance even though they could not find it listed as such under Tennessee statutes. They were also concerned about Zimmerman's plan to make purchases from more stores, padlock them and seize their

assets. In response, Zimmerman directed RCSO Major William Sharp (Sharp) to take a more active role in the investigation and move more quickly.

In late 2017, Zimmerman sent an email to various TBI employees evidencing his own doubts about the CBD campaign. "Before we indict these owners of businesses, and padlock their businesses, we want to make sure we are understanding what is being offered for sale." He had been informed by TBI that their testing equipment was not sophisticated enough to determine whether the products exceeded the .3% tetrahydrocannabinol (THC) threshold which would make them illegal.

TBI also informed Sharp that it "[did] not feel comfortable testifying about the [CBD products' legality]," leading Sharp to instruct his officers to cease the undercover purchases. Undeterred, District Attorney Jennings Jones (Jones) and others from his office met with County Sherriff Mike Fitzhugh (Fitzhugh) and various RCSO chiefs, informing them that TBI was "on board" with the prosecution. After contentious interactions among the players, Operation Candy Crush ultimately went forward.

A judge granted temporary injunctions and issued orders to padlock the stores based on "Petition[s] for Abatement of Nuisance" filed by Zimmerman and Jones. Jones and Fitzhugh staged a televised press conference in front of one of the raided stores. Fitzhugh claimed that the plaintiffs took candies out of their packaging, "spray[ed]" and "infuse[d]" the candy with illegal substances, then repackaged them to sell at a marked-up price, Jones also spoke at the press conference, claiming that the "TBI ha[d] certified that [CBD] [wa]s a Schedule VI controlled substance."

All charges against the plaintiffs were eventually dismissed and expunged. In late February 2018, Jones issued a press release blaming the TBI for the false arrests, claiming that his office initiated the actions "because the TBI assured us that the items being sold . . . were infused with illegal controlled substances."

The TBI rejected Jones's allegations: "It is inaccurate for the local stakeholders in these cases to assert they made decisions in this case unaware of the limits of our forensic work." The determination about the legality of the CBD products, the TBI claimed, was made "solely . . . by the local agency and District Attorney General."

The 17 storeowners brought Section 1983 and 1985 claims, alleging Fourth and Fourteenth Amendment violations and a conspiracy to violate those rights. Count I alleged false arrest, unlawful seizure, and unlawful prosecution; Count II alleged that the plaintiffs were selectively targeted "because they were small business owners, rather than large commercial operations such as Amazon or Wal-Mart," and Count III alleged a conspiracy to violate the plaintiffs' rights, based on Jones and Zimmerman's agreement with law enforcement to push Operation Candy Crush forward despite lacking probable cause, and on Fitzhugh's agreement to allow it to move forward despite objections by his subordinates.

Jones, Zimmerman, and Fitzhugh each filed motions to dismiss based on various categories of immunity: prosecutorial, quasi-judicial and/or qualified immunity. The district court rejected all three, leading to consolidated appeals.

The Sixth Circuit affirmed in large part. It found that the complaint "offers very specific factual allegations that Jones and Zimmerman acted outside their role as judicial advocates during the investigative phase of Operation Candy Crush and were objectively unreasonable in pushing the operation forward without probable cause," eliminating absolute or qualified immunity. Similarly, Fitzhugh was not entitled to quasi-judicial immunity because he could not show that absolute immunity extends to execution of a tainted court order based on false information, or to qualified immunity, because the complaint alleged that he knew or should have known that probable cause did not exist for the arrests. The only issue on which Fitzhugh succeeded was the equal protection claim: the complaint did not allege facts showing that he participated in the decision to selectively target the plaintiffs' stores.

The Circuit also found that plaintiffs alleged actionable violations by each defendant, allowing the conspiracy claim to proceed.

Absolute Immunity: Supreme Court precedent applies a "functional approach" to evaluating absolute immunity; it is not dictated by the identity of the actor in question, but by the function being performed. Therefore, a prosecutor is entitled to absolute immunity for his participation in a probable cause hearing or in filing an information, but not preparation for the initiation of a prosecution or for judicial proceedings." "In other words, absolute immunity does not protect 'the investigative functions normally performed by a detective or police officer.'" (citation omitted). The grounds for immunity are further weakened where the prosecutor advises law enforcement about probable cause or instructs officers to effect an arrest based on the prosecutor's own impressions of probable cause.

Jones and Zimmerman had crossed those lines. They participated in the investigation leading up to the execution of Operation Candy Crush and accelerated the inquiry despite insubstantial test results from TBI and the absence of probable cause.

Jones argued that, once he had decided to prosecute, any advice he gave to law enforcement after that time was in his role as an advocate, and therefore protected by immunity. The Circuit disagreed. In a precedent relied on by Jones, the prosecutor had decided to prosecute in the absence of input from police; here, not only did Jones receive express reservations by police about proceeding, he acted based on "specious confidence in the lab reports."

Having concluded that Jones and Zimmerman were not absolutely immune for their actions, the Circuit considered qualified immunity. Applying the familiar *Saucier v. Katz* two-prong inquiry, the court first found that a constitutional right had been violated—the right to be free from arrest without probable cause. The second inquiry—whether that right had been clearly established—also favored the plaintiffs: "A reasonable officer

would know that the mere presence of CBD in products, without any indication as to the products' origin or THC percentage, did not provide probable cause for violations of Tennessee's controlled-substance laws. Concluding otherwise was objectively unreasonable."

Fitzhugh had claimed quasi-judicial absolute immunity and qualified immunity. Quasi-judicial immunity extends to "[o]ne who acts as the judge's designee, and who carries out a function for which the judge is immune." But the actions being taken must be pursuant to a valid order. Fitzhugh's actions—arresting the plaintiffs, seizing their property, and locking their shops, did not fulfill that requirement. He did not make any argument on appeal to justify why absolute immunity should extend to his execution of a tainted court order, waiving his right.

Fitzhugh also failed on the qualified immunity dismissal. Like Zimmerman and Jones, he acted without probable cause and had no legal basis for effectuating the arrests—violating plaintiffs' clearly established Fourth Amendment rights. The only justifications he offered for the arrests were fabrications, claiming that the plaintiffs would take candies out of their packaging, "spray them" with an illegal substance, and repackage them for sale, and claiming they were derived from marijuana, even though the TBI never determined whether they were derived from hemp or marijuana.

Fitzhugh's only success came in the selective prosecution claim. One element plaintiffs must demonstrate in a selective prosecution action is that the defendant "must single out a person belonging to an identifiable group . . . for prosecution even though he has decided not to prosecute persons not belonging to that group in similar situations." Here, Fitzhugh was not responsible for the decision to target the local stores—that decision clearly emanated from the District Attorney's office.

LINK

COVID-19: Maryland Governor's Emergency Orders Do Not Violate First, Fifth or Fourteenth Amendments; Injunction Denied

Antietam Battlefield Koa v. Hogan, No. CCB-20-1130 (D. Md. May 20, 2020).

Rebuffing an effort by state legislators, business owners, veterans and religious leaders to enjoin Governor Hogan's stay at home, essential business, gatherings and face mask orders, the Maryland district court declines to impose an injunction, finding that each of the emergency provisions comports with US and Maryland constitutional requirements.

The COVID-19 pandemic continues to significantly affect Maryland, with nearly 2,000 dead in the state as of May 19, 2020. On March 5, 2020, Governor Larry Hogan (Hogan) issued a Proclamation of Catastrophic Health Emergency, which declared a

state of emergency, which was renewed on March 17, 2020, April 10, 2020, and May 6, 2020. Hogan also issued executive orders prohibiting gatherings of certain numbers of people and ordering the closure of certain businesses, referred to as "stay at home" orders, and requiring the wearing of face masks in retail establishments and on public transportation. The executive orders all referenced Title 14 of the Maryland Public Safety Article. Section 14-3A-03 of that title states that, following the declaration of a catastrophic health emergency, the Governor is empowered to "order the evacuation, closing, or decontamination of any facility" and to "order individuals to remain indoors or refrain from congregating."

Violation of various of the orders is a misdemeanor "subject to imprisonment not exceeding one year or a fine not exceeding $5,000 or both."

A cohort of plaintiffs filed this case on May 2, 2020, when the March 30, 2020, executive order was in effect. State Delegate Daniel Cox alleged that he was threatened with criminal prosecution if he attended or spoke at a Vehicle-Ride Rally to Reopen Maryland on May 2, 2020. He and State Delegates Warren Miller and Neil Parrott also alleged that they were prevented from freely speaking and meeting with their constituents, campaigning, holding rallies and events, leaving their home except for "essential" reasons and from ensuring that the laws are not suspended.

Antietam Battlefield KOA and Adventure Parks USA, LLC were deemed non-essential businesses and forced to close, causing loss of substantial income. Staff Sergeant Jason Anderson and Lance Corporal Christopher Repogle, both Iraq war veterans, objected particularly to the requirement to cover one's face when entering a retail establishment, because it reminds them of the battlefield. Reopen Maryland, LLC, a corporation with 22,000 members, sought redress of the alleged ongoing violations of their constitutional rights.

Reverends Christopher Ogne, James Wickham, Fredrick Caudle, Paul Goodwin, John Seay, Gary Pomrenke, Gary L. Cox, Steven Dixon, Johnny Hudson, and Deacon David Serenda objected to the orders which limited religious services to 10 people, and prohibited in-person weddings and funerals. They argued that they were "without the resources or equipment to broadcast their worship services online or conduct parking lot or drive-in services," and even if they could, their congregants did not necessarily have the resources to watch services over the Internet; furthermore, a tenet of their faith was to meet in person.

Plaintiffs brought a spectrum of claims, including: violation of the right to free exercise, peaceable assembly and free speech under the First Amendment and the Maryland Declaration of Rights; a Fourteenth Amendment Equal Protection Clause violation; and violation of the commerce clause and the Fifth Amendment takings clause. They sought a temporary restraining order (TRO) enjoining enforcement of Hogan’s executive orders.

On May 13, 2020, Hogan issued an amended order, still prohibiting gatherings of over 10 people and closing certain non-essential businesses, but allowing certain outdoor recreation areas and non-essential retail establishments to open, and allowing indoor religious services at 50% capacity, subject to certain requirements, including social distancing.

The district court treated the motion as seeking a preliminary injunction, which it denied.

MOOTNESS: Although plaintiffs' free exercise claim was based on an earlier executive order which had prohibited all religious gatherings of more than 10 people, they argued that Hogan had asserted the authority to reinstitute severe measures at any time. The court agreed that the issue was not moot:

> Here, the current executive order permits in-person religious services at half-capacity, but this is due to downward trends in COVID-19 hospitalizations, not because of the plaintiffs' claims.14 The Governor could amend the executive order to again include religious gatherings in the ban on gatherings of ten or more people. Therefore, voluntary cessation does not moot the motion for a temporary restraining order with respect to the religious claims.

LIKELIHOOD OF SUCCESS: In evaluating COVID-19 constitutional arguments, numerous cases have applied the standard in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). There, a board of health regulation required all adults in the state to get a smallpox vaccination, based on a smallpox outbreak in Cambridge, Massachusetts and pursuant to a state law that provided the board of health such power. The Supreme Court counseled against infringing on the legislature's power to protect public safety, limiting reversal to scenarios where "a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law."

This was the appropriate standard to review the Maryland orders—plaintiffs might succeed if Hogan's Governor's orders had no "real or substantial relation" to protecting public health or were "beyond all question, a plain, palpable invasion of rights secured by the fundamental law."

Relation to Public Health: The court easily found a substantial relation between the orders and public health. They were based on statistics showing a rapid spike in Maryland cases and scientific evidence about how to slow transmission. Plaintiffs disputed the severity of the situation: "the total number of Marylanders who, after nearly three months of the virus being in the State, have succumbed to the disease is far less than those who have died even this year from the annual flu or possibly from the effects of being under the stay-in home lock-down orders from suicide and overdoses." Even if accepted, which the court did not, these arguments did not undermine the fact that Hogan's measures were calculated to reduce the death toll.

Invasion of Constitutional Rights: The court also found that plaintiffs would likely not succeed in showing a “palpable invasion” of fundamental rights. On the Free Exercise issue, the government is not required "to exempt religious practices from a 'valid and neutral law of general applicability.'" Hogan’s 10-person order was not directed at religion but at any type of gathering, including movie theaters and sporting events. And the fact that some essential businesses could remain open did not implicate Free Exercise provisions, because the potential for harm in those locations differed dramatically from that in religious services: "[a]n in-person religious gathering is not analogous to picking up groceries, food, or medicine, where people enter a building quickly, do not engage directly with others except at points of sale, and leave once the task is complete." Gish v. Newsom, No. EDCV-20-755-JGB (KKx), 2020 WL 1979970, at *6 (C.D. Cal. Apr. 23, 2020).

While some courts had applied strict scrutiny to similar prohibitions (*Roberts v. Neace*, --- F. Supp. 3d ----, 2020 WL 2316679 (6th Cir. May 9, 2020); *Berean Baptist Church et al. v. Governor Roy A. Copper, III*, --- F. Supp. 3d ----, 2020 WL 2514313 (E.D.N.C. May 16, 2020)), the Maryland court found those orders distinguishable. Rational basis review applied, and the Hogan orders passed that test.

Plaintiffs similarly argued that Hogan’s restrictions on speech and assembly were First Amendment violations requiring strict scrutiny. Again, the court found otherwise. The prohibition on large gatherings was akin to a time, place, and manner restriction, satisfying the Supreme Court’s holding in *Ward v. Rock Against Racism*, that while content-based regulations are normally subject to strict scrutiny, content-neutral time, place, and manner restrictions are not. Hogan’s content neutral time, place, and manner restrictions on First Amendment rights were subject to intermediate scrutiny, meaning that the regulation in question must be "narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791 (citations omitted). "[T]he requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Id*. at 799. The medical data supported such an argument.

Plaintiffs fared no better on the face mask issue. While wearing a face covering might be to several of the plaintiffs a "sign of capture on the battlefield, and subservience to the captor," that meaning would not be "overwhelmingly apparent" to most observers, who would much more likely see wearing a face covering as a means of preventing the spread of COVID-19.

Strict Scrutiny: The court’s determination ultimately did not turn on the question of strict scrutiny. It found that, even if the plaintiffs’ First Amendment free exercise, free speech, and freedom of assembly claims were subject to strict scrutiny, they would not demonstrate a likelihood of success on the merits. Strict scrutiny requires the government to show that the regulation is narrowly tailored to serve a compelling government interest, with narrowly tailored meaning that "no 'less restrictive alternative'" would serve its purpose. It was inarguable that slowing the spread of COVID-19 is a

compelling government interest, and plaintiffs had not suggested any less restrictive alternatives that still satisfy the state's compelling interest.

Commerce Clause: Plaintiffs claimed that closing non-essential businesses in Maryland violated the commerce clause, because Adventure Park and other closed businesses regularly did business with suppliers and customers outside of Maryland, and were now prevented from that interstate commerce. They argued that "states like Georgia, including densely populated Atlanta, and West Virginia, have reopened with no spike in sicknesses. Countries like Israel and Sweden have been successful at curbing the spread of the virus despite no mandatory business closures and guidelines which do not compel behavior."

The court found Hogan's order was directed only at Maryland businesses and did not discriminate against interstate commerce. This required application of the "*Pike* test:" "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc*., 397 U.S. 137, 142 (1970). The plaintiffs were therefore incorrect to argue that if the Hogan orders had any effect on interstate commerce, they were invalid.

LINK

COVID-19: Wisconsin Legislature Overturns Stay-Home Order

Wisconsin Legislature v. Palm, no. 2020AP765-OA (Wi. May 13, 2020).

In a 4-3 decision including three concurrences and three dissents and totaling 161 pages, the Wisconsin Supreme Court invalidated "Emergency Order 28" issued by Andrea Palm, the Acting Secretary of Wisconsin's Department of Health Services, finding that her order was a "rule" subject to rulemaking procedures and that even in the absence of a rulemaking requirement, Order 28 exceeded the authority delegated to Palm by the legislature.

On March 12, 2020, Wisconsin Governor Tony Evers issued Executive Order 72 "Declaring a Health Emergency in Response to the COVID-19 Coronavirus." That order designated the state's Department of Health Services (DHS) as the lead agency to respond to the emergency, and directed DHS to take "all necessary and appropriate measures to prevent and respond to incidents of COVID-19 in the State."

On April 16, 2020 DHS Secretary designee, Andrea Palm ("Palm") issued Emergency Order 28 ("Order 28"), titled "Safer at Home Order." Order 28 did not rely on the Governor's emergency declaration, but relied solely on "the authority vested in [Andrea Palm, Department of Health Services Secretary-designee] by the Laws of the State." Order 28 prohibited "[a]ll forms of travel" unless deemed essential by Palm, closed "[a]ll

for-profit and non-profit businesses" except as allowed by Palm, prohibited "[a]ll public and private gatherings of any number" unless a single household. Order 28 also closed all schools and libraries, limited religious gatherings to "fewer than 10 people in a room" and imposed a six-foot social distancing requirement. Most significantly, it required that all individuals in Wisconsin "stay at home or at their place of residence" with certain limited exceptions or risk punishment "by up to 30 days imprisonment, or up to $250 fine, or both."

Order 28 was to remain in effect until May 26, 2020. However, on April 20, 2020, Palm issued Emergency Order 31, which established "Gating Criteria" which would dictate when Order 28's proscriptions were lifted. Order 31 had no specified end date.

On April 21, 2020, the Wisconsin legislature filed an Emergency Petition for Action, which the Wisconsin Supreme Court granted on May 1, 2020, considering two issues: (1) whether Palm violated Wisconsin law by issuing Order 28 without following required rulemaking procedures; and (2) whether, even if properly issued, Order 28 exceeded her authority.

In 4-3 decision, Chief Judge Patience Rogensack held that Palm had not followed required procedures and exceeded her authority.

STANDING: Palm had argued that the legislature did not have a standing to bring the action, because it had not been injured. The majority disagreed: "Wisconsin courts evaluate standing as a matter of judicial policy rather than as a jurisdictional prerequisite." It found plausible the legislature's argument that Palm's actions impinged on legislative authority, creating the requisite stake in the litigation.

RULEMAKING REQUIREMENT: The legislature's primary argument was that Order 28 was in reality a "rule" which required compliance with rulemaking procedures. Wisconsin Stat. § 227.01(13) was central to the controversy. It provides in relevant part: " 'Rule' means a regulation, standard, statement of policy, or **general order of general application** that has the force of law and that is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency."

Palm asserted that Order 28 was not a "general order of general application" because it responded to a specific situation: while an order responding to the pandemic might be a 'general order' because it applies to the population as a whole, it is not of 'general application' because it responds only to a specific, limited-in-time scenario." She cited Wis. Stat. § 252.02(4), which states, in part, that "[a]ny rule or order" made by DHS "may be made applicable to the whole or any specified part of the state." That law must have contemplated that an "order" could be applicable to the whole state, she argued. The court disagreed. It had previously found, in *Citizens for Sensible Zoning, Inc. v. DNR*, 90 Wis. 2d 804 (1979), that a zoning ordinance delineating a flood plain, even if only applicable to one county, was in fact a "rule" because it was a "regulation of general application:"

> It is not always easy to determine whether an agency action is a rule and is of general application or is a determination which affects specific parties. The Columbia County flood plain zoning ordinance applies only to land within the floodplain in unincorporated areas of Columbia County. The ordinance restricts the conduct of only those persons with a legal interest in such land. Nevertheless, to be of general application, a rule need not apply to all persons within the state. **Even though an action applies only to persons within a small class, the action is of general application if that class is described in general terms and new members can be added to the class.**

Citizens for Sensible Zoning and a subsequent case illustrated that whether an order had "general application" did not depend on the purpose for the order; rather, it was the fluidity of the group subject to the proscription. Because any traveler coming into Wisconsin would become subject to Order 28, "new members" could be added, meaning that the provision had "general application" and was a "rule."

Possible exceptions for emergency rulemaking were not helpful to Palm. While Wisconsin's emergency rulemaking procedures contemplate that rules may be promulgated in response to extraordinary circumstances "without complying with the notice, hearing, and publication requirements under this chapter" such a rule could only remain in effect for 150 days, unless extended by the legislature. Palm's gating methodology made such a time limit uncertain. Although Palm had not cited the Governor's emergency powers in her promulgation of Order 28, even those powers would not protect her. As the court pointed out, although "Constitutional law has generally permitted the Governor to respond to emergencies without the need for legislative approval," those powers "are premised on the inability to secure legislative approval given the nature of the emergency." A forest fire or flood would constitute such an emergency where legislative approval would not be practicable. **"But in the case of a pandemic, which lasts month after month, the Governor cannot rely on emergency powers indefinitely."**

Order 28's criminal sanctions also were problematic: the proscribed conduct had to be defined with specificity in order to meet due process standards. Furthermore, criminal penalties could only arise from a properly-promulgated rule, not from an order:

> Stated otherwise, Palm created the potential for a crime by Order 28. Counsel for Palm admitted as much at oral argument when he said that there was only one element that needed to be proved in a criminal prosecution for a violation of Emergency Order 28: that a provision of the order was violated. Such an argument is without legal foundation and ignores more than 50 years of Wisconsin law . . .

The majority concluded that Order 28 "is a general order of general application within the meaning of Wis. Stat. § 227.01(13). It is therefore a rule; and accordingly, the rulemaking procedures of Wis. Stat. § 227.24, which protect people affected by DHS

orders, were required to be followed during the promulgation of Order 28." In the absence of proper rulemaking, Order 28's criminal sanctions were also void.

SCOPE OF AUTHORITY: The court also examined Palm's asserted authority, assuming arguendo that rulemaking was not required. She claimed that under Wisconsin law, "DHS has the power to take direct action to control communicable diseases, just as it did through Safer-at-Home [Order 28]." She cited Wis. Stat. § 252.02 which states the DHS secretary can implement "all" emergency measures "necessary" to control communicable diseases. The court saw overreach: "Order 28 goes far beyond what is authorized in Wis. Stat. § 252.02." While § 252.02(4) authorized the quarantining of those infected or suspected of being infected, Palm quarantined "[a]ll individuals present within the State of Wisconsin" by ordering them "to stay at home or at their place of residence." She also prohibited "all forms of travel" unless defined by her as "essential." These were beyond the pale of authority delegated by the legislature.

INJUNCTION AND STAY: In an unusual choreography, while the legislature had sought an injunction against Order 28 on April 21, 2020, it had simultaneously requested a stay of that injunction for at least six days. The court "perceive[d] this request as being grounded in a concern for an orderly transition from Order 28 to a lawful rule." But because more than two weeks had passed since the court first began considering the merits of the case, "we trust that the Legislature and Palm have placed the interests of the people of Wisconsin.

Order 28 was declared unlawful, invalid and immediately unenforceable; no stay was issued.

CONCURRENCES: Three concurrences followed. Among them were Chief Judge Roggensack, concurring with her own majority opinion. She found an acceptable analogy behind the legislature's unusual request for a stay and a more typical declaratory judgment, and would stay enforcement of the court's decision until May 20, 2020:

> I conclude there is a legal basis upon which to consider the Legislature's extraordinary request. I too am appreciative of the concerns raised by COVID-19 and the possibility of throwing the state into chaos. Accordingly, although our declaration of rights is effective immediately, I would stay future actions to enforce our decision until May 20, 2020. However, I trust that the parties will place the interests of the people of Wisconsin first and work together in good faith to quickly establish a rule that best addresses COVID-19 and its devastating effects on Wisconsin.

Judge Rebecca Bradley's concurrence reprised the founding fathers and warned of the tyranny that could result from the improper arrogation of power by one branch of government: "The people of Wisconsin never consented to any elected official, much less an unelected cabinet secretary, having the power to create law, execute it, and

enforce it." Referring to "the people" as the only legitimate source of political authority, she cited *Korematsu v. United States*, 323 U.S. 214 (1944), as an exemplar of governmental overreach that can arise in the absence of continuous vigilance. She would have granted the injunction immediately upon the legislature's filing on April 21, 2020.

DISSENTS: Three dissents followed. Judge Ann Walsh Bradley questioned the inscrutable stance adopted by the Chief Judge:

> These positions taken in the majority opinion and the concurrence are fundamentally contradictory. If you are confused, you are not alone.
>
> Chief Justice Roggensack needs to clarify in an opinion whether she is or is not voting for a stay of the majority's decision. If her concurrence is to be interpreted as merely a lament that she would stay it, then such a lament rings hollow.
>
> But if there is no stay, your request has fallen on deaf ears. And there appears nothing in place to fill the void rendered by such a majority decision. The lack of a stay would be particularly breathtaking given the testimony yesterday before Congress by one of our nation's top infectious disease experts, Dr. Anthony Fauci. He warned against lifting too quickly stay at-home orders such as embodied in Emergency Order 28. He cautioned that if the country reopens too soon, it will result in "some suffering and death that could be avoided [and] could even set you back on the road to trying to get economic recovery."Given the admonition of Dr. Fauci, I fail to see the wisdom or the equity in invalidating Emergency Order 28 and, at least for the time being, leaving nothing in its stead.

Judge Rebecca Dallet also dissenting, found overreach—but not by the executive branch:

> The majority reaches its conclusion by torturing the plain language of Wis. Stat. § 252.02 (2017-18) and completely disregarding the long standing, broad statutory powers the Legislature itself granted to the Department of Health Services (DHS) to control COVID-19, a novel contagion. This decision will undoubtedly go down as one of the most blatant examples of judicial activism in this court's history. And it will be Wisconsinites who pay the price.
>
> A majority of this court falls hook, line, and sinker for the Legislature's tactic to rewrite a duly enacted statute through litigation rather than legislation. But legislating a new policy from the bench exceeds the constitutional role of this court.

LINK

Education: Outdated Property Tax Assessments Illegally Deny Funding for Delaware Public Schools

In re Delaware Public Schools Litigation, No. 2018-0029-JTL (Del. Ch. May 8, 2020).

The Delaware Chancery Court holds that Sussex County, Kent County, and New Castle County undervalued properties, violating various statutes and depriving school districts of tax revenues.

Delaware school districts generate local funding by levying taxes on non-exempt property located in their districts. *See* 14 *Del. C.* § 1902(a). The amount of local funding depends the assessed value of the property and the tax rate per dollar of assessed value. When levying local taxes, the school districts do not prepare their own property tax assessment: by statute, the school districts must use the assessed values that the counties establish. 14 *Del. C.* § 1912. The counties are required to assess property for tax purposes "at its true value in money," which is the same as its fair market value. The Delaware Code requires that each county make an annual determination of assessed value when preparing its written statement of assessments, otherwise known as the assessment roll. As part of the annual process, "each board of assessment or Department of Finance or Department of Land Use shall revise all valuations and assessments of assessable property in their counties, and lower or increase the assessments or valuations." § 8302(a). To ensure the annual process is followed, the Code imposes a monetary fine of up to $100 per property on any member of a board of assessment who knowingly assesses property at something other than true value in money. § 8306(b).

Sussex, Kent, and New Castle counties (Counties) persisted in using values established by their last general assessments, dating back 30 to 40 years. Sussex County used valuations that became effective in 1974, New Castle County valuations became effective in 1983, and Kent County's date from 1987. Each county refers to the year in which its last general assessment became effective as its "base year." None of the counties have any plan or intention to update their base-year valuations. Therefore, each uses an indefinite-base-year method of property assessment.

The NAACP Delaware State Conference of Branches (NAACP-DE), Delawareans for Educational Opportunity (DEO) challenged these methods, and the City of Wilmington (City) intervened to assert claims against New Castle County. NAACP-DE and DEO argued that Delaware's public schools fail to provide an adequate education for students from low-income households, students with disabilities, and students whose first language is not English. They asserted that the Counties' failed to comply with 9 *Del. C.* § 8306(a) (the True Value Statute) which states that "[a]ll property subject to assessment shall be assessed at its true value in money." 9 *Del. C.* § 8306(a). The Delaware Supreme Court has held that a property's "true value in money" is the present

fair market value. They also argued that the Counites violated Del. Const. art. VIII, § 1 (the Uniformity Clause), when preparing their assessment rolls. These failures interfered with the ability of school districts to raise local taxes and undermined Delaware's system of funding its public schools. The City similarly argued that New Castle County violated the True Value Statute, the Uniformity Clause, and the Assessment Roll Statutes, 22 *Del. C.* § 1101-1104.

Standing: The Counties first argued that the plaintiffs were not true parties in interest and did not have standing. The court found otherwise:

> The City of Wilmington has standing to assert its claims as an organization that has been injured by New Castle County's violations and as parens patriae. The NAACP-DE has standing to assert its claims as an organization that has been injured by the counties' violations. The DEO has standing to assert its claims as an association of individuals who would otherwise have standing to assert its claims. Even if the plaintiffs did not have standing under traditional standing doctrines, all three have standing to sue as appropriate parties to raise constitutional and statutory issues of substantial public importance, whose impact on the law is real, and where the ongoing violations are likely to continue and to evade judicial review.

The court addressed the issues in order: The True Value Statute, the Uniformity Clause, and the Assessment Roll Statutes.

True Value Statute: The court found that Sussex and Kent County did not even use their full base-year valuations. Sussex County uses 50% and Kent County uses 60%. The Court found that NAACP-DE and the DEO proved by a preponderance of the evidence that assessing properties using valuations from 1974 and 1987—much less using 50% and 60% of those valuations—is not the same as assessing properties at their present fair market value. The parties had an expert witness and factual evidence to support their findings. Therefore, the Court concluded that NAACP-DE and DEO established that the Counties failed to comply with the True Value Statute.

Uniformity Clause: The Uniformity Clause in Delaware's Constitution states, "[a]ll taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax . . . ." Del. Const. art. VIII, § 1. The Delaware Supreme Court has held that the Uniformity Clause requires all taxpayers within the same general class to be treated the same. Since the base-year valuations became effective, different properties have appreciated at different rates. The court found that by continuing to use the decades-old valuations when preparing their assessment rolls, the Counties treat owners of similar properties differently. Furthermore, to promote equity in school funding, the General Assembly designates a portion of the State's contribution to the public schools as "Equalization Funding," which is intended to provide financial support for less wealthy school districts. The Counties' failure to assess property at its present fair market value deprives school districts of their fair share of Equalization Funding. The parties had an expert witness and factual evidence to support their findings.

Therefore, the Court concluded that NAACP-DE and DEO proved that the Counties failed to comply with the Uniformity Clause.

Assessment Roll Statutes: Under the Delaware Code, each municipality has the right to "elect to use the assessments and supplementary assessments for property in the municipality as established annually or quarterly by the [county] in which such municipality is located, subject to statutory judicial appeals, as the assessment roll of such municipality for municipal taxation." 22 *Del. C.* § 1101. A municipality that exercises this right "shall be entitled to receive a copy of the county assessments for the properties in the municipality . . . ." *Id.* § 1103. In addition, the pertinent county officials are obligated to "certify the total assessed valuation for properties in the municipality to each municipality . . . ." *Id.* § 1104. These statutes are the Assessment Roll Statutes.

The City of Wilmington exercised its right to use New Castle County's assessments. The evidence at trial demonstrated that New Castle County's use of an indefinite-base-year method failed to assess property at its true value in money. This failure deprived the City of its right to use county assessments. It also deprived the City of its right to receive an accurate determination of total assessed value that has been certified by county officials. The evidence showed that New Castle County's use of an indefinite-base-year method also exacerbated the frequency of property appeals, which has a destabilizing effect on the City's budget. The court found that the City proved that New Castle County's persistent use of property valuations from 1983 violated the Assessment Roll Statutes in addition to the True Value Statute and the Uniformity Clause.

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