Order

Michigan Supreme Court
Lansing, Michigan

December 23, 2024

Elizabeth T. Clement,
Chief Justice

167456

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

WARREN FRANKLIN,
Plaintiff-Appellant,

v

SC: 167456
COA: 366226
Genesee CC: 22-117709-NH

McLAREN FLINT,
Defendant-Appellee.

_____/

On order of the Court, the application for leave to appeal the July 25, 2024 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

VIVIANO, J. (*dissenting*).

In response to the COVID-19 pandemic, the Legislature enacted the Pandemic Health Care Immunity Act, MCL 691.1471 *et seq*., which provides immunity from liability to certain healthcare providers and facilities. Among the issues in this case is whether MCL 691.1475 is void for vagueness. This case presents an opportunity to resolve questions regarding the applicability of the void-for-vagueness doctrine to civil statutes. I would grant leave to appeal to consider this important issue.

MCL 691.1475 states:

> A health care provider or health care facility that provides health care services in support of this state's response to the COVID-19 pandemic is not liable for an injury, including death, sustained by an individual by reason of those services, regardless of how, under what circumstances, or by what cause those injuries are sustained, unless it is established that the provision of the services constituted willful misconduct, gross negligence, intentional and willful criminal misconduct, or intentional infliction of harm by the health care provider or health care facility.

Plaintiff challenges the language "services in support of this state's response to the COVID-19 pandemic" as impermissibly vague.

In the context of reviewing a criminal statute, the United States Supreme Court has explained that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v Gen Constr Co*, 269 US 385, 391 (1926) (comma omitted). In *Woll v Attorney General*, we adopted the following test to determine if a criminal statute is void for vagueness:

> A statute may be challenged for vagueness on the grounds that it
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> —is overbroad, impinging on First Amendment freedoms, or
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> —does not provide fair notice of the conduct proscribed, or
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> —is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed. [*Woll v Attorney General*, 409 Mich 500, 533 (1980), citing *Grayned v Rockford*, 408 US 104, 108-109 (1972).]

Our Court of Appeals has applied a similar test when considering void-for-vagueness challenges to civil statutes. See, e.g., *Proctor v White Lake Twp Police Dep't*, 248 Mich App 457, 467 (2001) ("A statute may qualify as void for vagueness if (1) it is overbroad and impinges on First Amendment freedoms, (2) it does not provide fair notice of the conduct it regulates, or (3) it gives the trier of fact unstructured and unlimited discretion in determining whether the statute has been violated.").

But it is unclear whether *Woll* or *Proctor* provides an appropriate test to consider void-for-vagueness challenges to civil statutes. The test's foundation in criminal law is evident. Not all civil statutes regulate conduct or can be violated. For example, the statute at issue here, which creates immunity from liability, does not proscribe conduct and thus cannot be violated. It also does not appear to directly regulate conduct. It is unsurprising, then, that in the modern era, the void-for-vagueness doctrine has seldom been applied to civil statutes. See *Stone v Williamson*, 482 Mich 144, 205 (2008) (MARKMAN, J., concurring in the result only) ("The 'void for vagueness' doctrine has generally been held applicable only to criminal statutes or to laws infringing First Amendment freedoms. Indeed, to the best of my knowledge, this Court has *never* struck down a civil statute that does not implicate First Amendment freedoms under the 'void for vagueness' doctrine.").

But this has not always been the case. In the early 20th century, the United States Supreme Court developed the void-for-vagueness doctrine in considering the constitutionality of statutes, and the doctrine was a key aspect of early nondelegation

caselaw. Sohoni, *Notice and the New Deal*, 62 Duke L J 1169, 1181-1182 (2013). During this time, the Court applied the doctrine equally to civil and criminal statutes. *Id*. at 1190. But starting with the New Deal era, the Court began treating civil and criminal statutes differently when analyzing void-for-vagueness challenges:

> After the New Deal, the Court's stance on this issue shifted in a subtle way that would ultimately prove important. The Court started to emphasize that criminal statutes were subject to more rigorous review for vagueness than civil statutes. The Court stated that "[t]he standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement." By 1951, the differential treatment was entrenched still more deeply. In *Jordan v. De George*, the Court strongly implied that noncriminal statutes were presumptively exempt from vagueness attack when it stated that it was only entertaining a vagueness challenge to the civil immigration statute because of the "grave nature" of deportation. Indeed, the Court in *Jordan* went on to state that the "*essential purpose* of the 'void for vagueness' doctrine is to warn individuals of the *criminal* consequences of their conduct." The distinction for the purposes of vagueness analysis between civil and criminal laws was subsequently reiterated on several occasions, and the modern rule continues to reflect this analytical divide.
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> This shift in the verbal articulation of the formula may seem a slight one—a mere change in emphasis, or perhaps a statement of an unobjectionable or obvious fact in a system of laws that frequently, and without much ado, treats civil and criminal laws quite differently. But insofar as vagueness doctrine was concerned, the Court's emphasis on the civil-criminal divide appears to have had more than slight consequences. Since the New Deal, the Supreme Court has not struck down a federal civil statute regulating economic behavior as void for vagueness. On more than one occasion, it has reversed decisions by lower federal courts that have struck federal civil statutes as vague. State or local civil statutes that have been held void for vagueness have implicated First Amendment values. Conversely, vagueness challenges have retained some potency when levied against criminal statutes, usually state or local, but occasionally federal. [*Id*. at 1191-1192 (2013) (citations omitted).]

Our principles of statutory construction "force courts to respect the constitutional role of the Legislature as a policy-making branch of government and constrain the judiciary from encroaching on this dedicated sphere of constitutional responsibility." *People v McIntire*, 461 Mich 147, 153 (1999). It is not our role to revise or strike down statutes that we view as unwisely broad. But there is a difference between a broad statute and a vague statute. As the United States Supreme Court has observed, "[a] vague law impermissibly

delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 US at 108-109; see also *Notice and the New Deal*, 62 Duke L J at 1176 ("[V]ague laws permit arbitrary and discretionary enforcement[.]"). Such concerns about vague laws are not necessarily confined to criminal statutes, or even to statutes that proscribe specific conduct.[1]

I believe this case presents the jurisprudentially significant question whether the modern trend of treating civil statutes more deferentially than criminal statutes by insulating them from challenge under the void-for-vagueness doctrine is proper. Relatedly, although we adopted the federal void-for-vagueness test for purposes of criminal statutes in *Woll*, it does not appear that we have specifically considered whether the same test should be adopted for purposes of civil statutes. That test appears specifically crafted for criminal statutes and may be difficult to apply to civil statutes. I would grant leave to appeal to consider how we should review void-for-vagueness challenges to civil statutes and whether MCL 691.1475 is impermissibly vague.

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[1] To some extent, these concerns may be in tension with what has traditionally been viewed as a duty to resolve vagueness in statutes as opposed to striking down a vague provision entirely:

> [W]e cannot press th[e] unintelligibility principle too far. It is readily applicable when language makes no sense, or when two provisions are irreconcilable. But what about a provision that has a meaning so vague that its application to real-world events is imponderable? Or a term that is utterly ambiguous, even after all the tools of construction have been applied, but either of whose potential meanings would be workable and eminently reasonable? It would be appropriate to consider such a text unintelligible, but courts do not. They clarify the vagueness and resolve the ambiguity no matter what—subject to the principle that vague provisions restricting speech or imposing punishments are void. [Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 134.]